

**Role of USFWS in Review
(Section 7 Consultation Overview)
March 12, 2009**



Outline: What's to be covered...

- Endangered Species Act Overview
- Section 7 Consultations
- Informal Consultations
- Formal Consultations
- Biological Assessments

Objectives

- Discuss the components of Section 7 Consultation and describe procedures
- Define the kinds of actions that require Consultations and the procedures
- Describe information within Biological Assessment
- Provide definitions throughout

Endangered Species Act Overview



March 12, 2009

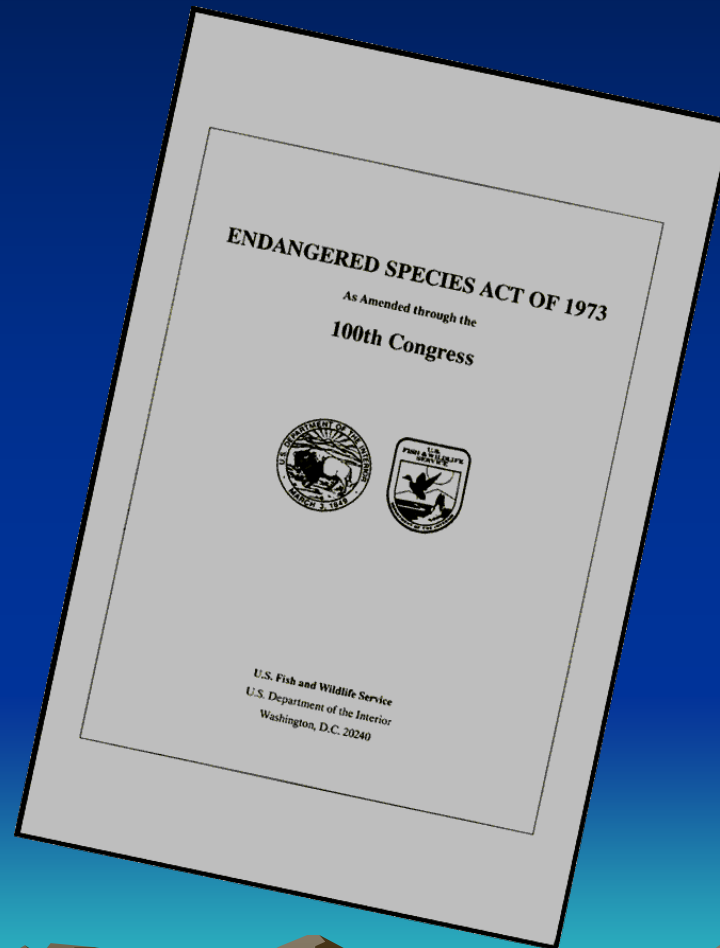
Symposium on Biological Control of
Invasive Plants

History

- 1871 Bureau of Fisheries established
- 1914 The last passenger pigeon dies
- 1918 Migratory Bird Treaty Act
- 1940 Eagle Protection Act
- 1962 Rachel Carson's *Silent Spring*
- 1966 & 1969 Limited protection for selected "endangered species"
- 1967 1st endangered species list
- 1973 ESA passed
(amended in '78, '82, and '88)



The Endangered Species Act of 1973 (as amended)



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Endangered Species Act

Table of Contents

- Section 2: Findings and Purposes
- Section 3: Definitions
- Section 4: Listing, Critical Habitat Designation, Recovery, Monitoring
- Section 5: Land Acquisition
- Section 6: Cooperation with States
- Section 7: The Role of Federal Agencies
- Section 8: International Cooperation
- Section 9: Unlawful Activities
- Section 10: Exceptions, including Permits
- Section 11: Penalties and Enforcement
- Etc.

Section 7 – “Interagency Cooperation”, requires Federal agencies to utilize their authorities to conserve listed species. Also requires Federal agencies to insure their actions do not jeopardize the continued existence of listed species.

Consultation Requirements

Affirmative Conservation Mandate

Section 7(a)(1) – Federal agencies shall use their authorities to carry out their programs for the conservation of endangered & threatened species

Consultation Requirements

Duty to Avoid Jeopardy

Section 7(a)(2) – Federal agencies insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species.

Consultation Requirements

Regulations – 50 CFR Part 402

Interagency Cooperation
Regulations

Also see the Consultation Handbook
(1998)

Consultation Requirements

When does section 7 apply?

If an action is funded, authorized, or carried out by a Federal agency (known as a Federal “nexus”)



Examples of an “Action” include, but not limited to:

- Actions intended to conserve listed species and their habitat;
- The promulgation of regulations;
- The granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- Actions directly or indirectly causing modifications to the land, water, or air.

Consultation is required when...

Pursuant to 50 CFR 402.14, consultation is required if an action “may affect” listed species or critical habitat, consultation is required

One of the major differences between Section 7 and Section 10

Informal Consultation

- Clarify whether and what listed or designated critical habitats may be in the action area;
- Determine what effect the action may have on the listed species;
- Explain ways to modify or reduce adverse effects;
- Determine need to enter into formal consultation

Informal Consultation con't

- Optional Process
- Unstructured
- No overall timetable
- Dialogue can continue as long as both parties are willing to participate
- All steps must be documented in the Administrative Record

Species Lists

Federal agency or non-Federal representative requests information

Service provides a Species List within 30 days or concur with agency's list

Lists are good for 90 days; can be used as basis for the Biological Assessment

Includes candidate species as an early alert to Federal agencies of potential listings

Designated non-Federal representative

This refers to the person designated by the Federal agency as it's representative to conduct informal consultation and/or to prepare any biological assessment.

Species Lists

Service's response within 30 days

Usually handled at the FO level and is a "heads up" for upcoming Federal actions

They can now be accessed over the internet by County

If Service advises that "...no listed species may be present," further consultation is not required. Service uses term "no effect"

Biological Assessment

Required if listed species or
critical habitat may be present
within the action area

“major construction activities”

Major construction activities
include:

dams, buildings, pipelines, roads,
water resource developments,
channel improvement, and
other projects that modify the
physical environment and that
constitute a major Federal
action.

Biological Assessment

Purpose:

- To evaluate the potential effects on listed/proposed species and designated/proposed critical habitat
- Assist in determining the type of consultation required

Biological Assessment

Definition:

- Information concerning the listed species within the action area
- Evaluation of the potential effects of the action on such species and habitat
- Action area is defined by the direct and indirect effects of the action

Biological Assessment Contents

- Description of Listed Species or Critical Habitat
- Project Description
- Effects Analysis
- Action Area Description
- Other information
- Effects Determinations

Direct Effects

ESA definition:

These are the effects that occur during the implementation of the action.

NEPA definition:

The effects that occur on site (within the “project footprint”)

Indirect Effects

- ESA Definition:
Effects occurring later in time.
- NEPA Definition:
Effects occurring off site (outside the “footprint” of the project)

Interrelated and Interdependent Actions

- All other actions that would not occur **BUT FOR** a larger action are interrelated actions.
- All other actions that would not occur **BUT FOR** the action under consideration are interdependent actions.

“But For”

In summary, you need to consider all interrelated and interdependent actions in your effects analysis

i.e., *Consider the larger action*

Cumulative Effects

- ESA: includes future state, private, or non-federal activities that are reasonably certain to occur within the action area.
- NEPA: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency undertakes them.

Cumulative Effects ESA and NEPA

The federal agency is responsible for a thorough cumulative effects analysis pursuant to both the ESA and NEPA

Effects to analyze

- Beneficial Effects
- Direct Effects
- Indirect Effects
- Effects of Interrelated Actions
- Effects of Interdependent Actions

Factors to be considered:

- Proximity of the action to listed species
- Proximity of the effects to listed species
- Distribution of the species and habitat use
- Timing of the effects
- Duration of the effects
- Type of effects
- Frequency, intensity, and severity

Effects Analysis

- Exposure – which organisms and habitats
- Response – what happens?

Exposure + Response = Effects

Section 7

Effect Determinations

No Effect

- Project will not affect listed species or critical habitat.

Is Not Likely to Adversely Affect = **Informal Consultation**

- Effects are
 - Discountable
 - Insignificant or
 - Beneficial (completely)

Is Likely to Adversely Affect = **Formal Consultation**

- Project will adversely affect listed species or critical habitat.

Consultation may be concluded if:

- The Service concurs in writing with the action agency/official non-federal representative that the proposed action “may affect, but is not likely to adversely affect listed species or critical habitat”
- Thus, the effects are insignificant, discountable, or beneficial.

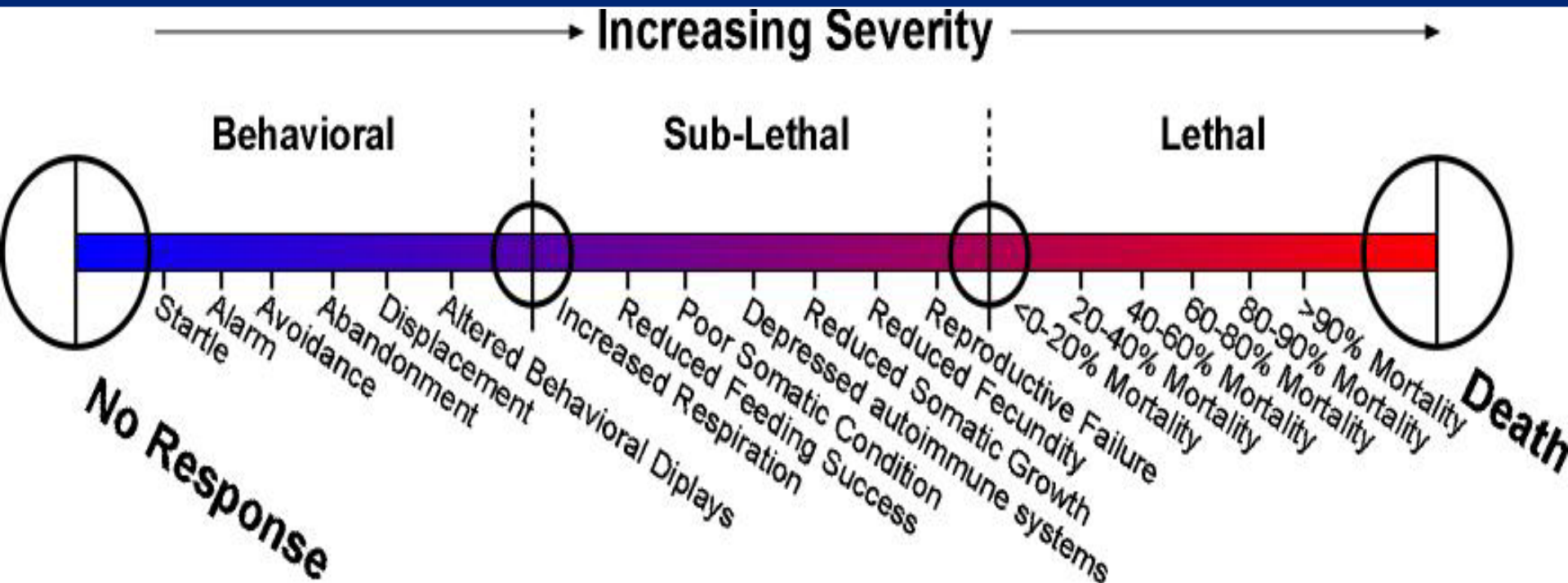
Section 7

Effect

- Any response to any stressor.
 - ✓ Regardless of size (e.g., startle).
- Consider the individual.



Exposure Response Table



Section 7

Informal Consultation

- Determines
species/critical habitat
effects
- Explores project modifications to avoid or
minimize effects
- Is formal needed?

“is not likely to adversely affect”

- Insignificant - cannot meaningfully measure, detect, or evaluate effects
- Discountable – extremely unlikely to occur
- Beneficial – positive effects without any adverse effects

Insignificant and Discountable

- “Insignificant effects relate to the size of the impact and should never reach the Scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur.”

Insignificant Effects

Insignificant effects are so minor that you should not be able to meaningfully measure, detect, or evaluate them.

Discountable Effects

Discountable effects are those that are so unlikely to occur that you do not expect them to occur.

Informal Consultation

Potential Outcomes:

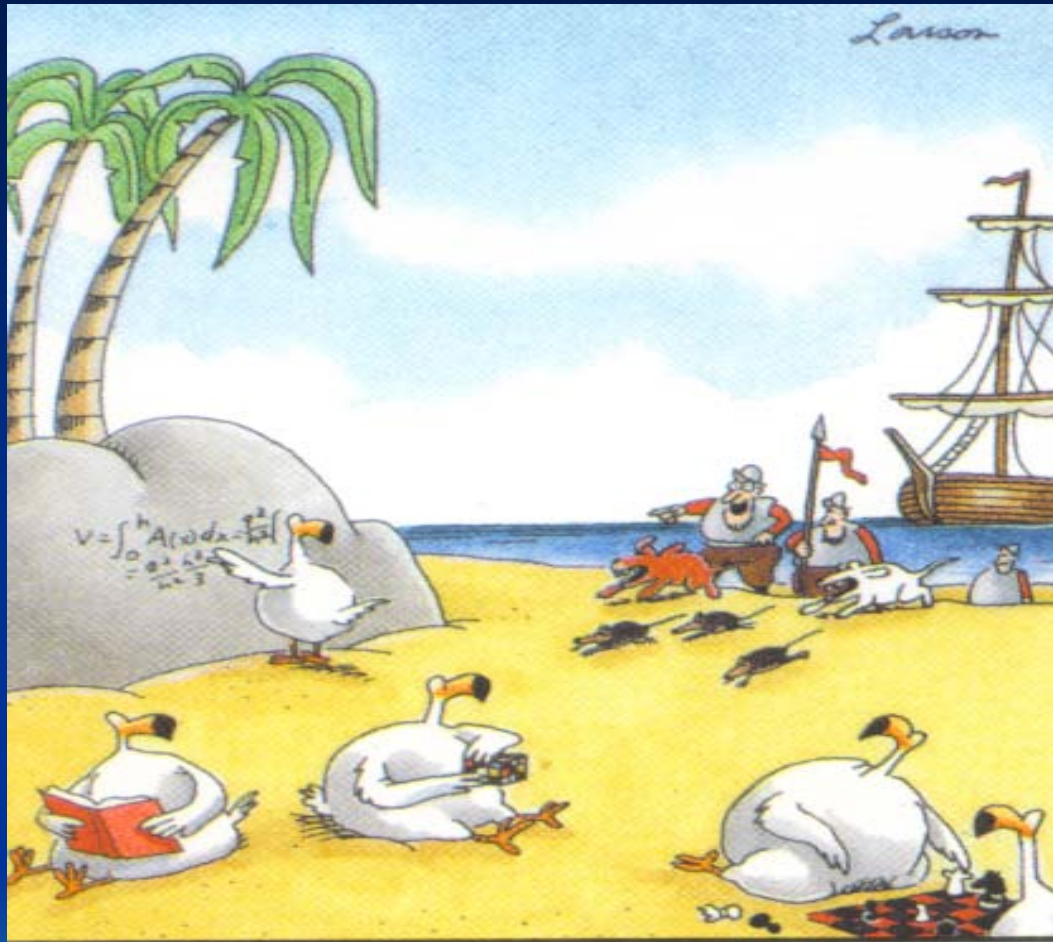
1. No effect, no further consultation needed
2. Not likely to adversely affect; informal consultation is concluded
3. Is likely to adversely affect; **FORMAL CONSULTATION** is required

Formal Consultation

Required when a Federal action “may affect, is likely to adversely affect listed species/or modify critical habitat

Biological Opinion is required

Service provides written acknowledgement of consultation and advises the action agency of any data deficiencies within 30 days



Unbeknownst to most ornithologists, the dodo was actually a very advanced species, living alone quite peacefully until, in the 17th century, it was annihilated by men, rats, and dogs. As usual.

Prohibited Acts

Section 9 of the Endangered Species Act of
1973, as amended

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Section 9 (a)(1) – Fish or Wildlife

It is unlawful for any person to take any endangered or threatened species of fish or wildlife

What is take?

To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

What is Harm?

Significant habitat modification or degradation that impairs essential behavioral patterns (breeding, spawning, rearing, migrating, feeding or sheltering).

What is Harass?

Annoying a species enough to significantly disrupt normal behavioral patterns (breeding, spawning, rearing, migrating, feeding or sheltering).

Section 9 (a)(2) - Plants

It is unlawful for any person to:

Remove and reduce to possession plants under Federal jurisdiction,
Maliciously damage or destroy plants on any other area in knowing violation of any state law.

Incidental Take

Results from, but is not the purpose of,
carrying out an otherwise lawful activity

Take

If you need an exemption, and the take is incidental, consult formally

Reinitiation

The Section 7 Regulations outline four general conditions for reinitiating formal consultations:

1. the amount or extent of incidental take is exceeded;
2. new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
3. the action is modified in a manner causing effects to listed species or critical habitat not previously considered;
4. a new species is listed or critical habitat designated that may be affected by the action.