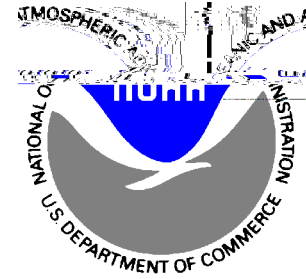




FOREWORD



It gives us great pleasure to introduce the final Section 7 Handbook. It is the culmination of much hard work by dedicated U.S. Fish and Wildlife Service and National Marine Fisheries Service employees. The Handbook provides internal guidance and establishes national policy for conducting consultation and conferences pursuant to section 7 of the Endangered Species Act of 1973, as amended. The purpose of the Handbook is to promote efficiency and nationwide consistency within and between the Services. The Handbook addresses the major consultation processes, including informal, formal, emergency, and special consultations, and conferences.

Through the section 7 consultation program, the Services strive to meet the consultation needs of all Federal Agencies. The Services work with their Federal partners to emphasize the identification and informal resolution of potential species conflicts in the early stages of project planning. They also provide information about listed, proposed, and candidate species and critical habitats to Federal agencies planning projects, and those applying for Federal permits and licenses. The Services work with Federal agencies on any action that is federally funded, authorized, or carried out that may affect a listed species and designated critical habitats. The Services advise the Agencies and applicants on how to avoid adversely impacting these species and habitats, and, where appropriate, the Services provide incidental take statements that allow take of threatened or endangered species that is incidental to an otherwise legal activity.

The Handbook will ensure consistent implementation of consultation procedures and development of associated documents by those biologists responsible for carrying out section 7 activities and provide the Services guidance necessary to assist other Federal agencies in meeting their responsibilities under section 7 of the Act. Although primarily targeted toward employees of the Services, other groups participating in the consultation process, including other Federal agencies, State, local, and tribal governments, private individuals, consultants, and industry groups should find the Handbook helpful in explaining section 7 processes and providing examples of various types of consultations.

We would like to take this opportunity to express our heartfelt thanks for the hard work and dedication of all those who have made the development of this Handbook possible. We especially want to thank those entities that have become conservation partners with our Agencies through this process. This document will be an important tool in threatened and endangered species conservation for our Nation.

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ENDANGERED SPECIES ACT CONSULTATION HANDBOOK

PROCEDURES FOR CONDUCTING

SECTION 7

CONSULTATIONS AND CONFERENCES

**U.S. FISH AND WILDLIFE SERVICE
NATIONAL MARINE FISHERIES SERVICE**

March 1998
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Glossary of Terms used in Section 7 Consultations

Act - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Action - all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR §402.02]

Action area - all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR §402.02]

Affect/effect - to affect (a verb) is to bring about a change ("The proposed action is likely to adversely affect piping plovers nesting on the shoreline"). The effect (usually a noun) is the result ("The proposed highway is likely to have the following effects on the Florida scrub jay"). "**Affect**" appears throughout section 7 regulations and documents in the phrases "may affect" and "likely to adversely affect." "**Effect**" appears throughout section 7 regulations and documents in the phrases "adverse effects," "beneficial effects," "effects of the action," and "no effect." [Proper grammatical usage]

Anticipated/allowable/authorized - in incidental take statements, the Services determine the amount or extent of incidental take "anticipated" (expected) due to the proposed action or an action modified by reasonable and prudent alternatives. When writing incidental take statements, use only the phrase "anticipated" rather than "allowable" or "authorized," as the Services do not allow or authorize (formally permit) incidental take under section 7. [Clarification of usage]

Applicant - any person (an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States) [ESA §3(12)] who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action. [50 CFR §402.02]

Appreciably diminish the value - to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species. [Clarification of usage]

Best available scientific and commercial data - to assure the quality of the biological, ecological, and other information used in the implementation of the Act, it is the policy of the Services to: (1) evaluate all scientific and other information used to ensure that it is reliable, credible, and represents the best scientific and commercial data available; (2) gather and impartially evaluate biological, ecological, and other information disputing official positions, decisions, and actions proposed or taken by the Services; (3) document their evaluation of comprehensive, technical information regarding the status and habitat requirements for a species throughout its range, whether it supports or does not support a position being proposed as an official agency position; (4) use primary and original sources of information as the basis for recommendations; (5) retain these sources referenced in the official document as part of the administrative record supporting an action; (6) collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies; and (7) require management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act. [59 FR 34271 (July 1, 1994)]

Biological assessment - information prepared by, or under the direction of, a Federal agency to determine whether a proposed action is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify proposed critical habitat. Biological assessments must be prepared for "major construction activities." See 50 CFR §402.02. The outcome of this biological assessment determines whether formal consultation or a conference is necessary. [50 CFR §402.02, 50 CFR §402.12]

Biological opinion - document which includes: (1) the opinion of the Fish and Wildlife Service or the National Marine Fisheries Service as to whether or not a Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat. [50 CFR §402.02, 50 CFR §402.14(h)]

Candidate species - plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. These are taxa for which the Fish and Wildlife Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions. [61 FR 7596-7613 (February 28, 1996)]

Conference - a process of early interagency cooperation involving informal or formal

species, or destroy or adversely modify proposed critical habitat; (2) designed to help Federal agencies identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (3) designed to develop recommendations to minimize or avoid adverse effects to proposed species or proposed critical habitat. [50 CFR §402.02, 50 CFR §402.10]

Conservation - the terms "conserve," "conserving" and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the] Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. [ESA §3(3)]

Conservation measures - are actions to benefit or promote the recovery of listed species that are included by the Federal agency as an integral part of the proposed action. These actions will be taken by the Federal agency or applicant, and serve to minimize or compensate for, project effects on the species under review. These may include actions taken prior to the initiation of consultation, or actions which the Federal agency or applicant have committed to complete in a biological assessment or similar document.

Conservation recommendations - the Services' non-binding suggestions resulting from formal or informal consultation that: (1) identify discretionary measures a Federal agency can take to minimize or avoid the adverse effects of a proposed action on listed or proposed species, or designated or proposed critical habitat; (2) identify studies, monitoring, or research longer necess TD -0.space Fed that: (1) identify 7assessmen92 may incdh mduommciend, in

elements) (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. [ESA §3 (5)(A)] Designated critical habitats are described in 50

that action. These effects are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action. [50 CFR §402.02] The environmental baseline covers past and present impacts of all Federal actions within the action area. This includes the effects of existing Federal projects that have not yet come in for their section 7 consultation.

Endangered species - any species which is in danger of extinction throughout all or a significant portion of its range. [ESA §3(6)]

Environmental baseline - the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process. [50 CFR §402.02]

ESA - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

FWS - the U.S. Fish and Wildlife Service.

Federal agency - any department, agency, or instrumentality of the United States. [ESA §3(7)]

Fish or wildlife - any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof. [ESA §3(8)]

Formal consultation - a process between the Services and a Federal agency or applicant that: (1) determines whether a proposed Federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with a Federal agency's written request and submittal of a complete initiation package; and (3) concludes with the issuance of a biological opinion and incidental take statement by either of the Services. If a proposed Federal action may affect a listed species or designated critical habitat, formal consultation is required (except when the Services concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat).

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 a Federal agency or applicant. [50 CFR §402.02]

Indirect effects - those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR §402.02]

Informal consultation - an optional process that includes all discussions and correspondence between the Services and a Federal agency or designated non-Federal representative, prior to formal consultation, to determine whether a proposed Federal action may affect listed species or critical habitat. This process allows the Federal agency to utilize the Services' expertise to evaluate the agency's assessment of potential effects or to suggest possible modifications to the proposed action which could avoid potentially adverse effects. If a proposed Federal action may affect a listed species or designated critical habitat, formal consultation is required

Plant - any member of the plant kingdom, including seeds, roots, and other parts thereof. [ESA §3(14)]

Population - "population," or "distinct population segment," are terms with specific meaning when used for listing, delisting, and reclassification purposes to describe a discrete vertebrate stock that may be added or deleted from the list of endangered and threatened species. The term "population" will be confined to those distinct population segments officially listed, or eligible for listing, consistent with section 4(a) of the Act and the Services' population policy. [61 FR 4722-4725 (February 7, 1996)]

Preliminary biological opinion - the opinion issued as a result of early consultation. [50 CFR §402.02]

Programmatic consultation - consultation addressing an agency's multiple actions on a program, regional or other basis. [Clarification of usage]

Proposed critical habitat - habitat proposed in the Federal Register to be designated as critical habitat, or habitat proposed to be added to an existing critical habitat designation, under section 4 of the Act for any listed or proposed species. [50 CFR §402.02]

Section 4 - the section of the Endangered Species Act of 1973, as amended, outlining procedures and criteria for: (1) identifying and listing threatened and endangered species; (2) identifying, designating, and revising critical habitat; (3) developing and revising recovery plans; and (4) monitoring species removed from the list of threatened or endangered species. [ESA §4]

Section 7 - the section of the Endangered Species Act of 1973, as amended, outlining procedures for interagency cooperation to conserve Federally listed species and designated critical habitats. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the Services to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Other paragraphs of this section establish the requirement to conduct conferences on proposed species; allow applicants to initiate early consultation; require FWS and NMFS to prepare biological opinions and issue incidental take statements. Section 7 also establishes procedures for seeking exemptions from the requirements of section 7(a)(2) from the Endangered Species Committee. [ESA §7]

Section 7 consultation - the various section 7 processes, including both consultation and conference if proposed species are involved. [50 CFR §402]

Section 9 - the section of the Endangered Species Act of 1973, as amended, that prohibits the taking of endangered species of fish and wildlife. Additional prohibitions include: (1) import or export of endangered species or products made from endangered species; (2) interstate or foreign commerce in listed species or their products; and (3) possession of unlawfully taken endangered species. [ESA §9]

Section 10 - the section of the Endangered Species Act of 1973, as amended, that provides exceptions to section 9 prohibitions. The exceptions most relevant to section 7 consultations are takings allowed by two kinds of permits issued by the Services: (1) scientific take permits and (2) incidental take permits. The Services can issue permits to take listed species for scientific purposes, or to enhance the propagation or survival of listed species. The Services can also issue permits to take listed species incidental to otherwise legal activity. [ESA §10]

Service(s) - the Fish and Wildlife Service or the National Marine Fisheries Service (or both).

Species - includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. [ESA §3(16)]

Survival - For determination of jeopardy/adverse modification: the species' persistence as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient

resilience to allow for the potential recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter. [Clarification of usage]

Take - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. [ESA §3(19)] **Harm** is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. **Harass** is defined by FWS as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. [50 CFR §17.3]

Threatened species - any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. [ESA §3(20)]

Unoccupied critical habitat - critical habitat not occupied (i.e., not permanently or seasonally occupied) by the listed species at the time of the project analysis. The habitat may be suitable, but the species has been extirpated from this portion of its range. Conversely, critical habitat may have been designated in areas unsuitable for the species, but restorable to suitability with proper management, if the area is necessary to either stabilize the population or assure eventual recovery of a listed species. As recovery proceeds, this formerly unoccupied habitat may become occupied.

Some designated, unoccupied habitat may never be occupied by the species, but was designated since it is essential for conserving the species because it maintains factors constituting the species' habitat. For example, critical habitat may be designated for an upstream area maintaining the hydrology of the species' habitat downstream. [Clarification of usage]

Wildlife - See "fish or wildlife".

EXECUTIVE SUMMARY

Section 7

Section 7 of the Endangered Species Act (Act) [16 U.S.C. 1531 *et seq.*] outlines the procedures for Federal interagency cooperation to conserve Federally listed species and designated critical habitats.

Proactive Conservation Efforts by Federal Agencies

Section 7(a)(1) directs the Secretary (Secretary of the Interior/Secretary of Commerce) to review other programs administered by them and utilize such programs to further the purposes of the Act. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act.

This section of the Act makes it clear that all Federal agencies should participate in the conservation and recovery of listed threatened and endangered species. Under this provision, Federal agencies often enter into partnerships and Memoranda of Understanding with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) for implementing and funding conservation agreements, management plans, and recovery plans developed for listed species. Biologists for the Services should encourage the development of these types of partnerships and planning efforts to develop pro-active approaches to listed species management.

Avoiding Adverse Effects of Federal Actions

Section 7(a)(2) states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to **jeopardize** the continued existence of a listed species or result in the destruction or **adverse modification** of designated critical habitat. In fulfilling these requirements, each agency must use the best scientific and commercial data available. This section of the Act defines the consultation process, which is further developed in regulations promulgated at 50 CFR §402.

The Handbook

This handbook was primarily developed to aid FWS and NMFS biologists implementing the section 7 consultation process. The purpose of the handbook is to provide information and guidance on the various consultation processes outlined in the regulations. Additionally, the handbook will ensure consistent implementation of consultation procedures by those biologists responsible for carrying out section 7 activities. Chapters of the handbook deal

actions can be modified so there is no need for formal consultation. The Services should ensure that all information needed to make an informed decision is made available. It is particularly critical when formal consultation begins that all parties are fully involved in providing information and discussing project options. Although it is the responsibility of the Services to make the determination of **jeopardy** or **destruction/adverse modification** in the biological opinion, action agencies and applicants should be fully informed and involved in the development of Reasonable and Prudent Alternatives, Reasonable and Prudent Measures, and Terms and Conditions to minimize the impacts of incidental take. Biologists should be creative in problem solving and look for ways to conserve listed species while still accommodating project goals.

Coordination

The Services have a policy to ensure coordination with State Agencies for gathering information in implementing the consultation program. [59 FR 34274-34275 (July 1, 1994)] The Services have a joint policy on coordination with tribal governments. Secretarial Order #32306 (June 5, 1997) entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" recognizes that the consultation process should include input from affected tribal governments. State and tribal government biologists often have information available that is pertinent to the description of the action area or to the species of interest in the consultation.

Shortening Timeframes

Recently, the Services have been implementing measures to streamline consultation processes. Examples include projects reviewed under the Northwest Forest Plan and nationwide Timber Salvage Program. These procedures have been able to effectively shorten consultation timeframes without giving up any protection for listed species/designated critical habitats or the use and review of the best available information. This has been achieved through enhanced interagency coordination, development of guidelines for implementation of a larger program (i.e. timber salvage) which can tier to an individual project (timber sale), and by providing consultation simultaneously with project analysis under the National Environmental Policy Act (NEPA). Biologists for the Services are encouraged to review examples of these streamlined consultations and to look for ways to incorporate streamlining techniques into other consultation procedures.

CHAPTER 1 - GENERAL INFORMATION

1.1 INTRODUCTION TO SECTION 7 CONSULTATION

Section 7 of the Endangered Species Act (Act) provides some of the most valuable and powerful tools to conserve listed species, assist with species' recovery, and help protect critical habitat. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species, and to address existing and potential conservation issues.

A review of the legislative history of the Act and its amendments makes it clear the drafters of the legislation were designing a law with the strength to protect species, while at the same time creating a mechanism encouraging a productive dialogue between project proponents and the agencies charged with implementing the Act.

Section 7(a)(1) directs the Secretary (Secretary of the Interior/Secretary of Commerce) to review other programs administered by them and utilize such programs to further the purposes of the Act. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act.

This section of the Act makes it clear that all Federal agencies should participate in the conservation and recovery of threatened and endangered species. Under this provision, Federal agencies often enter into partnerships and Memoranda of Understanding with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) for implementing and funding conservation agreements, management plans, and recovery plans developed for listed species. Biologists for the Services should encourage the development of these types of partnerships and planning efforts to develop pro-active approaches to listed species management, rather than reacting when a conflict occurs.

Section 7(a)(2) states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to **jeopardize** the continued existence of a listed species or result in the destruction or **adverse modification** of designated critical habitat. In fulfilling these requirements, each agency is to use the best scientific and commercial data available. This section of the Act sets out the consultation process, which is further implemented by regulation (50 CFR §402).

This handbook was developed to aid Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) biologists implementing the section 7 consultation process. Throughout the handbook, the term "Services" will be used to generically refer to both agencies together. However, this is not meant to imply that all actions discussed herein are taken by the Services jointly. If a particular section applies to only one agency, the acronyms FWS or NMFS will be used.

By law, section 7 consultation is a cooperative effort involving affected parties engaged in analyzing effects posed by proposed actions on listed species or critical habitat(s). This handbook demonstrates the latitude available within section 7 to work with applicants and agencies during this analytical process.

The following thoughts are offered as an expression of the philosophy guiding section 7 work.

- o The biology comes first. Know the facts; state the case; and provide supporting documentation. Keep in mind the FWS's ecosystem approach to conservation of endangered and threatened species [59 FR 34273-34274 (July 1, 1994)].
- o Base the determination of **jeopardy/no jeopardy** on a careful analysis of the best available scientific and commercial data. Never determine the conclusion of a biological opinion before completing the analysis of the best available data.
- o Clarity and conciseness are extremely important. They make consultation documents more understandable to everyone. A biological opinion should clearly explain the proposed project, its impacts on the affected species, and the Services' recommendations. It should be written so the general public could trace the path of logic to the biological conclusion and complete enough to withstand the rigors of a legal review.
- o Strong interpersonal skills serve section 7 biologists well. Establishing a positive working relationship with action agencies enhances the Services' ability to do the job successfully. Remember, you are trying to assist the agency in meeting their section 7 responsibilities under the Act.
- o Present a positive image as a representative of your Service.
- o Section 7 consultation is a cooperative process. The Services do not have all the answers. Actively seek the views of the action agency and its designated representatives, and involve them in your opinion preparation, especially in the development of

reasonable and prudent alternatives, reasonable and prudent measures, terms and conditions to minimize the impacts of incidental take, and conservation recommendations.

- o Use all aspects of section 7, especially opportunities for informal consultation where solutions can be worked out prior to the structured process mandated by formal consultation. Be creative, and make the process work to the species' advantage.
- o It is important to be consistent throughout a species' range when implementing section 7. Be flexible but not inconsistent. Study the law, the regulations and this handbook. Know the authorities and be flexible when it is prudent, but always stand firm for maintaining the substantive standards of section 7.
- o Take advantage of professional support within and outside the Services. For example, the FWS Division of Engineering can provide valuable technical review of development proposals. Attorneys in the Regional and field offices of the FWS Solicitor/NMFS General Counsel can offer advice on section 7 regulations and the latitude within which to conduct consultation. Similarly, the Services' law enforcement personnel may be able to answer questions about direct or incidental take.
- o Strive to solve problems locally.
- o An effective section 7 biologist is a good teacher and a good student. Seek every opportunity to teach the section 7 process within and outside the Services in an informative and non-threatening way. Learn all you can about other Services' programs, Federal action agency's mandates and procedures, and State/tribal/private agency's/client's needs and expectations.

1.2 AGENCY RESPONSIBILITIES

(A) Lead Regions for Consultation

Fish and Wildlife Service

When a proposed action takes place in more than one FWS Region, a lead FWS Region is assigned responsibility for the consultation. Generally, the lead FWS Region is the one in which the greatest impact or the largest number of affected species occur. The Regions

involved agree on the appropriate lead Region to prepare and sign the biological opinion. If agreement cannot be reached, the matter is referred to the FWS Director.

Coordination between the FWS consultation lead Region and the FWS recovery lead Region becomes necessary when a FWS Region consults on a species for which it does not have recovery lead. The level of coordination is mutually agreed to and the lead FWS recovery Region may release other FWS Regions from responsibility for coordinating on **no jeopardy** or **no adverse modification** opinions. The FWS Regional Director signing the biological opinion is responsible for its contents, and has final authority to make any **jeopardy** or other finding. However, any changes the lead Region may make in **jeopardy** or **adverse modification** determinations initially made by other Regions must be coordinated before multi-Region opinions are finalized.

Requests for consultation from agencies addressing geographically broad-based or extensive programs are referred to the FWS's Washington Office Division of Endangered Species. This Division coordinates with the Regions to decide whether to recommend formation of a national team or assign the consultation to a lead FWS Region for coordination with other involved Regions. A national team may report to a designated Regional Director or the Assistant Director for Ecological Services (AES). AES submits a recommendation to the FWS Director for consideration. The Director's decision will be communicated to the involved Regions.

National Marine Fisheries Service

Generally, the NMFS Regions are responsible for conducting consultations on activities occurring within their Region. If the activity occurs in more than one Region or the species covered by the consultation occurs in more than one Region, the Regions mutually decide upon a lead Region. If there is no agreement on a lead Region, then the Assistant Administrator for Fisheries (AA) designates a lead Region. The Endangered Species Division in the Office of Protected Resources (F/PR) conducts programmatic consultations and those with a national scope (e.g. EPA's Multisector general permit for stormwater). Currently, all formal biological opinions, with the exception of those conducted by the Southwest and Northwest Regions for anadromous species, are forwarded to the Headquarters Endangered Species Division for review and final clearance. For activities that the Southwest or Northwest Regional Director (RD) considers controversial, the RD must consult with the Director, Office of Protected Resources (Office Director), and advise the AA before the final action is taken.

(B) Signature Authority

Fish and Wildlife Service

The FWS's responsibility for implementing section 7 consultation and conference procedures generally rests with the Regional Directors. The Assistant Director for Ecological Services is the responsible official if the biological opinion or conference opinion is to be signed in the Washington Office. FWS Regional Directors and the Assistant Director for Ecological Services can delegate responsibility and signature authority on non-jeopardy biological opinions and conference opinions to subordinate line officers. For example, FWS Field Office supervisors have been given signature authority on non-jeopardy biological opinions for intra-Service (internal FWS) consultations (see Appendix E for the Intra-Service Consultation Handbook). However, signatory authority for biological opinions finding **jeopardy** or **adverse modification** has not been delegated below the Regional Director/Assistant Director level.

National Marine Fisheries Service

The NMFS Director, Office of Protected Resources, has signature authority for all formal consultations except where this authority has been delegated to the Regions. In 1995, as a result of an increasing number of consultations concerning listed salmon, the Southwest and Northwest Regional Directors were delegated authority to sign all biological opinions for anadromous species, unless the opinion concerns an activity of the Department of Commerce (e.g., fishery harvests). All opinions concerning a Department of Commerce activity are signed by the Office Director.

The Office Director also signs biological opinions related to issuance of section 10 research permits, section 10 incidental take permits (except for anadromous species) or activities such as issuance of regulations. NMFS Regional Directors have signature authority for most informal consultations. However, the Office Director has signature authority for informal consultations on activities that cross regional boundaries or have national significance.

(C) Intra-Service Section 7 Consultation

Fish and Wildlife Service

Intra-Service consultations and conferences will consider effects of the FWS's actions on listed, proposed and candidate species. Candidate species are treated as if they are proposed for listing for purposes of conducting internal FWS conferencing. Although including

candidate species is not required by law, it is Service policy to consider candidate species when making natural resource decisions. Therefore, candidate species will be considered during internal FWS conferencing. FWS units will consult or confer with the appropriate FWS Ecological Services field office on actions they authorize, fund, or carry out that may affect listed, proposed or candidate species or designated or proposed critical habitat. These actions include refuge operations, public use programs, private lands and federal aid activities, as well as promulgating regulations and issuing permits. A Service office requesting formal consultation provides the data required by the regulations at 50 CFR §402.14(c) and is treated as any other action agency (see Appendix E for a copy of the Intra-Service Consultation Handbook). Formal intra-Service consultation should occur on the proposed issuance of any section 10 permit.

National Marine Fisheries Service

NMFS conducts consultations on all activities that it authorizes, funds or permits that may affect listed species. Conferencing is conducted on proposed species. While NMFS does not consult on candidate species, they are considered when making natural resource decisions. Actions that warrant consultation includes fishery management plans, amendments to plans, permits issued under section 10 of the Act and the Marine Mammal Protection Act (MMPA) for research or incidental taking, and regulations issued under the Act, MMPA and Magnuson Fishery Conservation and Management Act. Biological opinions on these activities as well as other Commerce activities are reviewed and signed by the Director, Office of Protected Species.

(D) Information Standards and Sources

Best available scientific and commercial data

The Act requires the action agency to provide the best scientific and commercial data available concerning the impact of the proposed project on listed species or designated critical habitat. If relevant data are known to be available to the agency or will be available as the result of ongoing or imminent studies, the Services should request those data and any other analyses required by the regulations at 50 CFR §402.14(c), or suggest that consultation be postponed until those data or analyses are available as outlined in section 4.4(A) of this handbook.

Where significant data gaps exist there are two options: (1) if the action agency concurs, extend the due date of the biological opinion until sufficient information is developed for a more complete analysis; or (2) develop the biological opinion with the available information giving the benefit of the doubt to the species. These alternatives must be discussed with the action agency and the applicant, if any. Based on this discussion, a decision regarding the preparation of the biological opinion should be made and documented in the administrative

Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.

Writing and bibliographic style

- o In section 7 consultation documents, keep the first letter of the word "section" lower cased, except when it begins a sentence.

- o Write and edit consultation documents according to:

Submit the early alert to the Chief, Division of Endangered Species. The Division of Endangered Species will prepare a cover memo and forward the early alert to the Assistant Director for Ecological Services, who will forward it to the Director. Allow 10 days in Washington to be sure the alert has been reviewed by the Director. Regional Directors must first send in an early alert to Washington and obtain approval from the Director before signing any draft and final biological opinions, preliminary biological opinions (early consultation), and conference opinions of regional or national significance likely to result in findings of **jeopardy** or **adverse modification**.

Use the following format:

**C. IF NOT, HAVE THE PROPOSED REASONABLE AND PRUDENT
ALTERNATIVES BEEN DISCUSSED WITH THE ACTION**

REGIONAL OFFICE CONTACT: (name, office, phone number)

National Marine Fisheries Service

The NMFS Regions must provide the Chief of the Endangered Species Division and the Director, Office of Protected Resources, advance notice of any biological opinions that may result in a **jeopardy** or **adverse modification** conclusion and any biological opinion that is potentially controversial whether or not it results in a **jeopardy** or **adverse modification** conclusion.

(F) Release of Draft Documents

Providing action agencies or applicants an opportunity to discuss a developing biological opinion, preliminary opinion, or conference may result in productive discussions that may reduce or eliminate adverse effects. If an action agency asks to review a draft opinion or a draft conference report or opinion, the Services should provide a draft. The section 7 regulations do not specify how an action agency should ask for this review. Generally, a telephone request from the equivalent of a field supervisor or higher official, documented in the administrative record, is sufficient.

Applicants can request draft opinion/conference documents through the action agency. When an action agency then requests this document for the applicant, the Services must inform the action agency that, once released to an applicant, the document may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5)).

If an action agency or an applicant has comments on a draft opinion or conference document, the action agency must provide those comments to the Services in writing for the record. An applicant may copy the Services with the comments it provides to the action agency. The Services will consider an applicant's comments or concerns when they are officially transmitted by the action agency. [50 CFR §402.14(g)(5)]

(G) Maintaining the Administrative Record

A good administrative record documenting and supporting a consultation and the resulting biological opinion is important, especially if a biological opinion is challenged or questions are raised concerning how or why certain conclusions were reached. At a minimum, administrative records for significant informal consultations, concurrences, conferences, and formal consultations should contain the following types of records as appropriate:

- o letters, memoranda, public notices, or other documents requesting the consultation;

CHAPTER 2 - COORDINATION

2.1 COORDINATION WITH OTHER ENDANGERED SPECIES ACT FUNCTIONS

(A) Listing

Section 7 compliance may become necessary as soon as a species is proposed for listing or critical habitat is proposed for designation. Conferences are required if a proposed action is likely to jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed critical habitat. Conferences generally base analyses of effects on the species status, distribution and threat data included in proposed listing rules and/or constituent elements described in proposed critical habitat rules. Other reliable data, such as published studies, species accounts, and peer-reviewed journal articles are also considered. Conferences conducted during the proposal period provide listing biologists with information to help refine the analysis of threats, and species or habitat data collected during these conferences. The final listing or critical habitat designation packages provide a primary data source for consultations until recovery plans and recovery-related research become available.

(B)

- o any distinction in species' behavior or required habitat needs if the species has a different core area or need for another life cycle period (breeding, nonbreeding, migrating or over wintering period); and
- o tolerance of the species or essential elements of its habitat to human activities (Exhibit 2-1).

Interrelationships exist between management actions outlined in recovery plans and the consultation process. It is important for the section 7 biologist to be familiar with species' recovery plans and to coordinate with the appropriate species recovery coordinator while ensuring any reasonable and prudent alternatives or any reasonable and prudent measures developed through the consultation process are consistent with recovery plan goals. Further, management actions identified in a recovery plan can be used as Terms and Conditions of an incidental take statement as long as they have the effect of minimizing the impact of incidental take from the project, and are limited to minor changes. If recovery plans identify specific habitats as essential for species' survival and recovery, close attention should be given to actions that may affect that habitat. It is generally appropriate to use management actions outlined in recovery plans as Conservation Recommendations.

(C) Section 10 Coordination

Endangered and threatened species permits - section 10(a)(1)(A)

Section 10 of the Act provides exceptions for activities otherwise prohibited by section 9. Section 10(a)(1)(A) authorizes the Services to issue permits for scientific purposes or to enhance the propagation or survival of listed species. The permitted activity must not operate to the disadvantage of the species and must be consistent with the purposes and policy set forth in section 2 of the Act. Formal intra-Service consultation is required for the issuance of FWS Regional blanket permits. Section 7 consultation (see Appendix E for the FWS intra-Service consultation handbook) must also be conducted prior to issuance of a section 10(a)(1)(A) permit or a subpermit under the Regional blanket permit. Section 10(a)(1)(A) permits are also required:

- o when a reasonable and prudent alternative calls for scientific research that will result in take of the species (this includes scientific research carried out by the Services);
- o when the agency, applicant or contractor plans to carry out additional research not required by an incidental take statement that would involve direct take (if this is part of the action and direct take is contemplated, a permit is not needed); and
- o for species surveys associated with biological assessments (usually developed during informal consultation) that result in take, including harassment.

Habitat conservation planning - section 10(a)(1)(B)

Section 10(a)(1)(B) of the Act allows non-Federal parties planning activities that have no Federal nexus, but which could result in the incidental taking of listed animals, to apply for an incidental take permit. The application must include a habitat conservation plan (HCP) laying out the proposed actions, determining the effects of those actions on affected fish and wildlife species and their habitats (often including proposed or candidate species), and defining measures to minimize and mitigate adverse effects. The Services have developed a handbook for Habitat Conservation Planning and Incidental Take Permit Processing, which should be referenced for further information.

In some HCP planning areas, parties may strive to find a Federal nexus to avoid the HCP process altogether. These parties should be advised of the differences between incidental take capabilities under sections 7 and 10. Although the issuance of an incidental take permit under section 10 must not jeopardize the continued existence of a listed species, section 10

expressly authorizes the Services to minimize and mitigate, to the maximum extent practical, the adverse impacts to the species (supplying some benefit to the species such as land acquisition or habitat restoration or enhancement to offset unavoidable effects of the action). Mitigation may or may not reduce the actual number of individuals the Services' anticipate to be taken as a result of project implementation. For incidental take considerations under section 7, minimization of the level of take on the individuals affected is required. Also, the incidental take statement in a section 7 biological opinion does not provide a "No Surprises assurances" guarantee. The action agency is responsible for reinitiating consultation should their actions result in exceeding the level of incidental take.

Whenever practical, consideration should be given to programmatic or ecoregion consultation with Federal agencies having major programs in the HCP areas to facilitate overall consultation and recovery actions for the species involved (see section 5.3).

Experimental populations - section 10(j)

Section 10(j) of the Act authorizes listed species to be released as experimental populations outside their currently occupied range, but within probable historic habitat, to further species conservation. Before making a release, the Services determine by rulemaking whether that population is "essential" or "nonessential." An "essential experimental population" is a reintroduced population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. A "nonessential experimental population" is a reintroduced population whose loss would not be likely to appreciably reduce the likelihood of survival of the species in the wild. For section 7 consultation purposes, section 10(j) requires the following:

- o any nonessential experimental population located outside a National Park or National Wildlife Refuge System unit is treated as a proposed species (conference may be conducted);
- o any nonessential experimental population located within a National Park System or National Wildlife Refuge System unit is treated as a threatened species (standard consultations are conducted);
- o any essential population is treated as a threatened species (standard consultations are conducted, and special rules may allow take);
- o critical habitat may be designated for essential experimental populations (standard consultations are conducted), but not for nonessential experimental populations; and

- o all populations of the species (including populations designated as experimental) are considered to be a single listed entity when making **jeopardy** determinations or other analyses in a section 7 consultation.

By definition, a "nonessential experimental population" is not essential to the continued existence of the species. Therefore no proposed action impacting a population so designated could lead to a **jeopardy** determination for the entire species.

A listed species that is reintroduced into its historic range without experimental population status receives full protection under the Act.

2.2 COORDINATION WITH THE ACTION AGENCY AND APPLICANT

(A) Formal Consultations and Conferences

The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program). If there is an applicant for a permit or license related to the Federal action, the applicant may be involved in the consultation process (see section 2.2(E)).

Formal consultation becomes necessary when: (1) the action agency requests consultation after determining the proposed action may affect listed species or critical habitat [however, if the Service concurs in writing that the proposed action is not likely to adversely affect any listed species or critical habitat (i.e., the effects are completely beneficial, insignificant, or discountable), then formal consultation is not required]; or (2) the Services, through informal consultation, do not concur with the action agency's finding that the proposed action is not likely to adversely affect the listed species or critical habitat.

An action agency shall confer with the Services if the action is likely to jeopardize the continued existence of a proposed species or result in the destruction or **adverse modification** of proposed critical habitat. The conference process helps determine the likely effect of the proposed action and any alternatives to avoid **jeopardy** to a proposed species or destruction or **adverse modification** of proposed critical habitat.

When two or more Federal agencies are involved in an activity affecting listed species or critical habitat, one agency is designated as the lead (50 CFR §402.07), often based on which

agency has the principal responsibility for the project (e.g., a dam is maintained to provide a pool for generating electricity - a Federal Energy Regulatory Commission (FERC) responsibility, but the capacity behind the dam also provides flood storage - a Corps responsibility. In this case, FERC has lead for the consultation as the dam would probably not be there except for the power generation need). Although one agency has the lead, the other still has to provide data for effects analyses and development of reasonable and prudent alternatives and measures if its activities may affect listed species or critical habitat.

(B) Commitment of Resources during Consultation

"(d) After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)."

Section 7(d) of the Endangered Species Act

Section 7(d) was added to the Act in 1978 as part of the package that created the exemption process. Congress intended this provision to avoid future Tellico Dam scenarios by forbidding certain irreversible and irretrievable resource commitments during consultation, thus keeping open all opportunities to develop reasonable and prudent alternatives.

Not all irreversible and irretrievable commitments of resources are prohibited. The formulation or implementation of any reasonable and prudent alternative must be foreclosed by the resource commitment to violate section 7(d). Thus, resource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative.

action agency, not the Services, to determine the validity of the action agency's alternative. If the agency's alternative is challenged in court, the standard for review will be whether the decision was arbitrary and capricious under the Administrative Procedures Act. The validity of the action agency's decision will determine whether section 7(a)(2) has been satisfied and whether section 7(d) is applicable. If it is determined that the action agency's decision is not valid, that agency would be taking the risk of noncompliance with the Act (51 FR 19940 (June 3, 1986)).

The Services do not provide an opinion on the question of resource commitments. Under the

Figure 2-1. Application of section 7(d): irreversible or irretrievable commitment of resources

Agency requests consultation, either formal or informal

- | | | |
|--------|--|------------------------------------|
| I | "May affect" situation exists;
formal consultation is required | section 7(d)
prohibition begins |
| II If: | | |
| A. | The Services concur with a "not likely
to adversely affect" finding | section 7(d)
not applicable |
| B. | The Services issue a no jeopardy/adverse
modification biological opinion, or the
action agency chooses a reasonable and
prudent alternative from a jeopardy/adverse
modification opinion | section 7(d)
obligation expires |
| C. | Action agency chooses to disagree
with the Services' jeopardy/adverse
modification determination, or chooses
to implement an alternative that has not
been prescribed by the Services; and | |
| 1. | The best available scientific and
commercial data support the
agency decision | section 7(d)
obligation expires |
| 2. | The action agency decision
is not justified by available
data | section 7(d)
applies |
| III | Reinitiation of consultation is required
under 50 CFR §402.16 (Return to step II) | section 7(d)
applies |

(C) Dealing with Nonresponsive Agencies

Agencies that refuse to consult or confer

When an action agency disagrees or does not respond to the Services' informal suggestions for consultation or conference, the Services should send a letter requesting the agency to initiate

be to the appropriate Regional Director. For NMFS, the elevation would be to either the appropriate Regional Administrator, or the Director - Office of Protected Resources at the headquarters office. They can pursue the need to reinitiate consultation with the action agency.

Although the Services' can not require Federal agencies to reinitiate consultation if they choose not to do so, any unauthorized "take" should be referred to either the FWS Law Enforcement Division and the Office of the Solicitor, or the NMFS Office of Law Enforcement and the Office of General Counsel - depending upon which species are involved.

(D) Compliance with Section 7(a)(2)

The action agency determines whether and how to proceed with its proposed action in light of the Services' biological opinion, even though the terms and conditions of incidental take statements are non-discretionary. Nevertheless, the Services' biological opinion is traditionally afforded substantial deference by any reviewing court, and action agencies must give great weight to the Services' biological opinion before deciding on a proposed action. Failure to explain in the administrative record how the agency addressed the Services' biological opinion could expose the action agency to a judicial challenge under both the Act and the Administrative Procedure Act.

No jeopardy and/or no adverse modification finding

The action agency may proceed with the action as proposed, provided no incidental take is anticipated. If incidental take is anticipated, the agency or the applicant must comply with the reasonable and prudent measures and implementing terms and conditions in the Services' incidental take statement to avoid potential liability for any incidental take.

Jeopardy/adverse modification finding

If a **jeopardy** or **adverse modification** determination results from the consultation, the action agency may:

- o adopt one of the reasonable and prudent alternatives for eliminating the **jeopardy** or **adverse modification** of critical habitat in the opinion;
- o decide not to grant the permit, fund the project, or undertake the action;
- o request an exemption from the Endangered Species Committee (see Appendix G);

- o reinstate the consultation by proposing modification of the action or offering reasonable and prudent alternatives not yet considered; or
- o choose to take other action if it believes, after a review of the biological opinion and the best available scientific information, such action satisfies section 7(a)(2).

The action agency must notify the Services of its final decision on any proposed action that receives a **jeopardy** or **adverse modification** biological opinion (50 CFR §402.15(b)).

Incidental take statements

Violation of the section 9 taking prohibition results in liability unless the terms and conditions of the incidental take statement are followed. The agency must undertake the required actions to minimize incidental take, or require these actions as conditions of the permit or grant. The agency has a continuing duty to regulate the activity covered by the incidental take permit; otherwise the protective coverage of section 7(o)(2) may lapse.

(E) Role of the Permit or License Applicant

Identification of an applicant

The Services do not determine formally whether or who is an applicant for a Federal agency action, although the regulations and their preamble provide guidance. For purposes of this discussion, the Federal action involves the approval of a permit or license sought by the applicant, together with the activities resulting from such permission. The action agency determines applicant status, including requests arising from prospective applicants in early consultations. The action agency also determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the Act and the section 7 regulations.

Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations, including land management planning and other program level consultations.

If an agency supports an "applicant" who does not meet the criteria described above, the Services nonetheless should try to work with that party, although the procedural opportunities afforded to applicants will not apply to that party.

Applicant's role in the consultation process

If the Federal agency identifies an applicant, the Services and the action agency meet their obligations to that party as outlined in 50 CFR§402 through the following:

- o the action agency provides the applicant an opportunity to submit information for consideration during the consultation;
- o the applicant must be informed by the action agency of the estimated length of any extension of the 180-day timeframe for preparing a biological assessment, along with a written statement of the reasons for the extension;
- o the timeframes for concluding formal consultation cannot be extended beyond 60 days without the applicant's concurrence;
- o the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- o the Services will discuss the basis of their biological determination with the applicant and seek the applicant's expertise in identifying reasonable and prudent alternatives to the action if likely **jeopardy** or **adverse modification** of critical habitat is determined; and
- o the Services provide the applicant with a copy of the final biological opinion.

The Services do not work directly with or take comments directly from the applicant without the knowledge or consent of the action agency [50 CFR 402.14(g)(5)].

(F) Role of the Non-Federal Representative

Non-Federal representatives may be involved in the informal consultation process and may request and receive species lists, prepare the biological assessment, and provide information

for the formal consultation. However, the Services require the action agency to designate formally the non-Federal representative in writing. Moreover, the action agency must be informed that the ultimate responsibility for section 7 obligations remains with the action agency.

2.3 COORDINATION BETWEEN FWS AND NMFS

The NMFS and the FWS are individually responsible for consultation on listed species under each of their respective jurisdictions. However, the FWS and NMFS also have joint jurisdiction over some listed species. Consultation on these shared listed species requires a joint effort between the FWS and the NMFS. Use of this joint handbook will help to ensure that FWS and NMFS will approach section 7 consultation in a consistent manner. Increasingly, consultations on listed species administered by FWS overlap with those administered by the NMFS and vice versa. In these instances, the FWS should strive to coordinate informal and formal consultations with their NMFS counterparts and vice versa. Also, when formal consultations may affect species under NMFS jurisdiction, the FWS needs to remind the action agency, through early correspondence and/or as a footnote to the formal consultation package, of the need to consult with NMFS and vice versa.

Coordination between FWS and NMFS is critical to ensure any reasonable and prudent alternatives prescribed by both the Services (e.g., the conservation of sea turtles) are compatible. The terms and conditions of incidental take statements must be compatible so the action agency can implement both opinions without further consultation.

Currently, NMFS listed species that may require joint coordination include several whales, the Hawaiian monk seal, several runs of salmon in the Northwest and California, the shortnose sturgeon, and sea turtles while in the water. Recent joint FWS/NMFS consultations have included actions on the Gulf sturgeon in the Gulf of Mexico, Corps of Engineers dredging impacts to sea turtles in Florida, programmatic consultations on salmon and owls in the Pacific Northwest, and oil exploration in Alaska.

2.4 COORDINATION WITH OTHER FEDERAL AGENCIES

Consultations with other Federal agencies follow 50 CFR §402 unless counterpart regulations (explained in 50 CFR §402.04) are approved for that agency. Although no counterpart

regulations have been issued to date, field stations may consider entering into optional procedures that provide better working relationships with other agencies at a local level

sought, the applicant can be encouraged to use the early consultation process. If there is no Federal nexus, a section 10(a)(1)(B) permit may be appropriate.

Natural Resource Conservation Service (NRCS) (formerly the Soil Conservation Service): implements Federal mandates to maintain and enhance natural resources through local or regional sponsors. These sponsors may be designated as non-Federal representatives by written documentation from NRCS.

2.5 COORDINATION WITH STATE AGENCIES

The term State agency means any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State. (ESA § 3(17))

The Services' policy regarding the role of State agencies in activities under the Act [59 FR 34274-34275 (July 1, 1994)] (see copy in Appendix A), calls for cooperation with States as follows:

As part of the consultation program, it is the policy of the Services to:

- o inform State agencies of any Federal agency action that is likely to adversely affect listed or proposed species or designated or proposed critical habitat, and request relevant information from them, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.
- o request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.
- o recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information. Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions not containing such classified or confidential business information will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

This Secretarial Order clarifies the responsibilities of the component agencies, bureaus and offices of the Departments when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes.

Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Under the Secretarial Order, tribal governments can play a role in the consultation process when agency actions may affect tribal trust resources or tribal rights. The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities, shall encourage meaningful tribal participation in the section 7 consultation process and shall:

- o Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

may affect the reserved lands or the exercise of reserved rights under the jurisdiction of tribal governments, the Services will strongly recommend to the Federal action agency that they work with and encourage affected tribal governments to participate in the consultation process.

CHAPTER 3 - INFORMAL CONSULTATION

3.1 THE INFORMAL CONSULTATION PROCESS

Most consultations are conducted informally with the Federal agency or a designated non-Federal representative. Informal consultations:

- o clarify whether and what listed, proposed, and candidate species or designated or proposed critical habitats may be in the action area;
- o determine what effect the action may have on these species or critical habitats;
- o explore ways to modify the action to reduce or remove adverse effects to the species or critical habitats;
- o determine the need to enter into formal consultation for listed species or designated critical habitats, or conference for proposed species or proposed critical habitats; and
- o explore the design or modification of an action to benefit the species.

When used in the context of consultation, the term "informal" suggests an unstructured approach to meeting section 7 requirements. Such consultation includes phone contacts, meetings, conversations, letters, project modifications and concurrences that occur prior to (1) initiation of formal consultation or (2) the Services' concurrence that formal consultation is not necessary. Participation in informal consultation may include (1) the action agency, (2) a designated non-Federal representative, (3) an applicant or permittee, or (4) consultants working on behalf of any of the first three. The informal consultation process may uncover data gaps which may complicate the section 7 analysis. In such situations, additional studies may be necessary to document the species' status in the action area to improve the data base upon which a biological assessment or, if formal consultation is warranted, a biological opinion is developed.

While there is no overall timetable for informal discussions, timeframes are established for some individual elements of informal consultation (Figure 3-1). The biological assessment, including the effects of the action, must be submitted within 180 calendar days of receipt of a species list from the Services. The current accuracy of the species list needs to be verified if it is more than 90 days old and preparation of the biological assessment has yet to begin [50

CFR §402.12(e)]. Dialogue can continue as long as both parties are willing to participate and are actively working to complete the informal consultation. Although not required by section 7, many agencies request species lists, or concurrence with submitted species lists, for projects that are not "major construction activities." Although a timeframe for responding to these requests is not mandated by regulation, the Services will respond within 30 calendar days when possible. See Exhibit 3-1 for an example of a species list.

Documentation of the steps in the informal consultation process is essential to its continued utility and success. The administrative file should contain records of phone contacts, including name of the caller, the purpose of the call as it relates to the proposed action or action area, and any advice or recommendations provided by the Services' biologist. A meeting can be easily documented by letter to appropriate parties that summarizes the meeting results, particularly any Services' concerns and recommendations.

Figure 3-1. Informal consultation process

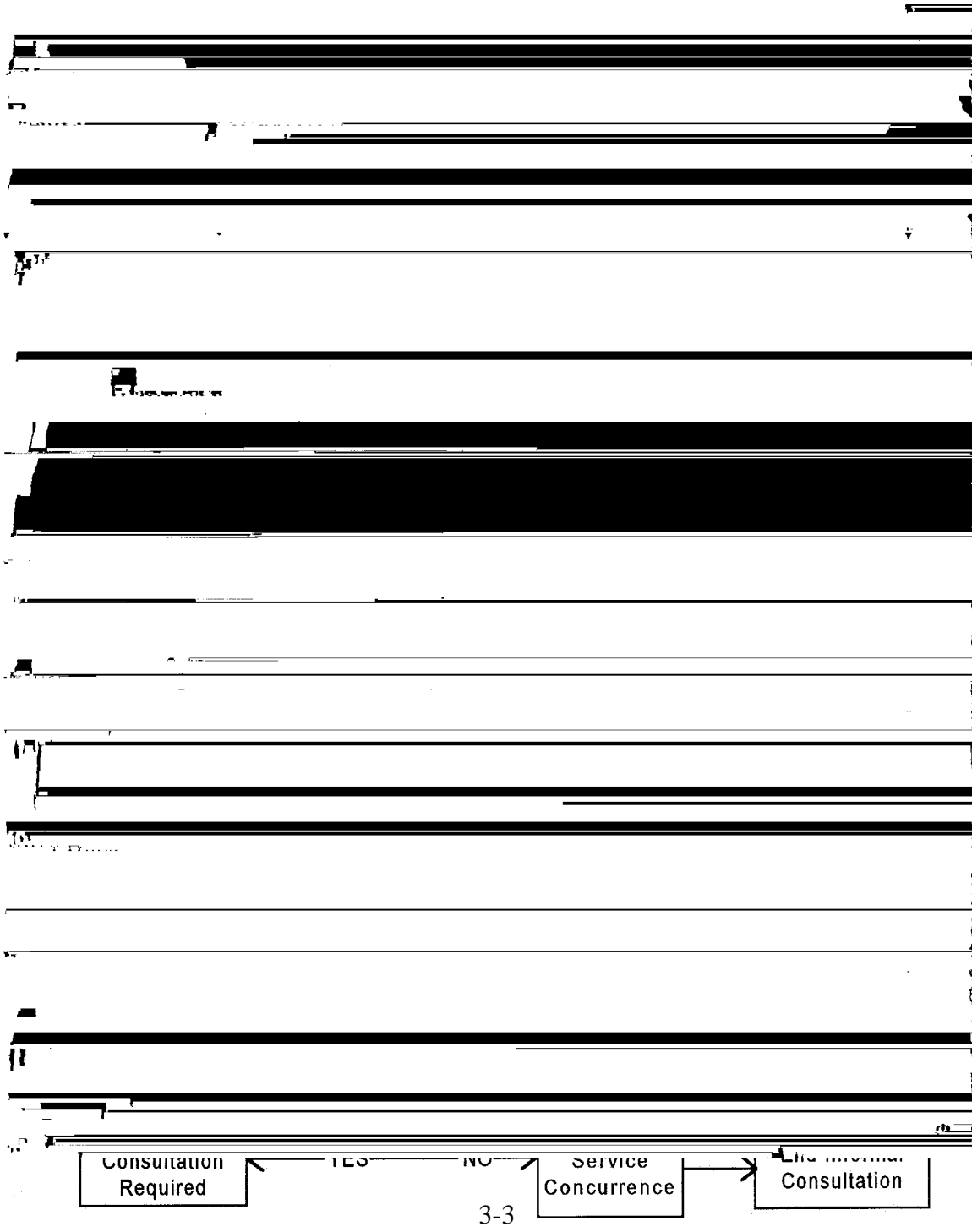


Exhibit 3-1. Example of a species list

(4) Designated critical habitat for
(give common name and scientific name of species)

(5) Proposed critical habitat for
(give common name and scientific name of species)

Our data indicate that Federally listed species, proposed species, candidate species, and designated and proposed critical habitat are not likely to be impacted by the proposed project action. With respect to wetlands and other important fish and wildlife habitat, it appears that the proposed action will not significantly impact these resources. If project plans change or portions of the proposed project were not evaluated, it is our recommendation that the changes be submitted for our review. If you require additional information, please contact _____(name)_____ of this office at _____(phone)_____.

Sincerely yours,

Field Supervisor

3.2 IDENTIFICATION, RESOLUTION, AND CONSERVATION

Except in those cases where the need for formal consultation is clear from the start, the Services will encourage all action agencies entering into the consultation process to start with informal consultation rather than formal consultation. This will allow for early consideration of listed species concerns, similar to the early scoping process of NEPA. Many consultations can and should be handled informally. This gives the Services an opportunity to be involved early and to resolve problems as they are identified.

Informal consultation determines the likelihood of adverse effects on a listed species or critical habitat. Informal consultations (1) identify adverse effects and suggest ways to avoid them, (2) resolve project conflicts or differences of opinion between the Services and the action agency or applicant as to the nature and extent of adverse effects, (3) provide the action agency with opportunities for carrying out conservation activities pursuant to section 7(a)(1), and (4) help monitor cumulative effects on a species or ecosystem.

Service biologists must be well informed about species' status, distribution, threats, and recovery objectives to carry out the informal consultation process effectively. All decisions reached during the consultation process must be based on sound science. The logical place to start data gathering is the field station's species files. Other reliable sources are State and tribal fish and wildlife agencies, Federal land management agencies, State Natural Heritage Programs, species experts, cooperative research units, recovery teams, The Nature Conservancy, and private consultants. All may provide or verify information, and should be used as needed.

Conflict resolutions during informal consultation may involve changes in construction scheduling, engineering design, pesticide formulation or application method, location, emission or discharge levels and many other changes. All possible options to eliminate adverse effects should be discussed freely with the action agency, and they should be encouraged to recommend their own options. The Services do not offer "not likely to adversely affect" concurrences unless the project's dimensions are defined clearly at the informal stage. Finally, informal consultation offers action agencies an opportunity to address their conservation responsibilities under section 7(a)(1). Recovery plans often identify tasks benefiting listed species that may be carried out on or near the project site. Examples include habitat protection, modification or improvement; predator control; and survey work.

3.3 TECHNICAL ASSISTANCE

A telephoned or written inquiry about the presence or absence of listed and/or proposed species in a project area usually initiates informal consultation. Service biologists may respond in several ways. If species are not likely to be present, the consultation requirement is met, and the Services may advise the agency, applicant or consultant of this in writing. If historical records or habitat similarities suggest the species may be in the area, then some survey work may be recommended to make a more precise determination. If the species is definitely in the project area, but the Services determine it will not be adversely affected, the Services may notify the agency of that finding (e.g., bald eagles fly over but do not feed, roost, or nest in the area, and are not expected to be adversely affected).

Technical assistance from the Services may take a variety of forms; it includes the species list provided by the Service, information on listed, proposed, and candidate species, as well as names of contacts having information on other sensitive species or State listed species. The Services may alert State or tribal agencies, or other Services offices of the project. See Exhibit 3-2 for a letter on the need for a survey.

The Services may recommend that the action agency conduct additional studies on species' distribution in the area affected by the action. Normally, Services biologists only request additional survey work, but sometimes monitoring impacts of the action on aspects of the species' life cycle may be agreed upon during informal consultation. Monitoring may be recommended when incidental take is not anticipated but might possibly occur, thus triggering the need for formal consultation. In this situation, the action agency should be notified of the consequences of an unauthorized taking and be encouraged to enter formal consultation if take is anticipated. The action agency has no legal obligation to conduct or pay for these studies, but Service biologists should point out the advantages of doing them during informal consultation, particularly if the data gathered may preclude formal consultation. Also, Service biologists can remind action agencies of their responsibilities under section 7(a)(1) of the Act to aid in conservation of listed species.

While candidate species have no legal protection, Service biologists should notify agencies of candidate species in the action area, and may recommend ways to reduce adverse effects and/or request studies as appropriate. These may be added as conservation recommendations. Legally, the action agency does not have to implement such recommendations. However, candidate species may later be proposed for listing, making conference necessary in the future if proposed actions are likely to jeopardize the continued existence of such species. Service biologists should urge other Federal agencies to address candidate species in their Federal programs. The Services are eager to work with other Federal agencies to conserve candidate species. Addressing candidate species at this stage of consultation provides a focus on the overall health of the local ecosystem and may avert potential future conflicts.

Only technical assistance can be provided to agencies conducting actions outside the United States (e.g., in Canada), but knowledge of such actions should be considered in the "status of the species" analysis if consultations arise on impacts proposed to the species (e.g., whooping crane) in the U.S.

should be conducted by a botanist familiar with this species and should occur in July or August to ensure best survey conditions.

In addition for the potential of small whorled pogonia populations occurring within the project area, the candidate species, ___(common and scientific name)___ is known to occur at several locations near Portland. While candidate species are not afforded protection under the Endangered Species Act, the U.S. Fish and Wildlife Service encourages their consideration in environmental planning. If unnecessary impacts to candidate species can be avoided, the likelihood that they will require the protection of the Act in the future is reduced. We recommend that the alignment in the vicinity of Portland and Falmouth be surveyed for the ___(common name of candidate species)___.

One portion of the proposed alignment near Willoughby, Vermont (Figure 11) passes within five miles of a nest site of the Federally listed endangered peregrine falcon (Falco peregrinus anatum). However, based on the proposed project's distance from the nest (approximately 5 miles), we do not expect any impacts to occur to the resident peregrine falcons.

No other Federally listed or proposed threatened and endangered species under the jurisdiction of the U.S. Fish and Wildlife Service are known to occur in the project area, with the exception of occasional transient endangered bald eagles (Haliaeetus leucocephalus) or peregrine falcons.

For further information about or assistance with surveys for the small whorled pogonia or the ___(common name of candidate species)___, we suggest that you contact the Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800.

Please notify this office with the results of any surveys for the small whorled pogonia or the ___(common name of candidate species)___, so that we may determine whether there may be any impacts to these species. A list of Federally designated endangered and threatened species in Maine, New Hampshire and Vermont is included for your information. Thank you for your cooperation and please contact ___(name)___ of this office at ___(phone)___ for further coordination regarding this project.

Sincerely yours,

Field Supervisor

3.4 BIOLOGICAL ASSESSMENTS

"(c)(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological

Sometimes, biological assessments are confused with environmental assessments. The contents of biological assessments prepared pursuant to the Act are largely at the discretion of the action agency although the regulations provide recommended contents (50 CFR §402.12(f)). Biological assessments are not required to analyze alternatives to proposed actions. Environmental assessments are prepared pursuant to the National Environmental Policy Act.

3.5 CONCURRENCE/NONCONCURRENCE LETTERS

Following review of the biological assessment or other pertinent information, another informal effort may be appropriate to try to eliminate any residual adverse effects. If that effort results in elimination of potential impacts, the Services will concur in writing that the action, as revised and newly described, is not likely to adversely affect listed species or designated critical habitat. Since concurrence depends upon implementation of the modifications, the concurrence letter must clearly state any modifications agreed to during informal consultation. If agreement cannot be reached, the agency is advised to initiate formal consultation.

Although not required, an action agency may request written concurrence from the Services that the proposed action will have no effect on listed species or critical habitat. This concurrence is useful for the administrative record. When the biological assessment or other information indicates that the action has no likelihood of adverse effect (including evaluation of effects that may be beneficial, insignificant, or discountable), the Services provide a letter of concurrence, which completes informal consultation. The analysis, based on review of all potential effects, direct and indirect, is documented in the concurrence letter. If the nature of the effects cannot be determined, benefit of the doubt is given to the species. Do not concur in this instance. After evaluating the potential for effect, one of the following determinations is made:

Listed species/designated critical habitat

- o **No effect** - the appropriate conclusion when the action agency determines its proposed action will not affect listed species or critical habitat (see Exhibit 3-3).
- o **Is not likely to adversely affect** - the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial. **Beneficial effects** are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to

meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur (see Exhibits 3-4 and 3-5).

- o **Nonconcurrency** - if the Services do not agree with the action agency's determination of effects or if there is not enough information to adequately determine the nature of the effects, a letter of nonconcurrency is provided to the action agency (see Exhibit 3-6).
- o **Is likely to adversely affect** - the appropriate conclusion if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial (see definition of "is not likely to adversely affect"). In the event the overall effect of the proposed action is beneficial to the listed species, but also is likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species. An "is likely to adversely affect" determination requires formal section 7 consultation.

Proposed species/proposed critical habitat

A fourth finding is possible for proposed species or proposed critical habitat:

- o **Is likely to jeopardize proposed species/adversely modify proposed critical habitat** - the appropriate conclusion when the action agency or the Services identify

Exhibit 3-3. Example of a no effect response

United States Department of the Interior

FISH AND WILDLIFE SERVICE
New England Field Offices
400 Ralph Pill Marketplace
22 Bridge Street, Unit #1
Concord, New Hampshire 03301-4901

RE: Nationwide Wetlands Permit
January 20, 1993
Drakes Island, Wells, Maine

Dear _____ :

We have reviewed your request for information about endangered and threatened species and their habitats for the above referenced project. The Federally listed threatened piping plover (Charadrius melodus) is known to occur on Laudholm Beach, near the proposed project. However, based on the project description and location, the Fish and Wildlife Service concurs with your determination that no impacts to Federally listed species will occur as a result of the proposed action. Should project plans change, or if additional information on the distribution of listed or proposed species becomes available, this determination may be reconsidered.

While it is not required for your Federal permit, we suggest that you contact the Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800 for information on state listed species that may be present.

A list of Federally designated endangered and threatened species in Maine is enclosed for your information. If you have further questions, please contact _____(name)_____ of this office at _____(phone)_____.

Sincerely yours,

Field Supervisor

Exhibit 3-4. Example of a concurrence letter

Re: Blanket clearance for minor construction projects

Dear _____ :

This responds to your request of November 18, 1992, for our concurrence with your approach to handling endangered species review of minor construction projects falling into the following categories specified in your letter:

1. Construction, abandonment, or relocation of points of delivery (PODs). We understand to establish a new POD, an existing pipeline is tapped at a point along a previously disturbed and maintained Right-Of-Way (ROW), and no more than 20 feet of small diameter pipe is installed. Limited aboveground facilities such as valves, separators, meters and small shelters may also be installed. To relocate or abandon a POD, an existing pipeline is cut and capped adjacent to the existing pipeline as previously described at a different location.
2. Construction and/or maintenance projects within existing, previously disturbed, and generally fenced compressor and measuring and regulatory (M&R) stations.
3. Construction and/or maintenance projects along existing, previously disturbed and maintained ROW. We understand from your letter that these minor projects are less than 100 feet in length and include projects for erosion and sedimentation control, cathodic protection installations and repairs to or replacement of facilities.

A Biological Assessment is required for "major construction activities" if listed species "may be present" in the action area - regardless of the likelihood or significance of the effects.

Migratory Bird Treaty Act (40 Stat. 755, as amended; 16 U.S.C. 703 et seq.) were provided in our letter of February 11, 1992. Those comments remain valid.

We appreciate your conscientious efforts to comply with Federal requirements. If you have any questions regarding this letter, please contact ____ (name) ____ of this office at ____ (phone) ____.

Sincerely yours,

Field Supervisor

Exhibit 3-5. Example of a concurrence letter on a beneficial effect

Dear _____ :

This letter responds to your Biological Assessment [or other title], received on [date], and your request for concurrence that all effects of the proposed [name and location of the action] on [name of listed species] will be beneficial.

The Fish and Wildlife Service [or National Marine Fisheries Service] (Service) has reviewed the submitted project description and evaluation of project effects, and concurs with your determination that all project effects on [name of listed species] will be beneficial.

[choose one of the following closings]

This concludes section 7 consultation on [name of action]. If you have any questions or

Sincerely yours,

Field Supervisor

Exhibit 3-6. Example of a nonconcurrence letter

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Chesapeake Bay Field Office
1825 Virginia Street
Annapolis, Maryland 21401

January 11, 1993

Re: Endangered Species Act concerns relative to CENAB-OP-RP (CHESAPEAKE BEACH, TOWN OF)90-04126-1

Dear _____ :

We are writing to express our concerns regarding impacts of the referenced project on the Federally threatened Puritan tiger beetle (Cicindela puritana). Our comments are provided in accordance with Section 7 of the Endangered Species Act (87 stat. 884 as amended; 16 U.S.C. 1531 et seq.).

The project involves construction of a stone revetment and wooden walkway along the Chesapeake Bay at the Town of Chesapeake Beach a short distance north of a bayside cliff that supports a Puritan tiger beetle population. This population represents the northern limit of this beetle on the western shore of the Chesapeake Bay. In 1991, The Corps initiated informal consultation with the Service to determine whether the revetment/walkway project, due to its potential for increasing public access to tiger beetle habitat, might adversely affect the Puritan tiger beetle. As a result of the informal consultation process, it was agreed that the Town would construct and maintain a chain link fence at the northernmost limit of the cliffs supporting this threatened species. The fence was to be tied in to the cliff face and to extend 30 feet channelward of mean high water. The Service concurred that such a fence would decrease public access to the tiger beetle cliffs sufficiently to compensate for the increase in human use of the beach area, thus resulting in a net "no effect" to the beetles. The permit, issued May 14, 1991, was conditioned upon the construction and maintenance of this structure.

On December 15, 1992, we received information from your office indicating that the applicant had requested permission to re-locate the fence some 400 feet to the south of the originally proposed location. On January 7, 1993, the project location was inspected by _____(name)_____, endangered species biologist from our office, _____(name)____ of your staff, and _____(name)_____ of the Maryland Natural Heritage Program. The fence had been constructed at the revised location, leaving a 400 foot section of cliff that is potential Puritan tiger beetle habitat on the public access side of the fence. Due to this change in the project, we can no longer concur with the "no effect" determination. In order to ensure compliance with the Endangered Species Act, we suggest one of the following courses of action be taken:

(a) The applicant should move the fence to the location specified in the existing permit. Compliance with this original permit condition would satisfy the previously established criterion for "no effect" and would conclude the consultation process for this project.

(b) Alternatively, the Corps should re-examine the project in its present form to determine whether it may affect any endangered or threatened species. If the possibility of an effect cannot be eliminated, the Corps is required to initiate formal consultation with the Service.

If you have any questions regarding this project, please contact _____(name)_____ of this office at _____(phone)_____. Thank you for your cooperation in the effort to protect endangered and threatened species.

Sincerely yours,

Field Supervisor

explain that informal consultation/concurrence letters are adequate to complete section 7 compliance, but that they will enter into formal consultation if the action agency desires.

Although the formal consultation process must result in a biological opinion reaching either a **jeopardy** or **no jeopardy** to listed species (or **adverse** or **no adverse modification** of critical habitat) finding, the process is flexible and can be adapted at any point to respond to project modifications agreed to by the action agency or the applicant. Moreover, in locations where numerous actions impact a species, changes in the baseline due to successive effects can be addressed on a continuing basis using biological opinions. Such a series of biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a **jeopardy** call. Successive biological opinions can be used to monitor trends in the species' baseline, making predictions of the impacts of future actions more reliable. Extrapolation of a diminishing baseline can help show where future **jeopardy** thresholds may be reached.

[REDACTED]

...of the...
incidental take statement to Action Agency
end formal consultation

4.2 INITIATING FORMAL CONSULTATION

Action agencies initiate formal consultation through a written request to the Services. For a major construction activity, the action agency is required to submit a biological assessment if listed species or designated critical habitat may be present in the action area. This biological assessment, including a description of the effects of the action, must be submitted within 180 days of receipt of a species list from the Services. The accuracy of the species list needs to be verified if it is more than 90 days old and work on preparing the assessment has not begun. Formal consultation is necessary even when the action is not a major construction activity if a "may affect" situation exists. Although there is no specific timeframe within which the action agency must submit an initiation package, agencies must review their actions "at the earliest possible time" to determine whether formal consultation is required. If a "may affect" situation exists, formal consultation must be initiated promptly. To comply with the section 7 regulations (50 CFR §402.14(c)), the initiation package is submitted with the request for formal consultation and must include all of the following:

- o a description of the action being considered;
- o a description of the specific area that may be affected by the action;
- o a description of any listed species or critical habitat that may be affected by the action;
- o a description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative effects;
- o relevant reports, including any environmental impact statements, environmental assessments, biological assessment or other analyses prepared on the proposal; and
- o any other relevant studies or other information available on the action, the affected listed species, or critical habitat.

The action agency can initiate formal consultation on a number of similar actions within the same geographic area (see section 5.3, Regional or Ecosystem Consultations) or a portion of a comprehensive plan of action (see section 5.5, Incremental Step Consultations), as long as the effects of the entire action are considered. The information provided by an action agency must include the best scientific and commercial data available.

4.3 EVALUATING INITIATION PACKAGES

An action agency's package initiating consultation needs to be reviewed promptly by the Services to determine if: (1) all of the information required by the regulations has been provided; and (2) whether the information includes the best scientific and commercial data available. The "other relevant information" requirement gives the Services an opportunity to determine what project-specific information is needed to develop the biological opinion. The action agency is obligated to submit the best data available or "which can be obtained during the consultation" (50 CFR §402.14(d)). Although not required by 50 CFR §402.14, a topographic map showing the affected area is a useful addition to the initiation package.

4.4 FORMAL CONSULTATION PROCEDURES

(A) Timeframes for Formal Consultation

"(I)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency;

(B) in the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A) -

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth -

(I) the reasons why a longer period is required;

(II) the information that is required to complete the consultation; and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to the extension."

Section 7(b) of the Endangered Species Act

The Act and the section 7 regulations require that formal consultation be concluded within 90 calendar days (all further references to days in this Handbook mean calendar days) of initiation, and the regulations require that the biological opinion be delivered to the action

agency within 45 days after the conclusion of formal consultation. The Services strive to issue all biological opinions within the 90-day period; however, the Services may use the additional 45 days when circumstances warrant.

Formal consultation is "initiated" on the date the request is received, if the action agency provides all the relevant data required by 50 CFR §402.14(c). If all required data are not initially submitted, then formal consultation is initiated on the date on which all required information has been received. Within 30 working days of receipt of an initiation package, the Services should provide written acknowledgment of the consultation request, advise the action agency of any data deficiencies, and request either the missing data or a written statement that the data are not available. Exhibits 4-1 and 4-2 are examples of letters for situations with and without all required data. This acknowledgement process is optional, but it is highly recommended that either a letter or phone conversation record be placed in the administrative record to document the actual initiation date, particularly if the need to acquire

These actions should be undertaken cooperatively with the action agency and any applicant, thus allowing the Services to develop a better understanding of direct and indirect effects of a proposed action and any cumulative effects in the action area. Action agencies also have the project expertise necessary to help identify reasonable and prudent alternatives, and reasonable and prudent measures. Other interested parties (including the applicant, and

Exhibit 4-1. Example of a letter sent to inform action agencies the Services have received a complete initiation package and will begin formal consultation on a proposed action.

(date)

Dear _____ :

This letter acknowledges the U.S. Fish and Wildlife Service's [or National Marine Fisheries Service's] (Service) [date of receipt of letter initiating consultation] receipt of your [date of agency's initiating letter] letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on [name of listed species and/or critical habitats affected].

All information required of you to initiate consultation was either included with your letter or is otherwise accessible for our consideration and reference. We have assigned log number [log number] to this consultation. Please refer to that number in future correspondence on this consultation.

Section 7 allows the Service up to 90 calendar days to conclude formal consultation with your agency and an additional 45 calendar days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, we expect to provide you with our biological opinion no later than [date = 135 calendar days after receipt of initiation request].

As a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact me or _____(name)_____ of this office at _____(phone)_____.

Sincerely yours,
Field Supervisor

Exhibit 4-2. Example of a letter sent when an incomplete formal consultation request has been received.

(date)

Dear _____ :

This letter acknowledges the U.S. Fish and Wildlife Service's [or National Marine Fisheries Service's] (Service) [date of receipt of letter initiating consultation] receipt of your [date of agency's initiating letter] letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on [name of listed species and/or critical habitats affected].

The Service has not received all of the information necessary to initiate formal consultation on [name of the project] as outlined in the regulations governing interagency consultations (50 CFR §402.14). To complete the initiation package, we will require the following information:

Exhibit 4-3. Example of a request for extension of time.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216

October 30, 1992

FWS Log No: 4-1-92441C
Application No: 199201162(LP-CRFO)
Dated: August 6, 1992
Applicant:
County: Citrus

Dear _____ :

On August 4, 1992, the Fish and Wildlife Service entered into formal Section 7 consultation on the above referenced public notice. The 90-day consultation period expires November 4, 1992. Because of the difficulties we have encountered in acquiring additional information from the applicant, we request a 60-day extension of the consultation period in accordance with 50 CFR §402.14(e). The Biological Opinion will be issued before January 3, 1993.

We have been awaiting necessary information (i.e. plat maps) showing the amount of shoreline owned or controlled by the applicant and information on the number and sizes of existing docks. We requested shoreline information from them in writing on August 13, 1992, and on September 1, 1992, we requested maps showing both shoreline and dock information. We asked for this information again in a telephone conversation with their agent on October 14, 1992. Maps have still not been provided, however, the applicant's wife provided us with a verbal description of the map and the existing docks in a telephone conversation on October 29, 1992. Additional time is needed to review this information and prepare the biological opinion.

By copy of this letter, we are notifying the applicant of our request of an extension. We look forward to your response. If you have any questions or concerns about this consultation or

Sincerely,

Field Supervisor

(B) Coordination with other environmental reviews

Formal consultation and the Services' preparation of a biological opinion often involve coordination with the preparation of documents mandated by other environmental statutes and regulations, including the Fish and Wildlife Coordination Act (FWCA) and the National Environmental Policy Act (NEPA). Although other environmental reviews may be processed

Sample language for various types of formal consultation packages can be found in Appendix B.

Following the address and salutation, the biological opinion begins with a standardized introduction and a history of the consultation.

Introductory Paragraph:

This document transmits the (Fish and Wildlife Service's/National Marine Fisheries Service's) (Service) biological opinion based on our review of the proposed (name or designation for the action) located in (County, State, and Marine Area as appropriate), and its effects on (species) in accordance with section 7 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.). Your (date) request for formal consultation was received on (date).

This biological opinion is based on information provided in the (date) biological assessment (or other title), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file at (this office/elsewhere).

Consultation history

The history of the consultation request includes any informal consultation, prior formal consultations on the action, documentation of the date consultation was initiated, a chronology of subsequent requests for additional data, extensions, and other applicable past or current actions. Conclusions reached in earlier informal and formal consultations on the proposed action also may be relevant. If so, such conclusions should be documented in the biological opinion.

Figure 4-2. Outline of a formal consultation package.

[Handbook discussion in brackets]

Address

Salutation

Introductory paragraph [page 4-12]

Consultation history [page 4-12]

BIOLOGICAL OPINION

- I. Description of proposed action [page 4-15]
- II. Status of the species/critical habitat [page 4-19]
 - A. Species/critical habitat description
 - B. Life history
 - C. Population dynamics
 - D. Status and distribution
 - E. Analysis of the species/critical habitat likely to be affected
- III. Environmental baseline [page 4-22]
 - A. Status of the species within the action area
 - B. Factors affecting species environment within the action area
- IV. Effects of the action [page 4-23]
 - A. Factors to be considered
 - B. Analyses for effects of the action
 - C. Species' response to a proposed action
- V. Cumulative effects [page 4-30]
- VI. Conclusion [page 4-31]
- VIII. Reasonable and prudent alternatives (as appropriate) [page 4-41]

INCIDENTAL TAKE STATEMENT [page 4-43]

Introductory paragraph [page 4-46]

Amount or extent of take anticipated [page 4-47]

Effect of the take [page 4-49]

Reasonable and prudent measures (as appropriate) [page 4-50]

Terms and conditions [page 4-51]

Coordination of incidental take statements with other laws, regulations, and policies [page 4-53]

CONFERENCE REPORT/CONFERENCE NOTICE (as appropriate) [page 4-58]

CONSERVATION RECOMMENDATIONS (as appropriate) [page 4-59]

REINITIATION - CLOSING STATEMENT [page 4-60]

LITERATURE CITED [page 4-60]

(A) Biological opinion

"... the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

Section 7(b)(3)(A) of the Endangered Species Act

A formal biological opinion consists of a description of the proposed action, status of the species/critical habitat, the environmental baseline, effects of the action, cumulative effects, the Services' conclusion of **jeopardy/no jeopardy** and/or **adverse modification/no adverse modification**, and reasonable and prudent alternatives, as appropriate.

Description of the proposed action

Provide descriptions of the proposed action and the action area (area including all direct and indirect effects). The description of the proposed action does not have to be comprehensive if details can be referenced from NEPA documents or other descriptions provided. However, some small actions may not have complete or formal descriptions of the proposed action, or the project's components may be scattered throughout a biological evaluation (or similar document), draft NEPA documents, draft plans for different portions of the action, miscellaneous policy and guidance documents, letters, telephone records, meeting notes, and other documents. In such cases, a comprehensive project description in the biological opinion is vital to determining the scope of the proposed action. The draft project description may be sent to the action agency for review to eliminate any inaccuracies regarding the scope of the action. This section should summarize enough information for the reader to understand and evaluate the action under consideration in the biological opinion.

by the Services. If appropriate, including a transition sentence clarifies why the action area was described in a manner differing from that provided by the action agency: "The Services have described the action area to include.... for reasons that will be explained and discussed in the 'Effects of the proposed action' section of this consultation." Maps and other graphics also may be appropriate.

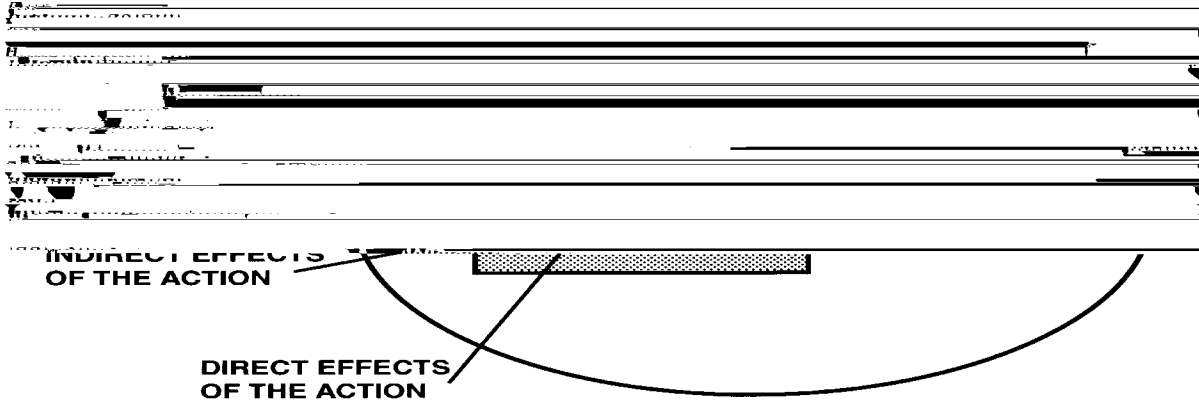


Figure 4-3. Example of an action area within the species' range.

Figure 4-4. Example of an action area that encompasses the species' range.

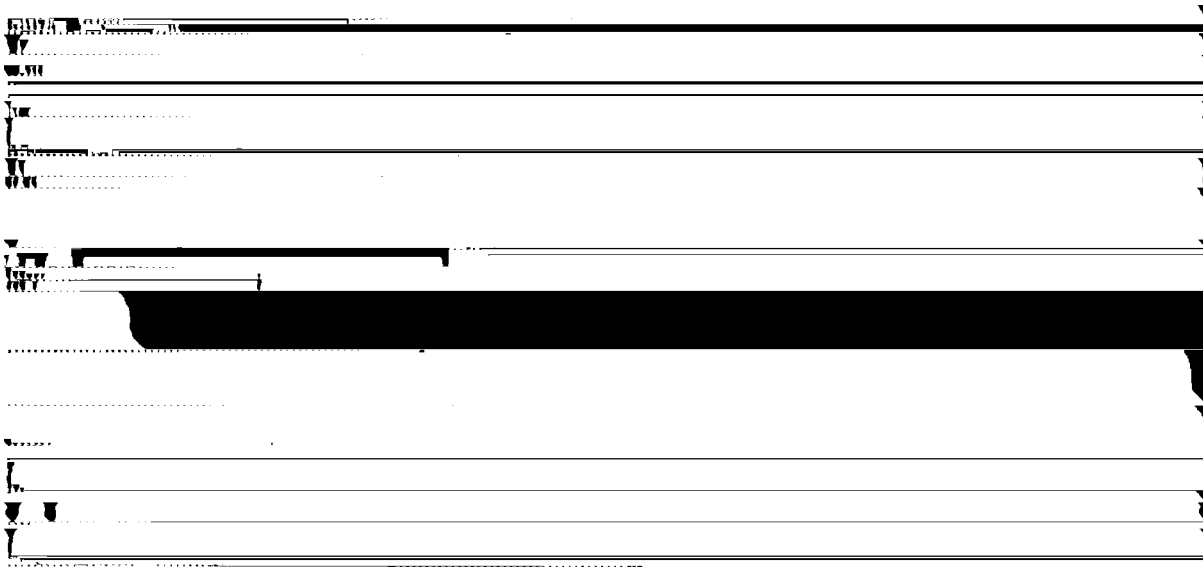
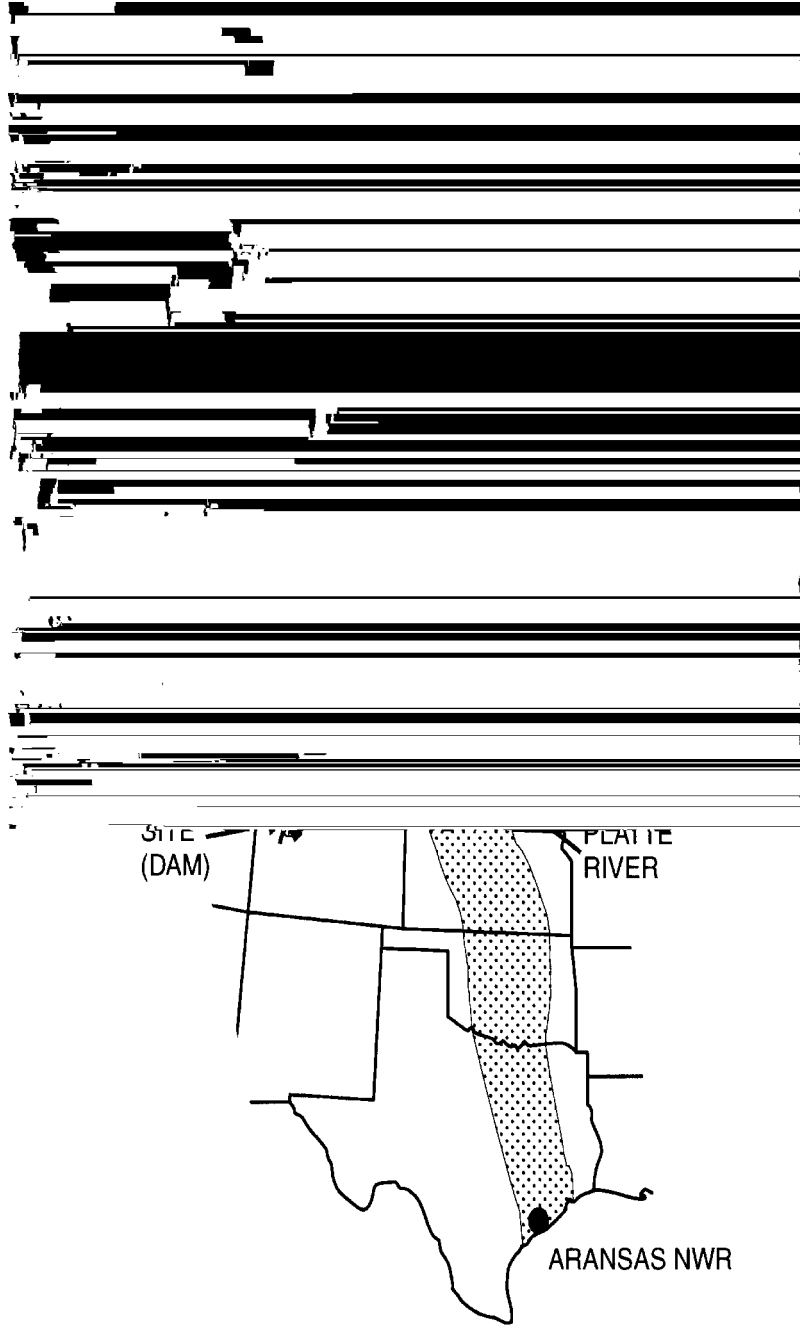


Figure 4-5. Example of an action area involving an effect not at the project site.

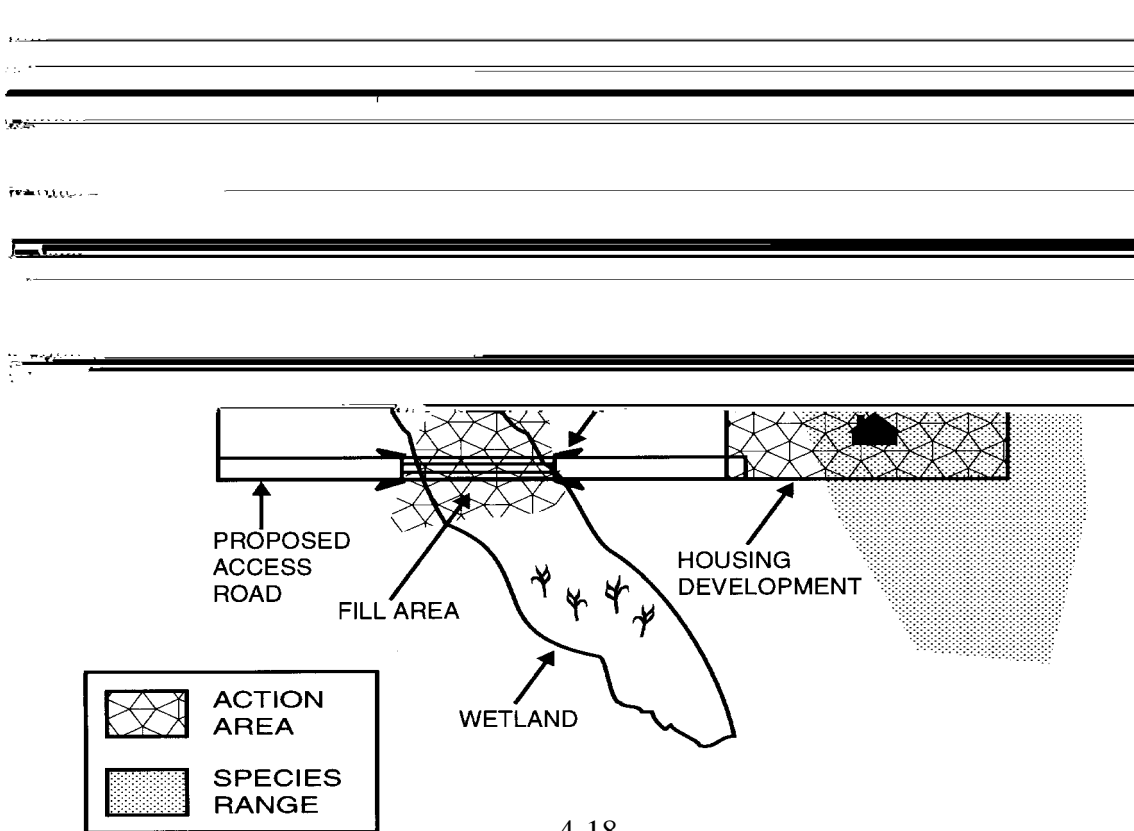
A dam on the Platte River in Colorado (project site) also may affect the water regime for whooping crane critical habitat (action area) 150 miles downstream in Nebraska.



Description of the proposed action (cont'd)

Determining the action area relates only to the action proposed by the action agency. Even if the applicant has an alternative not requiring Federal permits or funding, this does not enter into the Services' analyses. Such alternatives can be discussed in the reasonable and prudent alternatives or conservation recommendations if the alternative is within the agency's jurisdiction. The action area should be determined based on consideration of all direct and indirect effects of the proposed agency action [50 CFR 402.02 and 402.14(h)(2)]. For example (Figure 4-6), if the proposed action is a wetland fill (requiring a federal permit) to accommodate access to a proposed development (the actual area of impact to the species), then the development is included in the action area. Whether or not the applicant can build a road that does not impact the wetland, the analysis of effects of the action still encompasses the proposed development. If the applicant is seriously considering the alternative with no Federal nexus, the applicant should be advised of the need for acquiring a section 10(a)(1)(B) permit before proceeding with development for actions that will result in a taking.

Figure 4-6. Determining the action area.



status of that recovery unit is discussed including the recovery unit's role in both the survival and recovery of the species as listed.

The following types of information should be considered for inclusion in the biological opinion. All information may not be available for all species. However, Services biologists should use the best available scientific or commercial data. Pertinent information can be gathered from listing rules, including critical habitat designations, recovery plans, and published and unpublished studies done on the species. Once this section is developed for a given species, it can be used in successive biological opinions. Modification is necessary only when new information is developed.

a. Species/critical habitat description

This section should briefly describe the species and/or critical habitat, discussing the current legal status of the species, including listing history, and current known range of the listed species found in the action area. For critical habitat, the discussion should include the extent of designated critical habitat, the primary constituent elements identified in the final rule, and any activities which have been identified as having the potential for altering the primary constituent elements.

b. Life history

A large number of life history variables are relevant to **jeopardy** analyses. These variables help determine a species' population size, age distribution, sensitivity to a proposed action's effects, ability to recover from adverse effects, and ability to recolonize areas from which it has been extirpated. Relevant life history variables include, but are not limited to: longevity; age distribution; age to maturity; reproductive strategy (for example, the number of times mature individuals reproduce in a lifetime, or whether mature individuals reproduce sexually or asexually); recruitment; seasonal distribution patterns; biogeography; food habits; niche; life cycle; hosts and symbionts; predators and competitors; and disease factors.

c. Population dynamics

The size of a population and its natural variance over time are important characteristics affecting the species' response to disturbance factors. For many species, there is only cursory natural history or status survey information available. However, detailed demographic analyses have recently been undertaken for some species. The level of discussion in this section will depend upon the detail and quality of the information available.

Population size: This species characteristic is often emphasized in consultations. Reduction in population size may jeopardize the continued existence of threatened or endangered species because the longer a species remains at low population levels, the greater the probability of extinction from chance events, inbreeding depression, or additional environmental disturbance. However, although population size has a clear relationship to a species' extinction probability, it can be less important than population variability and should be used carefully. How long a species will persist before extinction depends on more than population size. Large populations may not protect a species from extinction in the face of extreme environmental disturbance.

Population variability: Fluctuations in a species' population over time can affect significantly the probability of its extinction. Population variability is affected by several characteristics of a species' life history: unstable age distributions and reproductive rates; widely variable mortalities resulting from unstable food resources or predation; population density; sex ratios; recolonization rates; and genetic viability. As a population fluctuates, one or more factors can lead to a chance extinction, e.g., irreversibly lowering population size to a point where it can no longer recover. Consequently, an action increasing a species' population variability may affect the continued existence of the species more significantly than a reduction in population size.

Population stability: Population stability is the ability of a species' population to resist change or dramatic fluctuations over time. It directly affects a species' sensitivity to the adverse effects of a proposed action. Even-age distribution, high reproductive rates, or long life spans with multiple reproductive periods can stabilize a population.

d. Status and distribution

Information on the status and distribution of listed species and designated critical habitat helps establish the environmental basis for a consultation. The Federal Register Notice with the final rule listing a species or designating critical habitat is a good starting point for gathering this type of information. The following factors should provide a reasonable environmental setting within which to consider the action and cumulative effects for the consultation.

Reasons for listing: The reasons for listing a species or designating critical habitat are important considerations. For example, a species listed because of commercial exploitation may be less sensitive to habitat loss than a species listed because of habitat loss.

Rangewide trend: Many listed species are declining throughout their range, therefore the

additional effects on the species. The trends of the remaining populations of listed species form the basis for evaluating the effects of a proposed action on that species.

New threats: Often, factors not considered when a species was first listed can threaten its continued existence, and must be considered when establishing the environmental baseline. For example, the zebra mussel (*Dreissena polymorpha*), an exotic species threatening native mussel fauna throughout its range, wasn't considered when most native mussels were listed.

e. Analysis of the species/critical habitat likely to be affected

This section summarizes the previous discussion in Status of the species/ critical habitat and identifies those species or designated critical habitat likely to be adversely affected by the proposed action, which will be considered further in the remaining sections of the biological opinion. If the action agency requests consultation on a beneficial action, that will be noted here. Other listed species/designated critical habitat present in the project area are also listed here along with the reasons they are not likely to be adversely affected. Since the Services concur with the action agency's determination of "is not likely to adversely affect," a statement that those species will not be considered further in the consultation should be included.

Environmental baseline

This section is an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area. The environmental baseline is a "snapshot" of a species' health at a specified point in time. It does not include the effects of the action under review in the consultation.

a. Status of the species within the action area

Unless the species' range is wholly contained within the action area, this analysis is a subset of the preceding rangewide status discussion. The purpose is to analyze the effects on the species and/or critical habitat at the action level. For example, the following issues are considered:

- o the percent or amount of the species range or designated critical habitat in the action area;

- o whether the effect is quantitative, qualitative, or both;
- o the distribution of the affected and unaffected habitat; and
- o if critical habitat will be impacted, the effect on the constituent elements.

b. Factors affecting species environment within the action area

This analysis describes factors affecting the environment of the species or critical habitat in the action area (Figure 4-3). The baseline includes State, tribal, local, and private actions already affecting the species or that will occur contemporaneously with the consultation in progress. Unrelated Federal actions affecting the same species or critical habitat that have completed formal or informal consultation are also part of the environmental baseline, as are Federal and other actions within the action area that may benefit listed species or critical habitat.

An agency action can be removed from the environmental baseline analysis under any of the following conditions:

- o an action agency notifies the Services in writing that a previously proposed action will not be implemented;
- o a biological opinion for the proposed action (not an ongoing action) is no longer valid because reinitiation of consultation is required and the action agency has been so informed in writing by the Services, or has requested that the Services reinitiate consultation; or
- o alternatives have been implemented that remove all adverse effects.

Effects of the action

This section includes an analysis of the direct and indirect effects of the proposed action on the species and/or critical habitat and its interrelated and interdependent activities.

a. Factors to be considered

Proximity of the action: to the species, management units, or designated critical habitat units.

Distribution: geographic areas where the disturbance occurs (e.g., may be several small or one large area).

Timing: relationship to sensitive periods of a species' lifecycle.

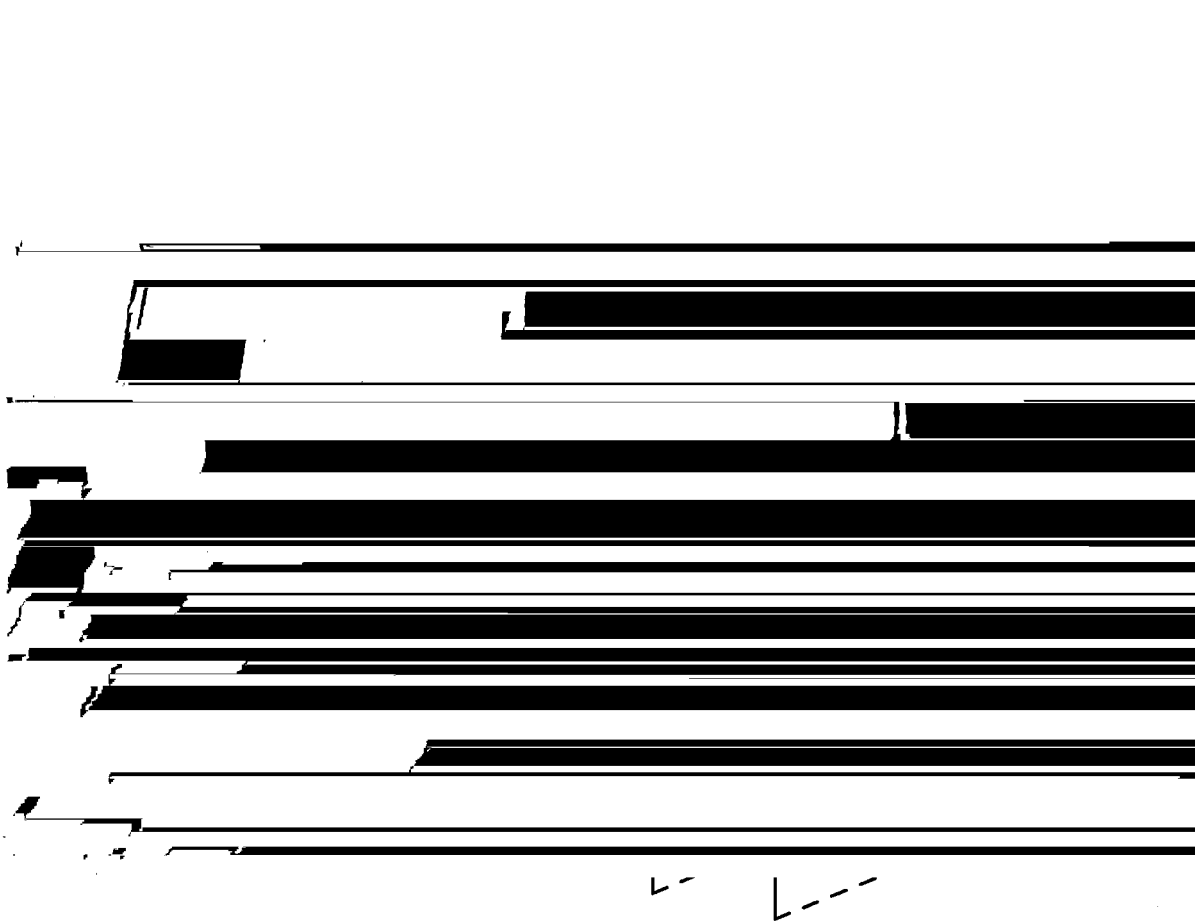
Nature of the effect: effects of the action on elements of a species' lifecycle, population size or variability, or distribution; or on the primary constituent elements of the critical habitat, including direct and indirect effects.

Duration: The effects of a proposed action on listed species or critical habitat depend largely on the duration of its effects. Three potential categories of effects are: (1) a short-term event whose effects are relaxed almost immediately (pulse effect), (2) a sustained, long-term, or chronic event whose effects are not relaxed (press effect), or (3) a permanent event that sets a new threshold for some feature of a species' environment (threshold effect). For many species, a proposed action producing a single, short-term effect is less likely to jeopardize the continued existence of a species than a long-term chronic event or the permanent alteration of a species' habitat.

Disturbance frequency: the mean number of events per unit of time affects a species differently depending on its recovery rate. If the disturbance frequency is less than the species'

Figure 4-7. Effects of the disturbance. (figures modified from Trudghill 1988)

Disturbance intensity



Disturbance severity: the effect of a disturbance on a population or species as a function of recovery rate. The longer the recovery rate, the more severe the disturbance. For example, a disturbance from which a species or habitat takes 10 years to recover is more severe than a disturbance requiring 2 years for recovery. A severe disturbance makes a population or species more susceptible to the effects of multiple actions.

b. Analyses for effects of the action

Sufficient description of the proposed action should be included so that the subsequent analysis of effects and the scope of the opinion are clear. If the analyses for this section determine that some individuals of a listed animal might be "taken" as a direct or indirect result of the proposed action, that information is included in the incidental take statement.

Beneficial effects: are those effects of an action that are wholly positive, without any adverse effects, on a listed species or designated critical habitat. Determination that an action will have beneficial effects is a "may affect" situation (see section 3.5). However, since there are no adverse effects, formal consultation is not required. Biological opinions may discuss beneficial effects if the applicant requests it, or if a biological assessment considers numerous species, some with adverse effects, and one or more with beneficial effects.

Example: The National Park Service proposes to modify an existing rock climbing management plan that allows climbing in historic peregrine falcon nesting areas. The new plan restricts climbing activities to areas outside of a zone 1/4 mile wide on either side of active peregrine falcon aeries during the breeding season. This protects the birds from human disturbance and eliminates take that could occur if an adult was flushed from an aerie with eggs or young needing incubation or brooding to survive. Therefore, the effects are wholly beneficial.

Direct effects: the direct or immediate effects of the project on the species or its habitat, e.g., driving an off road vehicle through the nesting habitat of the piping plover may destroy its ground nest; building a housing unit may destroy the habitat of an endangered mouse. Direct effects result from the agency action including the effects of interrelated actions and interdependent actions (see definitions below for clarification). Future Federal actions that are not a direct effect of the action under consideration (and not included in the environmental baseline or treated as indirect effects) are not considered in this biological opinion.

Interrelated and interdependent actions: Effects of the action under consultation are analyzed together with the effects of other activities that are interrelated to, or interdependent with, that action. An interrelated activity is an activity that is part of the proposed action and depends

on the proposed action for its justification. An interdependent activity is an activity that has no independent utility apart from the action under consultation. (Note: the regulations refer to the action under consultation as the “larger action” [50 CFR § 402.02]). In fact, the use of the term “larger” has proven to be confusing when applied in the case of a modification to an existing project. Instead of keeping the inquiry on whether other activities are interrelated to or interdependent with the modification, it has unintentionally and inappropriately shifted the focus to an inquiry on whether the modification itself is interrelated to or interdependent with the “larger” action or project. To better understand how the interdependent or interrelated analysis should work, see the detailed examples below.

As a practical matter, the analysis of whether other activities are interrelated to, or interdependent with, the proposed action under consultation should be conducted by applying a “but for” test. The biologist should ask whether another activity in question would occur “but for” the proposed action under consultation. If the answer is “no,” that the activity in question would not occur but for the proposed action, then the activity is interrelated or interdependent and should be analyzed with the effects of the action. If the answer is “yes,” that the activity in question would occur regardless of the proposed action under consultation, then the activity is not interdependent or interrelated and would not be analyzed with the effects of the action under consultation. There will be times when the answer to this question will not be apparent on its face. The biologist should ask follow-up questions to the relevant parties to determine the relationship of the activity to the proposed action under consultation. It is important to remember that interrelated or interdependent activities are measured against the **proposed action**. That is, the relevant inquiry is whether the activity in question should be analyzed with the effects of the action under consultation because it is interrelated to, or interdependent with, the proposed action. Be careful not to reverse the analysis by analyzing the relationship of the proposed action against the other activity. For example, as cited below, if the proposed action is the addition of a second turbine to an existing dam, the question is whether the dam (the other activity) is interrelated to or interdependent with the proposed action (the addition of the turbine), not the reverse.

turbine on fish passage and water quality are to be considered in the biological opinion on the proposed dam.

Ten years after construction of the dam, a federal permit is needed to add a second turbine to the dam to increase power generation. The addition of the turbine, as the proposed action under consultation, is now the “larger action” against which the “but for” test for interrelated or interdependent effects would be applied. The pre-existing dam has independent utility without the new turbine and therefore is not interrelated to, or interdependent with, the proposed action. Ongoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation. Activities which would be interdependent and interrelated to the proposed turbine could include construction of new power lines or conversion of natural habitat if the additional power capacity allowed for the development of a manufacturing facility that was dependent upon the new power grid.

Later, a new federal safety law requires the dam operator to construct a fuse plug on an existing spillway which improves response to emergency flood conditions. Construction

Indirect effects: are caused by or result from the proposed action, are later in time, and are reasonably certain to occur, e.g., predators may follow ORV tracks into piping plover nesting habitat and destroy nests; the people moving into the housing unit bring cats that prey on the mice left in the adjacent habitat. Indirect effects may occur outside of the area directly affected by the action.

Indirect effects may include other Federal actions that have not undergone section 7 consultation but will result from the action under consideration. In order to treat these actions as indirect effects in the biological opinion, they must be reasonably certain to occur, as evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by the agency in the action area; or they are a logical extension of the proposed action.

Non-Federal activities with indirect effects can also be predicted, particularly for ongoing projects that have a past pattern of use that is anticipated to continue.

Example: A very complex example of indirect effects arose in determining effects of renewing water service contracts from a large reclamation project (Friant Unit of the Central Valley Project) in the San Joaquin Basin of California. Upon checking with other Federal and State agencies, the FWS determined that the distribution of water for agricultural use on the higher east side of the Valley provided a hydrologic head maintaining the groundwater table on the west side of the Valley at a level making it economical to pump. As a result, occupied habitats for several species on the west side of the Valley were being destroyed because the pumped water could be used to convert this land to agriculture. The California Department of Water Resources provided trend data indicating a continuing conversion of habitat of 10,000 to 30,000 acres per year. These data were used to assess future non-Federal effects of the project.

Several court cases provide examples of indirect effects of a proposed action. In National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), cert. denied

Determining the effect of ongoing water projects: Under the Federal Power Act, as amended by the Electric Consumers Protection Act of 1986, the Federal Energy Regulatory

The "reasonably certain to occur" clause is a key factor in assessing and applying cumulative effects in biological opinions. First, cumulative effects involve only future non-Federal

* * * * * Final ESA Section 7 Consultation Handbook, March 1998 * * * * *

The remainder of the Conclusion section should summarize in a clear, concise manner the reasons for the finding(s) in terms of effects for each listed species or designated critical habitat.

This section addresses only two issues: whether the proposed action is likely to (1) **jeopardize the continued existence of** a listed species or (2) **result in the destruction or adverse modification of critical habitat**. The acceptable conclusions for this section of a biological opinion are as follows:

Jeopardy:

Likely to jeopardize the continued existence of [one or more species]

Not likely to jeopardize the continued existence of [one or more species]

Note: if the consultation is a reinitiation for consideration of effects on a subsequently designated critical habitat, re-evaluate the previous finding of **jeopardy** or **no jeopardy** here before continuing the analysis for **adverse modification** of critical habitat.

Destruction or adverse modification:

No critical habitat has been designated for this species; therefore, none will be destroyed or adversely modified.

Critical habitat has been designated for this species, but the action is not likely to affect that critical habitat. Therefore, there is no destruction or adverse modification of the critical habitat.

The action is likely to result in destruction or adverse modification of critical habitat.

The action is not likely to result in destruction or adverse modification of critical habitat.

Analyses for jeopardy and adverse modification

Section 7(a)(2) of the Act requires Federal agencies to satisfy two standards in carrying out their programs. Federal agencies must ensure that their activities are not likely to: (1) **jeopardize the continued existence of** any listed species, or (2) **result in the destruction or adverse modification of designated critical habitat**. Section 7(a)(4) requires Federal agencies to confer with the Services on actions likely to jeopardize the continued existence of

any species proposed for listing or result in the destruction or **adverse modification** of any proposed critical habitat.

Regulations implementing these sections of the Act define "**jeopardize the continued existence of**" as: "to engage in an action that reasonably 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," and "destruction or **adverse modification**" as: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."

"**Critical Habitat**" for listed species consists of (1) specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (i) essential to the conservation of the species, and (ii) that may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species (50 CFR §424.02(d)).

The Services' abilities to designate unoccupied habitat as critical habitat when such areas are essential to the conservation (recovery) of listed species adds another dimension to the analysis. It is possible to conclude **adverse modification** for proposed actions if unoccupied critical habitat is sufficiently affected to appreciably diminish its value for both survival and recovery. Therefore, it is practical to distinguish between occupied and unoccupied critical habitat when a biological opinion is prepared.

In evaluating project effects on critical habitat, the Services must be satisfied that the constituent elements of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the survival and recovery of affected species would be appreciably reduced. Modification or destruction of designated critical habitat that does not reach this threshold is not prohibited by section 7.

Independent analyses are made for **jeopardy** when the species is present or potentially present, and for **adverse modification** when designated critical habitat is affected. When both analyses are made and both standards are exceeded, the reasonable and prudent alternatives should address eliminating or reducing both conditions.

The determination of **jeopardy** or **adverse modification** is based on the effects of the action on the continued existence of the **entire** population of the listed species or on a listed population, and/or the effect on critical habitat as designated in a final rulemaking. When multiple units of critical habitat are designated for particular purposes, these units may serve as the basis of the analysis if protection of different facets of the species' life cycle or its distribution is essential to both its survival and recovery. Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in **jeopardy** or **adverse modification** determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.

Definitions to aid in determination of jeopardy or adverse effect

Appreciably diminish the value: to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.

Constituent elements:

Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

Unoccupied critical habitat: critical habitat not occupied (i.e., not permanently or seasonally occupied) by the listed species at the time of the project analysis. The habitat may be suitable, but the species has been extirpated from this portion of its range. Conversely, critical habitat may have been designated in areas unsuitable for the species, but restorable to suitability with proper management, if the area is necessary to either stabilize the population or assure eventual recovery of a listed species. As recovery proceeds, this formerly unoccupied habitat may become occupied.

Some designated, unoccupied habitat may never be occupied by the species, but was designated because it is essential for conserving the species because it maintains factors constituting the species' habitat. For example, critical habitat may be designated for an upstream area maintaining the hydrology of the species' habitat downstream from the designated area (e.g. Concho water snake).

a. Jeopardy analysis

In determining whether an action is likely to jeopardize the continued existence of a species, the action is viewed against the aggregate effects of everything that has led to the species' current status and, for non-Federal activities, those things likely to affect the species in the future. At this point, the biologist sums up the previous analyses done to determine (1) the status of the species, (2) the environmental baseline, (3) all effects of the proposed action, and (4) the cumulative effects of other anticipated actions.

The final analysis then looks at whether, given the aggregate effects, the species can be expected to both survive and recover, as those terms are defined above. For the **jeopardy** analysis, this survival is framed in terms of the species' reproduction, numbers, and distribution in the wild.

Exceptions to the application of the jeopardy standard to an entire species: In the majority of cases, a **jeopardy** opinion is rendered when the total of the species' status, environmental baseline, effects of the proposed action, and cumulative effects lead to the conclusion that the proposed action is likely to jeopardize the continued existence of the

entire species, subspecies, or vertebrate population as listed. However, for some wide-ranging species or those with disjunct or fragmented distributions, strict adherence to this general policy can result in significant accumulated losses of habitat and population that may, in total, result in a **jeopardy** situation.

In the past, exceptions from applying the jeopardy standard to an entire species were granted by memorandum for specific populations or "recovery units" of a species. That process of limiting the exceptions to those populations/recovery units listed in a memo is hereby discontinued and all future exceptions will adhere to the following guidance.

Jeopardy analyses may be based on an assessment of impacts to distinct population segments (DPS) of a species documented per the Services' joint policy on DPS (1995) in a final listing rule, or to a DPS as identified in a NMFS recovery plan, or to recovery units when those units are documented as necessary to both the survival and recovery of the species in a final recovery plan(s), for which a notice of availability has been published in the Federal Register. For species which had recovery plan notices published prior to this guidance, an addendum to the recovery plan, documenting the need to evaluate **jeopardy** on separate recovery units, can be written, and notice of its availability should be published in the Federal Register. FWS Regional recovery coordinators should be able to provide a list of species which meet this requirement.

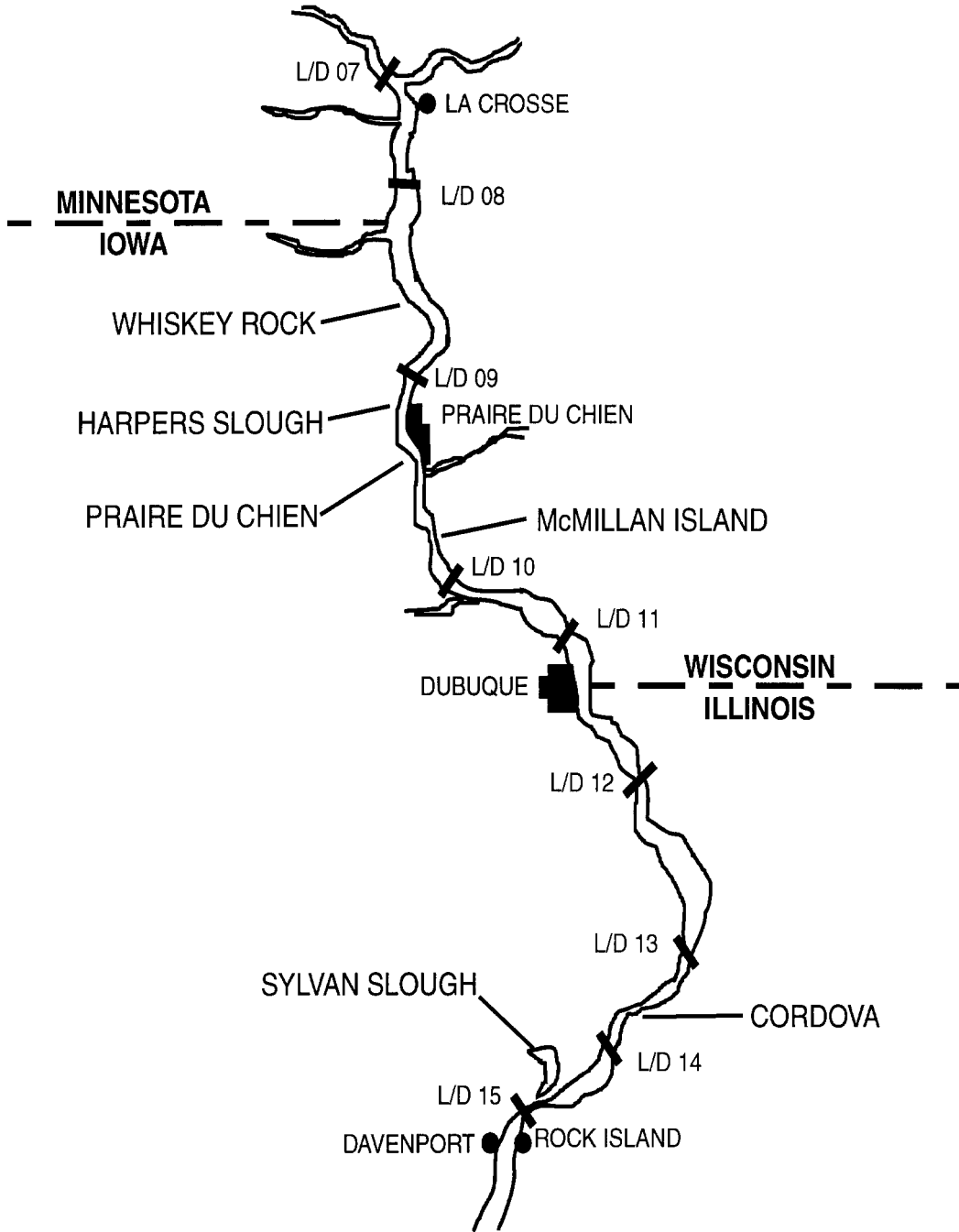
At publication, a species' recovery plan lays out the best available scientific information relative to the areas and environmental elements needed for that species to recover. Recovery plans may geographically describe actual recovery units (e.g., show lines on a map) essential to recovering the species that may or may not have been designated as critical habitat. Figures 4-8 and 4-9 illustrate such site-specific delineation of recovery units for the Higgin's eye pearly mussel.

When an action appreciably impairs or precludes the capability of a recovery unit from providing both the survival and recovery function assigned it, that action may represent **jeopardy** to the species. When using this type of analysis, include in the biological opinion a description of how the action affects not only the recovery unit's capability, but the relationship of the recovery unit to both the survival and recovery of the listed species as a whole.

For example, the recovery plan for the Higgin's eye pearly mussel identifies several site-specific units of habitat essential to the recovery of the species. An action that adversely affects the critical features of one of these recovery units can jeopardize the survival and

recovery of the entire species because each unit is an essential link in the same chain. However, when dealing with a recovery unit keep in mind the status of the species as a whole to ensure that an action affecting only one unit without broader geographical implications does not jeopardize the whole species. For example, the Prairie du Chien recovery unit of the Higgin's eye pearly mussel, considered alone, might be relatively healthy and appear to be able to sustain some impact before the species in that recovery unit is jeopardized. But, as identified by the approved recovery plan, that recovery unit contains the only known reproducing individuals of the species and may represent a major source of individuals for ensuring the survival of other recovery units. Any loss of reproductive capability in the Prairie du Chien unit can represent **jeopardy** because the survival of the entire species would be significantly impaired.

Figure 4-8. Example of "recovery unit."



b. Analysis of destruction or adverse modification of critical habitat

Critical habitat includes those physical and biological features essential to the conservation of listed species that may require special management considerations or protection. These physical and biological features include:

- o space for individual and population growth and for normal behavior;
- o food, water, air, light, minerals, or other nutritional or physiological requirements;
- o cover or shelter;
- o sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal;
- o habitats protected from disturbance or representative of the historic geographical and ecological distributions of a species.

Critical habitat designations must be thorough and accurate, encompassing habitat and its

To determine if a proposed action is likely to destroy or adversely modify critical habitat, refer to the critical habitat designation in 50 CFR §17 Subpart I. The rule provides a narrative description of the area(s) included in the designation. A map of the critical habitat may be provided, and since 1985, the rule may identify constituent elements associated with the habitat.

The level of detail used to describe constituent elements contained in critical habitat

5. Assess whether the aggregate effects of these analyses will appreciably diminish the value of the critical habitat in sustaining its role in both the survival and recovery of the species.

Critical habitat is not the same as a wilderness designation. Many activities can be expected to take place within critical habitat without conflicting with the prohibitions found in section 7(a)(2) of the Act.

Reasonable and prudent alternatives

This section lays out reasonable and prudent alternative actions, if any, that the Services believe the agency or the applicant may take to avoid the likelihood of **jeopardy** to the species or destruction or **adverse modification** of designated critical habitat (50 CFR §402.14(h)(3)). When a reasonable and prudent alternative consists of multiple activities, it is imperative that the opinion contain a thorough explanation of how each component of the alternative is essential to avoid **jeopardy** and/or **adverse modification**. The action agency and the applicant (if any) should be given every opportunity to assist in developing the reasonable and prudent alternatives. Often they are the only ones who can determine if an alternative is within their legal authority and jurisdiction, and if it is economically and technologically feasible.

If adopted by the action agency, the reasonable and prudent alternatives do not undergo subsequent consultation to meet the requirements of section 7(a)(2). The action agency's acceptance in writing of the Services' reasonable and prudent alternative concludes the consultation process.

Section 7 regulations (50 CFR §402.02) limit reasonable and prudent alternatives to:

- o alternatives the Services believe will avoid the likelihood of **jeopardy** or **adverse modification**,
- o alternatives that can be implemented in a manner consistent with the intended purpose of the action,
- o alternatives that can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, and
- o alternatives that are economically and technologically feasible.

Introductory paragraph:

Regulations (50 CFR §402.02) implementing section 7 of the Act define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Closing paragraph:

Because this biological opinion has found (jeopardy/destruction or adverse modification of critical habitat), the (agency) is required to notify the Service of its final decision on the implementation of the reasonable and prudent alternatives.

(B) Incidental Take Statement

"(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that -

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or a threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title; the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that -

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii)."

Section 7(b)(4) of the Endangered Species Act

As a matter of policy, the Services require that an incidental take statement be included in all formal consultations, except those only involving plants, thus assuring the action agency that this element of formal consultation has been considered.

What is incidental take?

Properly interpreting an incidental take statement requires familiarity with section 9 of the Act, which identifies acts that are prohibited when dealing with any endangered and some threatened¹ species of fish and wildlife. When the consultation involves listed plants, the agency is advised that the Act does not prohibit incidental take of these species. However, cautions may be provided on prohibitions against certain deliberate removal or disturbance of plants (see standardized statement on page 4- 47). The term "take" is defined by the Act (section 3(19)) to mean *"to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."*

Most of these terms are commonly understood. However, the terms "harass" and "harm" have been further defined by FWS regulations at 50 CFR §17.3, as follows:

- o Harass means an intentional or negligent act or omission which creates the

1 Section 9 prohibitions generally have been applied by regulation to threatened species unless there are special rules that provide exemptions, or some other alternative approach (see 50 CFR 17.31). To determine if section 9 prohibitions apply to threatened species, check 50 CFR Part 17 and 50 CFR Part 227 for any special rules that may have been promulgated for the species.

kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by FWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The measures described below are non-discretionary, and must be undertaken by the (agency) so that they become binding conditions of any grant or permit issued to the (applicant), as appropriate, for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to assume and implement the terms and conditions or (2) fails to require the (applicant) to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the (agency or applicant) must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. [50 CFR §402.14(i)(3)]

When the biological opinion finds **jeopardy** or **adverse modification** without a reasonable and prudent alternative, the introductory statement is as follows:

This biological opinion finds the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified. Any incidental taking is prohibited by section 9 of the Act.

If listed plant species are present in the action area, the following special provisions apply:

Sections 7(b)(4) and 7(o)(2) of the Act generally do not apply to listed plant species. However, limited protection of listed plants from take is provided to the extent that

jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State law or regulation or in the course of any violation of a State criminal trespass law. [Include citations to any applicable State laws.]

Amount or extent of take anticipated

This section outlines the amount of take anticipated from the action. Generally, incidental take is expressed as the number of individuals reasonably likely to be taken or the extent of habitat likely to be destroyed or disturbed. In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle; i.e., "but for" the implementation of the proposed action and its direct or indirect degradation of habitat, would actual injury or mortality to individuals of a listed wildlife species be reasonably likely to occur? If the take would not occur but for the proposed action, then the Services must describe the amount or extent of such anticipated incidental take.

When preparing an incidental take statement, a specific number (for some species, expressed as an amount or extent, e.g., all turtle nests not found and moved by the approved relocation technique) or level of disturbance to habitat must be described. Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species.

In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. For instance, the relative occurrence of the species in the local community may be sufficiently predictable that impacts on the community (usually surrogate species in the community) serve as a measure of take, e.g., impacts to listed mussels may be measured by an index or other censusing technique that is based on surveys of non-listed mussels. In this case, the discussion determining the level at which incidental take will be exceeded (reinitiation level) describes factors for the non-listed mussels indicating impact on the listed species, such as an amount or extent of decrease in numbers or recruitment, or in community dynamics. Similarly, if a sufficient causal link is demonstrated (i.e. the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation.

In programmatic or national consultations, which evaluate planning documents or broad programs (see Chapter 5, Special Consultations and Reviews), the best available scientific data may not support the determination of any anticipated level of incidental take. In such

instances, the incidental take statement should indicate that, based on the best available data, no incidental take is anticipated and that the issue will be reexamined during the consultation process for site-specific actions under the umbrella of the larger planning document.

Also, the time period over which the incidental take is expected to occur is addressed in this section. For example, the statement should distinguish between an instance in which a permanent loss of two bald eagle nesting territories will result from construction of a new bridge, and a case in which the two territories are likely to be abandoned only during the actual construction period.

Standardized statements:

- Incidental take statement when no take is anticipated (**jeopardy** or **non-jeopardy** opinion):

The Service does not anticipate the proposed action will incidentally take any (species).

- Incidental take statement for a biological opinion of likely **jeopardy** when incidental take is anticipated:

o For opinions with only one reasonable and prudent alternative:

The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

o For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take for each reasonable and prudent alternative, as appropriate:

The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

- Introductory statement for amount and extent of take (**jeopardy** or **non-jeopardy** opinion):

The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each type of take anticipated.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. **However, the following level of take of this species can be anticipated by loss of** [quantify amount of surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] **because:** [provide an explanation].

Effect of the take

The requirement that incidental take not reach the level of **jeopardy** or **adverse modification** is addressed in the biological opinion that finds **no jeopardy/no adverse modification** for the action or that provides reasonable and prudent alternative(s) to avoid **jeopardy/adverse modification**.

Statement of impact:

- o The following statement should be made when the biological opinion finds likely **jeopardy/adverse modification**, and no reasonable and prudent alternative is available.

Because the proposed action is (1) likely to jeopardize the continued existence of (species) or result in the destruction or adverse modification of critical habitat, and (2) no reasonable and prudent alternatives have been identified, any incidental take resulting from the proposed action would be prohibited.

- o The proposed action is not likely to result in **jeopardy/adverse modification**:

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

- o The opinion contains reasonable and prudent alternatives:

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or

adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

Reasonable and prudent measures

The incidental take statement provides nondiscretionary measures that are necessary and appropriate to minimize the impact of incidental take. In a biological opinion where there are a number of reasonable and prudent alternatives provided to eliminate **jeopardy** to a species, there may be varying levels of incidental take associated with the alternatives. In that case, the biological opinion may contain different incidental take statements, each with reasonable and prudent measures and terms and conditions, for each reasonable and prudent alternative.

Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take. Reasonable and prudent measures can include only actions that occur within the action area, involve only minor changes to the project, and reduce the level of take associated with project activities. These measures should minimize the impacts of incidental take to the extent reasonable and prudent. For example, a measure may call for actions like education of employees about the species, reduction of predation, removal or avoidance of the species, or monitoring. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design (e.g., narrowing of disturbed right-of-way at known species locations), location (e.g., temporary storage of equipment or other materials), scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project.

Reasonable and prudent measures and terms and conditions should be developed in coordination with the action agency and applicant, if any, to ensure that the measures are reasonable, that they cause only minor changes to the project, and that they are within the legal authority and jurisdiction of the agency or applicant to carry out. For example, the effect of measures costing \$10,000 or \$100,000 may be critically significant for a single family boat dock, but minor for a multi-million dollar development complex. An example of an unreasonable measure would be a timing delay to minimize the impacts of incidental take if project timing is critical.

Reasonable and prudent measures serve to minimize impacts on the specific individuals or habitats affected by the action. Activities resulting from these measures must occur within the action area, which may be larger than the footprint of the project itself (see description of action area in section 4.5(A)).

The impact of incidental take is to be minimized by the reasonable and prudent measures and implementing terms and conditions. In many cases, the implementation of the terms and conditions may lead to a reduction in the anticipated level of incidental take. However, the incidental take statement quantifies the amount of take anticipated based on implementation of the proposed action before implementation of the terms and conditions. To ensure that the measures are working as anticipated, a review requirement is included in the closing paragraph as follows:

Closing Paragraph

The Service believes that no more than (number or extent) of (species) will be incidentally taken as a result of the proposed action. 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. If, during the course of the action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

If, after receipt of a Final Biological Opinion, an action agency declines to take the reasonable and prudent measures and their implementing terms and conditions or to make them conditions of the license or permit, the Services document this fact(s) and state in writing that any anticipated taking would be prohibited by section 9, unless a permit is granted under section 10 of the Act. The Services should follow up with the action agency to determine if the terms and conditions have been implemented.

Coordination of incidental take statements with other laws, regulations, and policies

Section 10 permits

Section 10(a)(1)(A) permits (Research and Education)

Determining whether a section 10(a)(1)(A) permit is needed in addition to the incidental take statement depends on the proposed action. When intentional take is described as part of the proposal in order to minimize anticipated incidental take, the biological opinion and incidental

take statement serve as the authority for that take. Example: "Take" of desert tortoises where a highway is to be constructed. Animals captured as part of the proposed action could be put in research or captive propagation projects. Since this intentional "take" would be a requirement of the proposed action to minimize the anticipated impact to the species, this action would not require a separate section 10 permit. However, if the terms and conditions require future take for research purposes, a separate section 10 permit is required. Example: If the biological opinion for the highway construction requires the agency to capture additional tortoises for study at a later date, a section 10 permit would be required.

Section 10 permits are not required for:

- o activities carried out under an approved cooperative section 6 agreement as long as any taking of an endangered species is not reasonably anticipated to result in (1) the death or permanent disabling of the specimen; (2) the removal of the specimen from the State where the taking occurred; (3) the introduction of the specimen so taken, or any progeny derived from such specimen, into an area beyond the historical range of the species; or (4) the holding of the specimen in captivity for a period of more than 45 consecutive days. (50 CFR §17.21(c)(5))
- o take activities directed by the terms and conditions of an incidental take statement in accordance with section 7(o)(2).

When incidental take involves an applicant or licensee, the permitting Federal agency should be directed to provide a copy of the incidental take statement to the applicant/licensee, or to include the language of the terms and conditions in the permit itself if they are to be implemented by the applicant. The applicant/licensee then has a document in their possession at anytime they are involved in an action that may result in take.

Terms and conditions covering research or other "enhancement" activities detail the conditions of the research or require a subsequent Service and/or State review and approval of the research plan. See the FWS Handbook for Endangered and Threatened Species Permits for conditions included in section 10 permits.

Safe Harbor Agreements

The Act's "take" prohibitions may have, inadvertently, created some disincentives for non-Federal landowners to manage their lands for the benefit of listed species. To address this issue, the Services are seeking ways to encourage an "endangered species friendly" approach to non-Federal lands management through the creation of incentives or by removing conservation disincentives. One such approach is the "Safe Harbor" concept. This program

Appendix E of this handbook. The intra-Service consultation should be done concurrently during development of the Habitat Conservation Plan, and finalized once the HCP has been officially submitted. The Services have developed a handbook for Habitat Conservation Planning and Incidental Take Permit Processing (November 1996), which should be referenced for further information.

In some cases, Federal agencies besides the Services may be integrally involved in HCP efforts. In these cases, the action to be conducted by the Federal agency during the implementation of the HCP should be included as an additional element to be consulted on through the section 7 consultation conducted for the issuance of a permit. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any related and supportive Federal actions into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by

geographic region. After a set of area-specific regulations are promulgated for a particular area or activity, letters of authorization are issued annually by the NMFS or the FWS, depending on the species involved, to each person wishing to conduct an activity that may result in incidental take.

In addition, the MMPA amendments of 1994 authorize incidental take of marine mammals in the form of "harassment" authorizations for non-commercial fishing activities, and permits for incidental take for commercial fishing activities under certain circumstances. NMFS has published regulations implementing the 1994 MMPA amendments. [61 FR 45086 (August 30, 1995) and 61 FR 15884 (April 10, 1996)] The August 1995 regulations concern the taking of marine mammals incidental to commercial fishing operations. The April 1996 regulations clarify the existing regulations for obtaining a small, incidental take authorization for other activities. Consistent with the Act and regulations at 50 CFR §402.14(i) (Appendix A), incidental take statements for marine mammals are not included in formal consultations until regulations, authorizations, or permits under MMPA 101(a)(5) are in effect.

Standard paragraph for incidental take of marine mammals: [If the incidental take is not authorized under MMPA 101(a)(5):]

The Service is not including an incidental take authorization for marine mammals at this time because the incidental take of marine mammals has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations or authorizations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

After area-specific or activity-specific regulations have taken effect:

Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, and 50 CFR §216 and §229, the following measures are required to be consistent with the total taking allowable under the MMPA authorization and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing]. **Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to minimize take:** [Go on to list the measures, followed by the standard paragraph for terms and conditions.]

(C) Conference Report/Conference Notice

In addition to determining whether an action is likely to jeopardize listed species or destroy or adversely modify designated critical habitat, the Services also may assist action agencies in making such a preliminary determination for proposed species or proposed critical habitats. The final determination of likely **jeopardy** or **adverse modification** to such proposed species or critical habitats remains with the Services. When the Services make a preliminary determination that a proposed agency action presents the likelihood of **jeopardy** to proposed species or **adverse modification** to proposed critical habitat, the action agency should be advised in writing. A determination should be made as to whether the agency wants the proposed species/critical habitat included in the formal consultation.

If the agency does not want proposed species/critical habitat considered, notice of the need to confer (or, if the action agency requests an informal conference, the conference report) is included in the consultation package following the incidental take statement. A finding of "likely to jeopardize" is not required to trigger the conference procedure if the action agency wishes to initiate a review of possible effects on a proposed species or critical habitat. The Services will confer when an agency requests such a conference based on their determination that the proposed action may affect a proposed species or critical habitat.

When an action agency requests formal conference for an action that also affects listed species, the analyses of effects may be included in the body of the biological opinion. However, an incidental take statement for proposed species is separated from that for listed species, and contains the standardized language provided in Chapter 6.

(D) Conservation Recommendations

"(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other 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. . . ."

Section 7(a)(1) of the Endangered Species Act

When the Services identify discretionary actions the action agency can implement, relevant to the proposed action and consistent with their section 7(a)(1) authority, voluntary conservation recommendations may be included as a separate item in the consultation package. Conservation recommendations serve several purposes. They can suggest how an action agency can assist species conservation in furtherance of their responsibilities under section 7(a)(1) of the Act. They may further minimize or avoid the adverse effects of a proposed

action on listed species or critical habitat - in which case they are applied after the terms and conditions of the incidental take statement are implemented. They may also suggest ways to minimize or avoid the adverse effects of a proposed action on proposed or candidate species. They can recommend studies improving an understanding of a species' biology or ecology. Wherever possible, these actions should be tied to tasks identified in recovery plans.

Conservation recommendations may be provided separately or at the end of the consultation package, but they are not incorporated anywhere in the biological opinion or incidental take statement where they may be confused with the opinion or statement itself. These recommendations are never a precondition for a subsequent finding of **no jeopardy** or to reduce the impacts of anticipated incidental take.

cause a reassessment of the biological opinion, or proposed listings or critical habitat designations.

Federal action agencies should be informed of the advisability of maintaining a Federal nexus for the project so that consultation can be reinitiated, if necessary. This is usually done by making the terms of the biological opinion a condition of the license, permit, or other authorization that is issued for project approval.

The standard closing statement of the formal consultation package is as follows:

This concludes formal consultation on the action(s) outlined in the (request/reinitiation request). As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or

amending analyses of anticipated incidental take or the reasonable and prudent alternatives or

Exhibit 4-4. Example of modification of an incidental take statement.

United States Department of the Interior

FISH AND WILDLIFE SERVICE

FISH AND WILDLIFE ENHANCEMENT

RENO FIELD STATION

4600 Kietzke Lane, Building C-125

Reno, Nevada 89502-5093

February 7, 1991

File No.: 1-5-90-F-25

Memorandum

To: District Manager, Las Vegas District, U. S. Bureau of Land Management, Las Vegas, Nevada

From: Field Supervisor, Reno Field Station, U. S. Fish and Wildlife Service, Reno, Nevada

Subject: Clark County Regional Flood Control District's Proposed 10-Year Plan for Flood Control Facilities: Amendment to Opinion

This letter constitutes an amendment to the August 29, 1990, Biological Opinion on the Clark County Regional Flood Control District's (District's) 10-Year Plan (File No: 1-5-90-F-25). The Fish and Wildlife Service (Service) has received verbal communication from _____(name)_____ of the Bureau of Land Management's Las Vegas District office on January 10, 1991, and copies of correspondence to your agency from the District dated November 26, 1990, and January 3, 1991, regarding changes in the design of the Upper Las Vegas Wash Detention Basin (Facility N3-8). In addition, that portion of the floodway (N3-1) extending north of the detention basin is proposed to be eliminated. _____(name)_____ requested our determination of whether additional surveys would be required, and whether formal consultation with the Service should be reinitiated.

Our review of the alternative proposal indicates that the overall size of the new detention basin will be 5 acres less than that of the original facility. Furthermore, the area to be disturbed by the new proposed dike, located in the same general area as the floodway, is less

than that of the portion of the floodway that will be eliminated by the alternative design.

4.7 HANDLING CLASSIFIED DOCUMENTS

National security classified documents used during consultation require specialized handling.

- o Only personnel trained and qualified to handle such documents may do so. Security clearances are regularly checked to determine if they are still current.

- o

Wildlife Manual). Contact your Regional FOIA Coordinator or the Services' FOIA Officer for assistance in processing such requests.

4.9 DISTRIBUTION OF FINAL FORMAL CONSULTATION DOCUMENTS

Upon completion, the formal consultation package is provided promptly to the action agency and the applicant, if any. The action agency then provides copies to other interested parties. For example, EPA is responsible for distributing pesticide consultation documents. However, if the action agency refuses to provide copies, the Services will provide copies upon request after sufficient time (10 working days) has passed to ensure that the action agency has received the consultation document. The Services will inform the action agency that they are responding to the request.

Exceptions to this waiting period include providing copies simultaneously to appropriate State and tribal agencies when they are involved in the consultation or implementation of terms of the biological opinion.

Consultations containing classified material or confidential business information follow procedures laid out in 4.7 and 4.8 above.

CHAPTER 5 - SPECIAL CONSULTATIONS AND REVIEWS

The following procedures facilitate section 7 compliance for complex programs or specialized situations.

5.1 PROACTIVE CONSERVATION REVIEWS - Section 7(a)(1)

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other 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 listed pursuant to section 4 of this Act.

Section 7(a)(1) of the Endangered Species Act

Implementation of section 7(a)(1) needs to be closely coordinated with the section 7(a)(2) consultation program. FWS offices and other agencies have recognized the need for, but have yet to request, such a review of major national programs.

This type of programmatic review is also appropriate for Federal agency planning and program management documents (e.g. BLM Resource Area Management Plans, Forest Timber Program Planning Documents). Often in these cases there is not enough specific information about on-the-ground impacts to determine if there would be an adverse effect from a specific project and what the amount of incidental take might be. By identifying potential program effects and developing guidelines to minimize these effects to listed species and designated critical habitats, subsequent "stepped-down" consultations, where more specific effects on species can be determined within the context of a local geographical area, can be done more expediently (see also section 5.4 regarding Streamlined Consultations).

Ultimately, these conservation reviews should provide the agency with concurrence on, or recommendations for, a blueprint for conservation activities including section 7(a)(2) consultation, section 10 permits, assistance in developing and implementing recovery plans, and assistance in candidate monitoring and management programs. Initial efforts will address the consultation component, and examples will be provided as they become available. For the time being, such conservation reviews are confined to national programs (plans, regulations) and will be conducted or coordinated by the Washington Office of both Services.

5.2 NATIONAL CONSULTATIONS - Section 7(a)(2)

Increasingly, the Services are requested to consult on an action or series of actions affecting many species over all or a major portion of the country. Examples have included: the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) Animal Damage Control program addressing most of that office's activities nationwide; and the Environmental Protection Agency's (EPA) pesticide registration program. Within the FWS, these consultations have been addressed by one or more teams from the Regions, with the lead assigned to one Region or the Washington Office. National consultation documents will be signed in the FWS Washington Office. Within the NMFS, these consultation documents are addressed and signed in the Washington Office of Protected Resources.

These consultations differ from "conservation reviews" (see (A) above) in that (1) specific species affected by the action can be identified; (2) specific actions affecting these species can be described; (3) the effects of the action on the species can be determined during consultation; and (4) the consultation fulfills an agency's obligation under section 7(a)(2). If a federal action affects both NMFS and FWS species, it is appropriate to conduct a joint consultation and issue a joint opinion (see Appendix C for an example of a joint consultation). Joint consultation documents should be addressed and signed at the Washington Office level of both Services.

Successful conduct of these consultations requires the Regions to provide strong support to the development of these opinions, including funding and staff time to complete assigned portions of the work, and the Washington Office to designate a liaison to facilitate the consultation.

Program-specific protocols have been developed for recurring national consultations, like EPA's pesticide registration program.

(A) Pesticide consultations (FWS)

As the action agency responsible for most pesticide registrations, U.S. Environmental Protection Agency is usually the agency that requests consultation on these activities. Occasionally, other agencies (e.g., U.S. Food and Drug Administration) may also request consultation on chemicals with pesticidal effects under their jurisdiction for review of their effects on listed species. These consultations review the potential effects of all registered uses of pesticides on listed species. EPA has combined several pesticides into a single request. Occasionally, EPA may request case-by-case consultation on a specific pesticide when conditions warrant.

This section describes general procedures the FWS follows while reviewing Environmental

timeframe. DTE negotiates an acceptable timeframe for completing national pesticide consultations and requests extensions, as necessary, based on recommendations from team members.

When initiation is acknowledged, DTE's responsibility as team leader is to ensure that all team members have access to all necessary and pertinent information, coordinate all team meetings and workshops, and facilitate information exchange among team members, DEC, and EPA. Each team member is responsible for evaluating all listed and proposed species and designated or proposed critical habitats for which their Region has the lead. Each team member will develop the necessary biological opinions and submit them to the team leader for incorporation into a draft biological opinion. Once a draft opinion is developed it will be provided to DEC for their review. DEC's role at this stage of the consultation is to review the draft opinion for technical accuracy and comment on the technical feasibility of the reasonable and prudent alternatives or measures or both. Once the draft opinion has been reviewed, it will be provided to EPA for EPA's review and comment.

As soon as the team leader receives EPA's comments on the draft opinion, the team leader will transmit such comments to all team members and to DEC's technical subteam for their review and consideration. DEC's role at this stage would be to aid the team in evaluating EPA's comments on the draft opinion and suggesting courses of action to address EPA's comments. DTE's role at this stage is to facilitate the dialogue among DEC, National team members, and EPA on how to best address EPA's comments and develop the final opinion with implementable reasonable and prudent alternatives and measures. Each team member is responsible for editing or amending, as necessary, the portions of the opinion they developed. After all the team members have completed the necessary amendments to the opinion, they submit their work to the team leader for final review by both DEC and DTE prior to signature and transmittal to EPA.

Future EPA or other agency pesticide consultations will probably follow this general format. However, modifications will be made, as necessary, to continually improve the process and accommodate any special circumstances, if warranted.

(B) Other national consultations

Several other programs will probably generate national consultation requests. For example, State and tribal programs to assume administration of section 404 of the Clean Water Act may require development of specific national consultation procedures.

5.3 REGIONAL OR ECOSYSTEM CONSULTATIONS

Action agencies occasionally request multi-action and "ecosystem-based" consultations. These consultations may be step-downs of conservation reviews or national consultations. For FWS, a lead Region or field office may be designated. Regional and ecosystem biological opinions may be signed at the FWS Regional or Field Office level, as appropriate. For NMFS, these consultations are addressed by a lead Region for the Office of Protected Resources, and signed by the Washington Office Director, Protected Resources, except where signature has been delegated to a specific Region. Examples of these consultations include:

Regional:

- o U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) program to eradicate the hoof and mouth disease (FMD) from the United States. The program is a joint effort of the U.S. Department of Agriculture and the U.S. Department of the Interior, and is coordinated by the U.S. Department of the Interior.

* * * * * Final ESA Section 7 Consultation Handbook, March 1998 * * * * *

that BLM and FS implement. The MOA is being developed in response to the need for BLM and FS to update these plans in a timely manner when new species become listed or critical habitat is designated. Early and effective interagency cooperation is critical in meeting this need.

The MOA will confirm that the BLM and FS agree to consult on the effects that implementation of land management plans or other programmatic documents have on listed species or designated critical habitat, to conference on proposed species or proposed critical habitat, and to include an analysis of the effects of the plan on candidate species in a Biological Assessment/ Evaluation. The signatory agencies will agree to maintain and exchange information on species biology and planning schedules and priorities on a regular basis. A document providing guidance on the process for implementing streamlined consultations on land use plans and programs will be finalized and implemented when the MOA is put in place. The MOA will be signed soon. Once signed, the MOA will be considered an addendum to this handbook as Appendix H.

5.5 INCREMENTAL STEP CONSULTATIONS

When a statute authorizes an agency to complete an action in incremental steps, the Services
example of FS involves the MOA to implement the MOA exchange of information; 16 TD4685 Tc 0.18 is p.

- o there is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

Consultation for the first phase of an incremental step action must be conducted formally to address these five factors. If no adverse effect is likely for subsequent intermediate steps, consultation may be conducted informally for such steps. An example of an incremental step consultation can be found in Appendix C.

Incremental step consultation is most appropriate for long-term, multi-staged activities for which agency actions occur in discrete steps, such as the development of oil and gas resources on the Outer Continental Shelf. However, in Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), cert. denied

when an activity is "authorized by a statute that allows the agency to take incremental steps toward the completion of the action." The Department of the Interior believes the incremental steps need not be statutorily-mandated to meet the requirements of section 402.14(k), and has long held that the Mineral Leasing Act allows the use of a segmented decisionmaking process. Therefore, Service regulations do not prevent evaluating on-shore mineral leasing activities through incremental-step consultation. This disparity between Department of the Interior practice and the wording of the Ninth Circuit opinion in Conner

CHAPTER 6 - CONFERENCE

"Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed ... or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d)."

Section 7(a)(4) of the Endangered Species Act of 1973

6.1 THE NEED FOR CONFERENCE

Section 7(a)(4) was added to the Act to provide a mechanism for identifying and resolving potential conflicts between a proposed action and proposed species or proposed critical habitat at an early planning stage. While consultations are required when the proposed action may affect listed species, a conference is required only when the proposed action is likely to jeopardize the continued existence of a proposed species or destroy or adversely modify proposed critical habitat. However, Federal action agencies may request a conference on any proposed action that may affect proposed species or proposed critical habitat. The Services also can request a conference after reviewing available information suggesting a proposed action is likely to jeopardize proposed species or destroy or adversely modify proposed critical habitat.

6.2 INFORMAL CONFERENCE

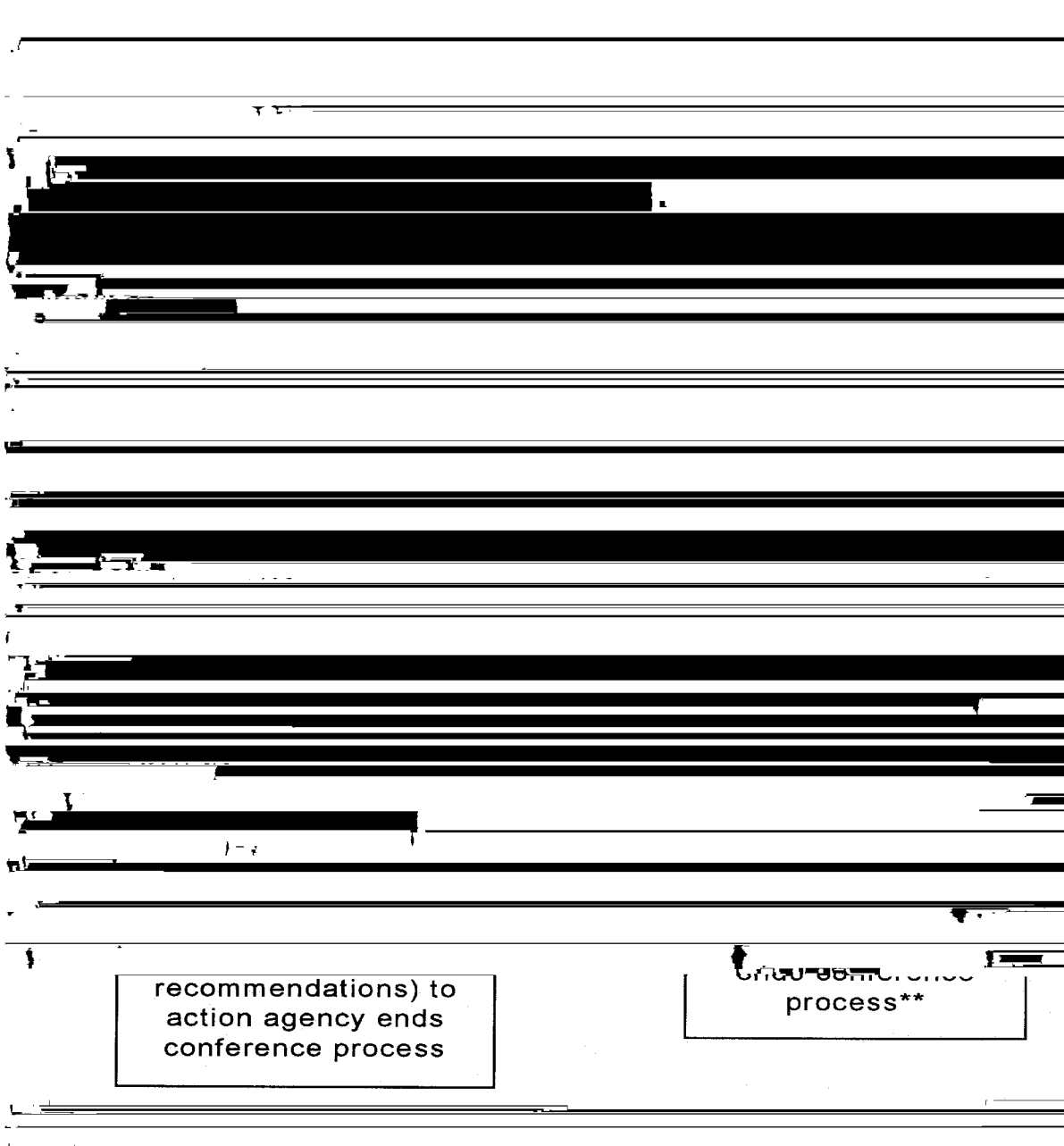
Conferences may involve informal discussions among the Services, the action agency, and the applicant (if any). During the conference, the Services may assist the action agency in determining effects and may advise the action agency on ways to avoid or minimize adverse effects to proposed species (or candidate species if present, and voluntarily considered by the action agency and/or the applicant), or proposed critical habitat (Figure 6-1). Although not required by the Act, the Services encourage the formation of partnerships to conserve candidate species since these species by definition may warrant future protection under the Act.

(A) Conference Report

Following informal conference with the action agency, the Services issue a conference report containing recommendations for reducing adverse effects. These recommendations are advisory because the action agency is not prohibited from jeopardizing the continued existence

of a proposed species or destroying or adversely modifying proposed critical habitat until the species is listed or critical habitat is designated. However, as soon as a listing becomes effective, the prohibition against **jeopardy** or **adverse modification** applies regardless of the species.

Figure 6-1. Conference processes.



* Informal discussions can occur at any time.

** The incidental take statement does not become effective unless the Services adopt the opinion as final once the species is listed and/or critical habitat is designated.

6.3 FORMAL CONFERENCE

Action agencies may request formal conference on a proposed action. Although the regulations (50 CFR §402.10(d)) permit the Services to decide whether formal conference is appropriate, generally formal conferences should be provided if requested.

Formal conferences follow the same procedures as formal consultation. The opinion issued at the end of a formal conference is called a conference opinion. It follows the contents and format of a biological opinion. However, the incidental take statement provided with a conference opinion does not take effect until the Services adopt the conference opinion as a

In **jeopardy** or **adverse modification** opinions with a reasonable and prudent alternative, the introductory statement is as follows:

Based on the foregoing analysis, the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While

not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The incidental take statement provided in this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species/habitat) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species/habitat) may occur between the listing of (species) and the adoption of the conference opinion through formal consultation, or the completion of a subsequent formal consultation.

Figure 6-2. Comparison of the conference and consultation provisions of the Endangered Species Act and regulations implementing section 7.

	CONFERENCE	CONSULTATION
Authority	section 7(a)(4)	section 7(a)(2)
When Required	Federal action to fund, authorize or carry out an action likely to jeopardize <u>proposed</u> species or destroy or adversely modify <u>proposed</u> critical habitat	Federal action to fund, authorize or carry out an action which may affect <u>listed</u> species or <u>designated</u> critical habitat.
Types of Procedures	Informal conference - Informal discussions resulting in advisory recommendations on ways to minimize or avoid adverse effects, avoid jeopardy, or adverse modification. If the species is listed or the critical habitat is designated before the action is completed, the need for formal consultation must be determined.	Informal consultation - Informal discussions resulting in advisory recommendations on ways to avoid adverse effects. If adopted, may lead to a concurrence that the action is not likely to adversely affect the listed species/designated critical habitat. ESA obligation is completed, based on concurrence by the Services.

CONFERENCE

CONSULTATION

Formal conference -
At the agency's request, and Service's concurrence, the formal process for consultation will be followed, resulting in an opinion that can stand as the biological opinion for the action if no significant new information or change in the action develops. The incidental take statement is not effective unless the Services adopt the conference opinion once the proposed species is listed.

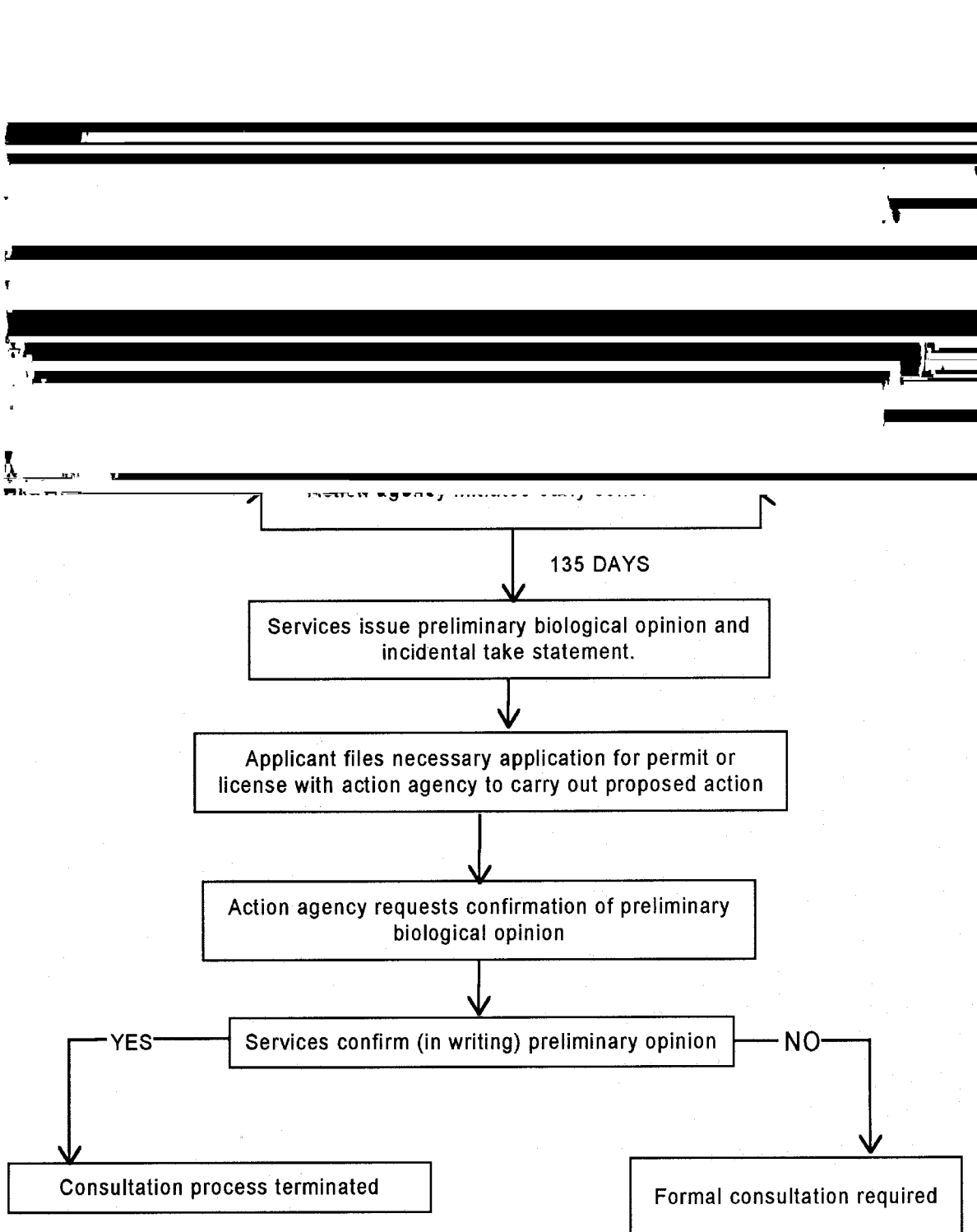
Formal consultation -

	CONFERENCE	CONSULTATION
Irreversible and Irretrievable Commitment of Resources Precluding Formulation or Implementation of Reasonable and Prudent Alternatives - Section 7(d)	Not applicable, but a prudent agency would not make such a resource commitment if the conference opinion is to be adopted as the biological opinion following listing.	Can not be made between the "may affect" finding and the conclusion of formal consultation.
Incidental Take	<p>Informal conference - Not required.</p> <p>Formal conference - Required to be addressed in the conference opinion but not effective until adopted by the Services after the species is listed.</p>	<p>Informal consultation - Not required.</p> <p>Formal consultation - Required except for plant species - anticipated incidental take may be zero.</p>

CHAPTER 7 - EARLY CONSULTATION

" ... a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."

Figure 7-1. Early Consultation Process.



7.2 PROCEDURES

"(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned."

Section 7(b)(2) of the Endangered Species Act

By regulation (50 CFR §402.11(e)) the procedures and timeframes for early consultation are the same as those for formal consultation (Chapter 4). The action agency's request for initiation of early consultation must be accompanied by the information described in 50 CFR §402.14(c). If the prospective activity involves a major construction activity, the action agency must prepare a biological assessment before initiating early consultation.

Preliminary biological opinions prepared for early consultations are nearly identical to biological opinions prepared for formal consultations so they can be confirmed as a final biological opinion once the prospective applicant submits a permit application to the action agency. The major difference between a preliminary biological opinion and a final biological opinion lies in the incidental take statement, which is not effective until the early consultation is confirmed as a formal consultation. A sample of an early consultation document can be found in Appendix B, with modified standardized statements including the following:

Closing of incidental take statement:

Because the proposed action is likely to result in the taking of listed species incidental to that action, the Service has included an incidental take statement pursuant to section 7(b)(4) of the Act. However, because this is an early consultation on the prospective action, this incidental take statement does not eliminate the (agency's) or the (applicant's) liability under the taking prohibitions of section 9 of the Act.

Instead, this statement provides your agency and the applicant with foreknowledge of the terms and conditions that will be required if this prospective application is filed with your agency. These reasonable and prudent measures and implementing terms and conditions become effective only after the Service confirms the preliminary biological opinion as a final biological opinion on the prospective action.

7.3 CONFIRMATION AS A FINAL BIOLOGICAL OPINION

"(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as

an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation."

Section 7(b)(3)(B) of the Endangered Species Act

At the conclusion of an early consultation, the Services issue a preliminary biological opinion that has the same format and contents as a final biological opinion. Once the prospective applicant formally applies for a permit or license from the action agency, and before final action is taken on the application, the action agency writes the Services to request confirmation of the preliminary biological opinion as a final biological opinion. Within 45 days, the Services confirm or deny the preliminary opinion as final if there are no significant changes in the proposed action or the information used in the early consultation. If the Services confirm the preliminary opinion as final, that action satisfies the action agency's section 7 consultation requirements. If the Services deny the request, it asks the action agency to initiate formal consultation. To make the action agency aware of the opportunity to confirm the early consultation, the following closing paragraph is used:

This concludes early consultation for the (action). You may ask the Service to confirm this preliminary biological opinion as a final biological opinion on the prospective action once you receive the permit application from the prospective applicant. The request must be in writing. If the Service reviews the proposed action and finds that there are no significant changes in the action as planned or in the information used during the early consultation, it will confirm the preliminary biological opinion as a final biological opinion on the project and no further section 7 consultation will be necessary except when one of the following criteria for reinitiation is met: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the action is subsequently modified in a manner that causes an effect on the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. When the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

If the Service does not confirm this preliminary biological opinion as a final biological opinion on the prospective action, the (agency) is required to initiate formal consultation with the Service.

Exhibit 7-1. Sample letter to prospective applicants about the availability of early consultation.

(date)

Dear _____:

Your request for EPA to initiate early consultation with the FWS must be in writing and must certify that: (1) you have a definitive proposal outlining your action and its effects, and (2) that you intend to carry out your proposal if it is authorized. When EPA receives your proposal, they are required by the ESA to initiate early consultation with the FWS.

If you have questions regarding our comments, please contact ____ (name) ____ of this office at ____ (phone) ____.

Sincerely yours,

Field Supervisor

CHAPTER 8 - EMERGENCY CONSULTATION

8.1 THE NEED FOR EMERGENCY CONSULTATION

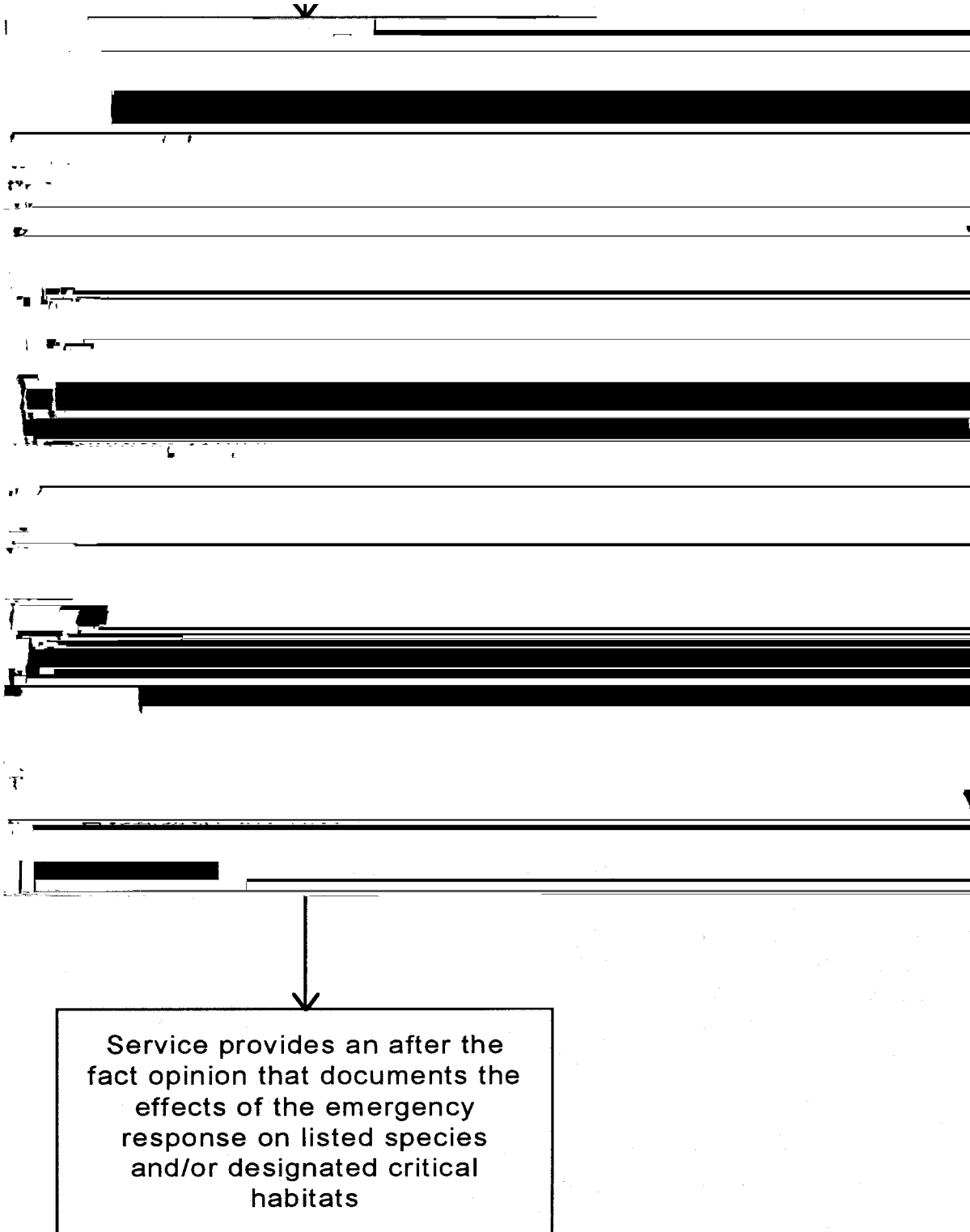
Section 7 regulations recognize that an emergency (natural disaster or other calamity) may require expedited consultation (50 CFR §402.05).

Where emergency actions are required that may affect listed species and/or critical habitats, a Federal agency may not have the time for the administrative work required by the consultation regulations under non-emergency conditions. Emergency consultations should be handled

Project leaders should establish procedures (e.g., a calling tree) within their offices outlining who can be called to handle the emergency consultation. Once these procedures have been established, they should be provided to all Federal agencies in that operating area responsible for handling emergency situations (e.g., Coast Guard, Environmental Protection Agency, and Federal Emergency Management Agency) and any other Federal agencies with responsibilities in the operating area.

The FWS Field Office conducting the consultation should notify the FWS Assistant Regional Director responsible for endangered species and/or the ecosystem at risk, following timeframes established by FWS Regional guidance. The notification should be in memo form, following the format outlined in Exhibit 8-1. Early telephone notification may be required. For NMFS, the Regional Director should notify the Director, Office of Protected Resources.

Figure 8-1. Emergency Consultation Process.



(B) Initiating Formal Consultation

As soon as practicable after the emergency is under control, the action agency initiates formal consultation with the Services if listed species or critical habitat have been adversely affected. Although formal consultation occurs after the response to the emergency, procedurally it is treated like any other formal consultation. However, the action agency has to provide additional information to initiate a formal consultation following an emergency:

- o a description of the emergency;
- o a justification for the expedited consultation; and
- o an evaluation of the response to and the impacts of the emergency on affected species and their habitats, including documentation of how the Services' recommendations were implemented, and the results of implementation in minimizing take.

(C) Emergency Biological Opinion

After concluding formal consultation on an emergency, the Services issue an emergency biological opinion. The "effects of the action" section, documents the recommendations provided by the Services to the action agency and the results of agency implementation of the recommendations on listed species. The timeframe, format and contents are the same as for formal consultation (Chapter 4). A sample of standardized language for an emergency consultation document can be found in Appendix B. The standardized statements for formal consultation have been modified to reflect that this is, in most cases, an after-the-fact consultation.

Documenting **jeopardy** and **adverse modification** biological opinions is particularly important to tracking the effect on species and habitat conditions. For FWS, emergency biological opinions with the conclusion of "not likely to jeopardize" the species or "not likely to result in destruction or **adverse modification** of critical habitat" are completed at the Field Office level. However, if the conclusion is likely **jeopardy** or **adverse modification**, the **jeopardy** consultation with FWS, emergency biological

(D) Incidental Take Statement

If incidental take is anticipated during the emergency response, the Services can advise the action agency during the informal consultation phase of ways to minimize take. In some circumstances, the actual or estimated take occurring from the agency's emergency response actions can be determined, and should be documented in the biological opinion for future inclusion in the species' environmental baseline. The incidental take statement in an emergency consultation does not include reasonable and prudent measures or terms and conditions to minimize take, unless the agency has an ongoing action related to the

Exhibit 8-1. FWS Emergency consultation notification memorandum to the Regional Office (optional).

(date)

Memorandum

To: Assistant Regional Director, Region __ (number) __

From: Field Supervisor, ____ (name of Field Office) ____

Subject: Emergency Consultation on ____ (name of Federal action) ____.

This office has completed an informal emergency consultation. The following information summarizes the location of the emergency, nature of the emergency, listed species and critical habitat(s) involved, and how those species and habitats are likely to be affected by the emergency.

Date of Contact:

Time:

Contact(s) Name:

Agency:

Contact(s) Title:

Nature of the Emergency:

Species/Critical Habitats in the Area:

Anticipated Effects:

Recommendations Given the Contact:

CHAPTER 9 - MONITORING AND REPORTING

9.1 MONITORING IMPLEMENTATION/EFFECTS OF REASONABLE AND PRUDENT ALTERNATIVES AND MEASURES

When incidental take is anticipated, the terms and conditions must include provisions for monitoring project activities to determine the actual project effects on listed fish or wildlife species (50 CFR §402.14(i)(3)). Project monitoring, carried out by the Federal agency or applicant, provides the Services with information essential to assessing the effects of various actions on listed species and designated critical habitat. Monitoring allows the Services to track incidental take levels and to refine biological opinions, reasonable and prudent alternatives, reasonable and prudent measures, and terms and conditions. Consequently, monitoring programs should be integral elements of all interagency consultations concluding that an action may adversely affect listed species or critical habitat.

Monitoring programs resulting from interagency consultations should be designed to: (1) detect adverse effects resulting from a proposed action, (2) assess the actual level of incidental take in comparison with the anticipated incidental take level documented in the Biological Opinion, (3) detect when the level of anticipated incidental take is exceeded, and (4) determine the effectiveness of reasonable and prudent measures and their implementing terms and conditions. The following objectives/steps should be taken to develop monitoring programs:

- o Develop objectives. Any monitoring program associated with section 7 consultations should answer specific questions or lead to specific conclusions, captured in the objectives. If the objectives are well-developed, they will help shape a complete monitoring program.
- o Describe the subject of the monitoring program: Effects on populations of a listed species, effects on the habitat (critical or not) of a listed species, or effects on both.
- o Describe the variables to be measured and how data will be collected. The success or failure of monitoring programs ultimately depends on the information collected about the variables that demonstrate or refute a position outlined in the objectives. Collection methods should be standardized to ensure comparability with data from studies in other areas.
- o Detail the frequency, timing, and duration of sampling for the variables. Determining how frequently and how long to collect data is important to the success or failure of the program. If the interval between samples is too long or if the sampling program is too short, the monitoring program may not detect an effect.

The frequency, timing, and duration of the sampling regimen should relate to the type of action being evaluated, the organism affected by the action, and the response of the organism to the effects produced by the action.

- o Describe how the data are to be analyzed and who will conduct the analyses. A monitoring program is more effective when the analytical methods are integrated into the design. For example, parametric and non-parametric statistical analyses require different sample sizes, which will affect the frequency, timing, and duration of sampling.
- o Discuss the relationship between the monitoring program being included in a consultation and other monitoring programs. At almost any given time, hundreds of environmental monitoring programs are being conducted in every region of the country. Whenever possible, these should be coordinated to eliminate duplication, standardize sampling methods, and/or improve geographic coverage.

9.2 TRACKING COLLECTIVE EFFECTS ON SPECIES AND THEIR HABITATS

Managing collected information efficiently improves the overall effectiveness of interagency consultations and makes it easier to (1) evaluate the effects of various actions as they accumulate over time, (2) determine which consultations need to be reinitiated when a new species is listed, (3) determine when the level of incidental take approaches the likely **jeopardy/adverse modification** thresholds, (4) exchange similar information across Regional boundaries, and (5) determine if reasonable and prudent alternatives and measures are carried out.

(A) FWS

For FWS, the following set of fields and values will form the core of a FWS nationwide information system on interagency consultation. The fields and values will become part of a national, computerized information system, which will be developed by a team of WO and Regional biologists. Data are to be maintained for all formal consultations, conferences, early

Field Name	Field Values
Species Name	For vertebrates, butterflies, and mussels, use the common name in the format used in the official list (50 CFR §17). For all other species (primarily invertebrates and plants) use the scientific name. Enter only one name for each record.
Log Number	Enter the log number for the consultation. Use the following format: RN-FO-YY-T-XXXX (RX) RN = Region number FO = two-number or letter code for the field office YY = last two digits of the fiscal year T = type of consultation F = formal I = informal C = conference E = early M = emergency P = programmatic XXXX = a sequential number 0001-9999 Reinitiated consultations use the log number of the original consultation with the letter (R) added at the end. If there are several Entere are s52nofi For all other

Field Name	Field Values
Office	FWS office that issued the document. Use a four letter code for field offices; or ROn (where n is the Region number) for consultations conducted by a Region.
Action Agency	Standard abbreviation for action agencies where applicable (e.g., EPA, BLM, COE).
Department	Standard abbreviation for the department (e.g., DOI).
Applicant	[Pursuant to the Privacy Act, do not maintain the applicant's name in this file if the applicant is an individual.]
Action Name	Short name of the proposed action (e.g., Didion bulk transfer facility; Page Avenue extension).
Permit Number	Permit number used by action agency where one exists.
Description	Short description of the proposed action. For example, bulk transfer facility, airport construction, landfill expansion, etc.
Ecoregion	Identify the ecoregion number and name. Provide a short description of species habitat.
State	Standard two letter code for State or Territory in which proposed action will occur.
County	County name or code if multiple counties.
Locality	Township, city, or land management area (for example, Shawnee National Forest, Indiana Dunes National Lakeshore) in which action will occur.

Field Name	Field Values
Start Date	For consultations and formal conferences, enter the date initiated.
Date Issued	Date the document or concurrence letter was entered into the system. Enter the date initiated. * 2 Ddver

<u>Field Name</u>	<u>Field Values</u>
Report Frequency	How frequently must the action agency report?
Report Due	Date report is due to the FWS.
Conservation Recommendations	Summary of conservation recommendations.
Follow-up	Summary of any follow-up evaluation.
Contact	Name and telephone number of the individual who authored the consultation.
Notes	Notes on the consultation.

(B) NMFS

SUGGESTED READING

Endangered & Threatened Species Conservation

- Bean, M.J. 1983. *The Evolution of National Wildlife Law*. Praeger Publ.; New York, New York. 449 pp.
- Clark, T.W., R.P. Reading, and A.L. Clarke (eds.) 1994. *Endangered Species Recovery - Finding the Lessons, Improving the Process*. Island Press; Washington, D.C. 450 pp.
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- Harrison, G.W. 1979. Stability under environmental stress: resistance, resilience, persistence, and variability. *American Naturalist* 113:659-669.
- Innis, G. 1974. Stability, sensitivity, resilience, persistence. What is of interest? pp.131-139. In: S. Levin (ed.) *Ecosystem analysis and prediction*. SIAM; Philadelphia, Pennsylvania.
- Littel, R. 1992. *Endangered and Other Protected Species: Federal Law and Regulations*. Bureau of Indian Affairs, Inc.; Washington, D.C. 185 pp.
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- Pimm, S.L. 1991. *The balance of nature: ecological issues in the conservation of species and communities*. University of Chicago Press; Chicago, Illinois.
- Schaffer, M. 1987. Minimum viable populations: coping with uncertainty. pp. 69-86. In: M.E. Soule (ed.) *Conservation biology: the science of scarcity and diversity*. Sinauer Associates, Inc.; Sunderland, Massachusetts.

APPENDIX A - REGULATIONS AND POLICIES RELATING TO CONSULTATION

- (1) Interagency Cooperation - 50 CFR §402 (June 3, 1986).
- (2) Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals - 50 CFR §18, 228 and 402 (September 29, 1989).
- (3) Interagency Cooperation Under the Endangered Species Act: information standards; Section 9 prohibitions; recovery plan participation and implementation; ecosystem approach; role of the States. 59 FR 166 34271-34275 (July 1, 1994).
- (4) Federal Memorandum of Agreement on streamlining consultation procedures for forest health and salvage projects (May 31, 1995, and February 26, 1997).
- (5) Supreme Court Decision on Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, et al. (June 29, 1995).

[Note: These regulations are not available in electronic format.]

APPENDIX B - FORMATS FOR CONSULTATIONS

[The following documents have been provided to FWS/NMFS Regional offices on disk as well.]

Page

CHAPTER 1 - GENERAL INFORMATION

Form for Early Alert of pending jeopardy/adverse modification
opinions B-3

CHAPTER 4 - FORMAL CONSULTATION

Outline of a formal consultation package, including standardized
statements B-5

Example of an optional letter sent to inform action agencies
that the Service has received a complete initiation package and
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Example of a letter sent when an incomplete formal consultation
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CHAPTER 6 - CONFERENCE

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Form for an early alert

EARLY ALERT

Prepared for: Director
Date submitted:

State(s):

ISSUE: Draft/Final [jeopardy/adverse modification] [opinion/conference] for the [name of the project]

CONSULTING AGENCY/APPLICANT:

DATE CONSULTATION INITIATED:

DATE COMPLETION OF CONSULTATION IS DUE:

DATE OF ANY EXTENSIONS: (explain reason for extension)

PROJECT DESCRIPTION: (provide a brief summary)

EFFECT ON SPECIES/CRITICAL HABITAT: (provide a brief summary of effect on [species/critical habitat])

I. REASONABLE AND PRUDENT ALTERNATIVES: (list)

A. HAVE YOU COORDINATED WITH THE AGENCY/APPLICANT TO DEVELOP THE REASONABLE AND PRUDENT ALTERNATIVES? (yes) (no) **EXPLAIN.**

B. HAVE YOU COORDINATED WITH ALL AFFECTED TRIBAL GOVERNMENTS TO DEVELOP THE REASONABLE AND PRUDENT ALTERNATIVES PER SECRETARIAL ORDER #3206?

(yes) (no) **EXPLAIN**

C. IF NOT, HAVE THE PROPOSED REASONABLE AND PRUDENT ALTERNATIVES BEEN DISCUSSED WITH THE ACTION AGENCY/APPLICANT? WHAT WAS THEIR REACTION?

- D. IS THE AGENCY/APPLICANT WILLING TO INCORPORATE THE REASONABLE AND PRUDENT ALTERNATIVES AND AMEND THEIR PROJECT DESCRIPTION TO AVOID A JEOPARDY/ADVERSE MODIFICATION OPINION? (yes) (no) EXPLAIN WHY/WHY NOT.**
- E. IF THERE ARE NO REASONABLE AND PRUDENT ALTERNATIVES, WHAT IS THE SCHEDULE FOR COORDINATING WITH THE AGENCY/APPLICANT TO DEVELOP THEM? EXPLAIN.**

Outline of a formal consultation package, including standardized statements

Address

Salutation

Introductory Paragraph:

This document transmits the (Fish and Wildlife Service's/National Marine Fisheries Service's) (Service) biological opinion based on our review of the proposed (name or designation for the action) located in (County, State, and Marine Area as appropriate), and its effects on (species) in accordance with section 7 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.). Your (date) request for formal consultation was received on (date).

This biological opinion is based on information provided in the (date) biological assessment (or other title), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file at (this office/elsewhere).

Consultation History

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

Conservation Measures

STATUS OF THE SPECIES (rangewide and/or recovery unit)

ENVIRONMENTAL BASELINE (in the action area)

EFFECTS OF THE ACTION

CUMULATIVE EFFECTS

Introduction:

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

CONCLUSION

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat.

INCIDENTAL TAKE STATEMENT

Introductory paragraph:

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by FWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

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10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR §402.14(i). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed [name] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit(s).

When the biological opinion finds **jeopardy** or **adverse modification** without a reasonable and prudent alternative, the introductory statement is as follows:

This biological opinion finds the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified. Any incidental taking is prohibited by section 9 of the Act.

If listed plant species are present in the action area, the following special incidental take provisions apply:

Sections 7(b)(4) and 7(o)(2) of the Act generally do not apply to listed plant species. However, limited protection of listed plants from take is provided to the extent that the Act prohibits the removal and reduction to possession of Federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State law or regulation or in the course of any violation of a State criminal trespass law. [Include citations to any applicable State laws.]

AMOUNT OR EXTENT OF TAKE

Incidental take statement when no take is anticipated (**jeopardy** or **non-jeopardy** opinion):

The Service does not anticipate the proposed action will incidentally take any (species).

Incidental take statement for a biological opinion of likely **jeopardy** when incidental take is anticipated:

- o For opinions with only one reasonable and prudent alternative:

The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

- o For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take for each reasonable and prudent alternative, as appropriate:

The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take (**jeopardy** or **non-jeopardy** opinion):

The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each type of take anticipated.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. **However, the following level of take of this species can be anticipated by loss of** [quantify amount of surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] **because:** [provide an explanation].

When take of listed migratory birds (including the bald eagle) will result from the actions under consultation:

The Fish and Wildlife Service will not refer the incidental take of any migratory bird or bald eagle for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

Standard paragraph for incidental take of marine mammals: [If the incidental take is not authorized under MMPA 101(a)(5):]

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Standardized introductory paragraph for reasonable and prudent measures for species other than marine mammals and migratory birds:

The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take of (species): [Go on to list these measures and provide a brief discussion documenting the Service's analysis of the biological need for, and reasonableness of, these measures.]

TERMS AND CONDITIONS

Standardized introductory paragraph for terms and conditions:

In order to be exempt from the prohibitions of section 9 of the Act, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required

Example of a letter sent to inform action agencies the Services have received a complete initiation package and will begin formal consultation on a proposed action.

(date)

Dear _____ :

This letter acknowledges the U.S. Fish and Wildlife Service's [or National Marine Fisheries Service's] (Service) [date of receipt of letter initiating consultation] receipt of your [date of agency's initiating letter] letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on [name of listed species and/or critical habitats affected].

All information required of you to initiate consultation was either included with your letter or is otherwise accessible for our consideration and reference. We have assigned log number [log number] to this consultation. Please refer to that number in future correspondence on this consultation.

Section 7 allows the Service up to 90 calendar days to conclude formal consultation with your agency and an additional 45 calendar days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, we expect to provide you with our biological opinion no later than [date = 135 calendar days after receipt of initiation request].

As a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact me or [name of staff member] at [number].

Sincerely yours,

Field Supervisor

Example of a letter sent when an incomplete formal consultation request has been received.

(date)

Dear _____ :

This letter acknowledges the U.S. Fish and Wildlife Service's [or National Marine Fisheries Service's] (Service) [date of receipt of letter initiating consultation] receipt of your [date of agency's initiating letter] letter requesting initiation of formal section 7 consultation under the Endangered Species Act. The consultation concerns the possible effects of your proposed [name and location of the action] on [name of listed species and/or critical habitats affected].

The Service has not received all of the information necessary to initiate formal consultation on [name of the project] as outlined in the regulations governing interagency consultations (50 CFR §402.14). To complete the initiation package, we will require the following information:

1. [Outline the additional information needs. Follow the general sequence and use language in 50 CFR §402.14(c) to identify each piece of missing information.]
2. etc.

The formal consultation process for the project will not begin until we receive all of the information, or a statement explaining why that information cannot be made available. We will notify you when we receive this additional information; our notification letter will also outline the dates within which formal consultation should be complete and the biological opinion delivered on the proposed action.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to call me at [number].

Sincerely yours,

Field Supervisor

Outline of a formal, stand-alone conference package, including standardized statements

Address

Salutation

Introductory Paragraph:

This document transmits the (Fish and Wildlife Service's/National Marine Fisheries Service's) conference opinion based on the Service's review of the proposed (name or designation for the action) located in (County, State and Marine Area as appropriate), and its effects on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). Your (date) request for formal conference was received on (date).

This conference opinion is based on information provided in the (date) biological assessment (or other title), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

Conference History

CONFERENCE OPINION

DESCRIPTION OF THE PROPOSED ACTION

Conservation Measures

STATUS OF THE SPECIES (rangewide)

ENVIRONMENTAL BASELINE (in the action area)

EFFECTS OF THE ACTION

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

CONCLUSION

If no jeopardy/adverse modification:

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's conference opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the proposed (species), and (is/is not) likely to destroy or adversely modify proposed critical habitat.

In jeopardy or adverse modification opinions:

Based on the foregoing analysis, the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While the Act does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action, the (agency) may be required to modify or suspend the action at that time pending resolution of formal consultation under section 7. Consequently, the Service advises (the agency) to consider implementing the following reasonable and prudent alternative(s).

When the conference opinion finds **jeopardy** or **adverse modification** without a reasonable and prudent alternative, the introductory statement is as follows:

The conference opinion finds the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified. While the Act does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action, the

(agency) may be required to modify or suspend the action at that time pending resolution of formal consultation under section 7.

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

Introductory Paragraph:

Regulations (50 CFR §402.02) implementing section 7 of the Act define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

INCIDENTAL TAKE STATEMENT

Introductory paragraph:

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by FWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The prohibitions against taking the species found in section 9 of the Act do not apply until the species is listed. However, the Service advises the (agency) to consider implementing the following reasonable and prudent measures. If this conference opinion is adopted as a biological opinion following a listing or designation, these measures, with their implementing terms and conditions, will be

nondiscretionary, and must be undertaken by the (agency) so that they become binding conditions of any grant or permit issued to the (applicant), as appropriate, for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to assume and implement the terms and conditions or (2) fails to require the (applicant) to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the (agency or applicant) must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement.

[50 CFR §402.14(i)(3)]le[o0.0045 Tce -0.033 218c 0.153entlistpeopl or n the sp thape pimplied if t

The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take (**jeopardy** or **non-jeopardy** opinion):

The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each type of take anticipated.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. **However, the following level of take of this species can be anticipated by loss of** [quantify amount of surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] **because:** [provide an explanation].

EFFECT OF THE TAKE

The following statement should be made when the conference opinion finds likely **jeopardy/adverse modification**, and no reasonable and prudent alternative is available:

Because the proposed action is 1) likely to jeopardize the continued existence of (species) or result in the destruction or adverse modification of proposed critical habitat, and 2) no reasonable and prudent alternatives have been identified, any incidental take resulting from the proposed action will be prohibited once the species is listed or the critical habitat is designated.

If the proposed action is not likely to result in **jeopardy/adverse modification**:

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the proposed species or destruction or adverse modification of proposed critical habitat.

If the opinion contains reasonable and prudent alternatives:

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the proposed species or destruction or adverse modification of proposed critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Standardized introductory paragraph for reasonable and prudent measures for species other than marine mammals and migratory birds:

The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take of (species): [Go on to list these measures and provide a brief discussion documenting the Service's analysis of the biological need for, and reasonableness of, these measures.]

The prohibitions against taking the species found in section 9 of the Act do not apply until the species is listed. However, the Service advises the (agency) to consider implementing the following reasonable and prudent measures. If this conference opinion is adopted as a biological opinion following a listing or designation, these measures, with their implementing terms and conditions, will be nondiscretionary.

TERMS AND CONDITIONS

Standardized introductory paragraph for terms and conditions:

In order to be exempt from the prohibitions of section 9 of the Act once the proposed species is listed, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required reporting/monitoring requirements. If this conference opinion is adopted as a biological opinion following a listing or designation, these terms and conditions will be non-discretionary.

[Go on to list these terms and conditions, including the requirements for monitoring, reporting, review, and disposition of any specimens.]

Salvage of specimens and/or habitat data included as a term and condition (as appropriate)

Closing paragraph:

The Service believes that no more than (number or extent) of (species) will be incidentally taken as a result of the proposed action. 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. If, during the course of the action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the

opinion, the Federal agency shall request reinitiation of consultation if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect the species or critical habitat in a manner or to an extent not considered in this conference opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the species or critical habitat that was not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The incidental take statement provided in this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species/habitat) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species/habitat) may occur between the listing of (species) and the adoption of the conference opinion through formal consultation, or the completion of a subsequent formal consultation.

LITERATURE CITED

Proposed species/critical habitat:

EFFECTS OF THE ACTION

Listed species/critical habitat:

Proposed species/critical habitat:

CUMULATIVE EFFECTS

Introduction:

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

CONCLUSION

Listed species/critical habitat:

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's biological opinion that the (action), as proposed, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.] No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.

Proposed species/critical habitat:

If no jeopardy/adverse modification:

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the proposed (action) and the cumulative effects, it is the Service's conference opinion that the

(action), as proposed, (is/is not) likely to jeopardize the continued existence of the proposed (species), and (is/is not) likely to destroy or adversely modify proposed critical habitat.

In jeopardy or adverse modification opinions:

Based on the foregoing analysis, the Service concurs with the agency that the (proposed action) is likely to (jeopardize the continued existence of the proposed species and/or destroy or adversely modify the proposed critical habitat). While the Act does not preclude an agency from taking an action with such adverse effects on a proposed (species/critical habitat), the (agency) is reminded that if the (species is listed/critical habitat is designated) prior to the completion of the action or while (agency) still maintains any discretionary authority relative to the action, the (agency) may be required to modify or suspend the action at that time pending resolution of the formal consultation under section 7. Consequently, the Service advises (the agency) to consider implementing the following reasonable and prudent alternative(s).

Introductory paragraph:

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by FWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The measures described below are non-discretionary, and must be undertaken by the (agency) so that they become binding conditions of any grant or permit issued to the (applicant), as appropriate, for the exemption in section 7(o)(2) to apply. The (agency) has a continuing duty to regulate the activity covered by this incidental take statement. If the (agency) (1) fails to assume and implement the terms and conditions or (2) fails to require the (applicant) to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the (agency or applicant) must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. [50 CFR §402.14(i)(3)]

The incidental take statement for any section 10(a)(1)(b) permit application includes the following standardized language which would replace the second paragraph above:

The proposed [name] HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions described in any associated Implementing Agreement and any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR

§402.14(i). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed [name] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit(s).

When the biological and/or conference opinion finds **jeopardy** or **adverse modification** without a reasonable and prudent alternative, the introductory statement is as follows:

The (biological and/or conference) opinion finds the proposed action will result in (likely jeopardy to the species/destruction or adverse modification of critical habitat), and no reasonable and prudent alternative can be identified. Any incidental taking is prohibited by section 9 of the Act. (For conference opinion change last sentence to) Once the species is listed or the critical habitat is designated, any incidental taking is prohibited by section 9 of the Act.

If listed plant species are present in the action area, the following special incidental take provisions apply:

Sections 7(b)(4) and 7(o)(2) of the Act do not apply to listed plant species. However, limited protection of listed plants from take is provided to the extent that the Act prohibits the removal of Federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of listed plants on non-Federal areas in violation of State law or regulation. [Include citations to any applicable State laws.]

AMOUNT OR EXTENT OF TAKE

[Break out discussions for listed and proposed species separately.]

Incidental take statement when no take is anticipated (**jeopardy** or **non-jeopardy** opinion):

The Service does not anticipate the proposed action will incidentally take any (species).

Incidental take statement for a biological/conference opinion of likely **jeopardy** when incidental take is anticipated:

- o For opinions with only one reasonable and prudent alternative:

The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

- o For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take for each reasonable and prudent alternative, as appropriate:

The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take (**jeopardy** or **non-jeopardy** opinion):

The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each type of take anticipated.]

[Provide a concise summary of the analysis leading to this determination.]

OR

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. **However, the following level of take of this species can be anticipated by loss of** [quantify amount of surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] **because:** [provide an explanation].

When take of listed migratory birds (including the bald eagle) will result from the actions under consultation:

The Fish and Wildlife Service will not refer the incidental take of any migratory bird or bald eagle for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

Standard paragraph for incidental take of marine mammals: [If the incidental take is not authorized under MMPA 101(a)(5):]

The Service is not including an incidental take authorization for marine mammals at this time because the incidental take of marine mammals has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations or authorizations, the Service may amend this biological opinion to include an incidental take statement for marine mammals, as appropriate.

After area-specific take statements (Following issuance of regulations or authorizations, the Service may have as an effect):

habitat, and 2) no reasonable and prudent alternatives have been identified, any incidental take resulting from the proposed action will be prohibited once the species is listed or the critical habitat is designated.

If the action is not likely to result in **jeopardy/adverse modification**:

In the accompanying biological/conference opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

If the opinion contains reasonable and prudent alternatives:

In the accompanying biological/conference opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

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REINITIATION NOTICE

The standard closing statement for formal consultation/conferences is as follows:

This concludes formal consultation and conference on the action(s) outlined in the (request/reinitiation request). As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

You may ask the Service to confirm the conference opinion as a biological opinion issued through formal consultation if the (species is listed or critical habitat is designated). The request must be in writing. If the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the conference, the Service will confirm the conference opinion as the biological opinion on the project and no further section 7 consultation will be necessary.

After (listing of the (species) as endangered/threatened and/or designation of critical habitat for (species)) and any subsequent adoption of this conference opinion, the Federal agency shall request reinitiation of consultation if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect the species or critical habitat in a manner or to an extent not considered in this conference opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the species or critical habitat that was not considered in this conference opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

The incidental take statement provided in this conference opinion does not become effective until the species is listed and the conference opinion is adopted as the biological opinion issued through formal consultation. At that time, the project will be reviewed to determine whether any take of the (species/habitat) has occurred. Modifications of the opinion and incidental take statement may be appropriate to reflect that take. No take of the (species/habitat) may occur

Outline of an early consultation package, including standardized statements

Address

Salutation

Introductory Paragraph:

This document transmits the (Fish and Wildlife Service's/National Marine Fisheries

Sections 7(b)(4) and 7(o)(2) of the Act generally do not apply to listed plant species. However, limited protection of listed plants from take is provided to the extent that the Act prohibits the removal and reduction to possession of Federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State law or regulation or in the course of any violation of a State criminal trespass law. [Include citations to any applicable State laws.]

AMOUNT OR EXTENT OF TAKE

Incidental take statement when no take is anticipated (**jeopardy** or **non-jeopardy** opinion):

The Service does not anticipate the proposed action will incidentally take any (species).

Incidental take statement for a preliminary biological opinion of likely **jeopardy** when incidental take is anticipated:

o For opinions with only one reasonable and prudent alternative:

The Service has developed the following incidental take statement based on the premise that the reasonable and prudent alternative will be implemented.

o For opinions with more than one reasonable and prudent alternative, provide separate estimates of anticipated take for each reasonable and prudent alternative, as appropriate:

The Service has developed the following incidental take statement based on the premise that reasonable and prudent alternative number XX will be implemented.

Introductory statement for amount and extent of take (**jeopardy** or **non-jeopardy** opinion):

The Service anticipates (number of individuals or extent of habitat resulting from take of (species)) could be taken as a result of this proposed action. The incidental take is expected to be in the form of (harm, harass, kill, etc.). [Separately specify each

The Service anticipates incidental take of (species) will be difficult to detect for the following reason(s): [Incidental take of actual species numbers may be difficult to detect when the species is wide-ranging; has small body size; finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in numbers or other causes (e.g., oxygen depletions for aquatic species); or the species occurs in habitat (e.g., caves) that makes detection difficult]. **However, the following level of take of this species can be anticipated by loss of** [quantify amount of surrogate species, food, cover, other essential habitat element such as water quantity or quality, or symbiont] **because:** [provide an explanation].

When take of listed migratory birds (including the bald eagle) will result from the actions under consultation:

The Fish and Wildlife Service will not refer the incidental take of any migratory bird or bald eagle for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

Standard paragraph for incidental take of marine mammals: [If the incidental take is not authorized under MMPA 101(a)(5):]

The Service is not including an incidental take authorization for marine mammals at this time because the incidental take of marine mammals has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments. Following issuance of such regulations or authorizations, the Service may amend this preliminary biological opinion to include an incidental take statement for marine mammals, as appropriate.

After area-specific or activity-specific regulations have taken effect:

Pursuant to section 101(a)(5) of the Marine Mammal Protection Act, as amended in 1994, and implementing regulations at 50 CFR §18.27, and 50 CFR §216 and §229, the following measures are required to be consistent with the total taking allowable under the MMPA authorization and to effect the least practical adverse impact on the species and its habitat and on the availability of the species for subsistence uses: [Cite measures identified in specific regulations and/or letters of authorization or permits for commercial fishing]. **Pursuant to section 7(b)(4) of the Endangered Species Act, the following reasonable and prudent measures are necessary and appropriate to**

minimize take: [Go on to list the measures, followed by the standard paragraph for terms and conditions.]

EFFECT OF THE TAKE

The following statement should be made when the preliminary biological opinion finds likely **jeopardy/adverse modification**, and no reasonable and prudent alternative is available:

Because the proposed action is (1) likely to jeopardize the continued existence of (species) or result in the destruction or adverse modification of critical habitat, and (2) no reasonable and prudent alternatives have been identified, any incidental take resulting from the proposed action would be prohibited.

If the proposed action is not likely to result in **jeopardy/adverse modification**:

In the accompanying preliminary biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

If the opinion contains reasonable and prudent alternatives:

In the accompanying preliminary biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat when (one of) the reasonable and prudent alternative(s) is implemented.

REASONABLE AND PRUDENT MEASURES (as appropriate)

Standardized introductory paragraph for reasonable and prudent measures for species other than marine mammals and migratory birds:

The Service believes the following reasonable and prudent measure(s) are necessary and appropriate to minimize take of (species): [Go on to list these measures and provide a brief discussion documenting the Service's analysis of the biological need for, and reasonableness of, these measures.]

TERMS AND CONDITIONS

Standardized introductory paragraph for terms and conditions:

In order to be exempt from the prohibitions of section 9 of the Act, the (agency) must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required reporting/monitoring requirements. These terms and conditions are non-discretionary.

[Go on to list these terms and conditions, including the requirements for monitoring, reporting, review, and disposition of any specimens.]

Salvage of specimens and/or habitat data included as a term and condition (as appropriate)

Closing Paragraph:

The Service believes that no more than (number or extent) of (species) will be incidentally taken as a result of the proposed action. 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. The Service believes that no more than (number or extent) of (species) will be incidentally taken. If, during the course of the action, this level of incidental take is exceeded, suchies) will bejp

Introductory paragraph:

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

Closing paragraph:

In order for the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations.

REINITIATION NOTICE

The following closing paragraph is used:

This concludes early consultation for the (action). You may ask the Service to confirm this preliminary biological opinion as a final biological opinion on the prospective action once you receive the permit application from the prospective applicant. The request must be in writing. If the Service reviews the proposed action and finds that there are no significant changes in the action as planned or in the information used during the early consultation, it will confirm the preliminary biological opinion as a final biological opinion on the project and no further section 7 consultation will be necessary except when one of the following criteria for reinitiation is met: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the action is subsequently modified in a manner that causes an effect on the listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. When the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

If the Service does not confirm this preliminary biological opinion as a final biological opinion on the prospective action, the (agency) is required to initiate formal consultation with the Service.

LITERATURE CITED

Sample letter to prospective applicants about the availability of early consultation rights.

(date)

Dear _____:

This responds to your letter of _____, _____, concerning the upcoming proposed experimental use of _____. This agricultural chemical was previously used in [State] under the U.S. Environmental Protection Agency's (EPA) Experimental Use Permit (EUP) ____-EUP-__ _.

We have enclosed a general list of all endangered, threatened, and proposed species in [State], organized by county, for planning purposes. When specific test plots have been designated, EPA should consult with this office pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended (ESA), prior to the issuance of the EUP for _____.

The enclosed list constitutes technical assistance only. It does not fulfill EPA's requirements pursuant to section 7 of the ESA; only EPA or their non-Federal designee can fulfill those requirements. By copy of this letter, EPA's Office of Pesticide Programs is being made aware of their responsibility to consult with the FWS to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. We hope the resulting dialogue between EPA and the FWS will provide registrants and permittees with better guidance on compliance with the Endangered Species Act. If EPA chooses not to consult, the FWS cannot be certain that EPA and you, as the project proponent, have complied with the provisions of the ESA.

Nevertheless, you should be aware that, pursuant to section 7(a)(3) of the ESA, you have certain opportunities as an applicant for a Federal permit or license. Section 7(a)(3) and implementing regulations at 50 C.F.R. §402.11 establish an optional process called "early consultation," which was specifically designed to reduce the likelihood of conflicts between listed species or critical habitat and prospective actions such as yours.

Copies of the specific regulations pertaining to early consultations are enclosed. If you have reason to believe that your proposal, which will eventually be included in an application for Federal agency approval, may affect listed species or critical habitat, you can ask the Federal agency issuing a permit or license (in this case it is EPA) to enter into early consultation with the FWS.

Although early consultation would be between EPA and the FWS, your office must be involved in the process if you elect to request EPA to initiate early consultation with the FWS. Your

request for EPA to initiate early consultation with the FWS must be in writing and must certify that: (1) you have a definitive proposal outlining your action and its effects, and (2) that you intend to carry out your proposal if it is authorized. When EPA receives your proposal, they are required by the ESA to initiate early consultation with the FWS.

If you have questions regarding our comments, please contact [Biologist] at [office and telephone number]

Sincerely yours,

Field Supervisor

Outline of an emergency consultation package, including standardized statements

Address

Salutation

Introductory Paragraph:

This document transmits the (Fish and Wildlife Service's/National Marine Fisheries Service's) biological opinion based on the Service's review of the (name or designation for the action) located in (County, State, and Marine Area as appropriate), and the emergency consultation on the effects of that action on (species) in accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). Your (date) request for formal consultation was received on (date).

This biological opinion is based on information provided in the (date) biological assessment (or other title), the (date) draft environmental assessment (or environmental impact statement), the (date) project proposal, telephone conversations of (dates) with (names), field investigations, and other sources of information. A complete administrative record of this consultation is on file in (this office/elsewhere).

Consultation History

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

Conservation Measures

STATUS OF THE SPECIES (rangewide and/or recovery unit)

ENVIRONMENTAL BASELINE (in the action area)

EFFECTS OF THE ACTION

[Document previous Service recommendations]

CUMULATIVE EFFECTS

Introduction:

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

CONCLUSION

After reviewing the current status of (species), the environmental baseline for the action area [use if different from the range of the species], the effects of the (action) and the cumulative effects, it is the Service's biological opinion that the (action), as implemented, (is/is not) likely to jeopardize the continued existence of the (species), and (is/is not) likely to destroy or adversely modify designated critical habitat. [If no critical habitat has been designated for the species or the action will not affect designated critical habitat, use one of the following statements.] **No critical habitat has been designated for this species, therefore, none will be affected. -OR- Critical habitat for this species has been designated at (location), however, this action does not affect that area and no destruction or adverse modification of that critical habitat is anticipated.**

REASONABLE AND PRUDENT ALTERNATIVES (as appropriate)

[Include only if further action can restore/enhance species/critical habitat to a level below the **jeopardy/adverse modification** threshold.]

Introductory Paragraph:

Regulations (50 CFR §402.02) implementing section 7 of the Act define reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (1) can be implemented in a manner consistent with the intended purpose of the action; -14.4 TDN5 species/c (Cr. Cr hgsntended i0.0085 Tced.46t with the intended pexb

REINITIATION NOTICE

None, if discretionary Federal agency involvement has terminated.

LITERATURE CITED

FWS Emergency consultation notification memorandum to the Regional Office (optional).

(date)

Memorandum

To: Assistant Regional Director, _____

From: Field Supervisor, [name of Field Office]

Subject: Emergency Consultation on [name of Federal action].

This office has completed an informal emergency consultation. The following information summarizes the location of the emergency, nature of the emergency, listed species and critical habitat(s) involved, and how those species and habitats are likely to be affected by the emergency.

Date of Contact: Time:

Contact(s) Name:

Agency:

Contact(s) Title:

Nature of the Emergency:

Species/Critical Habitats in the Area:

INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM

[Note: This form provides the outline of information needed for intra-Service consultation. If additional space is needed, attach additional sheets, or set up this form to accommodate your responses.]

Originating Person: _____

Telephone Number: _____

Date: _____

I. Region:

II. Service Activity (Program)

III. Pertinent Species and Habitat:

A. Listed species and/or their critical habitat within the action area:

B. Proposed species and/or proposed critical habitat within the action area

C. Candidate species within the action area:

D. Include species/habitat occurrence on a map.

IV. Geographic area or station name and action:

V. Location (attach map):

A. Ecoregion Number and Name:

B. County and State:

C. Section, township, and range (or latitude and longitude):

D. Distance (miles) and direction to nearest town:

E. Species/habitat occurrence:

(species: _____) _____ Conference

C. Candidate species:

Determination

Response requested

no effect

(species: _____)

_____ *Concurrence

is likely to jeopardize candidate species

(species: _____)

_____ Conference

signature
[Title/office of supervisor at originating station]

date

IX. Reviewing ESO Evaluation:

A. Concurrence _____ Nonconcurrence _____

B. Formal consultation required _____

C. Conference required _____

D. Informal conference required _____

E. Remarks (attach additional pages as needed):

signature
[Title/office of reviewing official]

date

INSTRUCTIONS

Originating Person: The person(s) or unit (field office, refuge, program) proposing an action for which the Intra-Service Section 7 Biological Evaluation Form is being prepared.

Date: Date the information on the form was finalized.

I. Region: The Region in which the proposed action will occur.

II. Service activity: The Service program initiating the proposed action.

III. Pertinent species and habitat.

A. Listed species and/or their critical habitat within the action area: The action area includes the immediate area where the proposed action will occur, as well as any other areas where direct or indirect impacts of the action may be expected. For example, effects of an action in the headwaters of a stream may affect endangered fish that occur 20 miles downstream. A compilation of listed species or critical habitats that possibly occur in the action area may be generated by the Project Leader, or it may be requested from the appropriate ESO.

Note: All experimental populations of listed species are treated as threatened species. However, for the purposes of intra-Service section 7 consultation, they are treated as species *proposed* for listing if they occur off National Wildlife Refuge or National Park System lands and they are classed as "non-essential" experimental populations.

List all threatened and endangered species and critical habitat that may be affected by the proposed action. An effect exists even if only one individual or habitat segment may be affected. Consider both beneficial and adverse effects, regardless of their magnitude.

It is necessary to list all threatened and endangered species and critical habitats in the action area that will not be affected at any level of significance. This informs the reviewer that such species have been considered.

B. Proposed species and/or proposed critical habitat within the action area: Lists of proposed species and critical habitat that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all species and habitats in the action area for which a proposed listing rule (but not a final rule) or proposed critical habitat designation has been published in the Federal Register. The list

should include not only proposed species that may be affected, but also those that will not be affected. Use the same consideration as in Item III (A) above.

C. Candidate species within the action area: Service actions shall include consideration of candidate species as though proposed for listing. Lists of candidate species that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all candidate species that may be affected by the proposed action. Because listing candidates may be added to, or dropped from, candidate species lists between the typically biannual printings of the Notice of Review, it is necessary to check candidate lists with the appropriate ESO.

Include in the list of candidate species in the action area those that will not be affected by the proposed action.

IV. Geographic area or station name and action:

Briefly describe the proposed action and where it will occur. (For example: The proposed action is to directly stock, or transfer to the State of X for stocking, channel catfish and smallmouth bass. These stockings would occur in both Blue Water and Minnow River drainages). A more detailed description of the proposed action will be presented under Section VI.

V. Location (attach map):

In addition to the following four specific descriptions, it is vital to attach a map(s). The reviewer may not be familiar with the project area and will need the maps to precisely relate the proposed project to the affected species. Maps should depict, preferably in large scale, the exact locations of project elements. The maps should include section, township, and range, or latitude and longitude. Topographic maps are preferred, with the action area depicted on them.

A. Ecoregion Number and Name: Self-explanatory

B. County and State: Self-explanatory.

C. Section, township, and range (or latitude and longitude):

Locate the project area as precisely as possible. If the action is stocking a small stock tank, the descriptor should include at least quarter section and preferably quarter/quarter section. For scattered project sites, such as in fish stocking, a location should be given for each site.

D. Distance (miles) and direction to nearest town: Self-explanatory.

E. Species/habitat occurrence: Depict on the location map the species and habitat occurrences.

VI. Description of proposed action:

What is the purpose of this proposed action and how do you plan to accomplish it? Describe the project area as well as the project. These descriptions should be detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species. Do not assume that the reviewing office will understand procedures that are taken for granted within your program. Details can be provided here, or by attaching copies of project plans, management plans, stocking schedules, or other project documents. National Environmental Protection Act documents are usually helpful attachments. Sketches or blueprints of the proposed action should be attached. Proposed project dates should be provided. Attach a biological assessment if the project is considered a "major construction activity." Include any measures agreed to through informal consultation to reduce any adverse impacts.

VII. Determination of effects

A. Explanation of effects of the action:

Discuss either the effects of the action on each listed, proposed, or candidate species and critical habitat in the action area, or why those species or critical habitats will not be affected. For species or critical habitats affected by the proposed action, provide the following information: [Note: candidate species will have no proposed critical habitat.]

1. Status of species in action area; is it native (natural and/or stocked) or non-native in the action area? Include population and/or distribution trends (provide survey information).
2. Species habitat in the action area and its significance to spawning, feeding, migratory habits (or behavior), cover, roost, etc. Is the area currently occupied or unoccupied historic range for the species?
3. Impacts of the proposed action on species and/or critical habitat, including direct, indirect, interdependent, interrelated, and cumulative impacts.
4. Quantification of effects - acres of habitat, miles of habitat, number of individuals, etc.

5. Summary of effects - include the basis for your conclusion - best judgment, literature,

May affect, and is likely to adversely affect species/adversely modify critical habitat.

This conclusion is reached if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed Service action or its interrelated or interdependent actions, and the effect is not discountable or insignificant (see definition of "is not likely to adversely affect". In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but may also cause some adverse effect on individuals of the listed species or segments of the critical habitat, then the determination should be "is likely to adversely affect." Such a determination requires formal section 7 consultation.

Example: A refuge proposes prescribed burning for a prairie remnant to improve the habitat for the endangered Karner blue butterfly. The burn will substantially improve the habitat for the species and promote its recovery in subsequent years. However, individual Karner blue butterfly eggs and larvae will be killed during the burn. Even though the net effect of the burn will be highly beneficial to the listed species, the burn must be considered to have an adverse effect. A finding of "is likely to adversely affect" is necessary.

B. Proposed species/proposed critical habitat:

No effect on proposed species/no adverse modification of proposed critical habitat.

This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect proposed species or destroy or adversely modify proposed critical habitat. A request for the optional written concurrence is encouraged.

Is likely to jeopardize proposed species/adversely modify proposed critical habitat.

For proposed species and proposed critical habitats, the Service is required to evaluate whether the proposed Service action is likely to jeopardize the continued existence of the proposed species or adversely modify an area proposed for designation as critical habitat. If this conclusion is reached, a section 7 conference is required. If this conclusion is reached, intra-Service conference is required.

C. Candidate species:

No effect on candidate species. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect candidate species. A request for the optional written concurrence is encouraged.

Is likely to jeopardize candidate species. For candidate species, the Service is required to evaluate whether the proposed Service action is likely to jeopardize the continued existence of the candidate species. If this conclusion is reached, intra-Service section 7 conference is required.

APPENDIX C - EXAMPLES OF CONSULTATION

<u>EXAMPLE NUMBER</u>	<u>AGENCY</u>	<u>TYPE OF CONSULTATION</u>
1	NMFS	Reinitiation
2	NMFS	Internal
3	NMFS	Informal
4	NMFS	Jeopardy
5	NMFS & FWS	Joint NMFS & FWS: Combined Biological Opinion and Conference Opinion
6	FWS	Stand Alone Conference
7	FWS	Intra-Service
8	FWS	Intra-Service w/ Conference
9	FWS	No Jeopardy w/ Incidental Take + Plants
10	FWS	Conference on Incremental
11	FWS	Early
12	FWS	Emergency
13	FWS	Sample Administrative Record

[Note: These are not available in electronic format.]

APPENDIX D - FWS SOLICITOR OPINIONS

Secretarial Memoranda

- S-1 Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service Under Section 7 of the Endangered Species Act. Manuel Lujan January 7, 1993.
- S-2 Reaffirmation of above from Bruce Babbitt. April 20, 1993.

Solicitor Opinions

NOTE: Included in this appendix are two lists (SO-A and SO-B) of legal opinions on sections 6, 7, and 9 of the Endangered Species Act, reviewed for a recent FOIA request.

- SO-A Opinions released to the requestors as public documents. These documents may be released to the public.
- SO-B Opinions that were, and are NOT to be, released to the public. If copies of any of these opinions are needed, requests should be sent through the Regional Office.
- SO-1 Fish and Wildlife Service Regulations Defining "Harm" under Section 9 of the Endangered Species Act. April 17, 1981.
- SO-2 HUD Delegation of Endangered Species Act Consultation Requirements. June 9, 1981.
- SO-3 Cumulative Effects to be considered Under Section 7 of the Endangered Species Act. August 27, 1981.
- SO-4 Request for Legal Opinion Concerning Section 7 Consultation for Mining Claim Land Patented by the BLM (Bureau of Land Management) March 1, 1990.
- SO-5 The Legal Sufficiency of the Biological Opinion for Inner-Perimeter Road, Lowndes County, Georgia. July 9, 1992.
- SO-6 Permitted Incidental Take of Migratory Birds Listed Under the Endangered Species Act. February 9, 1996 memo with attached February 5, 1996, opinion.
- SO-7 Conner v. Burford, January 13, 1988.
[Note: These opinions are not available in electronic format.]

APPENDIX E - FWS INTRA-SERVICE CONSULTATION HANDBOOK

ENDANGERED SPECIES ACT

**U.S. FISH AND WILDLIFE SERVICE
FINAL INTRA-SERVICE CONSULTATION HANDBOOK**

U.S. FISH AND WILDLIFE SERVICE

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GOALS

Internal Fish and Wildlife Service (Service) actions involving listed, proposed, and candidate species will promote the conservation of those species to the greatest extent practical under Federal law. Use the Service's Ecosystem Approach to Fish and Wildlife Conservation as the

10. Provide State, tribal and local governments with opportunities to play a greater role in carrying out the Endangered Species Act (Act).

LISTED, PROPOSED, AND CANDIDATE SPECIES INFORMATION

Knowledge of what species occur in an action area, including information on their life histories, is integral to an intra-Service section 7 consultation. Ecological Services Offices (ESOs¹) are responsible for providing lists of endangered, threatened, proposed, and candidate species and critical habitats to Service programs within their jurisdictions. Other Service units with responsibility for managing proposed and candidate species (e.g., Refuges, Fish Hatcheries) are responsible for keeping ESO information bases updated for their lead species and critical habitats.

The Washington Office Division of Endangered Species will ensure that Regional Office endangered species programs are furnished regularly with updated lists of endangered, threatened, proposed, and candidate species and critical habitat designations. Regional Office endangered species programs will provide these lists to all Regional and Field Office programs on a regular basis. Additional species information, such as known species distributions and biological requirements, may be obtained from the ESOs with lead responsibilities for that species. The above responsibilities of the ESOs and other Service units do not remove Project Leaders from the responsibility to assess which listed, proposed, and candidate species occur within action areas, as well as any proposed or designated critical habitat.

FISH AND WILDLIFE SERVICE ACTIONS

Following are examples of Service actions that may be subject to intra-Service section 7 consultation:

¹ In this handbook, "ESO" includes the Regional or Washington Office Division of Endangered Species for intra-Service consultations conducted at those levels.

Ecological Services

- Endangered species recovery plan implementation
- Endangered Species Act section 10 permits ²
- Endangered species Safe Harbor Agreements
- Endangered species Habitat Conservation Plans
- Farm Bill activities
- Partners for Wildlife
- Contaminant cleanup, spills, response activities, remedial actions
- Superfund activities

Section 10(a)(1)(B) permits applications may include species that are not Service listed, proposed or candidate species. In this situation, the biologist conducting the consultation will assess these species in the same way as candidate species, that is, as if they were proposed for listing. They should be included in the incidental take permit, however, only if there is adequate information about the species to determine what the specific project-related effects will be.

Fisheries

- Endangered species recovery plan implementation
- Fisheries and Wildlife Assistance projects
- Hatchery operations, endangered species projects, fish stocking, land acquisition, construction
- Fish management plans

Federal Aid

- Wildlife Restoration Act projects
- Sportfish Restoration Act projects
- Endangered Species Act Section 6 projects (programmatic)
- Clean Vessel Act projects
- National Coastal Wetlands Planning, Protection and Restoration Act

² Service activities such as research, marking, moving, and harassing that directly take endangered and threatened species may require a section 10(a)(1)(A) permit. This permit is subject to section 7 review and may require the issuance of a biological opinion, especially if takings are involved.

projects
Partnerships for Wildlife Act projects

Refuges and Wildlife

Endangered species recovery plan implementation
Refuge operation and maintenance
Refuge habitat management and improvement projects, public use
programs, commercial activities, construction projects, land disposal
North American Waterfowl Management Plan activities
Pest control activities on refuge croplands

All

Information transfer (e.g., a Service publication on use of rotenone
should caution against use where vulnerable listed or candidate species occur) if it
results in effects to listed species
Challenge grants
Partners in Flight

GLOSSARY OF TERMS USED IN INTRA-SERVICE SECTION 7 CONSULTATIONS

The wording of these definitions has been modified slightly from the cited source to reflect an internal Service consultation rather than a consultation between the Service and another Federal agency.

Act - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Action - all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by the Service or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR §402.02]

Action area - all areas to be affected directly or indirectly by the Service action and not merely the immediate area involved in the action. [50 CFR §402.02]

Affect/effect - to affect (a verb) is to bring about a change ("The proposed action is likely to adversely affect piping plovers nesting on the shoreline"). The effect (usually a noun) is the result ("The proposed highway is likely to have the following effects on the Florida scrub

approval or authorization from a Federal agency as a prerequisite to conducting the action. [50 CFR §402.02]

Appreciably diminish the value - to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species. [Clarification of usage]

Best available scientific and commercial data - to assure the quality of the biological, ecological, and other information used in the implementation of the Act, it is the policy of the Service to: (1) evaluate all scientific and other information used to ensure that it is reliable, credible, and represents the best scientific and commercial data available; (2) gather and impartially evaluate biological, ecological, and other information disputing official positions, decisions, and actions proposed or taken by the Service; (3) document their evaluation of comprehensive, technical information regarding the status and habitat requirements for a species throughout its range, whether it supports or does not support a position being proposed as an official agency position; (4) use primary and original sources of information as the basis for recommendations; (5) retain these sources referenced in the official document as part of the administrative record supporting an action; (6) collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies; and (7) require management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Service during their implementation of the Act. [59 FR 34271 (July 1, 1994)]

Biological assessment - information prepared by the Service to determine whether a proposed Service action is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing or are candidates for listing; or (3) adversely modify proposed critical habitat. Biological assessments must be prepared for "major construction activities." The outcome of this biological assessment determines whether formal consultation or a conference is necessary. [50 CFR §402.02, 50 CFR §402.12]

Biological opinion - document which includes: (1) the opinion of the Service as to whether or not a Service action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat. [50 CFR §402.02, 50 CFR §402.14(h)]

Candidate species - plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. These are taxa for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions. [61 FR 7596-7613 (February 28, 1996)]

Conference - a process of early intra-Service cooperation involving informal or formal discussions between one program of the Service and another program of the Service pursuant to section 7(a)(4) of the Act regarding the likely impact of a Service action on proposed species, candidate species, or proposed critical habitat. Conferences are: (1) required for proposed Service actions likely to jeopardize proposed species, candidate species, or destroy or adversely modify proposed critical habitat; (2) designed to help Service programs identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (3) to develop recommendations to minimize or avoid adverse effects to proposed species, candidate species, or proposed critical habitat. [50 CFR §402.02, §402.10]

Conservation - the terms "conserve," "conserving" and "conservation" mean to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the] Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. [ESA §3(3)]

Conservation measures - are actions to benefit or promote the recovery of listed species that are included by the Service as an integral part of the proposed Service action. These conservation measures will be taken by the Service to minimize, or compensate for, project effects on the species under review. These may include actions taken prior to the initiation of consultation, or actions which the Service has committed to complete in a biological assessment or similar document.

Conservation recommendations - the Services' non-binding suggestions resulting from formal or informal consultation that: (1) identify discretionary measures Service programs can

Constituent elements - physical and biological features of designated or proposed critical habitat essential to the conservation of the species, including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographic and ecological distributions of a species. [ESA §3(5)(A)(i), 50 CFR 424.12(b)]

Critical habitat - for listed species consists of: (1) the specific areas within the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements) (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. [ESA §3 (5)(A)] Designated critical habitats are described in 50 CFR §17 and 226.

Cumulative effects - are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Service action subject to consultation. [50 CFR §402.02] This definition applies only to section 7 analyses and should not be confused with the broader use of this term in the National Environmental Policy Act or other environmental laws.

Designated non-Federal representative - the person, agency, or organization designated by the Service as its representative to conduct informal consultation or prepare a biological assessment. The non-Federal representative must be designated by giving written notice to the Director. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and the Service must agree on the choice of the designated non-Federal representative. [50 CFR §402.02, 50 CFR §402.08]

Destruction or adverse modification of critical habitat - a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR §402.02]

Director - the Service's regional director, or his/her respective authorized representative. [50 CFR §402.02]

Distinct Population Segment - "population," or "distinct population segment," are terms with specific meaning when used for listing, delisting, and reclassification purposes to describe a discrete vertebrate stock that may be added or deleted from the list of endangered and threatened species. The use of the term "distinct population segment" will be consistent with the Services' population policy. [61 FR 4722-4725 (February 7, 1996)]

Early consultation - a preliminary consultation requested by the Service on behalf of a

Formal intra-Service consultation - a process between a Service program taking/authorizing an action and another Service program affected by that action that: (1) determines whether a proposed Service action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with the Service program taking the action providing a written request and submittal of a complete initiation package to the affected Service program; and (3) concludes with the issuance of a biological opinion and incidental take statement by the affected Service program. If a proposed Service action may affect a listed species or designated critical habitat, formal intra-Service consultation is required (except when the involved Service programs concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat). [50 CFR §402.02, 50 CFR §402.14]

Habitat Conservation Plan - Under section 10(a)(2)(A) of the Act, a planning document that is a mandatory component of an incidental take permit application, also known as a Conservation Plan.

Incidental take - take of listed fish and wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant. [50 CFR §402.02]

Indirect effects - those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR §402.02]

Informal intra-Service consultation - an optional process that includes all discussions and correspondence between Service programs, prior to formal intra-Service consultation, to determine whether a proposed Service action may affect listed species or critical habitat. This process allows the Service to utilize its in-house expertise to evaluate a Service program's assessment of potential effects or to suggest possible modifications to the proposed action which could avoid potentially adverse effects. If a proposed Service action may affect listed species or designated critical habitat, formal intra-Service consultation is required (except when the involved Service programs concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat). [50 CFR §402.02, 50 CFR §402.13]

Interdependent actions - actions having no independent utility apart from the proposed action. [50 CFR §402.02]

Interrelated actions - actions that are part of a larger action and depend on the larger action for their justification. [50 CFR §402.02]

Is likely to adversely affect - the appropriate finding in a biological assessment (or conclusion during informal consultation) if any adverse effect to listed species may occur as a direct or indirect result of the proposed Service action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial (see definition of "is not likely to adversely affect"). In the event the overall effect of the proposed Service action is beneficial to the listed species, but is also likely to cause some adverse effects, then the proposed Service action "is likely to adversely affect" the listed species. If incidental take is anticipated to occur as a result of the proposed action, an "is likely to adversely affect" determination should be made. An "is likely to adversely affect" determination requires the initiation of formal intra-Service section 7 consultation. [Clarification of usage]

Is likely to jeopardize proposed or candidate species/adversely modify proposed critical habitat - the appropriate conclusion when the Service identifies situations where the proposed Service action is likely to jeopardize the continued existence of a species proposed for listing or a candidate species, or adversely modify an area proposed for designation as critical habitat. If this conclusion is reached, intra-Service conference is required.

Is not likely to adversely affect - the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial. **Beneficial effects** are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. [Clarification of usage]

Jeopardize the continued existence of - to engage in an action that reasonably 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]

Letter - refers to all written correspondence, such as letters, memoranda, or electronic mail messages relating to a formal or informal consultation. [Clarification of usage]

Listed species - any species of fish, wildlife or plant which has been determined to be endangered or threatened under section 4 of the Act. [50 CFR §402.02]

Major construction activity - a construction project (or other undertaking having similar physical effects) which is a major Federal action significantly affecting the quality of the

May affect - the appropriate conclusion when a proposed action may pose **any** effects on listed species or designated critical habitat. When the Federal agency (in this case the Service) proposing the action determines that a "may affect" situation exists, then the Service must then either initiate formal consultation or seek written concurrence from the involved Service

modify designated critical habitat. Other paragraphs of this section establish the requirement to conduct conferences on proposed species and candidate species; allow applicants to initiate early consultation; require FWS and NMFS to prepare biological opinions and issue incidental take statements. Section 7 also establishes procedures for seeking exemptions from the requirements of section 7(a)(2) from the Endangered Species Committee. [ESA §7]

Section 7 consultation - the various section 7 processes, including both consultation and conference if proposed or candidate species are involved. [50 CFR §402]

Section 9 - the section of the Endangered Species Act of 1973, as amended, that prohibits the taking of endangered species of fish and wildlife. Additional prohibitions include: (1) import or export of endangered species or products made from endangered species; (2) interstate or foreign commerce in listed species or their products; and (3) possession of unlawfully taken endangered species. [ESA §9]

Section 10 - the section of the Endangered Species Act of 1973, as amended, that provides exceptions to section 9 prohibitions. The exceptions most relevant to section 7 consultations are takings allowed by two kinds of permits issued by the Service: (1) scientific take permits and (2) incidental take permits. The Service can issue permits to take listed species for scientific purposes, or to enhance the propagation or survival of listed species. The Service can also issue permits to take listed species incidental to otherwise legal activity. [ESA §10]

Service - the U.S. Fish and Wildlife Service.

Species - includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. [ESA §3(16)]

Survival - For determination of **jeopardy/adverse modification**: the species' persistence as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow for the potential recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter. [Clarification of usage]

Take - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. [ESA §3(19)] **Harm** is further defined by the Service to

include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. **Harass** is defined by the Service as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. [50 CFR §17.3]

Threatened species - any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. [ESA §3(20)]

Unoccupied critical habitat - critical habitat not occupied (i.e., not permanently or seasonally occupied) by the listed species at the time of the project analysis. The habitat may be suitable, but the species has been extirpated from this portion of its range. Conversely, critical habitat may have been designated in areas unsuitable for the species, but restorable to suitability with proper management, if the area is necessary to either stabilize the population or assure eventual recovery of a listed species. As recovery proceeds, this formerly unoccupied habitat may become occupied.

Some designated, unoccupied habitat may never be occupied by the species, but was designated because it is essential for conserving the species because it maintains factors constituting the species' habitat. For example, critical habitat may be designated for an upstream area maintaining the hydrology of the species' habitat downstream. [Clarification of usage]

Wildlife - See "fish or wildlife".

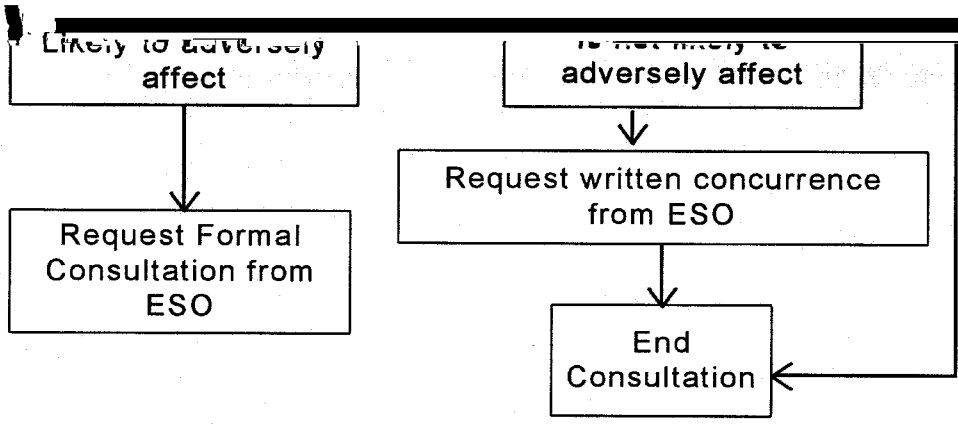
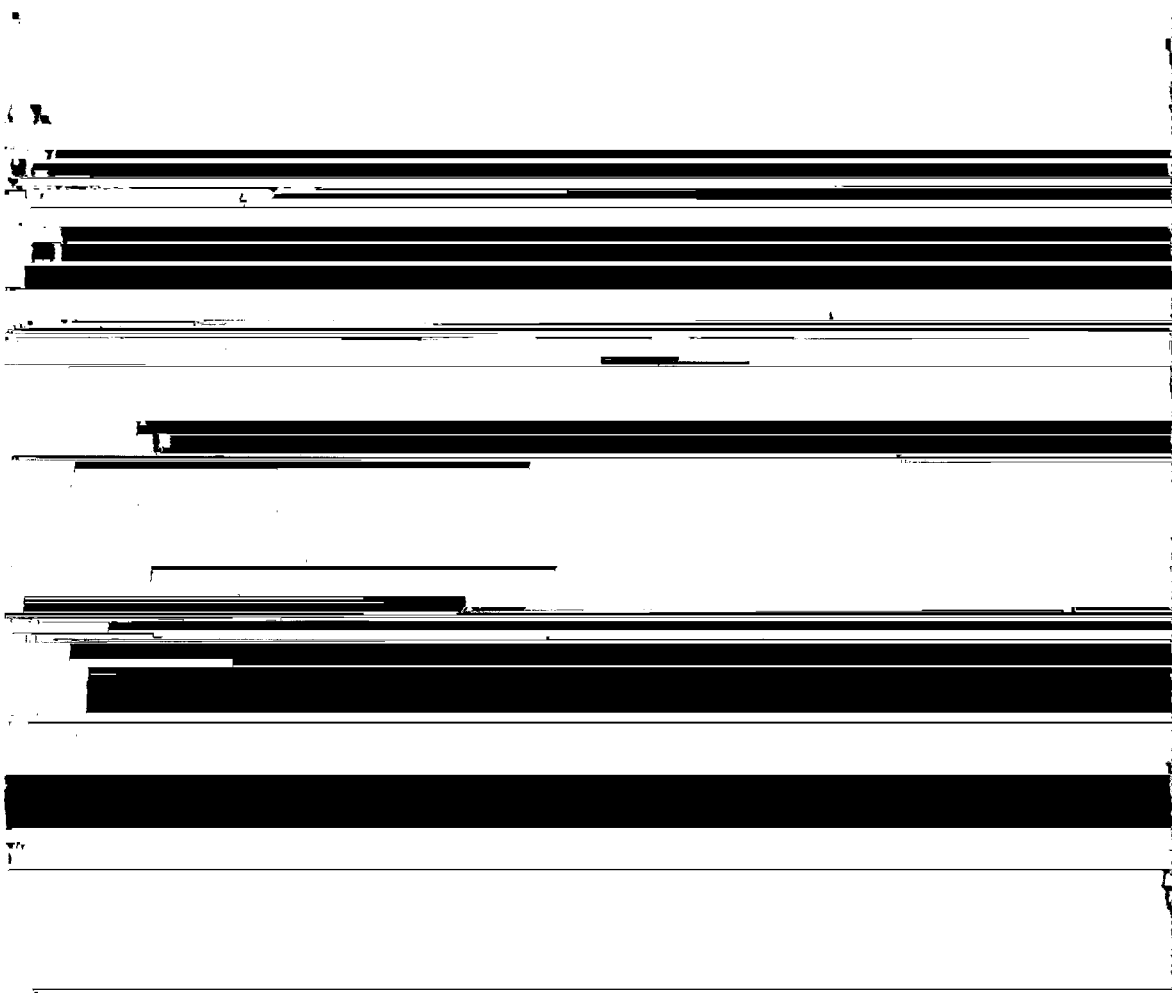
BASIC PROCEDURES AND RESPONSIBILITIES

The timeframes and data requirements in the following procedures are the same for all Federal agencies, and follow the section 7 consultation regulations at 50 CFR §402, except that as an internal policy established by the Director, Service actions shall include consideration of candidate species as though proposed for listing.

Ask yourself the following:

(1) IS THERE A FEDERAL ACTION?

Figure E-1. Intra-Service Consultation or Conference Process.



(3) IS THE PROPOSED FEDERAL ACTION A MAJOR CONSTRUCTION ACTIVITY?

Major construction activities include dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such projects that modify the physical environment and that constitute major Federal actions. Major construction activities do not include those activities that are exempted from NEPA review as a categorical exclusion for the Service under 516 DM 2.3A(2). As a rule of thumb, if an Environmental Impact Statement is required for the proposed action and construction-type impacts are involved, it is

If a listed, proposed, or candidate species, its habitat, or proposed or designated critical habitat is present, the Project Leader should determine whether the action "may affect" those species or habitat or may destroy or adversely modify critical habitat. Completing the

area to determine species' presence and status, seasonal use pattern, condition of the species' habitat, juxtaposition to the action/activity, etc.

(5) WHAT ARE THE OPTIONS FOR "MAY AFFECT" SITUATIONS?

When the Project Leader determines the action "may affect" a listed species, a designated or proposed critical habitat, or proposed or candidate species, the options are (1) to continue informal consultation with the ESO or (2) to initiate formal consultation or conference. The "may affect" evaluation looks not only at effects on the entire species or local management unit, but also considers the effect on individual members of the species. If even one individual may be affected, the biologist must conclude that there is a "may affect" situation. Project modifications agreed upon during informal consultation may result in a "no effect" determination, thus eliminating the need for formal consultation or conference.

When the Project Leader finds that the proposed action may affect, but is "not likely to adversely affect," listed, proposed, or candidate species, or designated or proposed critical habitats, a request for concurrence with that finding is sent to the appropriate ESO. The Project Leader can make such a finding only if all of the effects of the proposed action will be discountable, insignificant, or completely beneficial (see definition of "is not likely to adversely affect"). A copy of the Service Evaluation Form supporting the Project Leader's determination should be forwarded to the appropriate ESO within 30 days of that determination. The ESO will respond to the Project Leader's written request for concurrence within 30 days of receiving the request. Concurrence with the "not likely to adversely affect" finding completes the requirements for intra-Service section 7 consultation. If any adverse effect or any incidental take of listed species or critical habitat is likely to occur, formal consultation must be initiated; if any candidate or proposed species are likely to be jeopardized and if proposed critical habitat may be adversely modified, then conference is required.

Formal consultation must be conducted prior to issuing permits for the incidental take of listed species, even for activities conducted during recovery efforts for these species. These permits must include appropriate conditions to avoid or minimize incidental take, and to ensure the disposition of any dead or injured specimens in a way that preserves their potential use in other recovery activities.

(6) WHAT ARE THE PROCEDURES FOR FORMAL CONSULTATION OR FORMAL CONFERENCE?

proposed action. The Service also recommends that the biologist(s) that conduct the section 7 consultation and the biologist that provide technical assistance to the applicant, if any, should not have the same supervisor. This will help prevent any unintentional biases being shared in the development of the proposed action and the biological opinion. The biological

**EXAMPLES OF STEP-BY-STEP PROCEDURES FOR INTRA-SERVICE
SECTION 7 CONCURRENCE, FORMAL CONSULTATION, AND CONFERENCE**

A. Intra-Service Section 7 Concurrence

Situation: The Division of Federal Aid (FA) receives a project proposal from a State. The

B. Intra-Service Section 7 Formal Consultation

Situation: The Division of Fisheries (DF) receives a request from a State for an action.

Step:

1. The Project Leader assesses which listed, proposed, candidate species and proposed or designated critical habitats may occur within action areas. To assist in this determination DF may request a list of listed, proposed, and candidate species from the ESO. This request includes information on the specifics of the State request.
2. Within 30 days of receiving the request, the ESO furnishes DF with a list of species that may be present in the action area.
- 3.

determination, Refuges may request a list of listed, proposed, and candidate species from the ESO. This request includes information on the specifics of the request.

2. Within 30 days of receiving the request, the ESO furnishes Refuges with a list of species that may be present in the action area.
3. Upon receiving any requested species information, Refuges conducts a "may affect" analysis on listed, proposed, and candidate species that ESO said may be present.
4. Refuges works with the ESO to assess whether or not their proposed action may jeopardize the continued existence of the proposed or candidate species. Refuges evaluates their proposal for its potential effect on the proposed or candidate species.
5. As a result of the evaluation, Refuges concludes their proposal is likely to jeopardize the proposed or candidate species. Refuges requests conference with ESO on the Service Evaluation Form and asks for additional information.
6. The conference is held and ESO submits a draft conference report (the format follows that of a biological opinion issued through formal consultation) to the ARD/ES for review. The report contains advisory recommendations for minimizing or avoiding adverse effects.
7. The Regional Director signs the conference report and forwards it to Refuges with a copy to the ARD/Refuges. Refuges reviews the conference opinion and implements the actions that will avoid adverse effects to the proposed or candidate species.

INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM

[Note: This form provides the outline of information needed for intra-Service consultation. If additional space is needed, attach additional sheets, or set up this form to accommodate your responses.]

Originating Person:

Telephone Number:

Date: _____

I. Region:

II. Service Activity (Program)

III. Pertinent Species and Habitat:

A. Listed species and/or their critical habitat within the action area:

B. Proposed species and/or proposed critical habitat within the action area

C. Candidate species within the action area:

D. Include species/habitat occurrence on a map.

IV.

C. Section, township, and range (or latitude and longitude):

D. Distance (miles) and direction to nearest town:

E. Species/habitat occurrence:

VI. Description of proposed action (attach additional pages as needed):

VII. Determination of effects:

A. Explanation of effects of the action on species and critical habitats in items III. A, B, and C (attach additional pages as needed):

B. Explanation of actions to be implemented to reduce adverse effects:

VIII. Effect determination and response requested: [* = optional]

A. Listed species/designated critical habitat:

Determination

Response requested

no effect/no adverse modification

(species: _____) _____ *Concurrence

may affect, but is not likely to adversely

affect species/adversely modify critical habitat

(species: _____) _____ Concurrence

may affect, and is likely to adversely

affect species/adversely modify critical habitat

(species: _____) _____ Formal Consultation

B. Proposed species/proposed critical habitat:

Determination

Response requested

**no effect on proposed species/no adverse
modification of proposed critical habitat
(species: _____)_____ *Concurrence**

**is likely to jeopardize proposed species/
adversely modify proposed critical habitat
(species: _____)_____ Conference**

C. Candrdrdr_____sev.

signature
date
[Title/office of reviewing official]

INSTRUCTIONS

Originating Person: The person(s) or unit (field office, refuge, program) proposing an action for which the Intra-Service Section 7 Biological Evaluation Form is being prepared.

Date: Date the information on the form was finalized.

I. Region: The Region in which the proposed action will occur.

II. Service activity: The Service program initiating the proposed action.

III. Pertinent species and habitat.

A. Listed species and/or their critical habitat within the action area: The action area includes the immediate area where the proposed action will occur, as well as any other areas where direct or indirect impacts of the action may be expected. For example, effects of an action in the headwaters of a stream may affect endangered fish that occur 20 miles downstream. A compilation of listed species or critical habitats that possibly occur in the action area may be generated by the Project Leader, or it may be requested from the appropriate ESO.

Note: All experimental populations of listed species are treated as threatened species. However, for the purposes of intra-Service section 7 consultation, they are treated as species *proposed* for listing if they occur off National Wildlife Refuge or National Park System lands and they are classed as "non-essential" experimental populations.

List all threatened and endangered species and critical habitat that may be affected by the proposed action.

Register. The list should include not only proposed species that may be affected, but also those that will not be affected. Use the same consideration as in Item III (A) above.

C. Candidate species within the action area: Service actions shall include consideration of candidate species as though proposed for listing. Lists of candidate species that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all candidate species that may be affected by the proposed action. Because listing candidates may be added to, or dropped from, candidate species lists between the typically biannual printings of the Notice of Review, it is necessary to check candidate lists with the appropriate ESO.

Include in the list of candidate species in the action area those that will not be affected by the proposed action.

IV. Geographic area or station name and action:

Briefly describe the proposed action and where it will occur. (For example: The proposed action is to directly stock, or transfer to the State of X for stocking, channel catfish and smallmouth bass. These stockings would occur in both Blue Water and Minnow River drainages). A more detailed description of the proposed action will be presented under Section VI.

V.

C. Section, township, and range (or latitude and longitude):

Locate the project area as precisely as possible. If the action is stocking a small stock tank, the descriptor should include at least quarter section and preferably quarter/quarter section. For scattered project sites, such as in fish stocking, a location should be given for each site.

D. Distance (miles) and direction to nearest town: Self-explanatory.

E. Species/habitat occurrence: Depict on the location map the species and habitat occurrences.

VI. Description of proposed action:

What is the purpose of this proposed action and how do you plan to accomplish it? Describe the project area as well as the project. These descriptions should be detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species. Do not assume that the reviewing office will understand procedures that are taken for granted within your program. Details can be provided here, or by attaching copies of project plans, management plans, stocking schedules, or other project documents. National Environmental Protection Act documents are usually helpful attachments. Sketches or blueprints of the proposed action should be attached. Proposed project dates should be provided. Attach a biological assessment if the project is considered a "major construction activity." Include any measures agreed to through informal consultation to reduce any adverse impacts.

VII. Determination of effects

A. Explanation of effects of the action:

Discuss either the effects of the action on each listed, proposed, or candidate species and critical habitat in the action area, or why those species or critical habitats will not be affected. For species or critical habitats affected by the proposed action, provide the following information: [Note: candidate species will have no proposed critical habitat.]

- (1) Status of species in action area; is it native (natural and/or stocked) or non-native in the action area? Include population and/or distribution trends (provide survey information).

- (2) Species habitat in the action area and its significance to spawning, feeding, migratory habits (or behavior), cover, roost, etc. Is the area currently occupied or unoccupied historic range for the species?
- (3) Impacts of the proposed action on species and/or critical habitat, including direct, indirect, interdependent, interrelated, and cumulative impacts.
- (4) Quantification of effects - acres of habitat, miles of habitat, number of individuals, etc.
- (5) Summary of effects - include the basis for your conclusion - best judgment, literature, citations, studies, etc.

B. Describe, if known, project modifications that would promote the conservation of the affected species. Project modification ideas may be found in recovery plans. Although section 7 of Act prohibits only those actions by Federal agencies which are likely to jeopardize listed species or adversely modify critical habitat, the Service has a commitment to recovering listed species and trying to prevent the need to list additional species.

VIII. Effect determination and response requested:

Enter the species in the appropriate determination. For each determination, place an X on the response requested.

A. Listed species/critical habitat:

No effect/no adverse modification. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat. Formal section 7 consultation is not required when the no effect conclusion is reached. However, a request for the optional written concurrence is encouraged to facilitate a complete administrative record.

May Affect, but is not likely to adversely affect species/adversely modify critical habitat. This conclusion is appropriate when effects to the species or critical habitat are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to

occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. If the ESO concurs in writing with the Project Leader's determination of "is not likely to adversely affect" listed species or critical habitat, the intra-Service section 7 consultation process is completed.

If formal section 7 consultation is required for other species affected by this proposed action, then it may be easier and less confusing to fold the "is not likely to adversely affect" concurrence into the formal section 7 consultation rather than doing a separate concurrence.

May affect, and is likely to adversely affect species/adversely modify critical habitat. This conclusion is reached if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed Service action or its interrelated or interdependent actions, and the effect is not discountable, insignificant or beneficial (see definition of "is not likely to adversely affect". In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but may also cause some adverse effect on individuals of the listed species or segments of the critical habitat, then the determination should be "is likely to adversely affect." Such a determination requires formal section 7 consultation.

Example: A refuge proposes prescribed burning for a prairie remnant to improve the habitat for the endangered Karner blue butterfly. The burn will substantially improve the habitat for the species and promote its recovery in subsequent years. However, individual Karner blue butterfly eggs and larvae will be killed during the burn. Even though the net effect of the burn will be highly beneficial to the listed species, the burn must be considered to have an adverse effect. A finding of "is likely to adversely affect" is necessary.

B. Proposed species/proposed critical habitat:

No effect on proposed species/no adverse modification of proposed critical habitat. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect proposed species or proposed critical habitat. A request for the optional written concurrence is encouraged.

Is likely to jeopardize proposed species/adversely modify proposed critical habitat. For proposed species and proposed critical habitats, the Service is required to evaluate whether the proposed Service action is likely to jeopardize the continued existence of the proposed species or adversely modify an area proposed for designation as critical

habitat. If this conclusion is reached, a section 7 conference is required. If this conclusion is reached, intra-Service conference is required.

C. Candidate species:

No effect on candidate species. This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect candidate species. A request for the optional written concurrence is encouraged.

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**APPENDIX F - FWS/NMFS REGIONAL & FIELD OFFICES
HANDLING SECTION 7 CONSULTATIONS**

<p>Field Supervisor U.S. Fish and Wildlife Service Barstow Field SubOffice 222 East Main St., Suite 202 Barstow, California 92311</p> <p>Telephone: (619) 255-8801 Fax: (619) 255- 8845</p>	<p>WWO Supervisor U.S. Fish and Wildlife Service N. Pacific Coast Ecoregion - Western Washington Office 510 Desmond Drive, SE, Suite 101 Lacey, Washington 98503-1273</p> <p>Telephone: (360) 753-9440 Fax: (360) 753-9008</p>
<p>Field Supervisor Coastal California Fish and Wildlife Office U.S. Fish and Wildlife Service 1125 16th Street, Room 209 Arcata, California 95521-5582</p> <p>Telephone: (707) 822-7201 Fax: (707) 822-8411</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Upper Columbia River Basin Field Office 11103 E. Montgomery Drive, Suite 2 Spokane, Washington 99206</p> <p>Telephone: (509) 891-6839 Fax: (509) 891-6748</p>
<p>Field Supervisor Klamath River Fish and Wildlife Office U.S. Fish and Wildlife Service 1215 South Main, Suite 212 (P.O. Box 1006) Yreka, California 96097-1006</p> <p>Telephone: (916) 842-5763 Fax: (916) 842-4517</p>	<p>State Supervisor U.S. Fish and Wildlife Service Snake River Basin Field Office 1387 S. Vinnell Way, Room 368 Boise, Idaho 83709</p> <p>Telephone: (208) 378-5243 Fax: (208) 378-5262</p>
<p>Field Supervisor Northern Central Valley Fish and Wildlife Office U.S. Fish and Wildlife Service 10950 Tyler Road (P.O. Box 667) Red Bluff, California 96080</p> <p>Telephone: (916) 527-3043 Fax: (916) 529-0292</p>	<p>State Supervisor U.S. Fish and Wildlife Service Nevada State Office 1340 Financial Boulevard, Suite 234 Reno, Nevada 89502</p> <p>Telephone: (702) 861-6300 Fax: (702) 861-6301</p>

<p>U.S. Fish and Wildlife Service Big Island Office Box 44, Building 343 Hawaii Volcanoes, Hawaii 96718</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Hawaii Field Office</p>

Region 2: AZ, NM, OK, TX

Regional Director

<p>Field Supervisor U.S. Fish and Wildlife Service Oklahoma Field Office 222 South Houston, Suite A Tulsa, Oklahoma 74127-8909</p> <p>Telephone: (918) 581-7458 Fax: (918) 581-7467</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Clear Lake Field Office 17629 El Camino Real, Suite 211 Houston, Texas 77058</p> <p>Telephone: (713) 286-8282 Fax: (713) 488-5882</p>
<p>Field Supervisor U.S. Fish and Wildlife Service Austin Field Office 10711 Burnet Road, Suite 200 Austin, Texas 78758</p> <p>Telephone: (512) 490-0057 Fax: (512) 490-0978</p>	

Region 3

<p>Field Supervisor U.S. Fish and Wildlife Service Columbia Field Office 608 E. Cherry Street, Room 200 Columbia, Missouri 65201-7712</p> <p>Telephone: (573) 876-1911 Fax: (573) 876-1914</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Reynoldsburg Field Office 6950 Americana Parkway, Suite H Reynoldsburg, Ohio 43068-4132</p> <p>Telephone: (614) 469-6923 Fax: (614) 469-6919</p>
<p>Field Supervisor U.S. Fish and Wildlife Service Bloomington Field Office 620 South Walker Street Bloomington, Indiana 47403-2121</p> <p>Telephone: (812) 334-4261 Fax: (812) 334-4273</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Northern Indiana Sub-Office 120 South Lake Street, Suite 230 Warsaw, Indiana 46580</p> <p>Telephone: (219) 269-7640 Fax: (219) 269-7432</p>

Region 4

<p>Field Supervisor U.S. Fish and Wildlife Service Vero Beach Field Office 1360 U.S. Highway 1, # 5 (P.O. Box 2676) Vero Beach, Florida 32961-2676</p> <p>Telephone: (561) 562-3909 Fax: (561) 562-4288</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Cookeville Field Office 446 Neal Street Cookeville, Tennessee 38501</p> <p>Telephone: (615) 528-6481 Fax: (615) 528-7075</p>
<p>Field Supervisor U.S. Fish and Wildlife Service Brunswick Field Office 4270 Norwich Street Brunswick, Georgia 31520-2523</p> <p>Telephone: (912) 265-9336 Fax: (912) 265-1061</p>	

<p>Senior Biologist U.S. Fish and Wildlife Service Long Island Field Office 500 Saint Marks Lane (P.O. Box 608) Islip, New York 11751 (-0608)</p> <p>Telephone: (516) 581-2941 Fax: (516) 581-2972</p>	<p>Project Leader U.S. Fish and Wildlife Service Southwestern Virginia Field Office 322 Cummings Street, Suite B (P.O. Box 2345) Abingdon, Virginia 24212</p> <p>Telephone: (703) 623-1233 Fax: (703) 623-1185</p>
<p>Project Leader U.S. Fish and Wildlife Service New Jersey Field Office 927 North Main St. Bldg. D-1 Pleasantville, New Jersey 08232</p> <p>Telephone: (609) 646-0620 Fax: (609) 646-0352</p>	<p>Project Leader U.S. Fish and Wildlife Service West Virginia Field Office Route 250, South Elkins Shopping Plaza (P.O. Box 1278) Elkins, West Virginia 26241</p> <p>Telephone: (304) 636-6586 Fax: (304) 636-7824</p>

Region 6

<p>Sub-Office Coordinator U.S. Fish and Wildlife Service Kalispell Sub-Office 780 Creston Hatchery Road Kalispell, Montana 59901</p> <p>Telephone: (406) 758-6868 Fax: (406) 758-6877</p>	<p>U.S. Fish and Wildlife Service Colorado River Recovery Office 134 Union Boulevard, Room 440 (P.O. Box 25486, Denver Federal Center) Lakewood, Colorado 80228</p> <p>Telephone: (303) 236-2985 Fax: (303) 236-0027</p>
<p>Grizzly Bear Recovery Coord. U.S. Fish and Wildlife Service Forestry Sciences Lab University of Montana Missoula, Montana 59812</p> <p>Telephone: (406) 329-3223 Fax: (406) 329-3212</p>	<p>Asst. Field Supervisor U.S. Fish and Wildlife Service Western Colorado Field Office 764 Horizon Drive South, Annex A Grand Junction, Colorado 81506-3946</p> <p>Telephone: (970) 243-2778 Fax: (970) 245-6933</p>
<p>Field Supervisor U.S. Fish and Wildlife Service North Dakota Field Office 1500 Capital Avenue Bismarck, North Dakota 58501-2096</p> <p>Telephone: (701) 250-4481 Fax: (701) 250-4400</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Nebraska Field Office 203 West Second Street Federal Building, 2nd Floor Grand Island, Nebraska 68801-5907</p> <p>Telephone: (308) 382-6468 Fax: (308) 384-8835</p>
<p>Field Supervisor U.S. Fish and Wildlife Service South Dakota Field Office 420 South Garfield Avenue Suite 400 Pierre, South Dakota 57501-5408</p> <p>Telephone: (605) 224-8693 Fax: (605) 224-9974</p>	<p>Field Supervisor U.S. Fish and Wildlife Service Kansas Field Office 315 Houston Street, Suite E Manhattan, Kansas 66502-6172</p> <p>Telephone: (913) 539-3474 Fax: (913) 539-8567</p>

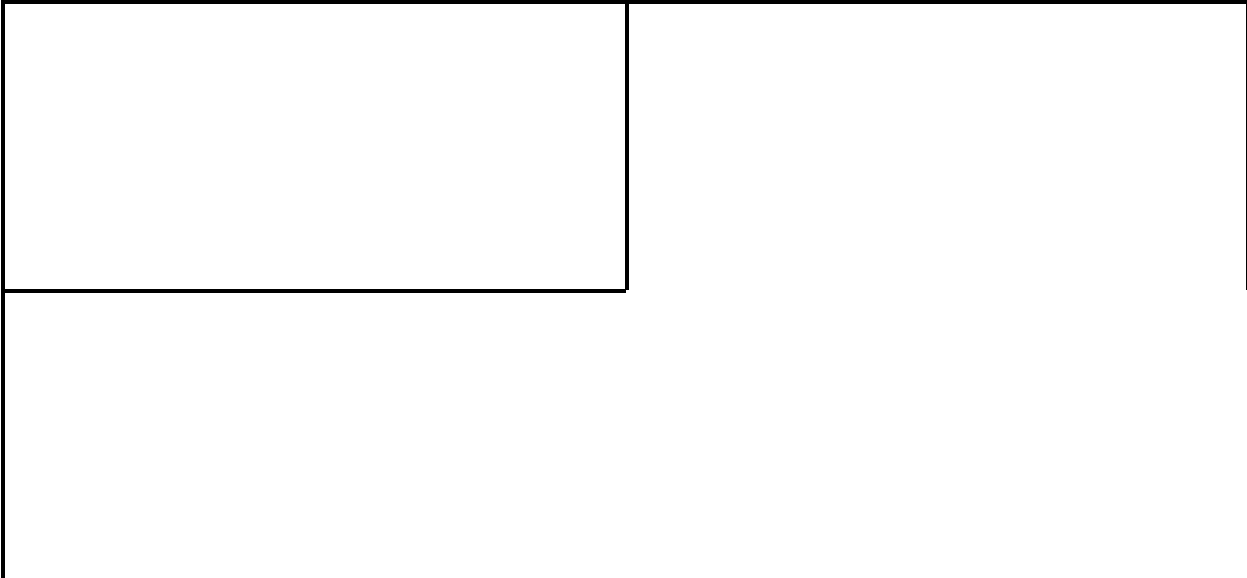
<p>Field Supervisor U.S. Fish and Wildlife Service Wyoming Field Office 4000 Morrie Avenue Cheyenne, Wyoming 82001</p> <p>Telephone: (307) 772-2374 Fax: (307) 772-2358</p>	
<p>U.S. Fish and Wildlife Service Black Footed Ferret Office 410 Grand Avenue, Suite 315 Laramie, Wyoming 80270</p> <p>Telephone: (307) 721-8805 Fax: (307) 742-4226</p>	

Region 7: AK

Regional Director
 U.S. Fish and Wildlife Service
 1011 East Tudor Road
 Anchorage, Alaska 99503

Telephone: (907) 786-3542
 Fax: (907) 786-3350

Field Supervisor U.S. Fish and Wildlife Service Anchorage Field Office 605 West 4th Avenue, Room G-62 Anchorage, Alaska 99501 (907) 786-3350 (F-16) Tj 11160U6-14.4 801-2842 TD - Tc 0.k0i035 Tc70e0100sor) Tj 68 Tc	Field Supervisor U.S. Fish and Wildlife Service Juneau Field Office 300 Vintage Boulevard, Suite 201 Juneau, Alaska 99801 (907) 586-3244 (U.S. Fish and Wildlife Se024 586.32 4
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Northwest Region: CO, ID, MT, ND, OR, SD, UT, WA, WY

Northwest Regional Office
 National Marine Fisheries Service
 7600 Sand Point Way, N.E.
 BINC 15700 Building 1
Seattle, Washington 98115-0070

Telephone: (206) 526-6150
 Fax: (206) 526-6426

<p>Protected Species Program Northwest Region National Marine Fisheries Service 525 N.E. Oregon Street Portland, Oregon 97232-2737</p> <p>Telephone: (503) 230-5400 Fax: (503) 230-5435</p>	<p>Olympia Field Office National Marine Fisheries Service 510 Desmond Drive, S.E. Suite 103 Lacey, Washington 98503</p> <p>Telephone: (360) 753-5827 Fax: (360) 753-9517</p>
<p>Dalles Field Office National Marine Fisheries Service 2325 River Road, # 4 The Dalles, Oregon 97058</p> <p>Telephone: (541) 296-8989 Fax: (541) 296-8717</p>	<p>Boise Field Office National Marine Fisheries Service 1387 South Vinnell Way Suite 377 Boise, Idaho 83709</p> <p>Telephone: (208) 378-5734 Fax: (208) 378-5699</p>
<p>Roseburg Field Office National Marine Fisheries Service 2900 Stewart Parkway, N.W. Roseburg, Oregon 97470</p> <p>Telephone: (541) 957-3383 Fax: (541) 957-3386</p>	

Alaska Region: AK

Alaska Regional Office
National Marine Fisheries Service
709 W. 9th Street, Federal Bldg. 461
Juneau, Alaska 99802-1668

Telephone: (907) 586-7235
Fax: (907) 586-7012

Anchorage Field Office
National Marine Fisheries Service
Federal Building
222 West 7th Avenue, # 43
Anchorage, Alaska 99513-7577

Telephone: (907) 271-5006
Fax: (907) 271-3030

APPENDIX G - EXEMPTION PROCESS

The Section 7 Exemption Process

To respond to situations where Federal agency actions would be prevented from going forward due to the "jeopardy" prohibition of section 7(a)(2) without further opportunity for review, Congress added an exemption procedure through the 1978 Amendments to the Act. That procedure was substantially amended through the Endangered Species Act Amendments of 1979 and 1982; implementing regulations have been codified at 50 CFR §§450-453.

The following summarizes the exemption process.

1. Federal actions subject to the exemption process

Any Federal action which, after consultation under section 7 of the Act, has resulted in a biological opinion which concludes that the action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat of a listed species, may pursue an exemption.

2. Initiating the exemption process

Following completion of formal consultation, the Federal agency, the Governor of the State in which the action is proposed, or the permit or license applicant may initiate the exemption process. A "permit or license applicant" is defined by the Act as the person whose application to a Federal agency for a permit or license has been denied primarily because of the application of section 7(a) to that agency action.

Within the Department of the Interior, the exemption process is administered by the Assistant Secretary for Policy, Management and Budget, rather than the FWS.

3. Prerequisites for consideration

In order to be accepted for consideration, an application must satisfy the following conditions. The Federal agency and the applicant must have:

-

- conducted any required biological assessment; and
- refrained from making any irreversible or irretrievable commitment of resources during consultation.

4. Exemption process

- a. An application for exemption is filed within 90 days of completion of consultation (for Federal agencies) or within 90 days of completion of the agency's final formal action on the permit or license (for non-Federal applicants).
- b. The Secretary of the Interior (or Commerce) conducts a threshold review of the application to determine whether the prerequisites for consideration have been met (20 days or longer if agreed to by the exemption applicant). Any negative finding made by the Secretary on the threshold review would constitute final agency action and terminate the exemption process.
- c. If the applicant passes the threshold review, the appropriate Secretary then holds a Administrative Procedure Act formal hearing on the application (presided over by an Administrative Law Judge). The purpose of the hearing is to allow the submission of appropriate evidence and the compilation of the agency record. The Secretary submits a report to the Committee within 140 days (or longer if agreed to by the exemption applicant) of the initial determination. The Secretary's report to the Committee must consider the following:
 - the availability of reasonable and prudent alternatives, the nature and extent of benefits of the agency action, and alternative courses of action consistent with conservation of the species or critical habitat;
 - a summary of evidence concerning whether the agency action is in the public interest and is of national or regional significance;
 - appropriate reasonable mitigation and enhancement issues to be considered by

- an application filed relative to dredging in the Suwannee River was withdrawn when it was determined that the contractor filing the request did not represent the applicant involved; and
- a barge fleeting permit on the Ohio River was withdrawn by the applicant prior to the administrative hearing.

One application was denied.

- 25 farmers applied for an exemption for the Montgomery County Conservation District.

The Committee must grant an exemption if the Secretary of Defense finds it is necessary for reasons of national security, and the President may grant an exemption to restore public facilities in declared natural disaster areas under certain circumstances.

An exemption cannot be granted if the Secretary of State finds that such an action would be a violation of an international treaty or other obligation of the United States.

APPENDIX H - INTERAGENCY MOA ON STREAMLINED CONSULTATIONS

NOTE: The MOA had not been signed when this handbook went to print. A copy of the signed MOA will be provided for insertion as Appendix H.