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Section 7(a)(4) of the ESA

The provision for Conferencing

What is conference?

- The conference process is similar to a consultation but concerns a proposed listing or CH designation (see 50 CFR 402.10)
- The action agency has the obligation to conference
- The action agency needs to determine if the action is likely to destroy or adversely modify the proposed critical habitat
- If so, a conference is required. If not, conference is optional
- Requirement applies to new actions being proposed and existing actions that are underway

What does a conference look like?

A conference can be an informal discussion concerning an action that is likely to result in the destruction or adverse modification of the proposed critical habitat. Applicants can be involved in these discussions. NMFS will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. The conclusions reached during a conference and any recommendations should be documented but the style and magnitude of this document can vary with the complexity of the conference.

At the request of the action agency, the conference may be conducted in accordance with the procedures of formal consultation (i.e., write a BA, get an Opinion). An Opinion issued at the conclusion of a conference may be adopted as the biological opinion when the critical habitat is designated, but only if no significant new information is developed and no significant changes to the Federal action are made that would alter the content of the Opinion. We recommend this approach if you anticipate adverse effects to critical habitat.

Why conference?

The conference is designed to assist the action agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process

Can avoid the need to reinitiate later when the rule is finalized

Destroy/Adversely Modify Standard

- Notice published in FR on Feb. 11, 2016 (81 FR 7214 – 7226) by FWS and NMFS
- Replaces the previous definition that is discussed in the Section 7 consultation handbook!

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

More information on the new definition:
https://www.fws.gov/endangered/improving_ESA/AM.html

How do I know if I need to conference?

Follow these steps...	
1. Does the action area overlap with the critical habitat area?	No – no conference is necessary
	Yes – go to 2
2. Will the action affect any of the physical features?	No – no conference is necessary
	Yes – go to 3
3. Will those effects be insignificant or discountable?	No – go to 4
	Yes – conclude that the activity is not likely to adversely affect critical habitat; no conference is necessary
4. Are those adverse effects likely to destroy or adversely modify the critical habitat?	No – no conference is necessary (but is strongly recommended!)
	Yes – conference is required!

How do I know what to consider?

Think about the likely effects of the activity on the physical features identified in the proposed critical habitat designation...

- Will the activity impact hard bottom substrate in waters with salinity less than 0.5 ppt?
- Will the activity impact habitat with soft substrate in waters with salinity between 0.5 and 30 ppt?
- Will the activity change the water depth in way that would impeded sturgeon movements?
- Will the activity result in a physical barrier to sturgeon passage?
- Will the activity affect water quality (temperature, salinity and dissolved oxygen) in a way that effects the ability of that habitat to support (a) spawning, (b) survival of any life stage, or (c) larval, juvenile or subadult growth, development or recruitment?

An Example...

A bridge replacement in a brackish reach of a river proposed as critical habitat

Will the activity impact hard bottom substrate in waters with salinity less than 0.5 ppt?	No. Salinity in the action area is above 0.5 ppt
Will the activity impact habitat with soft substrate in waters with salinity between 0.5 and 30 ppt?	Yes. Installing piles will impact soft substrate and there will be a small reduction in the amount of available soft substrate. The estimated acreage of habitat loss due to the pile footprints is <0.1 acres. The area of permanent habitat loss is equivalent to <0.01% of the available soft-sediment benthic habitat in the action area and an even smaller percentage of the total soft-sediment benthic habitat in the proposed CH in this river. Given the extremely small loss of soft-bottom benthic habitat, effects will be insignificant.
Will the activity change the water depth in way that would impeded sturgeon movements?	No. The activity will not result in changes to water depth in the action area

Bridge Example Cont...

Will the activity result in a physical barrier to sturgeon passage?	No. Atlantic sturgeon can swim past/around the new bridge piers just like they moved around the existing bridge
Will the activity affect water quality (temperature, salinity and dissolved oxygen) in a way that effects the ability of that habitat to support (a) spawning, (b) survival of any life stage, or (c) larval, juvenile or subadult growth, development or recruitment?	No.

In sum, it is not reasonable to anticipate that the temporary loss of an extremely small amount of soft substrate that could be used for juvenile foraging would result in a direct or indirect alteration of the proposed critical habitat that appreciably diminishes the value of the critical habitat for the conservation of Atlantic sturgeon. Therefore, we would not anticipate the destruction or adverse modification of the proposed critical habitat and conference is not necessary.

What if a Conference is required?

- The action agency must prepare an assessment of the effects of the activity on the proposed critical habitat (similar to a biological assessment or biological evaluation) and submit that along with a request for conference
- We will review that and the clock will start once we have all of the necessary information
- We will work to produce a conference Opinion within 135 days – this can be a section of a regular biological opinion
- If we determine that there will be adverse effects, but the activity will not result in the destruction or adverse modification of the proposed critical habitat, no changes to the action are required. There is no “incidental take statement” for critical habitat so there are no reasonable and prudent measures or terms and conditions.
- If we reach a destruction/adverse modification conclusion, we will work with you to develop a Reasonable and Prudent Alternative that modifies the activity in a way that would not result in destruction or adverse modification to the critical habitat
- If you receive a conference Opinion, once the rule is finalized we would work with you to determine if it could become a final biological opinion

What about actions that we have already consulted on?

- For ongoing actions where you have already completed consultation, think about the impacts and make a determination about whether conference is necessary. If you determine it is not, make a note for your record. If you think it is, get in touch with us to discuss.
- One of the reinitiation triggers is the designation of critical habitat – this only comes into play once the rule is finalized (June 2017).
- Reinitiation would be required if the identified action may affect the critical habitat – this is a very different standard than the trigger for conference

In Summary...

- If you are requesting a consultation on a proposed action, look to see if the action area overlaps with the proposed critical habitat.
- If it does, include a determination about the need for conference in your consultation request. Be sure to provide adequate support for your conclusion!
- If you think a conference will be necessary, be sure to build the time needed for us to develop a conference Opinion (135 days!) into your timeline
- For ongoing actions where you have already completed consultation, think about the impacts and make a determination about whether conference is necessary. If you determine it is not, make a note for your record. If you think it is, get in touch with us to discuss.
- Is the action you are authorizing, funding or carrying out impacting the ability of the habitat to support the successful reproduction and recruitment of Atlantic sturgeon?

What happens after the public comment period?

- We will work with SERO to review all public comments
- Changes can be made to the proposed designation
- We will submit a final rule to the Federal Register by June 3, 2017
- New information that comes available after the final rule is issued would need to be considered and new rulemaking promulgated if appropriate