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Endangered Species Act (ESA) Section 7 Consultation

Section 7 of the Endangered Species Act (ESA; 16 U.S.C. §1536) requires federal agencies to ensure that actions they undertake, authorize, or fund are not likely to jeopardize threatened or endangered species (i.e., *listed* species) or adversely modify designated critical habitat for listed species. To satisfy this mandate, Section 7 generally requires federal agencies to *consult* with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS)—together, the Services—when their proposed actions may affect listed species or *critical habitat*. FWS administers the ESA for terrestrial, freshwater, and catadromous species, and NMFS administers the act for marine and anadromous species. A multistep process, generally referred to as *Section 7 consultation*, is used to evaluate the effects of agency actions on listed species and critical habitat and to consider alternative actions that could minimize those effects.

Qualifying Federal Agency Actions

The Section 7 consultation requirements apply to “any action authorized, funded, or carried out” by federal agencies. The Services’ implementing regulations for the ESA interpret the term *action* to include “all activities or programs of any kind” that federal agencies authorize, fund, or carry out “in whole or in part.” *Actions* can include undertaking federal projects; granting federal permits, licenses, contracts, rights-of-way, leases, or funding to nonfederal entities; and promulgating federal regulations.

As interpreted by the Services, not all agency actions are subject to Section 7 requirements. Section 7 generally applies to *discretionary* actions. Nondiscretionary federal actions (i.e., actions directed by Congress in legislation) may not require Section 7 consultation.

Consultation Process

The agency proposing the action (or, in some cases, its delegated nonfederal representative) is often called the *action agency*. The action agency, and any applicable nonfederal entities, must determine whether listed species or critical habitat *may be present* in the *action area* (area affected by the action). The ESA requires action agencies to request information from the Services as to whether listed or proposed species or critical habitat may be present. If the action agency determines that listed species or critical habitat are not present in the action area, consultation with the Services generally is not required.

Biological Evaluation of Effects

When listed species or critical habitat are or may be present in the action area, the action agency typically must determine whether the proposed action *may affect* any listed species or critical habitat that are present. The process of

evaluating possible effects of the action is generically referred to as a *biological evaluation*.

If the project constitutes a major construction activity, Section 7 requires the action agency to conduct an evaluation known as a *biological assessment* (BA). The BA must be completed “before any contract for construction is entered into and before construction is begun with respect to such action.” The action agency prepares the BA, and its contents depend on the nature of the action. A BA may include a description of the proposed action; analyses of the action’s effects on species and critical habitat, including cumulative effects and any studies conducted to assess the effects; expert opinions; reviews of scientific literature; and analyses of the effects of any alternative actions the federal agency considered. An action agency may opt to conduct a BA even if the project is not a major construction activity.

Through the biological evaluation, whether a BA or otherwise, the action agency determines whether the action is likely to adversely affect any listed species or critical habitat. If the agency concludes the action is not likely to adversely affect listed species or critical habitat, and the Services concur, further consultation generally is not required. Alternatively, if the action agency determines a proposed action may adversely affect listed species or critical habitat, then the agency generally must initiate informal or formal consultation with the Service(s) with jurisdiction over the species that may be affected.

Informal Consultation

Informal consultation is an optional process that ESA regulations provide to help action agencies determine whether formal consultation is required. During informal consultation, the action agency may correspond and meet with one or both of the Services about a proposed action. Informal consultation may be initiated before or after the biological evaluation is complete. Informal consultation gives the Services an opportunity to suggest ways the action agency could modify the proposed action to avoid any anticipated adverse effects on listed species or critical habitat. Informal consultations have significantly outnumbered formal consultations under the ESA. If the action agency concludes the action is not likely to adversely affect listed species or critical habitat, and the relevant Service(s) concurs in writing, the consultation process ends.

Formal Consultation

If the action agency or Services conclude the action is *likely to adversely affect* listed species or critical habitat, either through a BA or in informal consultation, the action agency generally must initiate formal consultation. At that point, neither the action agency nor any nonfederal entity may irreversibly commit resources that could potentially

foreclose alternative measures that might mitigate the action's effects until consultation is complete.

To initiate formal consultation, the action agency submits a written request to the Service(s) with jurisdiction over the species in the action area. The request describes the proposed action and its anticipated effects on listed species (e.g., BA), along with any other relevant information. After reviewing the information, the Services discuss the analysis and any potential *reasonable and prudent alternatives* (RPAs) with the federal agency (and nonfederal entity, if applicable). RPAs are alternative actions that “can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, that is economically and technologically feasible.”

Biological Opinions

At the end of a formal consultation, the Service issues a *biological opinion* (BiOp). A BiOp states the Service’s opinion as to whether the proposed action is likely to jeopardize listed species or adversely modify their designated critical habitat. The scientific information and analysis in the BiOp must be based on the “best scientific and commercial data available.”

If the Service finds that the proposed action is not likely to jeopardize listed species or adversely modify critical habitat, the BiOp is known as a *no jeopardy opinion*. If it finds that the action may jeopardize listed species or adversely modify critical habitat, then the BiOp is known as a *jeopardy opinion*. For jeopardy opinions, the Service must suggest any RPAs that could avoid jeopardizing listed species or adversely modifying critical habitat. After a jeopardy BiOp is issued, the action agency decides whether to proceed with the original action at risk of violating the ESA, to proceed with a proposed RPA, or not to proceed with the action. Most consultations result in *no jeopardy opinions*, and nearly all of the rest identify RPAs for the project that allow the action agency to move forward.

If the Service concludes the proposed action (or, in the case of a jeopardy opinion, the action as modified by an RPA) would not jeopardize listed species or adversely modify critical habitat, the Service includes an *incidental take statement* (ITS) in the BiOp. The ITS describes the anticipated impact of any *incidental take* (i.e., harassing, harming, killing, or otherwise taking the species, as defined by the ESA, in the course of the otherwise legal action) and provides *reasonable and prudent measures* (RPMs) the Service considers necessary to minimize that impact. The ITS includes terms and conditions requiring the action agency and any involved nonfederal entity to implement the RPMs. As long as the action agency and any related nonfederal entity comply with these terms and conditions, they may take listed species pursuant to the ITS without violating the ESA’s prohibitions on take.

Expediting or Limiting Consultation

Programmatic Consultations

Programmatic consultations can be used, in some circumstances, to streamline the Section 7 consultation process. Programmatic consultations allow action agencies to consult with the Services on multiple, frequently occurring, or routine actions in a particular geographic area or on proposed programs, policies, or regulations that provide a framework for future actions. Individual projects conducted under a program covered by a programmatic consultation generally require a separate consultation under Section 7, but this consultation is usually limited to specific aspects of the individual project, which can reduce the duration of consultation.

Emergency Consultation

The consultation process can be expedited for infrastructure projects during certain emergency situations. In emergency situations, regulations allow action agencies to follow an alternate consultation procedure that may reduce the extent of consultation required before taking action. For example, an action agency may engage in informal consultation before undertaking action but complete formal consultation, if needed, after the emergency conditions have subsided.

If formal consultation is conducted after the action agency responds to an emergency, the Service(s) prepares a BiOp to document the emergency, any actions taken, any effects of the action on listed species and critical habitat, and recommendations for future conservation measures to mitigate such effects. The BiOp includes an ITS authorizing any take that may have occurred during the emergency.

Exemption from Section 7 Requirements

If a federal agency action may jeopardize listed species or adversely modify critical habitat, the agency may apply to the Endangered Species Committee for an exemption from the ESA. To grant the exemption, the committee must determine that there are no RPAs, that the benefits of proceeding with the action outweigh the benefits of alternative courses of action consistent with conserving species and their habitat, that the action is in the public interest and of national or regional significance, and that there was no prohibited irretrievable or irreversible commitment of resources before the exemption. The committee has granted only two exemptions to date.

Waiving Section 7 Requirements

Section 7 consultation requirements may be waived or superseded in certain circumstances by other statutory provisions. For example, subsection 7(p) of the ESA provides that in a presidentially declared major disaster area, the President may exempt federal agency actions related to the “repair or replacement of a public facility substantially as it existed prior to the disaster” from the consultation requirements under Section 7 if other conditions are met.

Congress also has enacted laws to alter Section 7 consultation requirements for certain activities. In some instances, Congress has waived consultation requirements for specific infrastructure projects or areas of public land. In

other instances, Congress has delegated the authority to waive consultation requirements to certain federal agencies.

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