

# TECHNICAL NOTE

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USDA NATURAL RESOURCES CONSERVATION SERVICE PACIFIC ISLANDS AREA

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## Biology Technical Note – No. 18

### ESA SECTION 7 COMPLIANCE PROCESS

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

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

- conservation practices/plans to be implemented by NRCS clients with the assistance of USDA program **funding**; and
- all **permitted** actions, such as Compatible Use Permits for grazing on land covered by Wetland Reserve Program (WRP) easements.

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

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

1. **“No Effect”**: Involves documenting a “No Effect” determination via a “No Effect” Worksheet.
2. **“Not Likely to Adversely Affect (NLAA)”**: Informal consultation via letter sent to FWS and/or NMFS for concurrence for Threatened and Endangered species or designated Critical Habitat, or documentation for Candidate species.
3. **“Adverse Affect”**: Formal consultation with FWS and/or NOAA required for Threatened or Endangered Species or designated Critical Habitat or documentation for Candidate species. Contact NRCS-PIA State Biologist.

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

## 1. Conduct Complete Species Inventory

### Complete Species Inventory = Off-Site Species Inventory + On-Site Species Inventory<sup>1</sup>

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

To request that a C, T, and E species map and table be prepared for a project area, planners should complete Attachment A — C, T, and E Species Map and Table Request Form. Send completed forms to the ESA Coordinator as an email attachment to: [krista@islandgeo.com](mailto:krista@islandgeo.com). You will receive an email confirmation when your request is received. Please contact the NRCS-PIA State Biologist, if you have not received an email confirmation within **7 days** or your request has not been fulfilled within **30 days**.

- B. **On-Site Inventory** takes place during one or more field site visits and incorporates observations made directly by the conservation planner as well as information obtained from the client. Conservation planners are free to request assistance from local experts including other conservation partners *i.e.* State of Hawaii, Department of Land and Natural Resources; qualified specialists including the NRCS-PIA State Biologist, and FWS or NOAA personnel. The planner should also assess the presence or absence of suitable C, T, and E habitat.

## 2. Identify Potential Effects

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

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

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<sup>1</sup> A species inventory is part of the general resource inventory which includes soil, water, air, plants, animals, humans, and energy which is produced for all clients regardless of whether or not they receive Federal (*i.e.* Farm Bill) funding from NRCS. Planners should use Conservation Planning Technical Note No. 1 the Resource Problem Worksheets to document the natural resources that have been identified as problems in a client's planning unit.

### 3. Make Determination of Effect

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

Use Attachment B – Determination Worksheet to document the effects analysis.

**A. “No Effect” Determination** - a “No Effect” determination can be made if the following requirements are met and a NRCS staff person has been to the site and agrees with the determination:

1. The project area is NOT located within critical habitat.
2. The Hawaii Biodiversity and Mapping Program database or Guam/CMNI database or American Samoa equivalent was consulted and indicates the following about listed C, T, and E species:

a. There are NO occurrences of listed species within a 1/3 mile radius of the project area or no listed animals in a locally relevant area.

OR

b. There ARE occurrences of listed C, T, or E species within a 1/3 mile radius or listed animals in a locally relevant area, however, the project is NOT expected to directly or indirectly result in ANY short-term or long-term effect, including any effect which could benefit the species.

If 2b is the answer, one of the following may be used as the reasoning to declare a “No Effect”:

- Species sighting is OLD (> 20 years old)
- Species is EXTINCT (no longer found in the wild)
- NO HABITAT for species found in project area
- Species NOT FOUND during NRCS site visit(s)
- Listed practices will have no effect on species

### **B. “Not Likely to Adversely Affect” (NLAA) Determination**

A “Not Likely to Adversely Affect” determination can be made if avoidance and/or mitigation measures are incorporated into the project to avoid adverse effects to the point of those effects being **insignificant** (of such small scale that no “take” would occur), **discountable** (extremely unlikely to occur), or **wholly beneficial**.

### **C. “Adverse Affect” Determination**

An “Adverse Affect” determination is made when the project cannot be modified to reach the insignificant, discountable, or wholly beneficial level for all effects.

## 4. Complete Consultation Requirements

### A. “No Effect” Documentation

If a “No Effect” determination is made it needs to be documented in the files. The process for a “No Effect” determination is as follows:

1. Planners complete the “**No Effect**” section of Attachment B – Determination Worksheet, Section C.
2. Planners complete section D. and send the Determination Worksheet, along with the C, T, and E map and data table as an email attachment to the ESA Coordinator for review: [krista@islandgeo.com](mailto:krista@islandgeo.com).
3. The ESA Coordinator will review the documents and complete section E. of the Determination Worksheet, and forward all of the documents to the State Biologist for final review and approval.
4. The State Biologist (or designated representative) will review the documents and complete section F. of the Determination Worksheet to document final approval, and email it back to the planner.
5. The planner files a copy of the Determination Worksheet, C, T, and E species map, and the data table in the client’s conservation plan file.

The Determination Worksheet is a Microsoft Excel® document which may be completed as a form. Part B. of the worksheet documents the project description and Part C. documents the “No Effect” determination. This should be completed for all actions that will have no effect on C, T, or E species.

### B. “Not Likely to Adversely Affect” Information Consultation

If a “Not Likely to Adversely Affect” determination is made on any of the proposed actions, an informal consultation is required. If any action may affect a listed Threatened or Endangered species, note that effect in part B. of the Determination Worksheet (lines 27 and 28).

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

For those practices/actions that may affect a listed T or E species, a NLAA informal consultation involves preparing and sending a Section 7 letter to the FWS and/or NOAA for their concurrence.

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

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

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

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

- Date, client name, project location, NRCS program, NRCS contract number.
- Project area description.
- Project description (including proposed conservation practices which may affect T or E species and their associated actions that may affect those species).
- Threatened and endangered species and/or critical habitat known to exist or believed to exist in the action area and surrounding 1/3 mile buffer or listed animals on the map and/or in a locally relevant area.
- Proposed avoidance or mitigation measures for those actions determined to have a potential adverse effect.
- Contact information for the planner.

**Note:** FWS and NMFS have different information and formatting requirements. Refer to the FWS letter template and sample letter for an informal consultation letter to the FWS. Refer to the NMFS letter template and sample letter for an informal consultation letter to NMFS.

### **C. “Adverse Effect” Formal Consultation**

If an “Adverse Effect” determination is made, a formal Section 7 consultation must occur. Planners are to contact the State Biologist for further assistance.

#### **For Additional Information**

If you have questions about this technical note, please contact Gregory Koob, State Biologist, NRCS Pacific Islands Area State Office, via phone at (808) 541-2600 ext. 109 or via email at [gregory.koob@hi.usda.gov](mailto:gregory.koob@hi.usda.gov).

Contact information for Krista Winger, ESA Coordinator is as follows: via email at [krista@islandgeo.com](mailto:krista@islandgeo.com) or via phone at (808) 237-1121. Click the following link to view the Pacific Island Area Bulletin regarding contracted services provided by the ESA Coordinator: [http://www.hi.nrcs.usda.gov/intranet/bulletins/FY2007/190\\_7\\_2.asp](http://www.hi.nrcs.usda.gov/intranet/bulletins/FY2007/190_7_2.asp).

Information about ESA Regulations for Section 7 Federal Consultations is available online at: [http://www.access.gpo.gov/nara/cfr/waisidx\\_99/50cfr402\\_99.html](http://www.access.gpo.gov/nara/cfr/waisidx_99/50cfr402_99.html)

This technical note and attachments are available online via the NRCS Pacific Islands Area website at: <ftp://ftp-fc.sc.egov.usda.gov/HI/pub/technotes/biology/>

# ESA Section 7 Compliance Process Flowchart

