In Reply Refer To:
FWS/AES/DCHRS/018567

Memorandum

To: Regional Director, Region 1, 2, 3, 4, 5, 6, and 7
Manager, California/Nevada Operations Office

From: Director

Subject: Guidance for Conducting Endangered Species Act Section 7 Consultations on Federal Assistance Grants to States

Attached to this memorandum is a guidance document for conducting Endangered Species Act section 7 consultations on Wildlife and Sport Fish Restoration Program grants administered by the U.S. Fish and Wildlife Service's Federal Assistance program. This guidance was developed jointly by the Endangered Species Program and the Federal Assistance program, with substantial input from the Joint Federal/State Task Force on Federal Assistance Policy. The guidance clarifies that Federal Assistance grants to States that may affect threatened or endangered species or critical habitat must undergo section 7 consultation. The guidance also provides examples to help clarify the proper range of effects that should be considered in the consultation process when evaluating Wildlife and Sport Fish Restoration grants to States. While this guidance pertains specifically to how to conduct section 7 consultations for Wildlife and Sport Fish Restoration Program grants, it should not be construed to foreclose or otherwise limit cooperation between the Service and our partners in State fish and wildlife management for management activities that fall outside of the scope of section 7 consultation.

This guidance should be transmitted to all offices involved in conducting section 7 consultations on Wildlife and Sport Fish Restoration grants. Please direct any questions regarding this guidance to Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants at (703) 358-2171.

Attachment

cc: 3238-MIB-FWS/Directorate RF
3242-MIB-FWS/AES RF
420 ARLSQ-FWS/TE RF
420-ARLSQ-FWS/TE (RSayers)

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Guidance for Conducting
Endangered Species Act Section 7 Consultation
on Federal Assistance Grants to States

I. Scope

Applies to Endangered Species Act (ESA) section 7 consultation conducted on all Wildlife and Sport Fish Restoration Program (Federal Assistance) grants administered by the U.S. Fish and Wildlife Service (Service).

II. Purpose

To establish guidelines for determining the scope of effects of Federal Assistance grants and to distinguish effects of Federal Assistance grants from effects of other State actions.

III. Need

Federal Assistance actions provide grants to States for use in conducting fish and wildlife conservation and restoration activities. Additional information on grant programs can be found at the Service's website (http://grants.fws.gov/). The States and Federal Assistance have a unique partnership using grant monies to further the conservation of natural resources. The States combine their resources with Federal Assistance grant monies and consequently it can be difficult for the Service and the States to determine how far the federal nexus extends into the programs administered by the States. Some people contend combining Federal grant and State monies means the entire State program becomes subject to federal agency obligations; therefore, the entire State program is subject to the analysis and legal authority of section 7. This is not the case – although Federal Assistance creates a partnership with States, significant portions of State programs are not subject to section 7 consultation.

The primary purpose of this guidance is to help delineate when section 7 consultation is required. The purpose of section 7 consultation is to assist federal agencies in meeting their responsibility to ensure that any action they authorize, fund, or carry out will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Secondarily, the consultation process may provide for incidental take of listed animal species for a proposed action.

Federal Assistance grants are subject to the ESA section 7 consultation requirements (see Appendix E, 1998 National Section 7 Handbook). Consultation is not required for Federal Assistance actions that have "no effect" on listed species or their critical habitats (see "consultation" definition in Section IV).

IV. Definitions

Most of the following definitions are quoted from the 1986 Implementing regulations for conducting section 7 consultations (50 CFR §402.02). These definitions and terms are provided context and further explanation later in this document.

Activities - purposeful undertakings by people. This definition is not in the ESA, implementing regulations, or Handbook. The term "activities" appears in the regulations and Handbook and is often incorrectly used interchangeably with "actions." An activity only qualifies as a (federal) action if it meets definition below.

(Federal) Action - all activities or programs of any kind authorized, funded, or carried out in whole or in part, by federal agencies in the United States or upon the high seas (50 CFR §402.02).

area - 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)
Consultation – means the cumulative process of action analysis and findings that occurs between any federal entity and the Service (for purposes of this policy, Federal Assistance consulting with Ecological Services), as directed by section 7 of the ESA.
Cumulative effects - those effects of future State or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation (50 CFR §402.02).
Effects of the action - the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action (50 CFR §402.02).
Formal consultation - occurs when, at the conclusion of informal consultation, a determination that the action may affect and is likely to adversely affect listed species or designated critical habitat. This consultation leads to a biological assessment by the action agency and a biological opinion from the Service. The biological opinion offers reasonable and prudent measures to minimize the effects of anticipated incidental take. If a biological opinion concludes that the action under consultation is likely to jeopardize a species and/or adversely modify critical habitat, then reasonable and prudent alternatives are offered by the Service to preclude jeopardy and/or adverse modification.
Incidental take – take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a federal agency or applicant (50 CFR §402.02).
Indirect effects - effects caused by the proposed action and later in time, but still reasonably certain to occur (50 CFR §402.02).
Informal consultation - means an optional process that includes all discussions and correspondence between the Service and a federal agency or designated non-federal representative, prior to formal consultation, to determine whether a proposed federal action may affect listed species or designated critical habitat. This process allows the federal agency to utilize the Service's expertise to evaluate the agency's assessment of potential effects or to suggest possible modifications to the proposed action that could avoid potentially adverse effects. If, at the conclusion of informal consultation, the determination is made that the action will have "no effect" or "may affect, but not likely to adversely affect" on listed species or designated critical habitat, the consultation process ends with the written concurrence of the Service on the "not likely to adversely affect" (no written concurrence is necessary for a "no effect" determination).
Interdependent actions – activities that have no independent utility apart from the action under consideration (50 CFR §402.02).
Interrelated actions – activities that are part of a larger action and depend on the larger action for their justification (50 CFR §402.02).

V. Guidance for Determining the Effects of Federal Assistance Grant Actions for Section 7 Purposes

This Section supplements the 1998 National Consultation Handbook. Refer to pages 4-23 through 4-28 of the 1998 Handbook for additional information. This Section briefly examines direct and indirect effects of proposed federal actions versus the cumulative effects of other future non-federal actions. You will also find an overview of the boundary between Federal Assistance-funded actions and wholly State-funded actions. The importance of clarifying this boundary for section 7 purposes cannot be overemphasized. Section V then provides additional guidance in applying the "but for" test. Section V also highlights some of the statutory restrictions on Federal Assistance funds that should be understood prior to considering effects. Finally, five types of grants are described, and general guidance on understanding potential effects is provided.

ect and Indirect Effects of Federal Actions: Federal actions can cause direct effects (immediate) indirect effects (caused by the action and later in time, but still reasonably certain to occur). The direct and indirect effects of a proposed federal action are the effects of the federal action itself. Causation is the key element in determining the effects of the action. Only those effects that are caused by the action under consultation should be considered as direct or indirect effects. It may be useful to differentiate between effects and actions. One helpful approach is to think of actions as purposeful undertakings by people, and consider effects to be the consequences of actions, e.g., physical changes in air, sound or light levels, water or land, or other physical characteristics of habitat.

B. Interrelated or Interdependent Activities: When analyzing the effects of a Federal Assistance action, determine if any other activities are interrelated or interdependent to the federal action. This is best achieved by applying the "but for" test. The "but for" test asks the question, "Would another activity occur 'but for' the action under consultation?" If the other activity would not occur without the action under consultation, then the other activity is likely to be interrelated or interdependent. The effects of interrelated and interdependent activities are considered effects of the action and are subject to consultation. If another activity would occur without the action subject to consultation, then that activity is not interrelated or interdependent and any effects of the activity are not included as effects of the action, but the effects might need to be considered as cumulative effects described below. The effects of interrelated or interdependent actions should be assessed in the effects analysis in addition to the direct and indirect effects of the proposed action itself.

One precaution: Take care to correctly identify the action under consultation when applying the "but for" test. For example, Federal Assistance may be considering a grant to build a bridge to connect an existing highway to an existing campground and stream access used by anglers. The bridge may be dependent with the highway and the campground, but neither the highway nor the campground is dependent with the bridge. The effects of the existing highway and campground would not be effects of the proposed bridge, but would instead be regarded as part of the environmental baseline.

C. Cumulative Effects: Cumulative effects are effects of future, non-federal actions that are reasonably certain to occur in the action area. Such effects are neither caused by the federal action agency nor are they its responsibility. During formal consultation, when the Service writes a biological opinion, cumulative effects are considered in combination with the effects of the action, the status of the species, and the environmental baseline when evaluating whether an action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat.

D. Understanding Federal Assistance Programs and State Programs: The Service provides grants to States to carry out fish and wildlife restoration projects, including but not limited to coordination, education, land acquisition, operations and maintenance, population and habitat management, survey, inventory, and research. When Federal Assistance grants are used to wholly, or partially fund such actions, the initiation of informal section 7 consultation is appropriate if the proposed action may affect listed species or designated critical habitat. In contrast, States may also fully fund and implement conservation activities such as public outreach and education, licensing, and setting regulations for hunting, fishing and other activities. The effects of activities that are wholly funded by the State that do not meet the definitions of interrelated or interdependent actions should not be considered as "effects of the action" when conducting formal section 7 consultations (See Section 7 Handbook, pages xiii and xiv).

E. Statutory Requirements and Limitations of Use of Funds as They Affect the Service's Ability to Influence Project Changes to Accommodate Threatened and Endangered Species Needs: The Service's ority to require changes in a proposed action occur under formal consultation in: reasonable and dent alternatives (RPAs) to an action that is likely to jeopardize the continued existence of a species or adversely modify or destroy its critical habitat; or reasonable and prudent measures (RPMs) and terms

nditions (T&Cs) in an incidental take statement. The Service's ability to require changes to a proposed action through a RPA are limited by the Service's legal authority and jurisdiction under the Federal Assistance program. The Service's authority to make changes through RPMs and T&Cs are limited by the "minor change" rule (see the Consultation Handbook and 50 CFR §402.14(i)(2)).

The Dingell-Johnson Sport Fish Restoration and Pittman-Robertson Wildlife Restoration Acts prohibit the use of grant funds for law enforcement, licensing, and regulatory functions. Grant funds under these programs may not be used to write or enforce regulations, including hunting, fishing, or other natural resource uses, or issue licenses and permits for such uses. These are considered wholly State policy actions not appropriate for federal participation. Therefore, since there is no federal nexus to these types of State activities, the Service cannot mandate changes in regulations, licensing, or permitting for protecting listed species through the section 7 process. In addition, Federal Assistance authority under two major programs (Wildlife and Sport Fish Restoration) is limited to an evaluation of eligibility and a test of "substantial in character and design" (50 CFR §80.13) that applies to Federal Assistance Programs:

All projects proposed for funding under the Acts must be substantial in character and design. A substantial project (for fish and wildlife purposes) is one which: (a) Identifies and describes a need within the purposes of the relevant Act to be utilized; (b) Identifies the objectives to be accomplished based on the stated need; (c) Utilizes accepted fish and wildlife conservation and management principles, sound design, and appropriate procedures; and (d) Yields benefits which are pertinent to the identified need at a level commensurate with project costs.

F. Grant Types: The following discussion illustrates where the effects of the federal action begins and ends for several common types of Federal Assistance-funded State projects.

1. Surveys, Data Collection and Analysis Grants: Effects of federally-funded surveys and data collection are from physical actions of taking measurements or making estimates. Service grants may also fund data analysis and management recommendations based on data analysis. The uses of data for analysis are varied and unpredictable. Data analysis and recommendations occur "on paper" and by themselves cause no effects. Policy is established when policymakers enact regulations, which typically involves the consideration of a number of information sources that may or may not include data and recommendations from federal actions. Establishment of policy by State policymakers is not a federal action. The existence of data and analyses of data should be considered neutral and to have no effect on the environment. The use of data or analysis of data in decision-making by policymakers is generally accompanied by other considerations not related to the specific data. For these reasons, unless there are unusual circumstances, data collection actions do not have interrelated or interdependent activities and do not have effects aside from those caused directly or indirectly by the physical acts of data collection (e.g. disturbing sediment in a stream or harassing a nesting bird). The effects of federally-funded surveys and data collection do not include the effects of States establishing hunting and fishing regulations based on the resulting data.

2. Land Acquisition: In general, the purposes of a land purchase are the focus of the section 7 consultation because the federal action of deciding whether to fund land purchases is based on a determination of whether the action is "substantial in character and design" (50 CFR §80.13). To make that determination, Federal Assistance reviews the purposes for which the land is being purchased. In consultation, future management of land proposed for acquisition is addressed in the limited fashion described below. Unless caused by the grant and reasonably certain to occur, the effects of grants to acquire land generally do not include analysis of actions that might be taken by landowners prior to completion of the acquisition.

Consultation on a federal action of funding land acquisition needs to consider direct and indirect effects as well as the effects of interrelated and interdependent activities. For example, the transfer and recording of title or deed from one entity to another is an interrelated activity because transfer and recording of title or deed would not likely occur "but for" Federal Assistance funding the land acquisition. However, the effect of the deed or title transfer in and of itself is nil.

Future management of land proposed for purchase could involve indirect effects, or interrelated and interdependent actions based on how the general or specific purposes and uses of the proposed land purchase are described or need to be described in the grant proposal or grant agreement to satisfy the "substantial in character and design" test (see 50 CFR §80.13, above). However, effects analyses are not constrained to those contained in the "substantial in character and design" test. Future management actions are subject to applicable ESA provisions and prohibitions either as they are conducted by the State or as part of a future Federal Assistance grant.

Land acquisition grants may include funding for specific construction or other development. If a specific construction activity is a part of a land acquisition grant, or if the purchase would not be "substantial in character and design" without specific future management or construction, then any effects caused by the management or construction activity would be included with the effects of the action. This would apply only to the management and/or construction activities identified at the time of acquisition necessary to make the purchase "substantial in character and design" and not to all management actions taken in the future. Those future management or construction actions would be covered under future Federal Assistance grants with a new section 7 consultation, or independently funded and carried out by the State agency with no section 7 requirements, but still in compliance with the ESA.

There is a continuing, larger, unresolved debate within the Service over assessing effects relative to land disposal in a number of the Agency's programs. For this reason, this guidance does not address land disposal in the Federal Assistance Program. Land disposal is less common in the Federal Assistance Program than land acquisition and future Federal Assistance guidance on this topic will be forthcoming when the issue is resolved.

3. Coordination and Technical Assistance: Generally, these types of grants fund State employees to conduct planning and coordination activities and to provide technical information to public and private entities. The duties of a technical assistance position include providing environmental comments on documents for projects that may impact the State's fish or wildlife resources, providing answers to resource questions from the public, and creating written materials for landowners contemplating habitat improvement projects. In addition, these grants can fund workshops, meetings and printing of informational materials. The information associated with these grants does not constitute direction or other mandatory guidance. As with all Federal Assistance grants, technical assistance funds cannot be used for law enforcement or regulatory purposes. Technical assistance grants do not fund implementation of on-the-ground actions, but rather provide information, and it is highly unlikely that they, or associated interrelated or interdependent activities, would cause adverse effects to listed species. For this reason, coordination and technical assistance grants would rarely, if ever, have direct or indirect effects on the environment including listed species or critical habitats. See the discussion presented in the Surveys, Data Collection and Analysis example for additional explanation regarding the effects of information.

4. Education: Generally education grants do not fund implementation of on-the-ground actions, but rather provide information. It is highly unlikely that they would cause adverse effects to listed species or have associated interrelated or interdependent actions. For this reason, education grants

would rarely, if ever, have direct or indirect effects on the environment including listed species or critical habitats. Most of these actions will result in "no effect" determinations.

5. Development: Grants that fund construction, reconstruction or routine maintenance of facilities may result in physical changes to the environment and may include interrelated and interdependent actions that may also cause physical changes to the environment. The physical effects of such changes would be part of the effects of the federal action of funding the development project. The direct and indirect effects of the proposed action and effects from interrelated and interdependent actions must be considered.

VI. Examples of Applying the Guidance to Projects

Below are examples of projects that are similar to actual projects funded by Service grants. Each example is described and then following is a response that shows how the guidance should be generally applied to the example.

Example 1. A boat access site was purchased in 1977 with Federal Assistance funds when no listed species occurred in the area. No effects were expected and no consultation occurred on the Federal Assistance funded purchase. The boat access site includes several acres of vegetated uplands that harbor a now-listed animal. Current Federal Assistance grants for the site are for maintenance of the access facilities (launch, approach, trails to fishing sites, parking lot, trash removal, and toilet maintenance), but do not address management of the vegetated uplands. Overnight camping is prohibited on the entire site, but sometimes does occur in the vegetated area. Are effects from overnight camping part of the effects of the maintenance funding?

Example 1 Response. No. This is an example of an operation and maintenance grant on existing, developed sites. The effect of the maintenance, including protective measures should be the subject of consultation, not the effect of illegal uses unless a strong argument can be made that the illegal activities are a result of the action, will occur later in time, and are reasonably certain to occur, and/or are interrelated or interdependent to the action. Linking the illegal activities to the action of funding routine maintenance is unlikely in this situation. The previous purchase and existence of the developed facilities is not under consultation and the land is serving the purposes for which it was purchased. The unauthorized or prohibited uses by citizens of lands purchased with Federal Assistance funds are not effects of the federally-funded maintenance, provided maintenance includes reasonable measures to differentiate between intended and prohibited public uses.

Example 2. Federal Assistance has funded the State to hire a technical coordinator who will provide comments regarding the effects on fish and wildlife from many federal actions in the State, including federal highway projects, Forest Service actions, and Army Corps of Engineers permitting and dam operations. The federal actions the technical coordinator will comment on would likely have far reaching effects on many listed species and critical habitats. In the past, the State comments have not always focused on the protection of all listed species and critical habitat. Does federal funding of this grant trigger section 7 consultation?

Example 2 Response. No. This is an example of a technical guidance grant. The federal action of funding a State technical coordinator has no effect on listed species or critical habitat.

Example 3. Federal Assistance is proposing to fund a State elk and deer compatibility study. The study measure the difference in browse availability in areas with only elk or deer, with areas with elk and deer. Two trained biologists will require 15 field days to collect browse measurements. One study area was recently closed to hunting through the State's hunting regulations for purposes not related to the

ed study. Using a grant from a private source, the State has also recently purchased public hunting ess on privately owned land that was previously closed to hunting. When the State posted the study area closure with signs and public notices, the State also included notification of the new access at the previously closed area. Gray wolves and grizzly bears, as well as many listed fish and plants occur in both the newly open and newly closed areas. Is section 7 consultation required for this action?

Example 3 Response. No. This is an example of a research grant and the federal action is funding a study. There are no anticipated impacts to listed species of two biologists walking through habitat assessing browse trends. Closing the hunting area was a State hunting regulation, unrelated to the proposed action and is not subject to section 7 consultation. Likewise, opening the new hunting area using private funds is not part of the federal action of the study, and the effects of opening the hunting area would not be considered as effects of the proposed federal action.

Example 4. Federal Assistance is proposing to fund a State grant to conduct an aerial helicopter survey of deer in an area with a large number of endangered plants that are eaten by the deer. Biologists will record the number and location of deer observed in the survey area. Biologists will compile and analyze the data from previous years to determine the trend in the population. The State will wholly fund biologists who use the report to make recommendations on deer harvest to policymakers who establish the public policy on regulations, seasons, bag limits, and their enforcement. If the hunting season is closed, deer numbers may increase and those deer may eat some of the endangered plants. Policy makers will receive information and recommendations from other biologists, other agencies, and the public prior to making a decision. Is the grant that funds this activity subject to section 7 consultation?

Example 4 Response. No, unless there are demonstrable data to support a finding that the physical acts of ollection such as flying and landing the helicopter impact listed species. This is an example of a y and inventory grant and the federal action is funding the survey. The data generated by the survey is varied and unpredictable. The data could indicate a stable, increasing, or decreasing trend in the deer population. The decision on what to do with the data and any changes in public policy and regulations are made by policymakers, with consideration of public safety, environmental and economic effects, and other issues not related to the data. The effects of the hunting regulations set by a State policymaking process would not be considered as effects of the federal action of collecting the survey data.

Example 5. The State has proposed funding a parking lot expansion and bridge improvement over Big Stream on the Big Stream State Wildlife Management Area. Big Stream State Wildlife Management Area was originally purchased with Federal Assistance funds in 1958. The bridge over Big Stream and the parking lot both existed on site prior to the State purchasing the area. The parking lot is over 500 meters from the Big Stream and services the trailhead for the four-mile, non-motorized, loop trail that winds through the wetland adjacent to Big Stream. The trail head is used by birders, duck hunters, and cross country skiers. The Wildlife Management Area prohibits non-passenger vehicles, biking, and horseback riding throughout the Wildlife Management Area, and prohibits hiking or skiing off the trail. The trail does not go through the steep, rocky slopes on the edge of the wetland. The bridge improvement will include removal of the existing mud and rock abutments and the one lane wooden bridge. The improvement will replace them with timber and concrete abutments and a one-lane steel bridge. The parking lot expansion will increase the existing gravel lot by 3,000 square feet and allow roughly five more passenger vehicles to use the parking lot, bringing the total number of vehicles that may use the parking lot to 20. The parking lot expansion will require removal of half of a little-used picnic area that was constructed in 1968, but will not disrupt currently undeveloped habitat. Threatened fish occur in the Big Stream. Three listed plants endemic to steep, rocky slopes also occur on the Wildlife Management The State has surveyed the bridge and picnic areas and immediate area around them, but did not ocate any of the listed plants or suitable habitat for them. Is section 7 consultation required for this grant?

le 5 Response. Yes. This is an example of a facilities construction grant. The effects of this proposed action would include all the physical effects of the parking lot expansion and changes to the bridge and bridge abutments. If the parking lot expansion would likely increase the potential for human use beyond the baseline, then the indirect effects of the of increased human use should also be considered as part of the effects of the proposed action. Because of the steep, rocky slope in the area of the proposed action or areas affected by the proposed action, one would expect no effects on listed plants. However, threatened fish occur in Big Stream, therefore effects on the fish from the bridge work would potentially be unavoidable, and may be adverse, depending upon the timing and other measures that are available to avoid or reduce effects. When designing the project, appropriate staff, such as State biologists and managers, and the Service's Federal Assistance and endangered species biologists should consider the best methods for accomplishing the proposed bridge and parking lot work while protecting the threatened fish in Big Stream. If adverse effects are likely, formal consultation on this action would be necessary. If a Corps' Clean Water Permit is also required for this action relative to in-water work associated with the bridge, that action should be regarded as interdependent with the Federal Assistance grant and any effects of the Corps permit would be included as effects of the Federal Assistance grant.

Example 6. The State proposes to conduct hunter education using, in part, grant monies from Federal Assistance. The hunter education classes will include discussion of known big game management techniques, as well as training to help hunters successfully identify the gender of an introduced species of ungulate. Through its regulations establishing permit numbers for this ungulate species, the State wants to only harvest males because the herd is below optimum size and they wish to allow the herd to increase in numbers until it reaches herd objectives. The ungulate's foraging habits impact the habitat of a listed species. Is section 7 required for this grant action supporting the hunter education classes?

ple 6 Response. No. This is an example of a hunter education grant. Education grants have "no ect" on listed species or their critical habitats because there are neither identifiable direct or indirect effects nor are there any interrelated or interdependent actions related to the grant proposal. Transfer of knowledge and information does not create effects for section 7 purposes. Establishing permit numbers is the action that may affect the listed species, and this is a state action independent of the hunter education grant.

Example 7. The State has applied to Federal Assistance for a grant to fund the purchase of native grasslands to provide hunting opportunities primarily for a metropolitan area 100 miles away. Hunting demand exceeds opportunity and the State commission heartily endorses the proposal. Species proposed for hunting are ring-necked pheasant, mourning dove, and waterfowl. In order to provide suitable habitat for those targeted species, the native grasslands will have to be converted to row crops and several shallow wetlands. The native grasslands are home to another grassland bird, and whooping cranes occasionally fly over the area during fall and spring migrations. The whooping crane is listed as endangered and the grassland bird is proposed for listing under the ESA. Is section 7 consultation required for this grant action?

Example 7 Response. Yes. This is an example of a land acquisition grant. The legal process of acquiring the land would have no effect on listed species or their habitats. However, because of the stated objectives of the land purchase, it is reasonable to assume that subsequent to land sale to the State, the grasslands would be converted to crop land which would likely impact the nesting activities of the grassland bird. These land use conversions are either indirect effects or interrelated actions related to the realty transaction process and need to be considered in a section 7 consultation. The impact on whooping nes is either neutral (no effect) or beneficial (may affect, not likely to adversely affect) due to the ation of wetlands. The Service needs to provide written concurrence that it is not likely to adversely affect whooping cranes.

Example 8. The State has applied to Federal Assistance for a grant to fund a hunter check station that collects information on a number of wildlife species harvested, including wild pigs that are a State-regulated game animal. The data gathered at the check station will be used to assess the health, age structure, sex ratios, and other life information of the pig population. The information will help enable the State to make informed management decisions for the pig population. Pig hunting is controversial within the State because they are non-natives and destroy habitat occupied by native listed species. A faction that would like to see pigs eliminated rather than regulated for sport hunting contends that information gathered at the check stations is used to make management decisions and thus the entire wildlife management program of the State fish and wildlife agency is subject to section 7 consultation. Is this grant subject to section 7 consultation?

Example 8 Response. No. This is an example of a survey and inventories grant. The physical process of collecting the data will not cause effects to listed species and their habitats and does not trigger section 7 consultation. The general operation of the State agency is not part of the federal action of funding the collection of data through surveys and inventories, even if data may be used in later management decision. Therefore, the general wildlife management program operation of the State agency is not subject to section 7 consultation.

Example 9. The State wishes to use a Sport Fish Restoration grant to stock non-native, hatchery-raised rainbow trout in streams occupied by a listed threatened species. Rainbow trout are highly sought by the State's sport anglers and there is widespread support for this proposed action because the streams cannot supply enough fish to satisfy local angling demands. Does section 7 apply in this case?

Example 9 Response. Yes. This is an example of a fish and wildlife population management grant. The act of stocking rainbow trout in habitat occupied by listed species would likely cause direct and indirect effects to the listed species. The effects of this grant proposal will have to undergo section 7 consultation to determine if the effects are adverse. If the effects are adverse to listed species or their critical habitats, formal consultation is required. However, if the non-native species had previously or historically been stocked into the system, the extent of the pre-existing stocking program should be included as part of the environmental baseline.

Example 10. The State wishes to increase public awareness of its properties. It proposes a grant to Federal Assistance to develop, publish, and distribute information that features the properties' locations, uses, history, and other types of information that would be useful to the public. Some of the properties have listed species within their boundaries. Does section 7 apply to this grant action?

Example 10 Response. No. This is an example of an outreach grant. The development of information has no effect to listed species, therefore, section 7 is not required on this type of grant proposal.

DEC 11 2003

Memorandum

To: Thomas Bennett, President
International Association of Fish and Wildlife Agencies

Steven Williams, Director
U.S. Fish and Wildlife Service

From: Terry Crawforth, Co-Chair
Joint State/Federal Task Force on Federal Assistance Policy

Clint Riley, Co-Chair
Joint State/Federal Task Force on Federal Assistance Policy

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal Assistance Policy - Guidance for Conducting Endangered Species Act Section 7 Consultation on Federal Assistance Grants to States

The Joint State/Federal Task Force on Federal Assistance Policy (JTF) submits the attached recommendation concerning "Guidance for Conducting Endangered Species Act Section 7 Consultation on Federal Assistance Grants to States" for your review and consideration. We suggest that the guidance be implemented in the form of a Director's memorandum.

The substance of the policy recommendation is detailed within the body of the recommendation itself. It was developed by the JTF over the course of two meetings (at NCTC on May 13-15, 2003, and in Missoula, MT on August 5-7, 2003), based on preliminary JTF discussions at previous meetings. The JTF notes that similar guidance had been previously developed by Service staff and States in Region 1. As designated by each of you, the members of the JTF represent both State fish and wildlife agencies and the Service, and are listed at the end of the memorandum.

Following the JTF meeting in May, a draft recommendation was developed incorporating workgroup input, which included input from a number of Service Regions. The draft recommendation was then provided to all grantees of the Wildlife and Sport Fish Restoration Programs, and to all Service Regional Offices and relevant Service Programs, requesting comment. Comments were received from nine grantee agencies, and from nine Service offices. Roughly summarized, the most substantial suggestions included the following:

- A number of commenters generally suggested that the guidance as drafted was not as helpful as it should be. Of these, several focused on the examples provided in the guidance, noting that some

examples didn't provide a clear resolution to the scenario presented. Others felt the guidance was too confusing or too technical. After review, the JTF edited several of the examples (addressed more specifically below), and made edits throughout to improve the clarity of the document.

- One commenter questioned the need for the guidance. After review, and in light of the other comments received, the JTF believes strongly that the guidance is necessary.

- Some commenters questioned the tone of the draft guidance, generally feeling it was inappropriately judgmental in places, especially in Section III. After review, the JTF considerably revised that section, and removed language that seemed unnecessary or inappropriate.

- Some commenters suggested clarification be added to address specific points, including: consultation requirements for candidate species; relationship between consultation and "not likely to adversely affect" determinations; and the potential implications of avoiding section 7 consultation and thereby creating a need for section 10 compliance. After review, the JTF added brief discussion of these points.

- Some commenters requested definitions be added for specific terms used frequently in the draft guidance, including: consultation, informal/formal consultation, and federal nexus. After review, the JTF added definitions for these terms to Section IV.

- One commenter advised that the draft guidance use of "may affect" was more restrictive than the current use of which the commenter is familiar. Although the JTF edited relevant areas of the guidance to improve clarification, it made no substantial changes to its "may effect" discussion, and believes the recommendation accurately reflects the requirements of law and regulation.

- One commenter suggested adding the topics of construction and development to the discussion in Section V.D. While the JTF agrees that these activities may require consultation, it felt the discussion appropriately reflected this fact, as revised.

- One commenter felt that the draft statements concerning "wholly-funded State activities" in Section V.D. were overstated, and suggested that citations to laws or regulations be added. After review, the JTF made a number of revisions to this section, to better explain that wholly-funded State activities may, but are unlikely to, require consultation.

- Some commenters suggested that other grant types be addressed. One comment referred to grants other than Wildlife and Sport Fish Restoration Program grants, and other commenters referred to the grant types listed in Section V.F. The JTF believes its mandate is to review policy specifically related to Wildlife and Sport Fish Restoration Programs, although it acknowledges that the Director may wish to apply policy more broadly. Concerning the grant types in Section V.F., the JTF did not add new broad categories, but in its edits more explicitly noted that this list is not exhaustive.

- Some commenters suggested that the discussion of land acquisition grants in the draft guidance was too limited. These comments included: land acquisition grants may include construction activities, requiring consideration of effects of the action; clarification is needed concerning potential implications of language about future actions; and land disposal is a common occurrence in some areas and thus should be addressed directly. After review, the JTF made several revisions to more clearly address potential effects of construction and future actions, to the extent they may need to be considered as part of the land acquisition grant action. The JTF refrained from providing guidance specific to land disposal, due to ongoing uncertainties

surrounding this issue that involve programs other than Wildlife and Sport Fish Restoration Programs.

- Many commenters provided specific editorial suggestions throughout the document. The JTF considered each of these, and adopted most, but not all, editorial suggestions.

- Commenters specifically commented on Examples 1, 6, 7, 8, and 11. Most of these comments suggested that the conclusions in Examples 7, 8, and 11 may be overly speculative, and involve factual scenarios not reasonably certain to occur. After review, the JTF revised each of these examples, at least in part. Most important, the JTF provided a clearer "yes" or "no" to each example, and revised the factual scenario to better ensure that it appropriately would lead to the conclusion stated. If the stated resolutions of the Examples in the guidance are changed, the JTF respectfully requests that the revisions be provided to the JTF before the guidance is adopted as policy.

The actual comments received could be provided to you at your request.

The recommendation presented to you at this time reflects the JTF's consideration of all of these comments, and our consensus opinion after this review. If you have any questions about this recommendation, or the process used by the JTF to arrive at this recommendation, please contact either of us, or any member of the JTF.

Members of the Joint State/Federal Task Force on Federal Assistance Policy (in alphabetical order):

[illegible]d Barnhart, Director, New York Division of Fish, Wildlife and Marine Resources
John Frampton, Director, South Carolina Department of Natural Resources
Don Friberg, Chief, Division of Federal Assistance, FWS Region 1
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David Waller, Director, Georgia Wildlife Resources Division (JTF during relevant discussions)

Attachment

Date: December 11, 2003

Guidance for Conducting Endangered Species Act Section 7 Consultation on Federal Assistance Grants to States

I. Scope

Applies to Endangered Species Act (ESA) section 7 consultation conducted on all Wildlife and Sport Fish Restoration Program (Federal Assistance) grants administered by the U.S. Fish and Wildlife Service (Service).

II. Purpose

To establish guidelines for determining the scope of effects of Federal Assistance grants and to distinguish effects of Federal Assistance grants from effects of other State actions.

III. Need

Federal Assistance actions provide grants to States for use in conducting fish and wildlife conservation and restoration activities. Additional information on grant programs can be found at the Service's website (http://grants.fws.gov/). The States and Federal Assistance have a unique partnership using grant monies to further the conservation of natural resources. The States combine their resources with Federal Assistance grant monies and consequently it can be difficult for the Service and the States to determine how far the federal nexus extends into the programs administered by the States. Some biologists contend that combining federal grant and State monies extends the federal nexus to the entire State program; therefore, the entire State program is subject to the analysis and legal authority of section 7. This is not the case – significant portions of State programs are not subject to section 7 consultation.

The primary purpose of this guidance is to help delineate the boundaries between the section 7 nexus and that portion of the State programs that are not subject to section 7. The purpose of section 7 consultation is to assist federal agencies in meeting their responsibility to ensure that any action they authorize, fund, or carry out will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Secondarily, the consultation process may provide for incidental take of listed animal species for a proposed action.

Federal Assistance grants are subject to the ESA section 7 consultation requirements (see Appendix E, 1998 National Section 7 Handbook). Formal consultation is not required for Federal Assistance actions that have "no effect" on listed species or their critical habitats (see "consultation" definition in Section IV).

IV. Definitions

Most of the following definitions are quoted from the 1986 Implementing regulations for conducting section 7 consultations (50 CFR §402.02). These definitions and terms are provided context and further explanation later in this document.

Activities - purposeful undertakings by people. This definition is not in the ESA, implementing regulations, or Handbook. The term "activities" appears in the regulations and Handbook and is often incorrectly used interchangeably with "actions."

(Federal) Action - all activities or programs of any kind authorized, funded, or carried out in whole or in part, by federal agencies in the United States or upon the high seas (50 CFR §402.02).

Action area - 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)

Consultation – means the cumulative process of action analysis and findings that occurs between any federal entity (for purposes of this policy, the Division of Federal Assistance consulting with the Division of Ecological Services) and the Service, as directed by section 7 of the ESA.

Informal consultation - means an optional process that includes all discussions and correspondence between the Service and a federal agency or designated non-federal representative, prior to formal consultation, to determine whether a proposed federal action may affect listed species or designated critical habitat. This process allows the federal agency to utilize the Service's expertise to evaluate the agency's assessment of potential effects or to suggest possible modifications to the proposed action that could avoid potentially adverse effects. If, at the conclusion of informal consultation, the determination is made that the action will have "no effect" or "may affect, but not likely to adversely affect" on listed species or designated critical habitat, the consultation process ends with the written concurrence of the Service on the "not likely to adversely affect".

Formal consultation - occurs when, at the conclusion of informal consultation, a determination that the action may affect and will likely adversely affect listed species or designated critical habitat is made. This consultation results in a biological assessment from the action agency and a biological opinion from the Service. The biological opinion offers reasonable and prudent measures to minimize anticipated incidental take. If jeopardy and/or adverse modification are concluded in the biological opinion, reasonable and prudent alternatives are offered by the Service to preclude jeopardy and/or adverse modification.

Federal nexus – all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies.

Incidental take – take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a federal agency or applicant (50 CFR §402.02).

Cumulative effects - those effects of future State or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation (50 CFR §402.02).

Effects of the action - the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action (50 CFR §402.02).

Indirect effects - caused by the proposed action and are later in time, but still are reasonably certain to occur (50 CFR §402.02).

Interdependent actions - have no independent utility apart from the action under consideration (50 CFR §402.02).

Interrelated actions - are part of a larger action and depend on the larger action for their justification (50 CFR §402.02).

V. Guidance for Determining the Limit of the Effects of Federal Assistance Grant Actions

This Section supplements the 1998 National Consultation Handbook. Refer to pages 4-23 through 4-28

of the 1998 Handbook for additional information. This Section briefly examines direct, indirect effects of proposed federal actions versus the cumulative effects of other future non-federal actions and clarifies the difference between an action and an effect. You will also find an overview of the boundary between Federal Assistance-funded actions and wholly State-funded actions. The importance of clarifying this boundary for section 7 purposes cannot be overemphasized. Section V then provides additional guidance in applying the "but for" test. Section V also highlights some of the statutory restrictions on Federal Assistance funds that should be understood prior to considering effects. Finally, five types of grants are described, and general guidance on understanding potential effects is provided.

A. Direct and Indirect Effects of Federal Actions: Federal actions can cause direct effects (immediate) and indirect effects (caused by the action and are later in time, but still are reasonably certain to occur). The direct and indirect effects of a proposed federal action are the effects of the federal action itself, together with the effects of interrelated or interdependent actions (see CFR definition above and the " Identifying any Interrelated or Interdependent Activities" below). Causation is the key element in determining the effects of the action. Only those effects that are caused by the action under consultation should be considered as direct or indirect effects. It may be useful to differentiate between effects and activities/actions. One helpful approach is to think of activities/actions as purposeful undertakings by people, and consider effects to be the consequences of activities/actions, e.g., physical changes in air, sound or light levels, water or land, or other physical characteristics of habitat.

B. Interrelated or Interdependent Activities: When analyzing the effects of a Federal Assistance action, determine if any other activities are interrelated or interdependent to the federal action. This is best achieved by applying the "but for" test. The "but for" test asks the question, "Could another activity occur 'but for' the action under consultation?" If the other activity could not occur without the action under consultation, then the other activity is likely to be interrelated or interdependent. The effects of interrelated and interdependent activities are considered effects of the action and are subject to consultation. If another activity would occur without the action subject to consultation, then that activity is not interrelated or interdependent and any effects of the activity are not included as effects of the action, but the effects might need to be considered as cumulative effects described below. The effects of interrelated or interdependent actions should be assessed in the effects analysis in addition to the direct and indirect effects of the proposed action itself.

One precaution: Take care to correctly identify the action under consultation when applying the "but for" test. For example, Federal Assistance may be considering a grant to build a bridge to connect an existing highway to an existing campground and stream access used by anglers. The bridge may be interdependent upon the highway and the campground, but neither the highway nor the campground is interdependent upon the bridge. The effects of the existing highway and campground would not be effects of the proposed bridge, but would instead be regarded as part of the environmental baseline.

C. Cumulative Effects: Cumulative effects are effects of future, non-federal actions that are reasonably certain to occur in the action area. Such effects are neither caused by the federal action agency nor are they their responsibility. During formal consultation, when the Service writes a biological opinion, cumulative effects are considered in combination with the effects of the action, the status of the species, and the environmental baseline when evaluating whether an action is likely to jeopardize the continued existence of a species or adversely modify its designated or proposed critical habitat.

D. Understanding Federal Assistance Programs and State Programs: The Service provides grants to States to carry out fish and wildlife restoration projects, including but not limited to coordination, education, land acquisition, operations and maintenance, population and habitat management, survey, inventory, and research. When Federal Assistance grants are used to wholly, or partially fund such actions, the initiation of informal section 7 consultation is appropriate if the proposed action may affect listed species or designated critical habitat. In contrast, States may also fully fund and implement conservation activities such as public outreach and education, licensing, and setting regulations for hunting, fishing and other activities. The effects of activities that are wholly funded by the State that do not meet the definitions of interrelated or interdependent actions should not be considered as "effects of the action" when conducting formal section 7 consultations (See Section 7 Handbook, pages xiii and xiv). Wholly State-funded activities occur without federal funds, but can still be interrelated or interdependent upon federally-funded activities (see above for more on interrelated and interdependent actions). In most cases, this scenario is highly unlikely. Some Service grant programs specifically prohibit funding State regulatory actions, including establishing hunting and fishing regulations. The effects of wholly-State funded activities, such as setting regulations, licensing, and law enforcement are not effects of Service grant actions and should not be included as effects of the action unless the "but for" test indicates that they are interrelated and/or interdependent on the proposed action. This outcome is unlikely.

E. Statutory Requirements and Limitations of Use of Funds as They Affect the Service's Ability to Influence Project Changes to Accommodate Threatened and Endangered Species Needs: The Service's authority to require changes in a proposed action occur under formal consultation in: reasonable and prudent alternatives (RPAs) to an action that is likely to jeopardize the continued existence of a species or adversely modify or destroy its designated critical habitat; or reasonable and prudent measures (RPMs) and terms and conditions (T&Cs) in an incidental take statement. The Service's ability to require changes to a proposed action through a RPA are limited by the Service's legal authority and jurisdiction. The Service's authority to make changes in RPMs and T&Cs are limited by the "minor change" rule (see the Consultation Handbook and 50 CFR §402.14(i)(2)).

The Dingell-Johnson Sport Fish Restoration and Pittman-Robertson Wildlife Restoration Acts prohibit the use of grant funds for law enforcement, licensing, and regulatory functions. Grant funds under these programs may not be used to write or enforce regulations, including hunting, fishing, or other natural resource uses, or issue licenses and permits for such uses. These are considered wholly State policy actions not appropriate for federal participation. Therefore, since there is no federal grant nexus to these types of State activities, the Service cannot mandate changes in regulations, licensing, or permitting for protecting listed species through the section 7 process. In addition, Federal Assistance discretion under two major programs (Wildlife and Sport Fish Restoration) is limited to an evaluation of eligibility and a test of "substantial in character and design" (50 CFR §80.13) that applies to Federal Assistance Programs:

All projects proposed for funding under the Acts must be substantial in character and design. A substantial project (for fish and wildlife purposes) is one which: (a) Identifies and describes a need within the purposes of the relevant Act to be utilized; (b) Identifies the objectives to be accomplished based on the Stated need; (c) Utilizes accepted fish and wildlife conservation and management principles, sound design, and appropriate procedures; and (d) Yields benefits which are pertinent to the identified need at a level commensurate with project costs.

F. Grant Types: The following discussion illustrates where the federal nexus (i.e., effects of the federal action) begins and ends for several common types of Federal Assistance-funded State projects.

1. Surveys, Data Collection and Analysis Grants: Effects of federally-funded surveys and data collection are from physical actions of taking measurements or estimates. Service grants may also fund data analysis and management recommendations based on data analysis. The uses of data for analysis are varied and unpredictable. Data analysis and recommendations occur "on paper" and by themselves cause no effects. Policy is established when policymakers enact regulations, which typically involves the consideration of a number of information sources that may or may not include data and recommendations from federal actions. Establishment of policy by State policymakers is not a federal action. The existence of data and analyses of data should be considered neutral and to have no effect on the environment. The use of data or analysis of data in decision-making by policymakers is generally accompanied by other considerations not related to the specific data. For these reasons, unless there are unusual circumstances, data collection actions do not have interrelated or interdependent activities and do not have effects aside from those caused directly or indirectly by the physical acts of data collection (e.g. disturbing sediment in a stream or harassing a nesting bird). The effects of federally-funded surveys and data collection do not include the effects of States establishing hunting and fishing regulations based on the resulting data.

2. Land Acquisition: In general, the purposes of a land purchase are the focus of the section 7 consultation because the federal action of deciding whether to fund land purchases is based on a determination of whether the action is "substantial in character and design" (50 CFR §80.13). To make that determination, Federal Assistance reviews the purposes for which the land is being purchased. In consultation, future management of land proposed for acquisition is addressed in the limited fashion described below. Unless caused by the grant and reasonably certain to occur, the effects of grants to acquire land generally do not include analysis of actions that might be taken by landowners prior to completion of the acquisition.

A federal action of funding land acquisition needs to include direct and indirect effects as well as the interrelated and interdependent actions of the funding action. For example, the transfer and recording of title or deed from one entity to another is an interrelated activity because transfer and recording of title or deed would not likely occur "but for" Federal Assistance funding the land acquisition. However, the effect of the deed or title transfer in and of itself is nil.

Future management of land proposed for purchase could involve indirect effects, or interrelated and interdependent actions based on how the general or specific purposes and uses of the proposed land purchase are described or need to be described in the grant proposal or grant agreement to satisfy the "substantial in character and design" test (see 50 CFR §80.13, above). However, effects analyses are not constrained to those contained in the "substantial in character and design" test. Future management actions are subject to applicable ESA provisions and prohibitions either as they are conducted by the State or as part of a future Federal Assistance grant.

Land acquisition grants may include specific construction or other development. In these cases the purchase would not be "substantial in character and design" without future construction. If a specific construction activity is a part of a land acquisition grant, or if the purchase would not be "substantial in character and design" without specific future management or construction, then any

effects caused by the management or construction activity would be included with the effects of the action. This would apply only to the management and/or construction activities identified at the time of acquisition necessary to make the purchase "substantial in character and design" and not to all management actions taken in the future. Those future management or construction actions would be covered under future Federal Assistance grants with a new section 7 consultation, or independently funded and carried out by the State agency with no section 7 requirements, but still in compliance with the ESA.

There is a continuing, larger, unresolved debate within the Service over assessing effects relative to land disposal in a number of the Agency's programs. For this reason, this guidance does not address land disposal in the Federal Assistance Program. Land disposal is less common in the Federal Assistance Program than land acquisition and future Federal Assistance guidance on this topic will be forthcoming when the issue is resolved.

3. Coordination and Technical Assistance: Generally, these types of grants fund State employees to conduct planning and coordination activities and to provide technical information to public and private entities. The duties of a technical assistance position include providing environmental comments on documents for projects that may impact the State's fish or wildlife resources, providing answers to resource questions from the public, and creating written materials for landowners contemplating habitat improvement projects. In addition, these grants can fund workshops, meetings and printing of informational materials. In almost all cases, Coordination and Technical Guidance grants do not fund implementation of on-the-ground actions. The information associated with these grants does not constitute direction or other mandatory guidance. As with all Federal Assistance grants, technical assistance funds cannot be used for law enforcement or regulatory purposes. Technical assistance grants do not fund implementation of on-the-ground actions, but rather provide information, and it is highly unlikely that they would cause adverse effects to listed species or have associated interrelated or interdependent actions. For this reason, coordination and technical assistance grants would rarely, if ever, have direct or indirect effects on the environment including listed species or critical habitats. See the discussion presented in the Surveys, Data Collection and Analysis example for additional explanation regarding the effects of information.

4. Education: Generally education grants do not fund implementation of on-the-ground actions, but rather provide information. It is highly unlikely that they would cause adverse effects to listed species or have associated interrelated or interdependent actions. For this reason, education grants would rarely, if ever, have direct or indirect effects on the environment including listed species or critical habitats. Most of these actions will result in "no effect" determinations.

5. Development: Grants that fund construction, reconstruction or routine maintenance of facilities may result in physical changes to the environment and may include interrelated and interdependent actions that may also cause physical changes to the environment. The physical effects of such changes would be part of the effects of the federal action of funding the development project. The direct and indirect effects of the proposed action and effects from interrelated and interdependent actions must be considered.

VI. Examples of Applying the Guidance to Projects

Below are examples of projects that are similar to actual projects funded by Service grants. Each example is described and then following is a response that shows how the guidance should be generally applied to the example.

Example 1. A boat access site was purchased in 1977 with Federal Assistance funds when no listed species occurred in the area. No effects were expected and no consultation occurred on the Federal Assistance funded purchase. The boat access site includes several acres of vegetated uplands that harbor a now-listed plant. Current Federal Assistance grants for the site are for maintenance of the access facilities (launch, approach, trails to fishing sites, parking lot, trash removal, and toilet maintenance), but do not address management of the vegetated uplands. Over-night camping is prohibited on the entire site, but sometimes does occur in the vegetated area. Are effects from overnight camping part of the effects of the maintenance funding?

Example 1 Response. No. This is an example of an operation and maintenance grant on existing, developed sites. The effect of the maintenance, including protective measures should be the subject of consultation, not the effect of illegal uses unless a strong argument can be made that the illegal activities are a result of the action, will occur later in time, and are reasonably certain to occur, and/or are interrelated or interdependent to the action. Linking the illegal activities to the action of funding routine maintenance is unlikely in this situation. The previous purchase and existence of the developed facilities is not under consultation and the land is serving the purposes for which it was purchased. The unauthorized or prohibited uses by citizens of lands purchased with Federal Assistance funds are not effects of the federally-funded maintenance, provided maintenance includes reasonable measures to differentiate between intended and prohibited public uses. Reasonable measures may include posting signs or placing fences to limit access. The Service has the responsibility to evaluate "otherwise lawful activities" in determining incidental take. It must be assumed that the lawful activities do not anticipate illegal activities and, as such, the action agency cannot be held responsible for possible future takings that are prohibited by law.

Example 2. Federal Assistance has funded the State to hire a technical coordinator who will provide comments regarding the effects on fish and wildlife from many federal actions in the State, including federal highway projects, Forest Service actions, and Army Corps of Engineers permitting and dam operations. The federal actions the technical coordinator will comment on would likely have far reaching effects on many listed species and critical habitats. In the past, the State comments have not always focused on the protection of all listed species and critical habitat. Does federal funding of this grant trigger section 7 consultation?

Example 2 Response. No. This is an example of a technical guidance grant. The federal action of funding a State technical coordinator has no effect on listed species or critical habitat.

Example 3. Federal Assistance has funded a State agency to conduct a study of two species of fish, one endangered, the other threatened. The study involves capture and marking of fish for observation while snorkeling. The Service and the State agency have signed a cooperative agreement under section 6 of the ESA, and there is a completed section 7 consultation on the agreement. The cooperative agreement stipulates that:

"Any employee or Agent of the State Agency who is designated by the State Agency for such purposes, may, when acting in the course of official duties, take any endangered species of fish or wildlife that are consistent with the purposes of the Act and this Agreement, or any Project Agreement attached thereto, provided that such taking is not reasonably anticipated to result in: 1) the death or permanent disabling of the specimen; 2) the removal of the specimen from the State; 3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the species; or 4) the holding of a specimen in captivity for a period of more than 45 consecutive days".

and

"Any employee or agent of the State Agency who is designated by the Agency may, when acting in the course of official duties, take any threatened fish or wildlife for conservation purposes that are consistent with the purposes of the Act and this Agreement".

Is section 7 consultation required for this grant?

Example 3 Response. No, because a section 7 consultation on the cooperative agreement has already been completed. This is a research grant and the federal action is funding the State agency to conduct the study of endangered fish and the interdependent action is implementation of the study plan. The current, updated section 6 cooperative agreement anticipates that States would conduct this sort of study and has already authorized take associated with this type of study. The study is the type of action anticipated, addressed, and authorized by the cooperative agreement. There are no effects of funding this action that are not previously addressed in the section 6 cooperative agreement between the Service and the State fish and wildlife agency.

Example 4. Federal Assistance is proposing to fund a State elk and deer compatibility study. The study will measure the difference in browse availability in areas with only elk or deer, with areas with elk and deer. Two trained biologists will require 45 field days to collect browse measurements. One study area was recently closed to hunting through the State's hunting regulations for purposes not related to the proposed study. Using a grant from a private source, the State has also recently purchased public hunting access on privately owned land that was previously closed to hunting. When the State posted the study area closure with signs and public notices, the State also included notification of the new access at the previously closed area. Grey wolves and grizzly bears, as well as many listed fish and plants occur in both the newly open and newly closed areas. Is section 7 consultation required for this action?

Example 4 Response. No. This is an example of a research grant and the federal action is funding a study. There are no anticipated negative impacts to listed species of two biologists walking through habitat assessing browse trends. Closing the hunting area was a State hunting regulation, unrelated to the proposed action and is not subject to section 7 consultation. Likewise, opening the new hunting area using private funds is not part of the federal action of the study, and the effects of opening the hunting area would not be considered as effects of the proposed federal action.

Example 5. Federal Assistance is proposing to fund a State grant to conduct an aerial helicopter survey of deer in an area with a large number of endangered plants that are eaten by the deer. Biologists will record the number and location of deer observed in the survey area. Biologists will compile and analyze the data

from previous years to determine the trend in the population. The State will wholly fund biologists who use the report to make recommendations on deer harvest to policymakers who establish the public policy on regulations, seasons, bag limits, and their enforcement. If the hunting season is closed, deer numbers may increase and those deer may eat some of the endangered plants. Policy makers will receive information and recommendations from other biologists, other agencies, and the public prior to making a decision. Is the grant that funds this activity subject to section 7 consultation?

Example 5 Response. No, unless there are demonstrable data to support a finding that the physical acts of data collection such as flying and landing the helicopter impact listed species. This is an example of a survey and inventory grant and the federal action is funding the survey. The data generated by the survey is varied and unpredictable. The data could indicate a stable, increasing, or decreasing trend in the deer population. The decision on what to do with the data and any changes in public policy and regulations are made by policymakers, with consideration of public safety, environmental and economic effects, and other issues not related to the data. The effects of the hunting regulations set by a State policymaking process would not be considered as effects of the federal action of collecting the survey data.

Example 6. The State has proposed funding a parking lot expansion and bridge improvement over Big Stream on the Big Stream State Wildlife Management Area. Big Stream State Wildlife Management Area was originally purchased with Federal Assistance funds in 1958. The bridge over Big Stream and the parking lot both existed on site prior to the State purchasing the area. The parking lot is over 500 meters from the Big Stream and services the trailhead for the four-mile, non-motorized, loop trail that winds through the wetland adjacent to Big Stream. The trail head is used by birders, duck hunters, and cross country skiers. The Wildlife Management Area prohibits non-passenger vehicles, biking, and horseback riding throughout the Wildlife Management Area, and prohibits hiking or skiing off the trail. The trail does not go through the steep, rocky slopes on the edge of the wetland. The bridge improvement will include removal of the existing mud and rock abutments and the one lane wooden bridge. The improvement will replace them with timber and concrete abutments and a one-lane steel bridge. The parking lot expansion will increase the existing gravel lot by 3,000 square feet and allow roughly five more passenger vehicles to use the parking lot, bringing the total number of vehicles that may use the parking lot to 20. The parking lot expansion will require removal of half of a little-used picnic area that was constructed in 1968, but will not disrupt currently undeveloped habitat. Threatened fish occur in the Big Stream. Three listed plants endemic to steep, rocky slopes also occur on the Wildlife Management Area. The State has surveyed the bridge and picnic areas and immediate area around them, but did not locate any of the listed plants or suitable habitat for them. Is section 7 consultation required for this grant?

Example 6 Response. Yes. This is an example of a facilities construction grant. The effects of this proposed action would include all the physical effects of the parking lot expansion and changes to the bridge and bridge abutments. If the parking lot expansion would likely increase the potential for human use beyond the baseline, then the indirect effects of the of increased human use should also be considered as part of the effects of the proposed action. Because of the steep, rocky slope in the area of the proposed action or areas affected by the proposed action, one would expect no effects on listed plants. However, threatened fish occur in Big Stream, therefore effects on the fish from the bridge work would potentially be unavoidable, and may be adverse, depending upon the timing and other measures that are available to avoid or reduce effects. When designing the project, appropriate staff, such as, State biologists and managers, and the Service's Federal Assistance and endangered species biologists should consider the

best methods for accomplishing the proposed bridge and parking lot work while protecting the threatened fish in Big Stream. If adverse effects are likely, formal consultation on this action would be necessary. If a Corps' Clean Water Permit is also required for this action relative to in-water work associated with the bridge, that action should be regarded as interdependent with the Federal Assistance grant and any effects of the Corps permit would be included as effects of the Federal Assistance grant.

Example 7. The State proposes to conduct hunter education classes to help hunters successfully identify the gender of an introduced species of ungulate using in part grant monies from Federal Assistance. The purpose of the class is to provide information to hunters to help them identify male ungulates for harvest. The State wants to only harvest males because the herd is below optimum size and they wish to allow the herd to increase in numbers until it reaches herd objectives. The ungulate's foraging habits impact the habitat of a listed species. Is section 7 required for this grant action?

Example 7 Response. No. This is an example of a hunter education grant. Education grants have "no effect" on listed species or their critical habitats because there are no identifiable direct or indirect effects nor are there any interrelated or interdependent actions related to the grant proposal. Transfer of knowledge and information does not create effects for section 7 purposes.

Example 8. The State has applied to Federal Assistance for a grant to fund the purchase of native grasslands to provide hunting opportunities primarily for a metropolitan area 100 miles away. Hunting demand exceeds opportunity and the State commission heartily endorses the proposal. Species proposed for hunting are ring-necked pheasant, mourning dove, and waterfowl. In order to provide suitable habitat for those targeted species, the native grasslands will have to be converted to row crops and several shallow wetlands. The native grasslands are home to nesting mountain plover and whooping cranes occasionally fly over the area during fall and spring migrations. The whooping crane is listed as endangered and the mountain plover is proposed for listing under the ESA. Is section 7 required for this grant action?

Example 8 Response. Yes. This is an example of a land acquisition grant. The legal process of acquiring the land would have no effect on listed species or their habitats. However, because of the stated objectives of the land purchase, it is reasonable to assume that subsequent to land sale to the State, the grasslands would be converted to crop land which would likely impact the nesting activities of mountain plover. These land use conversions are either indirect effects or interrelated actions related to the realty transaction process and need to be considered in a section 7 consultation. The impact on whooping cranes is either neutral (no effect) or beneficial (may affect, not likely to adversely affect) due to the creation of wetlands. The Service needs to provide written concurrence that it is not likely to adversely affect whooping cranes.

Example 9. The State has applied to Federal Assistance for a grant to fund a hunter check station that gathers information on a number of wildlife species harvested, including wild pigs that are a State-regulated game animal. The data gathered at the check station will be used to assess the health, age structure, sex ratios, and other life information of the pig population. The information will help enable the State to make informed management decisions for the pig population. Pig hunting is controversial within the State because they are non-natives and destroy habitat occupied by native listed species. A faction that would like to see pigs eliminated rather than regulated for sport hunting contends that information gathered at the check stations is used to make management decisions and thus the entire

wildlife management program of the State fish and wildlife agency is subject to section 7 consultation. Is this grant subject to section 7 consultation?

Example 9 Response. No. This is an example of a survey and inventories grant. The physical process of collecting the data will not cause effects to listed species and their habitats. Use of the data after it is collected is effect-neutral and does not trigger section 7 consultation. There is no legitimate section 7 nexus to the general operation of the State agency associated with this action; therefore, the general wildlife management program operation of the State agency is not subject to section 7 consultation.

Example 10. The State wishes to use a Sport Fish Restoration grant to stock non-native, hatchery-raised rainbow trout in streams occupied by a listed threatened species. Rainbow trout are highly sought by the State's sport anglers and there is widespread support for this proposed action because the streams cannot supply enough fish to satisfy local angling demands. Does section 7 apply in this case?

Example 10 Response. Yes. This is an example of a fish and wildlife population management grant. The act of stocking rainbow trout in habitat occupied by listed species would likely cause direct and indirect effects to the listed species. The effects of this grant proposal will have to undergo section 7 consultation to determine if the effects are adverse. If the effects are adverse to listed species or their critical habitats, formal consultation is required. However, if the non-native species had previously or historically been stocked into the system, the extent of the pre-existing stocking program should be included as part of the environmental baseline.

Example 11. The State wishes to increase public awareness of its properties. They propose a grant to Federal Assistance to develop, publish, and distribute information that features the properties' locations, uses, history, and other types of information that would be useful to the public. Some of the properties have listed species within their boundaries. Does section 7 apply to this grant action?

Example 11 Response. No. This is an example of an outreach grant. The development of information is effect-neutral to listed species, therefore, formal section 7 is not required on this type of grant proposal.