



June 22, 2020

Executive Order 13927 on Economic Recovery from the COVID-19 Emergency and the Endangered Species Act

On June 4, 2020, President Trump issued Executive Order (E.O.) 13927 on “Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities.” The President declared the COVID-19 outbreak a national emergency that threatens national security on March 13, 2020 (Proclamation 9994). The E.O. seeks to facilitate the nation’s economic recovery from the national emergency by directing selected federal departments and agencies to use emergency and other authorities to expedite regulatory compliance for infrastructure and other projects.

Section 7 of the E.O. addresses interagency consultation under Section 7 of the Endangered Species Act (ESA; 16 U.S.C. § 1536). Specifically, the E.O. directs all relevant agencies’ heads to identify and pursue opportunities to use the authority provided at 50 C.F.R. § 402.05 to implement alternative procedures to satisfy ESA Section 7 consultation requirements during certain emergencies.

Interagency consultation requirements under Section 7 of the ESA are of perennial interest to some Members of Congress and other stakeholders. Any agency actions related to infrastructure investment or other economic recovery, such as those described in the E.O., that could affect threatened or endangered species or critical habitat are likely subject to Section 7 consultation. This In Focus provides a summary of ESA Section 7 interagency consultation requirements, including the emergencies authority at 50 C.F.R. § 402.05, and an overview of Section 7 of the E.O., which addresses ESA Section 7, and potential policy and legal considerations.

ESA Section 7: Interagency Consultation

Section 7 of the ESA requires federal agencies to ensure that their discretionary actions and actions by nonfederal entities that require approvals, permits, or funding from those agencies are not likely to jeopardize the continued existence of threatened or endangered species (*listed species*) or adversely modify designated critical habitat, as defined in the ESA. To meet this obligation, Section 7 of the ESA requires agencies to *consult* about proposed actions that may affect listed species or critical habitat with the Secretary of the Interior and/or the Secretary of Commerce. The Secretaries have delegated this authority to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (hereinafter, the Services), respectively.

The consultation process begins with the agency requesting the Service(s) to identify any listed species (or species proposed to be listed) that are present in the area affected by the action. If such species may be present, the agency must complete a *biological assessment* to identify possible

impacts from the proposed action on listed species or critical habitat.

Agencies may engage in *informal consultation* with the Service(s) to determine whether their proposed actions may affect listed species or critical habitat. Informal consultations consist of correspondences and discussions between the agency and the Service(s) regarding the proposed action. If the agency determines the action is not likely to have an adverse effect on any listed species or critical habitat, the agency may request concurrence in writing from the Service(s). If the Service(s) concurs, further consultation generally is not needed. Regulations implementing the ESA require the Service(s) to respond to a concurrence request within 60 days. This deadline may be extended by up to 60 days by mutual agreement.

If the agency or the Service(s) determines the action may have an adverse effect, *formal consultation* generally is required. In a formal consultation, the Service(s) evaluates the action and issues a *biological opinion* (BiOp). The BiOp may include *reasonable and prudent alternatives* (RPAs) to the proposed action if the action is likely to jeopardize any listed species or adversely modify critical habitat. The BiOp states whether the action would result in a *take* (defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”) of listed species. If the Service(s) anticipates an incidental take (i.e., the take of a listed species due to an otherwise lawful action) from the action, the BiOp also may include an *incidental take statement* (ITS). An ITS states the anticipated incidental take and provides the agency with an exemption to the ESA’s prohibitions on take. If jeopardy to any listed species or adverse modification of critical habitat is likely and no RPAs are feasible, the agency must (1) forgo the action, (2) risk violating the ESA, or (3) obtain a formal exemption from the Endangered Species Committee. For formal consultations, the ESA generally requires the Service(s) to complete the consultation and issue a BiOp within 90 days, but the act allows the Service(s) and the agency to agree to a longer period. For consultations involving a nonfederal party, any extension that is longer than 60 days requires the nonfederal party’s permission.

Section 7 Consultation Emergencies Authority

In 1986, the Services promulgated a joint regulation (50 C.F.R. § 402.05) that allows agencies to conduct Section 7 consultations using *alternative procedures* when “emergency circumstances” require expedited actions that would preclude advance formal consultations. The agencies still must ensure, however, that they satisfy Section 7 obligations. The Services did not comprehensively define

what constitutes an emergency but extended the authority to “acts of God, disasters, casualties, national defense or security emergencies, etc.” The Services have clarified that agencies may exercise this emergency authority for unpredictable exigent circumstances that present a risk to human life or property. For example, emergencies could include hurricanes, wildland fires, oil spills, or flooding. Although agencies generally have the discretion to determine what constitutes an emergency, Congress has also identified emergencies in the past (e.g., Section 3003 of P.L. 105-18).

The Services do not prescribe specific alternative procedures in the regulation. The Services have stated that an alternative procedure could include an informal consultation during which the Services convey relevant information and any recommendations during the emergency to mitigate adverse impacts of an action on listed species or critical habitat. The agency must exercise its discretion as to when to consult with the Service(s) based on the emergency and needed response. Although the agencies are expected to contact the Services as early as possible during an emergency, the Services have stated that agencies should not wait for advice from the Service(s) before undertaking actions during an emergency.

The regulation requires federal agencies to initiate formal consultation “as soon as practicable” once the “emergency is under control.” After the formal consultation, the Service(s) issues an emergency BiOp describing the emergency, the recommendations given to the action agency through informal consultation during the emergency, and the effect on listed species and/or critical habitat. The BiOp also includes an ITS authorizing any take that may have occurred due to the emergency action. Because the formal consultation occurs after the agency action, the Services may not be able to identify any RPAs unless they can identify future mitigation actions.

Executive Order 13927

Section 7 of the E.O. addresses ESA Section 7 consultation. It directs selected agencies to use the emergency authority at 50 C.F.R. §402.05 “to the fullest extent possible and consistent with applicable law” for actions facilitating the nation’s economic recovery from the COVID-19 national emergency. The E.O. leaves it to the agencies’ discretion to identify which actions may qualify.

The E.O. includes reporting requirements, which direct agencies to submit a summary report within 30 days of the E.O. to the Secretaries of the Interior and Commerce, the Office of Management and Budget Director, the Assistant to the President for Economic Policy, and the Chairman of the Council on Environmental Quality. The report must list the agencies’ planned or potential actions to facilitate economic recovery that they have identified as potentially subject to the ESA emergency regulation. The agencies must then submit reports every 30 days until the national emergency ends that list the status of previously planned or potential actions and newly planned or potential actions that may qualify for expedited consultation under the ESA. The E.O. requires the Services to be ready to consult as needed.

Potential Policy and Legal Considerations

The extent to which agencies will use the emergency authority at 50 C.F.R. §402.05 to expedite infrastructure and economic recovery projects, as directed by the E.O., and what effects this use may have on listed species or critical habitat is unclear. To assess what effects the E.O. may have, Congress may consider several questions, including the following:

- How many planned or potential actions to foster economic recovery from the COVID-19 emergency qualify as “emergency circumstances” pursuant to 50 C.F.R. §402.05?
- Will the E.O. change how agencies identify what projects to pursue and which actions constitute a response to an emergency eligible for expedited consultation under 50 C.F.R. §402.05?
- What alternative consultation procedures will be used to expedite consultation using the emergency authority at 50 C.F.R. §402.05 and how will the efficacy of such procedures differ compared to nonemergency consultation procedures?
- What listed species and critical habitat might be present in the planned and proposed action areas and how might such actions affect listed species and critical habitat?
- When will the national emergency be “under control” and when will formal consultations be completed?

Courts have indicated that the Services and agencies have discretion to determine the circumstances under which emergency consultation procedures are appropriate. However, courts have interpreted the term *emergency* by using the examples provided in the regulation to conclude that emergencies must be “unpredictable or unexpected in some way” and generally must involve risk to human life or property. One court noted that emergency consultation “is meant for unexpected exigencies” and is “the exception, not the rule” for consultations under ESA Section 7. Whether any economic recovery actions planned or undertaken in response to the COVID-19 pandemic would be consistent with this interpretation will depend on the circumstances of a particular action.

If agencies use expedited consultation procedures pursuant to the E.O., judicial review of the emergency consultation itself may not be available. At least one court has held that emergency consultation, as an informal and temporary measure pending formal consultation, is not a final agency action subject to challenge under the Administrative Procedure Act (5 U.S.C. §§701-706). The court held that parties instead could bring any such allegations only with respect to the BiOp issued pursuant to the formal consultation after the emergency situation is under control.

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