



**NOAA**  
**FISHERIES**

West Coast  
Region

# Endangered Species Act Consultations

Nancy Munn, PhD  
October 24, 2017





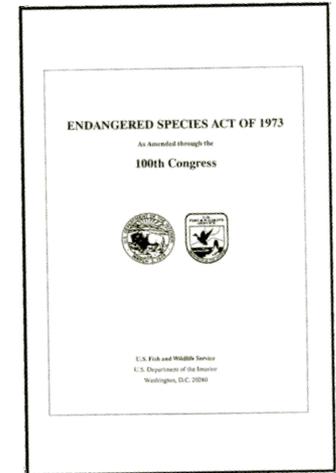


**“Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.”**

President Richard Nixon while signing the ESA  
December 28, 1973

# Endangered Species Act of 1973

- Focuses on protecting species in their natural environments
- **Defined “endangered” and “threatened”**
- Made plants and all invertebrates eligible for protection
- Expanded on prohibitions for all endangered animal species
- Allowed the prohibitions to apply to threatened animals by special regulation
- Required federal agencies to use their authorities to conserve listed species
- Prohibited federal agencies from authorizing, funding or carrying out any action that would jeopardize a species, destroy its critical habitat or adversely modify its critical habitat
- Made matching funds available to states with cooperative agreements
- Provided funding authority for land acquisition for foreign species
- Implemented CITES protection in the United States



# ESA Regulatory Authority



NMFS jurisdiction:  
marine species & most  
anadromous fish



USFWS jurisdiction:  
terrestrial species &  
freshwater aquatic species



# Purposes of the Endangered Species Act



- provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved,
  - provide a program for the *conservation* of such endangered species and threatened **species...**
- Section 2(b) of the Endangered Species Act

# Policy of the Endangered Species Act



All Federal departments and agencies shall

- seek to conserve endangered species and threatened species
- use their authorities in furtherance of the purposes of this Act

- Section 2(c) of the Endangered Species Act



# The Endangered Species Act of 1973



Sec. 1. Table of Contents

Sec. 2. Findings, purposes, and policy

Sec. 3. Definitions

Sec. 4. Determination of endangered species and threatened species

Sec. 5. Land acquisition

Sec. 6. Cooperation with the States

Sec. 7. Interagency cooperation

Sec. 8. International cooperation

Sec. 9. Prohibited acts

Sec. 10. Exceptions

Sec. 11. Penalties and enforcement

Sec. 12. Endangered plants

Sec. 13. Conforming amendments

Sec. 14. Repealer

Sec. 15. Authorization of appropriations.

Sec. 16. Effective date

Sec. 17. Marine Mammal Protection Act of 1972

Sec. 18. Annual cost analysis by FWS

Full text <http://www.nmfs.noaa.gov/pr/laws/esa/text.htm>



# Section 4: Listing, Critical Habitat and Recovery

Prescribes the determinations the Services must make and the procedures the Services must follow to list a species or to designate critical habitat

Prescribes the procedures for recovering species and monitoring

Provisions particularly relevant from the perspective of section 7

Section 4(d): protective regulations for threatened species

Section 4(f): recovery planning



Chinook salmon

# ESA-listed species in West Coast Region

## Status of ESA Listings & Critical Habitat Designations for West Coast Salmon & Steelhead

47 listed species

28 salmonids

North American green sturgeon

Eulachon (Columbia River smelt)

Black Abalone

White Abalone

Bocaccio

Canary rockfish

Yelloweye rockfish

Blue Whales

Fin Whales

Guadalupe Fur Seals

Humpback Whales

Northern Pacific Right Whales

Sei Whales

Southern Resident Killer Whales

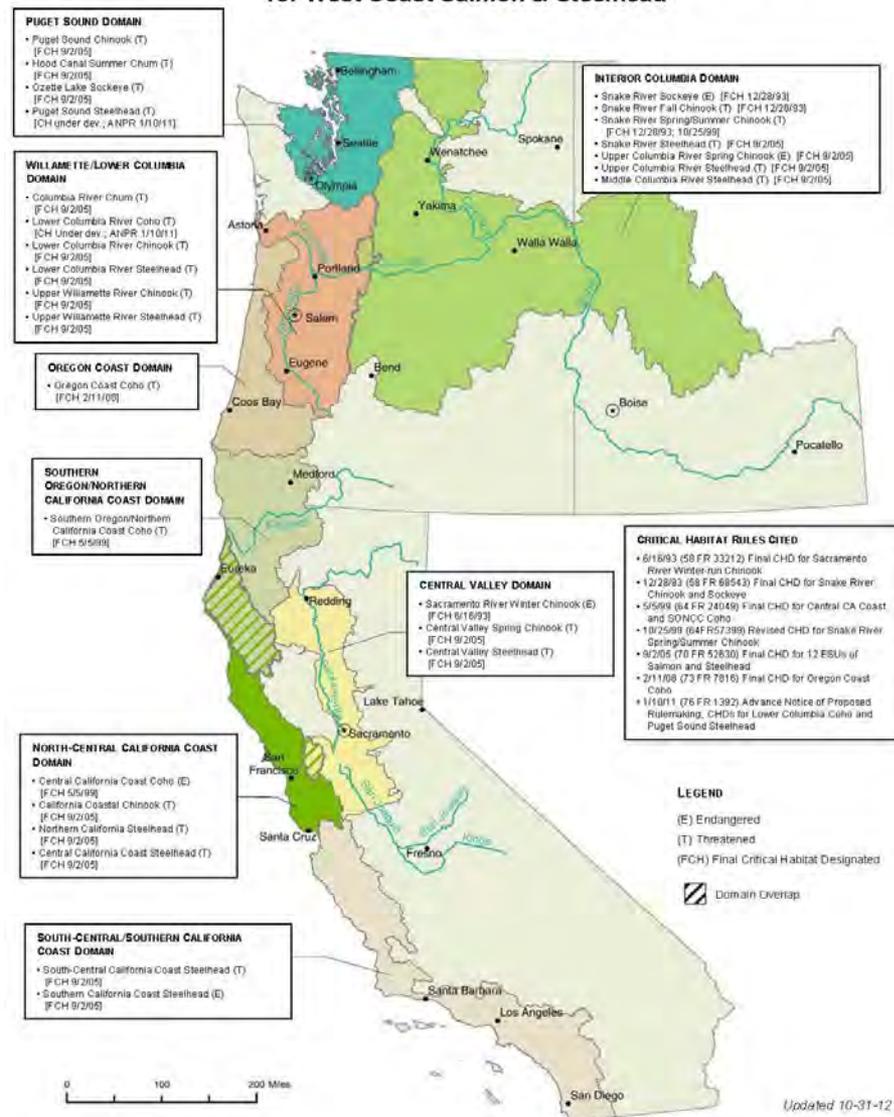
Sperm Whales

Leatherback sea turtle

Green sea turtle

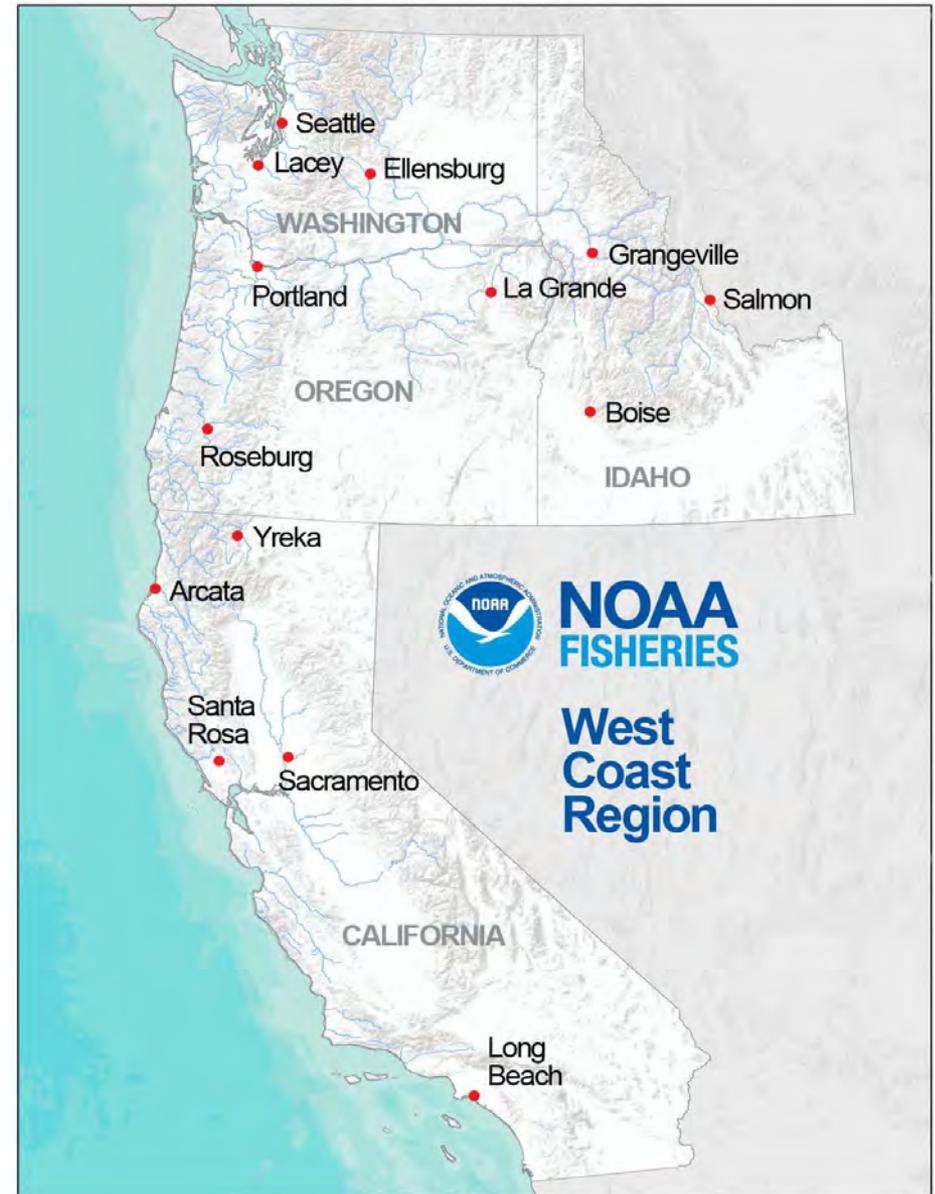
Olive ridley sea turtle

Loggerhead sea turtle



West Coast  
Region was  
created in  
October 2013

<http://www.westcoast.fisheries.noaa.gov/>



# Section 4: The Listing Process

To be considered for listing, the species must meet one of five criteria (section 4(a)(1)):

1. There is the present or threatened destruction, modification, or curtailment of its habitat or range.
2. An over-utilization for commercial, recreational, scientific, or educational purposes.
3. The species is declining due to disease or predation.
4. There is an inadequacy of existing regulatory mechanisms.
5. There are other natural or manmade factors affecting its continued existence.

During the listing process, economic factors cannot be considered, but the decision to list must be based solely on the best scientific and commercial data available.

# Section 4: What is Critical Habitat?

Those areas with particular physical or biological features essential to a listed species that may require special management and protection if the species is to survive and recover.

Space, cover and shelter, food, sites for breeding and rearing offspring, habitats that are already protected from disturbances or are representative of the historical, geographical and ecological distribution of a species.

This sometimes includes areas not currently occupied by a species but **deemed essential to the species' ultimate recovery.**

# Section 4(f): Recovery Plans

Goal of the ESA is not prevent extinction, but to bring species back to healthy population levels, with the threats removed or reduced **so that the species' survival in the wild can be ensured.**

Section 4(f) requires the government to develop and implement recovery plans, the blueprint to guide recovery actions.

- Species background and life history
- Recovery objectives and delisting criteria
- Threats assessments (aka limiting factors, stressors)
- Recovery strategies
- Research, monitoring, evaluation priorities

# Section 9: The Take Prohibition for Endangered Species

Section 9(a)(1)(B): It is unlawful for any *person* subject to the jurisdiction of the United States to take any such **species** ....

## What is Take?

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

- ESA §3(19)

# Section 7: Interagency Cooperation

Section 7 defines the responsibility of all Federal agency in the conservation of species

Federal agencies have a greater responsibility to conserve ESA-listed species.



Hawaiian spinner dolphins PIFSC

# Section 7(a)(1) Conservation Provision

- Federal Agencies shall use their authorities in furtherance of the purposes of this chapter
- by carrying out programs for the conservation of endangered species and threatened species



FEMA



NOAA FISHERIES

# Section 7(a)(2)

Each Federal Agency shall insure that any action authorized, funded, or carried out **by such agency...**



The image shows a small, detailed form titled "APPLICATION FOR DEPARTMENT OF THE ARMY PERMIT". The form is divided into several sections, including "APPLICANT INFORMATION", "PROJECT INFORMATION", "PERMIT INFORMATION", and "GENERAL INFORMATION". It contains various fields for text entry, checkboxes, and dropdown menus. The form is a standard regulatory document used for permit applications.



is not likely to **jeopardize the continued existence** of any endangered species or threatened species o

or result in the **destruction or adverse modification of critical habitat** of such species

## Section 7(a)(2)

- Consultation occurs between a Federal Action Agency and the consulting agency (FWS or NMFS)
- Consultation is not a public process
- Applicants do have some limited rights

50 CFR 402

# NMFS S7 Consultation Process

- Step 1: Federal Action Agencies make a determination on action
  - No effect
  - May Affect, Not Likely to Adversely Affect
  - May Affect, Likely to Adversely Affect

# No Effect

- Species are not present in the area affected by the proposed action
- The action does not change habitat conditions in areas used by listed species at any time during their life history cycle
- Example: No sediment will enter waters where **salmonids are, or will be, present (won't reach)**.
- Action Agency is not required to consult, but may inform NMFS of this determination



# Not Likely to Adversely Affect

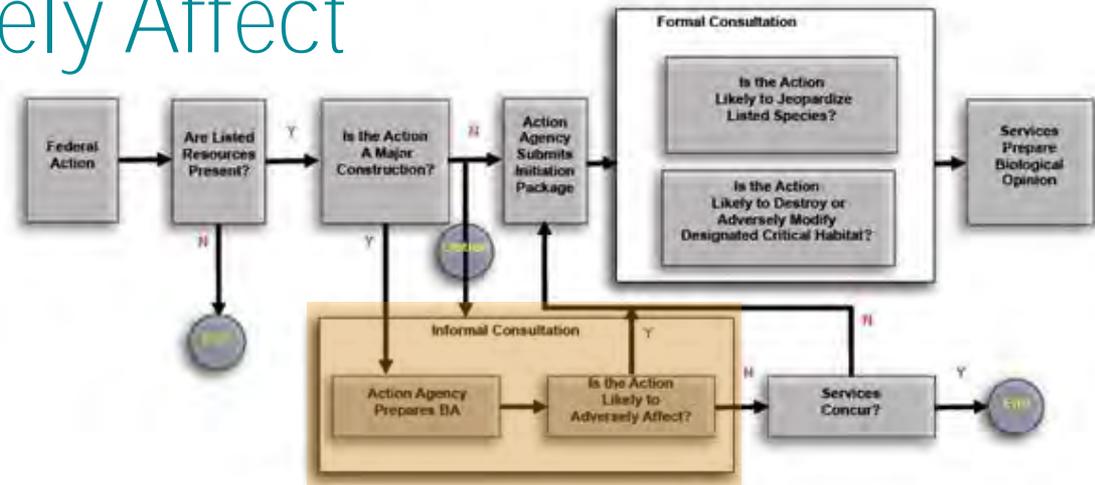
- Effects on listed species are expected to be discountable, insignificant, or completely beneficial.
  - Entirely beneficial effects are contemporaneous positive effects without any adverse effects to the species/habitat
  - Insignificant effects relate to the size of impact and should never reach the scale where take occurs
  - Discountable effects are those extremely unlikely to occur



# Not likely to Adversely Affect

- Based on best judgment, a person would not: (1) be able to meaningfully measure, detect or evaluate insignificant effects; or (2) expect discountable effects to occur.
- Action Agency provides sufficient information and requests concurrence from NMFS (informal consultation)

# Not Likely to Adversely Affect



Effects on listed species are expected to be discountable, insignificant, or completely beneficial.

- *Beneficial effects* are contemporaneous positive effects without any adverse effects to the species
- *Insignificant effects* relate to the size of impact and should never reach the scale where take occurs
- *Discountable effects* are those extremely unlikely to occur

- FWS & NMFS 1998 Section 7 Handbook

# Not Likely to Adversely Affect

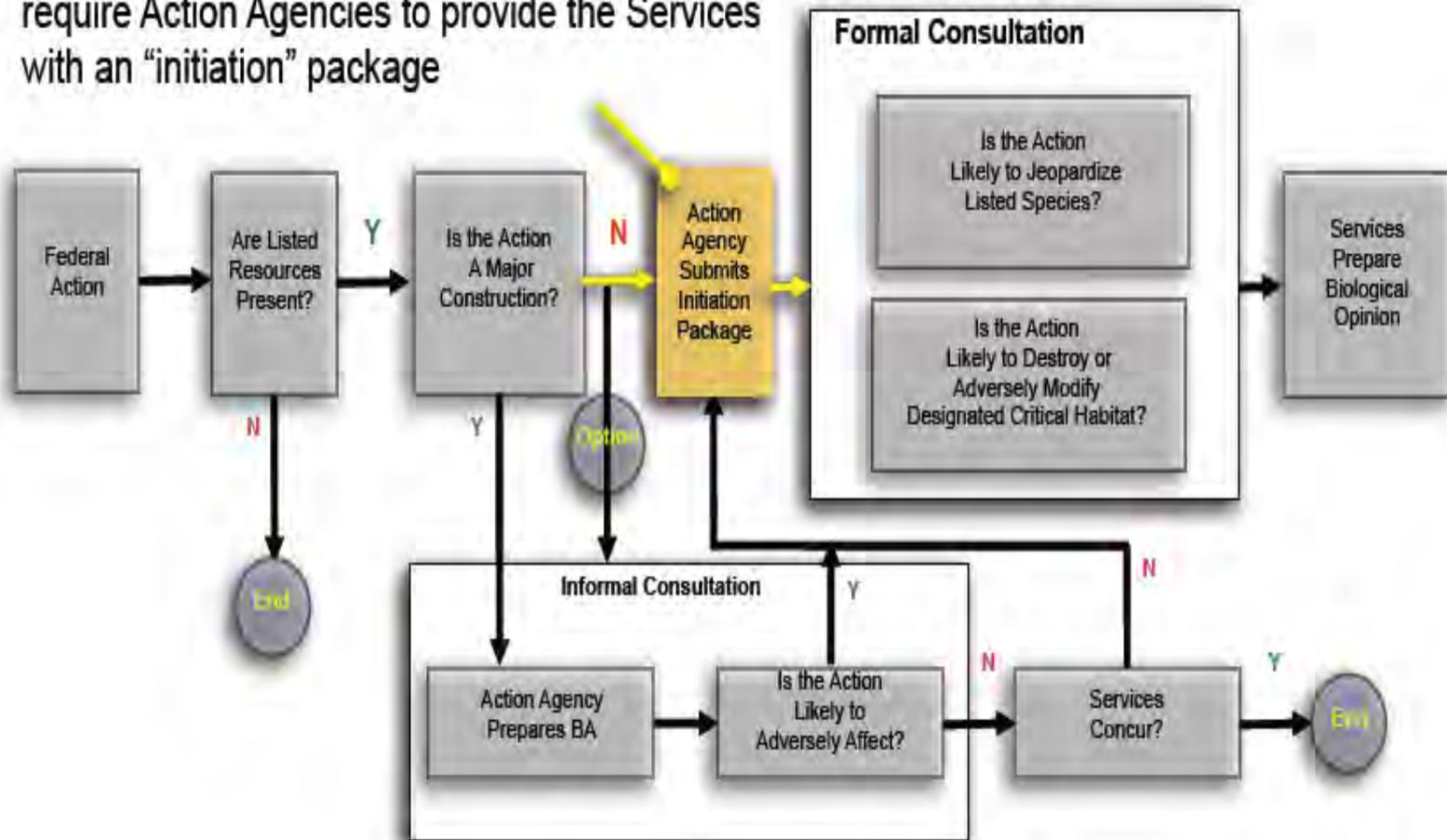
- Avoid net-benefit analysis- cannot use compensatory mitigation to off-set adverse effects of the proposed action in informal consultation
- **Proposed action cannot result in 'take' of listed species including capture**
- Be as clear as possible about species presence if we use the discountable rationale

# Likely to Adversely Affect

- Request formal consultation
- Provide an initiation package
  - Include a Biological Assessment (BA) if the **proposed action is a “major construction activity”**, i.e., requires an Environmental Impact Statement under NEPA.
- Participate in the consultation
  - Communicate with applicant, advise on avoidance and minimization measures, etc.

# The Generalized Consultation Process

To initiate formal consultation, regulations require Action Agencies to provide the Services with an "initiation" package



## Section 7(a)(2): Consultation Outcomes

- Not likely to adversely affect (NLAA, concurrence letter)
- Likely to adversely affect (biological opinion, Incidental Take Statement with terms and conditions)

An ITS expresses the amount or extent of anticipated **incidental “take” (e.g. death, injury, harm, or harassment)** of listed species caused by the proposed action and provide an exemption from the ESA section 9 prohibitions on such take and provides terms and conditions that minimize the effects of that take.

- Likely to jeopardize (biological opinion, Incidental Take Statement, Reasonable and Prudent Alternatives)

# Initiation Packages

- Whether or not a BA is provided, all requests for formal consultation must include 6 items, per 50 CFR 402.14(c):
  - 1. A description of the proposed action
  - 2. A description of the specific area affected by the proposed action
  - 3. A description of any listed species or critical habitat that may be affected by the action

# Initiation Packages

- 4. Description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects
- 5. Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared
- 6. Any other relevant available information on the action, the affected listed species, or critical habitat.

## Best Available Data

- The Federal Agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat (50 CFR 402.14(d)).
- For example: If the designated non-Federal rep prepares the BA, the Federal Action agency shall furnish guidance and supervision, and independently evaluate the scope and contents (50 CFR 402.08).

# What Does NMFS Do After Receiving Request?

- Consultation starts once the initiation package is complete.
- NMFS determines when the initiation package is complete and consultation begins.
- NMFS may request additional information as needed - 402.14(c).

# What Does NMFS Do After Receiving Request?

*Not Likely to Adversely Affect, requests for concurrence*

- NMFS reviews the request and information, and will:
  - Concur that the proposed action is NLAA, OR
  - Not concur and request that the Federal Action Agency initiate formal consultation, OR
  - Request additional information
- By policy, NMFS will make a reasonable effort to respond within 30 days.



# What Does NMFS Do?

## *Formal Consultations*

- NMFS reviews the initiation package to determine if it is complete
  - If complete, NMFS notifies the Action Agency and consultation begins
  - If incomplete, NMFS requests additional information and notifies the Action Agency that consultation will not start until the additional information is provided.



# Formal Consultations

What happens once consultation begins?

Variable:

- If the project is relatively simple and the effects are common, known, non-controversial, NMFS may produce a biological opinion with only limited interaction with the Action Agency/applicant.
- If the project is complex, controversial, or unusual, NMFS, the Action Agency, and the applicant may spend considerable time working together to complete the consultation (may also include additional internal review)



# Formal Consultation Timelines

By Federal regulation, NMFS has 90 days to complete consultation and then 45 days to issue a biological opinion (135 days total).

- Consultation may be extended with consent from the Action Agency.



# How Does NMFS Analyze Effects?

## Exposure and Response Framework

### *Exposure:*

- What will species be exposed to (chemical, physical, biotic)?
- What life history stages will be exposed?
- How many individuals will be exposed?
- What is the magnitude, frequency, and duration of exposure?

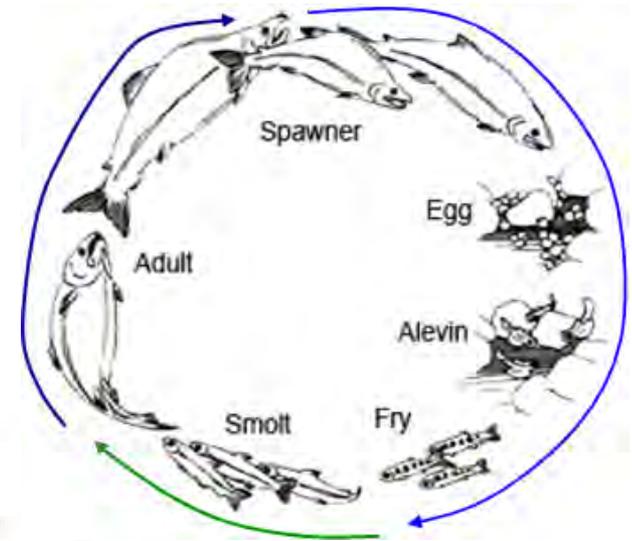


# How Does NMFS Analyze Effects?

## Exposure and Response Framework

*Response:*

- How will individuals respond?



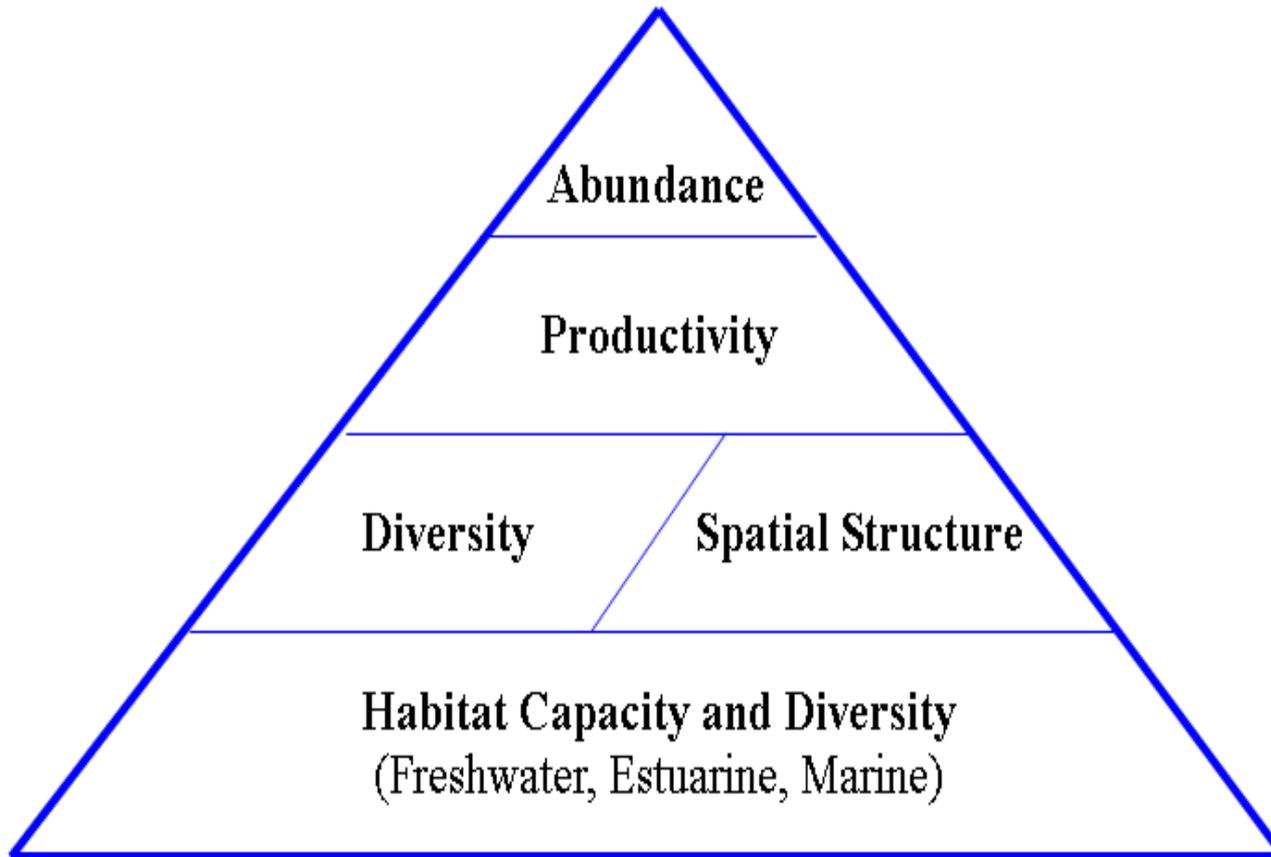
# Population and Species Response for formal consultations

- Will the viability (extinction risk) of the population the affected individuals belong to be impacted?
- If population viability is impacted, will species (ESU/DPS) viability be impacted?



# Foundational Principles:

## ***Viabile Salmonid Populations***



# Critical Habitat

Definition: Specifically designated geographic areas with physical and biological features (PBFs) essential to the conservation of a listed species

- Will the project result in reductions in the quantity, quality, or availability of physical, chemical, or biotic resources (PBFs) in the action area?
- If reductions occur, will these reductions affect the ability of critical habitat, at the scale of the species range, to conserve the species?



# Streamlining S7

The top seven ways to ensure the S7 consultation process functions smoothly and efficiently (avoid multiple requests for additional information and long delays in receipt of the biological opinion or concurrence letter).



# Streamlining S7 continued...

- Communicate with NMFS and/or the applicant
- Ensure that important information is provided in initiation packages and BAs (review and provide feedback to applicant/consultant before sending to NMFS)
- Request consultation with a large enough time buffer before desired project initiation, to ensure completed consultation within timing needs
- Provide any additional information requested ASAP; ask for clarification if needed



# Streamlining S7 continued...

- Avoid making last minute changes to projects, as this may result in need to start over with analysis, or if changes are necessary, inform NMFS immediately and discuss how it will affect the timeline
- Incorporate measures to minimize or avoid impacts to listed salmonids/habitat; propose mitigation for unavoidable impacts
- Communicate with other State, Local, or Federal Agencies that are involved



## Section 7(d): Limitation on commitment of resources

After initiation of consultation, the Federal agency and applicant...

“shall not make any irreversible or irretrievable commitment of resources ...**which has the effect of** foreclosing the formulation or implementation of any **reasonable and prudent alternative measures...**”

unless such agency has been granted an exemption by the Endangered Species Committee

# Section 7 consultations: Roles of Federal Action Agency, Applicants, NMFS



# Role of the Action Agency



US Army Corps  
of Engineers



FEMA



- Must provide best scientific and commercial data available
- Should be an active participant in the consultation
- Has requirements after opinion is issued
- May designate non-Federal Representative
  - Request species lists, prepare biological assessment, & provide information



# Designated non-Federal Representative

If a biological assessment is prepared by the designated non-Federal representative,

the Federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment.

*The ultimate responsibility for compliance with section 7 remains with the Federal agency.”* (50 CFR 402.08)



US Army Corps  
of Engineers

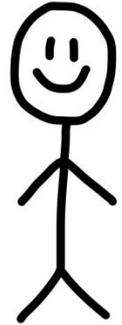


FEMA



NOAA FISHERIES

# Role of Applicants



- any person who requires formal approval or authorization from a Federal agency before conducting an action
- **Federal agency determines an applicant's status during consultation.** Applicants may:
  - Submit information for consideration during consultation
  - Review and comment on a draft opinion through the Federal agency
  - Entitled to the final consultation document
  - Responsible for complying with terms and conditions and monitoring & reporting

# Role of NMFS



- Advise Federal agencies through consultations to identify and help resolve conflicts between listed species and habitat and proposed actions
- Must provide best scientific and commercial data available
- Active participant in the consultation
- Provide regulatory, policy, and biological information as needed
- Discuss the potential effects of the action on listed species or critical habitat
- Discuss measures to reduce or avoid those effects

# Our Objectives in Section 7 Consultation

- Help Federal agencies insure that any action they authorize, fund, or carry out is
  - not likely to expose endangered or threatened species to stressors that are likely to cause those species to get closer to extinction
  - not likely to reduce the value of designated critical habitat for the recovery of endangered or threatened species
- Produce consultations that are legally-defensible because they are
  - transparent
  - **“objective”**
  - replicable
  - evidence-based

# Questions and Comments...



## Contacts

[http://www.westcoast.fisheries.noaa.gov/about\\_us/index.html](http://www.westcoast.fisheries.noaa.gov/about_us/index.html)

### Interior Columbia Basin Office:

Nancy Munn (ICBO Section 7 Coordinator)

[nancy.munn@noaa.gov](mailto:nancy.munn@noaa.gov)

Dale Bambrick (Columbia Basin Branch Chief)

[dale.bambrick@noaa.gov](mailto:dale.bambrick@noaa.gov)

### Oregon & Washington Coastal Office:

Eric Murray (ORCO Section 7 Coordinator)

[eric.murray@noaa.gov](mailto:eric.murray@noaa.gov)

Elizabeth Babcock (N Puget Sound BC)

[Elizabeth.babcock@noaa.gov](mailto:Elizabeth.babcock@noaa.gov)

Jennifer Quan (C Puget Sound BC)

[Jennifer.quan@noaa.gov](mailto:Jennifer.quan@noaa.gov)

## Website

<http://www.westcoast.fisheries.noaa.gov/>