

Better Conservation More Efficiently:

A Guide for Federal Agency Compliance with
Section 7(a)(1)
of the Endangered Species Act



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Executive Summary

This Regional 7(a)(1) guidance has been developed to assist federal agencies in efficiently performing their primary mission by proactively planning and implementing agency activities consistent with recovery of threatened and endangered species. Such proactive planning will increase regulatory certainty and flexibility, decrease regulatory conflict and delays, and significantly streamline 7(a)(2) consultations for individual projects. Additionally, this guidance provides procedural and substantive criteria to demonstrate compliance with its recovery conservation mandates under sections 2 and 7(a)(1) of the Endangered Species Act, and insures that the agency receives proper credit for its 7(a)(1) conservation efforts.

This conservation planning process will enable Federal agencies to better synchronize their actions and programs with the conservation and recovery needs of listed, proposed, and candidate species. Such planning can help Federal agencies develop specific, pre-approved design criteria to ensure their actions are consistent with the conservation and recovery needs of the species. Thus, early planning (before specific projects are fully designed) provides action agencies with the information needed to make appropriate adjustments to projects to avoid, minimize, and offset adverse effects to species while there is still the maximum flexibility to modify project designs and identifies opportunities for action agencies to implement proactive conservation. Both of these benefits will greatly facilitate and expedite the project-specific section 7(a)(2) consultation process.

Subpart A - General

§1 Scope

The authority for this guidance comes from sections 2 and 7 of the Endangered Species Act of 1973 (ESA) (16 U.S.C.A. §§ 1531 et seq.), regulations at 50 CFR §402, and the U.S. Fish and Wildlife Service's (Service) *Consultation Handbook* Chapter 5.1 *Proactive Conservation Reviews –Section 7(a)(1)*.

The ESA SEC. 2(c)(1) states that:

“[i]t is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”

The ESA SEC. 7(a)(1) mirrors and expands upon this concept stating that:

“[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.”

The Service's implementing regulations at 50 CFR §402.01(a) explain:

“[t]his part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended (“Act”). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (“listed species”) and habitat of such species that has been designated as critical (“critical habitat”). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary.”

Finally, the Service's Consultation Handbook, references 7(a)(1) “proactive conservation reviews” as “a blueprint for conservation activities” for Federal agency planning and program management documents (Chapter 5.1).

§2 Definitions

The term “**Action**” means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. (50 CFR §402.02)

The term “**Action area**” means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. (50 CFR §402.02)

The terms “**conserve,**” “**conserving,**” and “**conservation**” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. (16 U.S.C.A. §§ 1531 et seq.)

The term “**conservation benefit**” means the 7(a)(1) program should produce cumulative benefits for each endangered/threatened species that it can affect within its authorities (ESAWA) through conservation measures designed to improve the conservation status of the species.

The term “**ESAWA**” is an acronym for each “endangered species that it can affect within its authorities.” *Sierra Club at 606, 618 FN 7.* “Within its authorities” means both the *geographic* jurisdiction over which an agency operates, as well as *mission-related statutory* jurisdiction under which an agency carries out its responsibilities.

The term “**GMRAA**” is an acronym for an action agency’s *geographic* and *mission-related* areas of authority.

The term “**Federal agency**” means any department, agency, or instrumentality of the United States. (16 U.S.C.A. §§ 1531 et seq.)

The terms “**7(a)(1) program,**” “**7(a)(1) consultation**” and “**proactive conservation review**” all refer to the documentation associated with a proactive, strategic, landscape-level, *7(a)(1) Program* addressing ESAWAs.

The term “**Programmatic consultation**” means consultation addressing an agency's multiple actions on a program, geographic, or other basis. [Clarification of usage]

The term “**Recovery**” means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. (50 CFR §402.02)

§3 Applicability

All of the courts that have examined section 7(a)(1) have concluded that Federal agencies have an affirmative duty to develop and implement programs for the conservation of listed species. In 1998, the U.S. Court of Appeals for the 5th Circuit found that “section 7(a)(1) contains a clear statutory directive requiring the Federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to the statute.” *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998). The court clarified that “under section 7(a)(1), each Federal agency must consult with FWS and develop programs for the conservation of each endangered species that it can affect within its authorities.” *Sierra Club at* 606, 618 FN 7. Other courts have come to the same conclusion. See, e.g., *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (section 7(a)(1) gives the Coast Guard duties regarding the right whale); *Florida Key Deer v. Paulison*, (11th Cir. 2008) (Section 7(a)(1) imposes a judicially reviewable obligation to carry out programs for the conservation of listed species); *Wyoming Farm Bureau Federation*, 199 F.3d 1224 (10th Cir. 2000) (Section 7(a)(1) authorizes the trapping and transplanting of rare species in order to conserve them); *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990). More recently, the District Court for the District of Nevada stated “[t]hus, the ESA required (and requires) that the USDA take *some* action in an effort to actually conserve the flycatcher” and “[i]n short, the USDA has not adequately demonstrated how its termination policy satisfies its affirmative duty to adopt a ‘conservation’ policy as required under Section 7(a)(1). *Center for Biological Diversity, et al., v. Vilsack, et al.*, (D. Nev. 2017) (--F. Supp.3d --; No. 2:13-cv-01785-RFB-GWH).

Accordingly, section 7(a)(1) and this policy apply to all agencies having discretionary Federal involvement or control and listed species or critical habitat present within their GMRAAs. Aside from the general statutory requirement to carry out programs for the conservation of listed species, a 7(a)(1) program is particularly appropriate when:

there is not enough specific information about on-the-ground impacts to determine if there would be an adverse effect from a specific project and what the amount of incidental take might be. By identifying potential program effects and developing guidelines to minimize these effects to listed species and designated critical habitats, subsequent ‘stepped-down’ consultations, where more specific effects on species can be determined within the context of a local geographical area, can be done more expediently. Ultimately, these conservation reviews should provide the agency with concurrence on, or recommendations for, a blueprint for conservation activities including section 7(a)(2) consultations, section 10 permits, assistance in developing and implementing recovery plans, and assistance in candidate monitoring and management programs.”
(Handbook 5-1)

Agencies with overlapping GMRAAs should work cooperatively on either complementary or joint section 7(a)(1) programs. These cooperative efforts will increase conservation effectiveness by creating synergistic relationships among agencies and will avoid the possibility that one agency will either duplicate or possibly undermine the conservation efforts completed by another agency. It would also allow agencies to utilize their specific expertise and authorities in implementation efforts to leverage funds, and would ultimately reduce each agency’s conservation responsibility by sharing its conservation efforts with others.

§4 Coordination with Other Environmental Reviews

Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq., at 40 CFR parts 1500-1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 et seq.). Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligations to comply with the procedures set forth in this part or the substantive requirements of section 7(a)(1). The Service will attempt to provide a coordinated review and analysis of all environmental requirements. Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.

Numerous types of other environmental reviews and plans conducted at the appropriate level can significantly contribute to development of the agency's section 7(a)(1) program. Ideally, the Ecological Services Field Office (ESFO) should engage each land management agency to incorporate 7(a)(1) planning into its statutory planning process. For example, the Service's National Wildlife Refuge *Comprehensive Conservation Plan* process, the Department of Defense's *Integrated Natural Resource Management Plan* process, the Forest Service's *Land Resource Management Plan* process, and the National Park Service's *General Management Plan* process are examples of appropriate landscape-level planning processes with which to integrate 7(a)(1) planning. If those agency plans have been recently developed, the information they contain should still be useful in development of the 7(a)(1) program. Similarly, landscape-level (vs. project-level) NEPA analyses can incorporate 7(a)(1) planning and minimize duplication of effort.

Non-land-management action agencies may also wish to consider coordinating their environmental reviews to incorporate 7(a)(1) planning into whatever oversight review cycles or permit durations exist under their authorities (e.g., Army Corps of Engineers Clean Water Act permits, Environmental Protection Agency water quality standards).

Subpart B -- 7(a)(1) Consultation Procedures

§5 Introduction

The primary objective of a section 7(a)(1) program should be to implement proactive, landscape-level conservation and recovery actions. These actions may be undertaken completely separately or as part of individual projects that are under the purview of the agency. While a 7(a)(1) program can be developed at any time, ideally it will be jointly developed with a programmatic 7(a)(2) consultation, if efficient to do so. In other words, the 7(a)(1) program should function as a conservation filter through which all subsequent agency actions, both primary mission actions and conservation actions, flow.

Many agencies have ongoing beneficial actions that should be acknowledged through incorporation into the section 7(a)(1) program. Appropriate consideration should be given to the beneficial impact that implementation of these ongoing and newly developed conservation measures will have in subsequent biological opinions; specifically, the baseline conditions; effects analyses; the type, amount, and extent of take; and potentially the status of the species.

Incorporation of 7(a)(1) activities into a programmatic, 7(a)(2) biological assessment (BA) insures that proactive conservation will be appropriately accounted for as a beneficial part of the project description rather than simply “after-the-fact minimization measures” of a reasonable and prudent measure. Again, the important concept is to have a proactive approach that addresses *how* the impacts will manifest, not just *how much* habitat or *how many* individuals are lost.

In situations where the action agency chooses to develop a section 7(a)(1) program for an ongoing program for which 7(a)(2) consultation has already been completed, the 7(a)(1) program, produced jointly by the action agency and the Service, will supplement the existing BA and biological opinion. Avoidance and minimization measures identified in a 7(a)(1) program may remove the need to reinitiate formal consultation by sufficiently removing further adverse effects. The incidental take statement may need to be modified, however, to reflect the new, reduced level of take.

In the scenarios where a joint agency section 7(a)(1) program is created for an ongoing program, conservation measures outlined in the 7(a)(1) program should be incorporated into the action agency 7(a)(2) BA and Service biological opinion the next time the agency’s program is reauthorized and consulted upon. Meanwhile, the 7(a)(1) program can be implemented as appropriate. Ultimately, “consultation” will be implemented as a seamless, 7(a)(1)-7(a)(2) approach.

Many individual projects carried out under a section 7(a)(1) program will be eligible to use the Service’s new *Streamlined Consultation Guidance for Restoration/Recovery Projects (RRP)*, which will significantly reduce the administrative burden of future consultations for both the action agency and the Service.

§6 Guiding Principles for Development of a 7(a)(1) Program.

The current paradigm is that proactive section 7(a)(1) consultation is seldom used while section 7(a)(2) consultations are *reactive*, site specific and not a landscape level, seldom strategic, and *routinely* used. The required paradigm shift would make 7(a)(1) proactive, strategic, programmatic at the landscape level, and routinely used, and would create the conservation framework for subsequent programmatic and site-specific 7(a)(2) consultations.

7(a)(1) planning will help each action agency efficiently perform its primary mission in a way that is consistent with species recovery. Such planning will increase regulatory certainty and flexibility, decrease regulatory conflict and delays, and significantly streamline 7(a)(2) consultations for individual projects. Absent this proactive, strategic, landscape-level approach, it is difficult to envision how action agencies can meaningfully contribute to the conservation requirements of sections 2(c)(1) and 7(a)(1) of the ESA.

GUIDING PRINCIPLES

1. An action agency can achieve the section 7(a)(1) affirmative conservation mandate by developing and implementing a program that incorporates considerations of threatened and endangered species into its agency mission.

2. The goal of a section 7(a)(1) program is to achieve a net conservation (recovery) benefit for listed species and their habitats.
3. A 7(a)(1) program is proactive and strategic and should benefit any listed species that the action agency may affect within its authorities.
4. A section 7(a)(1) program should be geared towards *multispecies ecosystems* at the landscape level whenever possible and should consider proposed and candidate species. However, section 7(a)(1) is flexible, and programs can be developed to address individual species as situations warrant. Conservation measures can be implemented at both the landscape and project levels.
5. A section 7(a)(1) program addresses the adverse effects of the action agency programs to listed species, as well as conservation opportunities within the agency's GMRAA. It is important to realize that "one size does not fit all" and that creativity and flexibility are essential ingredients to successful development and implementation of the 7(a)(1) program.
6. A section 7(a)(1) program is developed by the action agency in cooperation and consultation with the Service.
7. The Service's primary role under section 7(a)(1) is to encourage and support the action agency in developing conservation programs and implementing conservation programs. It is implicit that the Service will not ask action agencies to reach beyond their authorities, so each 7(a)(1) program will complement the action agency's existing statutory authorities consistent with the supplemental obligations created by the ESA.
8. A section 7(a)(1) program has a significant benefit to both the species and Federal action agency missions.
9. Successful 7(a)(1) consultation requires developing and fostering relationships through significant and sustained interagency communication, coordination, and cooperation. This includes recognizing action agency mandates and constraints, using action agency expertise, and focusing on areas of mutual benefit.
10. A section 7(a)(1) program will provide a simple, flexible conservation framework or "blueprint" for all subsequent 7(a)(2) consultations. The section 7(a)(1) program does not, and is not intended to, take the place of section 7(a)(2) consultations; however, it does have the potential to complement, streamline, and facilitate section 7(a)(2) consultations.

§7 Criteria for Meeting 7(a)(1) requirements

Proactive

Proactive conservation should generally be contemplated and developed in four tiers of priority. The first tier is *beneficial conservation*, the second tier is *impact avoidance*, the third tier is *pre-impact conservation* to reduce temporal impacts, and the fourth tier is *post-impact minimization and offsetting impacts*.

Beneficial Conservation – Non-project Related

As stated previously, the primary objective of a section 7(a)(1) program should be to implement proactive, landscape-level conservation and recovery actions. While the Service has completed numerous programmatic consultations, many of which have good minimization requirements, with various action agencies over the years, the 7(a)(1) program must go beyond reactive, project-specific, conservation measures. In other words, the 7(a)(1) program should include *strategic, proactive, forward-looking actions that contribute to species' recovery, rather than simply minimizing impacts of specific projects*.

These measures can be derived from current recovery plans or outlines, recommendations from recent 5-year reviews, Species Status Assessments (SSA), or other documents, or simply created through the section 7(a)(1) collaborative process and tailored to the specific ESAWAs and relevant agency authorities. For example, these measures could include habitat management or restoration, research and monitoring, development of public education and outreach programs, and all programs that lead to conservation benefits to the ESAWA species. To insure that the Service and action agency have a shared understanding of how to best manage agency actions, we recommend that effects pathways be developed jointly between the agencies to identify potential impacts and clarify where, and how they can be avoided and minimized.

Project-related – Avoidance, Minimization, and Offsetting Measures

In addition to including beneficial conservation actions, a section 7(a)(1) program should programmatically address impacts from specific projects. However, again, avoidance and minimization should be viewed from a proactive rather than reactive perspective. Proactive behavior requires identifying potential stressors that may negatively affect a particular species and suggesting measures that negate anticipated impacts in advance, rather than just accepting the original result as a necessary outcome and then providing post-impact recommendations to reduce impacts. As recognized in the legislative history of the ESA, *avoidance* is one of the most effective and cost-efficient means of conservation available. Accordingly, the 7(a)(1) program should cover some agreed-upon program duration, identify what activities are likely to cause adverse impacts to listed species, and, if possible, include alternative site locations, project designs, construction windows, and other measures that would *avoid* causing these adverse impacts.

Pre-impact Conservation Measures

Third, when complete avoidance is not possible, the section 7(a)(1) program should include proactive agency actions *prior to project development* that can minimize, as much as possible, the *temporal* impacts of proposed projects. For example, if local populations can be bolstered *prior to impact*, then the project may only affect 2 percent of the local population instead of 15 percent, therefore having a lower overall impact to that local population. Similarly, if habitat

conditions can be improved prior to implementation of the action, the overall impact of the action can be reduced.

Adverse effects that cannot be minimized should be offset. Again, if habitat conditions can be improved, or populations bolstered *prior* to the anticipated impacts, the effect of the impacts might be substantially reduced resulting in a net benefit, rather than a net loss. This is the significant advantage of a proactive approach over a reactive one.

To insure that proposed offsetting measures can be fully credited to the action agency, offsetting measures should comply with the Service's mitigation policies, as well as, its *Restoration Recovery Project Streamlining Guidance* requiring that any offsetting measures have a *high level of scientific certainty of producing the intended conservation benefit*. In other words, offsetting measures that are largely experimental and have no proven track record of successful implementation may provide useful research data that may lead to development of new, successful conservation measures but, until such benefits are confirmed, cannot be relied up in a section 7(a)(1) program.

Post-impact Minimization and Offsetting Measures

Finally, for projects where impacts cannot be fully avoided, the section 7(a)(1) program should include all avoidance, minimization, and offsetting measures for future projects that contribute to the conservation of the species.

Strategic

Because many section 7(a)(2) consultations are not usually part of a larger conservation strategy, they often result in less effective, opportunistic, or ad hoc conservation measures being implemented onsite that don't necessarily contribute to benefits beyond the specific project area. Strategic conservation dictates what, how, and where conservation can be best implemented to maximum effect with a more landscape-level or holistic approach. A 7(a)(1) program will serve as the "conservation blue print" for agency activities and provide the context and framework for all conservation and consultation activities. Therefore, a 7(a)(1) program should be aligned with and informed by the most recent and relevant recovery plans, 5-year reviews, conservation strategies, SSAs, and other documents.

Landscape Approach

For land management agencies, such as the U.S. Forest Service, National Park Service, and Service (National Wildlife Refuges), the appropriate landscape level will align closely with the agency's geographic management boundaries. Similarly for those agencies such as the Department of Defense that manage land for their mission purposes, those geographic boundaries would generally delineate the "landscape" that would be addressed in a section 7(a)(1) program. For agencies that don't manage their own lands, but issue permits, grants, or licenses, the 7(a)(1) landscape approach would generally apply at an appropriate regional, district, or state subunit of the agency over which the agency maintains discretionary authority. There are a number of factors that would influence this approach including the agency's geographic overlap with the species' ranges and critical habitats, the frequency or predominance of jurisdictional control over activities that may adversely impact listed species, administrative efficiencies, and shared intra and interjurisdictional overlap with other agencies. In developing a

7(a)(1) program, conservation actions for all species within the agency's jurisdiction and authority should be included.

To further clarify, a section 7(a)(1) program does not have to coincide with a formally defined agency program (e.g., Army Corps of Engineers CWA 404 Program) or action area. It simply needs to identify a set of activities within a defined geographic landscape (i.e., "action area") that will form the basis for the 7(a)(1) program.

ESAWA

"Each endangered species that it can affect within its authorities" covers *all* listed species within an action agency's jurisdictional and geographic authorities. There is nothing in the statute, regulations, or case law that suggests a limit to the agency's section 7(a)(1) obligation or that suggests the 7(a)(1) program be limited to only those species for which the agency may cause adverse impacts. Indeed, the case law indicates a broad scope of obligation extending to "each" species that it "can affect" within its jurisdictional and geographic authorities, suggesting that *all* species should be included in the a 7(a)(1) program whether or not they are adversely affected by agency actions. Ultimately, the obligation is for the Service and the action agency to agree how best to meet the conservation standard described below.

In situations where the action agency is unable to fully address "each" species within its authorities in its section 7(a)(1) program, the Service should still acknowledge the 7(a)(1) contribution that is being made by the action agency. An agency with national geographic jurisdiction should create 7(a)(1) programs at regional, state, or local jurisdictional scopes as appropriate.

Conservation Standard

Implementation of the section 7(a)(1) program must, over some agreed-upon implementation period, produce a benefit to the species' conservation, meaning not only that program implementation must improve the conservation status of the species within the agency's GMRAAs, but also that *each project* implemented should be consistent with the conservation and recovery needs of the species. While an agency may not be able to influence the status of an entire species, to meet the intent of section 7(a)(1), the agency, through consultation with the ESFO, must implement a program that will improve the species' status across a geographic range appropriate for the agency. In some situations, it may be necessary to prevent further deterioration of a species' status as the first step in starting to improve its status. These proactive approaches can be done in any number of ways.

For example, the FO can identify existing threats (e.g., human disturbance, predation, erosion, disease) to a species/habitat within the action agency's GMRAA that can be reduced, remediated, or eliminated, or identify limiting factors or stressors in the species habitat that can be improved, restored, or managed. Conservation benefits can be accrued either directly through population augmentation or predator removal, or indirectly by improving conditions such that the species health, productivity rate, and survival rate are improved or remain stable. The action agency should attempt to improve as many adverse conditions or limiting factors as practicable within its GMRAA.

§8 Contents of a Section 7(a)(1) Program

To facilitate the most efficient development of a section 7(a)(1) program, the action agency should provide a concise summary of its relevant statutory and regulatory authorities, as well as any clear limitations of those authorities so Service personnel understand the potential tools that are available to the action agency. Additionally, it is of paramount importance that the bulk of the interagency effort be used to develop and succinctly summarize a sound conservation program, and to minimize the effort necessary to produce the program *document*. The 7(a)(1) program should read like a “conservation play book.” It should state as concisely as possible: “here’s *what* we are going to do, here’s *where* we are going to do it, here’s *when* we are going to do it, here’s *how* we’re going to do it, here’s the *anticipated effect* on the species, and here’s *how and when the results are going to be measured and incorporated into the program through adaptive management*.” It should be a bare-bones summary of the agreed upon actions, should incorporate by reference any necessary documents whenever possible and not replicate text found in other documents. Even in situations where the 7(a)(1) program is supplemental to an existing BA and BO, it does not require incorporation of species information other than what is specifically relevant to the 7(a)(1) program; it should use bullets when appropriate to convey the conservation tasks and should not duplicate introductory text or agency mission statements or other unnecessary information that is not necessary to explain and implement the 7(a)(1) program.

Generally, a section 7(a)(1) program should contain two distinct substantive sections, the first of which should consist of non-project-specific conservation recovery measures designed to improve baseline conditions, increase survivorship, enhance populations, reduce non-project-related stressors, or restore or properly maintain habitat, etc. This part of the program could include research to establish better understanding of habitat requirements, triggers and/or effects of stressors; funding opportunities for captive propagation/reintroduction or population augmentation, and other appropriate measures identified in the recovery program, 5-year reviews, SSAs, or other documents. Each conservation action should be concisely described and explained in the 7(a)(1) program.

The second section of the section 7(a)(1) program should identify measures to avoid or minimize the effects of the impacts caused by specific types of projects and activities. To clarify, these minimization measures are not intended to simply reduce the number of individuals impacted, but to reduce the effect of the impacts. This requires understanding the impact on the physiological, biological, and ecological needs of the species. For example, if the project creates stressors that adversely impact (reduce) juvenile survival rates, then, while it is certainly prudent to reduce the number of juveniles affected, an effort should be made to offset the resulting impacts to the local population due to the reduced survival rates. This might be accomplished by improving habitat conditions outside of the impacted area such that the juvenile mortality rate is reduced, and thus the effect of the take has been properly minimized.

Additionally, this section could: (1) identify mission-related research projects to verify the efficacy of the implementation or modification of new and long-standing conservation measures; (2) outline actions to improve and fine tune new and existing measures; or (3) eliminate inefficient and ineffective measures. Such research findings could further the goal of maximizing net conservation benefits.

Finally, monitoring and reporting on program implementation and effects on the species are necessary and important to effectively credit conservation implementation and update baseline conditions. The monitoring effort should be consistent with the magnitude of anticipated benefits, designed to minimize additional burdens on both agencies, and use existing reporting systems to the extent possible.

§9 Service Responsibilities

While it is anticipated that section 7(a)(1) programs will generally be developed and implemented through coordination with the local ESFO, it is also appropriate for these programs to be developed at the Regional Office or Headquarters level with appropriate coordination with the ESFOs. Each ESFO will be responsible for coordinating 7(a)(1) programs with their local action agencies and should use the Regional Project Priority Planning Guidance in determining which agencies should be approached to achieve the greatest net conservation benefit. While it is appropriate for the ESFO to suggest the scope of the 7(a)(1) effort to the action agency, the final scope of the 7(a)(1) program should be determined jointly between the ESFO and action agency. To meet the required purpose of section 7(a)(1), the ESFO should insure that the 7(a)(1) program goes beyond the standard 7(a)(2) requirements to avoid and minimize project specific impacts of the agency's actions and contribute to recovery.

Additionally, the ESFO is responsible for explaining the mutual benefits of this consultation process, including the regulatory efficiencies and planning certainty to be gained by the action agency and the conservation benefits provided to listed species.

By acknowledging that Federal agencies are assisting in furthering the conservation of listed species through implementation of 7(a)(1) programs, we will:

- Be more likely to fulfill the purposes of the ESA (recovery) and shorten the time to delisting
- Streamline 7(a)(2) consultations and reduce overall consultation workload
- Add predictability and regulatory certainty for short- and long-term planning
- Balance conservation with the agency's primary missions, thereby reducing action agency resource conflicts, project delays, administrative appeals, and ESA-related litigation
- Enable agencies to leverage additional funds for conservation measures by identifying them in recovery plans, SSAs, and 7(a)(1) programs
- Reduce the chance of controversial and jeopardy biological opinions and eliminate concern of "death by a thousand cuts"
- Promote numerous, conservation outreach opportunities
- Increase management flexibility for implementation of core mission activities by addressing conservation needs up front
- Decrease probability of listing of candidate species
- Facilitate compliance with the agency's ESA and other environmental mandates

The ESFO will be responsible for providing the action agency with the best available scientific and commercial information pertaining to the ecology and recovery needs of the species that will be included in the section 7(a)(1) program. This should include information from the listing package, recovery plan, latest 5-year review, SSA, and other documents that outline the status of the species throughout its range and within the agency's jurisdiction. The program should outline threats to the species, stressors and adverse impacts that the agency's actions can have on the species, and measures the agency can implement to contribute to the conservation of the species. To that end, this guidance suggests the most effective methods to provide that technical assistance on the species to the action agency is not through a "data dump" but rather through a face-to-face informational meeting where ESFO personnel can provide an efficient overview of the species ecology, recovery needs, etc. and discuss them with the action agency.

§10 Action Agency Responsibilities

As a first step in section 7(a)(1) planning, the action agency should provide a summary list and description of its *relevant discretionary authorities* and discuss them with the ESFO. This does not require an exhaustive statutory history of the action agency's mission, statutory mandate, etc., but a clear concise explanation of how, where, and when the action agency has discretion to shape and modify its own agency plans, actions, and designs to implement its actions in a way that contributes to meeting the species' conservation needs. The agency should clarify the explicit conservation requirements under its own statute/regulations as well as additional authorities it can utilize for conservation. These responsibilities are further defined by the geographic/political boundaries over which the action agency is operating for the purposes of the 7(a)(1) program. The goal of this conversation is to identify all of the situations where the agency has the ability to contribute to conservation for each ESAWA.

Additionally, the action agency needs to clarify how, when, and in what situations it can condition or set ESA conservation-related requirements for its applicants, grantees, or permittees to modify its actions to be consistent with conservation of listed species. For areas potentially relevant to the section 7(a)(1) program where the action agency has either "limited" or "no discretionary authority," it should provide a brief summary of those limitations with citations to those relevant statutory or regulatory mandates to help the Service understand what measures the action agency has authority to implement and where its authority is limited. This discussion should include, in addition to its substantive authorities, a brief description of the geographic authorities covered by the specific district or regional administrative unit of the action agency engaged.

While the action agency has substantial independence in developing its section 7(a)(1) program, to meet the spirit of interagency cooperation and comply with the plain language of the statute, the program must be developed "in consultation with" the Service's ESFO. In some situations, this may represent a significantly increased level of initial coordination between the Service and the action agency; however, these changes in practice are intended to improve and streamline future consultation activities resulting in significant time and cost savings for both the action agency and the Service.

The overall statutory responsibility of the action agency is to develop and implement a section 7(a)(1) program that contributes to improving the species' conservation status. Typically, this result will be achieved with a combination of both proactive, landscape-level, strategic, non-

project-specific conservation measures along with project-specific conservation measures that will produce a net conservation benefit for each ESAWA, which, in turn will contribute to recovery of the species.

§11 Signature Authority

Responsibility and authority to develop and implement a section 7(a)(1) program reside with the action agency, so signature authority for the program, whether “stand alone” or incorporated into a programmatic 7(a)(2) consultation, is at the discretion of the action agency. The ESFO Project Leader has authority to concur with an agency’s 7(a)(1) program.