



Back to the Basics: The Endangered Species Act and Section 7 Consultations

The Endangered Species Act (ESA) was enacted in 1973 to provide a program for the conservation of endangered and threatened species and their ecosystems. Congress declared its policy that Federal agencies utilize their authority to further the conservation of these species so that they no longer need the ESA's program. The U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Services (NMFS), collectively referred to as the Services, are the agencies primarily responsible for overseeing the ESA. Federal agencies have various requirements under [Section 7 of the ESA](#), namely conservation efforts through Section 7(a)(1) and consultation through Section 7(a)(2). Under Section 7(a)(1) of the ESA, Federal agencies are required, in a reiteration of Congress' policy, to promote the conservation of endangered and threatened species. Under Section 7(a)(2) of the ESA, Federal agencies are required to ensure, in consultation with the Services, any actions authorized, funded, or carried out are not likely to jeopardize species or destroy or adversely modify critical habitat. This newsletter provides an overview of the Section 7 consultation process to ensure agencies, such as the Federal Highway Administration (FHWA), are familiar with the process and its requirements.

Look What's New!

- Two proposed rulemakings to implement the Fixing America's Surface Transportation (FAST) Act were published recently in the Federal Register:
 - [Program for Eliminating Duplication of Environmental Reviews NPRM](#) – Comments are due on or before November 27, 2017.
 - [Environmental Impacts and Related Procedures SNPRM](#)
 - Comments are due on or before November 28, 2017.

For additional information on other FAST Act guidance related to the environmental review process please visit the [Environmental Review Toolkit](#).

Timing and Communication Are Critical to Successful Section 7 Consultations

The Section 7 consultation process requires collaboration between various agencies with differing responsibilities and missions. It is imperative that sufficient time be allocated for the consultation process. Section 7 consultation processes can require significant time and resource commitments, especially for proposed projects requiring formal consultation on multiple species. Building in placeholders in the project schedule for key milestones is recommended. These dates can be modified as more information becomes available during the analyses on potential impacts to species and critical habitat.

Communication is also key throughout the Section 7 consultation process. The Federal action agency should determine appropriate contacts within the Services early in the project development and consultation process to ensure all relevant parties are involved throughout the process, and to establish an effective working relationship. Regular and direct communication between the Federal action agency and the Services can help make the consultation process more efficient. Communications can include regular meetings or other check-ins to ensure the Services are involved and up to date on the most current, accurate information regarding the proposed project and upcoming activities. Regular communication with the Services can also provide opportunities to identify any potential concerns early on, and resolve any issues that may arise.

The general steps of the consultation process are outlined below:

- Step 1: Define Action Area and Submit/Request the Species List
- Step 2: Determine Whether the Proposed Action "May Affect" a Section 7 Resource
- Step 3: Determine Adverse Effects of the Action
- Step 4: Formal Consultation

Not properly following the steps and requirements of the Section 7 consultation process can lead to project delays. It is important to note that the consultation process is not linear. These steps can be iterative and the actions taken in one step may cause another step to be revisited. Additionally, the process described below is not comprehensive, but is meant to serve as a general overview to familiarize practitioners with the main elements of the Section 7 consultation process.

Step 1: Define Action Area and Submit/Request the Species List

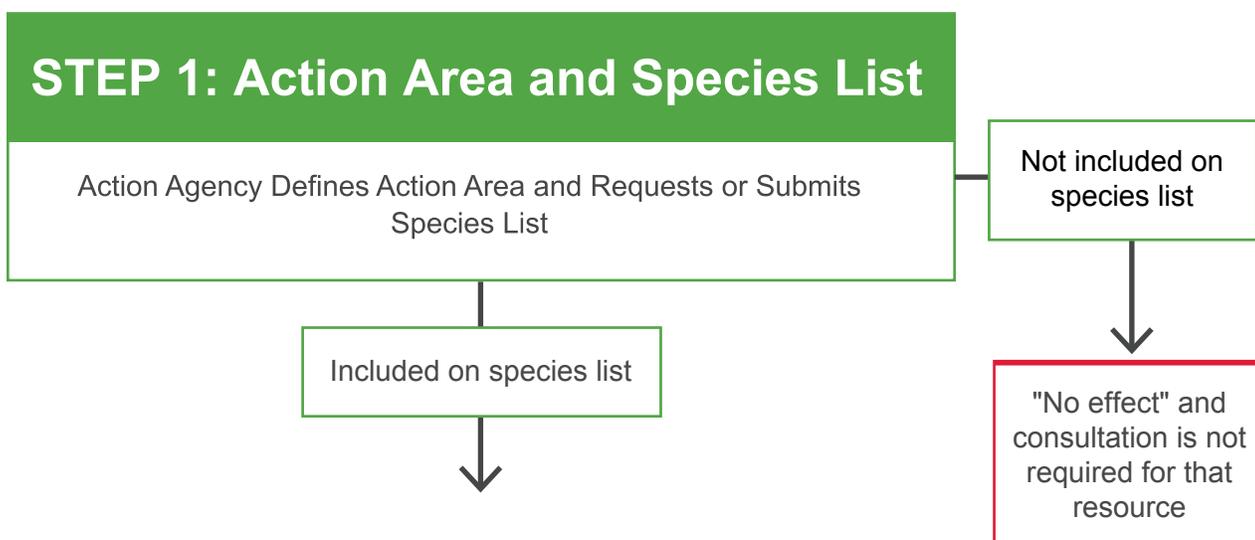
In Step 1 of the consultation process, the Federal action agency defines the action area for the proposed action and then either requests a species list from the Services, or submits a proposed species list to the Services and requests concurrence. The species list must include all listed and proposed species and designated critical habitat that may be present in the action area. The action area is often underestimated by neglecting indirect effects and effects such as noise, light, and stormwater run-off and may need to be refined upon completion of the effects analysis (Step 3). The Information Planning and Conservation System (IPaC, see text box) can be used to obtain species lists for species within USFWS jurisdiction.

If no Section 7 resources are on the species list provided or concurred by the Services, then the action will have "no effect" on listed resources and consultation is not necessary.

If any Section 7 resources are on the species list provided or concurred by the Services, the consultation process continues to Step 2.

What Is IPaC?

IPaC is a project planning tool to streamline the USFWS environmental review process. This publicly available database is maintained by the USFWS and can be used to identify all federally listed, proposed, and candidate species and all designated and proposed critical habitat. By using this tool, practitioners can identify resources that may be impacted by the proposed action, and either follow IPaC's Endangered Species Review process or perform an impact analysis and receive recommended conservation measures to aid in the consultation process. More information can be found on the [IPaC website](#).



Step 2: Determine Whether the Proposed Action "May Affect" a Section 7 Resource

In Step 2 of the consultation process, the Federal action agency determines the potential for the proposed action to affect any Section 7 resources from the species list determined in Step 1. This includes assessments for any direct or indirect effects on any Section 7 resource in any way, including positive, negative, or benign impacts. Although the "may affect" or "no effect" determination ultimately applies to the proposed action, the assessments are made for each resource to determine which, if any, resources must proceed to the next step or formal consultation.

If the Federal action agency concludes that the proposed action will have no effect on any Section 7 resource, the consultation process ends with a "no effect" determination for the action. A "no effect" determination is frequently completed incorrectly, and is applicable in the following circumstances:

- When species ranges and critical habitat do not overlap with the action area;
- When a species range does overlap, but there is no suitable habitat in the action area; or
- When there is overlap and suitable habitat and the species may be present, but the species or critical habitat could not respond to the effects of the action.

Concurrence with the Services is not required for this determination. If new information about the action or potential effects becomes available, the determination should be revisited.

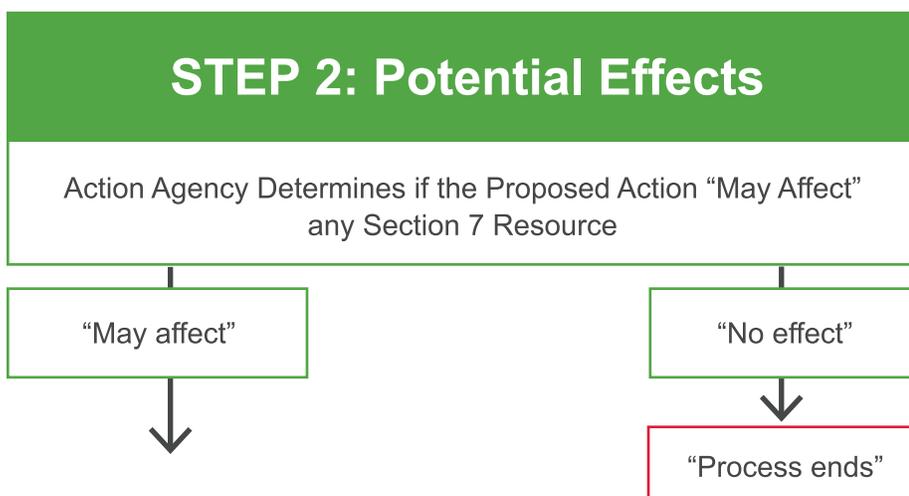
Key Definitions for Effects Analysis

The **environmental baseline** includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of State or private actions, which are contemporaneous with the consultation in process.

Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.

Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.

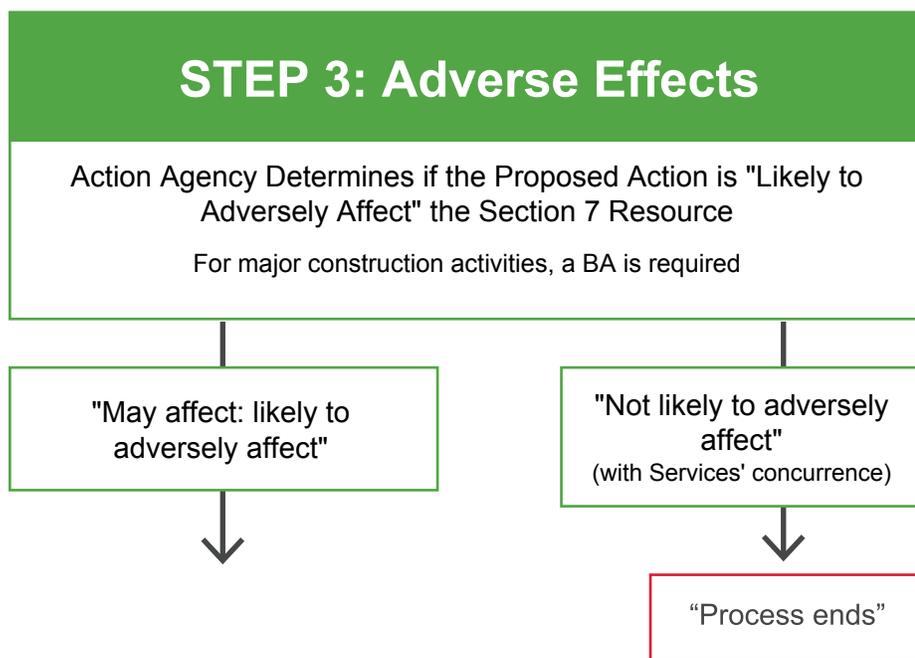
Interdependent actions are those that have no independent utility apart from the action under consideration.



If the Federal action agency concludes that the proposed action will have any effect on the Section 7 resource, the consultation process continues to Step 3 with a “may affect” determination, which is made if the proposed action has the potential to affect a listed species or designated critical habitat either positively or negatively. This designation is made for actions that are benign, beneficial, lethal, or sub-lethal to an individual organism, and/or actions that may potentially affect any portion of a designated critical habitat. A “may affect” determination is also given even when survey results are negative (with few exceptions).

Step 3: Determine Adverse Effects of the Action

In Step 3 of the consultation process, the Federal action agency analyzes the potential direct and indirect, adverse and beneficial effects of the action on the Section 7 resources that may be affected. It is possible for different Section 7 resources to have different determinations for the same proposed action. While the assessments in Step 2 and 3 are analytically distinct, these steps are frequently completed concurrently and are included in the same Biological Assessment (BA) (if prepared) or equivalent document. The term Biological Evaluation is sometimes used to refer to the equivalent documentation prepared to support findings in Steps 2 and 3 when BAs are not required. The name of the document is less important than ensuring a clear documentation is provided to support the determination being made.



A **“not likely to adversely affect”** determination is made if the action will not have an adverse effect to an individual of the species or any portion of designated critical habitat. This designation is made for actions that are expected to have effects that are discountable, insignificant, or entirely beneficial.

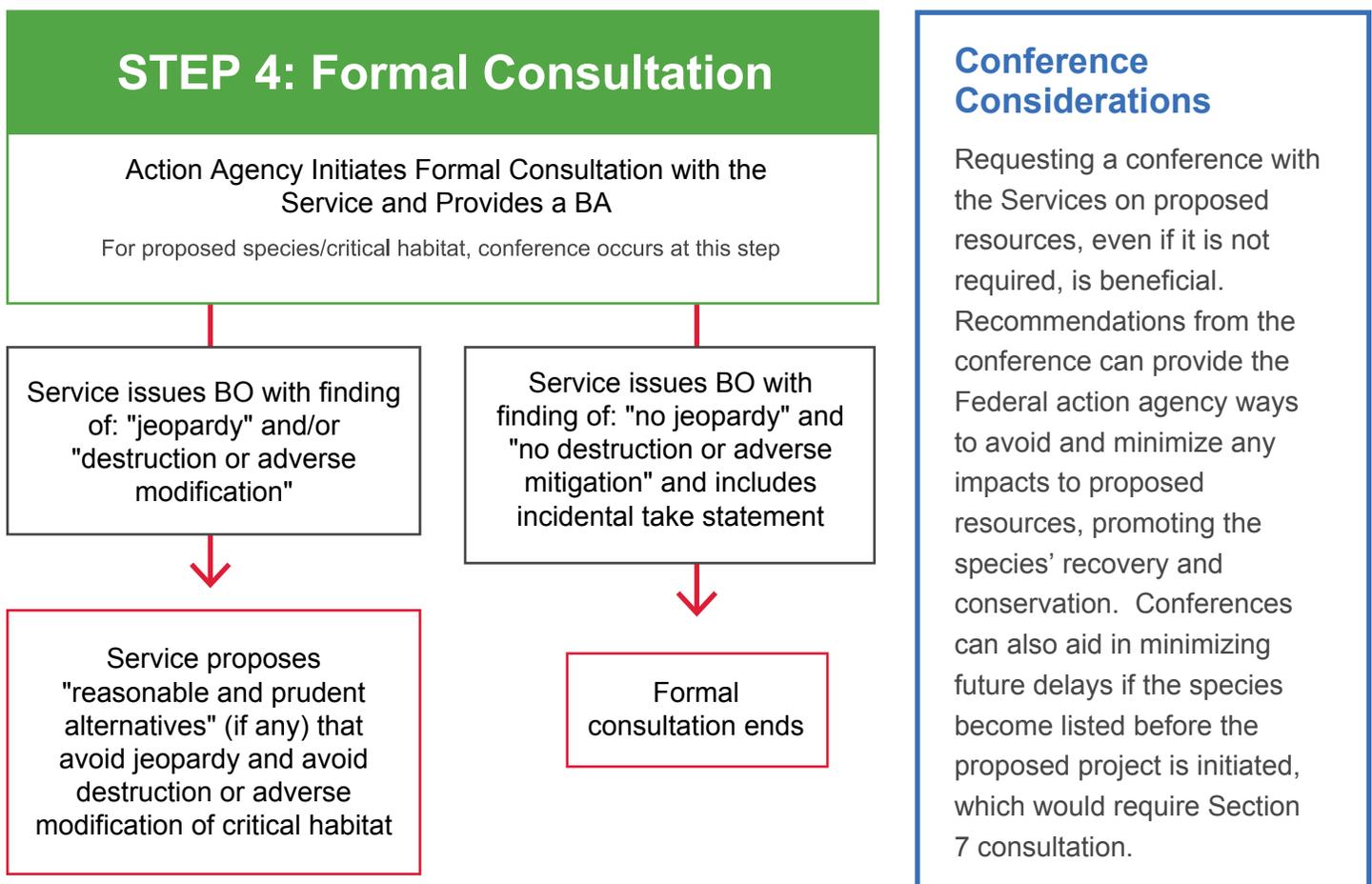
A **“likely to adversely affect”** determination is made if the action will have any adverse effects to an individual of the species or any portion of the designated critical habitat.

If the Federal action agency determines, and the Services concur, that the proposed action is not likely to adversely affect any Section 7 resource, the consultation process ends with a “not likely to adversely affect” determination (see text box for additional information). Formal written concurrence is required from the Services. The Services have 30 days from the receipt of the BA to inform the Federal action agency whether the Services concur with its findings.

If the Federal action agency determines that the proposed action is likely to adversely affect the Section 7 resource, or if the Services do not concur with the Federal agency’s determination of “not likely to adversely affect,” the consultation process continues to formal consultation in Step 4 with a “likely to adversely affect” determination.

It is possible that the need for formal consultation can be avoided through project modifications that change the determination to “not likely to adversely affect.” This can include alterations to the timing and/or location of project impacts, or reducing the magnitude of impact to the point it is insignificant.

Step 4: Formal Consultation



In Step 4 of the consultation process, the Federal action agency participates in formal consultation with the Services. The formal consultation begins with the submittal of an initiation package by the Federal action agency to the Services, which includes a letter requesting formal consultation, a BA, and relevant supporting documentation. The Services provide written acknowledgment to the Federal action agency within 30 days, noting if the initiation package is complete. If the initiation package is incomplete, the Services will request additional information. In the ESA, Congress allocated 90 days to complete formal consultation and 45 days to provide a Biological Opinion (BO). However, in practice, these interactions occur throughout the 135-day period. Extensions may be permitted for certain scenarios.

If the Services determine the proposed action is not likely to jeopardize listed species or destroy or adversely modify critical habitat, they will issue a BO with an incidental take statement. If the Services determine that the proposed action is likely to jeopardize any listed species or adversely modify or destroy any designated critical habitat, they will advise the development of reasonable and prudent alternatives that avoid these consequences. The Services may work with the action agency to refine the reasonable and prudent alternatives. If the Federal action agency proceeds with the proposed action, they must either adopt one of the developed alternatives or seek an exemption. Once the BO is issued by the Services, the consultation process is completed. It is important to note, however, that every BO includes specific criteria for determining when formal consultation must be re-initiated. New information and changes in the project should be monitored closely throughout project implementation to assess whether re-initiation is required. If there is any question about whether the criteria have been met, the Federal action agency should inform the applicable Service or Services of the issue and discuss whether re-initiation is required under the terms of the BO.

High-Quality Analysis and Documentation Ensure Accurate Effects Determinations

The information standard for Section 7 consultation is use of the best scientific and commercial data available. Information can be collected from existing data sources, such as IPaC or natural heritage inventories maintained by States. All technical information and data submitted to the Services during Section 7 consultations should be reviewed by the Federal action agency to ensure it is complete and accurate. Any limitations, such as time passage since data collection or methodologies used, or the Federal action agency's decision to not collect requested data should be acknowledged and explained. While the ESA does not require Federal action agencies to conduct new research, it may be advantageous to collect new data, such as species surveys, and document that species are likely not present.

Federal action agencies should be aware of variations in the Section 7 consultation practices across regions and States that can present issues in the type of information provided, documentation formatting, terminology, mode and frequency of communication throughout the process, and any substantive issues including methods to avoid, minimize, or mitigate impacts to a particular species. Early and often communication with the Services will aid in this process. The Federal action agency may decide to submit a draft of the BA to the Services for comment and review before formally submitting, which can be beneficial in addressing any technical issues and increasing the likelihood of the Service's concurrence when the document is officially submitted.

A comprehensive knowledge of the Section 7 consultation process, in addition to frequent communication with the Services, can result in accurate, straightforward determinations and ultimately better transportation projects with positive environmental outcomes. The FHWA Office of Project Development and Environmental Review's (HEPE) [Environmental Review Toolkit](#) provides resources and assistance to streamline the Section 7 consultation process, including information on the use of [programmatic approaches](#) such as Programmatic BOs and Programmatic Consultations. Additionally, the website hosts the [ESA Webtool](#), an online tool to streamline the preparation of BAs and the Section 7 consultation process for projects where the FHWA is the lead Federal action agency.

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