SECTION 7 CONSERVATION
Interagency Cooperation in the 21st Century

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Endangered Species Act of 1973

Section 2(b) Purposes -

...to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved...

...to provide a program for the conservation of such ...species, ...
Endangered Species Act of 1973

Section 2(c) Policy -

It is ... the policy of Congress that all Federal departments and agencies shall seek to conserve E&T species and shall use their authorities in furtherance of this purpose.
Section 7

Interagency Cooperation (1973)

“The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. *All other Federal departments and 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 by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."
119 Cong. Rec. 42913 (1973)

“The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.”
Section 7
Interagency Cooperation

“All other Federal departments and agencies shall... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species . . . and by taking such action necessary to insure that (their) actions ... do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat ..."
Supreme Court: TVA v. Hill 1978

“...ES legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.”
SECTION 7(a)(1)

...All...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...

Mandate and authority for all agencies to prioritize and conserve listed species on a programmatic level remained.
Conservation Mandate Confirmed

- Agencies **must affirmatively develop** programs to conserve listed species (TVA v. Hill, 1978; Sierra Club v. Glickman, 1985; Florida Key Deer v. Stickney, 1994; et al.)

- Conservation programs and actions **must be implemented**, and **they must do something** that results in meaningful conservation planning and success (Florida Key Deer v. Brown, 2005)
SECTION 7(a)(2)

Each Federal agency shall, in consultation with and with the assistance of the Secretary, **insure that any action ... is not likely to jeopardize** the continued existence of any endangered species or threatened species...or result in destruction...of (critical) habitat...

*Retains focus on “actions” and the bottom line*

Amendments added 15 additional sub-sections detailing 7(a)(2) consultation process, components, and exemptions

— **authorize (permit) “take” incidental to Federal agency actions**
  [section 7(b)(4)]
    • Permit (Biop) conditions **are non-discretionary**.
Section 7(a)(2) was never intended to be a conservation tool...Consultations under section 7(a)(2) are concerned strictly with facilitating Federal actions with negative effects to listed species within defined action areas.

Without positive conservation actions successive section 7(a)(2) consultations may,

• erode a species baseline,

• progressively limit action agency management options, and,

• contribute to a future jeopardy call.
Attempting Recovery through 7(a)(2)
What is 7(a)(1)?

- **Code of Federal Regulations:**
  - Section 402.01: Repeats section 7(a)(1)
  - Section 402.14(g)(8): “...the Service will give appropriate consideration to any beneficial actions taken by the agency...including any taken prior to consultation.”

- **Consultation Handbook:**
  - “Service biologists can remind action agencies of their responsibilities under section 7(a)(1) of the Act to aid in conservation of listed species.”
What is 7(a)(1)?

A programmatic strategy developed and implemented by a Federal agency (in coordination with FWS/NMFS), outlining how the action agencies authorities can and will be used to contribute to the recovery of listed species.

- Planning
  - Avoidance
- Project design, techniques, and processes
  - Minimization
  - Benefits
- Habitat rehabilitation
- Intelligence (information critical to management, i.e., “research”)

Developing and implementing 7(a)(1) is not optional; however, the when, where, how, and how much is Discretionary.
7(a)(1) Conservation

Recovery

Species Population or Habitat Listing Baseline

Jeopardy

Time

MORE

Improved Baseline
Increased Options
Flexibility
Positive Partnering
Cost Savings
Time Savings
Mission Sustainability
Ecological Benefits

LESS

Conflict
Regulatory Surprise
Mission Constraint

LESS

LESS
Benefits to the Action Agencies

- *Controlled by the Action agency... flexibility in implementation*;
- Path to address ecological, status and trend data (intelligence) gaps;
- Increased action agency awareness of the species baseline both within and beyond action areas (expands opportunities beyond action areas);
- *More action agency control of the 7(a)(2) consultation process*;

- *Transform perception of Federal program from a “threat” into a conservation tool*;

- Path to justify appropriation requests for conservation actions through normal budgetary processes;
- Administrative record demonstrating compliance with the Act, as well as other Federal laws, regulations, and policies relative to ecosystem management.

It’s not rocket science...
Challenges to 7(a)(1) Conservation

• *Lack of guidance for 7(a)(1) conservation*;
• Lack of knowledge, or understanding of the purpose and benefits of section 7(a)(1) planning;
• Lack of examples and experience.

• Lack of sufficient information for informed decisions (status and trends of the listed species, or habitat and ecological data);
• Inability to maintain “institutional memory;”
• Agency cultures of “winning or losing/them vs. us”
Over Coming Challenges
(for any agency/endeavor)

• Training
• Communication - honest and open dialogue
• Mutual understanding and respect for agency missions, capabilities, budgets and timelines
• Actively promote the development of 7(a)(1) programs and projects – SHOW SUCCESS
• Recognize the long term benefit to programs
• Realistic expectations: welcome to the Anthropocene
• Partnering for information needs/research and conservation actions
Section 7(a)(1) Opportunities

- Biological Assessments
- Existing Biological Opinions
- Integrated Natural Resource Management Plans
- US Forest Service Land Management Plans and individual Forest Management Plans
- FWS Comprehensive Conservation Plans
- BLM Resource Management Plans
- National Environmental Policy Act (NEPA) documents
- Etc.

Section 7(a)(1) does not preclude 7(a)(2)
Example 1: Marine Corps Base Camp Lejeune Recovery and Sustainment Program (RASP); 2012
Coastal NC Primary Core Population Recovery Goals (active clusters)
Landscape Analysis Depicting Good and Best Potential RCW Habitat
RASP Summary

Programmatic 7(a)(1) plan assessed species status and current baseline; identified methods to evaluate RCW recovery, demographics, genetic functions, and off-base property potential; implemented a process and standards for securing off-base properties and increasing RCW and habitat baselines.

Future proposed military training will undergo formal section 7(a)(2) consultations, incorporating and considering any increase to the environmental baseline by RASP.
Example 2:
USACE Conservation Plan for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel in the Lower Mississippi River (Endangered Species Act, Section 7(a)(1)); 2013
Endangered Species of the Lower Mississippi River

Pallid Sturgeon

Interior Least Tern

Fat Pocketbook Mussel
The Mississippi River and Secondary Channels

Cumulative loss of islands & secondary channels; reduction in “shallow water habitats.”
Dikes direct low flows into the navigation channel to maintain depth and width.

Comprehensive dike program began in 1960s.

over 300 miles of dikes

Main Navigation Channel
Stone Dike 1
Stone Dike 2
LOOSAHATCHIE BAR
AQUATIC HABITAT REHABILITATION

$167,000 to improve flow, connectivity, and maintain island integrity in 11.25 mile reach
Fat pocketbook mussel habitat

Pallid Sturgeon habitat

Interior least tern habitat

Recreation outside of the navigation channel

Neotropical migrants

Fisheries

Shorebirds

Stack Island
Summary

• USACE/FWS have a 15-year record of successful collaboration in management of LMR habitats and trust species.
  – Management and regulatory interactions are driven by science
  – Improved relations between States and Federal agencies

• Channel improvement and maintenance actions have been converted from “threats” to trust species, into primary conservation tools for the species and the ecosystem.

• Section 7(a)(1) formalized this approach to ensure institutional memory, regulatory compliance, and to address future challenges and opportunities.
Example 3: USACE Memphis District: CONSERVATION PLAN FOR THE ENDANGERED FAT POCKETBOOK MUSSEL IN THE ST. FRANCIS RIVER FLOODWAY (Draft)
Saint Francis River, AR

Figure 1. Survey sites with the fat pocketbook in the St. Francis River basin.
Ditch Cleanouts
CONSERVATION PLAN FOR THE ENDANGERED FAT POCKETBOOK MUSSEL IN THE ST. FRANCIS RIVER FLOODWAY; USACE, MVM

- Outlines programmatic mechanisms by which the St. Francis O&M Basin Operations and Maintenance projects can be conducted to ensure the conservation of FPM and its ecosystem
  - Construction and Maintenance BMPs and SOPs
  - Monitoring SOPs
  - Coordination and Collaboration
Recovery criteria for FPM
Reclassification to Threatened Status

1) The existing population in the St. Francis drainage is protected from habitat modification.

2) At least two additional viable populations are located (or established) and protected in two other river systems within the historical range of the species.
**SUMMARY**

### Section 7(a)(1) vs. Section 7(a)(2)

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<th>Attribute</th>
<th>7(a)(1)</th>
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Questions/Comments