



Module 9: Endangered Species Act and Marine Mammal Protection Act

- 1 Describe the purposes of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA)
- 2 Recall the consultation requirements for compliance with the ESA and coordination guidelines associated with the MMPA
- 3 Describe the process for identifying protected species and/or habitat within a project action area
- 4 Name the three possible determinations of effect under ESA and the level of consultation required in association with each
- 5 Describe how a Biological Assessment (BA) is prepared
- 6 Discuss how Incidental Take, Harassment Statements, and Authorizations play a role in the ESA consultation and MMPA authorization processes
- 7 Describe how threatened and endangered species should be addressed in the NEPA document
- 8 Identify the circumstances that require re-initiation of consultation



Length of training module: Approximately 30 minutes.



The topics of Endangered Species Act and Marine Mammal Protection Act are part of a course covering the requirements for preparing and processing environmental documentation under the NEPA Assignment Program. Keep in mind that the information presented here is intended to be used in conjunction with the *Alaska Department of Transportation and Public Facilities Environmental Procedures Manual*, which serves as a reference and the source material for this training.

Module 9 discusses how to comply with the Endangered Species Act and Marine Mammal Protection Act, and how they are considered during the NEPA environmental review process.

By the end of this module, you should be able to:

- Describe the purposes of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA).
- Recall the consultation requirements for compliance with the ESA and coordination guidelines associated with the MMPA.
- Describe the process for identifying protected species and/or habitat within a project action area.
- Name the three possible determinations of effect under ESA and the level of consultation required in association with each.
- Describe how a Biological Assessment (BA) is prepared.
- Discuss how Incidental Take Statements, Harassment Statements, and Authorizations play a role in the ESA consultation and MMPA authorization processes.
- Describe how threatened and endangered species should be addressed in the NEPA document.
- Identify the circumstances that require re-initiation of consultation.

Let's begin by looking at Section 7 of the Endangered Species Act on the next slide.



Overview: Endangered Species Act and Marine Mammal Protection Act



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[Endangered Species Act \(ESA\)](#)

[Marine Mammal Protection Act \(MMPA\)](#)

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The Endangered Species Act, or ESA, was enacted in 1973 to provide for the conservation of species that are threatened or endangered throughout all, or a significant portion of, their range. The Act also provides for the conservation of the ecosystems on which these species depend. The Marine Mammal Protection Act—or MMPA—was enacted in 1972 and protects all marine mammals, regardless of their status under the Endangered Species Act.

Key differences between the two acts are that the MMPA requires a public review process for any proposed action while ESA doesn't. When there's a conflict between MMPA and ESA, the more restrictive MMPA provision applies.



To view the ESA online, visit: <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>

To view the MMPA online, visit: <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>



Identification of Protected Species or Habitats

Action Area

All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Interrelated Action

Actions that are part of a larger action and depend on the larger action for their justification. An example of an interrelated action is a wetland fill which is a necessary part of the larger action—the development—and depends on the larger action for its justification

Interdependent Action

Actions that have no independent utility apart from the action under consideration. An example of an interdependent action is a marina that will be proposed by a third party which depends on a road associated with the proposed action and would have no utility but for the development.

[NMFS Marine Mammal Species Range and Critical Habitat Interactive Map](#)

[USFWS Information for Planning and Consultation Tool](#)

Early in the environmental process, a DOT&PF Environmental Impact Analyst will determine whether a threatened or endangered species, species proposed for listing under the ESA, or designated or proposed critical habitat may be present in the project action area.

The Environmental Impact Analyst will also determine whether any marine mammals may be present in the action area. A proposed action must be considered along with any interrelated and interdependent actions.

The two resources provided on this slide are available to help identify threatened and endangered species, proposed species, marine mammals, and designated and proposed critical habitat. Use these tools to inform and supplement analysis conducted prior to consultation.



To view the NMFS Marine Mammal Species Range and Critical Habitat Interactive Map online, visit:

<https://alaskafisheries.noaa.gov/portal/apps/webappviewer/index.html?id=0c4a81f75310491d9010c17b6c081c81>

To view the USFWS Information for Planning and Consultation Tool online, visit:

<https://ecos.fws.gov/ipac/>

Now let's review the definitions of "action area," "interrelated action," and "interdependent action".

Action areas are all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Interrelated actions are actions that are part of a larger action and depend on the larger action for their justification. An example of an interrelated action is a wetland fill which is a necessary part of the larger action—the development—and depends on the larger action for its justification.

Interdependent actions are actions that have no independent utility apart from the action under consideration. An example of an interdependent action is a marina that will be proposed by a third party which depends on a road associated with the proposed action and would have no utility but for the development.

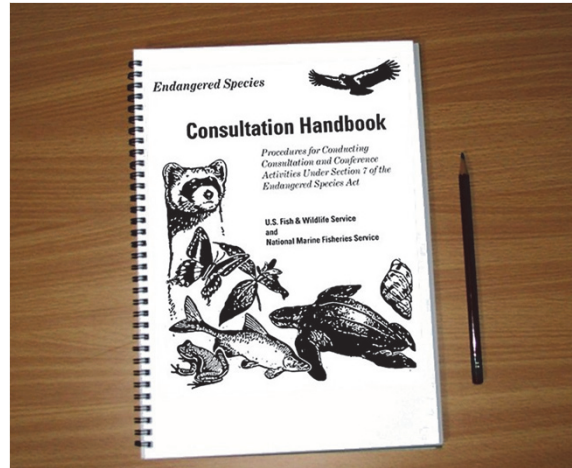


Consultation Requirements

- Assigning responsibilities and designating authority
- Releasing draft documents for review
- Maintaining an administrative record
- Planning for species recovery
- Discussing species' tolerance to disturbance
- Coordinating with other action agencies
- Approving or denying the permit



[Section 7 of the Endangered Species Act \(ESA\)](#)
[Endangered Species Consultation Handbook](#)



Section 7 of the ESA requires federal agencies to confer with the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) on proposed actions that may affect ESA-listed threatened or endangered species or their designated critical habitat. The next slide discusses the consultation requirement in detail.

Not only does Section 7 of the Endangered Species Act address proposed actions that may affect current federally-listed threatened or endangered species. It also requires consultation with USFWS or the NMFS on any action that is likely to jeopardize the continued existence of any species *proposed* to be listed under the ESA. Consultation is also required for actions that may result in the destruction or adverse modification of critical habitat proposed to be designated for such species under the ESA. This process ensures that federal actions authorized, funded, or carried out do not jeopardize the continued existence of any threatened or endangered species or those likely to become threatened or endangered, nor will the action result in the loss of critical habitat, unless the agency has been granted an exception for such action. Throughout this training, threatened or endangered species are also referred to as T&E species.

Though consultation is not required under the MMPA for marine mammals not currently listed as threatened or endangered, early coordination with the National Marine Fisheries Service is recommended to determine if MMPA authorization is needed.

Both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service use the Endangered Species Consultation Handbook to help ensure that Section 7

of the ESA is consistently implemented. Throughout this training the regulatory authority—either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service will be referred to as simply “the Service.”

The handbook outlines the consultation procedures for federal agencies under the Act. The guide is intended for employees of agencies participating in the consultation process. The guide explains Section 7 processes and provides examples of various types of consultations.



You can access the full handbook online at:

<https://www.fws.gov/midwest/endangered/section7/index.html>.



Impact Determination

Species or 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



[Endangered Species in Alaska under USFWS Authority](#)

[Endangered Species in Alaska under NMFS Authority](#)



When a threatened or endangered species, critical habitat, or species or habitat proposed for listing under the ESA is present in a project action area, the Environmental Impact Analyst must reference the best available information to determine the potential effects that the proposed action could have on the protected resources. Each component of the project must be considered when making an effect determination, as each component of a project may affect a species or habitat differently.

The analysis of the effects will result in one of three possible determinations:

- No effect;
- May affect, not likely to adversely affect; or
- May affect, likely to adversely affect.

The table displayed on this slide shows the level of consultation required in association with each determination. When consultation is needed, the Environmental Analyst must identify which agency has jurisdiction over the listed or proposed species or designated or proposed critical habitat.



You can review an index of species found in Alaska that are listed under the ESA and regulatory agencies corresponding to each by visiting the following links:

- <https://www.fws.gov/alaska/fisheries/endangered/listing.htm>
- <https://alaskafisheries.noaa.gov/pr/esa-species-list>



Key Terms for Consultation

Take

ESA defines take as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”

MMPA defines take as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”

May require Incidental Take Authorizations.

Harm

Includes significant habitat modification or degradation.

Harassment

Means any act of pursuit, torment, or annoyance actions that disrupt normal behavior patterns. Harassment is further categorized as Level A or Level B:

- Level A harassment has the potential to injure a marine mammal or marine mammal stock in the wild.
- Level B harassment has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering, but does not have the potential to injure a marine mammal or marine mammal stock in the wild.



The terms on this slide are central to the consultation process and determining impacted species and habitat. Let's discuss each key term on this slide to learn about how they are defined by the ESA and MMPA and how they relate to the consultation process.

Take:

The Endangered Species Act and the Marine Mammal Protection Act have very similar definitions of take. Specifically, ESA defines take as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. The MMPA defines it as: “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”

Harm:

The term “harm” is included in the definition of “take” and means significant habitat modification or degradation.

Harassment:

While harassment applies to both ESA and MMPA, harassment is further defined under the MMPA as “any act of pursuit, torment, or annoyance actions that disrupt normal behavior patterns,” and is categorized as Level A or Level B:

- Level A harassment has the potential to injure a marine mammal or marine mammal stock in the wild.
- Level B harassment has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering, but does not have the potential to injure a marine mammal or marine mammal stock in the wild.



Types of ESA Consultation



Consultation is required when DOT&PF determines that a threatened or endangered species, critical habitat, or species or habitat proposed for listing under the ESA may be affected by a project action. Let's discuss each type of consultation to learn about the associated process.

Informal Consultation

Informal consultation with the applicable regulatory agency is required when a project may affect, but is not likely to adversely affect, a threatened or endangered species or designated critical habitat. For example, a pile driving project stops work if a threatened or endangered species approaches the action area. This project would likely only require informal consultation with the National Marine Fisheries Service.

Informal consultation begins when the REM submits a written request to the regulatory agency to obtain concurrence with a finding that the proposed action may affect, but is not likely to adversely affect the protected resource.

As part of the informal consultation request, DOT&PF must provide all relevant information to support the determination, including but not limited to:

- The project location and description of the action area;
- A description of the project's activities;
- Proposed avoidance and impact minimization measures;
- T&E species or designated critical habitat that may occur within the action area;
- Anticipated impacts on the T&E species or designated critical habitat;

- Effects determination for T&E species and/or critical habitat; and
- Any other supporting documentation.

During an informal consultation, an Environmental Impact Analyst may serve as the point of contact for the regulatory agency at the discretion of the REM, however, the REM must be copied on all correspondence with the regulatory agency. The REM is ultimately responsible for ensuring informal consultation is complete.

Formal Consultation

Formal consultation with the regulatory agency is required when a proposed project may affect and is likely to adversely affect a threatened or endangered species or designated critical habitat. During formal consultation, the REM serves as the point of contact for the regulatory agency and must sign any formal correspondence to the regulatory agency. The NEPA Program Manager must be copied on all correspondence and be invited to participate in any relevant meetings or field reviews with the regulatory agency.

Preparation of a Biological Assessment—or BA—which is discussed in more detail on the next slide, is required before formal consultation can be initiated.

Formal consultation is initiated when DOT&PF submits a request for formal consultation along with a BA to the Service. If the Service requests additional information, the REM and Environmental Impact Analyst will coordinate compiling 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 T&E species, or destroy or adversely modify its critical habitat.

After the 90-day consultation period, the Service then has 45 additional days to develop a Biological Opinion—or BO—on the proposed action. The analysis described in the BO is used by the Service to determine whether the action is likely to jeopardize the continued existence of a threatened or endangered species.

If the Service determines that the action is not likely to jeopardize the species or adversely modify critical habitat, the Service will prepare a Biological Opinion that includes any “reasonable and prudent measures” and “terms and conditions” developed by DOT&PF and any conservation recommendations suggested by the Service.

If the Service determines the action is likely to threaten the continued existence of a listed species or harm critical habitat, the project cannot proceed as designed.

Conferences

While consultations are required when the proposed action may affect listed species, conferences are required if an action is likely to jeopardize the continued existence of a species proposed for listing under the ESA, or adversely modify or destroy proposed critical habitat. DOT&PF may, however, determine conferencing is advantageous even if crossing 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 best practice to conference with the Service for any project that affects a proposed species or proposed critical habitat because the listing status can change during the project development process. DOT&PF staff should follow the same procedures for conferences as for consultations.

Title 50 of the Code of Federal Register Section 402.10 provides guidance on consultation and conference procedures required by the Endangered Species Act.



To view 50 CFR Part 402.10 online, visit: <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=b24cad9a6960eaf89b15e417ced77b0d&mc=true&n=sp50.11.402.b&r=SUBPART&ty=HTML>



Preparing Biological Assessments (BA)



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[50 CFR §4012.12\(f\)](#)

[U.S. Fish and Wildlife Service Guidance for Preparing a Biological Assessment](#)

[NMFS General Format for Preparing a Biological Assessment](#)



A Biological Assessment, or BA, is an Endangered Species Act-required consultation document that defines the proposed action and analyzes impacts on threatened or endangered species and their habitat. Its purpose is to assist the Service in evaluating whether the proposed action is likely to jeopardize the continued existence of a threatened or endangered species, or destroy or adversely modify its critical habitat.

To evaluate cumulative effects, the BA should also describe any other activities that are reasonably certain to occur within the action area that are likely to affect the species.

A BA must include the best available scientific and commercial data, and the information required by 50 CFR Section 402.12(f). The Environmental Impact Analyst should coordinate with the project design team to verify that appropriate mitigation measures and best management practices have been included in the BA's description of the proposed action.

The BA may be prepared by an Environmental Impact Analyst or a consultant, and must follow the regulating authority's guidance for preparing a biological assessment. The BA must be reviewed and approved by the REM and NEPA Program Manager prior to submission to the Service. When a consultant prepares the BA, the Environmental Impact Analyst will review the consultant's work prior to submitting the BA to the REM and NEPA Program Manager for review, comment, and approval. The REM is responsible for transmitting the approved BA to the Service.



Visit the following links for more information about how to prepare a BA:

- 50 CFR §4012.12(f): https://www.ecfr.gov/cgi-bin/text-idx?SID=caddf1977ced604d7824809f337a5645&node=pt50.11.402&rgn=div5#se50.11.402_112
- U.S. Fish and Wildlife Service Guidance for Preparing a Biological Assessment: https://www.fws.gov/midwest/endangered/section7/ba_guide.html
- NMFS General Format for Preparing a Biological Assessment: https://alaskafisheries.noaa.gov/sites/default/files/ba_format.pdf



Incidental Take and Incidental Harassment Authorizations



[Incidental Take Authorizations Under MMPA](#)

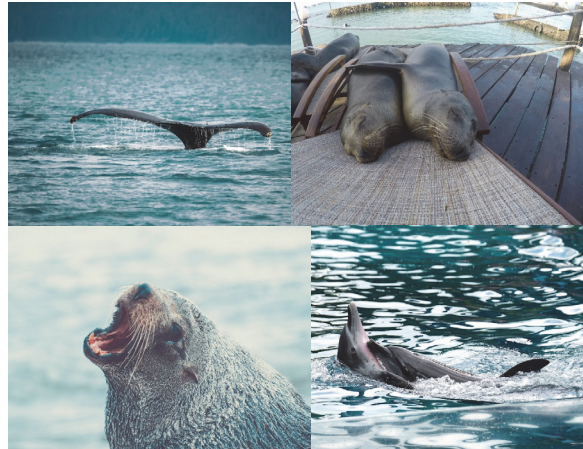


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Depending on the regulatory authority, a proposed action could require an Incidental Take Authorization or an Incidental Harassment Authorization. Incidental Take Authorizations, or ITAs, are required if the proposed action is anticipated to result in only incidental take and not intentional take. In these cases, the Service will issue an Incidental Take Statement—or ITS—as part of its completed Biological Opinion for the proposed action. The Incidental Take Statement quantifies the amount of expected “take,” either to individuals or to habitat area as a surrogate.

With some exceptions, activities that “take” marine mammals are subject to take prohibitions under the Marine Mammal Protection Act. MMPA requires applying for an Incidental Harassment Authorization (IHA) or a Letter of Authorization (LOA) from the National Marine Fisheries Service. An IHA or an LOA is required even if a marine mammal being harassed is not listed under the ESA.

Both authorizations allow the incidental, but not intentional, take of small numbers of marine mammals by harassment during an activity. An IHA is issued for a period of up to 1 year and must be reapplied for in subsequent years. For projects of longer duration, Incidental Take Regulations can be promulgated for a specified activity in a specified geographic region for up to 5 years. An LOA can then be requested each year from the Service to carry out these activities.

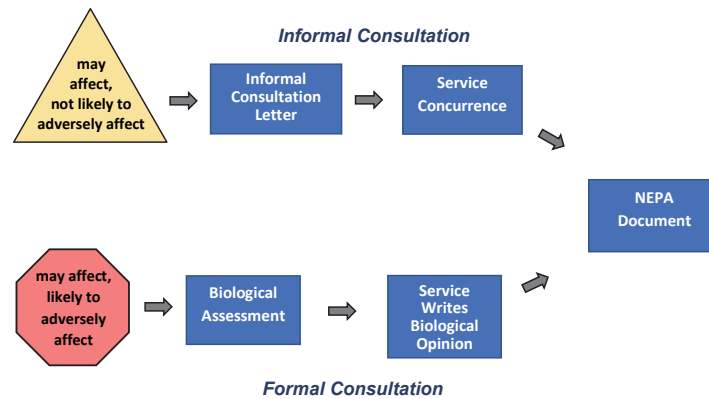
The National Marine Fisheries Service determines that an issuance of IHA is appropriate once it reviews public comments, once the findings of ESA consultation are final, and EA, EIS, or FONSI is completed and the applicant’s ability to implement necessary mitigation to comply with MMPA, ESA, and NEPA is assessed.



To view Incidental Take Authorizations Under MMPA online, visit:
<https://www.fisheries.noaa.gov/node/23111>



NEPA Process for Documenting ESA Compliance



An analysis of impacts to threatened and endangered species and critical habitat along with any Section 7 consultations must be completed and included in the NEPA document. Formal Section 7 consultations can lengthen the NEPA completion timeline significantly, and therefore consultation with the Service should begin as early as possible. Remember the consultation period begins with the submission of the Biological Assessment.

When the proposed action may affect, but is not likely to adversely affect a threatened or endangered species or its designated critical habitat, the Environmental Impact Analyst is required to attach an informal consultation letter and Service concurrence from the Service to the NEPA document.

When the proposed action may affect, and is likely to adversely affect a T&E species, the Environmental Impact Analyst is required to summarize the impacts to threatened or endangered species and their designated critical habitat; describe any avoidance and minimization measures, including conservation measures in the Biological Assessment. The NEPA document cannot be approved until the Service issues their Biological Opinion. The Environmental Impact Analyst incorporates the requirements provided by the Service into the NEPA document; and includes the Biological Assessment and Biological Opinion by reference, if applicable. The Biological Assessment and Biological Opinion shall be retained in the region project file. If a project re-evaluation is required and it is determined that the changes to the project may affect the Biological Opinion analysis, an updated Biological Assessment is submitted to the Service and an updated Biological Opinion is required prior to the approval of a re-evaluation.

If a Finding of No Significant Impact is issued, or a Categorical Exclusion is applied based on expected implementation of avoidance and minimization measures, those measures are legally binding and must be implemented with the proposed action.



Re-initiation of Consultation

Re-initiation of Consultation is required if any of the following occur:

-  A new species is listed, or critical habitat is designated, that may be affected by the action
-  New information reveals impacts associated with the action that may affect a threatened or endangered species or critical habitat in a manner, or to an extent, not previously considered
-  The scope of the proposed action is modified in a manner that would cause an impact, which was not considered during the consultation, on threatened or endangered species or critical habitat
-  The amount or extent of take specified in the Incidental Take Authorizations is exceeded



This slide presents the scenarios that would require re-initiation of consultation with the Service. If any of these occur during a project, DOT&PF must re-initiate consultation. If the action requires formal consultation, the REM will serve as the point of contact for the Service and must sign any formal correspondence to the Service. The NEPA Program Manager must be copied on all correspondence and be invited to participate in any relevant meetings.



Module Review

Module 9: What You've Learned...



- The purposes of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA)
- The consultation requirements for compliance with the ESA and coordination guidelines associated with the MMPA
- The process for identifying protected species and/or habitat within a project action area
- The possible determinations of effect under ESA and the level of consultation required in association with each
- How a Biological Assessment (BA) is prepared
- The role of Incidental Take Statements, Harassment Statements, and Authorizations in the ESA consultation and MMPA authorization processes
- How threatened and endangered species are addressed in the NEPA document
- The circumstances that require re-initiation of consultation



This concludes Module 9, which discussed the Endangered Species Act and Marine Mammal Protection Act and how these acts relate to NEPA actions.

We'll now take the module quiz to complete the requirements for this training course.