Interagency Cooperation: A Land Management Agency Perspective

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Interagency Cooperation

• Section 7 (a)(1)
  – Federal agencies are directed to utilize their authorities to carry out programs for the conservation of listed species.
• Section 7 (a)(2)
  – Interagency Consultation to ensure Federal actions do not jeopardize listed species or adversely modify critical habitat.

Common Areas of Mistake and Confusion

• Describing the Action
• Defining the Action Area
• Determining Meaningful effects to the species
• What is “No Effect”
• Connecting the logic path
• Confusing ESA and NEPA
• Whose document is the BA?
Solution: Deconstructing Actions

• Breaking Actions into their constituent elements makes it easier to
  – Identify various aspects of Actions that have implications for listed resources (and those that don’t)
  – Assess the effects of complex Actions on listed resources
  – Determine measures to avoid, minimize or offset the effects
Solution: Abiotic Effects First
Species Effects Second

- Where will the environment be changed
- Does the species occur there (exposure)
- What would the effect to the species be (response)
- Don’t “kitchen sink” the effects analysis
  - Open and close issues that are minor
Solution: Focus on Key Changes

- Breeding
- Feeding
- Sheltering
- Sensitivity and Resilience
- Effects to individuals that roll up
- Concerned with resulting changes in:
  - Numbers, Reproduction, and Distribution
Solution: No Means No

Meaning - **NO** effect

- Not to Listed Species
- Not to Critical Habitat
- Not a single individual
- Not even beneficial

Consultation requirement not triggered.
No concurrence required.
Still MUST document process

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Solution: Following a Logic Path

- Step Wise Approach
  - Connect each data piece to effect to environment and effect to species
  - Don’t leave any step out – no matter how obvious or apparent it is to you
  - Identify the assumptions you make
- “Connect the Dots”

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Solution: Avoid Common Pitfalls

- Approaches that are not Analysis of Effects:
  - “Displacement”
  - “Not Known to Occur Here”
  - “Contracting Clause “ or “We’ll Call You Later”
  - “Leap of Faith”
If you find yourself writing these...

• Displacement
  — 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.

• “Not known to Occur Here”
  — I’ve been here for X years and never seen one.
  — No we haven’t surveyed, we don’t need to.
  — CNDBB showed no occurrences, so the site is not occupied.

If you find yourself writing these...

• “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.

• “Leap of Faith”
  — Trust us, we know exactly what we’re doing.
  — We know the area, species, etc., and we’re sure there’s no problem.

Solution: Know the Differences

• In scope of the document
• Direct and Indirect Effects
• Connected and Cumulative Effects
• Public involvement
### Differences in Scope & Analysis

<table>
<thead>
<tr>
<th>ESA Section 7</th>
<th>NEPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Listed &amp; proposed species and their habitat (candidates situational)</td>
<td>Effects to the human environment</td>
</tr>
<tr>
<td>Designated &amp; proposed critical habitat</td>
<td></td>
</tr>
<tr>
<td>Activities and effects - reasonably certain to occur &amp; “Likely”</td>
<td>Reasonably foreseeable</td>
</tr>
</tbody>
</table>

### Differences: Direct and Indirect Effect

<table>
<thead>
<tr>
<th>ESA Section 7</th>
<th>NEPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct effects – occur during implementation of action</td>
<td>Direct effects – occur on site (footprint)</td>
</tr>
<tr>
<td>Indirect effects – occur later in time</td>
<td>Indirect effects – occur offsite</td>
</tr>
<tr>
<td>Effects that are interrelated &amp; interdependent</td>
<td>Effects that result from a connected action</td>
</tr>
</tbody>
</table>

### Differences: Cumulative Effect

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<tr>
<td>Cumulative – future non-federal actions (state, private, etc.) that are reasonably certain to occur in action area</td>
<td>Cumulative – incremental impact of action when added to all other past, present &amp; future actions</td>
</tr>
<tr>
<td>No public comment</td>
<td>Public comment</td>
</tr>
</tbody>
</table>
Similarities in ESA and NEPA Documents

- Objective analysis
- To analyze does not mean to “federalize”
- Analysis goes beyond project footprint
- Final agency product (CX, FONSI, ROD or BO) can be litigated

Solution: The Action Agency

- BA represents the Action Agency
  - Not the applicant
  - Not the consultant
- Applicant is responsible for accurate description of the project
- Action Agency is responsible for the Analysis

Conservation Programs

- Can the Conservation Measures of the 7(a)(2) process support the 7(a)(1) requirement?
- Can 7(a)(2) Terms and Conditions support 7(a)(1)?
- Should the 7(a)(1) and 7(a)(2) processes be kept separate?
- How does Section 7 dovetail with Section 10?