

Compliance with Section 7 of the Federal ESA and Section 106 of the NHPA – Procedural Highlights

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Endangered Species

- The Endangered Species Act
- Consultation
- Determinations



Endangered Species Act

- Conserve Endangered Species Habitat
- Conserve Endangered Species
- Honor International Treaties



What Are These Terms?

THREATENED SPECIES:

Species likely to become endangered within foreseeable future

ENDANGERED SPECIES:

Species in danger of extinction throughout all or a significant portion of its range



ESA - Section 7(a)(2)

- Interagency Cooperation:
 - ▶ Each Federal agency shall ensure that any (discretionary) **action** it intends to authorize, fund, or carry out is not likely to jeopardize threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.



Authority to Ensure ESA Compliance

- A Federal Agency proposes to take an **action**:
 - ▶ Issue a permit
 - ▶ Authorize an activity
 - ▶ Fund a project or program
 - ▶ Build/Maintain/Repair/Operate something
 - ▶ Refer to as **“Federal nexus”**

§ 7(a)(2) APPLIES



One of Three Effect Determinations is Possible

- No Effect
- May Affect, Not Likely to Adversely Affect
- May Affect, Likely to Adversely Affect



May Affect

**Not Likely to Adversely Affect
Likely to Benefit**

Likely to Adversely Affect

**Informal
ESA Consultation**

**Formal
ESA Consultation**



ESA Process Tips

- Assume at minimum, ***three months*** to complete a consultation with Service(s).
- Use ESA template guidance on our web site to submit a “**Biological Assessment.**”
- For National Marine Fisheries Service, NMFS has a checklist that we can provide.
- By using our template, support basis for our review of “The Six Questions”



Biological Assessment (402.12)

Document prepared to address effects on listed species or critical habitat

- ▶ May be prepared by designated non-Federal representative
- ▶ May be required before formal consultation may begin



The Six Questions

The following information is included to initiate consultation (from Corps Section 7 letter template):

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



The Six Questions, Con't

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



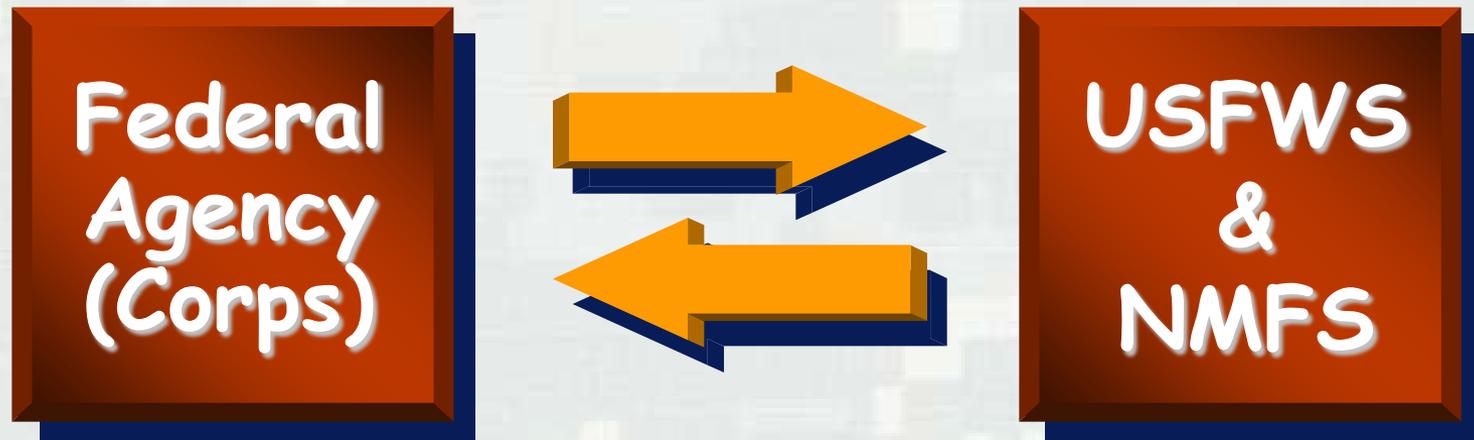
Giant Garter Snake



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Endangered Species Act Section 7

COORDINATION



CONSULTATION

To ensure actions will not jeopardize a listed species or destroy or adversely modify its designated critical habitat



Review by Service(s)

Service review of BA

- ▶ Action not likely to adversely affect - end informal consultation
- ▶ Action likely to adversely affect - formal consultation
- ▶ 135 Days to complete formal consultation (= 4.5 months)



Meanwhile...



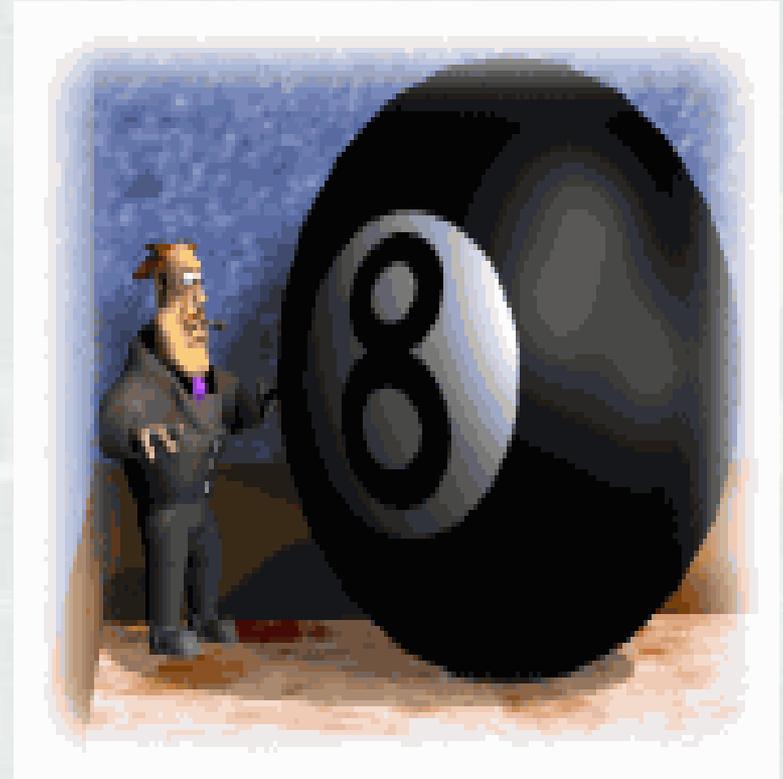
- Permit review ongoing
- Mitigation planning
- 401 processing
- Other permits (e.g., CDFW, local)
- Compliance with Section 106 NHPA

Yes, there is a lot going on...



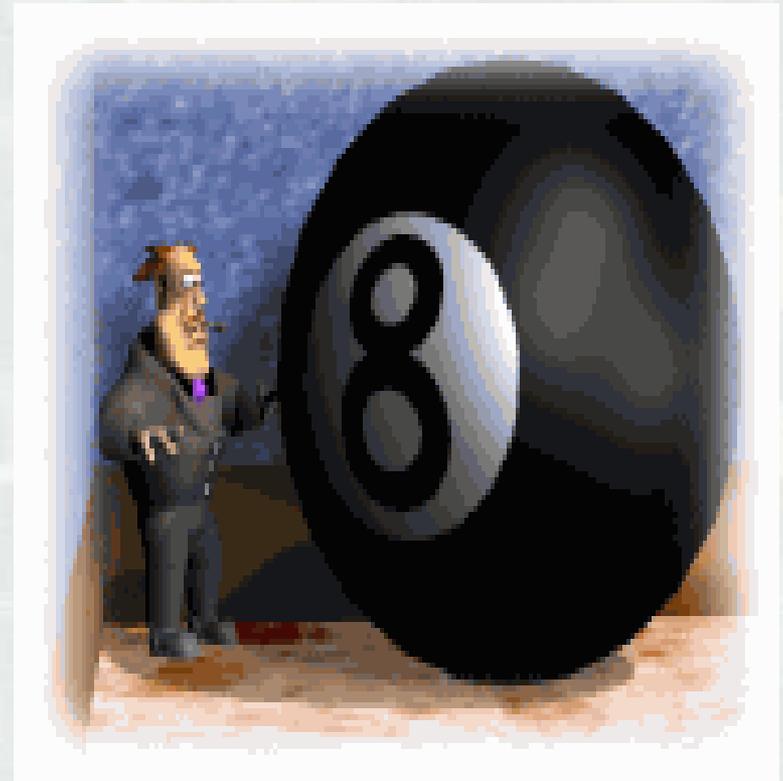
Tips or “Lessons Learned”

- Not starting early enough
- Effects analysis
 - ▶ “We didn’t see one in the field, it doesn’t live here”
 - ▶ Our project won’t do a thing – “Effect?” Where?
- Project description – level of resolution should be able to respond to six questions & Services’ “checklists”



More Tips

- Remember that state agencies (e.g., CDFW) have a separate process.
- **Be aware** that if information is lacking (insufficient, incomplete), we will request additional information, provide 30 days to submit it, and withdraw the permit application if information is not received.



There is Much Less to Worry About...



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National Historic Preservation Act Section 106 Compliance for the Regulatory Program



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Section 106 of the National Historic Preservation Act of 1966, as amended

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and **the head of any Federal department or independent agency having authority to license any undertaking shall**, prior to the approval of the expenditure of any Federal funds on the undertaking or **prior to the issuance of any license**, as the case may be, **take into account the effect of the undertaking on any district, site, building, structure, or object, that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.**”



Section 101 of the NHPA

Section 101(d)(6)(B)

“In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).”

Section 101(d)(6)(A)

“Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion on the National Register.”



33 CFR Part 325, Appendix C

- Corps' Regulatory Program's implementing regulations to take into account the effect of the undertaking on historic properties
- Provides a process for the review of all proposed permit actions
- Level of review is commensurate with impacts
- Applicants may be required to submit additional information and perform mitigation to compensate for impacts to historic properties



Completing the Process

General steps for the Section 106 process:

- Applicant provides the Corps with information per the guidelines: <http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/CulturalResourcesAgencyConsultation.aspx>
- The Corps initiates consultation with Tribes and any interested parties
- The Corps makes National Register of Historic Places eligibility and effect determinations for each identified cultural resource
- The Corps initiates consultation with the SHPO/THPO and ACHP (if the Corps determines there will be an adverse effect to an eligible resource)
- If there will be an adverse effect to an eligible resource, the applicant proposes mitigation and develops a Historic Properties Treatment Plan (HPTP)
- The Corps develops a Memorandum of Agreement (MOA) in consultation with the SHPO/THPO, applicant, and other consulting parties. The MOA includes the HPTP as a stipulation.
- The MOA is included in the Corps' permit as a special condition



Mitigation Examples



8 Points per sqm LIDAR Bare Earth
Glenborough at Easton (Sacramento County, CA)



Site capping,
Sacramento
River, CA

LIDAR
survey,
Alder
Creek
Mining
District,
CA



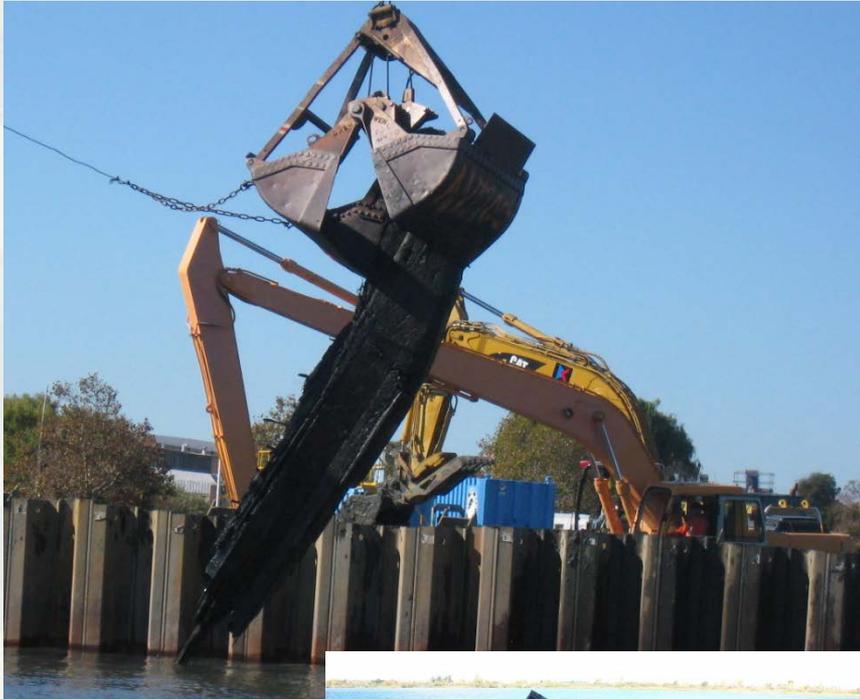
Structure relocation, Fort Rock, OR



Interpretive
signage,
Fort Rock,
OR



Unusual Circumstances



Unidentified
sunken vessel
discovered
during marina
excavation in
Antioch, CA



The Corps can address less common circumstances such as:

- ▶ Emergency projects
- ▶ Unanticipated discovery
- ▶ Lack of site access prior to project permitting
- ▶ Long-term, multi-phase projects



Tips or “Lessons Learned”



Site visit in Rocklin, CA, with United Auburn Indian Community of the Auburn Rancheria representatives

- **Not starting early enough**
- Insufficient consultation with interested parties
- Project description – include the construction, staging, and access areas
- **Be aware** that if information is lacking (insufficient, incomplete), we will request additional information, provide 30 days to submit it, and withdraw the permit application if information is not received.
- Subaqueous sites

