

When does an Action Require Consultation with NMFS under Section 7 of the ESA?

1. Does the action have a **Federal Nexus** (is the project/action funded, authorized, or carried out by a Federal agency)?

- Yes - consultation with NMFS may be required prior to initiating the action
- No - consultation with NMFS is not required and the action may proceed; however, the action is still subject to ESA Section 9 prohibitions (for example, it is illegal to take an endangered species*)

2. If there is a Federal nexus, the lead Federal action agency will request a species list from NMFS documenting the presence of threatened/endangered species or critical habitat in the action area. If listed species or critical habitat are present, the Federal action agency needs to assess the effects of the action on those listed species or critical habitat and make one of the following determinations (this process is often conducted through a Biological Assessment):

- **No Effect** - the proposed action will have zero effect on the listed species or critical habitat
- **May Affect but Not Likely to Adversely Affect** - the proposed action may affect the listed species or critical habitat but the effects will be insignificant, discountable, or beneficial
- **May Affect and Likely to Adversely Affect** - the proposed action may negatively and significantly affect the listed species or critical habitat

3. If the determination was “No Effect” then the action may proceed without consultation with NMFS. However, ESA Section 9 prohibitions will apply if an unanticipated take to a listed species occurs.

If the determination was “May Affect but Not Likely to Adversely Affect”, NMFS must be consulted. During consultation, NMFS will review the Biological Assessment and either will concur with the determination (at which point the consultation process ends and the action may move forward keeping in mind ESA Section 9 prohibitions on unanticipated take), or will not concur with the determination. If NMFS does not concur, NMFS may recommend changes or mitigation measures to remove any adverse effects, or recommend formal consultation.

If the determination was “May Affect and Likely to Adversely Affect”, the Federal action agency needs to enter into **formal consultation** with NMFS. The action may not proceed as designed until consultation is complete. During formal consultation, NMFS will review the Biological Assessment and prepare a Biological Opinion. If NMFS determines that the action will not jeopardize the species or adversely modify critical habitat, NMFS will prepare an Incidental Take Statement (ITS) to cover take of listed species; however, no ITS will be included for any species of listed marine mammals unless small take authorizations have been approved under the MMPA. At that point the action may proceed with approved types and levels of take. If NMFS determines the action will jeopardize the species or adversely modify critical habitat, then by law, the action cannot proceed as designed. NMFS may recommend a reasonable and prudent alternative which allows the action to proceed, but which avoids jeopardy or adverse modification.

**take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct*

ESA Section 7 Consultation Flow Chart for Actions with a Federal Nexus

