

## Overview of Activities That May Require Consultation

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Kelly Fitzgerald-Holland (EDAW) and Lucy Triffleman (Westervelt Ecological Services)

### **Section 4:**

Section 4(f)(1) of the Endangered Species Act outlines the requirement for the Service to issue recovery plans for listed species. Each plan must incorporate a description of site-specific management actions “...to achieve the plan’s goal for the conservation and survival of the species” and include “measurable criteria” that will allow species to be removed from the endangered species list. To meet these requirements, the Service often prioritizes the preservation and/or enhancement of certain areas that may be particularly valuable to the species (described near the end of most recovery plan). Implementation of preservation and/or enhancement within these areas may occur via Service encouragement of performing recovery actions on private landscapes that will benefit the species, thus assisting in the removal of these animals from the threatened and endangered species list.

### Example:

An individual who owns property in California red-legged frog Core Area 18 wants to dredge a pond that has become filled with sediment and vegetation, thus reducing the ability of the species to utilize this area for cover and breeding- essential life functions for this animal. Clearing the pond will help meet the defined recovery goal of creating additional breeding habitat in the area, increasing red-legged frog populations in the immediate vicinity as well as an increase in the total quantity of individuals throughout Core Area 18.

Because recovery actions are performed in, or immediately adjacent to, areas where the species is known to occur (otherwise, why would you do a recovery action here?!?), it is logical to think that take of the listed species you’re trying to help may occur. Therefore, the Service needs to perform an **Internal Consultation** (i.e. they write a biological opinion to themselves) that provides incidental take authorization to cover activities during the recovery project. In this way, the Service can act as the “federal nexus” on behalf of a private landowner, thus performing a section 7 consultation with themselves as the recovery is being implemented on something the Service wants done. Note however that all recovery projects **MUST**, first and foremost, have a direct **BENEFIT** for the **SPECIES**; they **ARE NOT** for residential developments, dams, or a bathroom at a park so don’t ask. Most of the time, folks in the Recovery Branch write these types of biological opinions based off of the monitoring and management plan that is prepared by the applicant. These management plans must accompany any recovery action proposal. This method of internal consultation is how mitigation banks get evaluated and approved by the Service as well as how work within the National Wildlife Refuge system gets completed (yes, the Service does have to follow it’s own rules).

### **Section 7:**

The most important thing to remember about section 7 is that it is about federal consistency with other federal regulations. Section 7(a)(2) states that “Each federal agency shall insure that an action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat...”. Section 7(b) authorizes the Service to issue the “opinion of the Secretary” (i.e. biological opinion) stating that effects of the project will, or will not, contribute to jeopardy (i.e. the eminent extinction of the species). To help the Service make this determination, the applicant, per Section 7(c), must submit a biological assessment to the Service.

In its purest form, Section 7 is geared directly toward federal projects.

Example:

The Bureau of Reclamations wants to expand levees on the Rio Grande that will result in the loss of inhabited southwestern willow flycatcher habitat. In this case, the Corps prepares and submits its own biological assessment.

However, section 7 is also performed for private citizens and State and local governments if another federal party is involved.

Example:

A private landowner wants to build a guest house over a vernal pool known to contain vernal pool fairy shrimp that has been determined by the U.S. Army Corps of Engineers to be a 404 wetland. In this instance, the applicant submits paperwork to the Corps to get a Corps permit. Before the Corps can issue this permit however, they consult with the Service to ensure that the project won't result in jeopardy of the species. To initiate consultation, the Corps issues a letter to the Service asking for consultation along with a biological assessment prepared by the original applicant. Note that all the expenses (surveys, reports, etc.) required by the Service to complete the consultation in this instance **MUST BE PAID FOR BY THE ORIGINAL APPLICANT.**

From each submitted biological assessment, whether from a federal agency or private citizen, the Service determines if the project has no effect (no consultation needed), is not likely to adversely affect (informal consultation), likely to adversely affect or will effect (biological opinion). Each of these documents, and the entire consultation process, is taken care of by people in one of the four section 7 branches. All biological assessments **MUST** have the required elements described in the ESA to be considered complete. The Service, however, can always request more information if they determine that they cannot make a decision on documents provided. For no effect determinations, the Service can issue an email. For informal consultations, the Service will issue an official one- to two-page letter. For formal consultations, the Service will issue a biological opinion whose length will vary depending on the species impacted and the complexity of the project. For a jeopardy determination, the service will issue a jeopardy opinion which is like a

biological opinion EXCEPT that you will NOT get an incidental take statement and thus you're project cannot move forward in its current form without being in violation of federal law and being subject to Section 9 (Prohibited Acts). You do not want to be on the receiving end of a jeopardy opinion.

### **Section 10:**

There are two portions of section 10 that can receive a biological opinion, section 10(a)(1)(A) and 10(a)(1)(B).

Habitat Conservation Plans (HCPs) are issued per **section 10(a)(1)(A)** of the Endangered Species Act. In general, the purpose of an HCP is to allow activities that may result in incidental take of listed species for projects that may not have a "federal nexus" (such as the Corps, EPA, or Department of Energy) and thus cannot receive incidental take under section 7, which is the section where consultation with the Service usually occurs.

### Example:

An individual rancher wants to clear some brush on his private ranch in Crawford, Texas where the golden cheeked warbler has been observed. Because his property is not on the nearby military base, the Army will not initiate consultation with the Service under section 7. Under section 10(2)(a) however, the rancher can clear his brush and simply pay a fee to the HCP implementing entity as long as this activity is described within the HCP document. This implementing entity may be associated with local, state or federal governments or utility, water, or energy providers. It may also be the individual applicant, though normally not in California. (See: San Joaquin HCP, East Contra Costa HCP and San Bruno Mountain HCP for in-depth examples).

Additionally, HCPs may be used to facilitate continuing operations and management items that may result in take, such as vegetation control around power lines or reservoir dredging.

Generally, HCPs cover large areas (30,000+ acres in East Contra Costa County) allowing all projects/applicants to be covered by a single biological opinion. This is in contrast to most section 7 consultations where a biological opinion is needed for each individual project that the Service determines may result in take of listed species. Note, however, that as take may occur for all projects covered under within the HCP area, **a biological opinion is still needed prior to approval of the HCP**. The Service issues an internal section 7 biological opinion to itself in this instance as issuing a section 10 permit from the Service is a federal action. These biological opinions are normally written by the HCP staff and are very, very, very long (220+ pgs).

Projects located within HCP coverage areas that **DO** still require a section 7 consultations (e.g. putting in a gas station on top of existing wetland features) still need an individual biological opinion (remember, section 10 is more for projects that **CAN'T** consult under section 7). However, these individual projects can usually move quickly through the

consultation juggernaut as most of the effects of projects in the area have already been analyzed by the HCP biological opinion and therefore can simply reference (= amend) the HCP bio-op. Thus, individual biological opinions within the HCP area are usually about three (versus 50) pages long. This is one reason why HCP's can be cool from a permitting standpoint, even though they can take years to put together.

**Section (10)(a)(1)(B)** is Safe harbors agreements. These allow partnerships with local landowners to perform projects that will benefit the species and are similar in idea to recovery plans. However they must meet certain and specific guidelines. Know that biological opinions under this program are internal and are written by Safe harbors (SHA) staff. The Service should be contacted directly for more information regarding this.

### **Partners Program**

This program is also developed was developed to encourage conservation of wildlife on private lands. It is a combination of the Partners for wildlife Act, the Wildlife conservation act of 1956 and the Fish and Wildlife Coordination Act. These projects are often SO beneficial for the recovery of the species that the applicant is able to receive money, via grants applied for under section 6 of the ESA, for their implementation.

#### Example:

An open space district wants to remove the remnants of an old large Christmas tree farm on their land and replant this area with species known to provide valuable cover and dispersal habitat for California red-legged frogs that are breeding in adjacent ponds.

In these instances, internal biological opinions to the Service via the section 7 process, as the Service is initiating a federal action through funding the project. Generally partners staff are responsible for issuing these documents. Although these programs are primarily designed to help endangered and threatened species, they are sometimes used to help State listed or sport species as well.