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SECTION 7 OF THE ENDANGERED SPECIES ACT (ESA): GUIDANCE FOR BTOP GRANTEES

The Endangered Species Act of 1973 (ESA) protects endangered and threatened species and the habitats they need to survive. The ESA is administered by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).

The Department of Commerce (DOC), National Telecommunications and Information Administration (NTIA) will examine project information in the pre-award phase to determine whether there is any potential for the action to impact protected species. If the agency determines that there would be no effect, then no consultation is required. Otherwise, the Special Award Condition (SAC) issued to the grantee by DOC/NTIA will include a requirement for an ESA Section 7 consultation to determine:

- The effects on protected species and their critical habitats.
- What mitigation is required to reduce adverse effects.

In the BTOP program, the grantee initiates ESA Section 7 consultation with FWS or NMFS, and DOC/NTIA will assist and advise throughout the consultation, as needed.

Consultation is expedited by open and comprehensive communication between the grantee and the FWS or NMFS ESA Section 7 staff, regarding both construction and operational impact of the proposed project.

Section 7 of the ESA requires all Federal agencies to consult with the appropriate resource agencies, either FWS or NMFS, on any action they are proposing that could affect any endangered or threatened species or critical habitat. **This includes actions funded by grant dollars.** For BTOP, grantees should initiate informal consultation, while keeping DOC/NTIA informed. If formal consultation is required, DOC/NTIA will take the lead, with assistance from the grantee. Consultation with the NMFS occurs only for marine species, while consultation for all other species is conducted through FWS.

SECTION 7 RESPONSIBILITIES OF BTOP GRANTEES: CONSULTATION PROCESS

There are two types of Section 7 consultation, informal and formal. Grantees should initiate informal consultation, notify DOC/NTIA, and provide assistance in the form of project data if formal consultation is necessary. DOC/NTIA conducts formal consultation if it is required, with the assistance of the grantee.

The Process – Informal Consultation: Informal consultation is a frequently used process, which includes all discussions, telephone conversations, meetings, and correspondence between the FWS or NMFS, the BTOP Grantee, and DOC/NTIA. Informal consultation takes place prior to, and may eliminate the requirement for, formal consultation.

Grantees should research potential threatened and endangered (T&E) species or habitat by looking up the species list via the FWS website:

<http://www.fws.gov/Endangered/wildlife.html>, prior to the initiation of informal FWS consultation. Informal

consultation with FWS is necessary to follow through on whether there is any potential effect in the study area. The grantee should contact FWS to determine whether there may be listed species and whether the proposed

Informal consultation takes place prior to, and may eliminate the requirement for, formal consultation. It may include telephone conversations, meetings, and correspondence between the FWS or NMFS, the BTOP Grantee, and DOC/NTIA to determine potential effect to T&E species and/or habitat.

Formal consultation takes place after the informal consultation of potential impacts to T&E species and habitat have been determined and are known to exist. DOC/NTIA will work with the BTOP grantee to initiate formal consultation with FWS or NMFS.

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project has the potential to impact them. The BTOP grantee should ensure that DOC/NTIA is kept aware of all findings in order to provide support as needed.

The FWS or NMFS will prepare a list of species known to exist in the study area. If no species or habitat is known to exist then the consultation is complete. If a T&E species or habitat is known to exist, then the FWS/NMFS will determine if the proposed action will effect the species or habitat.

The possible outcomes of an informal consultation are as follows:

- No effect, and no further consultation necessary.
- May affect but not likely to adversely affect, which requires FWS or NMFS concurrence of determination with possible mitigation.
- Likely to adversely affect, which requires a Biological Assessment, to be prepared by the grantee, initiating formal consultation.

The Process – Formal Consultation: To begin formal consultation, DOC/NTIA personnel will provide support to the BTOP grantee to send a written request, accompanied by a Biological Assessment (BA), to FWS or NMFS initiating formal consultation. Formal consultation should last no longer than 90 days and the appropriate Service (FWS or NMFS) will issue a Biological Opinion (BO) within 45 days.

The BA should include the following information:

- A description of the action being considered
- The geographic area that may be affected by the action
- Any listed species or critical habitat that the action may affect, and how the action may affect them
- Cumulative effects on any listed species or critical habitat
- A discussion of any EAs, EISs, or other BAs which have been prepared for the action
- Any other relevant information on the action, affected species, or critical habitat

Biological Assessment (BA) is a document prepared for the Section 7 process to determine whether a proposed major activity under the authority of a Federal action agency is likely to adversely affect listed species, proposed species, or designated critical habitat. BTOP grantees will be responsible for the preparation of BAs; the costs associated with it, which may include hiring a qualified consultant, are an allowable use of grant funds.

The formal consultation process concludes with the FWS and/or NMFS issuing a biological opinion. The BO has three possible findings:

- **Not Jeopardized.** The action will not jeopardize protected species, and the action may proceed.
- **Likely To Jeopardize.** The action is likely to jeopardize protected species. The potential to jeopardize may be mitigated to below significant levels. DOC/NTIA has several options:
 - Adopt "reasonable and prudent measures" for eliminating jeopardy/adverse modification and comply with incidental take statement
 - Cancel the project
 - Reinitiate consultation by proposing modifications or alternatives not yet considered.
- **Jeopardize Continued Existence.** The action will jeopardize the continued existence of protected species. The project cannot proceed as is. After major redesign or relocation, the consultation process may be reinitiated and the project re-evaluated.

MORE INFORMATION ON SECTION 7

- Endangered Species Act of 1973 (www.fws.gov/laws/lawsdigest/ESACT.html or www.fws.gov/Endangered/pdfs/esaall.pdf)
- US Fish and Wildlife Service offices (www.fws.gov/endangered/contacts.html)
- US Fish and Wildlife Service species (<http://www.fws.gov/Endangered/wildlife.html>)
- National Marine Fisheries Service (www.nmfs.noaa.gov/)

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