

The Endangered Species Act



... to conserve endangered
and threatened species
and the ecosystems on which they depend



USFWS Mission Statement

Working with others, to conserve, protect and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people.





Sections of the ESA

- Section 4: Listing, critical habitat, and recovery plans
- Section 5: Land acquisition
- Section 6: Cooperation with States
- Section 7: **Interagency Cooperation**
- Section 8: International Cooperation
- Section 9: **Prohibited Acts**
- Section 10: **Exceptions**
- Section 11: Penalties and Enforcement



ESA Section 9 Prohibited Acts



California red-legged frog



giant garter snake

- Prohibits “take” of listed animals
- Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.



Harm and Harass

- **Harm** includes significant habitat modification or degradation that results in death or injury to listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Court tested and upheld.
- **Harass** is defined as intentional or negligent actions that create the likelihood of injury to listed wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Not court tested.



Plant Prohibitions

- Section 9 prohibitions for plants:
 - remove and reduce to possession from areas under Federal jurisdiction;
 - maliciously damage or destroy on any such lands
 - remove, cut, dig up, or damage or destroy on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law.





Section 10 Exceptions

- A way to authorize activities otherwise prohibited under Section 9 of the Act
- 10(a)(1)(A)
 - For beneficial actions or research (both Federal or non-Federal)
- 10(a)(1)(B) – incidental take permits (HCP)
- 10(j) – experimental populations



Permits

Section 10

The Fish and Wildlife Service issues incidental take permits to private landowners under section 10(a)(1)(B) provided an approved Habitat Conservation Plan is developed.

Habitat Conservation Plans are a tool for conserving listed, proposed, and candidate species while providing for development that will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”



Private Landowner Agreements

Section 10

Type of Agreement	Landowner agrees to...	Fish and Wildlife Service assures...
Safe Harbor Agreement	take actions to benefit listed species on their land	no additional restrictions will be imposed as species populations improve
Candidate Conservation Agreements with Assurances	take actions to benefit candidate or other non-listed species on their land	no additional restrictions will be imposed if species is later listed



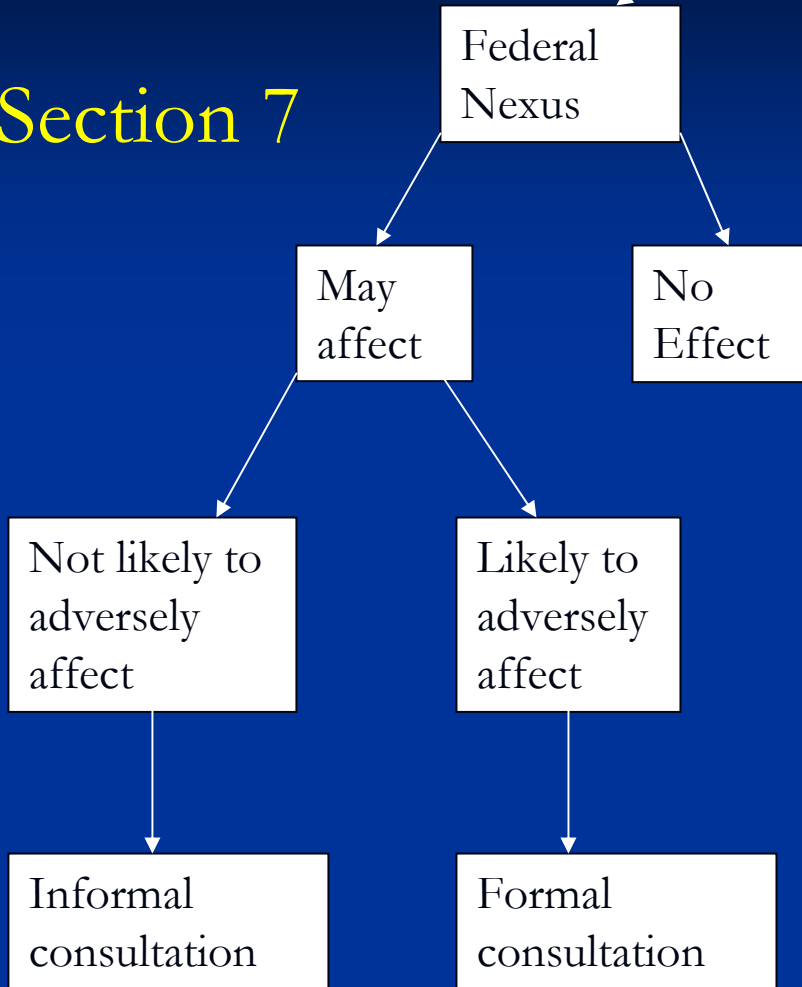
What is an HCP?

- Section 10 of the Act provides exceptions to section 9 prohibitions including the issue of permits to take listed species incidental to otherwise legal activity.
- Incidental take permit - permit that exempts a project proponent from the take prohibition of section 9.
- Habitat Conservation Plan (HCP) - planning document that is a mandatory component of an incidental take permit application.

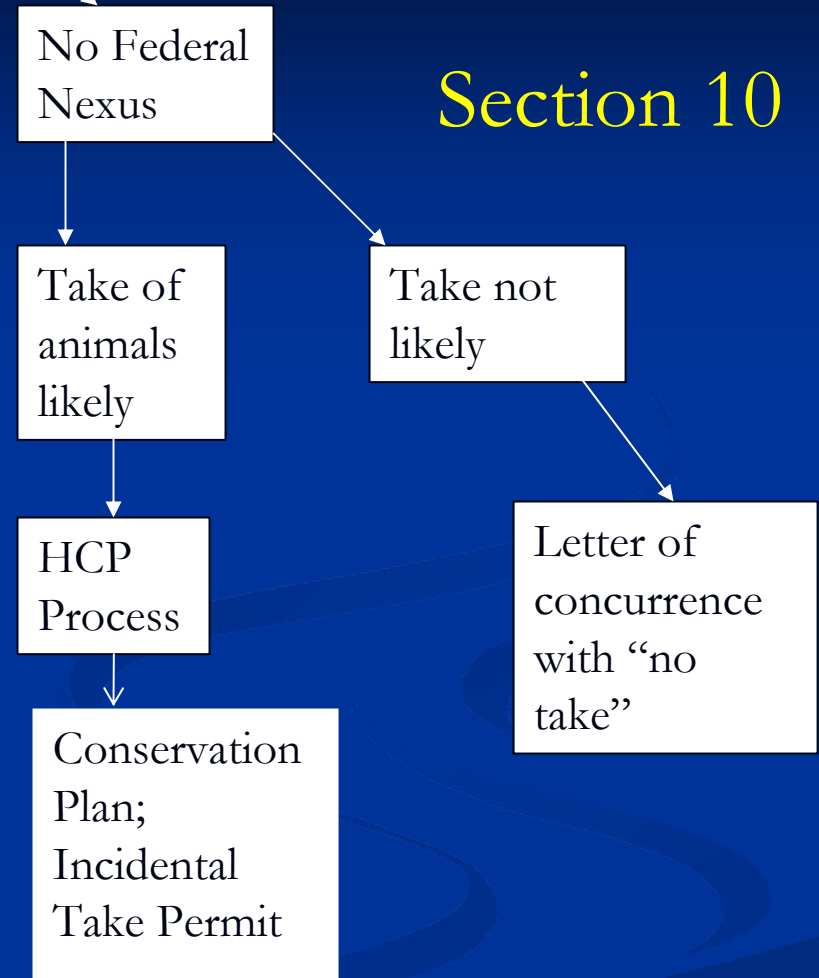


ACTION

Section 7



Section 10





ESA Section 7 Consultation

Requires Federal agencies to:

- conduct programs to conserve endangered and threatened species [7(a)(1)]
- ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat [7(a)(2)]

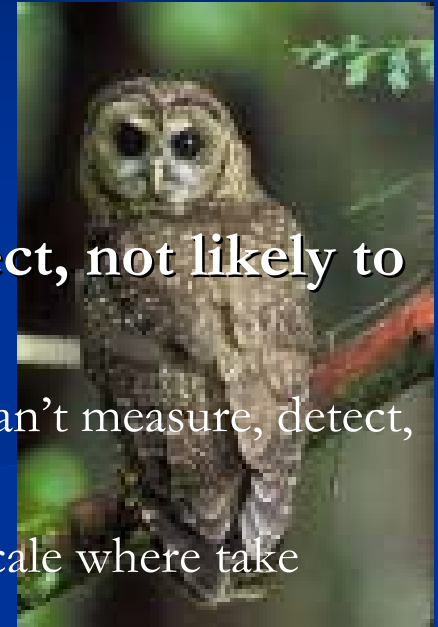
If agency **may affect** species or critical habitat, the agency must initiate consultation with the Fish and Wildlife Service.

Private individuals are affected by section 7 when their action needs a Federal permit or funding.



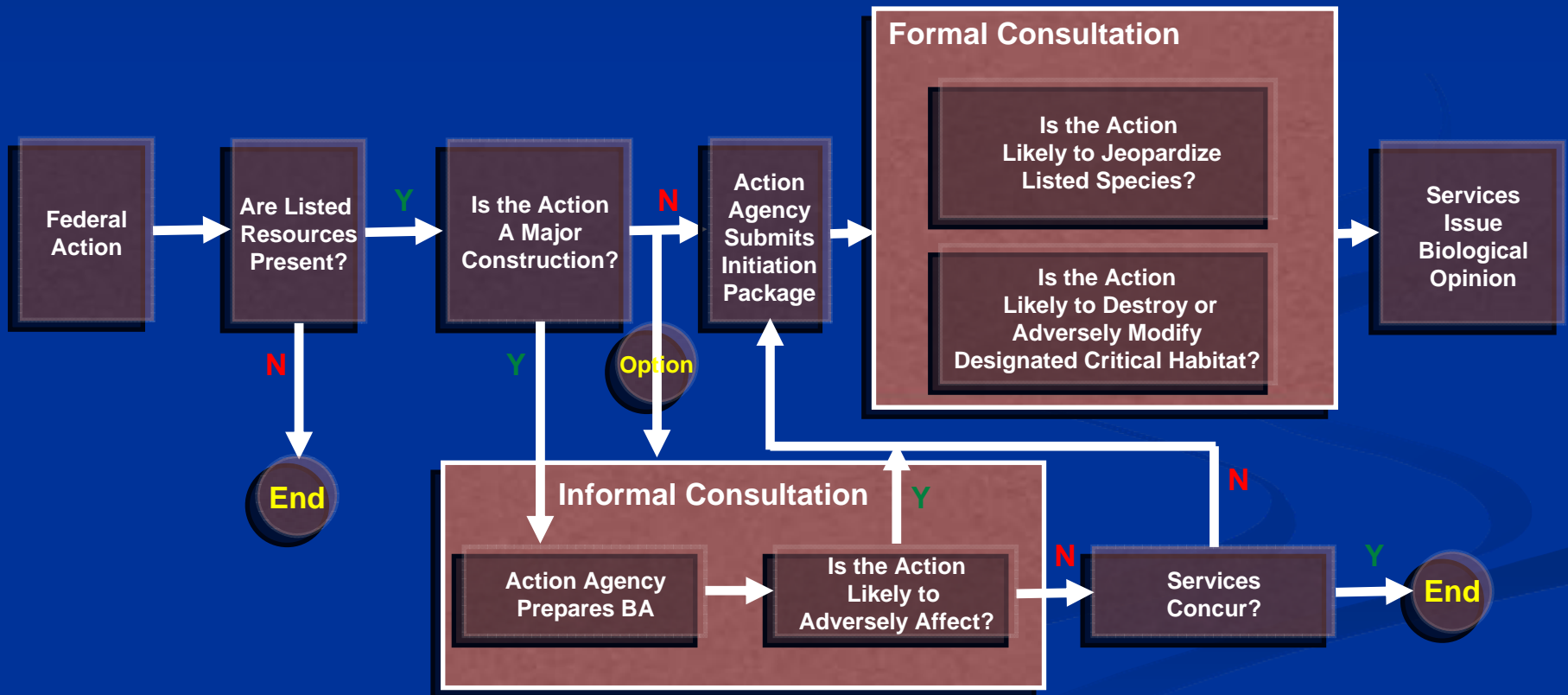
Three Choices for Listed Resources

- **“No effect” determination**
- **Request concurrence with a “may affect, not likely to adversely affect” determination**
 - Discountable – extremely unlikely to occur, can’t measure, detect, or evaluate
 - Insignificant – size of impact never reaches scale where take occurs
 - Wholly beneficial – positive effects, no adverse effects
- **Request formal consultation with a “may affect, likely to adversely affect” determination**





The Generalized Consultation Process





Section 7

Informal Consultation

- Process to determine whether formal consultation is necessary
- Determines whether there are ways to avoid adverse effects to listed species or habitat
- Action agency may modify action to eliminate adverse effects





Section 7

Formal Consultation

If action is *not* likely to jeopardize species or adversely modify habitat, then biological opinion includes:

- Incidental take statement estimating amount of take that may occur incidental to the action
- Reasonable and prudent measures to minimize take





APPLICANTS

- Anyone who requires formal approval/authorization from a Federal agency, so they can conduct an action
- It is up to the action agency to recognize applicant status





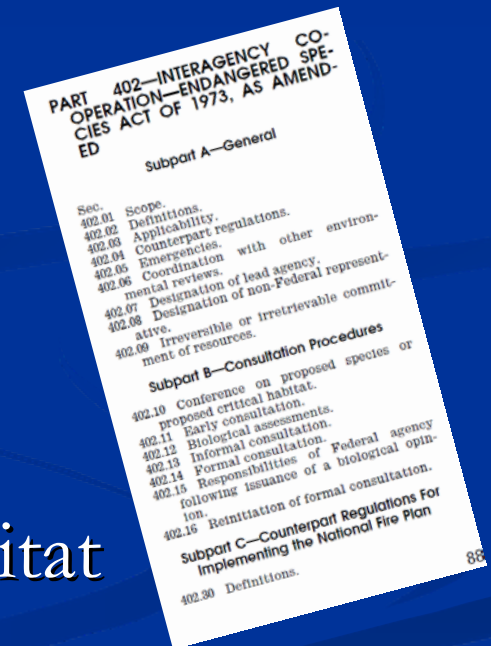
APPLICANTS

- Have a place at the table
- But, they work through the action agency
- Provide:
 - information
 - input
 - analysis
 - understanding



Required Information to Initiate Consultation

- Requests for consultation must include 6 items [50 CFR 402.14(c)]:
 - A description of:
 - (1) the proposed action
 - (2) the specific area affected
 - (3) listed species or critical habitat affected





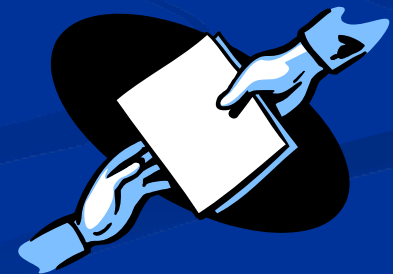
Required Information con't

- A description of:
 - (4) the manner in which the action may affect the species and critical habitat and an analysis of cumulative effects
 - (5) Relevant Reports
 - (6) Any other relevant available information on the action, species, or critical habitat



Required Information con't

- In addition:
 - A Biological Assessment if required per 50 CFR 402.12
- All of this information is called the “Initiation Package”





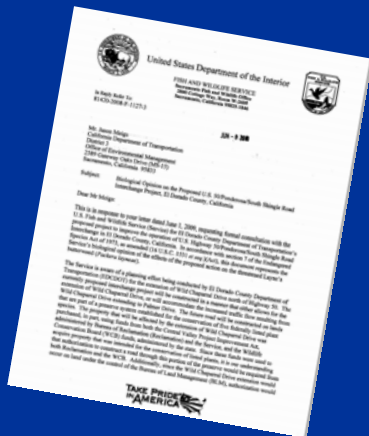
Required Information con't

- The Federal action agency is required to use and provide the best scientific and commercial information available
- ESA section 7(a)(2)
- 50 CFR 402.14(d)



Formal Consultation Process – Biological Opinion

- Service issues a biological opinion that includes:
 - A summary of the base information
 - A detailed discussion of the effects, and
 - The Service's opinion on jeopardy and adverse modification





Formal Consultation Process – Biological Opinion

- If the conclusion is jeopardy or adverse modification:
 - Service drafts Reasonable and Prudent Alternatives (RPAs)
 - Expertise of action agency and applicant utilized
 - 50 CFR 402.14(g), (h)



Consultation Process - Timelines

- Informal consultation has no set timelines
 - The Services generally respond to requests for concurrence within 30 days

- Formal consultation lasts 90 days.
 - Mutual agreement on extensions
 - Applicants must agree to extensions greater than 60 days

- Biological Opinion due 45 days after



Formal Consultation Process – RPAs

- Reasonable and Prudent Alternatives must:
 - Avoid the likelihood of jeopardy or adverse modification
 - Consistent with the intended purpose of the action
 - Consistent with the scope of the action agency's legal authority and jurisdiction
 - Be economically and technologically feasible

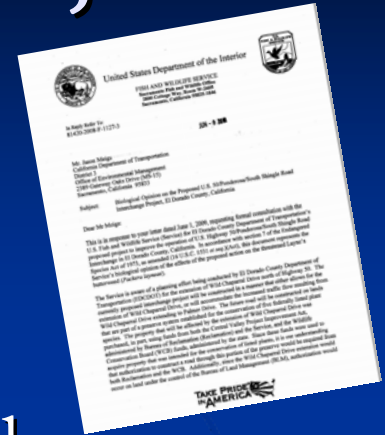


Formal Consultation Process – Incidental Take Statement

- 50 CFR 402.14(i)
- If incidental take is anticipated and can be determined, the Service issues an ITS which specifies:
 - The amount or extent of take
 - Reasonable and prudent measures
 - Non-discretionary Terms and Conditions



So You've Got an Opinion, Now What?



- Once an opinion has been issued:
 - The action agency must determine the course of action to ensure compliance with §7(a)(2) [50 CFR 402.15]
- Certain events may trigger reinitiation of consultation



Reinitiation

50 CFR 402.16

- Consultation must be reinitiated when:
 - The amount or extent of incidental take is exceeded
 - New information reveals effects of the action that may affect species or habitat in a manner or to an extent not previously considered...



Reinitiation, con't

50 CFR 402.16

- Consultation must be reinitiated when:
 - The proposed action is modified in a manner that causes an effect to species or habitat that was not considered in the opinion; and,
 - A new species is listed or critical habitat designated



Q. What information is needed by the FWS to begin a jeopardy analysis/formal consultation? [50 CFR §402.14 (c)]

A. In writing,

a description of:

- All the actions of the project (construction, operations, etc.)
- Any listed species or critical habitat that may be affected by the project (not just in the project footprint)
- How the listed species or critical habitat may be affected by the actions
- Analysis of cumulative effects
- Any relevant biological/environmental reports prepared for or associated with the project
- Any other relevant information



Q: Why do the Services ask for so much information?

A: Section 7(a)(2) provides the information standard:

“... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”



You have a proposed project.

Q. What 'triggers' the Endangered Species Act process?

A. If there is a possibility any project actions 'MAY AFFECT' a listed species, you must consult with FWS.

Q. What is the first thing you do to start the process?

A. Find out what listed species you may have in your area. 1st step: go to our website to obtain a species list for their location (quad or county based). <http://www.fws.gov/sacramento/>



You have a proposed project.

Q. How do we know if we have any listed species that may be affected by our project?

Databases such as California Natural Diversity Database (CNDDDB); knowledgeable local, county, state, federal biologists; surveys.

Q. How may we get technical assistance from the FWS?

A. Send letter to your local FWS office, requesting technical assistance. Include:

- brief description of project,
- geographical location of the project, and
- habitat type(s), e.g. grasslands, chaparral, forest.