

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)

AASHTO
PRACTITIONER'S
HANDBOOK

17
November 2016

COMPLYING WITH SECTION 7 OF THE ENDANGERED SPECIES ACT FOR TRANSPORTATION PROJECTS

This Handbook provides an overview of Section 7 consultation under the Endangered Species Act (ESA) and provides advice on carrying out Section 7 consultation for transportation projects. This Handbook focuses on the consultation process primarily from the perspective of the federal action agency and the applicant.

The Background Briefing section describes the legal framework for Section 7 consultation as defined in the ESA itself and in regulations issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. This section includes a flow chart illustrating the four main steps in Section 7 consultation and the findings that can be made at each step.

The Key Issues to Consider section raises a series of questions for practitioners to consider when undertaking Section 7 consultation for a transportation project. This section can be used as a checklist when preparing for each step in Section 7 consultation.

The Practical Tips section provides advice on how to comply with Section 7 requirements as efficiently and effectively as possible. Issues covered in the Practical Tips section of the Handbook include:

- Preparing for Section 7 consultation
- Defining the action area and requesting or submitting a species list
- Assessing the effects of the proposed action on Section 7 resources
- Conducting formal consultation
- Conducting conference for proposed species and proposed critical habitat
- Coordinating Section 7 with the NEPA process and other requirements
- Complying with Section 7 following completion of the NEPA process

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Center's Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>.

 Center for Environmental Excellence by AASHTO

 American Association of State Highway and Transportation Officials



Center for Environmental Excellence



- Visit our website:
<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



ESA – 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

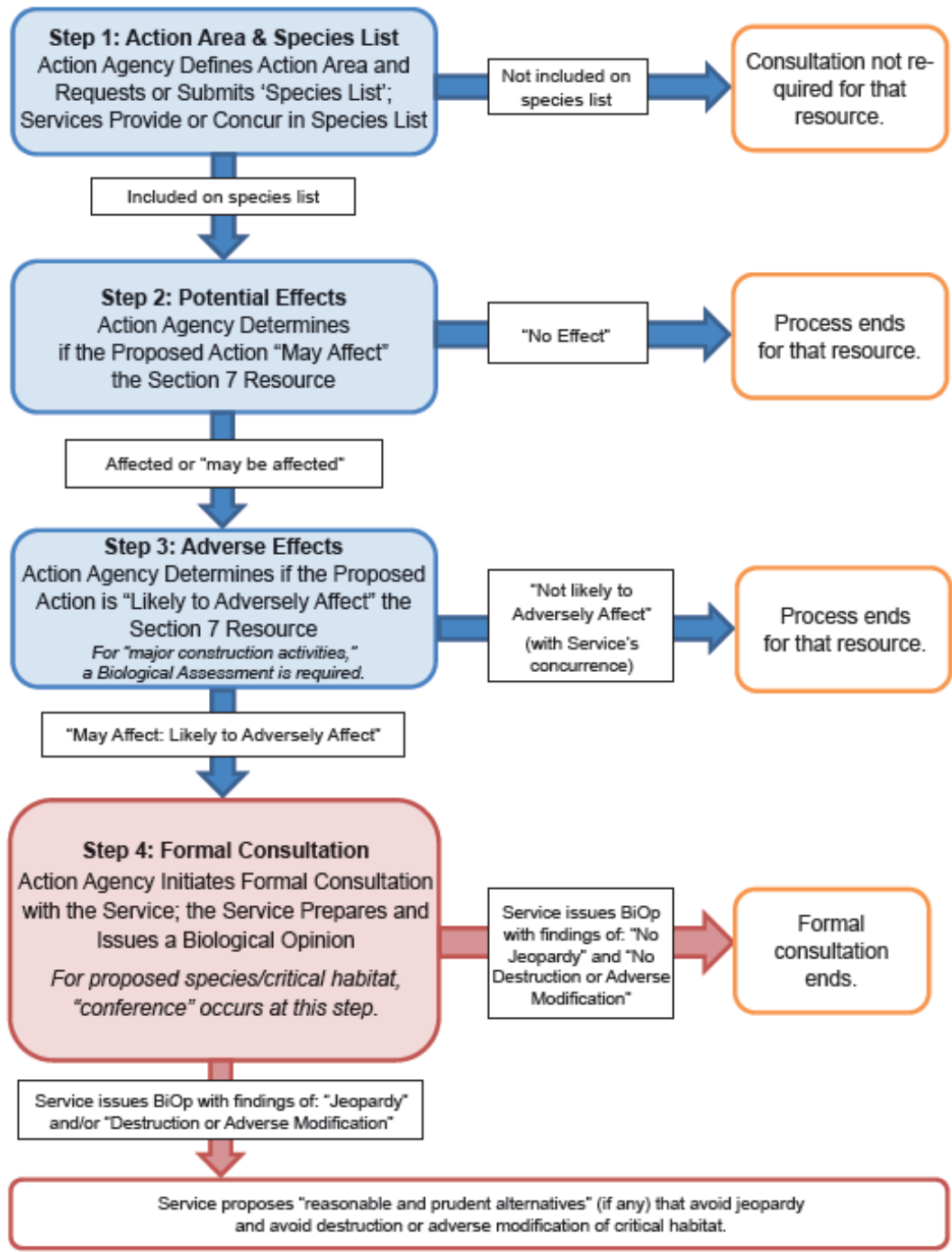


“Steps” in Section 7 Consultation

- 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
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Q&A Panel

- Panelists

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

- Moderator:

- Bill Malley, Perkins Coie LLP

