

# **Demystifying the ESA Consultation Process**

*Eastern Washington Land Use Conference*

**July, 2007**


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## What is the ESA?

- The Endangered Species Act of 1973 (“the ESA”) authorizes the Secretaries of Interior and Commerce to (1) list species; (2) designate critical habitat; and (3) implement programs and regulations to conserve such species.
  - Implemented by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) through an MOA.
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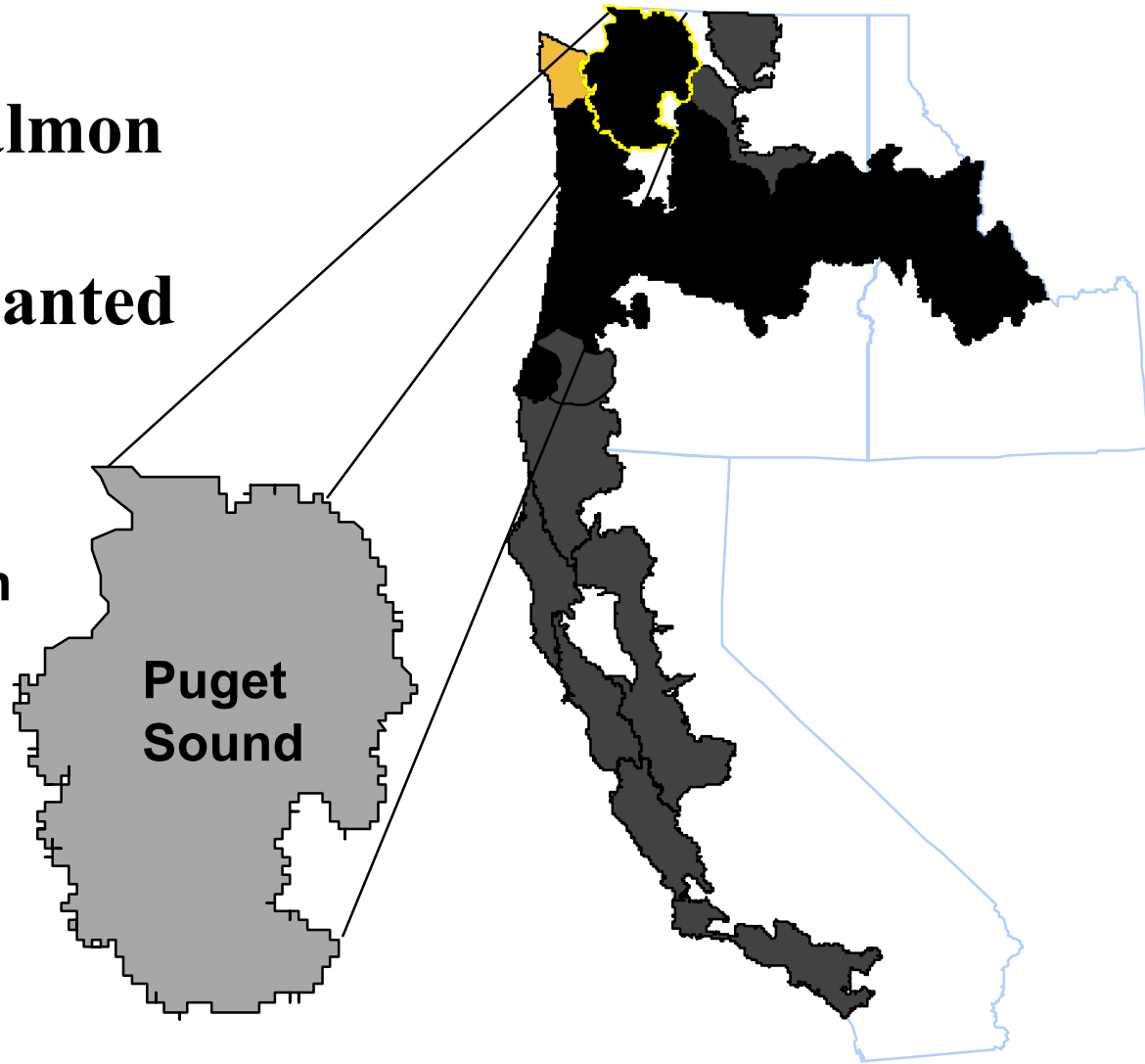
## What is a Species?

- The ESA defines a “species” to include any “distinct population segment (DPS) of any species of vertebrate...which interbreeds when mature.”
  - DPS Policy – discreteness and significance.
  - NMFS policy states that a salmonid population will be considered a “species” under the ESA if it represents an evolutionarily significant unit (ESU) of the biological species.
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■ **Listed Salmon**

■ **Not warranted**

- **Killer Whales**
- **Chinook Salmon**
- **Bull Trout**
- **Chum Salmon**
- **Steelhead?**




## Section 9 Take Prohibitions

- Section 9 of the ESA makes it illegal to “take” listed species. Take is defined broadly to mean, among other things, to harass, harm, injure, or kill listed species.
- FWS and NMFS have adopted regulations defining the term “harm” as including significant habitat alteration which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns...
- Governmental liability
- Proof issues
- Civil fines and criminal penalties
- Injunctive relief


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## Section 7 Consultation

- Every discretionary federal action that “may affect” a listed species or designated critical habitat must undergo section 7 consultation
  - Avoid jeopardy and adverse modification
  - Reasonable and prudent measures (RPMs)
  - Incidental take statements
  - Quantification of take
  - Reinitiation of consultation
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## The ESA Section 7 Jeopardy Standard


- The regulations at 50 CFR Part 402 define “jeopardy” as an appreciable reduction in both the survival and recovery of a listed species.
  - Ninth Circuit has essentially invalidated this definition
  - Services must evaluate the effects of the action when added to the environmental baseline.
  - The sum total of the effects of the action when added to the baseline cannot equal an appreciable reduction in either survival or recovery.
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## Critical Habitat

- After listing a species, NMFS and FWS typically designate “critical habitat” for the species
- Federal agencies must avoid authorizing activities that “adversely modify” designated critical habitat
  - Adverse modification vs. jeopardy analysis
  - Implications of Gifford Pinchot and requirement to analyze effects on species recovery
  - Current status of adverse modification analyses

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## Section 7 Consultation – Key Concepts

- Every **discretionary** federal action that “may affect” a listed species or designated critical habitat must undergo consultation
  - Species list letters
  - No effect determinations
  - Informal v. formal consultation
  - Biological assessments
  - Section 7(d) limitation on commitment of resources
  - Reasonable and prudent measures (RPMs)
  - Incidental Take Statements and Quantification of Take
  - Reinitiation of consultation
  - Recovery planning
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## Timing for ESA Consultations

- Clock starts when Service determines information is complete
- Regulations provide that Service has 90 days from initiation (submission of BA/BE) unless extended
- Service may extend by an additional 60 days without consent of applicant
- Within 45 days of concluding consultation, the Service must issue a biological opinion (4 to 6 months).
- Informal consultation was intended to be faster


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## Status During a Consultation

Applicant status - HLA v. NMFS, 288 F.Supp 2d 7 (D. DC 2003)


- Right to request (receive) and comment upon draft BO prior to its issuance
- Right to object to extensions of time in consultation
- Right to discuss any terms and conditions and requirement for Service to utilize applicant's expertise

Non-federal representative status

- Highly variable if agencies will extend non-federal representative status
  - Non-fed representative status provides ability for applicant to prepare BA/BE on behalf of action agency
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## Procedural Considerations


- Establishing the “lead agency”
  - Designation as non-federal representative
  - Relationships with agencies and consultants
  - Requesting “formal consultation”
  - Resolving conflicts between ESA, NEPA, and other legal requirements
  - Resolving timing issues with agencies and securing staff resources for consultation
  - Building relationships with agency staff
  - Reviewing draft agency documents
  - Ensuring sufficiency of documentation
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## Section 10 Permits

- The Services may issue permits authorizing incidental take of listed species if for actions conducted pursuant to an approved “conservation plan.” *See* ESA Section 10(a)(1)(B); 50 CFR § 222.307; 50 CFR § 17.32.
- The required documents include HCP, Permit, IA, BiOp, NEPA document
- Implementation Agreement or “IA”
  - Dispute resolution
  - Adding new species
  - Termination
- Post-termination mitigation


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## Key Cases

- (1) *Gifford Pinchot Task Force*, 378 F.3d 1059 (9th Cir. Aug. 6, 2004) (adverse modification).
  - (2) *ONRC v. Allen*, No. 05-35830 (9th Cir. 2007) (quantification of take).
    - *National Wildlife Federation v. NMFS*, No. CV 01-640-RE (D. Or. May 26, 2005)(environmental baseline and jeopardy).
    - *National Association of Home Builders v. Defenders of Wildlife*, 2007 WL 1801745 (2007)(discretionary involvement or control and need for consultation)
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## Scientific Uncertainty

- Numerous scientific methodologies have evolved to determine the amount of instream flow necessary to conserve fishery resources: IFIM, WUA, PHABSIM.
  - All methodologies are imprecise, and are billed as “tools to permit negotiation”
  - Conflicts arise between species, and life stages of species
  - Minimum flows may not provide certain habitat functions necessary to maintain habitat (e.g., flushing flows)
  - Much remains unknown regarding species’ needs. Key uncertainties remaining regarding migration, instream flow needs, and habitat functions.
  - Why is the science unsettled?
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## Water Rights

- Water rights constitute property rights which if taken, require payment of just compensation under the U.S. Constitution (“Constitutional Taking”)
  - At what point does a “regulatory taking” occur?
  - Can the federal ESA curtail a water right and if so, must the federal government pay just compensation?
  - Can exercising a water right result in the violation of ESA section 7 or ESA section 9?
  - Can Tribal Treaty rights require curtailment of private water rights to benefit fishery resources?
  - Why is all of this so unsettled?
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## Treaty Rights

- A series of 9<sup>th</sup> Circuit and Supreme Court cases establish that certain tribes that have entered into treaties with the United States possess the right to 50% of the available harvest of fish species (e.g., herring, salmonids, halibut).
  - Treaty rights are property rights
  - Usual and Accustomed (U&A) Fishing Areas
  - Right to Co-management
  - Right includes a conservation limitation
  - Right “may” include habitat element
  - Potential extinguishment of treaty fishing rights
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## Guiding Principles

- As a society, we must set priorities. Many of these priorities have been established through the U.S. Constitution, State and Federal law, and common law.
  - The problems we face today will not be easier tomorrow.
  - The answers to some scientific questions are unknowable.
  - We must adjust as science evolves, or we must decide to live with uncertainty and the resulting impacts.
  - Much can be gained through compromise and agreement.
  - It is important to understand the role of functioning ecosystems in our long-term survival.
  - The economy plays a significant role in our decisions.
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## Additional Resources

*ESA Section 7 Consultation Handbook* - Policy handbook produced by NMFS and FWS concerning the section 7 consultation process ([endangered.fws.gov/consultations/](http://endangered.fws.gov/consultations/))

*HCP Handbook* - Policy handbook produced by NMFS and FWS concerning the HCP process ([endangered.fws.gov/hcp/index.html](http://endangered.fws.gov/hcp/index.html))

*ESA and EFH Regulations* - regulations guiding agency implementation of ESA (e.g., 50 C.F.R. Part 402 [ESA consultation]; 50 C.F.R. § 600.920 [EFH Consultation])

