

Frequently Asked Questions

GENERAL ESA QUESTIONS

Q. What is the Endangered Species Act (ESA) Section 7 consultation?

A. Under the Corps' Federal permit program, permit applications must be reviewed for the potential impact on threatened and endangered species pursuant to Section 7 of the ESA. The Corps, through informal and formal consultation procedures with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS), must evaluate information on the presence of threatened and endangered species (including timing and life stages), habitat for such species and their prey sources, and other parameters. The consultation process involves review and negotiations to identify potential impacts of the proposed work and conservation measures that can help protect threatened and endangered species and their habitat.

Q. When is an ESA consultation required?

A. If the Corps determines that the work proposed in a permit application would have "no effect" on all threatened or endangered species, consultation with NMFS and USFWS is not required. If the Corps determines that the work proposed in a permit application may affect any threatened or endangered species, some type of consultation with NMFS and USFWS is required.

Q. If a project is funded by another Federal agency, who has lead for ESA consultation?

A. In situations where the funds are provided to an applicant or project proponent by a Federal agency, that Federal agency typically has the lead for compliance with ESA, including Section 7 consultation. As the lead, the Federal funding agency will be

responsible for completing consultation requirements when a project may affect listed or proposed species. For example, if the Federal Highways Administration (FHWA) provides funds for a road widening project, they would be responsible for ESA consultation on the whole project, including parts of the project that may require a Department of the Army permit from the Corps. Before making a final permit decision, the Corps requires a copy of the final resolution of ESA for its' records.

Q. Can the Corps deny a permit based on the ESA?

A. Yes. If, in the opinion of NMFS or USFWS, a project results in a "take" severe enough to jeopardize the continued existence of the listed or proposed species, the Corps will deny the permit, except in extremely unusual circumstances [33 CFR 320.3(i); 50 CFR 402.15; and 40 CFR 230.10(b)(3)]. This situation is quite rare because "take" issues are addressed during the consultation process, and the Services and the Corps work with the applicant to modify their project design or construction techniques such that impacts are minimized and jeopardy will not occur.

PROGRAMMATIC CONSULTATIONS

Q. What is a programmatic ESA consultation?

A. To streamline the ESA consultation process, the Seattle District Corps is working closely with NMFS and USFWS on programmatic consultations for broad categories of activities that require permits. Once a programmatic consultation for a particular activity and species is completed, ESA requirements are met for that activity as long as it complies with the terms and conditions of the programmatic consultation. While streamlined coordination or reporting may be required, individual consultation between the Corps and USFWS and NMFS generally is not required for activities covered by programmatic consultations. Activities covered by programmatic ESA consultations must still comply with Corps notification and permitting requirements.

Q. What activities are currently covered by programmatic ESA consultation?

A. The following activities are covered under the programmatic consultation for threatened and endangered salmonid species: · Aids to Navigation · Mooring Buoys · Temporary Recreational Structures [not approved for listed salmon and steelhead] · Replacement of up to Eighteen (18) Existing Piling · Installation or Replacement of One (1) Boatlift · Scientific Measurement Devices · Oil Spill Containment · Fish and Wildlife Harvesting · Tideland Markers · Nearshore Fill for State Hydraulic Project Approval (HPA) Mitigation Requirements · Minor Bank Stabilization Repair Activities The description and conditions for the activities covered under the programmatic consultation are separated into geographic regions. The conditions for each activity may vary by region or the activity may not be approved in certain regions. Regions are separated by waterbody type and county. In addition, all activities must comply with the general implementation conditions and timing windows of the programmatic consultations. Please see our [Programmatic Consultation](#) web page for more information.

Q. What if my activity is not one of the activities covered by one of the programmatic consultations?

A. If your project is not one of the activities covered in the programmatic consultation, then an individual ESA consultation is required if the proposed work has the potential to affect threatened or endangered species. Additionally, if any threatened or endangered species or designated critical habitat might be affected, or is in the vicinity of your project, you must notify the Corps. Do not begin any work until you receive notification from the Corps that the proposed work complies with the ESA. We recommend that you use the [Joint Aquatic Resource Permits Application \(JARPA\)](#) form to notify us.

Q. What if my project meets the conditions of the

programmatic consultation, but a threatened or endangered bird, mammal, amphibian, reptile, or plant species occurs in the vicinity?

A. The new programmatic consultation covers **only** listed fish species. If other threatened or endangered species or designated critical habitat occur in the vicinity of your project, you must notify the Corps. Do not begin any work until you receive notification from the Corps that the proposed work complies with the ESA. We recommend that you use the [Joint Aquatic Resource Permits Application \(JARPA\)](#) form to notify us.

Q. What if my project does not meet the conditions of the new programmatic consultation?

A. If your project is one of the covered activities but cannot meet the conditions of the programmatic consultation, then an individual consultation is required if the proposed work has the potential to affect threatened or endangered species. As always, if any threatened or endangered species or designated critical habitat might be affected or is in the vicinity of your project, you must notify the Corps. Do not begin any work until you receive notification from the Corps that the proposed work complies with the ESA. We recommend that you use the [Joint Aquatic Resource Permits Application \(JARPA\)](#) form to notify us.

Q. Do I need to provide any specialized information if the programmatic consultation applies to my project?

A. You must complete the programmatic consultation tracking form and send it, along with project drawings, to the Corps. If your project meets the terms and conditions of the applicable nationwide permit and the programmatic consultation, you may submit the tracking form and drawings after project construction. To obtain the tracking form, please see our [Programmatic Consultation](#) web page.

Q. Will there be any other activities addressed via programmatic consultation?

A. Seattle District is working to cover more categories of activities via programmatic consultation. Habitat restoration was recently approved and culvert removal activities will likely be the next approved activity. In addition, we are working with various agencies and stakeholders who are helping us work on other categories of activities such as mooring buoy systems for multiple boats, underwater cable installation, and certain types of piers and floats. Please continue to check our web site for new information.

Q. Why is the Corps pursuing programmatic consultation on habitat restoration projects before other kinds of projects?

A. The ESA requires all Federal agencies to use their authorities to carry out programs for the conservation and recovery of threatened or endangered species. In order to do our part, we are making programmatic consultations on habitat restoration projects our top priority.

INDIVIDUAL ESA SECTION 7 CONSULTATION

Q. Do I need to provide any specialized information if an individual ESA consultation is required?

A. If an individual ESA consultation is necessary, applicants need to provide a biological evaluation (BE) with their permit application. The BE assesses project impacts to listed, and/or proposed species and designated and/or proposed critical habitat, forming the basis for initiating the ESA consultation process.

Q. Where can I find information on preparing a biological evaluation that meets the criteria of the Corps, USFWS, and NMFS?

A. For helpful guidance, we use and recommend a variety of resources that can help you prepare an acceptable BE. Some of the more helpful resources include: · Special Public Notice titled [*Corps of Engineers Regulatory Program and the Endangered*](#)

[Special Public Notice](#) (April 11, 2009), concerning Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences · USFWS document titled A Framework to Assist in Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Bull Trout Subpopulation Watershed Scale · NMFS document titled The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids. These documents can be obtained from the Services or their websites.

Q. Are there any guidelines that the Corps uses to make effects determinations for projects?

A. We use and recommend a variety of resources that can help you with effects determinations. Some of the more helpful resources include · USFWS/NMFS Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences, · USFWS document titled A Framework to Assist in Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Bull Trout Subpopulation Watershed Scale · NMFS document titled The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids. These documents can be obtained from the Services or their websites. For shoreline construction proposals in the Lake Washington system, please see our [Special Public Notice](#) for Lake Washington, Lake Sammamish, and the Ship Canal, including Lake Union.

Q. Do I need to notify the Corps of Engineers (Corps) in order to use Nationwide Permits (NWP)?

A. In most cases, yes. Even if the work falls within the thresholds and conditions of a NWP, applicants must notify us if their proposed work might affect threatened or endangered species, or their habitat, or if the project is in the vicinity of such habitat. Listed fish species currently occur in much of the State and we advise

applicants to contact us for all work in or near streams, including intermittent or seasonal streams. Our policy aims to comply with the NWP general condition 11 that states that no activity is authorized under any NWP if that work is likely to jeopardize the continued existence of a threatened or endangered species. If any threatened or endangered species or designated critical habitat might be affected, or is in the vicinity of your project, you must notify the Corps and not begin work until you receive notification from the Corps that the proposed work complies with the ESA. We recommend that you use the [Joint Aquatic Resource Permits Application \(JARPA\)](#) form to notify us.

Q. Is ESA consultation required for projects that are clearly beneficial to habitat for listed species?

A. Yes. The ESA requires us to consult on any project that may affect listed species, even if those effects are beneficial. Many times, our analysis of habitat restoration projects focuses on the short-term impacts. Even if a habitat restoration project may be tremendously beneficial over the long-term, temporary construction activities may result in short-term adverse effects to listed species. For example, construction may require de-watering or diversion of a stream, temporary increases in turbidity, or the increased risk for fuel spills into sensitive habitats. The ESA requires us to consider all types of impacts. During the consultation process, we work with the Services and the applicant to minimize the potential for harm or "take" of listed species and their habitat, even if the adverse effects are only temporary. We have worked to streamline the consultation process for habitat restoration projects so that we can move such projects through our regulatory process in a timely manner.

EMERGENCY PROCEDURES

Q. Does the Corps have an emergency process?

The Seattle District is able to expedite the application review process for emergencies. According to 33 CFR 325.2(e)(4), an emergency is a situation which would result in an unacceptable hazard to life, significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. Except in extreme and rare circumstances, we will not classify situations created by poor planning or late submittal of a permit application as emergencies. For emergency situations that comply with 33 CFR 235.2(e)(4), our review process can take from one day to one week to complete. We will make reasonable efforts to receive comments from interested Federal, State, and local agencies and the affected public. Also, the Corps will publish through notice any special procedures authorized and the rationale. If the work is authorized by a NWP, the Seattle District will make the final decision and after-the-fact coordination and additional requirements will be unlikely. For emergency work subject to an individual permit, the Seattle District will perform coordination and recommend a decision, however the Northwestern Division office, one level above the Seattle District office, is responsible for final approval. After the emergency work authorized via an individual permit is completed, the Corps must finalize their evaluation of the project and may add requirements concerning restoration, mitigation, or the operation and maintenance of the completed work.

Q. Do the NMFS and USFWS have any emergency consultation processes?

A. The two Services have an emergency consultation process (50 CFR 402.05) for unpredictable events with potential to cause imminent loss of human life or property. Property is defined as significant infrastructure such as key transportation corridors, dwellings, and office buildings. Emergency consultation can take from one day to about two weeks. In an emergency, the Corps notifies NMFS and/or USFWS that emergency procedures are

being invoked and employs measures to minimize the impacts of the emergency work. Where possible, the Services may provide advice to reduce the potential for adverse effects on listed species. After-the-fact consultation is required and may require significant modification, or total removal of temporary solutions employed in the emergency once the emergency has subsided. Additional mitigation actions may be required to account for "take" of listed species and/or loss of habitat for listed species.

ENFORCEMENT

Q. Why should I go through a lengthy permit application process as opposed to just building the project without a permit?

A. The Corps and the two Services operate enforcement programs to ensure compliance with their regulatory programs and the ESA. Response to unauthorized work or "take" of listed species would depend on the reason for moving forward with the work, the potential impacts to listed fish species and their habitat, and actions the Services decide to take. The Corps can elect to pursue violators to the full extent of the law. In egregious situations, Seattle District will do that, in conjunction with the Environmental Protection Agency. In situations involving unauthorized filling of non-navigable waterbodies, including wetlands, the Corps has the ability to handle the situation as a civil action (includes fines, etc.) or as a criminal action. Violations occurring in navigable waterbodies must be handled as criminal actions. The two Services have this same latitude. If the entity responsible for the work has not received a "take permit", or the entity has not gotten an "incidental take" authorization, the Service can fine an entity \$50,000 for each listed species that is killed by the work.

Q. What would happen if an applicant did the work before the

Corps finished ESA consultation?

A. In situations where the applicant begins the work without the required authorization, the Corps and the Services would likely pursue an enforcement action. Response would depend on the reason for beginning the work without authorization, the potential impacts to listed fish species, and actions the Services decide to take. The Corps can elect to pursue violators to the full extent of the law. In egregious situations Seattle District will do that, in conjunction with the Environmental Protection Agency. In situations involving unauthorized filling of non-navigable waterbodies, including wetlands, Seattle District has the ability to handle the situation as a civil action (with fines, etc.) or as a criminal action. A serious violation occurring in navigable waterbodies can only be handled as a criminal action. The two Services have this same latitude. If the entity responsible for the work has not received a "take permit", or the entity has not gotten an "incidental take" authorization, the Service can fine an entity \$50,000 for each listed species that is killed by the work.

Q. Who would be liable if the Corps or Services initiated an enforcement action?

A. The land owner, applicant or project proponent (as an entity), contractors employed by the project proponent, and individual managers or staff employed by the project proponent all face potential liability for violations of the ESA.

MISCELLANEOUS

Q. If an activity is covered by the limits described in the 4(d) Rule, does the Corps still need to consult with the Services?

A. Yes. The 4(d) Rule does not substitute for the Section 7 consultation required of the Corps. The 4(d) Rules set forth certain categories of activities that minimize harm to threatened salmon and steelhead or contribute to their conservation. "Take" is legal

for categories of activities approved via the 4(d) Rule. Any take outside of the approved activities in the 4(d) Rules, unless authorized separately under Section 7 or Section 10 of the ESA, is illegal under the ESA. Even though the 4(d) Rule limits do not substitute for Corps consultation, we expect that the approval via the 4(d) Rule will help expedite our Section 7 consultations for those activities.

Q. Does "take" only apply to killing an individual fish?

A. No. "Take" can occur when you harm, harass, or cause mortality to individual fish or harming their critical habitat.

Point of Contact: Regulatory Reception or
Contact a Specific Staff Member

Phone: (206)
764-3495

Email:
MARNE.A.PACKER@USACE.ARMY.MIL