

Endangered Species Act Biological Opinions

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The Endangered Species Act

- Section 2: Findings and Purposes
- Section 3: Definitions
- Section 4: Listing and Critical Habitat Designation; Recovery; Monitoring
- Section 5: Land Acquisition
- Section 6: Cooperation with States
- Section 7: Interagency Cooperation
- Section 8: International Cooperation/ Convention Implementation
- Section 9: Prohibited Acts
- Section 10: Exceptions, including Permits
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Section 7 – Interagency Consultations

Section 7(a)(2) requires agencies to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat

- Informal
- Formal
- Conference
- Others: Emergency, Early, Streamlined, Programmatic



Type of Consultation

The effects of the project determine the type of consultation:

- Begins with Corps request for species list.
- No Effect: no consultation required
(Corps coordination standard)
- May Affect: informal consultation.
 - ▶ Not Likely to Adversely Affect (insignificant, discountable, or beneficial effects) -- requires USFWS/NMFS concurrence
 - ▶ Likely to Adversely Affect –
requires **formal consultation**



Formal Consultation

- Initiation package with request for formal consultation: *Biological Assessment* done by the Corps.
- USFWS/NMFS:
 - ▶ Consults & issues a *biological opinion* within 135 days.
 - ▶ Determines whether an action may *jeopardize* the continued existence of a species or *destroy or adversely modify* critical habitat.
 - ▶ Analyzes effects to determine potential *incidental take*.
 - ▶ Identifies incidental take associated with the action.



Biological Opinion Components

- The “Opinion” of USFWS/NMFS
- Reasonable and Prudent Alternatives (RPAs)
- Incidental Take Statement (ITS)
- Reasonable and Prudent Measures (RPMs)
- Terms and Conditions (TCs)
- Conservation Recommendations
- Re-initiation Requirements



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Jeopardy Opinion

- USFWS/NMFS opinion that the Corps action is likely to jeopardize continued existence of T&E species or cause destruction or adverse modification of critical habitat.
- Usually BiOp proposes *reasonable and prudent alternatives* (RPAs) to avoid jeopardy or adverse modification: consistent with project purpose; within Corps' legal authority and jurisdiction; economically/technically feasible.
- Corps Options:
 - ▶ Implement RPA
 - ▶ Not undertake action
 - ▶ Request exemption
 - ▶ Disagree and proceed with action *
 - ▶ Reinitiate

developed in
consultation with
Corps



Incidental Take Statement (ITS)

- Exempt agencies from Section 9 prohibitions.
- In order to receive an ITS, Take must –
 - ▶ Not result in jeopardy/adverse modification
 - Including implementing an RPA
 - ▶ Result from otherwise lawful activity
 - ▶ Be incidental
- Take usually expressed as # of individuals or extent of habitat loss.
- Time period over which Take occurs.
- Effect of Take.



Reasonable & Prudent Measures (RPMs)

- RPMs refer to actions the Services believe are necessary or appropriate to minimize the impacts, i.e. amount or extent, of incidental take.
- RPMs are non-discretionary (for ITS exemption).
- RPMs are: in action area; only minor project changes; to minimize take; within our legal authority and jurisdiction.

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Terms & Conditions (TCs)

- TCs set specific methods by which RPMs are to be accomplished.
- TCs must include reporting and monitoring of incidental take (determine if amount or extent is exceeded).
- TCs include a discussion on disposition of dead and injured animals.



Conservation Recommendations



Re-initiation of Consultation

- Standard requirements for re-initiation:
 - ▶ Amount/extent incidental take exceeded.
 - ▶ Agency action modified; effects not considered.
 - ▶ New information; effects not considered.
 - ▶ New species listed or critical habitat designated.



References

- The Endangered Species Act
- ESA Regulations –
Interagency Cooperation at 50 CFR §402
- ESA Consultation Handbook 1998
- ER1105-2-100 (particularly Appendix C)
- CECC-ZA June 2013 ESA Guidance



Corps Responsibilities & Lessons Learned

- Completion of consultation for final feasibility reports and Chief's Reports.
 - ▶ (ER 1105-2-100, C-3.c(2))
- The Corps' Biological Assessment.
 - ▶ Baseline Conditions.
 - ▶ Defining the Agency Action.
- Best scientific and commercial data available.



Corps Responsibilities & Lessons Learned

- Jeopardy Opinion and RPAs.
- Incidental Take Statements (ITS).
- RPMs and TCs versus
Conservation Recommendations

**Request, Receive, Review
Draft BiOp**



Questions?

Type questions in the chat box.
We will answer as many
as time allows.

For more information:
<http://www.corpsplanning.us>

