

## Endangered Species Act Section 7: Interagency Consultation

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Congress passed the Endangered Species Act (ESA) in 1973 to protect both imperiled species and their ecosystems. The ESA is administered by the U.S. Fish & Wildlife Service (FWS) for terrestrial species and the National Marine Fisheries Service (NMFS) for designated marine species. Section 7 applies to the actions of federal agencies and aims to ensure that any proposed action by the agency “is not likely to jeopardize the continued existence of...[a listed] species or result in the destruction or adverse modification of” its critical habitat. (16 U.S.C. § 1536(a)(2)). In essence, the provisions are meant to prevent a federal agency from putting a listed species in danger of extinction.

### *When does Section 7 Consultation apply?*

There are some parameters for when Section 7 applies. Section 7 only applies to:

- Discretionary federal actions - any action authorized, funded, or carried out by a federal agency.
- Actions that will jeopardize the species as a whole, not simply individual members of the species.
- Actions that will destroy or adversely modify only designated critical habitat.

### *What is consultation?*

Section 7 Consultation is an administrative process that requires the federal agency proposing the action, known as the “action agency,” to consult with the “expert agency” - either FWS or NMFS - to assess the impact of its proposed action on the listed species or its critical habitat. The consultation process is detailed more below.

### *What is the jeopardy prohibition?*

The jeopardy prohibition prevents federal actions from jeopardizing the continued existence of a species. Regulations have defined this to mean either a direct or indirect action that one could reasonably expect to appreciably reduce “the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 CFR § 402.02.

### *What is adverse modification?*

To destroy or adversely modify critical habitat means “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” 50 CFR § 402.02. This can include altering the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of these features. These can include interfering with the species’ eating, feeding, or sheltering.

### *Does the adverse modification standard apply to private property?*

Yes. When critical habitat is designated on private property, it does not directly limit the landowner’s use of the property. However, critical habitat is subject to Section 7 consultation. Thus, if a landowner seeks federal funding or a federal permit (such as a Clean Water Act permit) for an action that may affect designated critical habitat, the landowner would have to work with the agency through the Section 7 consultation process.

## The Consultation Process

Once consultation is initiated, the ESA prohibits “any irreversible or irretrievable commitment of resources with respect to the agency action.” (16 U.S.C. § 1536(d)). During the process, the action agency works with the expert agency to determine whether its action will jeopardize the species or adversely modify its habitat.

### Informal consultation:

- Optional process used to determine whether formal consultation is needed.
- Asks whether listed species are present in the area of the proposed action.
  - ➔ If yes, asks if it is possible that the proposed action “may adversely affect” listed species or its critical habitat.
  - ➔ If yes, then formal consultation is required.

### Formal consultation:

- Expert agency produces a Biological Opinion (BiOp) based on the “best scientific and commercial data” provided by the action agency.

### Biological Opinion:

- Considers if the action and its cumulative effects will likely result in jeopardy or adverse modification.
- Scope of the BiOp is limited to the proposed agency action.
  - While there may be multiple stressors on a listed species’ survival, the BiOp can only address actions under the control of the permitting agency.
  - For example, if agricultural runoff is harming a listed species’ habitat, but the action agency is getting a permit renewed for a dam, only the impacts from the dam operations are considered in the BiOp, as the expert agency has no authority to dictate actions to another agency not party to that BiOp.

### Reasonable and Prudent Alternatives (RPAs):

If the action and its cumulative effects will likely result in jeopardy or adverse modification, the expert agency must formulate RPAs that can be implemented by the action agency to avoid jeopardizing the species or harming its critical habitat.

### Incidental Take Statement (ITS):

If the activity will result in some take of the species, the BiOp will likely include an ITS.

- An incidental take is when a legal activity has the unintended consequence of harming a listed species.
- An ITS allows a certain amount of take for the activity at a level that will not jeopardize the species.

### Outcome:

Once the expert agency issues the BiOp, the consultation process is ended.

- If no jeopardy/adverse modification is found, the project may advance.
- If the BiOp contains a jeopardy/adverse modification determination, the action agency has three options:
  - (1) Terminate the action;
  - (2) Implement the RPAs, or
  - (3) Seek an exemption from the Endangered Species Committee (also known as the God Squad).