AASHTO WEBINAR
Practitioner’s Handbook 17:
Complying with Section 7 of the ESA for Transportation Projects

January 31, 2017
Today’s Presentations

- Welcome
  - Melissa Savage, AASHTO

- Section 7 Consultation – Brief Overview & Tips from the Handbook
  - Bill Malley, Perkins Coie LLP

- Q&A with Panel
  - Dan Buford, FHWA
  - Catherine Liller, USFWS
  - Cathy Tortorici, NOAA
  - Bill Malley (moderator)
Center for Environmental Excellence

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  http://environment.transportation.org/

- Use our resources:
  - Weekly Website Updates
  - Broadcast Emails
  - Practitioner's Handbooks
  - Climate Change Webinars
  - Programmatic Agreement Library
  - Case Law Database (CLUE)
    - Recently updated with 2016 cases
Practitioner’s Handbook Series

- 01 Maintaining an Administrative Record for a NEPA Study
- 02 Responding to Comments on an EIS or EA
- 03 Managing the NEPA Process for Toll Lanes and Toll Roads
- 04 Tracking Compliance with Environmental Commitments
- 05 Utilizing Community Advisory Committees for NEPA Studies
- 06 Consulting Under Section 106 of the NHPA
- 07 Defining Purpose & Need and Range of Alts for Transportation Projects
- 08 Implementing an Environmental Management System in a State DOT
- 09 Using the SAFETEA-LU Environmental Review Process (23 U.S.C. 139)
- 10 Using the Transportation Planning Process to Support the NEPA Process
- 11 Complying with Section 4(f) of the U.S. DOT Act
- 12 Assessing Indirect Effects and Cumulative Impacts under NEPA
- 13 Implementing a Stormwater Management Program in a Transportation Agency
- 14 Applying the Section 404(b)(1) Guidelines for a Transportation Project
- 15 Preparing High-Quality NEPA Documents for Transportation Projects
- 16 Eco-Logical: Integrating Transportation Planning and Ecological Decision Making
- 17 Complying with Section 7 of the ESA for Transportation Projects
Practitioner’s Handbook 17: Complying with Section 7 of the ESA for Transportation Projects
Goals of the Handbook

- **Goals of the Handbook:**
  - Describe the basic steps of Section 7 as clearly and simply as possible
  - Provide practical advice for navigating the Section 7 process.
- **Approach:**
  - Break down the Section 7 consultation process into four distinct steps, and describe the findings required at each steps.
- **How it Differs from Other Reference Materials**
  - Focuses on Section 7 consultation requirements from the specifically perspective of a transportation agency.
Organization of the Handbook

- Background Briefing
  - overview of the ESA
- Key Issues to Consider
  - checklist for use when undertaking Section 7 consultation
- Practical Tips
  - advice on how to compliance with Section 7
- Reference Materials
  - list of key resource materials
Cautionary Notes about the Handbook

- The Handbook is not “guidance”
- Practices and terminology vary across the country
- Use the Handbook as a resource, but not as a substitute for agency regs and guidance
Section 7 Consultation: Overview
ESAs – The Basics

- Goals of the ESA
  - Protect imperiled species from extinction, and
  - Promote the recovery of those species and their ecosystems

- Overview of the ESA:
  - Section 4: Listing of species
  - Section 7: Federal agency responsibilities
    - 7(a)(1): Conservation obligation
    - 7(a)(2): Consultation obligation; duty to avoid ‘jeopardy’
  - Section 9: Prohibition against ‘taking’ any listed species
  - Section 10: Authority to issue ‘incidental take permits’
Section 7 Consultation – The Basics

• Consultation may include:
  • Informal consultation
    • May include preparation of a Biological Assessment by the federal action agency (or project sponsor)
  • Formal consultation
    • Requires issuance of a Biological Opinion by USFWS and/or NMFS

• Biological Opinion may include authorization for ‘incidental take’ of listed species.
  • ‘Incidental take statement’ = equivalent to permit under Sec. 10
Key Terms in Section 7 Consultation

- **“Action”**
  - “Action means **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....”

- **“Action Area”**
  - “all areas to be **affected directly or indirectly** by the Federal action and not merely the immediate area involved in the action”

- **“Effects”**
  - “the **direct and indirect effects** of an action on the species or critical habitat, **together with the effects of other activities that are interrelated or interdependent with that action**, that will be added to the environmental baseline.”
Key Section 7 Consultation Documents

- **Species List**
  - Applicant requests from Service, or submits for concurrence
  - Includes species that ‘may be present’ in the ‘action area’

- **Biological Assessment (BA)**
  - Produced by the federal action agency or project sponsor
  - Required for ‘major construction activities’ (project w/ EIS) if listed species ‘may be present’ in action area.
  - Includes findings regarding potential effects on listed species

- **Biological Opinion (BiOp)**
  - Issued by the USFWS and/or NMFS after formal consultation.
  - Required if project is ‘likely to adversely affect’ listed species
  - Typically includes an ‘incidental take statement’
Key Reference Documents

- Section 7 of the ESA
- Section 7 Consultation Regulations
- Services’ Section 7 Consultation Handbook (issued in 1998)
- Agency Guidance, Counsel Opinions
- Agency Websites, FAQs, Etc.
Section 7 Consultation: Step-by-Step
“Steps” in Section 7 Consultation

- The requirement to consult depends on a series of findings regarding presence and effects ...
- Each finding is a potential ‘off-ramp” from consultation
- Handbook depicts this process as a flow-chart
- Caveats:
  - Section 7 regs don’t refer to “steps”
  - Any flow-chart will over-simplify to some extent
The Four Steps

- Breaks down Section 7 consultation into four distinct steps.
- Shows the findings needed at each step and which agency makes those findings.
Informal Consultation Steps - Key Points

- **Step 1**
  - Issue = whether species ‘may be present’ in ‘action area’
  - ‘Species list’ req’d as part of a BA (issued or OK’d by Services)
  - Prudent to request a species list for any project

- **Step 2**
  - Issue = whether action ‘may affect’ listed species / critical habitat
  - Federal action agency makes the finding
  - Services’ concurrence not required

- **Step 3**
  - Issue = whether action is ‘likely to adversely affect’ listed species/critical habitat
  - Finding of “not likely to adversely affect” requires Services’ concurrence.
Formal Consultation – Key Points

- **Initiation of Formal Consultation**
  - Initiated when ‘initiation package’ is complete
  - Normally 135 days from initiation to Biological Opinion
  - Can be extended for various reasons

- **Biological Opinion**
  - The Services’ document
  - May share a draft with action agency (or portions of draft)
    - e.g., to review project description
  - Includes ‘incidental take statement’
  - If jeopardy finding is made, Services must propose ‘reasonable and prudent alternatives’
Section 7 Consultation: Additional Issues
Uncertainty and Unavailable Information

- “Best scientific and commercial data available”
  - Action agencies are required to “use the best scientific and commercial data available” in Section 7 documentation.
  - Not required to conduct new scientific research.

- “Benefit of the doubt to the species”
  - Services’ policy is to “give the benefit of the doubt to the species” when relevant info is unavailable or inconclusive.
Species Not Yet Listed

- “Proposed Species”
  - Species that are proposed for listing as threatened or endangered by publication of notice in Federal Register
  - “Conference” requirement - similar to consultation for listed species, but does not result in any binding requirements (unless/until the species is listed).

- “Candidate Species”
  - Species that are under consideration for listing, but not yet listed or formally proposed for listing.
  - No legal protection, but may be considered voluntarily as part of Section 7.
Section 7 Consultation: Practice Tips
Tips for Practitioners

- If NEPA applies, Section 7 applies
  - Triggered by any discretionary federal action
  - CE does not mean you’re exempt from Section 7
- Findings must be supported in project file.
  - Finding that species is not present?
  - Finding that project will have no effect?
  - Think about what documentation supports that finding.
- Be careful about assuming ‘we don’t need a BA’
  - Trigger for preparing a BA = you’re preparing an EIS and T/E species ‘may be present in action area’
  - Even if BA is not required, similar documentation may be needed to support findings of ‘no effect’
Tips for Practitioners

- Build Section 7 timeframes into project schedules
  - Section 7 consultation focuses on the preferred alternative – often identified late in NEPA process ...
  - Developing a BA – needed just to start formal consultation – can involve multiple drafts and take many months.
  - Changes to the project can extend formal consultation.

- Know which agency makes/concurs in each finding.
  - Distinct agency responsibilities at each step
  - Understanding roles => better relationships, better documents.

- Make sure ‘project description’ is complete and up-to-date.
  - Project description underpins the effects analysis.
  - If incomplete or outdated, delays consultation.
  - Sharing drafts with Services early can help.
Tips for Practitioners

- Use the NEPA document to show compliance w/ Sec. 7.
  - Include chronology of consultation activities
  - Clearly report and support key findings for each species.
  - Cross-reference or include list of Section 7 commitments

- Section 7 responsibilities continue after NEPA ends
  - New listings, new info on existing species, changes in project – many factors can trigger need for additional consultation.
  - If finding hinges on commitment, and commitment changes – the finding is no longer valid.
Q&A Panel

We want your questions!

Submit questions via text in the GoToWebinar panel on your screen.
Q&A Panel

- Panelists
  - Dan Buford, FHWA
  - Catherine Liller, USFWS
  - Cathy Tortorici, NOAA

- Moderator:
  - Bill Malley, Perkins Coie LLP