

Endangered Species Act Compliance

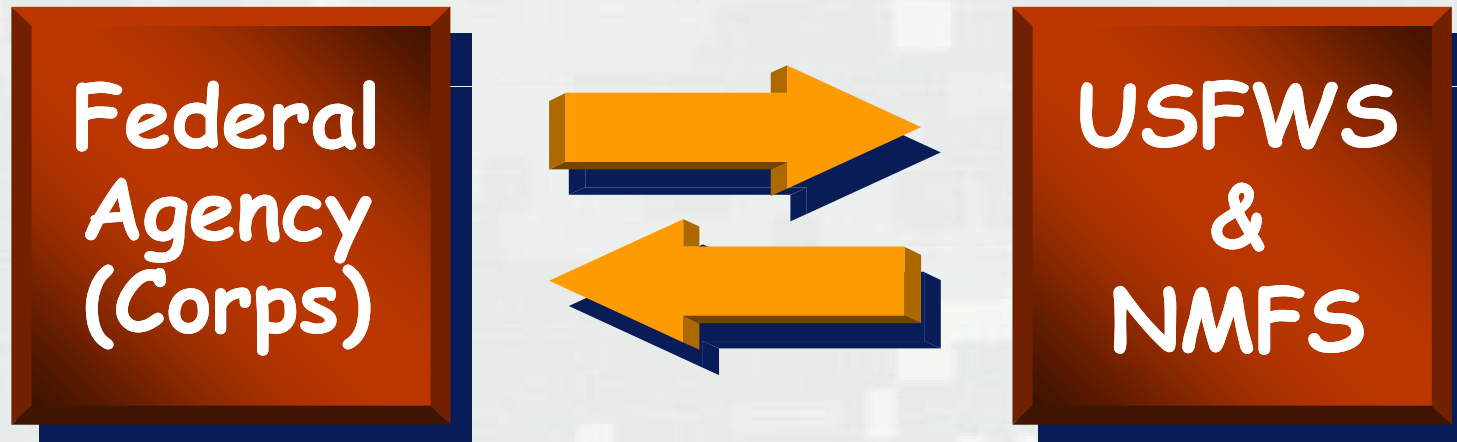
Permit Workshop
December 5, 2013

Zachary Simmons



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



Section 7 Consultation

- Consultation Handbook (1998)
http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf
- ▶ Time Frames
- ▶ Biological Assessment
- ▶ Consultation – Informal/Formal
- ▶ Letter of Concurrence/Biological Opinion



Scope of Analysis for Endangered Species

- **Action Area**

- ▶ Work in waters of U.S.
- ▶ Uplands affected by work in water

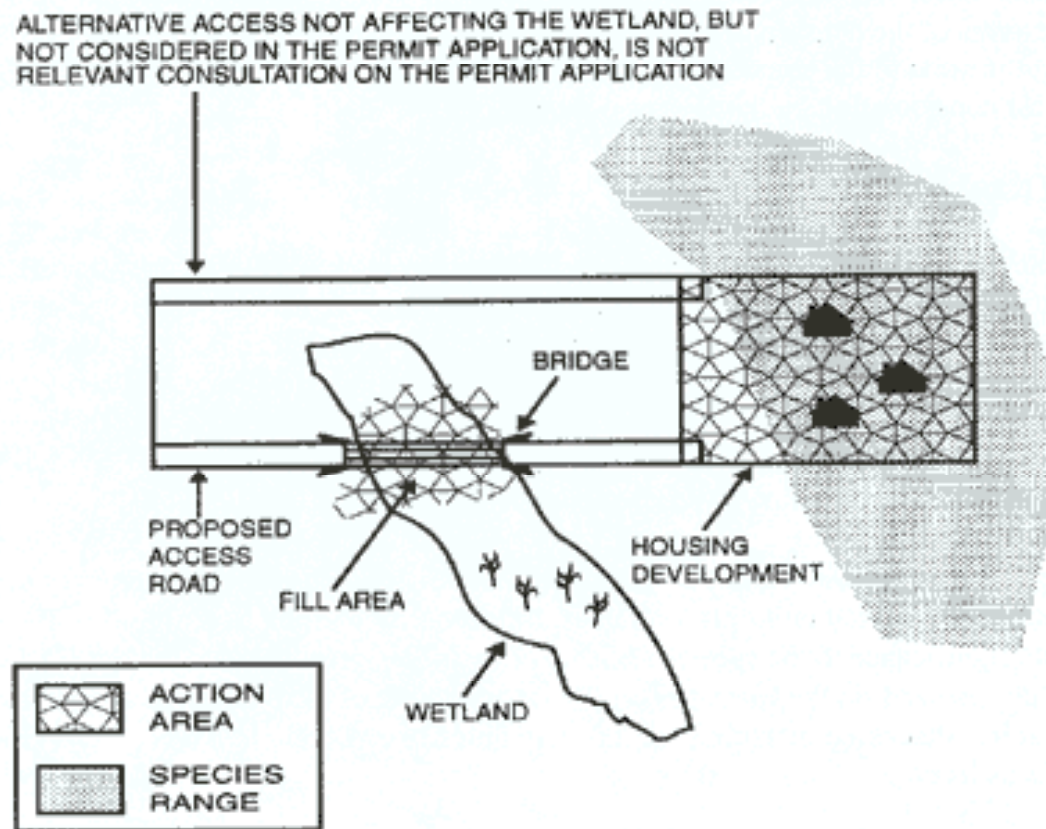
- **Decision to Expand Action Area**

- i. Merely a link in a project corridor
- ii. Portions of work in uplands that directly affect the location and configuration of regulated activity
- iii. Extent of project within Corps jurisdiction
- iv. Cumulative Federal control and responsibility



1998 Endangered Species Consultation Handbook

Figure 4-6. Determining the action area.



4-18



Size of Action Area

- Figure 4-6 indicates a larger ESA scope of Analysis (action area)

BUT

- The ESA Handbook also emphasizes the ‘but for’ test
 - ▶ would activity occur without the action?
 - ▶ interrelated and/or interdependent
- *Agreed to Disagree*



Gathering Information Required for Consultation

- Answer the six questions
- Use Species Lists
 - ▶ Occurrence Information (CNDDDB)
- Do your Homework
 - ▶ Recovery Plans
 - ▶ Studies & Publications
- USFWS Web Site



<http://www.fws.gov/endangered>

<http://www.fws.gov/sacramento>



The Six Questions

The following information is included to initiate consultation (from Consultation Handbook, Sec 4.2):

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
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



1. Description of Action

- Clearly define ALL elements of the action
- Include a summary of impacts to waters of the U.S.
- Include maps and plans as necessary
- Purpose and Use



2. Description of Effected Area

- Describe the action area and surrounding landscape
- Current site conditions
- What are the current and surrounding land uses?



3. Description of Listed Species and Critical Habitat

- Describe ALL listed species with the potential to occur on site
- How are they currently using the site
- If potential species aren't there, why?
- Describe PCE's for critical habitat that exist on site



4. Description of Effects to Listed Species and Critical Habitat

- Describe how the project would affect listed species
- Would the action result in a take?
- Include all proposed avoidance and mitigation measures
- Describe impacts to each PCE for critical habitat on site
- Does it affect the Recovery Plan?



5. & 6. Relevant Reports and Studies

- Include the reference to relevant studies and environmental reports for the site or region
- Any additional information about the species, critical habitat, or proposed action



CRITICAL HABITAT

The final rule listing critical habitat describes the **primary constituent elements (PCEs)**



Consider and address effects to each element

Quantify:

- Condition of PCEs
- Changes in Distribution
- Changes in Productivity



Biological Assessment

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



Biological Assessment

Content of BA

- ▶ On-site inspection data
- ▶ Expert views on species of concern
- ▶ Literature & information review
- ▶ Analysis of effects on species & habitat
- ▶ Alternatives considered
- ▶ Avoidance and Mitigation Measures (aka BMPs)



Effects to analyze

Effects of the Proposed Action and Interrelated and Interdependent Actions

- Direct
- Indirect
- Beneficial

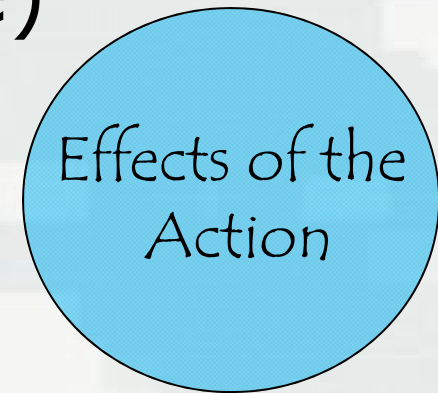
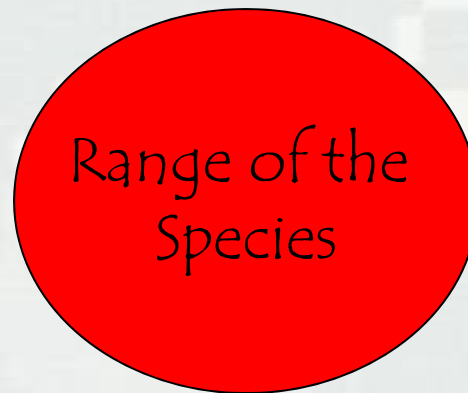


No Effect to Listed Species or Critical Habitat

Means: **NO** Effect

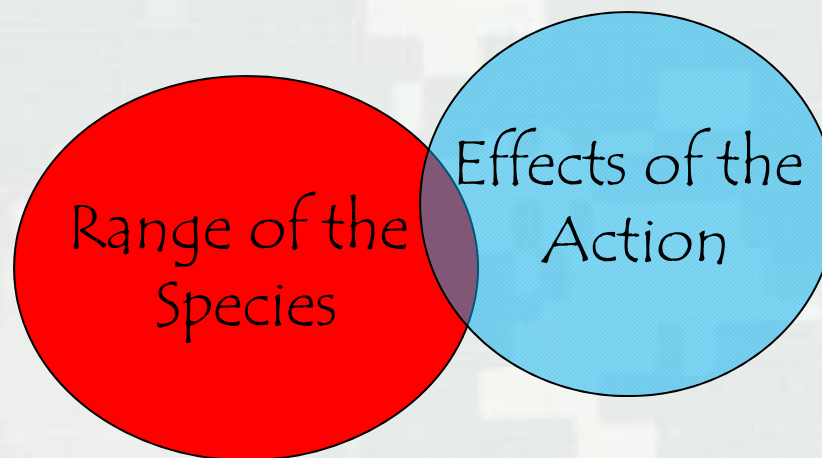
(Not even a beneficial one)

Consultation requirement
is not triggered.



May Affect

Exposed to a stressor generated or caused by the action or interrelated or interdependent actions



May Affect, Not Likely to Adversely Affect

The appropriate conclusion when the responses by a species or its critical habitat are likely to be:

- ❖ Discountable
- ❖ Wholly beneficial
- ❖ Insignificant (does not involve take)
 - ❖ No “mitigated NLAAs”

Written Concurrence from Service(s) required



May Affect, Likely to Adversely Affect

The stressors generated or caused by the action, or its interrelated and interdependent actions, are likely to **directly or indirectly have any adverse affect** to a listed species or its critical habitat.

Formal Consultation is Required



Common Flaws in Effect Determinations

- “Displacement”
- “Not Known to Occur Here”
- “Contracting Clause or We’ll Call You Later”
- “Leap of Faith”, “Trust Me, I know what I’m doing”



Informal Consultation

Process

- ▶ Initiated by Federal agency or designated non-Federal representative
- ▶ Service may suggest modifications to avoid adverse effect
- ▶ Ends with Letter of Concurrence
- ▶ No Take Authorization



Formal Consultation

Process

- ▶ Written request to Service with **best scientific & commercial data available** including description of:
- ▶ **Incidental Take Statement**



Emergency Consultation

- Expedited Consultation for situations involving acts of God, disasters, casualties, national defense or security emergencies.
- **Informal consultation**
- Formal consultation shall be initiated as soon as practicable after the emergency is under control



Reinitiation of Formal Consultation

- Required if:
 - ▶ Amount or extent of incidental take is exceeded
 - ▶ New information reveals effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered
 - ▶ Action is modified and causes previously unconsidered impacts
 - ▶ New species listed or critical habitat is designated



Standard Special Condition

- “contains **mandatory** terms and conditions to implement the reasonable and prudent measures”
- “authorization...is **conditional** upon your compliance with all of the mandatory terms and conditions”
- “terms and conditions are **incorporated by reference**...Failure to comply...where a take of the listed species occurs, would constitute an **unauthorized take**, and it would also constitute **non-compliance with your Corps permit.**”



ESA Process Tips

- Use Section 7 guidance on our web site
- For National Marine Fisheries Service, NOAA has a template available on-line
- Address all species in U.S. Fish and Wildlife Service's query (quads, county)
- **The Six Questions**



Contact Information

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*Help me,
Manatees*