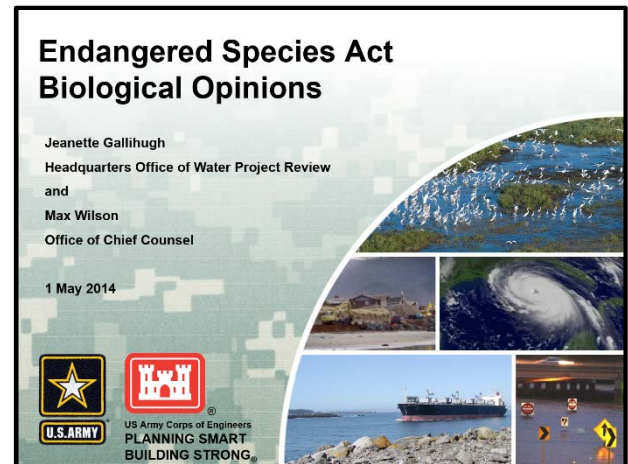


**Q&A: Endangered Species Act Biological Opinions**  
**SMART Planning Webinar Series**  
**May 1, 2014**

The May 1<sup>st</sup> webinar, part of a series of information-sharing webinars hosted by the Planning Community of Practice, shared background information on the development of Biological Opinions under the Endangered Species Act (Section 7 consultation).

Jeanette Gallihugh (HQUSACE Office of Water Project Review) and Max Wilson (HQUSACE Office of Chief Counsel) jointly presented on the topic. Sue Hughes (HQUSACE, PCoP) and Mark Matusiak (OWPR) joined Jeanette and Max to respond to questions from the field.



The Endangered Species Consultation Handbook referenced during the webinar is available online at [http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf). Although last updated in 1998, the handbook remains a good resource for planners.

The regulations for Section 7 consultations (50 CFR 402) can be found online at: <http://www.nmfs.noaa.gov/pr/pdfs/laws/sec7regs.pdf>

The questions and responses below are not a direct transcript; they have been reordered and edited for clarity. Additional questions and feedback are always welcome via the Planning Community Toolbox’s SMART Guide comment form online at:

<http://planning.usace.army.mil/toolbox/smart.cfm?Section=10&Step=1>

**Reasonable and Prudent Measures, Terms and Conditions, and Project Formulation**

**As part of our project description, can we include measures to minimize the effect of take on the species?**

In general, we always try to minimize impacts, and you may be able to do that to the point where you have concurrence on a “not likely to adversely affect” determination for listed species, but those minimization measures still have to be appropriate to the study. If those measures are outside of what would be normal formulation – for example if it is an element that is not directly related to the main project purpose – then it should come up through ESA consultation.

**Is a “Term and Condition” outside the project action area allowed to occur in perpetuity?**

Accepting any Terms and Conditions for perpetuity, whether inside or outside the project area, is a concern. If there is a situation in which this is proposed and seems necessary, the PDT should check with vertical team.

**With respect to the specificity of Terms and Conditions, our regional USFWS and NMFS offices have preferred a collaborative, performance-based approach, to avoid prescriptiveness. Is that consistent with HQ messaging?**

Terms and Conditions set specific methods to implement the Reasonable and Prudent Measures to minimize the amount or extent of incidental take. They are non-discretionary and if not done, the Incidental Take Statement may become invalid. Specificity and prescriptiveness is very important so that the Corps knows in advance exactly what is needed to comply with the Incidental Take Statement, and when we have met the Terms and Conditions. All Terms and Conditions must be measurable and enforceable.

**If the USACE and the Service do not agree on the appropriateness of a Reasonable and Prudent Measure (RPM) or Terms and Conditions (TC), who gets the final word?**

The Services get the final word on the Biological Opinion – it is their document. We get the final word on whether we are going to accept it or proceed with the action. We don't like to get to that position; those are the discussions that should be elevated if there isn't a resolution.

### **Navigating the Consultation Process**

**We are in informal consultation and the Service is not willing to issue a concurrence letter without more detailed information, typically detailed information that would be developed in the Preconstruction Engineering & Design phase (PED); they indicate they do not think a jeopardy outcome is likely and are discouraging formal consultation. Should we initiate formal consultation to have resolution?**

It's a long way between informal consultation and jeopardy. A "may affect, likely to adversely affect", requires formal consultation whether or not it may jeopardize the species. This is a good time to get the vertical team engaged. If we truly think that the project is "not likely to adversely affect" endangered species and therefore will not cause any incidental take, then we may have to consider moving forward without a concurrence letter (a determination that an action is "not likely to adversely affect" listed species or critical habitat does not require formal consultation), with the assumption that our vulnerability under the Take provisions of the ESA is slight. This would need to be coordinated with HQ and Counsel. However, in the case mentioned it may be productive to go forward with initiating formal consultation and "start the clock."

**Has the Corps ever proceeded despite a Jeopardy Opinion?**

I know of only one regulatory action that has gone forward with a jeopardy opinion when the Corps decided not to implement the Reasonable and Prudent Alternative (RPA) proposed. I don't think you would or will see it with a feasibility study. The Corps has requested an exemption from the "God Squad" (Endangered Species Committee) for the Tennessee-Tombigbee waterway project, but this is exceedingly rare.

**When are programmatic Biological Opinions appropriate?**

There is a Programmatic Consultation process that would cover an entire Program. What may be more appropriately used for feasibility studies – or a group of studies in a given area or region – would be a

Regional Consultation. That would be decided on a case-by-case basis, if leadership decided that would be appropriate given the circumstances.

**Is “early consultation” Biological Opinion acceptable for Feasibility studies?**

Early consultation is not applicable to Corps Civil Works projects; it’s for applicants for a Federal permit or license.

**The Consultation Process and Integration with Feasibility Study Milestones and NEPA**

**Should ATR teams be involved in reviewing the draft Biological Assessments and Biological Opinions?**

The biological assessment is part of your feasibility study. Since it should be completed by your draft report stage, it is appropriate to review it as part of Agency Technical Review.

Although the Corps has a chance to review the draft Biological Opinion, the Biological Opinion is another agency’s action. The Biological Opinion therefore is not subject to our technical review.

**In general, have the Services been willing to provide a final Biological Opinion without having a finalized NEPA document? Or what if our local FWS/NMFS office will not issue a final Biological Opinion until after the Civil Works Review Board?**

The first concern is the other way around ... how do we complete our NEPA document without completing ESA consultation? The NEPA document discloses impacts to endangered species that would be based upon our coordination with the resource agencies. Providing a final biological opinion is not discretionary. The Services, by regulation, must issue a biological opinion 90 days after receipt of a complete formal consultation initiation package. The Corps then has 45 days to review the draft BiOp before the Biological Opinion and Incidental Take Statement is finalized, ending formal consultation. If there are challenges to having the initiation package accepted as complete, then that may be something to be elevated internally. There have been, and can be, extensions to the 90 day period, but that is also something that is agreed to by both parties.

**The Service’s position in our region has been that they provide a Biological Opinion on the final project description. They want to be assured that public / agency comments have been considered. If we have a final Biological Opinion before State and Agency Review, are we facing reinitiating Consultation for any changes based on State and Agency Review?**

If it was a significant enough change that came out of state and agency review, yes, we may have to reinitiate ESA consultation, but then would also be looking at revisions to the feasibility report, our NEPA document, and a lot of other processes. Generally, state and agency review doesn’t change our proposed action.

**Interagency Coordination and Messaging**

**Has the June 2013 memo from the Office of Chief Counsel been coordinated with the Services and what is their position?**

Both Services received it shortly after it was released. Headquarters elements of NOAA, FWS, and the Corps met a few months ago to discuss the memo and broader issues of coordination. The resource

agencies indicated that while they may have some minor disagreements with some of the details in the memo, in general they do not dispute the legal positions taken in that document. All three agencies are committed to meeting at the Washington level on a more consistent basis to work through some of these more global, recurring issues.

The PCoP is meeting regularly with the Washington offices of both Services. As we are working together, having monthly conversations and quarterly face-to-face meetings, we are advancing our ability to communicate effectively and efficiently and developing strategies for carrying those messages down through the regions and districts and between the Corps and the Services. We are working on ways to talk about memos like that before they are launched so it's not surprising.