THREATENED AND ENDANGERED SPECIES IN THE MARINE REALM

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Topics

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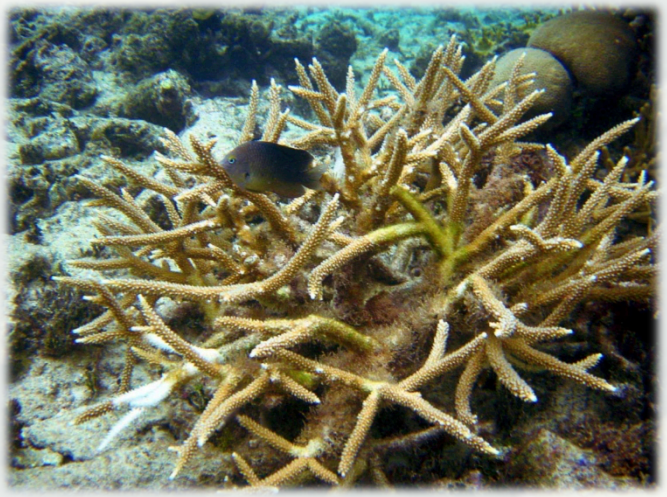
- Endangered Species Act
- Types of consultations
- Effect determinations
- Programmatic Tools
- Consultations



1973 Endangered Species Act

- Allows protection for species and their habitats
- Gives joint authority to Fish and Wildlife Service and National Marine Fisheries Service (Services)

Endangered Species Act 1973

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- Section 7 requires that all federal agencies ensure that any **action** they authorize, fund or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat

Types of Consultations

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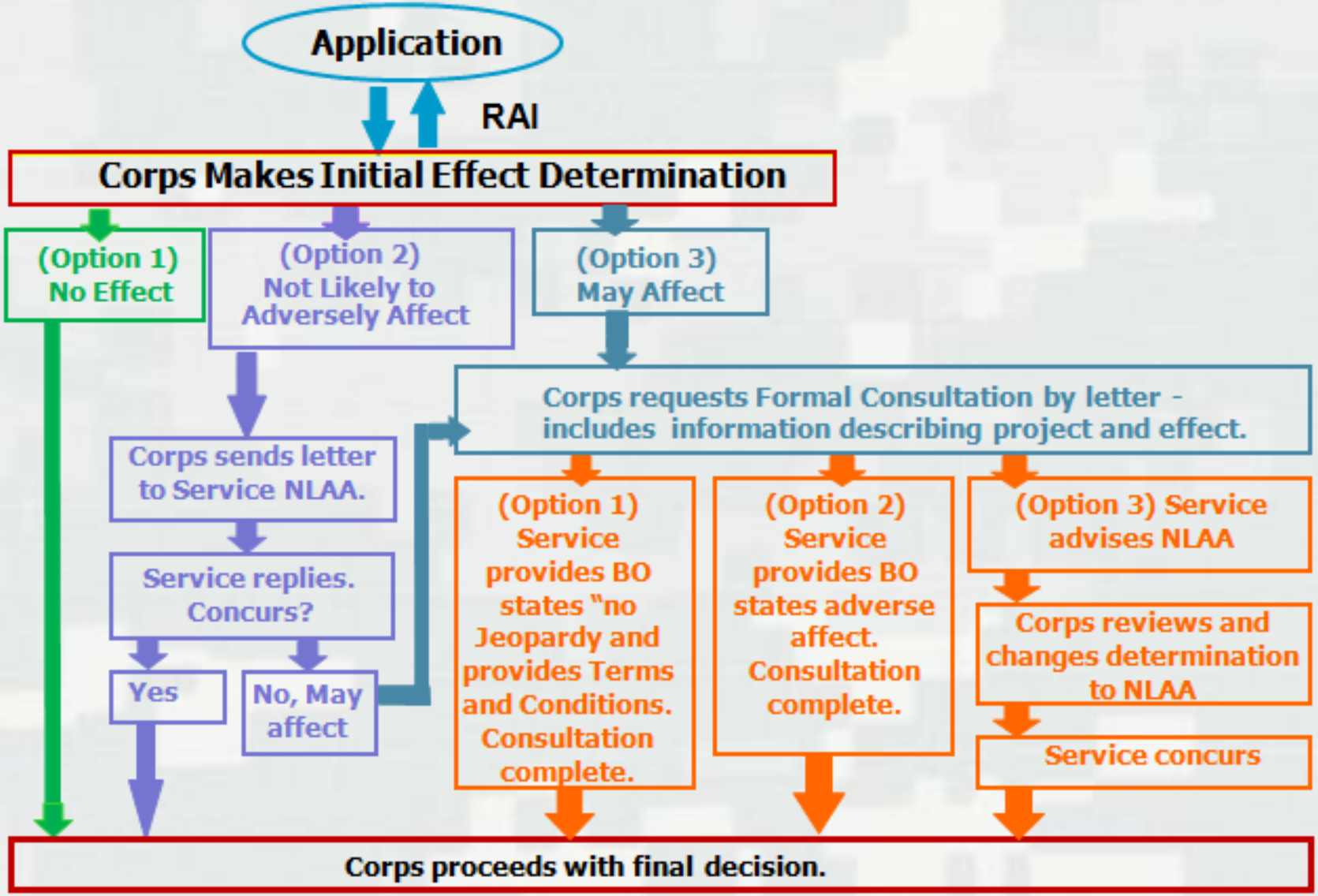
- Early
- Emergency
- Conference
- Informal
- Formal

USACE makes Effect Determination and initiates consultation with the Service

Effect Determinations

- No effect
  - No exposure to the environmental impacts resulting from the action or neither the species or Designated Critical Habitat (DCH) will respond in any manner (behavioral, physiological, chemical) upon exposure to the action
  - Difficult to achieve, especially with in-water work
  - No consultation required
- Not likely to adversely affect
  - Effects on species beneficial, discountable, insignificant
  - Informal consultation
- May affect
  - If incidental take is expected the action is adverse
  - Formal consultation; requires biological opinion


Application
RAI
Corps Makes Initial Effect Determination
(Option 1) No Effect
(Option 2) Not Likely to Adversely Affect
(Option 3) May Affect
Corps requests Formal Consultation by letter - includes information describing project and effect.
Corps sends letter to Service NLAA.
Service replies. Concurs?
Yes
No, May affect
(Option 1) Service provides BO states "no Jeopardy and provides Terms and Conditions. Consultation complete.
(Option 2) Service provides BO states adverse affect. Consultation complete.
(Option 3) Service advises NLAA
Corps reviews and changes determination to NLAA
Service concurs
Corps proceeds with final decision.

NMFS Section 7 Checklist

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- Use most recent version (September 15, 2015)
- Send Corps editable version (i.e. do not scan or print)
- Statement of compliance or statement applicant is not willing to modify project to comply
- Complete all parts of the question. For example:

2. Methods:

i. Construction methodology (Please provide detail)
ii. Demolition/removal of existing structures/debris
iii. Location of work (barge, upland, or both)

http://sero.nmfs.noaa.gov/protected_resources/section_7/consultation_submittal/index.html

Programmatic “Keys”

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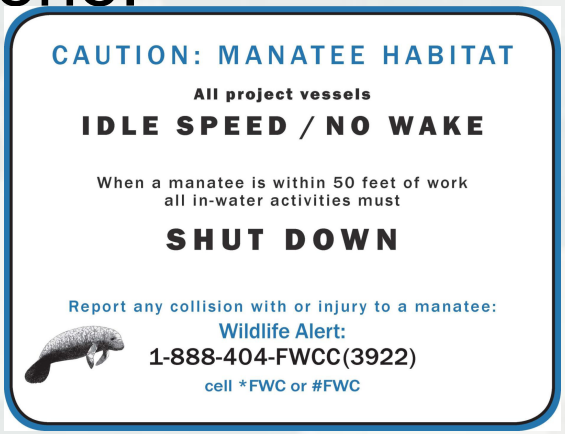
- Manatee, wood stork, Johnson seagrass
- Pay extra attention to the definitions, footnotes and the scope of the Key
- May require a foraging analysis or survey; submit with the application to save time
- Typically have programmatic concurrence so no need to coordinate; it’s already done!



Programmatic Biological Opinions (BO)

- Considers a defined action's effect on a defined list of species
- Includes terms and conditions and parameters for reinitiating consultation
- Project must meet specific terms and conditions
- Requires a second-tier review including a 10-day "comment" period

Programmatic BOs

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- 1997 NMFS South Atlantic Regional Biological Opinion (SARBO)
- NMFS Gulf Regional Biological Opinion (GRBO)
- 2011 FWS Sand Placement BO
- 2012 NMFS (12) SAJ Regional General Permits (12 SAJ)
- 2013 FWS Piping Plover BO
- 2015 Statewide Programmatic BO (SWPBO)

SWPBO Covered Activities

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1. Shoreline stabilization
2. Pile-supported structures
3. Maintenance and minor dredging
4. Reconfiguration and repair of docking facilities within a marina
5. Outfall structures
6. Scientific survey devices
7. Boat ramps
8. Aquatic habitat enhancement and restoration activities
9. Aerial and subaqueous utility and transmission lines
10. Marine debris removal
11. Temporary platforms, access fill, and cofferdams

SWPBO - What's included?

- Project Design Criteria (PDC)
  - All projects
  - Project specific
  - Critical Habitat (CH) specific
- PDCs are special conditions of permit
- Noise BMPs
  - Metal pilings/sheet piles by impact hammer not authorized.
  - If 5 or more concrete pilings a day using impact hammer in confined space, must use noise abatement measures.

SWPBO - What's excluded?

- Not used for Regional/Programmatic General Permits with their own Programmatic Consultation
- Exclusion Areas:
  - Smalltooth sawfish exclusion zones.
  - Mouth of Gulf sturgeon spawning rivers.
  - Structures within the boundaries of nearshore reproductive habitat of loggerhead critical habitat.
- Exceptions to Exclusions Areas
  - Marine debris removal
  - Scientific survey devices
  - Aquatic habitat enhancement/restoration
- Other activity specific exclusions may apply

Project Design Criteria

- NMFS Sea Turtle & Smalltooth Sawfish Construction Conditions
- Vessels cannot be closer than 500 yards of a right whale
- Turbidity control measures
- Exclusion areas
- Reporting of collisions with listed species
- In-water rope or chains that do not loop or tangle
- Best Management Practices
- Prior approval from Sanctuary
- All work during daylight hours

SWPBO Consultations

- 254 pending informal consultations when SWPBO was finalized
- 142 consultations withdrawn and pulled under SWPBO
- +178 “new” consultations under SWPBO
- 120 pending informal consultations that do not qualify for SWPBO

NMFS Pilot Program

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NMFS HQ has pushed out a 1-year pilot program for informal consultations from Feb 2016 through Feb 2017

- Minimal effects to listed species and DCH
- Routine and non-controversial
- Covered in prior BO
- Low litigation risk
- Expedited consultation

NMFS Pilot Program

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- Requires an adequate description of the proposed action
- Requires an adequate description of the action area
- Identification of each species and/or DCH affected by the action
- Certification the best scientific and commercial data available was used

NMFS Pilot Program

- Participating Offices: Palm Beach Gardens, Ft. Myers, Panama City, Antilles
- Consultation status (over 4 months)
  - 21 consultations completed
  - 9 consultation pending
  - 5 consultations withdrawn
- 48 day average time, as opposed to 225 days

What's next? JAXBO

- Consolidates and addresses Section 7 ESA Consultation Requirements with NMFS for certain activities
- Minor activities would predominantly result in NLAA
- A couple specific activities would result in MA
  - removal of Johnson seagrass
  - adverse affect to smalltooth sawfish DCH
- Designed to complete consultation requirements (NMFS concurrence) in 10-days
- Provides more flexibility for PDCs
- Improves checklist
- Potential for integrated consultation under MSFCMA

Questions?