



**NOAA
FISHERIES**

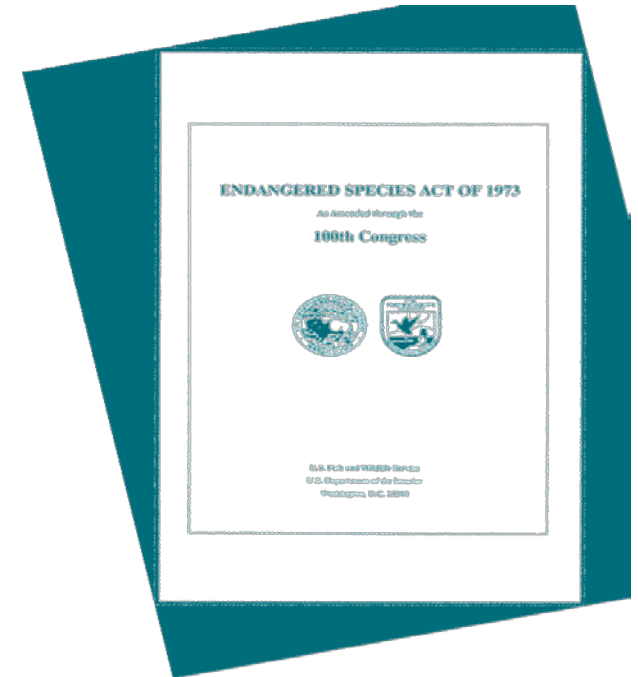


Endangered Species Act Section 7 Consultation

**Jacqueline Pearson Meyer
ESA Interagency Cooperation Division
Office of Protected Resources**

The Endangered Species Act (ESA)

- Focuses on protecting species in their natural environments
- Gives joint authority to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service



Purposes of the Endangered Species Act



- To provide a means whereby the **ecosystems** upon which endangered species and threatened species depend may be conserved ...
- To provide a program for the conservation of such endangered species and threatened species ... Section 2(b) of the Endangered Species Act

Pertinent Sections of the ESA

Section 6 - Federal funding, provided in the form of state grants, can be used to support management, research, monitoring and outreach projects that have direct conservation benefits for listed species, recently de-listed species, and candidate species that reside within that State.

Section 9 - prohibits take of endangered species. Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

Section 10 -

- **Section 10(a)(1)(A)** - Permits for scientific research or to enhance the propagation and survival of the species
- **Section 10(a)(1)(B)** - Permits for taking species incidental to (not the purpose of) an otherwise lawful activity . The latter must be accompanied by a Conservation Plan (CP), often referred to as a Habitat Conservation Plan (HCP).

Pertinent Sections of the ESA

Section 7 – Interagency Cooperation

- **Section 7(a)(1)** – Federal agencies shall use their authorities to carry out their programs for the conservation of endangered & threatened species
- **Section 7(a)(2)** – Federal agencies must ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat
- **Section 7(a)(4)** – requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of *proposed* species or adversely modify or destroy *proposed* critical habitat

Why Does a Federal Action Agency Consult under the ESA?



- The Legal Trigger – The Federal Action Agency has a duty to Avoid Jeopardy and Destruction/Adverse Modification of Designated Critical Habitat
 - 7(a)(2): **Each Federal agency shall**, in consultation with the Secretary, insure that any action authorized, funded, or carried out by such agency ('agency action') is **not likely to jeopardize** the continued existence of any endangered species or threatened species or **result in the destruction or adverse modification** of critical habitat
 - Use the **best scientific and commercial data available**.

Federal Actions

All activities or programs of any kind **authorized, funded, or carried out**, in whole or in part, by Federal agencies in the United States or upon the high seas.

Examples include, but are not limited to:

- actions intended to conserve listed species or their habitat;
- the promulgation of regulations;
- the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- actions directly or indirectly causing modifications to the land, water, or air

Key Definitions

- **Endangered Species** – Any species which is in danger of extinction throughout all or a significant portion of its range (other than some pest species of insects).
- **Threatened Species** – Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.
- **Proposed Species** – Any species for which the Service has published in the Federal Register a proposed rule to list as either threatened or endangered
- The ESA defines species as species, subspecies or, for vertebrate species, **distinct population segments (DPS)**
- **Critical Habitat** – The specific areas within the geographical areas occupied by the species at the time it is listed, on which are found those physical or biological features essential to the conservation of the species, and which may require special management considerations or protection.
- Species and designated critical habitat = **“ESA-listed Resources”**

Consultation Timelines

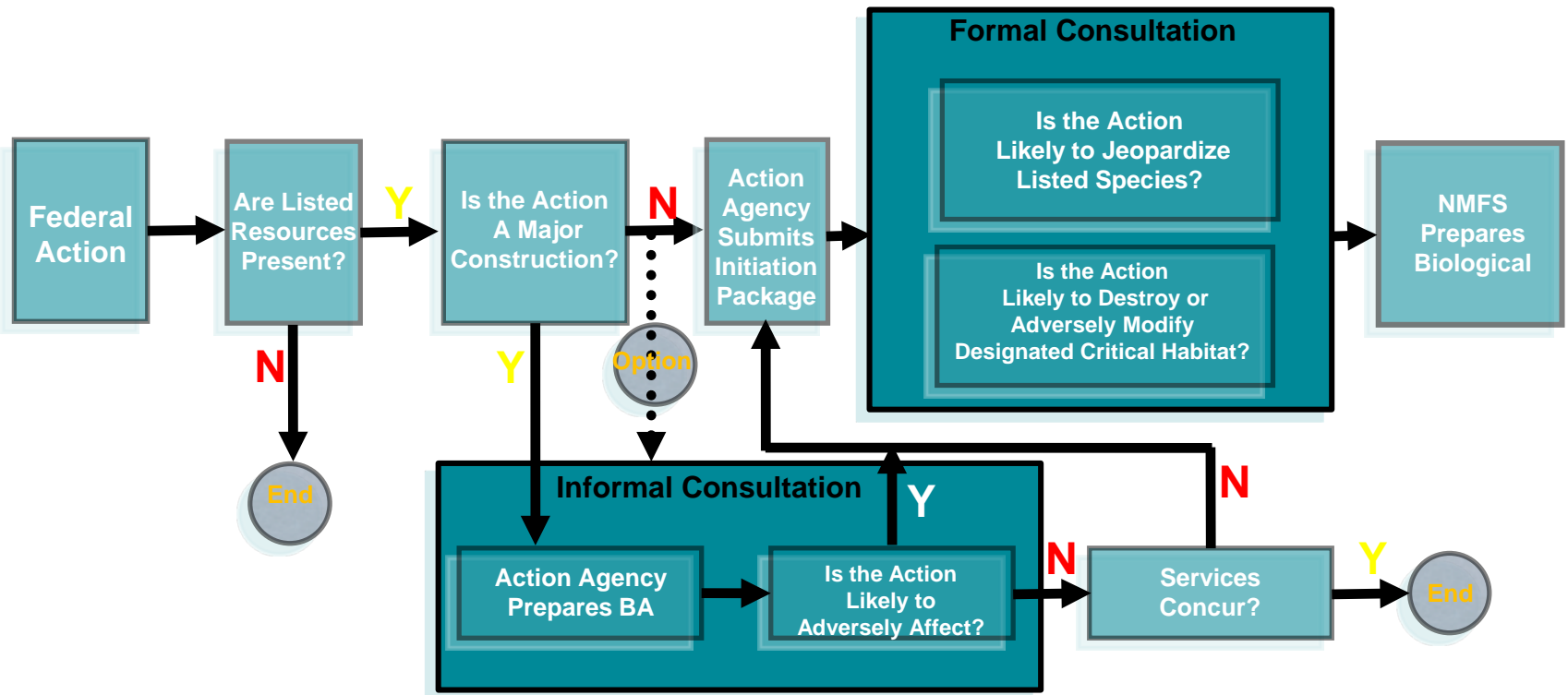
- Initiated with a **written request and complete initiation package**
- Informal consultation ends with Letter of Concurrence – response from the Service usually within 30 days
- Formal consultation ends with issuance of Biological Opinion in 135 days (unless extended) of a complete initiation package
- Sometimes Biological Opinions take longer than 135 days to complete!



What's an Initiation Package?

- A description of the action;
- A description of the specific area affected by the action;
- A description of the ESA-listed species/critical habitat that may be affected by the action;
- A description of the manner in which they may be affected;
- Analysis of any cumulative effects (future non-federal activities that are reasonably certain to occur);
- Any relevant reports (e.g., NEPA documents & others); and,
- Other relevant studies or available information (e.g., survey data, past monitoring reports, etc.).

The Generalized Endangered Species Act Consultation Process



What is a Biological Opinion?



- *Document* that summarizes the effects of a Federal “action” on ESA-listed species and/or designated critical habitat
- Provides NMFS *conclusion* whether or not the action is likely to jeopardize the continued existence of a ESA-listed resources or adversely modify or destroy critical habitat
- Represents the *opinion* of NMFS and considers technical, legal, and policy issues relative to the project

Biological Opinion Conclusion

= Jeopardy and/or Destruction/Adverse Modification of Critical Habitat



Reasonable and Prudent Alternative(s)

- Be consistent with the intended purpose of the action;
- Be consistent with the scope of the Federal agency's legal authority
- Be economically and technologically feasible;
- Not jeopardize the continued existence of listed species or result in adverse modification of critical habitat

Can include Reasonable Prudent Measures and Conservation Recommendations

- Discretionary measures to minimize or avoid adverse effects

Biological Opinion Conclusion

= No Jeopardy and/or No Destruction/Adverse Modification of Designated Critical Habitat



Reasonable and Prudent Measure(s)

- Define Mandatory Terms and Conditions that are actions necessary to minimize the impacts of incidental take and comply with the RPMs
- Cannot require major modifications to project design

Incidental Take Statement

- Specifies the Amount or extent of take

Conservation Recommendations

- Discretionary measures to minimize or avoid adverse effects

Incidental Take Statements & Conservation Recommendations

Incidental take statements specify the amount or the extent of incidental take & the reasonable and prudent measures (RPMs) that minimize the impact of the take on listed species.

- Set forth terms and conditions (including reporting requirements) to implement the RPMs; and,
- Complying with the terms and conditions of an ITS exempts the Federal agency from take prohibitions (**Section 9**).

Reinitiation Requirements

After a biological opinion is issued the Federal agency can proceed with the action. Reinitiation of consultation is required if:

- Take limit is exceeded;
- New information reveals unexpected effects;
- Action is modified in a way not previously considered; or,
- A new species is listed or critical habitat designated that may be affected by the action.

Questions?

