

Reclamation Manual

Policy

- Subject:** Reclamation Consultation Under the Endangered Species Act of 1973, as Amended
- Purpose:** Describes Reclamation's role in consultations required by the Endangered Species Act.
- Authority:** Federal Reclamation law, including individual project authorizations and contracts; the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (hereafter, ESA or the Act).
- Contact:** Environmental and Planning Coordination Office, D-5100
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1. Definitions (as used herein).

A. Critical Habitat means:

- (1) Specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements):
 - (a) Essential to the conservation of the species; and
 - (b) Which may require special management consideration or protection.
- (2) Specific areas outside the geographical area occupied by the species, at the time it is listed in accordance with provisions of section 4 of the Act, upon determination by the Secretary that such areas are essential for the conservation of the species.

B. **Listed Species** mean any species of fish, wildlife, or plant which has been determined to be threatened or endangered under section 4 of the Act.

C. **Proposed Species** means any species of fish, wildlife, or plant proposed in the *Federal Register* to be listed under section 4 of the Act.

D. **Species** includes any subspecies of fish, wildlife, or plants and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

2. General Policy.

A. Legal Authorities of Reclamation.

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- (1) Reclamation staff must design proposed actions and prepare biological assessments in a manner that is consistent with Reclamation's legal authorities. In all section 7 consultations, Reclamation must be prepared to clearly set forth its authority with respect to proposed actions. Reclamation is responsible for making all determinations about the scope of its authority and discretion.
 - (a) **Explanation.** Section 7 of the Act and the requirements of the Act's implementing regulations set out in 50 CFR Part 402 apply to all actions in which there is discretionary Federal involvement or control. It is critical that Reclamation be prepared to clearly identify its legal authorities when preparing the proposed action statement and during any section 7 consultation. Identification of the scope of those authorities will be made by Reclamation, in consultation with the Solicitor's Office.

- B. **Consultations.** Reclamation will undertake or support activities to determine the effects that Reclamation's actions (both proposed actions and existing project operations where Reclamation retains discretionary involvement or control) may have on listed or proposed species, or on their designated or proposed critical habitat. Reclamation will ensure, through consultations and/or conferences pursuant to section 7(a)(2) of the Act and any applicable regulations or guidelines issued by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (Services), that its discretionary actions are not likely to jeopardize the continued existence of any listed or proposed species, or result in the adverse modification or destruction of designated or proposed critical habitat.
 - (1) **Definition of Proposed Action.** As the action agency under the ESA's implementing regulations, Reclamation is responsible for defining its proposed actions for purposes of section 7 consultations.
 - (a) **Explanation.** As the action agency under the ESA, Reclamation is responsible for defining its proposed discretionary actions and ensuring that any such action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species. The implementing regulations state that the action agency has the discretion to determine the contents of a biological assessment, and the contents are dependent on the nature of the proposed action (50 CFR § 402.12). Reclamation will be the entity to define, modify, or expand a proposed action. In developing a description of a proposed action, Reclamation will coordinate with the Services and may coordinate with other affected interests.

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- (2) **Determinations of Effect.** Reclamation will determine whether the proposed action may affect a listed species or designated critical habitat.
- (a) **Explanation.** As set out in 50 CFR § 402.14, it is the responsibility of the action agency to determine whether a proposed action may affect listed species or critical habitat. In the past, Reclamation has sometimes requested concurrence from the Services with its determination that a proposed action had no effect on listed species, although this concurrence is not required by the ESA regulations. In the future, Reclamation will not seek such concurrence unless the Regional Director determines it is appropriate. Even if Reclamation determines there is no effect, it is important to recognize that the Services retain the ability to request consultation, in the event they identify actions that they believe may affect listed species that have not undergone consultation. Reclamation may then agree to consult or decline to consult. Such determination should be appropriately documented.
- (3) **Establishment of Baseline.** For purposes of evaluating effects of a proposed action in a biological assessment or any other document that initiates formal consultation, Reclamation will define a baseline of population and habitat quantity and quality for listed and proposed species and designated and proposed critical habitat.
- (a) **Explanation.** The environmental baseline is a component of both biological assessments (including any other document that initiates formal consultation) and biological opinions and must be established and applied in accordance with the Act and the implementing regulations. For purposes of biological assessments, Reclamation is responsible for defining the environmental baseline. In developing the baseline, Reclamation may want to coordinate with the Services, because they are responsible for issuing the biological opinion and supporting analysis.
- (4) **Determination of Reasonable and Prudent Measures (RPMs) and Implementing Terms and Conditions.** In order to decide whether to accept the terms and coverage of an incidental take statement, Reclamation must determine whether the scope of the RPMs to be included in the incidental take statement meets the requirements of the Act and the implementing regulations and whether Reclamation has the capability to implement the RPMs.
- (a) **Explanation.** RPMs should be used only to minimize the amount or extent of incidental take when there is either a no jeopardy determination as to a

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proposed action or in the implementation of a reasonable and prudent alternative. Such RPMs, along with the terms and conditions that implement them, may not alter the basic design, location, scope, duration, or timing of a proposed action and may involve only minor changes to the proposed action [50 CFR § 402.14(i)(2)]. Before accepting a biological opinion and its incidental take statement, Reclamation must determine whether (i) the RPMs comply with the Act and the implementing regulations and (ii) Reclamation has the capability to implement those requirements. It is important to recognize that in making this determination Reclamation has two alternatives. It may accept the biological opinion and its incidental take statement, including the RPMs and the terms and conditions that implement them. Or, if Reclamation believes the RPMs do not comply with the Act or the implementing regulations or cannot be implemented by Reclamation, Reclamation should work with the appropriate Service to develop legally acceptable RPMs that are amenable to both agencies.

- (5) **Reasonable and Prudent Alternatives (RPAs).** Reclamation will work with the Services to develop RPAs that are consistent with the Act's implementing regulations.
 - (a) **Explanation.** If one of the Services notifies Reclamation that the proposed action is likely to jeopardize the continued existence of a listed species, Reclamation will work with the Service to develop an RPA that will avoid the likelihood of jeopardizing the listed species. As set out in 50 CFR § 402.02, the RPA must be one that can be implemented in a manner consistent with the intended purpose of the action, can be implemented consistent with the scope of Reclamation's legal authority and jurisdiction, and is economically and technologically feasible.
- C. **Costs of Consultations.** Determinations as to what portion of the costs of preparing biological assessments, carrying out consultations pursuant to section 7(a)(2) (including testing, data collection, and monitoring carried out prior to or as part of a consultation), and implementing the commitments resulting from a consultation will be project costs and what portion will be non-project costs (non-reimbursable) will be made on a case-by-case basis.
 - (1) Costs that are determined to be project costs will be expensed or capitalized as appropriate and will be allocated among project purposes (both reimbursable and non-reimbursable). Any costs allocable to reimbursable project purposes will be borne by project beneficiaries in the appropriate manner.

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- (2) Costs that are determined to be non-project costs will be non-reimbursable.
3. **Effective Date.** This policy will be effective immediately.