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Section 7 of the Endangered Species Act and Offshore Wind

Workshop on Best Management Practices for Atlantic Wind
Facilities and Marine Protected Species

March 7, 2017

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Section 7(a)(2)

Each Federal Agency shall insure that any action authorized, funded, or carried out by such agency...



The image shows a small, detailed view of a permit application form. The title is 'APPLICATION FOR DEPARTMENT OF THE ARMY PERMIT'. It includes sections for 'APPLICANT INFORMATION', 'PROJECT INFORMATION', and 'PERMIT INFORMATION'. The form is filled out with various details, including names, addresses, and project descriptions. The NOAA logo is visible in the bottom left corner of the form.



is not likely to **jeopardize the continued existence** of any threatened or endangered species or result in the **destruction or adverse modification of habitat** of such species

Our Objectives in Section 7 Consultation

- **Help** Federal agencies **insure** that any action they authorize, fund, or carry out is
 - not likely to expose endangered or threatened species to stressors that are likely to cause those species to get closer to extinction
 - not likely to reduce the value of designated critical habitat for the recovery of endangered or threatened species
- Produce consultations that are legally-defensible because they are
 - transparent
 - “objective”
 - replicable
 - evidence-based



Jeopardy



“Jeopardize the continued existence of” [as in ESA § 7(a)(2)] means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species (50 C.F.R. § 402.02).

Destroy/Adversely Modify Standard

More information on the new definition:
https://www.fws.gov/endangered/improving_ESA/AM.html

- Notice published in FR on Feb. 11, 2016 (81 FR 7214 – 7226) by FWS and NMFS
- Replaces the previous definition that is discussed in the Section 7 consultation handbook!

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

“Action” under the ESA regulations means *all* activities or programs *of any kind* authorized, funded or carried out, *in whole or in part*, by Federal agencies . . .

Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitats; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements rights- f-way, permits, grants-in-aid; or (d) actions directly or indirectly causing modifications to land, water, or air.
[50 CFR 402.02]

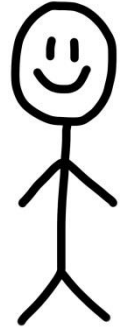


Roles and Responsibilities

- **Action Agency –**
 - The action agency determines applicant status, including requests arising from prospective applicants in early consultations and how applicants are involved.
 - Should be an active participant in the consultation
 - Ultimately responsible for consultation but can *designate a non-federal representative* for informal consultations
 - If there is more than one Federal agency, one is designated as the “lead” Federal agency
- **Consulting Agency (NMFS or USFWS) -**
 - Advise Federal agencies through consultations to identify and help resolve conflicts between listed species and habitat and proposed actions
 - Must provide best scientific and commercial data available
 - Provide regulatory, policy, and biological information as needed
 - Discuss the potential effects of the action on listed species or critical habitat
 - Discuss measures to reduce or avoid those effects
 - Completes the consultation document (LOC or BiOp)



Role of Applicants



Federal agency determines an applicant's status during consultation.

Applicants can:

- **Submit information** for consideration during consultation
- Applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- **Entitled to the final consultation** document
- Apply for exemption from section 7(a)(2) process
- Responsible for **complying with terms and conditions** and **monitoring & reporting**

All Consultations

Four main ingredients:

- Information about the proposed action
- Information about ecological entities (listed species, critical habitat, etc.)
- An assessment method that integrates this information to produce and support a conclusion
- A written record of the interactions, deliberations, or analysis that occurred during the consultation process, the information that was (or was not) considered, and any resolution of disagreements.

May Affect

Effects are wholly beneficial, insignificant or discountable

Adverse Effects

Action Agency requests concurrence with "NLAA" determination

Action agency requests formal consultation

NMFS issues Letter of Concurrence

NMFS issues Biological Opinion

Informal Consultation
30-60 days from initiation to completion

Formal Consultation
135 days from initiation to completion (by regulation)



Section 7 (c)

Biological Assessment

Process to identify any endangered species or threatened species which is likely to be affected by the action. Should be completed before any contract for construction is entered into and before construction is begun with respect to such action. The BA may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).



Section 7(d) Limitation on commitment of resources

After initiation of consultation, the Federal agency and applicant...

“shall not make any irreversible or irretrievable commitment of resources ...which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures...”

unless such agency has been granted an exemption by the Endangered Species Committee

Anatomy of a Biological Opinion

Background

Consultation History

Proposed Action

Action Area

Status of the Species and Critical Habitat

Environmental Baseline

Effects of the Action on Species and Designated Critical Habitat

Cumulative Effects

Integration and Synthesis

Conclusion

Incidental Take Statement

Amount or Extent of Take

Effect of the Take

Reasonable and Prudent Measures and Terms and Conditions

Conservation Recommendations

Reinitiation of Consultation



Action Area

- Often goes beyond the footprint of the project
- All areas where direct and indirect effects of the action will be experienced
- NMFS identifies the location of the action area at the end of the description of the proposed action section.



Interrelated and Interdependent Activities and the Action Area

- **Interrelated:** An activity that is part of the proposed action and depends on the proposed action for its justification.
- **Interdependent:** An activity that has no independent utility apart from the action under consideration

The analysis of whether other activities are interrelated to, or interdependent with, the proposed action under consultation should be conducted by applying a “but for” test. The biologist should ask whether another activity in question would occur “but for” the proposed action under consultation.

Environmental Baseline

Includes

- The past and present impacts of all Federal, State, or private actions and other human activities in the action area,
- The anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and
- The impact of State or private actions which are contemporaneous with the consultation in process
- 50 CFR 402



Effects of the Action

Direct effects: the immediate effects of the project on the species or its habitat



Indirect effects: Caused by or result from the proposed action, are later in time, and are reasonably certain to occur

Effects Analysis



- Critical Habitat
 - Exposure of physical and biological features
 - Response of physical and biological features
 - Risk to the value of those features for species conservation in the action area
- Listed Species
 - Exposure of listed species
 - Response of listed species
 - Risk analysis for individuals in the action area



Cumulative Effects

- Effects of non-Federal future activities reasonably certain to occur within the action area.
 - Typically state or private activities with no federal hook.
 - Cumulative Effects outside of the action area are not included
 - ESA and NEPA define this differently

Biological Opinion Conclusions

- Likely/Not likely to jeopardize the continued existence of one or more species.
- Likely/Not likely to result in destruction or adverse modification of critical habitat.



What happens if you conclude Jeopardy or Destruction/Adverse Modification?

REASONABLE AND PRUDENT ALTERNATIVES

A recommended alternative action identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action

▪

Incidental Take Statement

Every “no jeopardy” opinion must include an ITS section, even if no “take” is being exempted

- “Take” statements must outline the amount or extent of take that is expected to occur from the proposed action
- “Take” statements must provide reasonable and prudent measures that minimize the effects of the take on T/E species
- “Take” statements must provide terms and conditions
- RPMs and T&Cs may only make minor changes to an action
- Include an explanation of how the RPMs and Terms and Conditions comply with the requirements



ITS and ESA Listed Whales

- We can not exempt take of ESA listed whales until there is an authorization provided under the Marine Mammal Protection Act (MMPA)



- Consultations are typically amended with a revised or new ITS after the MMPA authorization is issued
- This requires coordination between NMFS (multiple offices), the action agency and the applicant

Incidental Take Statement

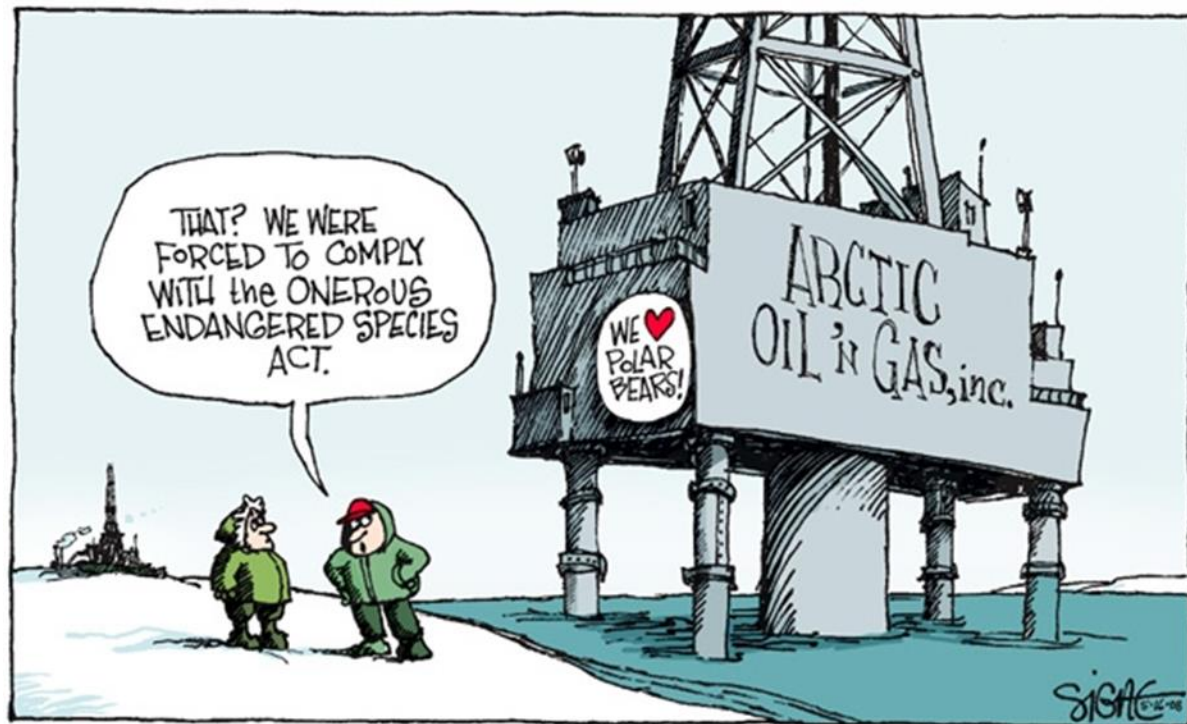
AMOUNT OR EXTENT OF TAKE ANTICIPATED

This section outlines the amount of take anticipated from the action. Generally, incidental take is expressed as the form of take, manner of take, number of individuals reasonably likely to be taken or the extent of habitat likely to be destroyed or disturbed.

Must be measurable whether numbers of individuals, area(acres), change in habitat quality.

Reasonable & Prudent Measures

An action that the Service believes necessary or appropriate to minimize the impacts (the amount or extent) of incidental take caused by an action that was subject to consultation.



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Terms and Conditions and Reasonable and Prudent Measures

- Required actions described in an Incidental Take Statement intended to implement the Reasonable and Prudent Measures .
- Must include reporting and monitoring requirements that assure adequate action agency oversight of any incidental take [50 CFR §402.14(i)(1)(iv) and (i)(3)]. The monitoring must be sufficient to determine if the amount or extent of take is approached or exceeded, and the reporting must assure that the Services will know when that happens.
- Minor Change Rule: “...**cannot alter the basic design, location, scope, duration, or timing of the action** and may involve only minor changes”



Monitoring and Reporting

We require monitoring during project implementation to ensure that take is not exceeded: “In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement”.

Conservation Recommendations

When the Services identify discretionary actions the action agency can implement, relevant to the proposed action and consistent with their section 7(a)(1) authority, voluntary conservation recommendations may be included as a separate item in the consultation package.



Reinitiation Requirement

Section 7 regulations outline four general conditions for reinitiating formal consultation: (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. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.



Individual vs. Batch vs. Programmatic

Individual Consultation

- Considers effects on one action
- Has an appropriate ITS with project specific RPMs and Terms and Conditions
- Life of BiOp is consistent with the life of the action



Batched Consultation

- Considers effects of multiple, defined actions that an action agency is proposing to authorize or permit
- One ITS that includes project specific level of exempted take
- May have project specific RPMs and terms and conditions depending on details of individual projects
- Life of the BiOp is consistent with the life of the individual actions



Programmatic Consultations

- Considers effects of an action agency's program – there might not be individual defined actions yet
- May or may not have an ITS, depending on the details available
- RPMs and Terms and Conditions might be more general
- Life of the BiOp is set by the action agency and NMFS
- Includes procedures for determining if a future action is consistent with the programmatic and identifies how take exemptions will be provided
- Follow up action is necessary when an individual action is proposed



Consultations Currently in Place

Programmatic

- Atlantic G&G
- MA, RI, NY and NJ Wind Energy Areas (leasing and SAP)

Individual

- Deepwater Wind Block Island Wind Farm
- Virginia Offshore Wind Technology Advancement Project

Questions?

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Consultations available online:

<https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts>

More Info on the ESA and Section 7:

<https://www.greateratlantic.fisheries.noaa.gov/protected/section7/index.html>

<http://www.nmfs.noaa.gov/pr/consultation/>

