ESA Overview Module 4 – Section 7, Interagency Consultation Text

Biological Opinion (slides 41 - 47)

Biological Opinion

The response to the action agency's biological assessment (or biological evaluation) from the Services is called the Biological Opinion. It is a written statement setting forth the Services opinion, in making a determination on whether an action will result in jeopardy or adverse modification. The Service begins by looking at the current status of the species, or baseline, and various types of effects which include direct, indirect, interrelated interdependent and cumulative effects.

A Biological Opinion will contain an Incidental Take Statement, except in the case of plants, which we will discuss in more detail in upcoming slides. A Biological Opinion should also contain Reasonable and Prudent Alternatives when there is a determination of jeopardy or adverse modification of critical habitat

A Biological Opinion also contains Reasonable and Prudent Measures, Terms and Conditions and includes some type of reporting requirement, potential conservation recommendations and reinitiation criteria.

Let's look at these contents in a little more detail. Reasonable and Prudent measures are intended to reduce or avoid incidental take.

Terms and Conditions are mandatory actions that instruct an action agency, or applicant, as to how to implement Reasonable and Prudent Measures. Terms and Conditions include, monitoring and reporting requirements. Monitoring and reporting allows both the action agency and the Services to assess the progress of the action and its' impact on the species or critical habitat

Conservation recommendations are discretionary actions provided by the Services, that the action agency may choose to undertake.

And finally, there will be a statement detailing under what conditions re-initiation of consultation would be required. An example of when a consultation may need to be reinitiated is if take exceeds what was provided for in the Incidental Take Statement or conditions have changed from the original consultation, or the project has changed from its original form or a new species is listed or critical habitat is newly designated.

If the Service believes the project, as proposed, will result in jeopardy to a species or adverse modification to critical habitat, the Service will suggest Reasonable and Prudent Alternatives.
In other words, will the project, as described, directly or indirectly diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciable reduced.

"Reasonable and prudent alternatives" are those actions that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented within the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and would avoid the likelihood of jeopardy or adverse modification of critical habitat.

An example of a Reasonable and Prudent Alternative might be to restrict the number or acreage of timber sales being proposed.

What is an example of a Reasonable and Prudent Alternative that is not within the action agency's jurisdiction? Well, one might be, for example, if you suggested to have the agency purchase some land that might be out of their legal authority.

Reasonable and Prudent Alternatives can look very different from the original project proposal. A Reasonable and Prudent Alternative should be derived in close coordination with the action agency and/or applicant because they will decide if an alternative is reasonable and prudent.

Reasonable and Prudent Alternatives are not to be confused with "reasonable and prudent measures". Reasonable and Prudent Measures refer to those actions the Services believe are necessary or appropriate to minimize the amount or extent of incidental take. Reasonable and Prudent Measures include only actions that occur within the action area, involve only minor changes to the project and reduce the level of incidental take associated with project activities.

A couple of statements you might see in a Biological Opinion regarding Terms and Conditions and Reasonable and Prudent Measures are: "These terms and conditions are non-discretionary. The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action."

For example, a Reasonable and Prudent Measure might include educating employees about a listed species whose habitat they are working in. Employees constructing a renewable energy plant in the Mohave desert tortoise habitat may be educated on tortoise activity periods and be required to reduce speed limits during the times that the tortoises are active.

We've talked about what's in a Biological Opinion and now we will talk about how long it should take to complete the consultation.

Formal consultation should be completed within 135 days after initiation, provided there is no applicant involvement and the consultation package submitted to the Services was complete. The regulatory timeframe for consultation is 90 days. The Service has an additional 45 days to write the Biological Opinion, for a total of 135 days. Consultation can be extended, if the action agency and the Services mutually agree to the extension.

In practice, consultation and document preparation can take much less or much more time. Complexities such as a need for legal review, agency review, additional analysis, etc. can make extensions in time a necessity.

If an action involves a permit or license applicant, and an extension is required, the Services will provide a written explanation for the extension. If the consultation period is to be extended for more than 60 days (that is, greater than 150 days in total), the Services must have consent of the applicant.

So, what do we mean by "applicant"? In general, an applicant is anyone (including corporations and state governments) who requires formal approval or authorization of a Federal agency as a prerequisite to conducting an action. The action agency decides who has applicant status and how they will be involved in the consultation.

For example, the power company that is requesting the transmission line in our previous example would be an applicant. The power company may request applicant status, but any correspondence must still go through the action agency since the consultation is still between two Federal agencies.