

Section 7 of the Endangered Species Act



Jeromy Applegate
Columbus, OH Ecological Services Field Office

Endangered Species Act

- Section 2: Findings, Purpose, and Policy
 - Policy: “...all Federal departments and agencies shall seek to conserve endangered species and threatened species...”
- Section 3: Definitions
- Section 4: Listing, Recovery Planning
- Section 5: Land Acquisition
- Section 6: Cooperation with States
- Section 7: Interagency Cooperation
- Section 8: International Cooperation
 - CITES
- Section 9: Prohibited Acts
 - “Take”
- Section 10: Permits
- Section 11: Penalties and Enforcement
- Section 12: Endangered Plants
- Sections 13-18: legislative necessities...

Section 7, Interagency Cooperation

- Sec. 7(a)(1)
 - “...All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act...”

Section 7, Interagency Cooperation

- 7(a)(2)
 - “Each **Federal agency** shall, in **consultation** with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is **not likely to jeopardize the continued existence** of any endangered species or threatened species or result in the destruction or adverse modification of [Critical Habitat]...”

What is a Federal Action?

- Federal agency authorizes, funds, or carries out.
 - Authorizes
 - USACE issues a CWA section 404 permit
 - OSMRE authorizes state coal mine permitting programs
 - Funds
 - FHWA funds road construction
 - USFWS funds conservation and habitat management
 - Carries Out
 - Wright Patterson Air Force Base expands a runway
 - WNF conducts a timber harvest



What are “effects of the action”

- “...the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action...” 50 CFR 402.02



- But for Test

Effects of the action include all the activities that would not occur “but for” the Federal action.

When is Consultation Required?

- When a discretionary Federal action may affect a listed species or Critical Habitat.
 - If the action area occurs within the range of the species and will effect suitable habitat for that species (not just Critical Habitat), the project typically “may affect” the species.
- Consultation not required if there will be no effect on listed species.

Consultation Process

- Step 1. Look at list of species by county
 - Updated and distributed ~ twice/year
 - <http://www.fws.gov/midwest/endangered/saction7/s7process>
- Step 2. Does suitable habitat for species in your county occur in the action area?
 - I-bat and NLEB: Woods, wooded fence-rows.
 - Mussel species: Rivers listed in the *Ohio Mussel Survey Protocols*
 - No suitable habitat = species not present

Consultation process

- Step 3. if so, will habitat be impacted?
 - No
 - project will have “no effect” on listed species. No consultation required. Document for files.
 - Yes
 - Contact FWS field office to request technical assistance
 - Do we know that the species is present?
 - Yes, project “may affect” species
 - No
 - » assume presence (may affect)
 - » Conduct a survey to demonstrate presence or probable absence.
 - Not Sure?
 - request technical assistance from FWS to aid in determination.

When a Federal Action may affect a listed species...

- ...consultation between the Action Agency and FWS is required
- Formal Consultation
 - Generally 135-days
 - Jeopardy Analysis
 - More on this later...
- Informal Consultation
 - Optional – can skip this step and go directly to formal consultation
 - Typically a short timeframe
 - Generally ~ 30 days

Informal Consultation

- Optional (or go straight to Formal)
- Consultation concluded informally when effects are
 - Insignificant
 - Unable to be meaningfully measured or detected; never rises to the level of take (e.g., harm, harassment)
 - Discountable
 - Extremely unlikely to occur
 - Wholly beneficial
- I.e., the Federal action is “not likely to adversely affect” listed species

Take (wildlife)

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

- **Harm**

“Significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering”



Incidental Take

- **“Take” resulting from, but not the purpose of, an otherwise lawful activity.**
- **Unintentional, but still a prohibited action under the ESA**
- **Can be authorized or permitted, if take will not result in Jeopardy to the species.**

Informal Consultation

- Optional (or go straight to Formal)
- Consultation concluded informally when effects are
 - Insignificant
 - Unable to be meaningfully measured or detected; never rises to the level of take (e.g., harm)
 - Discountable
 - Extremely unlikely to occur
 - Wholly beneficial
- i.e., the Federal action is “not likely to adversely affect” listed species

Formal Consultation

- Required when action is “likely to adversely affect”
- Action agency submits “Biological Assessment” (BA) to the FWS
 - Analyzes effects of the action to the species
 - Cumulative effects of other “non-federal” actions
 - BA includes conservation measures developed in coordination with FWS

Formal Consultation

- FWS reviews the BA and develops a Biological Opinion (BO)
 - Jeopardy Analysis
 - Jeopardy – Rare: Reasonable and Prudent Alternatives
 - No Jeopardy – Common: Reasonable and Prudent Measures
 - Incidental Take Statement
 - Terms and conditions
- BO received by action agency within 135 days of FWS's receipt of complete BA

- Jeopardize the continued existence of...
 - “...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, numbers, or distribution of that listed species.”
 - 50 CFR 402.2

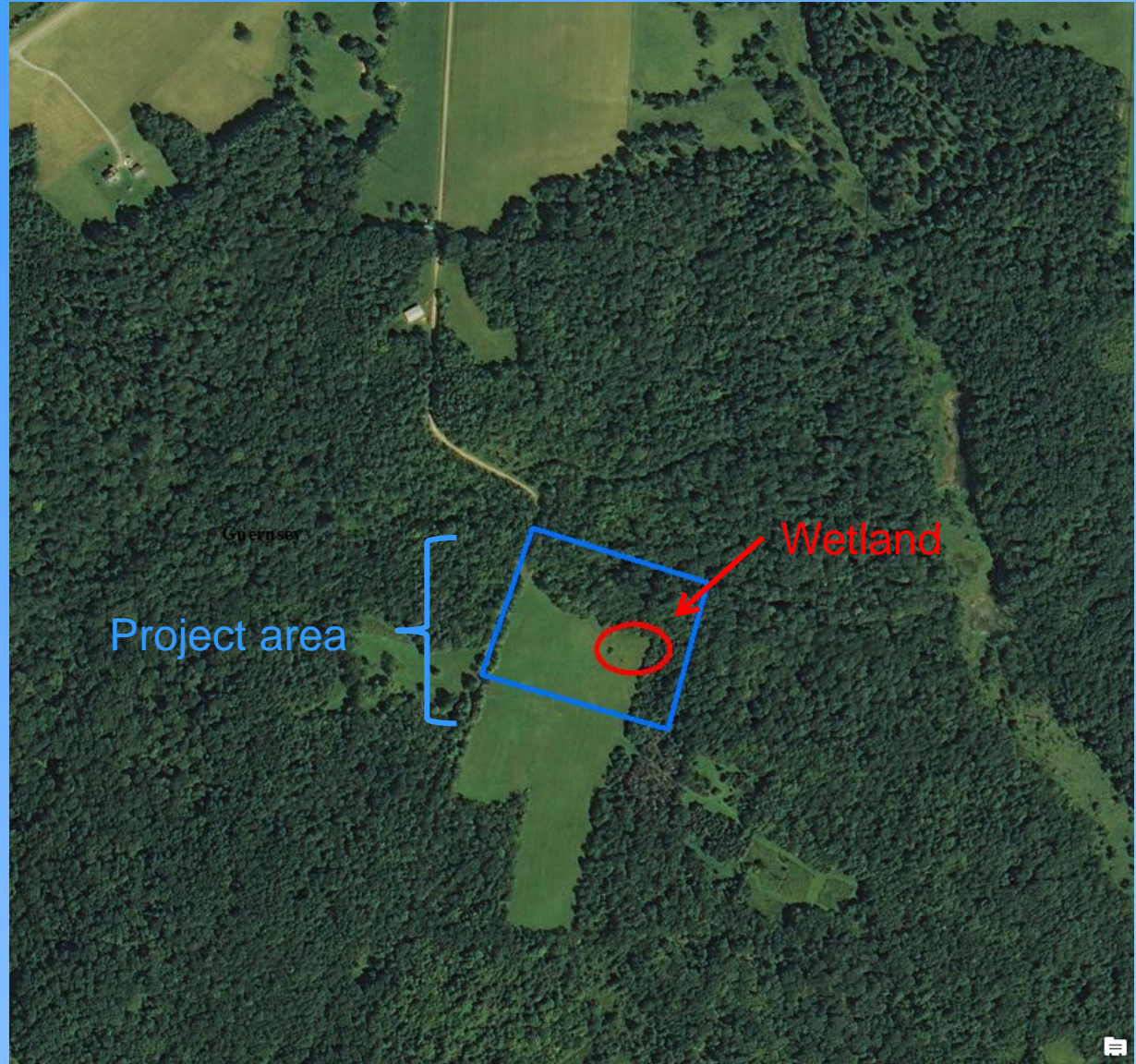


Formal Consultation

- Service reviews the BA and develops a Biological Opinion BO
 - Jeopardy Analysis
 - Jeopardy – Rare: Reasonable and Prudent Alternatives
 - No Jeopardy – Common: Reasonable and Prudent Measures
 - Terms and conditions
 - Incidental Take Statement
- BO received by action agency within 135 days of FWS's receipt of complete BA

Example

- Guernsey County
- Natural Gas well pad
- 10-acre site
- 5 acres of woods
- Wetland on-site
 - 404 Permit
 - Federal Nexus



- Step 1. Look at list of species by county

- <http://www.fws.gov/midwest/Endangered/section7/s7process>

- Step 2. Suitable habitat in the action area?

			streams and small rivers
	Rayed bean (<i>Villosa fabalis</i>)	Endangered	Smaller, headwater creeks, but they are sometimes found in large rivers
	Snuffbox (<i>Enioblasma triquetra</i>)	Endangered	Small to medium-sized creeks and some larger rivers, in areas with a swift current
Guernsey	Indiana bat (<i>Myotis sodalis</i>)	Endangered	Hibernacula = Caves and mines; Maternity and foraging habitat = small stream corridors with well developed riparian woods; upland forests
	Northern long-eared bat <i>Myotis septentrionalis</i>	Threatened	Hibernates in caves and mines - swarming in surrounding wooded areas in autumn. During late spring and summer roosts and forages in upland forests.
Hamilton	Indiana bat (<i>Myotis sodalis</i>)	Endangered	Hibernacula = Caves and mines; Maternity and foraging habitat = small stream corridors with well developed riparian woods; upland forests
	Northern long-eared bat <i>Myotis septentrionalis</i>	Threatened	Hibernates in caves and mines - swarming in surrounding wooded areas in autumn. During late spring and summer roosts and forages in upland forests.
	Fanshell (<i>Cyprogenia stegaria</i>) (= <i>C. irrorata</i>)	Endangered	Found in areas of packed sand and gravel at locations in a good current
	Pink musket	Endangered	The lower Ohio River and its larger

- Step 3. will habitat be impacted?
 - No
 - project will have “no effect” on listed species. No consultation required. Federal action agency should document for its files.
 - Yes
 - Contact FWS field office to request technical assistance
 - Do we know that the species is present?
 - Yes, project “may affect” species
 - No
 - » assume presence (may affect)
 - » Conduct a survey to demonstrate presence or probable absence.



Technical Assistance

- Send us a request!
 - Ohio@fws.gov
 - Location map
 - Lat/Long
 - Aerial Photo
 - Project area outlined
 - Limits of disturbance outlined
 - Project description
 - Description of onsite habitat
 - Proposed impacts
 - Photographs



- Step 3. will habitat be impacted?

- No

- project will have “no effect” on listed species. No consultation required. Federal action agency should document for its files.

- Yes

- Contact FWS field office to request technical assistance
 - Do we know that the species is present?

- Yes, project “may affect” species (northern long-eared bat)

- No

- » assume presence (may affect) (Indiana bat)

- » Conduct a survey to demonstrate presence or probable absence.

Effects of the Action

- Clearing trees during the summer (April 1 – September 30) can result in adverse effects.
- What about clearing trees during the winter?

Could a maternity roost tree be cut?

If a maternity colony was living in the action area, and 5 acres was cut down, would they still be able to breed, feed, and find shelter?

Will bats have to fly much farther or through open areas to get to foraging habitat?

Is other habitat readily available nearby?

What about clearing trees during the winter?

Could a maternity roost tree be cut?

Is other habitat readily available nearby?

If a maternity colony was living in the action area, and 5 acres was cut down, would they still be able to breed, feed, and find shelter?

Will bats have to fly much farther or through open areas to get to foraging habitat?



- **FEDERALLY LISTED SPECIES COMMENTS:** All projects in the State of Ohio lie within the range of the federally endangered **Indiana bat** (*Myotis sodalis*) and the federally threatened **northern long-eared bat** (*Myotis septentrionalis*). In Ohio, presence of the Indiana bat and northern long-eared bat is assumed wherever suitable habitat occurs unless a presence/absence survey has been performed to document absence. Suitable summer habitat for Indiana bats and northern long-eared bats consists of a wide variety of forested/wooded habitats where they roost, forage, and travel and may also include some adjacent and interspersed non-forested habitats such as emergent wetlands and adjacent edges of agricultural fields, old fields and pastures. In the winter, Indiana bats and northern long-eared bats hibernate in caves and abandoned mines.
- **The proposed project is in the vicinity of one or more confirmed records of northern long-eared bats.** Therefore, we recommend that trees ≥ 3 inches dbh be saved wherever possible. Because the project will result in a small amount of forest clearing relative to the available habitat in the immediately surrounding area, habitat removal is unlikely to result in significant impacts to Indiana bats or northern long-eared bats. Since northern long-eared bat presence in the vicinity of the project has been confirmed and presence of Indiana bats is assumed, clearing of trees during the summer roosting season may result in direct take of individuals. If any caves or abandoned mines may be disturbed, further coordination with this office is requested to determine if fall or spring portal surveys are warranted. If no caves or abandoned mines are present and tree removal is unavoidable, we recommend that removal of any trees ≥ 3 inches dbh only occur between October 1 and March 31. Following this seasonal tree clearing recommendation should ensure that any effects to Indiana bats and northern long-eared bats are insignificant or discountable. **Please note that, because northern long-eared bat presence has already been confirmed in the project vicinity, any additional summer surveys would not constitute presence/absence surveys for northern long-eared bats.**

So, in order to conclude consultation informally, I know I will need to:

1. Verify that no caves or mines (i.e., potential hibernacula) are on site.
2. Commit to cutting all trees \geq 3-inch dbh only from October 1 – March 31.

But, how and when will consultation conclude?

- Consultation occurs between FWS and the Federal action agency
 - Army Corps of Engineers
 - Some exceptions (e.g., ODOT)
- Include FWS technical assistance letter in the 404 permit application.
 - State that no caves or mines are present
 - Commit in the application that cutting trees will not occur from April 1 – September 30.



DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

REPLY TO
ATTENTION OF CELRH-RD-N

03E15000-2015-I-1109

To: U.S. Fish and Wildlife Service, Columbus, Ohio Field Office
Request for review pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 and/or coordination required by the Fish & Wildlife Coordination Act.

Date: 26 May 2015

Permit Application Number: LRH-2015-435-GMR

Project Name: Northmont Middle School Stream Crossing

County: Montgomery

U.S. Army Corps of Engineers Contact: Andrew Wendt (513) 825-4518 or
andrew.j.wendt@usace.army.mil

Listed species with potential to occur in proposed project area: (E) – Endangered; (T) – Threatened

- | | |
|---|---|
| <input type="checkbox"/> American burying beetle (E) | <input type="checkbox"/> Purple cat's paw pearly mussel (E) |
| <input type="checkbox"/> Clubshell mussel (E) | <input type="checkbox"/> Rabbitsfoot mussel (T) |
| <input type="checkbox"/> Eastern prairie fringed orchid (T) | <input checked="" type="checkbox"/> Rayed bean mussel (E) |
| <input type="checkbox"/> Fanshell mussel (E) | <input type="checkbox"/> Running buffalo clover (E) |
| <input checked="" type="checkbox"/> Indiana bat (E) | <input type="checkbox"/> Scioto madtom (E) |
| <input checked="" type="checkbox"/> Northern long-eared bat (T) | <input type="checkbox"/> Sheepsnose mussel (E) |
| <input type="checkbox"/> Northern monkshood (T) | <input checked="" type="checkbox"/> Snuffbox mussel (E) |
| <input type="checkbox"/> Northern riffleshell mussel (E) | <input type="checkbox"/> Small whorled pogonia (T) |
| <input type="checkbox"/> Pink mucket pearly mussel (E) | <input type="checkbox"/> Virginia spiraea (T) |

See attached project description (including any conservation measures that are part of the proposal), permit conditions, permit application details, and rationale for the following determination(s).

The U.S. Army Corps of Engineers has determined the proposed project:

- will result in no effect to *Rayed bean mussel and snuffbox mussel*. - Additional information is below
- may affect _____
- may affect, but is not likely to adversely affect the *Indiana bat and northern long-eared bat*. - Additional information is below
- is likely to adversely affect _____
- will not result in take of *osprey* under the *Bald and Golden Eagle Protection Act* and the *Migratory Bird Treaty Act* (if applicable)

The U.S. Army Corps of Engineers requests:

- USFWS concurrence with our determination(s)
- Additional assistance to make our determination
- Other: _____

The U.S. Fish and Wildlife Service:

- Requests additional time for review
- Concurs with your determination and has no further ESA comments
- Will provide FWCA comments separately
- Has no comments pursuant to FWCA

USFWS Contact(s): *Charles Allen*
Charles Allen

Date: *May 27, 2015*

- Determination of effects: “We determine that action may affect, but is not likely to adversely affect, the Indiana bat and northern long-eared bat”
- Provide justification

- Request concurrence

“We request USFWS concurrence with our determination”



DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

REPLY TO
ATTENTION OF CELRH-RD-N

03E15000-2015-I-1109

To: U.S. Fish and Wildlife Service, Columbus, Ohio Field Office
Request for review pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 and/or coordination required by the Fish & Wildlife Coordination Act.

Date: 26 May 2015

Permit Application Number: LRH-2015-435-GMR

Project Name: Northmont Middle School Stream Crossing

County: Montgomery

U.S. Army Corps of Engineers Contact: Andrew Wendt (513) 825-4518 or
andrew.j.wendt@usace.army.mil

Listed species with potential to occur in proposed project area: (E) – Endangered; (T) – Threatened

- | | |
|---|---|
| <input type="checkbox"/> American burying beetle (E) | <input type="checkbox"/> Purple cat's paw pearly mussel (E) |
| <input type="checkbox"/> Clubshell mussel (E) | <input type="checkbox"/> Rabbitsfoot mussel (T) |
| <input type="checkbox"/> Eastern prairie fringed orchid (T) | <input checked="" type="checkbox"/> Rayed bean mussel (E) |
| <input type="checkbox"/> Fanshell mussel (E) | <input type="checkbox"/> Running buffalo clover (E) |
| <input checked="" type="checkbox"/> Indiana bat (E) | <input type="checkbox"/> Scioto madtom (E) |
| <input checked="" type="checkbox"/> Northern long-eared bat (T) | <input type="checkbox"/> Sheepnose mussel (E) |
| <input type="checkbox"/> Northern monkshood (T) | <input checked="" type="checkbox"/> Snuffbox mussel (E) |
| <input type="checkbox"/> Northern riffleshell mussel (E) | <input type="checkbox"/> Small whorled pogonia (T) |
| <input type="checkbox"/> Pink mucket pearly mussel (E) | <input type="checkbox"/> Virginia spiraea (T) |

See attached project description (including any conservation measures that are part of the proposal), permit conditions, permit application details, and rationale for the following determination(s).

The U.S. Army Corps of Engineers has determined the proposed project:

- will result in no effect to *Rayed bean mussel and snuffbox mussel*. - Additional information is below
- may affect _____
- may affect, but is not likely to adversely affect the *Indiana bat and northern long-eared bat*. - Additional information is below
- is likely to adversely affect _____
- will not result in take of bald eagles under the **Bald and Golden Eagle Protection Act** and the **Migratory Bird Treaty Act** (if applicable)

The U.S. Army Corps of Engineers requests:

- USFWS concurrence with our determination(s)
- Additional assistance to make our determination
- Other: _____

The U.S. Fish and Wildlife Service:

- Requests additional time for review
- Concurs with your determination and has no further ESA comments
- Will provide FWCA comments separately
- Has no comments pursuant to FWCA

USFWS Contact(s): *Charles Allen*
Charles Allen

Date: *May 27, 2015*

- If FWS agrees, we provide concurrence
- “The USFWS concurs with your determination and has no further ESA comments”



DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

REPLY TO
ATTENTION OF CELRH-RD-N

03E15000-2015-I-1109

To: U.S. Fish and Wildlife Service, Columbus, Ohio Field Office
Request for review pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 and/or coordination required by the Fish & Wildlife Coordination Act.

Date: 26 May 2015

Permit Application Number: LRH-2015-435-GMR

Project Name: Northmont Middle School Stream Crossing

County: Montgomery

U.S. Army Corps of Engineers Contact: Andrew Wendt (513) 825-4518 or
andrew.j.wendt@usace.army.mil

Listed species with potential to occur in proposed project area: (E) – Endangered; (T) – Threatened

- | | |
|---|---|
| <input type="checkbox"/> American burying beetle (E) | <input type="checkbox"/> Purple cat's paw pearly mussel (E) |
| <input type="checkbox"/> Clubshell mussel (E) | <input type="checkbox"/> Rabbitsfoot mussel (T) |
| <input type="checkbox"/> Eastern prairie fringed orchid (T) | <input checked="" type="checkbox"/> Rayed bean mussel (E) |
| <input type="checkbox"/> Fanshell mussel (E) | <input type="checkbox"/> Running buffalo clover (E) |
| <input checked="" type="checkbox"/> Indiana bat (E) | <input type="checkbox"/> Scioto madtom (E) |
| <input checked="" type="checkbox"/> Northern long-eared bat (T) | <input type="checkbox"/> Sheepsnose mussel (E) |
| <input type="checkbox"/> Northern monkshood (T) | <input checked="" type="checkbox"/> Snuffbox mussel (E) |
| <input type="checkbox"/> Northern riffleshell mussel (E) | <input type="checkbox"/> Small whorled pogonia (T) |
| <input type="checkbox"/> Pink mucket pearly mussel (E) | <input type="checkbox"/> Virginia spiraea (T) |

See attached project description (including any conservation measures that are part of the proposal), permit conditions, permit application details, and rationale for the following determination(s).

The U.S. Army Corps of Engineers has determined the proposed project:

- will result in no effect to *Rayed bean mussel and snuffbox mussel*. - Additional information is below
- may affect _____
- may affect, but is not likely to adversely affect the *Indiana bat and northern long-eared bat*. - Additional information is below
- is likely to adversely affect _____
- will not result in take of bald eagles under the **Bald and Golden Eagle Protection Act** and the **Migratory Bird Treaty Act** (if applicable)

The U.S. Army Corps of Engineers requests:

- USFWS concurrence with our determination(s)
- Additional assistance to make our determination
- Other _____

The U.S. Fish and Wildlife Service:

- Requests additional time for review
- Concurs with your determination and has no further ESA comments
- Will provide FWCA comments separately
- Has no comments pursuant to FWCA

USFWS Contact(s):

Charles Allen
Charles Allen

Date:

May 27, 2015

But, how and when will consultation conclude?

- Section 7 consultation concludes when FWS concurs with the Federal action agency's determination that the action is "not likely to adversely affect" federally listed species.

What if I need to cut trees in the summer?

- Formal Consultation
 - NLEB are known in the area. Cutting in the summer can result in direct adverse impacts and take.
- Summer surveys for the species are an option when the action area is not within known habitat
 - I.e., not near capture records
 - Contact FWS to determine this

What about the special 4(d) rule for northern long-eared bat?

- Exempts certain activities from the take prohibition.
- Even though take is “exempted,” the requirement for Federal agencies to consult on the effects of the take is not.
- Formal consultation is required.
 - Jeopardy analysis
 - Incidental take statement not needed for take that is already exempted by 4(d) rule
- Indiana bat!

What if there is no Federal Nexus?

- No Federal Nexus = no section 7 consultation
- No requirement to contact FWS
- But...
- Section 9: Thou shalt not “take”
 - Can request technical assistance
 - If take is likely, section 10 permit and HCP to be exempted from take prohibition

Summary

- Section 7 requires Federal Agencies consult with FWS to ensure that their actions are not likely to jeopardize the continued existence of listed species.
- Consultation is required for all actions that may affect listed species.
- Consultation occurs between the FWS and the Federal action agency. However, much of the data collection is often conducted by the project proponent/applicant.
- Consultation can conclude informally when the action is not likely to adversely affect listed species.
- Formal consultation and a jeopardy analysis are required for all actions that are likely to adversely affect listed species.