

Endangered Species Act (ESA)



WHAT IS THE ESA?

The Endangered Species Act (ESA) (codified at 16 U.S.C §§ 1531-1599) conserves and protects threatened and endangered species, as well as species that are proposed for listing as threatened or endangered, and their critical habitat. The National Marine Fisheries Service (NMFS) oversees ESA implementation for marine wildlife and the U.S. Fish and Wildlife Service (USFWS) oversees implementation for land and freshwater species. NMFS and USFWS are often jointly referred to as the “Services.” Under ESA Section 7, federal agencies must consult with the Services for actions the agency carries out, authorizes, or funds to determine whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. This also includes the “take” of a protected species, which means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (16 USC § 1532(19)).

ROLE OF EPA

Projects receiving grant funding from the U.S. Environmental Protection Agency (EPA) through the Community Grant Program are subject to compliance with ESA Section 7. Therefore, EPA is required to assess the impacts of all proposed actions on listed species and critical habitat. EPA is responsible for reviewing Community Grant projects for Section 7 compliance and requesting project details and supporting information from the grant recipient when needed. If Section 7 compliance is outstanding, EPA is responsible for making effects determinations, submitting letters requesting Service concurrence as applicable with these determinations, ensuring mitigation measures from the consultation are included in grant conditions, and—in the case of a “major construction activity”—developing and submitting a Biological Assessment (BA).¹ EPA may designate a non-federal representative to conduct informal consultation or prepare a BA by issuing a

Key Definitions (50 CFR § 402.02)

Action – 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.

Listed Species – Any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the ESA. Listed species are found in 50 CFR § 17.11–17.12.

Critical habitat – An area formally designated by USFWS or NMFS as critical habitat.

Effects of the action – All consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

¹ *Major construction activity* is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, [42 U.S.C. 4332\(2\)\(C\)](#)]. See 50 CFR 402.02.

non-federal designation letter; however, the ultimate responsibility for compliance with Section 7 remains with EPA (50 CFR § 402.08).

SECTION 7 REVIEW REQUIREMENTS

Section 7 compliance is required for all levels of NEPA (CATEX, EA, and EIS). This begins with informal consultation with the Service(s), which EPA initiates by requesting technical assistance from the appropriate Service field office—e.g., by obtaining an official species list via the USFWS Information for Planning and Consultation (IPaC) website—and determining the potential presence of, and effects on, listed species or critical habitat in the action area. The review must consider the action’s potential direct (e.g., direct mortality of individuals, removal of suitable habitat) and indirect effects (e.g., sediment and effluent discharges that may affect downstream aquatic species, construction noise near nesting or roosting habitat). This assessment can result in one of three determinations: “no effect,” “may affect, not likely to adversely affect,” or “may affect, likely to adversely affect.” Individual field offices of the Service have developed project review guides to assist with determinations. As noted above, a “major construction activity” requires a BA. As discussed below, a “may affect, likely to adversely affect” determination triggers formal consultation.

Determinations

<u>No Effect</u>	<u>May Affect, Not Likely to Adversely Affect</u>	<u>May Affect, Likely to Adversely Affect</u>
<p>The proposed action will have no effect on listed species, their suitable habitat, or critical habitat.</p> <ul style="list-style-type: none">• Consultation with the Service is not required.• Proceed with NEPA review. <p>Documentation: EPA records the findings in the cross-cutter memo only.</p>	<p>Effects are anticipated but they will not adversely affect listed species or their suitable habitat. Typically occurs when impacts are minimal and no take is involved.</p> <ul style="list-style-type: none">• Informal consultation with the Service is required.• Proceed with NEPA review after informal consultation is complete. <p>Documentation: EPA submits a letter to USFWS/NMFS requesting concurrence on the determination. Written response from USFWS/NMFS is required.</p>	<p>An action may negatively impact listed species, suitable habitat, or critical habitat.</p> <ul style="list-style-type: none">• Formal consultation with the Service is required.• If a “no jeopardy” biological opinion is reached by the Service, proceed with NEPA review. <p>Documentation: EPA submits a letter to USFWS/NMFS requesting initiation of formal consultation and requesting concurrence on the determination. If the project qualifies as a “major construction project,” a BA must accompany this letter.</p>

ADVERSE EFFECTS AND FORMAL CONSULTATION

While Section 7 does not explicitly define adverse effect, a “may affect, likely to adversely affect” determination signifies that an action may negatively impact a protected species’ habitat, resources, or general survival. Adverse effects may involve the removal of large areas of suitable habitat for a protected species, the take of a proposed species, etc. They can also occur further in time or distance from the initial undertaking and can include cumulative effects.

Section 7 does not prohibit agencies from taking actions that may result in adverse effects, but formal consultation is required. Formal consultation is a process between the Service and EPA that commences

with EPA's written request for consultation under section 7(a)(2) of the Act, which initiates a consultation period of up to 90 days during which EPA and the Service exchange information about the action and its impacts. The Service then has 45 days to prepare a biological opinion, which states whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (50 CFR § 402.02). The biological opinion, which concludes the formal consultation, may include mitigation measures to minimize potential adverse effects.

ROLE OF THE GRANT RECIPIENT

Grant recipients must demonstrate compliance (if already completed for a project with a different federal agency) or assist EPA with complying with Section 7 for their project. As soon as the decision has been made to apply for an EPA-funded grant, the recipient should contact EPA to request assistance in determining the level of involvement in the Section 7 process. Grant recipients are responsible for providing EPA with the information needed to properly characterize impacts. If a BA is required, EPA may request project details or analysis to support development of this document. As described above, grant recipients may be designated a non-federal representative to conduct informal consultation or prepare a BA. For more information on designation letters, the grant recipient may reach out to the regional point of contact.

ADDITIONAL TOOLS AND RESOURCES

The following tools and resources may assist you in understanding the consultation process and identifying federally listed species and critical habitat near your project:

- USFWS and NMFS ESA Consultation Handbook provides in-depth guidance on Section 7 consultation procedures and requirements: <https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf>
- USFWS Information for Planning and Consultation (IPaC) tool contains resources to aid project proponents in determining species affected by their project and for initiating consultation: <https://ipac.ecosphere.fws.gov/>
- USFWS Critical Habitat Mapper is a web-based map application that allows viewers to explore designated critical habitat: <https://fws.maps.arcgis.com/home/webmap/viewer.html?webmap=9d8de5e265ad4fe09893cf75b8dbfb77>
- USFWS has an ESA Section 7 Consultation guide that provides information on the Section 7 consultation process: <https://www.fws.gov/service/esa-section-7-consultation>
- The Code of Federal Regulations provides a more in-depth explanation of the Section 7 process: <https://www.ecfr.gov/current/title-50/chapter-IV/subchapter-A/part-402>
- The Code of Federal Regulations also contains a full list of species determined to be threatened or endangered: <https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-17/subpart-B/section-17.11>