In the Beginning…

• A Federal Agency proposes to take an action:
  – Issue a permit
  – Authorize an activity
  – Fund a project or program
  – Build/Maintain/Repair/Operate something

§ 7(a)(2) APPLIES
One of Three Effect Determinations is Possible

• No Effect

• May Affect, Not Likely to Adversely Affect

• May Affect, Likely to Adversely Affect
How do I make the determination?
Effects to analyze

Effects of the Proposed Action and Interrelated and Interdependent Actions

• Beneficial
• Direct
• Indirect
Consider Exposure:

• Proximity of the action to listed species
• Distribution of species and habitat use
• Timing of effects
• Duration of effects
• Nature of effects
• Magnitude of effects
Address Biology:

• Breeding
• Feeding
• Sheltering

• Response
  – Sensitivity
  – Resilience
  – Reproductive capacity
  – Recovery capacity
CRITICAL HABITAT

The final rule listing critical habitat will describe the primary constituent elements. Consider and address effects to each element.
How Do I Measure Effects?

Quantify:

• Changes in
  – Breeding
  – Feeding
  – Sheltering

Relate these changes to local threats, stressors and limiting factors.
Interface Exposure with Biology

conservation  reproduction

sensitivity  threats

crisis  breeding

resilience  limiting factors

feeding  acuity

numbers  distribution

fecundity  needs

sheltering
What About Critical Habitat?

Quantify:

- Condition of PCEs
- Changes in Distribution
- Changes in Productivity

Relate the changes to local threats, stressors and limiting factors within the CH Unit.
Critical Habitat Response to the Action

• Primary constituent elements (PCEs) affected in the action area
• PCEs sensitivity to project effects
• PCEs resilience to impacts
• PCEs regrowth rate/capability
• Critical Habitat viability after project (for either survival OR recovery)
Biological Assessment

No Effect

Proceed *without* ESA consultation

May Affect

Trigger for ESA consultation
No Effect

to Listed Species or Critical Habitat

Meaning: NO Effect

Not even a beneficial one...

Consultation requirement is not triggered. No concurrence required from Services.
No Effect

• No effect what-so-ever

Species

Effects of the Action
May Affect

- when a listed species or designated critical habitat is exposed to a stressor generated or caused by the action or interrelated or interdependent actions
May Affect (NLAA and LAA)
May Affect

Not Likely to Adversely Affect
Likely to Benefit

Informal ESA Consultation

Likely to Adversely Affect

Formal ESA Consultation
May Affect, Not Likely to Adversely Affect Listed Species or Critical Habitat

The appropriate conclusion when the responses by a species or its critical habitat are likely to be:

- Discountable
- Wholly beneficial
- Insignificant (does not involve take)

No “mitigated NLAAAs”

Written Concurrence from Service(s) required
May Affect, Likely to Adversely Affect Listed Species or Critical Habitat

The appropriate conclusion when the stressors generated or caused by the action, or its interrelated and interdependent actions, are likely to *directly or indirectly* have any adverse affect (including take) to a listed species or its critical habitat.

➢ *Formal Consultation is required*
Likely to Adversely Affect

- effects to species or habitat may occur as a direct or indirect result of the proposed action or interrelated or interdependent actions and the effect is not *wholly* beneficial, discountable, or insignificant.
Common Flaws in Effect Determinations

- Approaches that will put you behind the 8 ball:
  - “Displacement”
  - “Not Known to Occur Here”
  - “Contracting Clause or We’ll Call You Later”
  - “Leap of Faith”
The “Displacement” Approach

• They’ll just move out of the way during construction.

• It’s just a 50 foot wide road and their habitat will be avoided.

• There are plenty of other places for them to go.
The “Not Known to Occur Here” Approach

• I’ve been here for 30 years and never seen one of those.

• Well, no we haven’t surveyed, we don’t need to.
The “Contracting Clause” or “We’ll Call You Later” Approach

• We’ll stop construction and call you if we see any.

• If found during construction, we’ll ask you for avoidance measures.
The “Leap of Faith” Approach

• Trust us, we know exactly what we’re doing.

• We know the area, species, etc., and we’re sure there’s no problem.
A not-so-common, but problematic, flaw:

Action agency makes a “not likely to jeopardize” call for listed species
Flawed effect determinations:

- Costs everyone time, money, and aggravation
- Can leave action agency, applicant, or contractors vulnerable to section 9
- Undermine credibility and relationships with other agencies
Yuck! How can we avoid those problems?

You Are Not Alone!

- Establish working relationships with your Service counterparts
- Early coordination and “informal” consultation