

Module 2: MSA and Other Applicable Laws



Endangered Species Act

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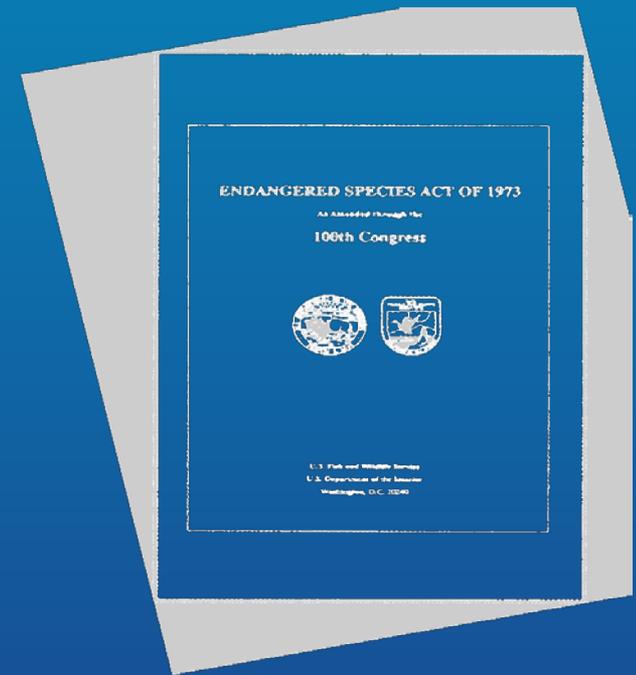
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The Endangered Species Act

- Focuses on protecting species in their natural environments
- Gives joint authority to the National Marine Fisheries Service and the US Fish and Wildlife Service



Purposes of the Endangered Species Act



- provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved ...
- provide a program for the *conservation* of such endangered species and threatened species ... Section 2(b) of the Endangered Species Act



Pertinent Sections of the Endangered Species Act



- **ESA Section 6** - Federal funding, provided in the form of state grants, can be used to support management, research, monitoring and outreach projects that have direct conservation benefits for listed species, recently de-listed species, and candidate species that reside within that State.
- **ESA Section 10**
 - **Section 10(a)(1)(A)** - Permits for scientific research or to enhance the propagation and survival of the species
 - **Section 10(a)(1)(B)** - Permits for taking species incidental to (not the purpose of) an otherwise lawful activity . The latter must be accompanied by a Conservation Plan (CP), often referred to as a Habitat Conservation Plan (HCP).
- **ESA Section 7**

Why Does a Federal Action Agency Consult under the ESA?



- Affirmative Conservation Mandate
- Section 7(a)(1) – Federal agencies shall use their authorities to carry out their programs for the conservation of endangered and threatened species

Why Does a Federal Action Agency Consult under the ESA?



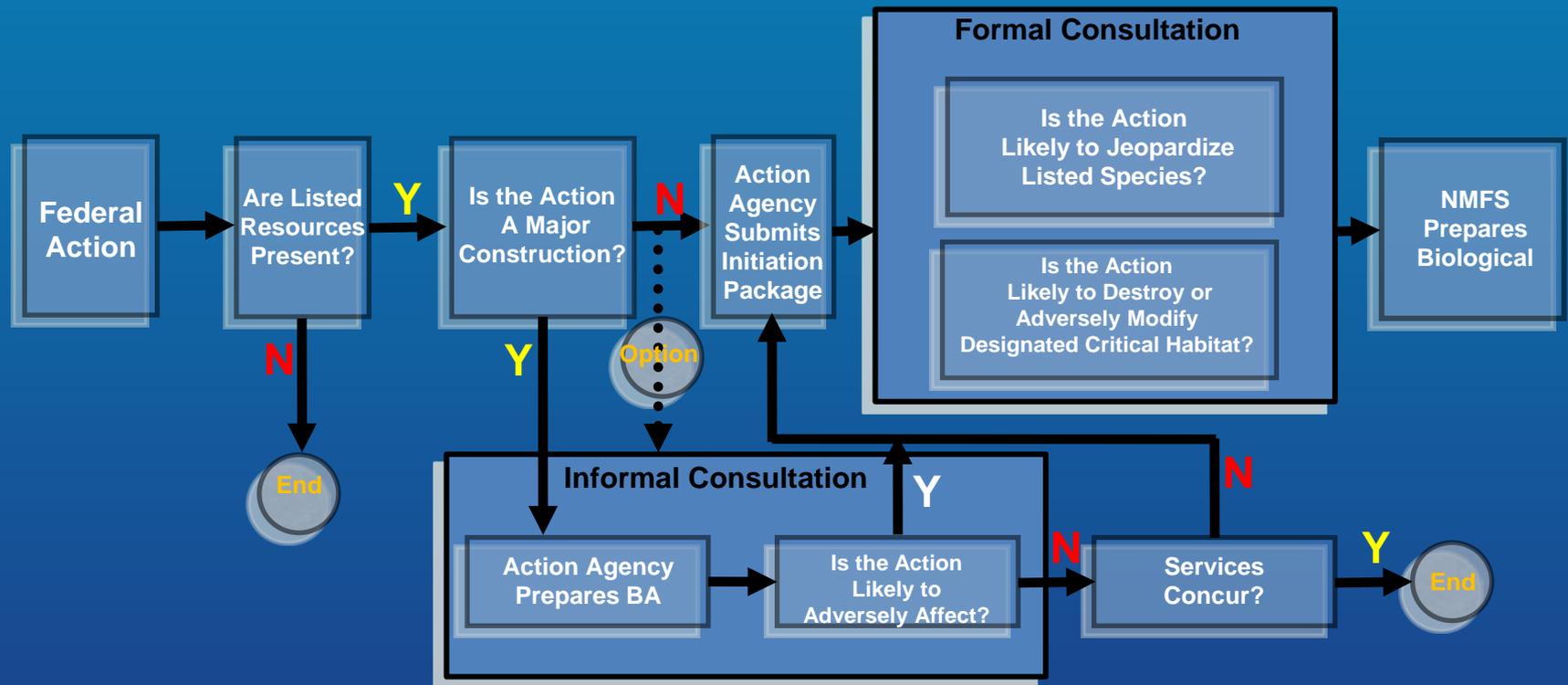
- The Legal Trigger – The Federal Action Agency has a duty to Avoid Jeopardy and Destruction/Adverse Modification of Designated Critical Habitat
 - 7(a)(2): **Each Federal agency shall**, in consultation with the Secretary, **insure** that any action authorized, funded, or carried out by such agency ('agency action') is **not likely to jeopardize** the continued existence of any endangered species or threatened species or **result in the destruction or adverse modification** of critical habitat
- ESA Section 9
 - Take prohibitions

ESA Definitions



- **Take:** To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct
- **Jeopardy:** Reduce appreciably the likelihood of survival and recovery of a listed species in the wild
- **Critical Habitat:** A specific geographic areas formally designated by NMFS
- **Destruction or Adverse Modification:** A direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

The Generalized Endangered Species Act Consultation Process



Technical Assistance/ Informal Consultation



- Assists in determining appropriate level of consultation
- Can explore opportunities to benefit the species [Section 7(a)(1)]
- Allows the development of creative alternatives that may not be possible once formal consultation begins

Effects Determinations



- **No effect**
 - There are no plausible routes of effects of the project, positive or negative
- **May affect, but is not likely to adversely affect (NLAA)**
 - All effects are beneficial, insignificant or discountable
- **May affect and is likely to adversely affect (LAA)**
 - If adverse effects (take) can be detected in any way
 - At the level of the Individual

Not Likely to Adversely Affect Conclusions



- **Beneficial effects** - positive effects existing, occurring, or originating during the same time as the action without any adverse effects to the species
- **Insignificant effects** - too small to meaningfully measure, detect, or evaluate; never reach the scale where take occurs
- **Discountable effects** – extremely unlikely to occur
- Consultation product – **Letter of Concurrence concluding NLAA**

What is a Biological Opinion?



- An **analytical document** that looks at the effects of a Federal “action” on ESA-listed species and/or designated critical habitat
- The Biological Opinion concludes whether or not the action is likely to **jeopardize** the continued existence of a listed species or **destroy/adversely modify** designated critical habitat
- **Represents the Opinion** of NMFS and considers technical, legal, and policy issues relative to the project

Who Prepares the Consultation?



- **Sustainable Fisheries** (action agency) requests consultation
- **Protected Resources** (consulting agency) prepares the Biological Opinion
- The draft Biological Opinion can be shared with a **Fishery Management Council** (per Policy Directive 01-117) at their request and approval by a **NMFS Regional Administrator** (after review by NOAA General Counsel)

The ESA Consultation Process on a Fishery Management Council Action



- Sustainable Fisheries (action agency) requests consultation
- Protected Resources (consulting agency) prepares the Biological Opinion
- NMFS can work with Fishery Management Councils (Policy Directive 01-117) to help describe the proposed action; identify feasible alternatives; obtain Council views on “best scientific information available of fisheries management practices and/or potential effects; assist in preparing draft biological assessments or evaluations
- NMFS and a Council can enter into a written agreement – ESA/MSA section 7 Integration Process
- The draft Biological Opinion can be shared with the Council at their request and approval by a NMFS Regional Administrator (after review by NOAA General Counsel)

Information Needed to Initiate Formal Consultation



- Description of the action
- Description of the specific area affected by the action (**action area**)
- The **ESA-listed species/designated critical habitat** that may be affected
- How the action will affect ESA-listed species or designated critical habitat that occur in the action area (**effects of the action**)
- **Best scientific and commercial data available** to support consultation information and conclusions

What Makes up a Biological Opinion?



- Description of the proposed action
- Status of the species (range-wide)
- Environmental baseline
- Effects of the action
- Cumulative effects (other future actions)
- Integration and Synthesis - Jeopardy/Adverse modification analysis
- Conclusion
- Reasonable and Prudent Alternatives
- Incidental Take Statement - ESA Section 9
 - Reasonable and Prudent Measures with Mandatory Terms and Conditions
- Conservation Recommendations

What is the Action Area?



Biological Opinion Timelines



- Initiated with a written request and complete initiation package
- Biological Opinion issued by consulting agency with 135 days (unless extended) of a complete initiation package
 - 90 days to conclude consultation, 45 days to provide the Biological Opinion
- **BIG NOTE – Sometimes Biological Opinions take longer than 135 days to complete!**

Biological Opinion Conclusion



Biological Opinion – Jeopardy and/or Destruction /Adverse Modification of Critical Habitat Conclusion

- Reasonable and Prudent Alternative(s)
 - Be consistent with the intended purpose of the action;
 - Be consistent with the scope of the Federal agency's legal authority
 - Be economically and technologically feasible;
 - Not jeopardize the continued existence of listed species or result in adverse modification of critical habitat
- Can include Reasonable Prudent Measures and Conservation Recommendations
 - Discretionary measures to minimize or avoid adverse effects



Biological Opinion Conclusion



Biological Opinion – No Jeopardy and/or No Destruction/Adverse Modification of Designated Critical Habitat Conclusion

- Reasonable and Prudent Measure(s)
 - Define Mandatory Terms and Conditions that are actions necessary to minimize the impacts of incidental take and comply with the RPMs
 - Cannot require major modifications to project design
- Incidental Take Statement
 - Specifies the Amount or extent of take
- Can include Conservation Recommendations
 - Discretionary measures to minimize or avoid adverse effects



Incidental Take Statement



- The Incidental Take Statement specifies the amount or extent of anticipated take
- The Incidental Take Statement can contain Reasonable and Prudent Measures and Terms and Conditions
 - Actions necessary to minimize the impacts of incidental take
 - Cannot require major modifications to project design
 - Terms and Conditions specify actions that need to be taken to comply with the Reasonable and Prudent Measures

Conservation Recommendations



- Suggestions from consulting agency of discretionary measures to minimize or avoid adverse effects
- Supports ESA section 7(a)(1)