



  **Module 4: Section 7—
Interagency Cooperation**

Module 4, Section 7—Interagency Consultation

The Subtitle of Section 7: Federal Agency Actions and Consultations



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Module 4, Section 7—Interagency Consultation

Module Objectives

By the end of the module, according to section 7 of the ESA, you will be able to:

- Determine whether a proposed action requires consultation and explain why.
- Explain the steps of the consultation process; including what information should be included in the consultation package from the action agency perspective and from the Services perspective.



Credit: Dwight Harvey/USFWS

Module 4, Section 7 - Interagency Consultation

Module Route

- 7(a)(1) - Affirmative Conservation Mandate
- 7(a)(2) Consultation Process
 - The process – 7(b), 7(c)
 - When is consultation required?
 - Action area
 - Effects determination
- How to Initiate Consultation



Credit: USFWS

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Module Route

- 7(d) Irreversible and Irretrievable Commitment of Resources
- 7(b) Biological Opinion
 - Consultation Process
 - Timeframes
 - Incidental Take
- Special Cases
 - Emergency – (50 CFR 402.05)
 - 7(a)(4) - Conference

16 U.S.C. 1531 et seq., 50 CFR § 402



Credit: Fritz Knopf/USFWS

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Responsible Parties

Section 7 applies to:

- All Federal Agencies
- Only Federal Agencies



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Directives



Two Directives:

- Affirmative Conservation Mandate 7(a)(1)
 - Conserve listed species and their habitats
- Duty to not jeopardize listed species and not adversely modify critical habitat 7(a)(2)

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Section 7(a)(1) Affirmative Conservation Mandate



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Affirmative Conservation Mandate

“... all Federal agencies *shall* in consultation with, and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species...”



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Affirmative Conservation Mandate

Federal agencies should develop conservation programs for listed species



Agency conservation programs are those that can be supported, regulated or enforced.

Credit: Len Young

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Section 7(a)(2) Consultation



Credit: Sarena Sebor@USFWS

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Section 7(a)(2) Consultation

Consultation – the interaction between the action agency and the Services that evaluates the effects of a **Federal action** on listed species and designated critical habitat.

Federal Action – all activities or programs ... **authorized, funded, or carried out**, in whole or in part, by Federal agencies.

50 CFR 402.02



Credit: USFWS

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Section 7(a)(2) Consultation

- Purpose – to insure *proposed actions* do not jeopardize the continued existence of listed species and do not adversely modify critical habitat.
- Use the best scientific and commercial data available to make the determination.



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Jeopardy?

Jeopardize the Continued Existence of:
... an action that ... would be expected, directly or indirectly to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species.

50 CFR 402.02



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NMFS/FWS Consultation Responsibilities

NMFS has responsibilities for anadromous and marine listed species such as salmon, whales, marine turtles at sea, and corals. (50 CFR 222.23(a), 216, 217)

FWS has responsibilities for all other species.

50 CFR 17.11, 17.12, 17.95, 17.96



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Is Consultation Required?

Is there a Federal action?

Is there Federal discretion?

If yes, then . . .

50 CFR 402.12



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Is Consultation Required?

- Action agency evaluates proposed project
 - listed species or critical habitat occur within the action area
 - Affect of the action on listed species or critical habitat ("Effects Determination")
- Need for consultation is triggered by a "*may affect*" determination



Credit: USFWS

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Credit: USFWS

Action Area

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Action Area

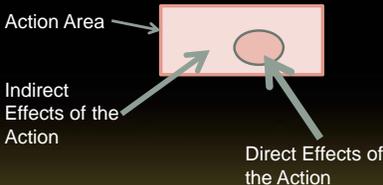
- All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.



Credit: Matthew Strausser, USFWS

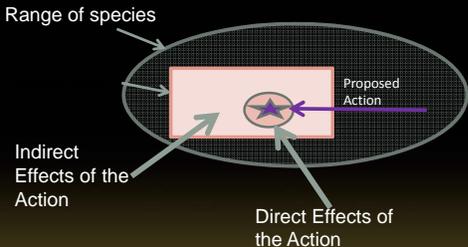
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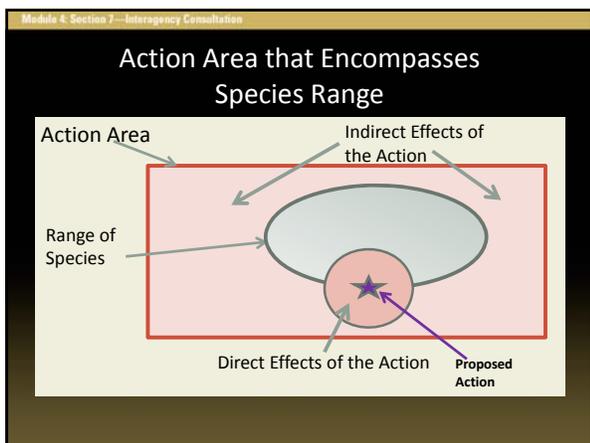
Action Area



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Action Area Within Species Range





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Cumulative Effects

ESA <ul style="list-style-type: none">• Future Only• Non-Federal Actions• Reasonably certain to occur	NEPA <ul style="list-style-type: none">• Past, Present and Future• Federal and non-Federal• Occur in reasonably foreseeable future
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Credit: BLM

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Effects of Interrelated-Interdependent Actions

Credit: BLM

- Interrelated Actions – are part of a larger action and depend on the larger action for their justification.
- Interdependent Actions have no independent utility apart from the action under consideration.

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Effects Determination



Credit: USFWS

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Effects Determinations

- Action agency determines effects of proposed action on listed species and/or critical habitat.
- Listed species or critical habitat present - the effects determination can be:
 - A No Effect determination – **no further consultation required**
 - A May Affect determination – **further consultation required: either informal or formal**



Credit: USFWS

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Informal or Formal Consultation?

Consultations can be Informal or Formal

Informal Consultation – a process through which Federal agencies can meet their consultation requirements for actions that are *not likely to adversely affect* listed species and their critical habitats.

50 CFR 402.13-14

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    graph TD
      MA[May Affect] --> NLA[Not Likely to Adversely Affect]
      MA --> LA[Likely to Adversely Affect]
      NLA --> IEA[Informal ESA Consultation Ends]
      LA --> IFEA[Initiate Formal ESA Consultation]
      SC[Services Concurrent] --> IEA
      SC --> IFEA
    
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Informal Consultation

- Variety of communication methods
- Identify affected species/critical habitat
- Determine potential effects of proposed project
- Explore ways to reduce or avoid adverse effects
- Determines whether formal consultation is necessary

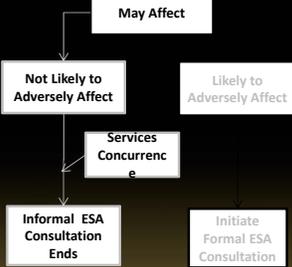


Panorama of a restored salt marsh near Mad River (Google Earth)

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May Affect (NLAA) Determination

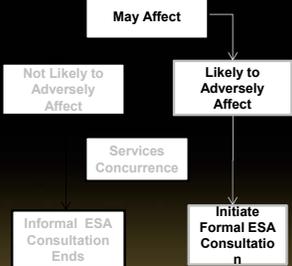
- Action agency determines action **May Affect Not Likely to Adversely Affect (NLAA)** a listed species or its critical habitat.
- Analysis submitted to Services.
- The Services *must concur in writing* with the determination. Informal consultation is concluded.



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May Affect (LAA) Determination

- When a Federal action is **Likely to Adversely Affect** a listed species or its critical habitat, the Federal agency initiates mandatory formal consultation *in writing* with the Services.



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How to Initiate Consultation



Credit: Robert Burton/USFWS

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Biological Assessment (BA)



Purpose: A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether listed species or critical habitat will be adversely affected. It is used to determine whether formal consultation or a conference is necessary.

BA Criteria: 50 CFR 402.12 and 50 CFR 402.14

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Formal Consultation Request

Must Include:

1. A description of the action to be considered
2. A description of the specific area that may be affected by the action
3. A description of any listed species or critical habitat that may be affected by the action



U.S. Fish and Wildlife Service
Tom Smylie

50 CFR 402.14

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Formal Consultation Request

Must include:

4. A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects
5. Relevant reports, including any environmental impact statements or biological assessments prepared, and
6. Any other relevant available information on the action, the listed species or critical habitat.

50 CFR 402.14

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Biological Assessment

A BA is *required* for:

- Major construction action occurring within the action area
- When an exemption to section 7(a)(2) is requested

50 CFR 402.12

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Suggested Biological Assessment Contents (Consultation Package)

Developed by Action Agency and may include:

- Results of an on-site inspection to document the listed species occurrence
- Views of species experts
- Literature Review

50 CFR 402.12

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Suggested Biological Assessment Contents (Consultation Package)

- Effects analysis, including cumulative effects
- An analysis of alternate actions considered by the action agency for the proposed action
- Complete BA within 180 days

All documentation must be submitted to the Services before consultation can begin.

50 CFR 402.12



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BA Consultation Package The Simplified Version

- Who, What, When, Where, Why and How
 - Who's involved?
 - What is the action?
 - When will it occur?
 - Where is it located?
 - Why is it necessary?
 - How will it affect listed species and/or habitat?
 - Why will it affect them?



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Section 7(d) Irreversible and Irretrievable Commitment of Resources

- Applies once consultation is initiated
- Attempts to keep all options open in case of jeopardy/adverse modification Biological Opinion
- Applies to both Federal agency *and* applicant
- Added to Act in 1978 because of Tellico Dam



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Section 7(d) Irreversible and Irretrievable Commitment of Resources



Credit: USFWS

- Determined by action agency
- FWS/NMFS can provide advice
- FWS/NMFS cannot provide concurrence
- Has implications for 7(a)(2) exemption – (7g)

50 CFR 402.09

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Biological Opinion



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Biological Opinion

- A Biological Opinion:
 - is a summary of the project/species information written by the Services
 - evaluates how the agency action affects the species or critical habitat
 - The Services' opinion of whether the action is likely to jeopardize listed species and adversely modify critical habitat



Credit: USFWS

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Biological Opinion

- A Biological Opinion contains:
 - Incidental Take Statement (except in the case of plants)
 - Reasonable and Prudent Alternatives for jeopardy or adverse modification opinions



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Biological Opinion

- A Biological Opinion contains:
 - Reasonable and Prudent Measures
 - Terms and Conditions (Mandatory)
 - Monitoring/Reporting Requirements
 - Conservation Recommendations (Discretionary)
 - Reinitiation Criteria



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Biological Opinion

If jeopardy or adverse modification will result, the Services will suggest *reasonable and prudent alternatives (RPAs)* [7(b)(3)(A)].

"Reasonable and prudent alternatives" - . . . actions that can be implemented:

- in a manner consistent with the intended purpose of the action
- within the scope of the Federal agency's legal authority and jurisdiction
- that is economically and technologically feasible
- would avoid the likelihood of jeopardy or adverse modification of critical habitat
- RPAs are not the same as Reasonable and Prudent Measures



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RPA vs. RPMs

- Reasonable and Prudent Alternatives are suggested in the case of a jeopardy or adverse modification Opinion.
- Reasonable and Prudent Measures are actions that are necessary and appropriate to minimize the impacts of incidental take.
 - Only actions that occur within the action area
 - Involve only minor changes to the project
 - Reduce the level of take associated with project activities



Credit: USFWS

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Biological Opinion Timeframe

- Consultation concluded by the Services within 90 days from initiation, unless extended by mutual agreement
- BO prepared within 45 days following conclusion of consultation (total: 135 days)
- Applicant extension:
 - written explanation for extension by Services
 - If extension is for > 60 days (>150 days total), the applicant must consent.



Credit: istockphoto.com

7(b)(1)

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Incidental Take



Credit: USFWS

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Incidental Take

"Take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant."

- Explains what the action agency/applicant need to do to be exempt from section 9.

50 CFR 402.02



Credit: Ryan Hagerty/USFWS

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Incidental Take Statement



Credit: USFWS

- Provides the amount or extent of take expected from the proposed action
- Applies only to fish and wildlife
- Identifies ways to minimize the effects of the action (Reasonable & Prudent Measures)
- Is not used to remove the threat of an action jeopardizing a listed species

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Amount or Extent of Take

- Incidental take must be quantifiable.
- Can be expressed in terms of:
 - the number of individual animals
 - the percentage of an affected population
 - an ecological surrogate or habitat marker
 - other methods



Credit: USFWS

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Incidental Take ≠ Plants

The ESA **does not** generally prohibit the incidental take of listed plants.

A BO for plants does not contain:

- an incidental take statement
- reasonable and prudent measures
- terms and conditions

see section 9(a)(2)



Photo by USFWS/Phil Zischler

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Incidental Take ≠ Plants

Listed plants **do** have *limited* protection from removal or destruction in areas under Federal jurisdiction and on non-Federal lands if the listed plant is protected under State law.



Credit: Ian Robertson/USFWS

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Reinitiation of Consultation

Is required if:

- Amount of expected take is exceeded.
- New information reveals effects not considered.
- Modification of action alters anticipated effects.
- New species or critical habitat listing may be affected by the action.
- Federal agency maintains discretion or control over the action.



Credit: Greg Clayton/USFWS

50 CFR 402.16

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Credit: USFWS

Special Cases

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Special Cases

- Early Consultation - (50 CFR 402.11)
- Emergency – results from natural disasters, and other emergencies (50 CFR 402.05)
- Conferencing - discussion regarding the impact of an action on *proposed* species or *proposed* critical habitat



Credit: Stephen Ting USFWS

7(a)(4) and 50 CFR 402.10

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Special Cases

- Emergency – results from acts of God, disasters, casualties, national defense or security emergencies (50 CFR 402.05)
- Emergency consultation is about the emergency response not the emergency itself
- Examples - Wildfires, oil spills, floods, tornadoes, or other events



Credit: Steve Mertzano USFWS

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Emergency Consultation Steps

- Do **not** delay response actions.
- Request recommendations from Services to minimize effects on listed species or critical habitat.
- Federal agency is notified if jeopardy is likely.
- At the conclusion of the emergency response, complete the consultation process.



Credit: Colin White-USFWS

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Section 7(a)(4) Conferencing



- Required when an action is likely to jeopardize a proposed species or adversely modify proposed critical habitat
- Can be formal or informal
- Recommendations to *minimize* or avoid adverse effects may be included
- *If* take is authorized it does not become effective until the species is listed
- Formal conference opinion can be converted to a BO once species is listed.

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Exercise Time



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Conclusion



Credit: Jan P. Zogarra/USFWS

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Conclusion

- Section 7(a)(2) consultation has been the most valuable and frequently used avenue of interagency involvement in the conservation of listed species.
- If all Federal agencies fully engage in the 7(a)(1) authority, species recovery **could** be more likely and therefore 7(a)(2) responsibilities would lessen.



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Module Objectives

You should be able to:

- Determine if consultation is required, according to section 7 of ESA and why.
- Explain the steps of the consultation process, including what information should be included in the consultation package: a) from the action agency perspective and b) from the Services perspective, according to section 7 of ESA.



Credit: James E. Johnson/USFWS

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Review

- Section 7 gives Federal agencies two directives:
 - Use their authorities to conserve listed species and their habitat
 - Ensure their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat
- Action agencies must provide information regarding the proposed actions and their effects
- Consultation is required if listed species or critical habitat may be affected.

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Review

- Consultation can be concluded informally if the effects are not likely to be adverse
- If an action's effects are likely to be adverse, consultation is concluded with preparation of a biological opinion
- Conferencing is similar to consultation but involves proposed species and proposed critical habitat