

INTERIM

June 21, 2005

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MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS, CHIEFS, OPERATIONS DIVISIONS

SUBJECT: Technical Compliance Guidance Regarding Endangered Species Consultations under Section 7 of the Endangered Species Act at Existing U.S. Army Corps of Engineers Projects in Operations and Maintenance Status

1. **Background.** The U.S. Army Corps of Engineers (Corps) operates and maintains over 25,000 miles of navigable waterways; 237 lock chambers, many with dams and reservoirs; and 456 multiple-purpose reservoir projects in all 50 states, as well as in U.S. territories. The Corps has a long history of environmental stewardship to the resources charged to its care. Species and habitat that are provided Federal protection under the Endangered Species Act (ESA) frequently exist in the area of Corps projects. The Corps embraces its environmental stewardship responsibilities and strives to ensure that all operating projects fulfill congressionally intended purposes in a manner that is consistent with the ESA. The Districts and Divisions of the Corps utilize numerous authorities, including Sections 1135 and 206 of Water Resource Development Acts, to meet obligations under the ESA and to further the purposes of the ESA by engaging in activities that encourage habitat recovery and propagation of threatened and endangered species. Since these commitments and duties to comply with the ESA must be tempered by limitations in authorities and budgets, specific budget requests are made on a project basis as warranted by need and the extent of the potential positive returns to the species and environment. When considering project and environmental constraints and opportunities, the Corps must follow certain coordination processes and procedures internally and with the U.S. Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries, also known as the National Marine Fisheries Service) when provisions of the ESA apply.

2. **Scope.** This technical compliance guidance derived entirely from existing statutes and regulations and clarifies and supplements existing guidance regarding the Corps' responsibilities toward species and habitat that are provided Federal protection under the ESA and which may be affected by water resources projects operated and maintained by the Corps. The intent of this guidance is to provide clarified procedures to Corps Districts and Divisions to foster more effective and efficient compliance with the ESA. The existing guidance provided in ER 1130-2-540, and ER 1105-2-100 (references a. and b., listed below) is general in nature. This supplemental guidance is the first detailed Corps guidance to outline processes and procedures specifically for operations and maintenance (O&M) activities by which Districts and Divisions should carry out their responsibilities under Section 7 of the ESA. It is also the first guidance to address the internal management (between Corps Districts and Divisions) of interagency coordination when the range of a species or its habitat exceeds the areas of operation of a single

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Corps District or Division. The guidance applies to all Corps Divisions and Districts. This guidance does not apply to the planning or construction of new civil works projects, or to regulatory program activities.

New technologies and advancing science have given the Corps and Services the capability to more rapidly integrate data and research into real-time decision-making. An expectation of this guidance is that the Corps and Services will use these advances in science and technology to insure that current information is used for the conservation of species and habitat protected by the ESA and project management purposes.

3. References.

- a. ER 1130-2-540, Environmental Stewardship Operations and Maintenance Policies.
- b. ER 1105-2-100, Planning Guidance Notebook.
- c. Endangered Species Act of 1973, as amended, 16 U.S.C.1351, *et seq.*
- d. Interagency Cooperation - Endangered Species Act of 1973, as Amended; Final Rule. Department of the Interior and Department of Commerce. 50 CFR 402; Federal Register Vol. 51, 19957, June 3, 1986.
- e. Endangered Species Act Consultation Handbook, U. S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration, National Marine Fisheries Service, March 1998.
- f. Discharge of Dredged Material into Waters of the U.S. or Oceans Waters; Operations and Maintenance; Final Rule. 33 CFR 335-338, Federal Register Vol. 53, No. 80, 14902, April 26, 1988.
- g. Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1371, *et seq.*

4. Key Definitions.

“Listed species” and “Proposed species”- The term "listed species" refers to both endangered and threatened species currently listed under the ESA, while the term “proposed species” refers to those species that are proposed for listing in the Federal Register as either threatened or endangered species under Section 4 of the ESA. The phrase “proposed and listed species” refers collectively to both classifications of species as defined above.

“Critical habitat” and “proposed critical habitat”- These terms refer, respectively, to geographic locations that are currently designated, or are under consideration in the Federal Register for

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official designation, as “critical habitat” under Section 4 of the ESA. The phrase “proposed and designated critical habitat” refers collectively to both classifications of habitat as defined above.

“Species list”- This term refers to 1) a list of any Federally listed or proposed species or critical habitat or proposed critical habitat that may be present in the action area (provided by the FWS and/or NOAA Fisheries) and/or, 2) a written notification of the species and critical habitat that are being included in the biological assessment (provided by the action agency).

5. General Policy. It is the policy of the Corps to operate and maintain existing water resources projects in accordance with project authorizations in a manner that fosters the existence and encourages the propagation of proposed and listed species and that protects proposed and designated critical habitat. The Corps strives to protect and promote the economic, environmental, and security needs of the nation; however, efforts in this regard must be accomplished within existing project purpose requirements and budget authorities. In some cases, mandatory ESA compliance requirements may render an O&M project economically unjustified when the costs of the O&M-associated activities in combination with the costs of the ESA conservation measures exceed the expected value of the economic benefits to the nation expected to result from the project itself. In these circumstances, the District will seek a determination from higher authority on the appropriate course of action. Additionally, the Corps does not have unilateral authority to expend O&M project funds on programs for the conservation of species and/or habitat not reasonably related to Corps project activities. For this reason, field biologists and project managers must not make formal commitments or obligations to undertake ESA conservation measures until funds are available. If the Corps determines that conservation measures are allowable and funds are available to implement such measures, then the conservation measures should be accomplished. Funds for conservation measures should be requested through the O&M budget process, or through the Continuing Authorities Program, Sections 1135 or 206 environmental protection and restoration programs, if an interested non-Federal sponsor is identified.

6. Roles of Resource Agencies. The FWS and NOAA Fisheries, hereinafter referred to singularly or jointly as "the Services" or “Service(s),” are the Federal natural resource agencies responsible for assisting Federal "action agencies" such as the Corps when adhering to the requirements of the ESA. Section 7(a)(1) of the ESA directs all Federal agencies to further the purposes of the ESA through their existing authorities and in consultation with the Secretary of the Interior or Commerce, as appropriate.

The appropriate implementation of Section 7(a)(1) is the responsibility of each individual Federal action agency. The Services provide their expertise in an advisory capacity to assist the Federal action agencies in implementing Section 7(a)(1) of the ESA. As such, neither agency directs the other to action, but should act in partnership when proposed and/or listed species or critical habitat may be jeopardized, destroyed, or otherwise affected.

7. Need for Interagency Conference or Consultation. The mere presence of a proposed or listed species or critical habitat at an existing O&M project, in itself, does not constitute a need to

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initiate a conference, informal consultation, or formal consultation with the Services or even to write a biological assessment. However, the presence of both a proposed or listed species or critical habitat and a proposed action that might affect the species or habitat does constitute a need for such coordination.

In general, the need for coordination is determined by the likelihood that an O&M-related *action* would (or has the potential to) affect a proposed or listed species and/or critical habitat. An *action* (here, used synonymously with *activity* and *activities*) is defined in reference d., section 402.02. It may be necessary to *confer* with the Services to determine whether an O&M activity is likely to jeopardize a proposed species or result in the destruction or adverse modification of proposed critical habitat. Informal and subsequent formal *consultation* may be needed if a proposed O&M activity is likely to affect listed species or designated critical habitat.

Interagency coordination may be triggered if (a) the Corps proposes to modify or change project operations activities, (b) a condition external to the project changes (e.g. new species is listed, new critical habitat is designated), and there are indications that Corps activities may affect proposed or listed species and/or designated critical habitat, or (c) if the Services or another knowledgeable third party present compelling new scientific information that ongoing Corps O&M activities are having an effect, or potentially jeopardizing, destroying, or adversely modifying, respectively, listed species or critical habitat. In all cases, the driving factor for conference and consultation is the expectation that one or more *activities* related to project operations may jeopardize or affect proposed or listed species or destroy or adversely modify critical habitat.

8. Documentation. Thorough documentation of all coordination, including formal and informal evaluations and negotiations, phone calls, and meetings associated with listed species or associated critical habitat is required. Importantly, the District will document all agreements/disagreements between the District and Services during and following the informal and formal conference and consultation processes. Copies of that documentation will be placed in the District's administrative record.

9. Inter-District and Inter-Division Coordination. When proposed or listed species or proposed or designated critical habitat occur in more than one District within a Division, the Division office will assign a "lead District" for all interagency coordination related to that species or habitat. Criteria for selecting a lead District are a Division responsibility. For regional proposed and listed species and critical habitats involving two or more Divisions, the affected Divisions will decide which Division will become the "lead Division."

If the Divisions feel that a reasonable regional consultation solution with the Services' Regional Offices cannot be achieved, the Divisions should refer such matters to Corps Headquarters to coordinate with the Services at the Headquarters level. Otherwise, the lead Division or District will ensure that all affected Divisions and Districts (and the branches/work units within them) coordinate their efforts throughout the consultation process as warranted by the potential effect on species, habitat, and other ongoing conservation and recovery initiatives.

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10. General Interagency Coordination Procedures. Procedures for coordination with the Services to comply with Section 7(a)(2) are generally outlined in references (a) and (b). If a “no effect” determination is reached by the Corps for proposed species or proposed critical habitat, coordination may be forgone or include only informal consultation (also referred to as informal conference if conducted without any identified concerns for listed species or designated critical habitat). If the District finds proposed species are likely to be jeopardized or proposed critical habitat destroyed or adversely modified, a formal conference should be initiated (unless a “no effect” determination is reached or the Services concur with a “not likely to adversely affect” determination made by the District before or during informal conference). Conservation measures for proposed species and critical habitat may be further considered during consultation for listed species or critical habitat. For listed species and designated critical habitat areas, the process can include *informal* consultation only if a “no effect” determination is reached or if the Services concur with the “not likely to adversely affect” determination made by the District before or during informal consultation. If, however, the District determines that Corps activities may affect the listed species and/or critical habitat the process will lead to formal consultation.

The District should proactively coordinate with the appropriate Service(s) when proposed or listed species and/or critical habitat are located in Corps project areas. An evaluation of the project and associated activities shall be made by the District to determine if there are means by which the species or critical habitat can be managed to further the goals of Section 7(a)(1) of the ESA while not compromising project operations. The District may also consider conservation efforts for proposed species and proposed critical habitat areas. Additionally, to the extent that Districts and Divisions believe it is appropriate, the development and use of regional and/or programmatic coordination, consultations and biological opinions are encouraged.

11. Informal Consultation and Effect Determinations. Consultation of any kind must be entered into only if an activity may have an effect on proposed or listed species or critical habitat. Informal consultation is an optional part of the consultation process. Therefore, if the District does not find a correlation between operational activities and potential effects to proposed or listed species or critical habitat, a “no effect” determination may be made and consultation (or further consultation) regarding that activity may be forgone so long as project activities and area conditions remain the same. Written concurrence with the “no effect” determination by the appropriate Services should be requested in writing by the District (as supported by reference e., section 3.5) and, upon receipt, placed in the District’s administrative record.

a. If the District determines that consultation is warranted given the activities involved in project operations and the potential for effects to proposed and/or listed species or critical habitat, it shall first enter into informal consultation with the appropriate Service(s). The informal consultation process usually begins with a District’s request to the Service(s) for a species list or concurrence with a previously prepared species list and subsequently involves verbal discussions and written correspondence between the District and the Services.

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b. A biological assessment (a written evaluation of the potential effects to proposed and/or listed species, or designated and/or proposed critical habitat) is not a prerequisite to informal consultation. However, if a biological assessment is conducted, its preparation must begin not later than 90 days beyond the receipt of a new species list from the resource agency, or the resource agency's concurrence with the species list provided by the Corps. The biological assessment must be completed not later than 180 days beyond the receipt of a new, or concurrence with the provided, species list, unless a later date is agreed upon by both agencies. If the 90-day and 180-day periods (or other period as agreed) are exceeded, the species list must be updated by the Services.

c. Early and expedient preparation of a biological assessment is recommended whenever the District recognizes that an activity may affect listed species or designated critical habitat to assist the District and Services in determining effects and the potential need for formal conference or consultation.

(1) "No effect" and "Not Likely to Adversely Affect." Informal consultation may result in a "no effect" or "not likely to adversely affect" determination by the District. The District shall request written concurrence with the "no effect" or "not likely to adversely affect" determination from the appropriate Service(s). Once the written concurrence is received, the consultation process is terminated at the informal stage without any further documentation. If the District does not receive written confirmation of its "no effect" or "not likely to adversely affect" determination, the District is urged to document and record all coordination efforts with the Services leading up to the determination. If there is no likelihood of "jeopardy" to proposed species or "destruction or adverse modification" to proposed critical habitat, the Services will prepare a conference report. The District's administrative record should reflect that ESA coordination is complete if a final administrative record is needed as required in reference (g) or if an environmental assessment is needed. Regardless, documentation is required to demonstrate that consultation was completed.

(2) Non-concurrence. If the Services do not concur with the District's findings regarding the likelihood of jeopardy to proposed species, destruction or adverse modification to proposed critical habitat, or effects to listed species and/or critical habitat, they must explain their non-concurrence in writing. If the Services provide scientific evidence to support their non-concurrence, the District should enter into formal conference and/or formal consultation as appropriate. If the District and Services continue to disagree on the potential for, or degree of, an effect or effects to proposed or listed species or critical habitat, the District should elevate the matter to the Division office for coordination with the Services' Regional Office.

(3) Concurrence. When the District and Service(s) concur that proposed species may be jeopardized, that destruction or adverse modification to proposed critical habitat is likely, or that there may be effects to listed species and/or critical habitat, the District shall initiate, as appropriate, a *formal* conference and/or *formal* consultation.

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12. Biological Assessments. A biological assessment (BA) is prepared and presented by (or at the direction of) the Corps prior to, or as part of a request for formal consultation. The preparation of a biological assessment for use during a conference is optional when only proposed species and/or proposed critical habitat are present (in the absence of listed species and designated critical habitat). If both proposed and listed species and/or critical habitat are present in the project activity area and are likely to be affected by project activities, a biological assessment is required and must address listed and proposed species and critical habitat. The procedures and requirements for preparing a BA are provided at reference d., section 402.12, and reference e., section 3.4. Specifically, reference d., section 402.12(f), describes the contents of a BA. An environmental assessment or other compliance document which may be required under the National Environmental Policy Act or other environmental statutes may contain the information required for a BA but cannot be used in lieu of a BA. Given the specific compliance requirements and legal consequences of BAs, using other documents to convey the compliance information is discouraged. However, any available and pertinent information from any source(s) should be provided to support the BA. In addition to the information required at reference d., section 402.12(f), the District should identify available alternatives that could be reasonably implemented to avoid a jeopardy opinion. In the event that incidental take of an endangered species may occur, the District will identify conservation measures that reduce the impact to the species. These alternatives and conservation measures will be included in the BA.

13. Conference. When the District determines that an activity *is likely to jeopardize* the continued existence of any proposed species or *is likely to result in the destruction or adverse modification* of proposed critical habitat, the District shall confer with the appropriate Service(s). Although not required, the District may also request a conference with the Services when an activity is likely to affect (as opposed to jeopardize or destroy) a proposed species or proposed critical habitat.

The conference is intended to resolve potential present and future conflicts between project operations activities and the well-being of the proposed species and critical habitat. The conference usually consists of informal discussions and results in advisory recommendations from the Services on ways to minimize or avoid adverse effects to the proposed species or proposed critical habitat. Conference processes can be referred to as “informal conference” and “formal conference” in the same general manner as consultations.

a. Formal conferences may be held separately from formal consultations, or the District may, with the agreement and cooperation of the Service(s), request the conference be conducted in accordance with the procedures for formal consultation in reference d., section 402.14. The combined formal consultation process is suggested for project activities that may affect both proposed and listed species and/or critical habitat.

b. Whether the conference is held separately or in a combined manner (with formal consultation), it will result in the preparation of a conference opinion by the Service(s). The conference opinion may be either a “no jeopardy/no adverse modification” or a

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“jeopardy/adverse modification” and may include an incidental take statement. If the District and the Service(s) coordinate in the combined manner (simultaneously for proposed and listed species and/or critical habitat), the conference opinion regarding the proposed species and critical habitat will be included in the biological opinion provided for the listed species and/or designated critical habitat.

c. If, at some later date, the proposed species or critical habitat becomes formally listed or designated, and project operation activities are such that effects to said species are likely to occur, the Corps shall enter consultation, building upon any earlier conference and/or consultation efforts, as appropriate. The District may request that the conference opinion be adopted by the Service(s) as the formal biological opinion at such time that proposed species or critical habitat becomes formally listed or designated (provided that no changes in the activity or newly available information would alter the content of the opinion or incidental take statement).

14. Formal Consultation. In those cases where it is determined that *listed species or critical habitat may be affected* by an activity undertaken by the Corps, formal consultation under the ESA is required. Procedures for formal consultation are prescribed at reference d., section 402.14(c) and are described further (from the Services’ perspective) at reference e. Formal consultation must be requested in writing to the appropriate Service(s) and will require the preparation and submission of a BA along with other required information as outlined in reference d., section 402.14(c). Districts are responsible for ensuring that all available relevant and scientifically appropriate information is provided in the request for formal consultation. The letter requesting initiation of formal consultation and transmitting the BA should also include a request for review of the draft BO. Although the formal consultation process is mandatory, it is flexible and can be adapted at any point to respond to project modifications agreed to by both the District and the Services. The District must ensure documentation of discussions between the District’s and Services’ project managers, biologists, ecologists, and other personnel as appropriate.

a. Best Scientific and Commercial Data Available- The District is responsible for providing the best scientific and commercial data available with its request for formal consultation and as it becomes available during the consultation process. Primary and original sources of information are preferred; however, any relevant information found that is deemed credible by the District, shall be provided to the Services to aid in the discussion and evaluation of the effects of a proposed or ongoing action. The Service(s) may request that consultation be extended (according to reference d., section 402.14(e)) until such time as data or analyses that will become available as the result of imminent or ongoing studies, are available for reference. In this case, the District has the option of either agreeing to extend the consultation process until such information is available, or continuing with the consultation utilizing the data and analyses that are currently available. While the District should remain mindful of the Services’ prerogative to provide the benefit of the doubt to the species, the extension of consultation, in response to a request by the Service(s) to do so, is at the discretion of the Corps.

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b. Additional Data Requests- The District may receive a request from the Service(s) to extend consultation (in accordance with reference d., section 402.14(e)) so that the District can conduct and/or fund a technical study to obtain additional information when the Service(s) determines that additional data would provide a better base from which to evaluate the effects of the action on listed species or designated critical habitat. This request does not mean that the District's requirement to provide information to the Services has been unfulfilled. The District may agree that such study is necessary and appropriate and may agree to the extension of consultation to pursue funding sources for and undertake such efforts. As written above in Section 5 of this guidance, District field biologists and project managers must not make commitments to fund a technical study until such time as an economic evaluation has been performed on the costs of such initiatives with respect to the economic viability of the project. The District project manager shall determine and advise the District Engineer whether the activity should proceed as intended given the costs of the study and with respect to project authorities. If the District project manager determines that the study costs are excessive and the activity or project is no longer economically viable, the District Engineer may then either communicate to the Services that the District desires to proceed with the consultation without performing additional study, or may terminate the consultation by written notice to the Service(s). Should the District find that the technical study is allowable, appropriate, and funding is appropriated to do so, a mutually agreed extension of consultation should be arranged with the Services and, if warranted, the BA updated to reflect the newly ascertained data. Again, while the District should remain mindful of the Services' prerogative to provide the benefit of the doubt to the species, the extension of consultation, in response to a request by the Service(s) to do so, is at the discretion of the Corps.

c. Reasonable and Prudent Alternatives- During consultation, the Services may provide suggestions for "reasonable and prudent" alternatives that it believes may be undertaken to avoid or reduce the likelihood of jeopardy to listed species and/or destruction or adverse modification to designated critical habitat. Reasonable and prudent alternatives must be, by definition (reference d., section 402.02), implementable in a manner consistent with the intended purpose of the action, consistent with the Corps' authorities and jurisdiction, economically and technically feasible, and cannot alter the basic design, location, scope, duration, or timing of the action. It is the District's responsibility, not the Service's, to determine whether any suggested "reasonable and prudent" alternative would actually be reasonable, prudent, practicable, or affordable (see reference e., 2.2 (B)). As such, the District may choose not to implement any suggested "reasonable and prudent" alternative suggested either during consultation discussions or within the (draft or final) biological opinion prepared by the Services. If the biological opinion developed by the Service(s) declares the likelihood of jeopardy to listed species or destruction or adverse modification to designated critical habitat, the District shall notify the Service(s) of the reason(s) the suggested alternatives are not considered "reasonable and prudent" and must then identify alternatives that can be supported by the best available scientific and commercial data and project authorizations and appropriations. The District shall also notify the Services which alternative(s) will be implemented as part of the project.

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The main purpose of the formal consultation process is to either avoid jeopardy to listed species, and/or destruction or adverse modification to designated critical habitat, or to determine that such effects cannot be avoided. The formal consultation process will result in a biological opinion from the Service(s), outlining the Services' conclusions regarding whether a District activity is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

15. Biological Opinion. The biological opinion (BO) is a document written by the Services that states whether, and to what extent, the Service(s) believe that the District's activity is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. The procedures for preparation of a BO by the Services are provided at reference d., section 402.14(h) and reference e., section 4.5(A). The District shall, at the earliest reasonable time, request that the draft BO (also referred to as the "preliminary BO") be made available to them for review. Requesting a draft BO is an important responsibility of the District. The draft BO may be available for review as a result of coordination that occurred during informal consultation proceedings, or may not be available until significant formal consultation has occurred. It is advised that the request for review of the draft BO be made in the letter requesting the initiation of formal consultation.

Recommendations in the draft BO are advisory and are not intended to be legally binding, nor does a draft BO constitute authority to take listed species. The draft BO shall be used by the District and the Services to further discussions and coordination regarding minimizing adverse effects to species or critical habitat.

If, in the opinion of the Service(s), the activity is not likely to jeopardize the continued existence of listed species, a "no jeopardy" opinion will be provided by the Service(s). A "no jeopardy" BO may contain discretionary conservation recommendations and an authorization for incidental take if, pursuant to Section 7(1)(2) of the ESA and Section 101(a)(5) of the MMPA, such a take may occur. Alternatively, if the opinion of the Service(s) is that the activity is likely to jeopardize the continued existence of listed species and/or result in the destruction or adverse modification of designated critical habitat, a "jeopardy" BO will be provided by the Service(s). A "jeopardy" BO may contain discretionary conservation recommendations, suggested reasonable and prudent alternatives (as discussed above), and/or an authorization for incidental take if such a take may occur (pursuant to Section 7(1)(2) of the ESA and Section 101(a)(5) of the MMPA). Conservation recommendations made by the Services and put forth in the BO are advisory and not legally binding.

Authorizations for incidental take are included in an "incidental take statement." The incidental take statement will specify the amount or extent of allowable incidental take and will set forth the reasonable and prudent measures with their associated terms and conditions, including reporting requirements, that must be met. The incidental take statement will also specify procedures for the handling or disposal of any individuals of a listed species that have been taken. The amount or extent of incidental take allowed may vary depending on which reasonable and prudent alternative, if any, the action agency may choose to implement. In kind, each level of allowable incidental take may have specialized reasonable and prudent measures and their

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associated terms and conditions. These terms and conditions are legally binding on the District and, when clearly complied with, they provide exemption from the takings prohibition of Section 9 of the ESA, should a taking occur as a result of the subject activity. The District may, with respect to a “jeopardy” opinion of the Services as written in the BO, choose to adopt one or more reasonable and prudent alternatives, request an exemption, change the activity, or present new alternatives and reinitiate consultation. If a District determines that none of those approaches would successfully resolve the ESA compliance dispute with the Service(s), the District should elevate the matter through the Division to Corps Headquarters to determine how to proceed.

Since issuance of the BO terminates the consultation process, it is important that the District and the Services coordinate in a manner that fosters understanding, respect, proactive conservation and agreement as to reasonable and environmentally sound actions before the final BO is issued. When, during the draft BO consultation process, the District and Service(s) cannot reach agreement, the draft BO with the conditions, controls, and requirements that cannot be resolved will be elevated to higher Corps authority before a final BO is issued. Below is a list of example circumstances in which the District might consider intra-agency elevation of the draft BO.

a. The BO recommends alternatives and/or measures that are asserted to be "reasonable and prudent" that cannot be implemented in a manner consistent with the intended purposes of the activity, or that are not technologically or economically feasible, even though the Service(s) may believe that the recommended alternative would avoid the likelihood of jeopardizing the continued existence of the species or avoid the destruction or adverse modification of critical habitat.

b. The District requests, but the Service(s) do not make available, the draft BO, or the final BO contains conditions, controls, or requirements not previously agreed to by the District, and they are unacceptable to the District.

c. The BO contains conservation recommendations that are purported to be mandatory.

d. The BO asserts that the activity would jeopardize the species, but the BO does not contain a detailed summary of scientific data on which the BO is based.

e. The BO contains critical habitat protection measures when there is no critical habitat designation under 50 CFR parts 17 or 226.

f. The BO contains reporting requirements not legally, fiscally, or otherwise implementable by the Corps other than reporting requirements for those reasonable and prudent measures that the Director considers necessary or appropriate to minimize impacts from incidental takes.

g. The BO contains reasonable and prudent measures to minimize effects from incidental take, along with terms and conditions to implement them that would alter the basic design, location, scope, duration, or timing of the activity in a manner unacceptable to the Corps.

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16. Summary. The Corps manages vast and varied resources. The water resources missions combined with the environmental stewardship responsibilities of the Corps may require coordination with the Services under Section 7 of the ESA. When coordination is warranted the Corps must be diligent in complying with the requirements of the ESA while ensuring all operating projects fulfill congressionally intended purposes. Identifying activities which may affect proposed or listed species and/or proposed or designated critical habitat, documenting all coordination efforts, ensuring project manager involvement, and proactively resolving disagreement are key elements to successful compliance with the law and accomplishing Corps missions. In carrying out missions, the Districts of the Corps will look for opportunities to implement those reasonable, optional conservation measures identified in biological opinions and practicable recovery measures identified in recovery plans. Working with the Services to develop endangered species recovery plans is also an important stewardship responsibility. Within existing budgetary authorities and capabilities, Districts are encouraged to meet the environmental stewardship challenge, and evaluate and implement measures at operating projects to support the goals of the ESA.

17. Information Sources. In the informal and formal ESA conference and consultation processes, it is important that all Corps participants be thoroughly knowledgeable of all relevant statutory and regulatory procedures for each stage of the process. The Joint regulations implementing the ESA are available at web link http://www.access.gpo.gov/nara/cfr/waisidx_03/50cfr402_03.html. The Internet web link for the ESA statute is <http://endangered.fws.gov/esaall.pdf>. FWS's Mitigation Handbook is at web link <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>. Each District/Division is advised to ensure that the appropriate staff personnel are familiar with the procedural requirements for undertaking ESA compliance actions. For questions regarding this policy, please contact Mr. Joe Wilson either electronically at joseph.r.wilson@usace.army.mil or by telephone at (202) 761-7697.

18. Future Guidance. The Corps is developing a Memorandum of Understanding (MOU) with the Services for the elevation of issues that cannot be resolved by the District staff and the Services at the draft BO stage. This guidance will be updated upon completion of the elevation MOU. District and Division offices will be notified when the MOU is complete. This guidance will be further updated to incorporate changes in policy, legislation, or regulations. Updated guidance will be available electronically at web link <http://el.ercd.usace.army.mil/tessp/index.cfm>.

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COMMANDER, SOUTH ATLANTIC DIVISION, ATTN: CESAD-CM-OC
COMMANDER, SOUTH PACIFIC DIVISION, ATTN: CESPDP-CM-O
COMMANDER, SOUTHWESTERN DIVISION, ATTN: CESWD-ETO

INFORMATION COPIES SENT TO:

COMMANDER, ALASKA DISTRICT, ATTN: CEPOA-CO-OR
COMMANDER, ALBUQUERQUE DISTRICT, ATTN: CESP-OD-O
COMMANDER, BALTIMORE DISTRICT, ATTN: CENAB-OP-TR
COMMANDER, BUFFALO DISTRICT, ATTN: CELRB-CO-TB
COMMANDER, CHARLESTON DISTRICT, ATTN: CESAC-TS-O
COMMANDER, CHICAGO DISTRICT, ATTN: CELRC-CO
COMMANDER, DETROIT DISTRICT, ATTN: CELRE-CO-L
COMMANDER, FORT WORTH DISTRICT, ATTN: CESWF-OD-R
COMMANDER, GALVESTON DISTRICT, ATTN: CESWG-OD-O
COMMANDER, HONOLULU DISTRICT, ATTN: CEPOH-EC-T
COMMANDER, HUNTINGTON DISTRICT, ATTN: CELRH-OR
COMMANDER, JACKSONVILLE DISTRICT, ATTN: CESAJ-CO-OP
COMMANDER, KANSAS CITY DISTRICT, ATTN: CENWK-OD-TR
COMMANDER, LITTLE ROCK DISTRICT, ATTN: CESWL-OP-ON
COMMANDER, LOS ANGELES DISTRICT, ATTN: CESPL-CO-O
COMMANDER, LOUISVILLE DISTRICT, ATTN: CELRL-OP-TO
COMMANDER, MEMPHIS DISTRICT, ATTN: CEMVM-CO
COMMANDER, MOBILE DISTRICT, ATTN: CESAM-OP-TR
COMMANDER, NASHVILLE DISTRICT, ATTN: CELRN-OP-T-N
COMMANDER, NEW ENGLAND DISTRICT, ATTN: CENAE-CO-TM
COMMANDER, NEW ORLEANS DISTRICT, ATTN: CEMVN-OD-T
COMMANDER, NEW YORK DISTRICT, ATTN: CENAN-OP
COMMANDER, NORFOLK DISTRICT, ATTN: CENAO-TS-O
COMMANDER, NWD – OMAHA OFFICE, ATTN: CENWD-CM-O - OMAHA
COMMANDER, OMAHA DISTRICT, ATTN: CENWO-OD-TN
COMMANDER, PHILADELPHIA DISTRICT, ATTN: CENAP-OP
COMMANDER, PITTSBURGH DISTRICT, ATTN: CELRP-OR-TR
COMMANDER, PORTLAND DISTRICT, ATTN: CENWP-CO-SR
COMMANDER, ROCK ISLAND DISTRICT, ATTN: CEMVR-OD-T
COMMANDER, SACRAMENTO DISTRICT, ATTN: CESPCK-CO-O
COMMANDER, SAN FRANCISCO DISTRICT, ATTN: CESPNC-CO-O
COMMANDER, SAVANNAH DISTRICT, ATTN: CESAS-OP-SR
COMMANDER, SEATTLE DISTRICT, ATTN: CENWS-OD-TS-NR
COMMANDER, ST. LOUIS DISTRICT, ATTN: CEMVS-CO-T
COMMANDER, ST. PAUL DISTRICT, ATTN: CEMVP-CO-OP
COMMANDER, TULSA DISTRICT, ATTN: CESWT-OD-R
COMMANDER, VICKSBURG DISTRICT, ATTN: CEMVK-OD
COMMANDER, WALLA WALLA DISTRICT, ATTN: CENWW-OD-TN
COMMANDER, WILMINGTON DISTRICT, ATTN: CESAW-OP-TN
COMMANDER, ENGINEER RESEARCH AND DEV. CENTER, ATTN: CEERD-EE
COMMANDER, ENGINEER RESEARCH AND DEV. CENTER, ATTN: CEWES-EE-R