



Endangered Species Act

16 U.S.C. § 1531, *et seq.*

Water Quality Standards Academy
May 2007

Background

- Enacted by Congress in 1973
- Purpose is to protect and recover imperiled species and the ecosystems upon which they depend
- Administered by U.S. Fish and Wildlife Service (FWS) and NOAA Fisheries (NOAA)

Background

- Species may be listed as “threatened” or “endangered”
- Approximately 40 new species listed per year
- 1,300 endangered/threatened species in U.S.
- 85% of listed animal species use aquatic habitats and wetlands

Background

- Designation of a species' "critical habitat"
 - Areas with physical/biological features essential to the recovery of the species
 - Primary constituent elements (PCEs): cover or shelter; sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal
 - Adequate water quality is a common PCE

ESA §7 Consultation

- 7(a)(1): Federal agencies shall use their authorities to conserve species
- 7(a)(2): Federal agencies shall 'consult' with FWS/NOAA to ensure actions are not likely to jeopardize listed species or adversely modify designated critical habitat
 - Definition of "jeopardy" (50 CFR 402.02)

ESA §7 Consultation

- 7(a)(2) applies to 'action authorized, funded or carried out by' Federal agencies
- EPA's view is that approval of new and revised State/Tribal WQS, and promulgation of Federal replacement WQS, are covered by ESA §7, e.g.
 - Approval of State-wide aquatic life criteria for mercury
 - Approval of a site-specific criterion

“Take”—ESA §9

- Generally unlawful to “take” a listed animal without authorization
- “Take” – to harm, harass, pursue, hunt, kill, shoot, wound, trap, capture, or collect or attempt to engage in any such conduct
 - Can include significant habitat modification that kills or injures wildlife by significantly impairing essential behavioral patterns

"Take"—ESA §9

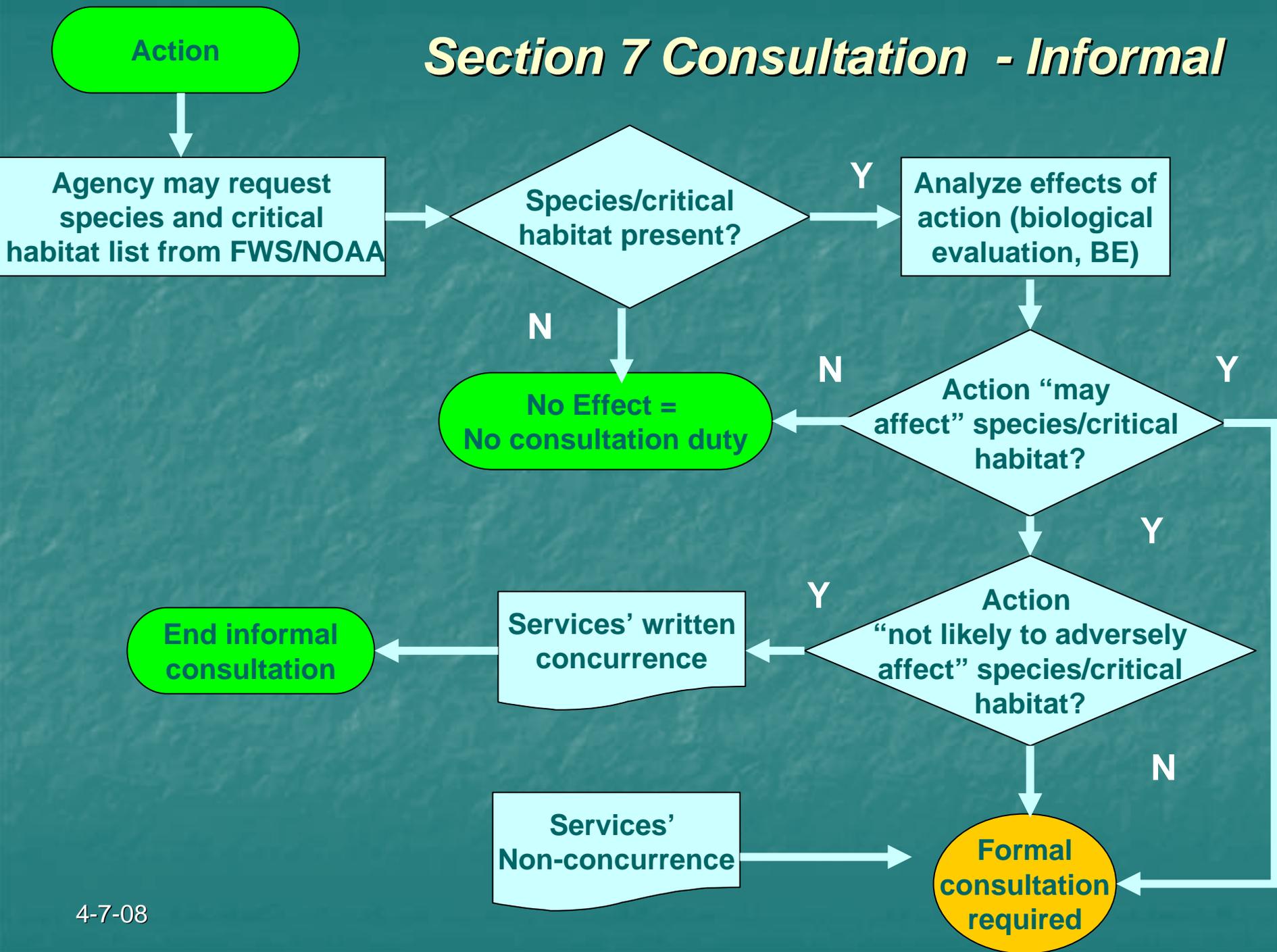
- ESA §9 applies to all persons, not just Federal Agencies
 - Prohibits take of even one individual animal
- Authorization to take for federal actions provided in 'incidental take statement' after section 7 consultation
- ESA §10 allows permitting of take for non-federal entities

Selected Consultation Terms in the ESA

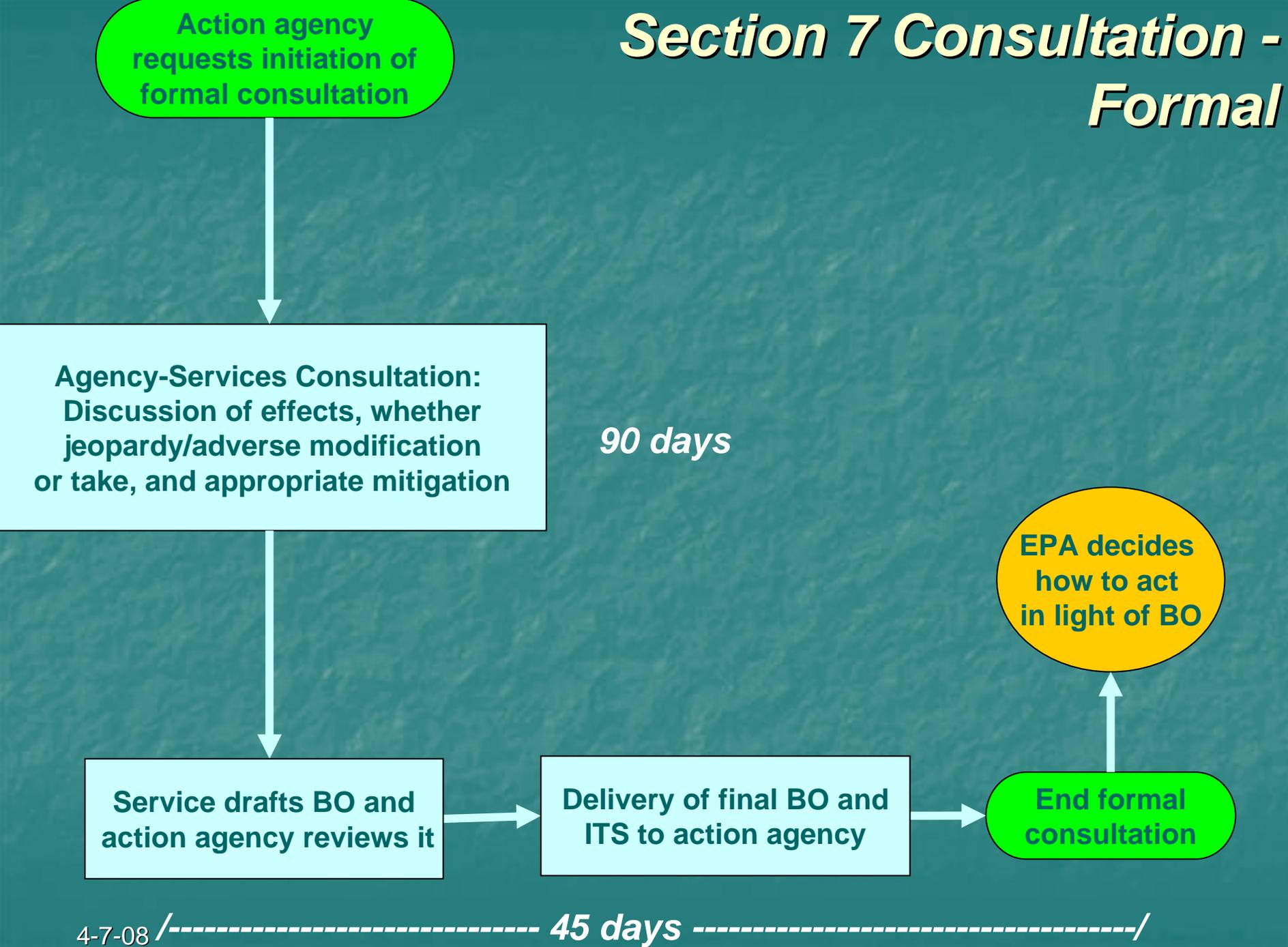
50 CFR Part 402

- Action
 - “No effect”/“May Affect”
 - Biological Evaluation
 - Not Likely to Adversely Affect
- Informal Consultation
- Formal Consultation
 - Biological Opinion
 - Jeopardy
 - Alternatives to Avoid Jeopardy (RPAs)
 - Take
 - Measures to Minimize Take (RPMs)

Section 7 Consultation - Informal



Section 7 Consultation - Formal



Memorandum of Agreement ESA, CWA Coordination

- Signed by EPA, FWS, NOAA in 2001
- Intended to improve coordination for consulting on WQS at the State/Tribal level
 - Establishes regional-level interagency coordination teams
 - Teams to coordinate with States on upcoming triennial reviews, early Service involvement, and research needs

Memorandum of Agreement ESA, CWA Coordination

- Provides process for coordination on State-issued permits
- Outlines elevation process
- Provides basis for “National” consultations

National Consultations

Purpose:

- To voluntarily evaluate EPA's 304(a) criteria
- To ease Regional-level consultation burden by streamlining ESA responsibility for EPA's approval of State/Tribal standards equal to or more stringent than 304(a) criteria

Scope:

- 49 agreed upon 304(a) Aquatic life criteria
- Effects on 561 Aquatic and aquatic dependent species
- BE evaluates exposure through multiple routes (waterborne, diet, sediment); critical habitat; food organisms

Key Elements of BE Methodology

- Extensive literature search
- Use of surrogate data
- Ecological risk approach
- Includes allowance for uncertainty

What about me?

State and non-Federal agency roles

- Designated non-Federal representative
 - May participate in informal consultation
 - Prepare biological evaluation
 - Provide information for formal consultation
- Habitat conservation plan
 - Mandatory for incidental take permit application
 - Non-Federal agency action with no federal nexus that results in incidental take

Example

California Toxics Rule

- In 2000, EPA promulgated to fill gap in CA WQS
 - 1994 State court overturned CA's water quality control plans, which contained WQ criteria for priority toxic pollutants
 - CA without numeric water quality criteria for many priority toxic pollutants, in noncompliance with the CWA
- Promulgated
 - Ambient aquatic life criteria for 23 priority toxics
 - Ambient human health criteria for 57 priority toxics

California Toxics Rule

- 1994-97 Informal consultation
- 8/97 EPA proposes CTR.
- 10/97 BE completed, EPA requests concurrence
- 11/97 Services issue non-concurrence letter
- 4/98 Services send draft jeopardy Biological Opinion (BO) to EPA
- 12/99 EPA sends list of modifications to its action, to avoid jeopardy BO.
- 3/00 Services issue final (non-jeopardy) BO
- 5/00 EPA promulgates the CTR.

California Toxics Rule

- RPMs included:
 - Review, revise, and promulgate by a date certain aquatic life criteria for mercury, selenium, cadmium, and PCP separately from CTR
 - Request formal consultation on above criteria revisions that are less stringent

California Toxics Rule

- RPMs continued
 - Revising and promulgating human health criteria for mercury
 - Developing sediment guidelines for cadmium and other toxics
 - Generating new data on toxicity of commercial grade PCP on early life stage salmonids

California Toxics Rule

- RPMs continued
 - Developing a national methodology to derive site-specific criteria
 - developing a revised criteria calculation model
 - issuing clarifications to a 1994 document concerning the use of calcium-to-magnesium ratios

California Toxics Rule

- Lessons learned from CTR
 - Can avoid jeopardy by putting mitigation into the rule/action
 - "friendly" jeopardy
 - Can disagree with jeopardy call and elevate issue
 - Must carefully consider if doing this
 - RPMs should be minor and within the scope of the action
 - Emphasized this in the 2001 MOA

Other Lessons Learned

- Proceed to formal consultation if needed
 - Extended informal can be unproductive
- Consider elevating a jeopardy call
 - Hesitation to elevate a jeopardy call may have significant consequences
 - Don't unnecessarily rewrite the proposed action to avoid jeopardy