

Part 1970 - ENVIRONMENTAL

Subpart N - BIOLOGICAL Resources

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Part 1970 - ENVIRONMENTAL

Subpart N - BIOLOGICAL Resources

§ 1970.651 Purpose.

This subpart provides guidance to staff of the Rural Housing Service, Rural Business-Cooperative Service, and Rural Utilities Service (collectively referred to as the "Agency") regarding the implementation and integration of Section 7 of ESA and other laws protecting biological resources into the Agency's National Environmental Policy Act (NEPA) review process. For purposes of this Subpart, the term "biological resources" means flora (plants) and fauna (invertebrates, fish, birds, amphibians, reptiles, birds, mammals, etc.) that may be found or have historically been located in a particular area. The term also includes rivers, lakes, wetlands, upland communities and other habitat types necessary to support local flora and fauna.

The biological resources discussion in NEPA documents must address the effects of the proposed action on biological resources, including federally-listed or proposed threatened and endangered species and critical habitat as well as other species of concern, such as state-listed species, species on federally-managed land subject to habitat management plans or other conservation efforts, or species of importance found on Tribal lands. Note that while these species of concern may not be protected under ESA, they may still be subject to mitigation measures in approved management or recovery plans and any impacts to them should be disclosed under NEPA.

NEPA documents should include brief descriptions of existing biological resources within the action area of the project and a discussion of possible impacts to these resources as a result of project implementation. Include direct and indirect impacts, such as from earth disturbance, tree removal, sedimentation, artificial lighting, stream or river flow impedance, habitat fragmentation or increased hunting or fishing pressure, etc. Include estimates of the magnitude of impacts for each alternative under consideration, including any short-term or temporary effects. Document the results of consultation with any other federal or state resource-protection or land-management agencies and tribal governments.

§ 1970.652 [RESERVED].

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Environmental Policies
and Procedures

§ 1970.653 Authorities.

(a) ESA (16 U.S.C. §§ 1531 et seq.) provides for the protection and recovery of species threatened with extinction and ensures federal agencies use their authorities to further the purpose of ESA to protect and conserve endangered and threatened species. This law is administered by two federal agencies (collectively, "the Services"): FWS, a division of the Department of the Interior, and the National Marine Fisheries Service (NMFS), a division of the National Oceanic and Atmospheric Administration.

(1) Section 7 of ESA imposes an affirmative duty on federal agencies to ensure their actions are not likely to adversely affect or jeopardize the continued existence of any species listed as threatened or endangered, or that would result in the destruction or adverse modification of the critical habitat of a listed species. Section 7 allows "incidental" take of a species, but only with authorization. Refer to 50 C.F.R. Part 402, Interagency Cooperation, for FWS regulations that interpret and implement Section 7.

(2) To "jeopardize the continued existence" means to engage in an action that reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to the extent that survival and recovery of that species is appreciably reduced.

(3) The destruction or adverse modification of critical habitat means a direct or indirect alteration of such habitat that appreciably diminishes the value of that habitat for survival and recovery of a listed species.

(b) MBTA (16 U.S.C. §§ 703-712) establishes a federal prohibition, unless permitted by regulations, to:

pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatsoever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention ... or any part, nest, or egg of any such bird.

§ 1970.653(b) (Con.)

(1) MBTA, which protects over 800 bird species, is a strict liability law with criminal penalties. The statute applies to private actions, rather than directly to federal actions, so the Agency's role is advisory to applicants for certain types of proposals, such as installation of wind turbines or projects that involve vegetation clearing, that are known to have the potential to affect migratory birds.

(2) See 50 CFR § 10.13 for a list of species protected under MBTA. Species **not** covered under MBTA include the house (English) sparrow, European starling, rock doves, non-migratory upland game birds (e.g., grouse, turkey), and introduced/exotic species (e.g., monk parakeet).

(c) BGEPA of 1940 (as amended at 16 U.S.C. 668), provides additional legal protection for bald and golden eagles, their nests, eggs, and parts. As with MBTA, BGEPA has a take prohibition defined as pursuing, shooting, shooting at, poisoning, wounding, killing, capturing, trapping, collecting, molesting, or disturbing bald or golden eagles. The law has civil and criminal penalty provisions.

(1) FWS is authorized to issue permits to take, possess and transport bald and golden eagles only for scientific, educational, and Native American religious purposes. In the case of golden eagles only, FWS is also authorized to issue permits for falconry purposes in certain areas.

(2) FWS has proposed implementation of special utility permits to address unintended or non-purposeful take for certain types of projects but there is currently no non-purposeful take permit program in effect.

(d) The Marine Mammal Protection Act of 1972 (as amended at 16 U.S.C. §§ 1361-1362, 1371-84, and 1401-07) protects all marine mammals. The Act prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the United States.

(e) The Magnuson-Stevens Act of 1976 (16 U.S.C. 1801-1882) prohibits actions that may adversely affect essential fish habitat. Agencies must consult with NMFS on projects with the potential to affect anadromous species or essential fish habitat.

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(f) The Fish and Wildlife Coordination Act (as amended at 16 U.S.C. 661 - 667(e)), requires that wildlife be given equal consideration to other project features and requires consultation with the Services for water resource development projects affecting streams or other water bodies.

(g) Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, stipulates that each federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations develop and implement a Memorandum of Understanding with FWS to promote the conservation of migratory bird populations. Actions delegated to or assumed by non-federal entities, or carried out by non-federal entities with federal assistance, are **not** subject to this order. Such actions, however, continue to be subject to MBTA.

(h) Executive Order 13112, Invasive Species, directs federal agencies whose actions may affect the status of an invasive or alien species to use relevant programs and authorities to the extent practicable and subject to available resources to prevent the introduction of such species, and provide for restoration of native species and habitat conditions. Agencies may not carry out actions that are likely to cause or promote the introduction or spread of invasive or alien species unless the benefits of such actions outweigh the potential harm and all feasible and prudent measures to minimize harm have been taken.

(i) Departmental Regulation 9500-4, USDA Fish and Wildlife Policy, states that "fish and wildlife are important economic, aesthetic, ecological, educational, recreational and scientific resources", and USDA agencies are directed to conserve fish and wildlife.

(j) 50 CFR Part 402, Interagency Cooperation - ESA of 1973, As Amended. These regulations describe consultation requirements under Section 7 of the ESA and allow consultation to be consolidated with NEPA review.

§ 1970.654 Policy.

The Agency recognizes that healthy ecosystems depend on diverse and abundant plant and animal populations. Fish and wildlife are important economic, aesthetic, ecological, educational, recreational and scientific resources and have inherent value as components and indicators of healthy ecosystems. Therefore, it shall be Agency policy to:

(a) Assist in the identification and recovery of threatened and endangered species and avoid actions which may cause a species to become threatened or endangered;

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- (b) Consider impacts to flora and fauna species and their critical habitat, as appropriate, for proposed construction activities at all levels of NEPA review;
- (c) Consult early with the Services, as appropriate; and
- (d) Complete consultation prior to any irretrievable or irreversible commitment of resources that would preclude subsequent consideration of modifications or alterations to the proposal.

§ 1970.655 Responsible Parties.

Responsibilities for compliance with all above laws, regulations, and Executive Orders are as follows:

- (a) Administrator. The Administrators have responsibility to ensure implementation within their program areas.
- (b) Approving Official. The Agency official with the authority to execute the federal action, usually approval of federal financial assistance. This official is usually a state director, program administrator or their designated delegate.
- (c) NES. NES provides:
 - (1) Technical advice and training;
 - (2) Assistance with negotiation, approval, and execution of all memoranda of understanding or agreement, interagency or cooperating agency agreements, or programmatic agreements related to any environmental issue or actions taken under this part;
 - (3) Liaison with federal Executive and Legislative Branch agencies;
 - (4) The same functions as an SEC for all programs administered at the National Office level (such as Electric and Telecommunication Programs, some Energy Programs, etc.); and
 - (5) Guidance on resolving environmental disputes.

(d) Staff Director. The Staff Director oversees agency environmental staff and supervises compliance with the procedures contained in this subpart within their area of jurisdiction. The state program director typically functions in this role at the state office level. For programs administered directly at the National Office level, the NES Director(s) fulfill this role.

(e) State Director. Each state director will ensure compliance with the procedures contained in this subpart within their area of jurisdiction. They will ensure Agency staff properly conduct the consultation process, independently evaluate the scope and content of all supporting documents and Biological Assessments (BA), and make appropriate determinations of effect on listed species, critical habitat or other biological resources.

(f) SEC. The SEC advises the state director and state staff on environmental matters. The SEC also solicits, as necessary, the expert advice and assistance of other professionals, including the Services, in order to adequately implement this subpart. The SEC will provide guidance and training to Agency staff and others as needed. The SEC will immediately inform NES when the state office enters into formal consultation and when any adverse Biological Opinion (BO) is received from the Services.

(g) FWS and NMFS. The Services share responsibility for administration and enforcement of ESA, MBTA, and BGEPA. NMFS has primary federal jurisdiction over anadromous fish and sea-dwelling organisms while FWS assumes responsibility for all other protected species. For a list of species protected under ESA, see 50 CFR § 17.11-12; for critical habitat see 50 CFR § 17.95 and 226. Although local office policies may vary, the Services generally do not work directly with or take comments from applicants without the knowledge or written delegation and consent of the federal action agency.

§ 1970.656 Definitions.

Unless repeated herein, definitions for the terms utilized are found in 50 C.F.R. 402.02, or the individual statutes, regulations, or Executive Orders.

(a) Action refers to all programs, services, or applicant activities of any kind authorized, funded, or carried out in whole or in part, by the Agency. See 7 CFR § 1970.8 for actions the Agency has determined to be subject to review under NEPA and other environmental statutes.

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(b) Agency refers collectively or individually, as appropriate, to Rural Development (Rural Housing Service, Rural Business-Cooperative Service, and Rural Utilities Service).

(c) Anadromous Fish are fish that are born in fresh water and migrate to the ocean where they mature and then return to fresh water to spawn. Examples include species of salmon, sturgeon and trout.

(d) The BA is information prepared by, or under the direction of, the Agency to determine whether an applicant's activity is likely to:

- (1) Adversely affect listed species or designated critical habitat;
- (2) Jeopardize the continued existence of species that are listed or proposed for listing; or
- (3) Adversely modify proposed critical habitat.

A BA must be prepared for major construction activities or where there is reason to believe that a species may be at risk. The outcome determines whether formal consultation or conference is necessary.

(e) The BO is a document issued by FWS or NMFS that includes:

- (1) The opinion of FWS or NMFS as to whether or not the Agency action and the subsequent applicant activity is likely to jeopardize the continued existence of listed or proposed species or result in the destruction or adverse modification of designated or proposed critical habitat;
- (2) A summary of the information on which the opinion is based;
- (3) A detailed discussion of the effects of the activity on the affected species or habitat; and
- (4) An "incidental take statement," if necessary, detailing the allowable amount of take, appropriate measures to minimize take and any monitoring and reporting requirements.

(f) Candidate Species refers to any species being considered by the Services for listing as threatened or endangered but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under ESA, these species are receiving consideration for possible listing in the future. These species should be identified and considered during the environmental review process in accordance with NEPA and Departmental Regulation 9500-4, Fish and Wildlife Policy.

(g) Conference is a process of early interagency cooperation involving informal or formal discussion between the Agency and the Services pursuant to ESA Section 7(a)(4) regarding the likely impact of Agency action on proposed species or critical habitat. Conferences are:

(1) Required for proposed federal actions likely to jeopardize proposed species, or destroy or adversely modify proposed critical habitat;

(2) Designed to help the Agency identify and resolve potential conflicts early in a proposed action's planning; and

(3) Designed to develop recommendations to minimize or avoid adverse effects to proposed species or habitat.

(h) Consultation under Section 7 of ESA requires federal agencies to consult with either FWS or NMFS if their actions could impact species or their critical habitat listed or designated under ESA. Consultation may be informal or formal.

(1) Formal Consultation is required when an applicant's activity may affect a listed species or designated critical habitat, unless the Services concur in writing that the action "is not likely to adversely affect" such species or adversely modify critical habitat. Formal consultation is a process between FWS or NMFS and the Agency that:

(i) Determines whether an applicant's proposal and resulting Agency action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat;

(ii) Begins with the Agency's written request and submittal of a complete initiation package including a BA; and

§ 1970.656 (h)(1) (Con.)

(iii) Concludes with the issuance of a BO and, if necessary, an incidental take statement.

(2) Informal Consultation is the process that includes all discussions and correspondence between the Services and the Agency or its applicant, prior to any decision to enter formal consultation. Informal consultation may, and often does, end with the concurrence of the Service that the proposed Agency action may affect, but is not likely to adversely affect listed species.

(i) Critical Habitat, designated or proposed, for listed species consists of:

(1) Specific areas within the geographical area occupied by the species in which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and

(2) Specific areas outside the geographical area currently occupied by the species but determined by the Secretary of the Interior to be essential for the conservation of the species.

(j) Designated Non-federal Representative is the person, agency, or organization designated by the Agency as its representative to conduct informal consultation or prepare a BA. For Agency programs, this normally would be the applicant or the applicant's consultant.

(k) Endangered Species is any species that is in danger of extinction throughout all or a significant portion of its range and that is listed as endangered in accordance with ESA Section 4.

(l) Incidental Take is the take of a listed species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by an Agency or its applicant. If an Agency-supported project may result in incidental take, the applicant will normally be required to obtain authorization from FWS or NMFS.

(m) Invasive Species are species that are non-native, alien, or exotic to the ecosystem under consideration, and whose introduction causes, or is likely to cause, economic or environmental harm or harm to human health.

(n) Major Construction Activity is a construction project or other undertaking which is a major federal action significantly affecting the quality of the human environment as defined under NEPA.

(o) Migratory Bird is an individual of any species protected by the MBTA, including any part, nest, egg or product of such bird. Generally, migratory birds have seasonal and predictable patterns of movement although note that MBTA applies to certain non-migrant species as well. A list of birds protected under MBTA can be found in 50 CFR § 10.13.

(p) Reasonable and Prudent Alternatives are alternative actions recommended during formal consultation that can be implemented consistent with the scope of the Agency's legal authority and jurisdiction, that are economically and technically feasible, and that FWS or NMFS believes would avoid the likelihood of jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat.

(q) Reasonable and Prudent Measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

(r) Take is to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is an action that creates the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include breeding, feeding or sheltering.

(1) Takings under ESA are allowed by two kinds of authorizations issued by the Services: Scientific take permits and incidental take statements.

(2) Takings under MBTA are not allowed under any condition although FWS has proposed implementation of such a permitting program. Currently no such program is in effect.

(3) Takings under BGEPA are permitted by FWS under certain limited conditions.

§ 1970.657 ESA Consultation.

(a) General.

(1) Under Section 7 of the ESA, federal agencies are required to consult or confer with either FWS or NMFS if their actions could impact species or critical habitat listed or designated under ESA, or proposed for listing or designation.

(2) The ESA states that federal agencies shall, in consultation with FWS or NMFS, ensure that any actions they fund or authorize are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

(3) Applicant proposals involving certain construction activities may affect protected biological resources. Therefore, the following Agency actions will normally be subject to ESA consultation or conference:

(i) All applicant proposals for financial assistance such as loans, grants, or guarantees involving construction activity; and

(ii) Sale of government-owned real estate held in inventory from foreclosure or other servicing actions where a major change in land use is reasonably foreseeable.

(4) If required, the Agency will consult with the appropriate FWS/NMFS Ecological Services field office as a part of the Agency's NEPA review process. It is important to note that ESA consultations may be necessary for all levels of NEPA review including categorical exclusions depending upon the particular circumstances or type of the proposal. All appropriate ESA documentation will be included within the Agency's NEPA documents to evidence compliance with ESA and demonstrate, when appropriate, that a categorical exclusion does not have extraordinary circumstances.

(i) Designation of non-federal representative. The ESA implementing regulations at 50 CFR § 402.08 allow the Agency to delegate informal consultation and preparation of a BA or other supporting material to non-federal applicants or their consultants. Applicants will normally fund such studies by qualified consultants; the studies are then submitted to the Agency for review and approval prior to submittal to the Services. The Agency will provide guidance to the designee,

independently review the scope and contents of any work products and maintain responsibility for compliance with Section 7 consultation requirements. Applicants may work with the Agency during consultation to review and provide comments on any responses from the Services. When the Agency designates a non-federal entity to conduct informal consultation with the Services or to prepare a BA or supporting material, the agency must notify the affected Service in writing (see Exhibit B, Attachment 1).

(ii) If the proposal under review involves financial participation or permit approval from another federal agency, the Agency may work with the other agency or agencies to determine a lead agency for consultation with the Services if timing of the reviews can be coordinated.

(iii) An evaluation of potential impacts to threatened, endangered, or proposed species or designated or proposed critical habitat includes a search of the FWS or NMFS web-based species lists (see Information for Planning and Conservation tool at ecos.fws.gov/ipac/ or other web tools approved for use by the Services). If such lists show species or habitat that could be impacted by the proposal, the Agency will contact FWS and/or NMFS with a request for consultation (refer to Exhibit B, Attachment 2 or 3 for a template letter initiating consultation with the Services).

(b) Determination of Effect. The Agency is responsible for making a determination of effect under the ESA (see Exhibit A). The determinations that can be made are:

(1) "No effect" on species; When listed species or critical habitat are not known to occur or potentially occur in the project area or if there is no mechanism for the federal action to affect the listed species or critical habitat, a "no effect" determination is documented within the NEPA review, and no further consultation with the Services is required under ESA (although consultation under other statutes, such as MBTA or BGEPA, may still be advisable). Any correspondence obtained from the Services and any other supporting information will be included in the project file.

§ 1970.657(b) (Con.)

(2) "May affect, not likely to adversely affect" protected species; when the federal action area includes areas known to be inhabited, or known to be potentially inhabited, by one or more listed species, or the project area includes critical habitat and a mechanism exists for the federal action to affect the listed species or critical habitat, the federal action "may affect" listed species or critical habitat. When the effects on listed species are expected to be discountable, insignificant or completely beneficial to the species, the proper determination is "may affect, not likely to adversely affect." Insignificant effects relate to the size of the impact and should never result in any take of the species. Discountable effects are those that are unlikely to occur. Beneficial effects are those that are positive without any adverse effect on the species. This finding can be applied to those impacts which are unlikely to occur based upon studies, risk analyses, or other documented information relevant to the species or habitat affected by the project. For this determination, the Agency has the option of entering into either informal consultation or formal consultation. The Services may request submission of a BA but may accept other documentation to support this finding.

(3) "May affect, likely to adversely affect" protected species; is the appropriate finding in a BA or conclusion of consultation if any adverse effect to the species may occur as a direct or indirect result of the action and if the effect is not discountable, insignificant or beneficial. If any incidental take is anticipated, this determination should be made and will trigger formal consultation with the Services.

(4) "Jeopardize the continued existence of the species"; is the determination made by the Services for actions that reasonably would be expected to directly or indirectly reduce the likelihood of the survival and recovery of the species by reducing the reproduction, numbers, or distribution of that species. The Agency may not approve or fund any action that is likely to jeopardize the continued existence of the species or destroy any habitat necessary for their conservation unless exemption is granted pursuant to section 7(h) of ESA.

(5) "Not result in the destruction or adverse modification of designated critical habitat"; is the determination made by the Services when the proposed action would not directly or indirectly diminish the value of the critical habitat for the survival and recovery of the species, including no adverse modification to any of the physical or biological features that were the basis for determining the habitat to be critical.

(6) "Result in the destruction or adverse modification of designated critical habitat" is the determination made by the Services when the proposed action would directly or indirectly diminish the value of the critical habitat for the survival and recovery of the species.

(c) Consultation. Consultation with the Services can be "informal" or "formal." The applicant normally participates and supports the Agency in either of these processes (see Exhibit A). In all cases, consultation should begin as soon as practicable after the preliminary details of the potential project are known and prior to any irreversible or irretrievable commitment of resources in order to avoid, minimize or mitigate any potential impacts to proposed or listed species or proposed or designated critical habitat.

(1) Informal Consultation: Most FWS and NMFS consultations begin informally. Informal consultations serve to clarify the presence of listed, proposed or candidate species or designated or proposed critical habitat in the action area and determine what effect the action may have on these resources. Informal consultation includes the steps necessary to determine whether or not formal consultation or conference is required (see Exhibit A).

(i) If the agency determines that its action may affect, but is unlikely to adversely affect a listed species or critical habitat, the SEC/NES will send a written request for informal consultation along with supporting information (such as a BA, any available surveys or other supporting documentation) to FWS or NMFS. Note that, with prior written notification and agreement with FWS and NMFS, the applicant or their consultant may initiate contact with the Services. However, the Agency retains sole authority to make the finding of effect.

§ 1970.657(c)(1) (Con.)

(ii) Documentation of the informal process is important and the project file should include such things as telephone logs, emails, letters, meeting minutes, research efforts, etc.

(ii) According to the FWS Section 7 Consultation Handbook, informal consultations (1) identify adverse effects and suggest ways to avoid them, (2) resolve project conflicts and differences of opinion between the Agency and FWS as to the nature and extent of adverse effects, (3) provide the Agency with opportunities for carrying out conservation activities pursuant to section 7(a)(1), and (4) help monitor cumulative effects on a species or ecosystem.

(iv) There is no regulatory time limit for informal consultation with FWS or NMFS; however, the Agency should request that the Services respond to the Agency's finding within thirty (30) days of receipt of the determination.

(v) Informal consultation may complete the Section 7 process and formal consultation would then not be necessary. Section 7 consultation requirements are complete if the BA or other supporting documentation results in a determination that the applicant's activity is not likely to adversely affect any listed species and/or critical habitat, and concurrence with this determination is received from the Services. The concurrence by the Services must be received and documented in the Agency's environmental file and documented in the applicable NEPA document.

(vi) A proposed project that falls within the definition of a categorical exclusion must be examined to determine the likely presence and potential impacts of the proposal on listed or proposed species and designated or proposed critical habitat. Adverse effects upon a listed species or critical habitat would be an "extraordinary circumstance" which would preclude the Agency from applying the categorical exclusion to that proposal.

(vii) If it is determined that other listed species or critical habitat may be affected before project completion, the informal consultation process may again be utilized to identify project alternatives or mitigation measures.

(viii) Whenever the results of the informal consultation process include recommendations by the Services for modifications to enhance the conservation and protection of a listed species or critical habitat, the approving official will review these recommendations and require that they be incorporated into the proposal as either design changes or inclusions in the Agency's Letter of Conditions.

(2) Formal Consultation: If the Agency determines that its action is likely to adversely affect a listed species or result in adverse modification or destruction of designated critical habitat, the SEC will notify the NES and the SEC/NES will send a written request for formal consultation to FWS or NMFS along with a BA and any other supporting information, or will request assistance from the National Office in performing such consultation. If any incidental take is possible, formal consultation (and an incidental take statement) is required.

(i) The Agency must initiate formal consultation but the applicant may be involved.

(ii) Until the consultation process is completed, as outlined in 50 CFR § 402.04, the Agency should not take the federal action if it will irreversibly or irretrievably commit resources that would subsequently preclude the consideration of modifications or alternatives to the proposed action.

(iii) Formal consultation is also triggered if, during the informal consultation process, FWS or NMFS does not concur with the Agency's finding that the proposed action is not likely to adversely affect a listed species or critical habitat.

(iv) Re-initiation of formal consultation may be necessary under certain circumstances and may be requested by either the Agency or the Services. Re-initiation will be considered when: new information changes the effect of the proposal on listed species or critical habitat not previously considered; the proposal is modified such that it causes an effect to a listed species or critical habitat that was not considered in the BA or BO; or, a new species is listed or a new critical habitat is established that may be affected by the proposal. Consultation is also re-initiated if there is an unauthorized take of a listed species as a result of project operation.

§ 1970.657(c)(2) (Con.)

(v) Whenever the results of the formal consultation process include recommendations by the Services for modifications to enhance the conservation and protection of a listed species or critical habitat, the approving official will review these recommendations and require that they be incorporated into the proposal as either design changes or inclusions in the Agency's Letter of Conditions.

(d) Conference. A conference is a process of interagency cooperation, very similar to the consultation process, designed to assist in identifying and resolving any potential conflicts with proposed species or proposed critical habitat and must be undertaken when the Agency action is likely to jeopardize the continued existence of any proposed species or proposed critical habitat. Participation of the applicant is encouraged during this process.

(1) As a result of conference, FWS or NMFS may make advisory recommendations on ways to minimize or avoid adverse effects to proposed species or habitat.

(2) If the species are listed or the critical habitat is designated prior to completion of the Agency's environmental decision document the Agency will review the proposal to determine whether formal or informal consultation is required. The criteria used to decide whether to proceed to formal or informal consultation are: significant new information about the species or critical habitat or significant changes to the applicant's proposal. Unless either criterion develops, a conference may complete the Section 7 requirements for proposed species or habitat.

(3) Whenever the results of the conference process include recommendations by the Services for modifications to enhance the conservation and protection of a proposed species or critical habitat, the approving official will review these recommendations and require that they be incorporated into the proposal as either design changes or inclusions in the Agency's Letter of Conditions.

(e) The Biological Assessment. A Biological Assessment (BA) establishes the groundwork for a determination of whether an applicant's activity is likely to adversely affect listed species or critical habitat.

(1) A BA is required for formal consultation and will help inform the Agency's decision in informal consultation.

(2) It is prepared by or under the direction of the Agency for all major construction activities and should be commensurate with the scope of the applicant's activity. For most Agency proposals, a briefer version, sometimes called a biological evaluation, will be sufficient for informal consultation. The SEC/NES may prepare the BA, although generally the Agency will delegate this to the applicant or the applicant's consultant. However, the Agency remains responsible for the contents and quality of the BA and determination(s) of effect.

(3) The Agency must complete the BA within 180 days of receiving/confirming the species list for the action area unless the FWS/NMFS field office and the Agency agree upon a different timeframe. If the BA is incomplete at this time, the species list should be updated and the BA revised accordingly.

(4) Submission of a complete initiation package initiates formal consultation and starts the regulatory clock for this process. Normally, the consultation period will conclude within 90 days of acceptance of a complete initiation package, including a BA, from the Agency, unless an extension is mutually agreed upon. For this reason, the Agency should ask the Service to confirm receipt of a complete formal consultation initiation request within 30 days of receipt of such. The confirmation of a complete package will start the 90-day clock.

(i) If the Agency and the Service mutually agree to an extension of the consultation period, it cannot be extended more than 60 days without the consent of the project applicant.

(ii) If the Service desires an extension greater than 60 days, the Service is required to solicit the views of the applicant with an explanation for the extension request, any outstanding information needed from the applicant, and a schedule for completion of consultation.

(5) The BA should include an analysis of the action area for the species under consideration, consideration of key habitat elements, biological characteristics of the listed species, potential impacts

§ 1970.657(e)(5) (Con.)

Of the proposal (including noise, disturbance, and other factors that could affect the behavior, reproduction, and general ecological functions of the listed species), cumulative impacts, and a determination of effect from the Agency. The conclusions must be supported by the information in the BA, including recommended avoidance, minimization or mitigation measures.

(6) The FWS website includes detailed guidance and a sample outline for a BA. You can find the BA guide and outline at: www.fws.gov/midwest/endangered/section7/ba_guide.html (see also Exhibit C).

(f) The Biological Opinion

(1) Within 45 days following the end of the formal 90-day consultation period, the Service will issue a BO and Incidental Take Statement (if necessary) based on information from the BA and other sources.

(2) This 45-day period will be extended by 10 days if the Agency or applicant submits written comments to the Service on any draft opinions.

(3) The BO will provide a detailed discussion of the project's impacts on protected species and habitat and will clearly state if the action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

(4) The BO will result in either a "no jeopardy" opinion or a "jeopardy" opinion (or "adverse" or "no adverse" modification of critical habitat).

(i) The process is complete if a "no jeopardy"/"no adverse modification" opinion is issued. If necessary, the BO will provide a statement on incidental take. ESA allows incidental take provided that the Agency and applicant comply with the conditions of the incidental take statement. The statement provides the extent of take of the species and specifies reasonable and prudent measures to minimize take and any associated disposal, handling and reporting requirements. These conditions must be included in the Environmental Report, Environmental Assessment/Finding Of No Significant Impact or Environmental Impact Statement/Record Of Decision and any commitment letters issued by the Agency.

(ii) If a "jeopardy"/"adverse modification" opinion is issued and the Services recommend changes to the applicant's proposal to convert the "jeopardy" opinion to a "no jeopardy" opinion, the Agency may accept any reasonable and prudent alternatives necessary to convert the "jeopardy" opinion to "no jeopardy" or deny the applicant's application.

(iii) Departmental Regulation 9500-4 stipulates that agencies of the Department will not approve, fund, or take any action that is likely to jeopardize the continued existence of threatened and endangered species or destroy any habitat necessary for their conservation unless an exemption is granted pursuant to Section 7(h).

(iv) If the Agency agrees with the recommendations to revise the applicant's proposal in order to avoid the jeopardy opinion, the Agency will ensure the applicant adopts the reasonable and prudent alternatives contained in the opinion and the Section 7 consultation process is complete.

(v) If the Agency (or applicant) cannot commit to the reasonable and prudent alternatives or reasonable and prudent measures in the opinion, the Agency will deny the application unless the Agency, through the approving official, determines that the project is of national, regional or great local significance and there are no reasonable and prudent alternatives to avoiding impact to protected species or habitat. In this case, the approving official can request a review by the Administrator to determine whether the Agency will seek an exemption from ESA. Based upon this review, the Administrator will inform the approving official whether or not the request for exemption is warranted or not.

(vi) If the Administrator believes the request for exemption is not warranted, the application shall be denied.

(vii) If the Administrator believes a request for exemption is warranted, the Administrator will request an exemption from ESA by the Endangered Species Committee established under Section 7(h) of ESA. No action will be taken by the approving

§ 1970.657(f)(4)(vii) (Con.)

official on the application until informed by the Administrator of the Committee decision on the exemption request. Such exemptions are rarely approved by the Committee.

(viii) The Agency will notify the Services in writing of the Agency's final decision to accept the recommendations or to deny the applicant's application.

(g) Emergency Consultation.

(1) Section 7 regulations recognize that an emergency may require expedited consultation. An emergency is a situation involving acts of God, disasters, casualties, national defense or security emergencies and includes response activities that must be taken to prevent imminent loss of human life or property.

(2) When emergency actions are required that may affect listed species or critical habitats, the Agency may not have the time for the administrative work required by the consultation regulations under non-emergency conditions. The Agency environmental staff (SEC/NES) will begin the initial stages of emergency consultation with the Services by telephone, facsimile, or email within 48 hours of the emergency, if possible and follow up with written correspondence as soon as possible thereafter. The NES will be kept informed of consultation status and will assist as needed.

(3) If the initial consultation indicates that the proposed action may result in jeopardy or adverse modification, and no means of reducing or avoiding this effect are apparent, the Agency will be advised by the Services. Timeframes for Service response will vary according to FWS/NMFS regional guidance. If incidental take is anticipated during the emergency response, the Services will advise the Agency during the consultation phase of ways to minimize take.

(4) As soon as practicable after the emergency is under control, the Agency will initiate formal consultation with the Services, as appropriate, if listed species or critical habitat have been adversely affected. Although formal consultation occurs after the response to the emergency, procedurally it is treated like any other formal consultation.

(5) The Agency will provide the following information to initiate a formal consultation following an emergency: a description of the emergency; a justification for the expedited consultation; an evaluation of the response to and the impacts of the emergency on affected listed species and their critical habitats; documentation of how the Services' recommendations were implemented; and the results of efforts to minimize take.

§ 1970.658 MBTA and BGEPA.

(a) MBTA makes it unlawful to pursue, hunt, take, capture, kill or sell migratory birds or parts of birds (feathers, eggs, etc.). For a list of migratory bird species protected under MBTA, see 50 CFR § 10.13 or generate a location-specific list using the FWS IPAC website (ecos.fws.gov/ipac) or other FWS-approved site (see Exhibit F for more information).

(1) The statute applies to private actions, rather than directly to federal actions, so the Agency's role is advisory to applicants.

(2) Early coordination with FWS is necessary for achieving full consideration of avian species and for resolving potential resource conflicts. Identification of potential issues early in the planning process limits the need for subsequent intensive FWS review and minimizes conflicts.

(3) Standard mitigation measures have been developed to minimize or eliminate potential problems. Many utilities have or are in the process of developing avian protection plans to reduce impact on migratory birds. The same principles of an avian protection plan can be applied to other types of projects (see Exhibit D).

(4) Examples of applicant proposals that are most likely to result in a take of migratory birds or eagles are: construction of above-ground utilities, wind turbines, clearing or grubbing of migratory bird nesting habitat during the nesting season when eggs or young are likely to be present, demolition activities, or reconstruction activities where bird nests are present (e.g., swallows or other species that nest in or on buildings).

§ 1970.658(a) (Con.)

(5) FWS has issued guidance for land-based wind developers. These voluntary guidelines were designed to provide developers with the information they need to make the best possible decisions in selecting sites for wind energy facilities to avoid and minimize the negative effects to fish, wildlife, plants and their habitats. Using a "tiered approach" for assessing potential effects to wildlife and their habitats, the guidelines present an iterative decision-making process for collecting information in increasing detail, quantifying the possible risks of proposed wind energy projects to wildlife, and their habitats, evaluating those risks to select sites, and making construction and operation decisions. The guidance and associated documents are at:

www.fws.gov/midwest/wind/resources/guidances.html. For a summary of the tiered approach of the wind energy guidelines, see Exhibit E.

(b) BGEPA continues to provide protection for bald and golden eagles even though bald eagles have been delisted under ESA. The National Bald Eagle Management guidelines were published in 2007:

www.fws.gov/migratorybirds/CurrentBirdIssues/Management/BaldEagle/NationalBaldEagleManagementGuidelines.pdf. It should be noted that some FWS regions have specific management plans in place and, in some cases, state management plans apply as well.

(1) BGEPA prohibits the take, possession, sale, purchase, barter, or transport of any bald or golden eagles or parts or nests thereof. Additional limited take provisions for bald and golden eagles, and their nests, were issued in 2009 (50 CFR §§ 13 and 22).

(2) Many of the measures developed in avian protection plans are applicable to the protection of bald and golden eagles as well.

(c) Both MBTA and BGEPA apply to actions taken by applicants. Therefore, the Agency will advise its applicants of their need to consult directly with FWS and will assist in this consultation when possible.

(1) The unauthorized take of migratory birds or bald and golden eagles is a strict liability criminal offense which does not require knowledge or specific intent on the part of the offender. As such, even when engaged in an otherwise legal activity where the intent is not to kill or injure migratory birds or eagles, violations can occur if bird death or injury results.

(2) It is the responsibility of the applicant to understand and comply with MBTA and BGEPA.

(3) Note that FWS is considering the issuance of special utility permits which will allow or expand unintended or non-purposeful take of eagles and migratory birds in certain circumstances; however, no such permit program has yet been implemented.

(d) Applicant proposals involving the construction of overhead power lines, wind turbines, or telecommunications towers may require pre- and post-construction monitoring, development of an avian protection plan that identifies measures to avoid or minimize impacts as well as other best practices to limit potential takings, or other mitigation measures to eliminate or minimize takings of birds protected under MBTA or BGEPA.

§ 1970.659 Invasive Species.

(a) Non-native species can cause significant changes to ecosystems, upset the ecological balance, and cause economic harm to our nation's agricultural and recreational sectors. Executive Order 13112 addresses the growing environmental and economic threat of invasive species, both plants and animals, and directs federal agencies to use relevant programs and authorities to work to prevent and control the introduction and spread of such species.

(b) Under Order 13112, the Agency cannot authorize, fund, or carry out actions that are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless all reasonable measures to minimize risk of harm have been analyzed and considered. Complying with Order 13112 means that federal assistance cannot be used for construction, re-vegetation, or landscaping of project areas that purposely include the use of known invasive plant species.

(c) A determination of the likelihood of introducing or spreading invasive species and a description of the measures being taken to minimize their potential harm is necessary to meet Agency responsibilities under NEPA. Consideration of invasive species should occur during all phases of the environmental review process. For example, early discussions with agencies with special expertise should identify the potential effects from invasive species and include possible prevention and control measures.

§ 1970.659 (Con.)

(d) The National Invasive Species Council was established by Order 13112 to ensure federal programs and activities to prevent and control invasive species are coordinated, effective and efficient. The National Invasive Species Council provides overall management, planning, and coordination for federal and state agencies to address invasive species: www.invasivespecies.gov. Additional information on invasive species is found at the National Invasive Species Information Center: www.invasivespeciesinfo.gov.

§ 1970.660 The Magnuson-Stevens Act.

The Magnuson-Stevens Act is the primary law governing marine fisheries and is implemented by NMFS. The law prohibits activities that may adversely affect essential fish habitat. If an Agency action may adversely affect essential fish habitat, disclosure and consideration of the impact in either an Environmental Assessment or Environmental Impact Statement is required. The assessment of effect and any required mitigation are developed in consultation with NMFS following a process similar to ESA Section 7 consultation.

§ 1970.661 Fish and Wildlife Coordination Act.

The Fish and Wildlife Coordination Act establishes equal considerations for fish and wildlife along with other values when federal actions result in the control or modification of a stream or water body. The Act provides the authority for FWS to evaluate impacts to fish and wildlife resources for proposed water resource development projects. The Agency must consult with FWS and with applicable state wildlife agencies on proposed projects with potential impacts on fish and wildlife resources. Any recommendations developed in this consultation are not binding but should be given full consideration by the Agency. Note that water impoundment projects of less than 10 acres of surface area are exempt from consultation requirements under this Act, although consultation requirements under NEPA, ESA or other statutes may still apply (The Tennessee Valley Authority is specifically exempted by statute from this requirement).

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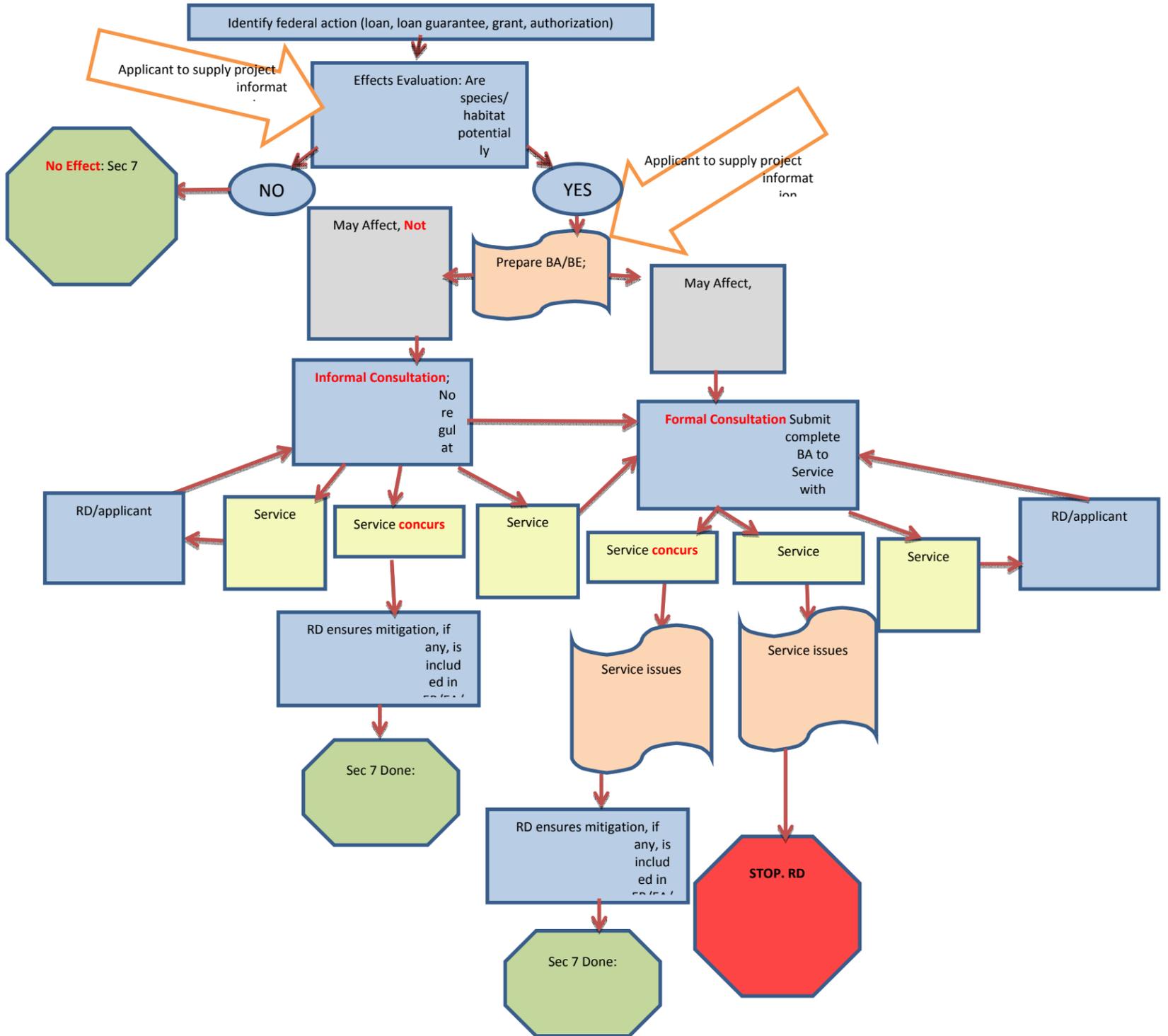
§ 1970.662 Marine Mammal Protection Act.

The Marine Mammal Protection Act prohibits actions that may result in take of any marine mammal. Any Agency actions with the potential to take a marine mammal require consultation with NMFS (for seals, sea lions, whales or dolphins) or FWS (sea otters, polar bears, walruses, and manatees) following a process similar to ESA Section 7 consultation. Mitigation actions, developed in consultation with the Services, to avoid or minimize the potential take must be implemented and incidental take or incidental harassment permits may be necessary.

Exhibits - A, B, C, D, E, F and G

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Consultation Flowchart



Designation of Non-Federal Representative

[Insert Date]

[Insert address of
FWS Ecological Services Field Office
or NMFS Office
for State]

Re: USDA [RHS, RBS, RUS] Improvement Project [insert title of project]:
Designation of Nonfederal Representative

Dear _____,

USDA [insert agency] is in receipt of an application for financial assistance submitted by [name of applicant] for the purpose of [brief description of project], located in [city, county, state]. This project may affect listed or proposed species and/or designated or proposed critical habitat. Species or habitat potentially present in the action area include [insert list of proposed or listed species or proposed or designated critical habitat].

To facilitate Section 7 consultation, we are designating [entity] as our nonfederal representative for the purpose of initiating informal consultation with [FWS or NMFS]. The role of the nonfederal representative includes conducting studies, attending meetings, participating in telephone and email contact, developing draft biological assessments, etc., in support of our eventual Endangered Species Act determination. The authority for making Endangered Species Act determinations remains with USDA-[agency]. The USDA-[agency] contact for this project is [Agency environmental staff]. [Agency environmental staff] can be reached at [insert Environmental staff email and telephone].

Sincerely,

SEC/NES

cc: Applicant (and designated representative if different from applicant,
such as a consultant)
Staff Director

Informal Consultation and Concurrence Request

[Insert Date]

[Insert address of
 FWS Ecological Services Field Office or NMFS Office
 for State]

Re: USDA [RHS, RBS, RUS] Improvement Project [insert title of project]:
 Request for Informal Consultation and Concurrence of Not Likely to Adversely
 Affect Finding

Dear _____,

USDA [insert agency] is in receipt of an application for financial assistance submitted by [name of applicant] for the purpose of [brief description of project]. The proposed project is located in [city, county, state] and involves [describe area of impact, adjacent area, ground disturbance, tree removal, impact to streams, wetlands, equipment involved, etc.] Construction of this project is anticipated to start on/around [date] and conclude by [date].

Based on results from FWS's IPaC planning tool (attached) obtained on [insert date of IPaC search], the following species and/or habitat may be present in the action area:
 [Modify table as needed; include all T&E species and habitat, including proposed.]

| Species | Critical Habitat | Status | Notes | ESA Determination |
|-----------|------------------|------------|---|--|
| Species 1 | None | Threatened | No suitable habitat present. | No effect |
| Species 2 | None | Endangered | Suitable habitat present. Survey conducted on [date]: negative. | May affect, not likely to adversely affect |
| Species 3 | Proposed | Proposed | Design changes to avoid impact. | No adverse modification |

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Exhibit B
Attachment B-2
Page 2

[If required, add a paragraph explaining conclusions reached above, including any project design considerations or mitigation measures. If any surveys, habitat evaluations, etc., were conducted to support the finding, briefly describe and attach.]

Based on the above analysis, we conclude that financial assistance for this project may affect, but is not likely to adversely affect any listed or proposed species or result in the adverse modification of any designated or proposed critical habitat. With this letter, we request your participation in informal consultation per Section 7 of the Endangered Species Act and seek your concurrence with our finding. We respectfully request a response within 30 days.

Sincerely,

Agency environmental staff

Attachments

1. IPaC Species List
2. Project Sketch
3. Any other pertinent information to support our determination (such as presence/absence surveys, literature reviews, etc.)

Formal consultation Request

[Insert Date]

[Insert address of
 FWS Ecological Services Field Office or
 NMFS Office for State]

Re: USDA [RHS, RBS, RUS] Improvement Project [insert title of project]:
 Request for Formal Consultation

Dear _____,

USDA [insert agency] is in receipt of an application for financial assistance submitted by [name of applicant] for the purpose of [brief description of project]. The proposed project is located in [city, county, state] and involves [describe area of impact, adjacent area, ground disturbance, tree removal, impact to streams, wetlands, equipment involved, etc.] Construction of this project is anticipated to start on/around [date] and conclude by [date].

Based on results from FWS's IPaC planning tool (attached) obtained on [insert date of IPaC search] and the attached Biological Assessment, the following species and/or habitat may be present in the action area:
 [Modify table as needed.]

| Species | Critical Habitat | Status | Notes | ESA Determiantion |
|-----------|------------------|------------|---|--|
| Species 1 | None | Endangered | Suitable habitat present. Survey conducted on [date]: positive. | May affect, likely to adversely affect |
| Species 2 | None | Threatened | No suitable habitat present. | No effect |
| Species 3 | Proposed | Proposed | Design changes to avoid impact. | No adverse modification |

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Exhibit B
Attachment B-3
Page 2

Based on the above analysis, we conclude that financial assistance for this project is likely to adversely affect the [list species or designated habitat which may be adversely affected]. With this letter, we request your participation in formal consultation per Section 7 of the Endangered Species Act.

We are submitting the attached Biological Assessment in support of this request; please provide a courtesy receipt acknowledging a complete submittal package within 30 days.

Sincerely,

[Staff Director]

Attachments

1. IPaC Species List
- 2.
3. Biological Assessment

Exhibit C: Guidance for Preparing Biological Assessments

Under the Endangered Species Act, the Agency must ensure any action it funds, authorizes, or carries out is not likely to jeopardize the continued existence of any listed species of plant or animal or result in the destruction or adverse modification of designated critical habitat. When threatened or endangered species or designated critical habitat may be affected by the action, the Agency must consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (collectively, the Services). Note that both agencies have statutory and regulatory jurisdiction over endangered species and share responsibility for consultation. In general, NMFS has jurisdiction over sea-dwelling organisms and anadromous fish while FWS consults on the remaining protected species and critical habitat.

In initiating project review, the Agency will evaluate the impact of the federal action on any listed or proposed species or designated or proposed critical habitat. While the first step is generally to determine whether or not these species or habitat are present within the action area of the project, there is often not enough information available to make an effect determination from a simple review of a species list. Supplemental information may be necessary to support the Agency's finding of effect, or such information may be requested by the Services upon submission of an Agency determination. Generally, a Biological Assessment (BA) will be developed to supply this information, and will contain sufficient information to evaluate the potential effects of the Agency's actions on protected resources.

Note that the FWS often distinguishes between a BA and Biological Evaluation (BE). Although they are similar documents with much the same information, a BE is generally less detailed than a BA. The FWS regulations limit the requirement to submit a BA to "major construction activities." By definition, major construction activities are major federal actions significantly affecting the quality of the human environment (50 CFR 402.02). For Agency actions significantly affecting the environment, 7 CFR 1970.101(a) requires preparation of an Environmental Impact Statement. However, the Agency may require supporting information on protected biological resources when evaluating impacts that otherwise qualify for an Environmental Assessment or Categorical Exclusion. In these cases, a BA or BE may be prepared. The contents of a BA can vary according to the parties involved, the action and the resources potentially impacted and may include such things as presence/absence surveys, literature reviews, habitat evaluation, alternatives analysis, etc.

When preparing a BA, it is necessary to include all listed and proposed species as well as all designated and proposed critical habitat within the action area, not just the species or habitat potentially affected by the agency action. The action area is defined as 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).

If the Agency has designated a non-federal representative, such as the applicant or the applicant's consultant, to participate in informal consultation on its behalf, the non-federal designee may prepare the BA. However, the Agency remains responsible for the content of the BA and any resultant determinations of effect. The Agency will provide guidance and independently review the quality of the draft BA before submitting it to the Services.

The BA should present a complete description of the proposed project and analysis of potential effects the project may have on protected resources. While the contents of a BA are at the Agency's discretion, key components can be found at 50 CFR 102.12(f) and include the following:

- **Introduction and Project Description**
This section should provide a complete description of the proposed project. The description should include what portion of the action is being funded, authorized, or carried out by the Agency (and under what authority) and what, if any, other federal, state or local agencies are involved. Describe the direct effects of the Agency action and any indirect effects of associated project elements regardless of funding source. Briefly describe construction techniques and schedule, equipment involved, footprint of proposed activity including any haul routes or staging areas, total acreage disturbed, number of trees to be removed, amount of fill to be used, etc. Preliminary design sketches and location maps may be useful.
- **Existing Conditions and Action Area**
Describe the topography, climate and vegetative community as it currently exists at the project site. Define the limits of the action area, which may be larger than the footprint of the project if the action may induce physical, chemical or biological effects that are beyond the immediate project area (e.g., paving a parking lot would increase the amount of impervious surfaces and may result in increased pollutant runoff into local waterbodies thus affecting larger areas of the watershed). List any known wetlands or water bodies and any unique soil types found in the area. Include a description of the surrounding area and current land use. Photographs and maps of the site may be useful.

- **Species and Habitat Considered**
List any proposed or listed species or proposed or designated critical habitat in the project area. Use the species list provided by the FWS/NMFS office in your state, or generated automatically by a FWS/NMFS-approved site, such as the Information Planning and Conservation (IPac) website hosted by the Service (ecos.fws.gov/ipac). Note that any species list must be no more than 90 days old when the BA is initiated (50 CFR 102.12(e)). If the Agency determines that a species may be present in the general area but not in the action area, explain why the species is not expected to occur in the action area.
- **Analysis of Effect**
For each species or habitat present or potentially present in the action area, provide an analysis of the project's impact on the resource. Habitat requirements may be found in Federal Register listing documents, published recovery plans, peer-reviewed literature and other sources. If a site visit and habitat evaluation was conducted, include the qualifications of the individuals performing the evaluation. Likewise, if presence/absence surveys or other biological studies were conducted, list the qualifications of the individuals conducting the study. Provide a concise description of survey methods, dates conducted, etc. List any permits that may have been acquired in conduction of the survey. Provide maps and data points. If the presence or absence of a species or habitat was gleaned through a literature search, cite any publications and ensure publication date is recent. Document discussions, if any, with qualified experts. If several project alternatives are being considered, describe the impacts of each alternative on the species or habitat affected.
- **Mitigation**
Describe any mitigation measures that will be implemented to avoid or minimize the impact to species or habitat. Consult with engineers, the project applicant and subject matter experts at the Service or elsewhere to develop sound mitigation strategies that still meet the purpose and need of the project. Describe whether mitigation measures will be incorporated into the project design and construction schedule, or will be implemented at a later time (such as habitat restoration following a temporary construction project, etc.). Indicate how implementation of mitigation measures will be monitored and tracked for completion and effectiveness.

- **Determinations of Effect**
Make a determination of effect for each species or habitat listed. Consider all effects of the proposed project on the species or habitat, including beneficial effects, and be sure to consider direct, indirect and cumulative effects of the action on the species or habitat involved. Describe any effects the proposed action might have and what specific components of the action would cause the effect (e.g., lights, noise, tree removal, soil compaction, etc.) and the duration and expected intensity of the effect. Describe how the species may be affected (loss of foraging habitat, interruption of breeding season, incidental take, etc.) and if the impact is expected to be temporary or permanent. For each species or habitat, the Agency is responsible for making a determination of effect under the Endangered Species Act. The determinations that can be made are described in subpart N.
- **Literature Cited and List of Preparers**
Include any academic research, previous studies or contact with subject matter experts relied upon in making determinations of effect. Identify the preparer of the BA but remember that the Agency is responsible for the quality and scope of the document and must make the effects determinations.
- **Include a cover letter when submitting the BA to the Service (see Exhibit B, Attachments 2 and 3).** The letter should state that the Agency is submitting a BA to meet Section 7 consultation requirements for a particular project and explain the Agency's role in supporting the project. Identify if the Agency is requesting informal or formal consultation. Summarize the results of the BA and request concurrence from the Service for the Agency's determination of effect for each species and habitat potentially affected by the project. If the Agency is entering into informal consultation, request that the Service respond within 30 days of receipt of the complete BA. Formal consultation timelines are prescribed at 50 CFR 402.14.

Avian Protection Plan Guidelines

In 2005, guidelines were developed by Fish and Wildlife Service (FWS) in partnership with the Avian Power Line Interaction Committee. The guidelines are designed to help utilities prepare an Avian Protection Plan (APP) to reduce avian mortalities with electric and telecom facilities. Working with the guidelines, a utility can use the latest technology and science to tailor a voluntary APP that meets specific utility needs.

An APP is utility-specific and is designed to reduce avian and operational risks that result from avian interactions with electric utility facilities. It can be both proactive and reactive in nature.

Electrocutions are a particular threat to birds with large wingspans, such as eagles, hawks, and owls, all species protected under the Migratory Bird Treaty Act. Wire strikes are a serious problem for many different bird species. Birds can also cause power outages and fires resulting in increased costs and inconvenience for electric utilities and their customers.

These guidelines are intended to help utilities manage avian issues and offer a toolbox that utilities can use to create a specific program that meets its needs to minimize or eliminate avian deaths.

The 12 principles of an APP are:

- Corporate Policy
- Training
- Permit Compliance
- Construction Design Standards
- Nest Management
- Avian Reporting System
- Risk Management Methodology
- Mortality Reduction Measures
- Avian Enhancement Options
- Quality Control
- Public Awareness
- Key Resources

The APP are discussed in detail on the following two websites:

<http://www.aplic.org/APPs.php>

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<https://birdreport.fws.gov/AvianProtectionPlan.cfm>

Other helpful documents include:

Suggested Practices for Avian Protection on Power Lines: The State of the Art
in 2006

HYPERLINK

[www.aplic.org/uploads/files/2613/SuggestedPractices2006\(LR-2watermark\).pdf](http://www.aplic.org/uploads/files/2613/SuggestedPractices2006(LR-2watermark).pdf)

Reducing Avian Collisions with Power Lines: The State of the Art in 2012

[www.aplic.org/uploads/files/15518/Reducing_Avian_Collisions_2012watermarkLR.p
df](http://www.aplic.org/uploads/files/15518/Reducing_Avian_Collisions_2012watermarkLR.pdf)

Best Management Practices for Electric Utilities in Sage Grouse Habitat

www.aplic.org/uploads/files/15646/SAGR%20BMP%20FINAL_June%202015.pdf

SUBPART E WIND ENERGY GUIDELINES

Advances in wind energy technologies and increased interest in renewable energy sources have resulted in the rapid expansion of the wind energy industry in the United States. Fish and Wildlife Service's (FWS) final Voluntary Land-Based Wind Energy Guidelines will help shape the smart siting, design, and operation of the expanding wind energy operations. These voluntary guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind development. They also provide effective communication among wind developers and federal, state, tribal and local conservation agencies. In addition, the guidelines provide best management practices for site-development, construction, retrofits, repowering and decommissioning wind facilities.

Project developers should contact FWS early in the development process to identify and possibly avoid areas of high wildlife impact. Early consultation could avoid difficult or costly measures necessary at a later stage in the project. Impacts to wildlife may potentially affect migratory birds, bats, bald and golden eagles and other birds of prey, prairie and sage grouse, and listed, proposed, or candidate threatened and endangered species.

Impacts to wildlife include:

- Collisions with turbines and associated infrastructure
- Loss and degradation of habitat from site development
- Fragmentation of large habitat blocks into smaller segments that may not support sensitive species
- Displacement and behavioral changes
- Indirect effects such as increased predator populations or introduction of invasive plants
- Indirect effects related to the construction of electrical facilities in the area

The final guidelines and associated training materials are available on the following website:

www.fws.gov/windenergy

www.fws.gov/ecological-services/energy-development/wind-training-materials.html

Other resources include:

Developing Power Pole Modification Agreements For Compensatory Eagle Mitigation For Wind Energy Projects

www.aplic.org/uploads/files/15523/APLIC%20PPM%20FINAL_June%202014.pdf

Exhibit F: Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (16 USC § 701-12, 1918) (MBTA) serves to implement several international treaties and agreements to protect migratory birds primarily from poaching and commercial hunting. It is administered by the Fish and Wildlife Service (FWS) and applies to most native U.S. birds, even short-distance migrants or non-migratory birds. Introduced birds, such as the English Sparrow and European Starling, are not protected under the Act. See 50 CFR 10.13 for the complete list of over 1000 species of protected birds.

MBTA is a criminal statute prohibiting take of migratory birds, nests, eggs or parts. Note the definition of "take" in MBTA differs from the definition found in the Endangered Species Act. Unless permitted by FWS, MBTA establishes a prohibition to:

pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or case to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention...or any part, nest, or egg of such bird.
(16 USC § 704)

Some exemptions and permitted activities are allowed for scientific, public safety, education and religious reasons, and some migratory game birds may be hunted in season.

Prosecution of violations of MBTA is the jurisdiction of the United States; there is no citizen suit provision in the statute. However, the District of Columbia Circuit Court has ruled that citizens may bring suit against federal agencies for MBTA violations under the Administrative Procedures Act (Human Soc'y of the US vs Glickman, 217 F 3d 882, DC Circuit Court, 2000). Other courts have not universally followed this view.

A knowing violation of this act is a felony offense; other violations are misdemeanors. The statute is unclear of the consequence of incidental take. On May 26, 2015, the FWS initiated an environmental review of a proposal to regulate incidental take under MBTA under a permitting program to bring clarity to the process.

Until such a permitting program is implemented, the Agency will encourage applicants to work with FWS on developing voluntary guidelines and best practices to minimize or eliminate incidental take.

To comply with the spirit and letter of MBTA, Agency projects must avoid impacts on nesting birds during construction projects. Note that bird nests may be found throughout a project site, such as under building eaves, on bridges, on utility and light poles, in culverts, on stream banks, in stumps and standing deadwood, in crevices and under bark, in shrubs and on the ground. It may be necessary to survey a project site for the presence of migratory birds or their nests or avoid construction during nesting season (which will vary with latitude and species present). FWS and state wildlife agency should be consulted to provide locality-specific data on migratory birds and their nesting seasons.

Due in part to MBTA and other statutes protecting birds in the United States, FWS and the Edison Electric Institute's Avian Power Line Interaction Committee jointly issued guidance designed to minimize adverse impacts to birds from power lines (Avian Protection Plan Guidelines, 2005). Working with these voluntary guidelines, utilities can implement programs best suited to their endeavors while furthering conservation of birds without further consultation with FWS. According to the Guidelines, a utility that implements the principles contained therein through development of an Avian Protection Plan will greatly reduce avian risk as well as its own risk of enforcement under MBTA. For more information on Avian Protection Plans, see Exhibit 4 of this Subpart.

The Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (16 USC § 668a-d, 1940) (BGEPA) was promulgated to specifically protect these two species of eagles. The statute is implemented by FWS and provides criminal and civil penalties for activities resulting in the take of these birds, unless permitted by FWS for exhibition, scientific, religious, or certain other limited purposes. All persons and activities, not just those with a federal nexus, are subject to BGEPA.

Note that "take" under BGEPA applies to not only direct taking of individual birds, parts, eggs or nests but also to disturbance of these birds. "Disturb" is defined in the implementing regulations as "to agitate or bother a bald or golden eagle to a degree that cause, or is likely to cause... 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior (50 CFR 22.3).

In its national Bald Eagle Management Guidelines (May 2007) the FWS clarified that disturbance also "covers impacts that result from human-caused alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagles return, such alterations agitate or bother and eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering" behavior.

Construction activity during sensitive phases of eagle life cycles, such as nest-building, nesting, and fledging stages, can disturb eagles to the point of causing prolonged absences of adults from the nests, disrupting foraging schedules or resulting in premature fledging of hatchlings. All of these disturbances can affect mortality and reproduction rates in eagles and would be considered disturbances, and thus violations, of the Act. Whether the eagles respond negatively to such human activities depends on many factors, such as topography and the presence of vegetated buffers that interrupt the sightline of the eagles to the activity, duration of activity, noise levels, and size of impacted area. Eagles show large variability in tolerance to human activities but, in general, eagles are not as sensitive to human activities during migration and over the wintering periods. However, wintering eagles depend on established roost sites for access to shelter and foraging areas.

In 2007, FWS developed National Bald Eagle Management Guidelines to minimize impact to eagles from a variety of human activities. The Guidelines recommend the following measures to minimize impact to eagles:

- 1) Establish distance buffers between human activity and nests
- 2) Maintain landscape buffers between human activity and nests
- 3) Avoiding activities during breeding season

The size and shape of adequate buffers will vary depending on topology and other ecological characteristics surrounding the nest site but recommendations in the Guidelines range from 330 feet to 660 feet. However, in open areas with little vegetation, the distance between the activity and the nest may need to be greater. For assistance in determining the size and configuration of protective buffers, and timing restrictions on activities, the Agency should contact a FWS Field Office. In some cases, implementing and enforcing the measures in the Guideline will preclude the need to obtain an unintended take permit from the FWS.

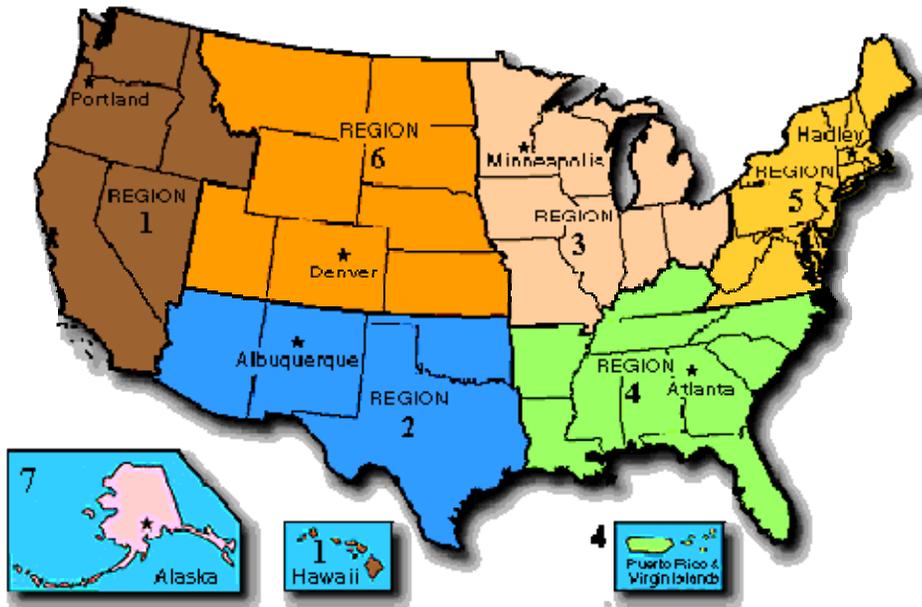
The FWS has implemented a permitting process whereby actions that are otherwise lawful, but could result in unintended, unavoidable take of an eagle may be permitted under certain conditions. These permits may authorize take only when the take cannot be practicably avoided; permits may not be issued for intentional killing or injury of eagles. Most permits will have mitigation and monitoring requirements.

In counties where eagles are known to occur, Agency-supported projects should be evaluated for the impact to eagles and the need for the applicant to obtain a take permit. Activities that may result in unintended take of eagles, including disturbance, are construction, installation of utility lines, expanded agricultural or aquacultural activities, alteration of wetlands, water impoundment, oil and gas operations, etc., especially if such activity may be visible from a known nest. For regulatory requirements for eagle permits, see 50 CFR Part 22.

While following the Guidelines and implementing protective measures provide some assurance of enforcement discretion under BGEPA and MBTA, some states and local jurisdictions have additional laws and regulations related to the protection of eagles. Projects that may impact eagles should also be coordinated with state wildlife agencies.

Note that FWS de-listed the Bald Eagle as a protected species in most of its range in 2007, although it is still protected under BGEPA and MBTA. However, Bald Eagle considerations and findings are no longer required, and should not be included, in Biological Assessments developed in compliance with the Endangered Species Act.

US Fish and Wildlife Service Regional Map



U.S. Fish & Wildlife Service Regions

Region 1: Pacific Region

Idaho, Oregon, Washington, Hawaii and the Pacific Islands

Region 2: Southwest Region

Arizona, New Mexico, Oklahoma, Texas

Region 3: Great Lakes-Big Rivers Region

Illinois, Indiana, Iowa, Michigan, Missouri, Minnesota, Ohio, Wisconsin

Region 4: Southeast Region

Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico/Virgin Islands

Region 5: Northeast Region

Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia

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Region 6: Mountain-Prairie Region

Colorado, Kansas, Montana, North Dakota, Nebraska, South Dakota, Utah,
Wyoming

Region 7: Alaska Region

Alaska

Region 8: Pacific Southwest Region

California, Nevada, Klamath Basin of Oregon

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