

# Interim 6004 Program Procedures for Section 7 ESA Consultations

## I. INTRODUCTION

The renewal of the Memorandum of Understanding (MOU) between the Federal Highway Administration (FHWA) Alaska Division and the Alaska Department of Transportation and Public Facilities (DOT&PF) under 23 U.S.C. 326 for the State Assumption of Responsibility for Categorical Exclusions (6004 Program) on September 18, 2015, assigned to the State the FHWA's responsibility for Section 7 consultation under the Endangered Species Act (ESA).

This interim guidance describes the DOT&PF's procedures for complying with Section 7 of the ESA (Section 7). Section 7 requires Federal action agencies consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on proposed actions that may affect a listed or threatened or endangered (T&E) species or designated critical habitat. Conferences are required if a proposed action is likely to jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed Critical Habitat.

Under the 6004 Program MOU, the DOT&PF is responsible for conducting all Section 7 consultations as the lead Federal action agency for projects assigned under the MOU. The term "the Service(s)" is used in this document to refer to the NMFS and the USFWS as appropriate.

This guidance only applies to ESA consultations and does not address Marine Mammal Protection Act (MMPA) consultations with the Services. The MMPA incidental take authorization process is linked to the ESA consultation process and the timelines for achieving compliance with both laws are closely related. Discussions with the Services regarding both laws should occur early in the project development process for any project in which both ESA consultations and an MMPA incidental take authorization is anticipated.

These interim procedures are effective immediately and will remain in effect until such time that it is superseded by a revision of this guidance or approval of an Alaska 6004 Program Environmental Procedures Manual chapter addressing Section 7.

## II. SPECIES/CRITICAL HABITAT IDENTIFICATION

The Environmental Impact Analyst (Analyst) will determine whether a listed or proposed T&E species, candidate species, or proposed or designated critical habitat is present in the project action area.

Online tools available for identifying T&E species and designated Critical Habitat include the NMFS [Marine Mammal Species Range and Critical Habitat Interactive Map \(also called the NMFS ESA/MMPA Mapper\)](#) and the USFWS [Information for Planning and Conservation \(IPaC\)](#) tool. Additional information may also be obtained via an onsite visit or communicating with local residents and the Services' staff.

### III. DETERMINATION OF EFFECT

When a T&E species or Critical Habitat may be present in the project action area, the Analyst is responsible for evaluating the best available information and determining the project's potential effects on the T&E species and/or Critical Habitat. The effects resulting from each component of the proposed project must be considered in making an effect determination, as each component of a project may affect a T&E species differently. Common components of a DOT&PF project include but are not limited to: earthwork (e.g., grading, cutting, filling); vegetation removal or clearing; in-water work (e.g., culvert replacement); and activities that increase the timing and duration of noise above background levels (e.g., blasting and pile driving).

In addition, consider how any proposed avoidance and minimization measures will change the impacts of the proposed project. Common avoidance and minimization measures include but are not limited to: timing restrictions; exclusion zones; noise mitigation measures; and restoring areas disturbed by the project (e.g., revegetation; removing temporary fill).

In considering noise impacts to marine mammals, refer to the NMFS's [Interim Sound Threshold Guidance](#). NMFS Alaska Region recommends establishing exclusion zones based on the anticipated 160 dB root mean square (rms) isopleth (for impulsive noise sources), and the 120 dB rms isopleth (for continuous noise sources) to ensure that no take of marine mammals is likely to occur. Other resources on the NMFS West Coast Region's [Marine Mammal ESA Section 7 Consultation Tools](#) may also be helpful in considering noise impacts to marine mammals.

**No Effect:** This determination is appropriate if the project and its interrelated or interdependent actions will not directly or indirectly affect a T&E species or designated Critical Habitat. In this case, no consultation with the Service is required.

**May Affect, Not Likely to Adversely Affect:** This determination is appropriate when all of the effects are expected to be "discountable, insignificant or completely beneficial." *Insignificant effects* relate to the size of the impact and are those that one would not be able to meaningfully measure, detect, or evaluate, and should never reach the scale where take occurs. *Discountable effects* are those that are extremely unlikely to occur. *Beneficial effects* are contemporaneous positive effects without any adverse effects to the species. In this case, proceed under information consultation with the Service. Procedures for informal consultations are provided in Section IV. Note that during the informal consultation process, the finding of effect may change.

**May Affect, Likely to Adversely Affect:** This determination is appropriate if any adverse effects on listed species or designated critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial. Also the appropriate determination if any "take" of listed species will occur. Initiation of formal Section 7 consultation is required and the Service is responsible for completing a biological opinion on the proposed action (and may issue an incidental take statement). Procedures for formal consultations are provided in Section IV.

If needed, the Services may also be contacted to solicit more data or information necessary to make a determination. This can be done as part of the scoping process, or separately.

#### IV. CONSULTATION PROCESS

The need for, and level of consultation, is based on the Analyst’s determination of effect as follows:

Species/Critical Habitat Status	Determination	Level of Consultation
Any	No effect	Not needed
Listed/Designated	May affect, not likely to adversely affect	Informal
	May affect, likely to adversely affect	Formal
Proposed	May affect	Conference

**When consultation is needed, first identify the Service with jurisdiction** over the T&E species or designated Critical Habitat. NMFS has jurisdiction over listed marine fish, and marine mammals other than the sea otter, polar bear, and walrus. Free swimming sea turtles and sea turtles caught in fishing gear are also under NMFS jurisdiction, whereas sea turtles on Alaska’s beaches fall under the jurisdiction of USFWS. All other listed species are under USFWS jurisdiction. For more specific details, see the [Endangered, Threatened, Proposed, Candidate, and Delisted Species in Alaska](#), and the additional websites provided in the Resources section at the end of this guidance.

**Informal consultation** [50 CFR 402.13] with the Service with jurisdiction is required when a project may affect, but is not likely to adversely affect a listed T&E species or designated Critical Habitat. Informal consultation begins when DOT&PF submits a written request (including email) to the Service to obtain concurrence with a finding of “may affect, but not likely to adversely affect.” This must be submitted to the Service by the Regional Environmental Manager (REM).

As part of this request, DOT&PF must provide all pertinent information to support the determination, including but is not limited to: the project location; a description of the project’s activities (including any pile driving or blasting); proposed avoidance and minimization measures; T&E species or designated Critical Habitat identified within the project action area; anticipated impacts to the T&E species or designated Critical Habitat; and any supporting figures. Descriptions and analysis of project activities resulting in noise impacts to marine mammals must include specific details regarding local conditions, materials and methods used, and noise propagation distances from the sound source.

During informal consultation, an Analyst may serve as the point of contact for the Services at the discretion of the REM. However, all correspondence (including email) with the Services must be copied to the REM. The REM is ultimately responsible for ensuring informal consultation is complete. Although a timeframe for informal consultation is not mandated by regulation, the Services will respond within 30 calendar days when possible.

The Services may request more information or there may be discussions regarding DOT&PF’s proposed avoidance and minimization measures and/or other conservation requirements prior to making a

finding. The REM and, as appropriate, the Analyst are responsible for responding to any requests from the agencies. If the Service concurs with the “may affect, but not likely to adversely affect,” finding, the informal consultation is complete. If the Service does not concur and finds that the action “may affect, likely to adversely affect,” the DOT&PF will need to enter into formal consultation. For example, this may result when impacts to listed species and critical habitats are unavoidable or when DOT&PF is unable to commit to the Service’s recommended reasonable and prudent measures.

**Formal consultation** [50 CFR 402.14] with the Service with jurisdiction is required when a proposed project may affect, and is likely to adversely affect, a T&E species or designated Critical Habitat. During formal consultation, the REM serves as the point of contact for the Service and must sign any formal correspondence to the Service. The NEPA Manager must be copied on all correspondence and invited to participate in any relevant meetings or field reviews with the Service. If a Biological Assessment (BA) is required, formal consultation cannot be initiated until the BA is completed. The DOT&PF may agree to provide the Service an informal draft BA for their review and comment prior to formally submitting the BA. Procedures for preparing a BA are discussed in Section V.

Formal consultation is initiated when DOT&PF submits a request for formal consultation along with a BA, when required, to the Service. Within 30 working days of submission, the Service should provide written acknowledgment of the consultation request, advise of any data deficiencies, and request either missing data or a written statement that the data are not available. If the Service requests additional information, the REM and Analyst will coordinate the pertinent information, and the REM will provide a written response to the Service.

After receiving all pertinent information, the Service has 90 days to conclude consultation. The Service will determine whether the proposed activity is likely to jeopardize the continued existence of a listed species, or destroy or adversely modify its Critical Habitat. The time period to make this determination may be extended for complex or large-scale projects, and the 90 day period is suspended if the Service requires more information. After concluding consultation, the Service then has 45 days to write the Biological Opinion (BO). Formal consultation terminates with the issuance of the BO. Further consultation may be required during final design or construction if the project design is modified (see Section VI).

If the Service determines that the action is not likely to jeopardize the species, or adversely modify Critical Habitat, the Service will provide DOT&PF with a BO that includes Conservation Measures and Conservation Recommendations and an Incidental Take Statement (ITS) to cover the take of the listed species. The Analyst, the REM, and project team will review the reasonable and prudent measures and terms and conditions of the BO, and prepare a response to the Service regarding the implementation of the Conservation Measures and Conservation Recommendations. The NEPA Manager must be given the opportunity to review the response prior to submission to the Service.

If the Service determines the action is likely to jeopardize the species, or adversely modify Critical Habitat, then by law, the action cannot proceed as designed. The Service may recommend a reasonable

and prudent alternative which allows the action to proceed, but which avoids jeopardy or adverse modification.

**Conferences** [50 CFR 402.10] are required if a proposed action is likely to jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed Critical Habitat. However, DOT&PF as the Federal action agency may determine conferencing is advantageous even if this threshold is not anticipated. Conferences may be informal or formal, depending on the level of project impacts on proposed species or habitat. It is highly advisable to conference with the Service for any project that affects a proposed species or habitat, as proposed species may become listed species during the project development process. The DOT&PF staff should follow the same procedures for conferences as for consultations.

## **V. PREPARATION OF THE BIOLOGICAL ASSESSMENT**

A Biological Assessment (BA) is prepared during formal consultation and may be prepared for informal consultation. The BA may be prepared by an Analyst or consultant, and must follow the Service guidance on preparing a BA. The BA is reviewed and approved by the REM and NEPA Manager prior to submission to the Service. When a consultant prepares the BA, the Analyst will review the consultant's work prior to submitting the BA to the REM and NEPA Manager for review, comment, and approval.

The BA includes an evaluation of all potential effects of the action on the T&E species and Critical Habitat of concern. The BA should also describe any known unrelated future non-Federal activities ("cumulative effects") reasonably certain to occur within the action area that are likely to affect the species. In preparing a BA, the preparer must use the best available scientific and commercial data, and include the information required by regulation [50 CFR 402.12(f)]. The Analyst should coordinate with the project design team to verify that appropriate mitigation measures and best management practices have been included in the document.

The BA must provide all the pertinent information necessary to assist the Service in evaluating whether the proposed action is likely to jeopardize the continued existence of a listed species, or destroy or adversely modify its Critical Habitat. Any revisions of the BA must be reviewed and approved by the REM and NEPA Manager prior to submission to the Service. The REM is responsible for transmitting the approved BA to the Service.

## **VI. CIRCUMSTANCES REQUIRING RE-INITIATION OF CONSULTATION**

**Formal consultations:** Per 50 CFR 402.16, reinitiation of formal consultation on a previously reviewed action is required if any of the following occur:

- The amount or extent of take specified in the ITS is exceeded
- New information reveals effects of the action that may affect T&E species or Critical Habitat in a manner, or to an extent, not previously considered
- The identified action is subsequently modified in a manner that causes an effect to the T&E species or Critical Habitat that was not considered in the consultation; or

- A new species is listed or Critical Habitat designated that may be affected by the action.

**Informal Consultations:** Informal consultation must be reinitiated if any of the following occur:

- A new species is listed, or Critical Habitat designated, that may be affected by the action (note: in this case, if the proposed project will not have an effect, no consultation is necessary. The analysis should be documented in project file)
- New information reveals effects of the action that may affect T&E species or Critical Habitat in a manner, or to an extent, not previously considered
- The identified action is subsequently modified in a manner that causes an effect to the T&E species or Critical Habitat that was not considered in the consultation

## **VII. CATEGORICAL EXCLUSION DOCUMENTATION**

The analysis of impacts on T&E species and any Section 7 consultations must be documented in the CE document as part of DOT&PF's National Environmental Policy Act (NEPA) responsibilities. The level of documentation is based on the level of effects and consultation as follows:

**No effect:** When the proposed project will not have an effect on a T&E species, including proposed and candidate species, or designated or proposed Critical Habitat, the Analyst must include this determination and summarize any supporting information in the CE Document. Any supporting information should be maintained in the project file.

**May affect, not likely to adversely affect:** When the proposed action may affect, but is not likely to adversely affect, a T&E species, including proposed and candidate species, or designated or proposed Critical Habitat, the Analyst is required to attach informal consultation documentation and concurrence from the Service to the CE document.

**May affect, likely to adversely affect:** When the proposed action may affect and is likely to adversely affect a T&E species, the CE document cannot be approved until the BO is issued. In the CE document, the Analyst is required to summarize the impacts; describe any avoidance and minimization measures including Conservation Recommendations and other requirements provided by the Services to be implemented; and incorporate by reference the BO and BA, and retain these documents in the project file.

## **VIII. RESOURCES**

Endangered Species Act

<http://www.gpo.gov/fdsys/pkg/BILLS-108s369is/html/BILLS-108s369is.htm>

ESA Section 7 Implementing Regulations in 50 CFR 402

[http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title50/50cfr402\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title50/50cfr402_main_02.tpl)

U.S. Fish and Wildlife Service Endangered Species website

<http://www.fws.gov/alaska/fisheries/endangered/>

ESA-listed species under USFWS jurisdiction

<http://www.fws.gov/alaska/fisheries/endangered/species.htm>

USFWS Consultation Website

<http://www.fws.gov/Midwest/endangered/section7/index.html>

National Marine Fisheries Service Endangered Species website

<https://alaskafisheries.noaa.gov/protectedresources/esa/>

ESA-listed species under NMFS's jurisdiction

[https://alaskafisheries.noaa.gov/protectedresources/esa/ak\\_nmfs\\_species.pdf](https://alaskafisheries.noaa.gov/protectedresources/esa/ak_nmfs_species.pdf)

NOAA Fisheries National critical habitat website

<http://www.nmfs.noaa.gov/pr/species/criticalhabitat.htm>

Endangered Species Consultation Handbook (used by both Services)

[https://www.fws.gov/ENDANGERED/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf)