
Guidance on Reinitiation of ESA Section 7 Consultation

April 2008

Interagency cooperation, as defined in Section 7 of the Endangered Species Act (ESA) of 1973, as amended, requires all federal agencies to consult with the US Fish and Wildlife Service and the National Marine Fisheries Service (collectively referred to as “the Services”) if a federal action agency determines that any action it funds, authorizes, or carries out may affect a listed species or designated critical habitat. Section 7 of the ESA applies to transportation projects, including local or state projects that have a federal nexus (i.e., have been funded, authorized, or carried out by a federal agency). Section 7(a)(2) of the Act and its implementing regulations ([50 CFR Part 402.16](#)) require Federal agencies to reinitiate consultation on previously reviewed actions if any of the following occur:

- The amount or extent of take specified in the incidental take statement is exceeded.
- New information reveals effects of the action that may affect listed 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 listed species or critical habitat that was not considered in the biological opinion.
- New species is listed or critical habitat designated that may be affected by the identified action.

If one of these scenarios arises, reinitiation of consultation should occur and may be requested by the State DOT, the FHWA, or the Services as made necessary by changes in the scope or design of the project, discovery of the presence of previously unknown listed species or critical habitat within the project area, or the listing of new species or critical habitat designations (U.S. Department of Transportation FHWA 2002).

Formal consultations must be reinitiated by the federal action agency (i.e., FHWA). Because of this requirement, the federal action agency (or its non-federal representative, i.e., WSDOT) must stay abreast of project activities throughout construction and remain aware of the current species and critical habitat listing status.

Informal consultations are reinitiated by WSDOT, on behalf of the FHWA. Informal consultation should be reinitiated if any of the following occur:

- New information reveals potential effects of the action on listed species or critical habitat in a manner or to an extent not previously considered in the consultation.

For example: a fish passage barrier occurring downstream of the road project is corrected after the road project consultation is complete but before the project is initiated. Listed fish are now able to access and are utilizing the project area. The project consultation was completed based on a lack of fish presence.

- The action is modified in a manner causing effects on listed species or critical habitat not previously considered in the consultation.

For example: the consultation was completed based on operating from a barge for in-water work. After the consultation is complete the project design changes and the project is now requiring temporary work trestles. No in-water pile driving was addressed in the consultation.

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

For example: a fish species is listed after the consultation is complete but before the bridge is constructed. The project did not consult on that species.

Although the consultation process is completed with issuance of a letter of concurrence or a biological opinion, the agency's ESA responsibilities must be diligently maintained until construction of a project is complete. Between the completion of consultation and completion of a project, the status of species or critical habitat can change, as can the design or scope of the proposed project resulting in effects to listed species or designated critical habitats that were not addressed in the consultation process.

WSDOT must ensure that the ESA approval received through consultation is still valid for all listed species and designated critical habitats before and during construction of a project. To ensure this, WSDOT should review the project description, design, and scope to make sure there are no changes, along with species lists at least 6 months prior to and at least every 6 months once the project is under construction to determine whether new species have been listed or critical habitats designated that were not addressed in the biological assessment (BA) submitted for consultation. Updated species lists and critical habitat can be obtained on NMFS and USFWS websites:

Species Lists

- NMFS (<http://www.nwr.noaa.gov/Species-Lists.cfm>)
- USFWS Western Washington (http://www.fws.gov/westwafwo/se/SE_List/Endangered_Species.asp)
- USFWS Eastern Washington (<http://www.fws.gov/easternwashington/county%20species%20lists.htm>)

Critical Habitat

- USFWS Critical Habitat Portal (<http://crithab.fws.gov/>)
- NMFS Critical Habitat (<http://www.nmfs.noaa.gov/pr/species/habitat.htm>)
- NMFS Critical Habitat Maps and Data (<http://www.nmfs.noaa.gov/gis/data/critical.htm>)

Following completion of Section 7 consultation and prior to completion of a project, a change in conditions requiring reanalysis may result in stopping construction or some components of construction under certain circumstances (*e.g.*, marine pile driving injuring marbled murrelets that exceeds the amount of incidental take allowed or results in take when none was granted). In instances where there is a change in the status of a species or critical habitat, resulting in a higher level of protection (*e.g.*, a species undergoes an emergency listing), or where there is a change in scope or design of the proposed project after construction has begun that causes an effect to listed species and/or critical habitat not previously considered, these changes may require some components of construction to be avoided while potential project impacts are reassessed and consultation is reinitiated.

If there is no change in the effect determination to the species and/or critical habitat, consultation does not need to be reinitiated but an update should be sent to the Services informing them of the change in the project design or the change in species status and subsequent reanalysis of the project impacts. In most cases the Services will not require stopping construction if the initial consultation was done in good faith. However, in instances where the amount or extent of incidental take [specified in the biological opinion] is exceeded, or incidental take occurs when none was granted, any operations causing such take must cease pending reinitiation (USFWS & NMFS 1998).

Commonly Asked Questions and Scenarios

1. *What if consultation has been completed and an emergency listing of a species is made (the species could occur in the action area of the project but was not addressed in the original consultation) prior to or during construction of a project?*

Consultation should be reinitiated to address this new species, unless there is no effect to new listed species and/or designated critical habitat in which case you would document your analysis in the project file.

2. *What if consultation has been completed and a new species that was not addressed in the original consultation but could occur in the action area is proposed for listing, or new critical habitat is proposed for designation, prior to or during construction of a project?*

A conference should be requested with the Services to address these new proposed species and critical habitats, unless there is no effect or the project will be completed before it is listed and/or critical habitat designated.

3. *What if a conference for proposed species or critical habitat has been completed and the species is listed or the critical habitat is designated prior to or during construction of a project?*

If a proposed species is listed or proposed critical habitat is designated prior to or during construction of the project, the action agency (Federal lead) can formally request that the previously completed conference opinion be converted to the biological opinion for the project. With this single request, the action agency fulfills its consultation obligations with the Services and receives take coverage for its project. This is considered a re-initiation. The terms and conditions and incidental take statement from the conference opinion is reissued as a biological opinion at the time of listing or designation.

4. *What if a project design or scope changes so that the proposed action no longer matches the project description included in the BA submitted for consultation?*

The action agency should reanalyze the potential impacts associated with the revised project, and consultation should be reinitiated to address this new information only if there is an effect to the species or critical habitat that was not previously considered or consulted on. If the effects do not change, then provide the Services with a project update.

Scenario Examples

1. *Listed bull trout and proposed bull trout critical habitat were addressed in a project BA. Bull trout critical habitat was designated after consultation was complete but before all in-water work was complete.*

If a conference took place for the proposed critical habitat, then the action agency should send a project update to the Services and request to change the conference concurrence to a consultation, or conference opinion to a biological opinion.

2. *A bank stabilization project that will require work within the OHWM of a stream with listed fish during the in-water work window (which could overlap with the migration season) has undergone consultation. The BA identified that the work was to be conducted in the dry. However, it was later determined that in-water work will occur.*

Reinitiation of consultation is required because the action was modified in a manner that will cause effects to listed fish that were not previously considered. This consultation may go from informal to formal depending on the work window.

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3. *A bridge repair project that involves riparian impacts is underway following completion of consultation. The project requires a design modification that will result in additional impacts to riparian vegetation on the north side of the bridge, but will result in equally fewer impacts to similar riparian vegetation on the south side.*

Reinitiation of consultation is not required if the design modification does not cause effects to listed species and critical habitat not previously considered. Send an update to the Services to inform them of the design modification and update the project file.

4. *A project has completed consultation and, as described in the BA, was to be conducted during the 2009 construction season. Budget reallocations require a delay until the following season. All other aspects of the project are unchanged including species listings, habitat impacts, construction methods, in-water work windows, etc.*

Reinitiation of consultation is not required if the action is not modified and there is no new information that reveals effects of the action not previously considered. The action agency should inform the Services of the change in the project construction date. The action agency will also need to remain aware of the status of current species listings and critical habitat designations, keep informed of the latest information regarding the interpretation of the impacts on listed species and critical habitats, and ensure that the ESA approval received through consultation is still valid for all listed species and designated critical habitats before beginning construction of the project.

Literature Cited

U.S. Fish & Wildlife Service and National Marine Fisheries Service. 1998.

Endangered species consultation handbook: Procedures for conducting consultation and conference activities under section 7 of the Endangered Species Act. Available:
<http://www.fws.gov/endangered/consultations/S7HNDBK/s7hndbk.htm> Accessed on January 23, 2008.

U.S. Department of Transportation Federal Highway Administration. 2002.

Memorandum: Management of the Endangered Species Act (ESA) Environmental Analysis and Consultation Process. Available:
<http://www.fhwa.dot.gov/environment/esaguide.htm> Accessed on January 28, 2008.