

TECHNICAL NOTE

USDA NATURAL RESOURCES CONSERVATION SERVICE PACIFIC ISLANDS AREA

Biology Technical Note – No. 18

Threatened, Endangered and Candidate Species Compliance Process

According to GM 190, Part 410, Subpart B, Section 410.22E(1), “NRCS is committed to supporting its clients and partners by providing technical assistance and NRCS actions to conserve and improve natural resources on private lands. Within this framework, and consistent with legal requirements, the implementation of conservation programs through planning and application of conservation practices and measures shall provide for the conservation of:

- (i) Federally listed species (endangered and threatened).
- (ii) Species proposed for Federal listing.
- (iii) Federal candidate species.
- (iv) Federally designated and proposed critical habitat.
- (v) State and Tribal species of concern and their habitats.

Section 7 of the Endangered Species Act (ESA) requires that the Natural Resources Conservation Service (NRCS) conduct a thorough analysis of the effects of any proposed action it authorizes or funds to ensure that such actions are not likely to jeopardize the continued existence of any listed species (Threatened, or Endangered) or results in the destruction or adverse modification of Critical Habitat.

The NRCS Pacific Islands Area (PIA) has an ESA section 7 compliance process for our proposed actions with the agencies responsible for administering the ESA — the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) - National Marine Fisheries Service (NMFS). Proposed actions include:

- conservation practices/plans to be implemented by NRCS clients with the assistance of USDA program **funding**; and
- all other **actions under NRCS-control** actions (*e.g.* Compatible Use Authorizations for actions on land covered by Wetland Reserve Program (WRP) easement).

Conservation practices not funded with NRCS financial assistance are not subject to ESA section 7 compliance but need to be reviewed to comply with NRCS-ESA policy and that analysis is documented in the PIA-NRCS-CPA-52.

The compliance process involves conducting a complete species inventory, identifying potential effects, making a determination of effect(s), and then completing the consultation per policy requirements. The three effect determinations and requirements are:

1. **“No Effect”**: Involves documenting a “No Effect” determination on the CPA-52.
2. **“Not Likely to Adversely Affect (NLAA)”**: Informal consultation via letter sent to FWS and/or NMFS for concurrence for Threatened and Endangered species or designated Critical Habitat.
3. **“Adverse Affect”**: Formal consultation with FWS and/or NMFS required for Threatened or Endangered Species or designated Critical Habitat.

The compliance process is described in more detail below. The NRCS-PIA developed several forms and worksheets (included as attachments to this technical note) for use by our conservation planners to assist with implementing the process.

1. Conduct Complete Species Inventory and Critical Habitat Review

- A. **Off-site Inventory** takes place in the local NRCS office using GIS shape files of the project area, TMK or Parcel ID, critical habitat, and sighting data from the Hawaii Biodiversity & Mapping Program (HBMP) database, USFWS Rare Species Data, Guam/CMNI database(s) or American Samoa equivalent(s). The off-site inventory results in a candidate, threatened, and endangered, proposed threatened, proposed endangered (C, T, E, PT, or PE) species and critical habitat map and associated data table (if needed). These documents should be referenced during the on-site species inventory.

Complete Species Inventory = Off-site Species Inventory + On-site Species Inventory

These maps can be made using Toolkit and the appropriate data sets. See **Biology Technical Note 13** for details on what to include on the map and data table (if needed) and where to find the data.

Note: For animals, since they are mobile, presence is considered possible in the action area if they are on the map at a 1:24,000 resolution and current or historical. For plants, presence in the action area is considered possible if there is a point or polygon that is in the 1/8-mile buffer zone and are current. Critical habitat is considered present if it overlaps the action area.

- B. **On-site Inventory** takes place during one or more field visits.
- a. Incorporates observations made directly by the conservation planner as well as information obtained from the client. Conservation planners are free to request assistance from local experts including other conservation partners *i.e.* State of Hawaii, Department of Land and Natural Resources, Division of Fish and Wildlife, etc.; qualified specialists including the NRCS-PIA State Biologist, and USFWS or NMFS personnel.
 - b. The planner should also assess the presence or absence of suitable habitat for C, T, E, PT, and PE species known from the area (*i.e.* wetlands or water bodies for listed water birds, trees for listed birds or bats, host plants for listed insects or snails, etc.).

Note: Current = Sighted within the last 20 years.

Historical = Sighted more than 20 years ago.

2. Identify the Action Area

The **Action Area** is 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]. This should include both direct effects and indirect effects.

- A. **Direct effects** are the direct or immediate effects of the project on the species or its habitat.
- B. **Indirect effects** are those effects that are caused by or will result from the proposed action and are later in time or off-site, but are still reasonably certain to occur.

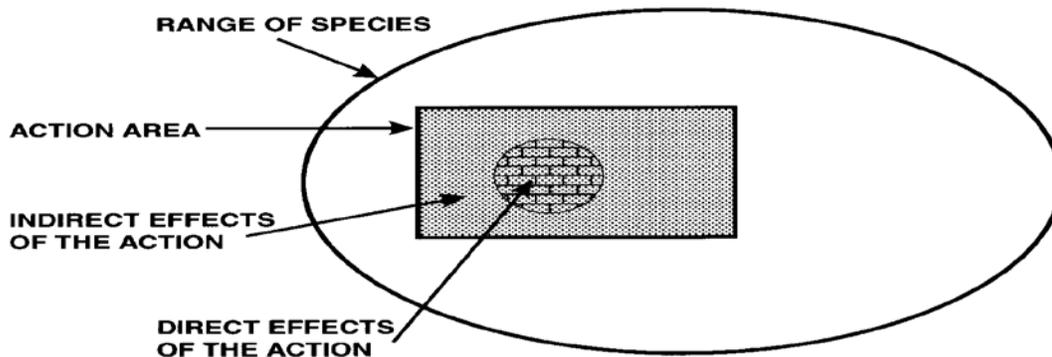


Figure 1. Example of an action area within a species range. (From the FWS/NMFS Endangered Species Consultation Handbook (1998))

3. Identify Potential Effects

For each project, a conservation planner should identify the potential direct, indirect, long-term and short-term effects of all of the proposed conservation practices included in the project on Critical Habitat and C, T, E, PT, and PE species.

If adverse effects are anticipated, planners should work with clients to incorporate avoidance and/or mitigation measures into their projects. Measures may include the following: conduct a species survey prior to commencement of work; select hand-tools or power-tools instead of larger and louder heavy equipment; adjust the work schedule to avoid sensitive periods such as breeding seasons for birds or bats; modify the size, shape, or location of the practices to avoid adverse impact; and/or entirely eliminate a practice from project if adverse effects cannot be avoided and a formal consultation is not desirable by the client.

4. Make Determination of Effect

Careful analysis of the potential effects enables NRCS to make the appropriate determination of effect. Three types of determinations can be made: “No Effect,” “Not Likely to Adversely Affect,” or “Adverse Effect”.

Use “Attachment A – Compliance Documentation” to document the effects analysis.

Complete “Attachment A – Compliance Documentation” in its entirety. The worksheet starts out with a “Preparation” section to make sure all the appropriate data is available to make a determination. It follows with a series of “Screening Questions” to determine what may be affected, such as designated Critical Habitat, and the presence of C, T, E, PT, or PE species or their habitat. USFWS Programmatic Informal Consultation (PIC) includes a list of endangered species and their ranges in the Pacific Islands Area. The PIC provided a list of “Disturbance Categories” and “Actions”. The USFWS divided the Disturbance

Categories into three: 1) Earth Disturbance; 2) Vegetation Removal or Manipulation; 3) and Pesticide, Herbicide or Nutrient Application. A list of approved conservation practices or “Actions” are associated for each Disturbance Category.

By answering these questions the planner can determine how much further analysis, if any, is needed. This portion of Attachment A will also guide the planner on how to complete the T and E section of the CPA-52.

5. Complete Consultation Requirements

If there is a “Yes” answer to any of the screening questions 1 through 5 then the “Determination Documentation” section of Attachment A must be completed for those questions with a “Yes” answer.

Any “No Effect” determination must be reviewed by the Responsible Federal Official (RFO - usually the DC for the field office) and concurred with. Signature lines are available in Attachment A to document concurrence.

Note: A tracking system must be in place to assure actions controlled by NRCS (financial assistance contracts or CUA for easements) do not occur until all ESA documentation, determinations, and concurrences are completed and documented. Use the tracking procedures provided by the Area Office or State Office.

Note: Candidate species are not covered by ESA section 7 but NRCS policy requires we let the client know of any adverse effects to Candidate species and also, by policy, NRCS and the client need to implement avoidance measure to minimize or eliminate any adverse effects, if possible.

For those practices/actions that may affect a listed T or E species or designated Critical Habitat but not adversely affect or adversely modify Critical Habitat, a NLAA informal consultation involves preparing and sending a Section 7 letter to the USFWS and/or NMFS for their concurrence. To qualify for NLAA status, the actions must be wholly beneficial, insignificant or discountable and a case must be made as to why that is the determination.

An informal consultation letter for a NLAA determination, along with Critical Habitat, C, T, E, PT, and PE map and data table, are to be sent to the RFO for initial review. The RFO will forward the documentation to the State Biologist for final review, approval, and processing for mailing. An electronic copy of the signed letter will be sent to the planner for inclusion into the client’s conservation plan file. This documentation is required to comply with section 7(a)(2) of the Endangered Species Act but no action can occur until a concurrence letter is received from USFWS or NMFS and the CPA-52 updated and signed.

When a response is received from the USFWS or NMFS, an electronic version of that response letter will also be sent to the planner for inclusion in the conservation plan file. If a response has not been received from USFWS or NMFS within 45 days of the date the NRCS letter was signed, the planner may contact USFWS or NMFS to find out if a response letter is forthcoming. The CPA-52 cannot be updated and signed and work on the proposed actions cannot be started until a concurrence letter is received from USFWS or NMFS.

If a “non-concurrence” letter is received contact the State Biologist (or designated representative) who will advise you on how to proceed.

The informal consultation letter for a “Not Likely to Adversely Affect” determination is a Microsoft Word® document. The following information needs to be provided by the planner:

- Date, client name, project location, NRCS program, NRCS contract number.
- Project area description.
- Project description (including proposed conservation practices which may affect T or E species and their associated actions that may affect those species).
- A description of the Critical Habitat and any listed species in the action area, including any suitable habitat for listed species known from the area.
- Proposed avoidance or mitigation measures for those actions determined to have a potential adverse effect on listed species or designated critical habitat.
- Contact information for the planner.

Note: USFWS and NMFS have different information and formatting requirements. Refer to the USFWS letter template and sample letter (Attachments B and C) for an informal consultation letter to the USFWS. Refer to the NMFS letter template and sample letter (Attachments D and E) for an informal consultation letter to NMFS.

For proposed species and proposed Critical Habitat, the process is the same, but it is called a “conference” and not a “consultation.”

For those practices that may affect a T or E species eligible under the USFWS PIC, an informal consultation letter for NLAA is not required. Species covered by the PIC are the following: Hawaiian Hoary Bat (*Lasiurus cinereus semotus*), Hawaiian Hawk (*Buteo solitarius*), Hawaiian coot (*Fulicia alai*), Hawaiian stilt (*Himantopus mexicanus knudseni*), Hawaiian moorhen (*Gallinula chloropus sandvicensis*), Hawaiian duck (*Anas wyvilliana*), Hawaiian goose (*Branta sandvicensis*), Blackburn’s sphinx moth (*Manduca blackburni*), Nightingale reed-warbler (*Acrocephalus luscinius*) and the Marianna common moorhen (*Gallinula chloropus guami*). Not covered by the Programmatic Informal Consultation are: 1) actions affecting critical habitat; 2) actions involving hazing or the purposeful dispersing of nēnē or Hawaiian waterbirds, including directive actions to deter the birds from using a site; and 3) creating attractive nuisances, e.g. permanent water resources.

For contracts whose practices are covered under the USFWS PIC, the RFO will document the information in the designated USFWS PIC tracking worksheet located in the PIA share-point site: PIA share-point/shared documents/300_LTP_Land_Treatment_Programs/FY-2015 USFWS Programmatic Informal Consultation folder. The documented information will include contract number, cooperator name, species, island, disturbance category, actions, and avoidance and minimization measures for the specific species. If a species was observed during a field visit, specific metadata will be included in the worksheet such as date of observation, observers, species name, common name, number of individuals observed, island, federal status, state or local status, GPS location information: projection, longitude and latitude, and accuracy.

Note: USFWS PIC includes avoidance and minimization measures for listed species that will be included into the conservation practice jobsheets and designs.

If an “Adverse Effect” determination is made (*i.e.* the effects are likely and are **not** wholly beneficial, insignificant or discountable), a formal Section 7 consultation must occur. Responsible Federal Officials should contact the State Biologist for further assistance.

For Additional Information

If you have questions about this technical note, please contact Anthony Ingersoll, Assistant Director for Technology, NRCS Pacific Islands Area State Office, via phone at (808) 541-2600 ext. 111 or via email at anthony.ingersoll@hi.usda.gov.

Information about ESA Regulations for Section 7 Federal Consultations is available online @:
http://www.access.gpo.gov/nara/cfr/waisidx_99/50cfr402_99.html

This technical note and attachments are available online via the NRCS Pacific Islands Area website Technical Page under Biology.

ESA section 7 Compliance Process Flowchart

1. Conduct Complete Species Inventory

Off-site Inventory

- Complete Request for C, T, E, PT, and PE Species Map and Data Table Attachment A

On-site Inventory

- One or more field site visits
- Information from client and other sources
- Document presence/absence of C, T, E, PT, and PE species and suitable/potential habitat

2. Identify Potential Effects

- For all of the proposed conservation practices included in the preferred alternative, identify potential effects on critical habitat and C, T, E, PT, and PE species and their habitat.
- If adverse effects are anticipated, incorporate avoidance and/or mitigation measures into the proposed alternative. description and practice job sheets.

3. Make Determination of Effect (using Attachment A)

No Effect

Complete Biology Technical Note 18, Attachment A and document on CPA-52.

May Affect, Not Likely to Adversely Affect

Standard NLAA Informal Consultation

Complete Biology Technical Note 18, Attachment A. Draft NLAA letter to USFWS and/or NMFS and document on CPA-52.

Covered under the USFWS PIC

Complete Biology Technical Note 18, Attachment A. For contracts that have eligible practices covered under the USFWS PIC, RFO will document in the tracking worksheet.

May Adversely Affect

Contact NRCS-PIA State Biologist or Assistant Director for Technology.