

Memorandum

To: DISTRICT DEPUTY DIRECTORS FOR
ENVIRONMENTAL ANALYSIS AND
LOCAL ASSISTANCE

Date: May 28, 2021

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Subject: NEPA PROCESS IMPROVEMENT TEAM—INITIAL IMPLEMENTATION: FLEXIBILITY IN TIMING OF OBTAINING BIOLOGICAL OPINIONS

The NEPA Process Improvement Team (Team) Steering Committee has approved the initial implementation of a proposal by the Team to allow flexibility in the timing of obtaining biological opinions as long as certain conditions are met, as part of our federal Endangered Species Act Section 7 and National Environmental Policy Act (NEPA) processes.

Attached to this memorandum are the guidance documents produced by the Team: *Guidance for Section 7 Timing During Project Delivery (May 2021)*, and *Federal Endangered Species Act Section 7 and Biological Opinion Timing Processes (May 2021)*. These guidance documents address both projects on the State Highway System as well as Local Assistance projects. The guidances must be adhered to for a project to enter into this initial implementation phase. Approval to enter into this initial implementation phase will allow the project to obtain the biological opinion(s) for a project after the approval of the final environmental document.

This process change is being implemented in an initial phase in order to assess its effectiveness, not only for project delivery for Caltrans and its transportation partners, but also to assess its effectiveness for our resource agency partners. Projects in this initial implementation phase will be reviewed by Headquarters Division of Environmental Analysis, the Division of Local Assistance (as applicable), and the applicable district for the project(s) to determine best practices, and any potential adjustments that may be needed as decisions are made regarding the permanent implementation of a flexible biological opinion timing policy. This review will occur no later than 3 years from the date of this memorandum.

For projects on the State Highway System, if a district elects to have a project enter this initial implementation phase, the Deputy District Director for

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Environmental or Principal or Supervising Environmental Planner designee must send an email to the Headquarters' Environmental Coordinator assigned to that district stating that intention. For Local Assistance projects, the Environmental Branch Chief, must send the email to the appropriate Headquarters' Environmental Coordinator and copy the District Local Assistance Engineer. For both types of projects, the email must include the following:

- Project name, location, and expenditure authorization
- Which biological opinion(s) will be obtained in PS&E
- Most current estimate for when biological opinion(s) are expected to be obtained
- Documentation/evidence of the Technical Assistance with the Services as required in the guidance documents, if currently available; otherwise that documentation/evidence must be sent at the time of the administrative final environmental document

The Headquarters' Environmental Coordinator will notify the Headquarters' Division of Environmental Analysis Division Chief, Assistant Division Chief, and Office of Biological Studies Office Chief of the project's entrance into the initial phase of implementation of this proposal. If the project is a local assistance project, the Headquarters' Environmental Coordinator will also notify the Division of Local Assistance Division Chief and Environmental Compliance and Outreach Office Chief.

Once those notifications have occurred, the Headquarters' Environmental Coordinator will respond to the district notifying them that the project information has been received and the project is officially entered into the initial implementation subject to following the guidance attached to this memorandum.

We look forward to the initial implementation of this new proposal and trust in your continued professionalism and diligence to help make this new flexibility a success for Caltrans and its resource agency and transportation partners. If you have any questions regarding this memorandum, please contact Kelly Dunlap, NEPA Process improvement Team Lead, at (916) 870-7613, or Kelly Hobbs, the Office Chief responsible for Local Assistance environmental compliance, at (916) 838-9085.

Guidance for Section 7 Timing During Project Delivery
NEPA Process Improvement Team
Biological Sub-team
May 2021

The following guidance clarifies requirements of Federal Endangered Species Act (FESA) Section 7 (Section 7) consultations during the Caltrans project delivery process and provides for flexibility in the timing of implementation of the requirements.

For Projects on the State Highway System

Section 7 Completion During PS&E

The Caltrans Project Development Team (PDT) can exercise flexibility in the timing of Section 7 consultation process and allow it to extend beyond the Project Approval and Environmental Document (PA&ED) milestone or initiate formal/informal consultation during the Plans, Specifications, and Estimates (PS&E) phase, ensuring it is complete, and all findings are incorporated into the Ready to List (RTL) package. The benefits to finalizing Section 7 consultation during PS&E include allowing a shorter PA&ED schedule and having a more thorough, developed, and completed engineered design package from which to determine all of the effects of the project actions in the final Biological Assessment (BA) submitted for Section 7 consultation.

The finalization of Section 7 consultation beyond PA&ED and the final environmental document (FED) could reduce risks to the overall project costs, scope, and schedule if changes occur either to project design and/or the assessment of all effects of project actions to FESA species and critical habitats. However, additional risk could result to the FED for the project if anticipated project effects changed between the FED and when Section 7 consultation occurs and is complete.

The PDT should discuss these risks on a case-by-case basis for each project that proposes to delay or extend Section 7 responsibilities beyond PA&ED. The following specific cases are instances where there is reasonable assurance that completing Section 7 responsibilities during PS&E could be beneficial:

- 1) Projects eligible for FESA coverage under completed Section 7 programmatic consultation efforts. If a project is eligible for FESA coverage under an existing Programmatic Letter of Concurrence (PLOC) or to be appended to an existing Programmatic Biological Opinion (PBO) then the Section 7 process is already complete. Caltrans can exercise its responsibilities under these completed Section 7 efforts with the more advanced design available during PS&E. The determination of whether a project is eligible within a PLOC or PBO must be made and documented during PA&ED, and all FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.

- 2) Projects eligible for FESA coverage under completed Section 10 programmatic consultation (Section 10) efforts. If a project is eligible for FESA coverage under an existing Habitat Conservation Plan (HCP) then the Section 7 process can proceed quickly on the completed HCP. Caltrans can exercise its responsibilities under these completed Section 10 efforts with the more advanced design available during PS&E. The determination of whether a project is eligible within an HCP must be made and documented during PA&ED, and all FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.
3. Consultation with National Marine Fisheries Service (NMFS). If a project has potential to affect FESA species and critical habitats under NMFS jurisdiction, completing Section 7 responsibilities during PS&E allows for the more advanced engineered design of the proposed structure(s) in the BA. NMFS often requests a level of design detail of in-stream structures for BA studies not available during PA&ED, so completing Section 7 responsibilities during PS&E can result in more detailed and advanced designs and studies to analyze in the BA. Additionally, Caltrans Biologists can often very accurately predict the need for formal consultation with NMFS when water diversion structures and fish relocation are anticipated, so effects determinations and planning for Section 7 consultation timelines, conservation measures, and potential mitigation or compensation can be included with increased confidence in the FED.

The decision to initiate formal/informal consultation during PS&E should be documented as early in project delivery as possible and should not be done simply to deal with challenges meeting the PA&ED schedule milestone. If an incomplete assessment of potential effects to FESA species and/or critical habitat is made during PA&ED, there is increased risk that either the NMFS, and/or the United States Fish and Wildlife Service (the Services) may not concur with these determinations when Section 7 consultation is initiated in PS&E. If Section 7 consultation concludes during PS&E with changes to the determinations, conservation measures, compensation, or mitigation detailed in the FED, the FED may need to be re-evaluated, re-written, and re-circulated for public comment. Substantial modifications to the FED during PS&E can result in increased costs and delays to the project near critical RTL milestones, and should be avoided by following the requirements and recommended best practices below. Caltrans can complete Section 7 during PS&E but only if there is reasonable assurance that the Services will concur with Caltrans effects determinations and that the effects determinations made in the NEPA document are likely to remain consistent.

Projects identified with Advance Mitigation to account for adverse impacts to protected species and habitats may be good candidates for initiate formal/informal consultation during PS&E.

Requirements

Notify Headquarters. The district must notify their assigned Headquarters' Environmental Coordinator as set forth in the *NEPA Process Improvement Team--Initial Implementation: Flexibility in Timing of Obtaining Biological Opinion Memorandum* (May 2021). Once the initial implementation of this NEPA Process Improvement Team proposal concludes the district must follow the then-applicable requirements.

Effects determinations must be made for all species and critical habitats in PA&ED. FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.

Species lists are obtained. The IPaC and, if applicable, NMFS species lists must be obtained and included in the NES and FED during PA&ED in accordance with the *Changes to Species List Requirements Policy Memorandum* dated April 9, 2021.

Technical assistance and/or informal coordination occurs with the Services during PA&ED. Coordination with the Services during development of the FED is required, and Technical Assistance communications between Caltrans and the Services must be documented and included in the FED. The communications should share a basic project description, current FESA species lists, proposed effects determinations for each species and critical habitats, and proposed avoidance, minimization, and compensation measures Caltrans can commit to. The Services should respond with comments and any additional proposed conservation measures.

Fulfilling the above requirements will provide the reasonable assurance needed for completing Section 7 during PS&E.

Recommendations for Best Practices

Completion of the BA during PA&ED. Regardless of when formal/informal consultation will be undertaken, the project Biologist should draft the BA and have it reviewed and approved by a Senior Biologist during PA&ED based on the most accurate information on project design available. All FESA effects determinations for all species identified on species lists are to be made through an assessment of potential effects of the proposed action in the BA. This draft BA should be shared with the Services as the focus of a request for Technical Assistance.

Document Approval of Section 7 schedule. When the PDT proposes to initiate formal/informal consultation in PS&E, the decision should be supported by the Office Chief, and the decision and rationale should be documented in writing and added to the appropriate environmental tracking database. The Biologist, Environmental Coordinator/Generalist, and subject matter experts involved with Section 7 consultation responsibilities should be engaged to thoroughly detail project-specific challenges and needs.

The Caltrans PDT should follow the recommendations provided by the Biological subject matter experts concerning the timing of completing Section 7 requirements. When formal/informal Section 7 consultation extends beyond the PA&ED milestone, there may be significant risk to the project's cost, scope, and schedule. The environmental document content and type could be at risk due to the federal endangered species not being accurately assessed, mitigation needs not adequately identified and budgeted for, and measures to minimize harm not considered early in the project development process.

There can also be benefits resulting from completing Section 7 consultation during PS&E vs. PA&ED, as the overall project engineered design is more complete and additional details are available. Allowing for flexibility to complete Section 7 consultation within the project delivery process could result in more efficient and cost-effective engagement with our federal partners under some circumstances. For dual-listed species, consideration should be made regarding the timing of Section 7 consultation to allow for the coordination and development of a Consistency Determination from the California Department of Fish and Wildlife (CDFW) if appropriate.

For Local Assistance Projects

Section 7 Completion During PS&E

The Caltrans District Local Assistance Engineer (DLAE) and Environmental Branch Chief (EBC) can exercise flexibility in the timing of Section 7 consultation process and allow it to extend beyond FED or initiate formal/informal consultation during Final Design, ensuring it is complete, and all findings are incorporated into the RTL package. The benefits to finalizing Section 7 consultation during Final Design include allowing a shorter Preliminary Engineering schedule and having a more thorough, developed, and completed engineered design package from which to determine all of the effects of the project actions in the final Biological Assessment (BA) submitted for Section 7 consultation.

The finalization of Section 7 consultation beyond the FED could reduce risks to the overall project costs, scope, and schedule if changes occur either to project design and/or the assessment of all effects of project actions to FESA species and critical habitats. However, additional risk could result to the FED for the project if anticipated project effects changed between the FED and when Section 7 consultation occurs and is complete.

These risks should be discussed on a case-by-case basis for each project that proposes to delay or extend Section 7 responsibilities beyond FED. The following specific cases are instances where there is reasonable assurance that completing Section 7 responsibilities after FED could be beneficial:

- 1) Projects eligible for FESA coverage under completed Section 7 programmatic consultation efforts. If a project is eligible for FESA coverage under an existing PLOC or to be appended to an existing PBO then the Section 7 process is already complete. Caltrans can exercise its responsibilities under these completed Section 7 efforts with the more advanced design available after FED. The determination of whether a project is eligible within a PLOC or PBO must be made and documented during development of the FED and all FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.
- 2) Projects eligible for FESA coverage under completed Section 10 programmatic consultation (Section 10) efforts. If a project is eligible for FESA coverage under an existing Habitat Conservation Plan (HCP) then the Section 7 process can proceed quickly on the completed HCP. Caltrans can exercise its responsibilities under these completed Section 10 efforts with the more advanced design available after FED. The determination of whether a project is eligible within an HCP must be made and documented during preparation of the FED and all FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.
- 3) Consultation with National Marine Fisheries Service (NMFS). If a project has potential to affect FESA species and critical habitats under NMFS jurisdiction, completing Section 7 responsibilities after FED allows for the more advanced engineered design of the proposed structure(s) in the BA. NMFS often requests a level of design detail of in-stream structures for BA studies not available during preparation of the environmental document, so completing Section 7 responsibilities after FED can result in more detailed and advanced designs and studies to analyze in the BA. Additionally, biologists can often very accurately predict the need for formal consultation with NMFS when water diversion structures and fish relocation are anticipated, so effects determinations and planning for Section 7 consultation timelines, conservation measures, and potential mitigation or compensation can be included with increased confidence in the FED.

The decision to initiate formal/informal consultation after FED should be documented as early in project delivery as possible and should not be done simply to deal with challenges meeting the environmental document schedule milestone. If an incomplete assessment of potential effects to FESA species and/or critical habitat is made during preparation of the environmental document, there is increased risk the Services may not concur with these determinations when Section 7 consultation is initiated after FED. If Section 7 consultation concludes after FED with changes to the determinations, conservation measures, compensation or mitigation detailed in the FED, the FED may need to be re-evaluated, re-written, and re-circulated for public comment. Substantial modifications to the FED can result in increased costs and delays to the project near critical bidding and construction milestones and should be avoided by following the requirements and recommended best practices below. Caltrans can complete Section

7 after FED but only if there is reasonable assurance that the Services will concur with Caltrans effects determinations and that the effects determinations made in the NEPA document are likely to remain consistent.

Projects identified with Advance Mitigation to account for adverse impacts to protected species and habitats may be good candidates for initiate formal/informal consultation after FED.

Requirements

Notify Headquarters. The district must notify their assigned Headquarters' Environmental Coordinator as set forth in the *NEPA Process Improvement Team--Initial Implementation: Flexibility in Timing of Obtaining Biological Opinion Memorandum* (May 2021). Once the initial implementation of this NEPA Process Improvement Team proposal concludes, the district must follow the then-applicable requirements.

Effects determinations must be made for all species and critical habitats during development of the FED. FESA effects determinations for all species identified on species lists must be made through an assessment of potential effects in the FED.

Species lists are obtained. The IPaC and, if applicable, NMFS species lists must be obtained and included in the NES and FED in accordance with the *Changes to Species List Requirements Policy Memorandum* dated April 9, 2021.

Technical assistance and/or informal coordination occurs with the Services during development of the FED. Coordination with the Services during development of the FED is required, and Technical Assistance communications between Caltrans and the Services must be documented and included in the FED. The communications should share a basic project description, current FESA species lists, proposed effects determinations for each species and critical habitats, and proposed avoidance, minimization, and compensation measures Caltrans can commit to. The Services should respond with comments and any additional proposed conservation measures.

Fulfilling the above requirements will provide the reasonable assurance needed for completing Section 7 after FED.

Recommendations for Best Practices

Completion of the BA during development of FED. Regardless of when formal/informal consultation will be undertaken, the project Biologist should draft the BA and have it reviewed and approved by the Caltrans Biologist during preparation of the environmental document based on the most accurate information on project design available. All FESA effects determinations for all species identified on species lists are to be made through an assessment of potential effects of the proposed action in the BA. This draft BA should be shared with the Services as the focus of a request for Technical Assistance.

Document approval of Section 7 schedule. When the project proposes to initiate formal/informal consultation after FED, the decision must be supported by the DLAE and EBC, and the decision and rationale should be documented in writing and added to the appropriate environmental tracking database. The Biologist, EBC, and subject matter experts involved with Section 7 consultation responsibilities should be engaged to thoroughly detail project-specific challenges and needs.

The DLAE and EBC, in consultation with the Local Agency, should follow the recommendations provided by the Biological subject matter experts concerning the timing of completing Section 7 requirements. When formal/informal Section 7 consultation extends beyond the FED milestone, there may be significant risk to the project's cost, scope, and schedule. The environmental document content and type could be at risk due to the federal endangered species not being accurately assessed, mitigation needs not adequately identified and budgeted for, and measures to minimize harm not considered early in the project development process.

There can also be benefits resulting from completing Section 7 consultation after FED as the overall project engineered design is more complete and additional details are available. Allowing for flexibility to complete Section 7 consultation within the project delivery process could result in more efficient and cost-effective engagement with our federal partners under some circumstances.

For dual-listed species, consideration should be made regarding the timing of Section 7 consultation to allow for the coordination and development of a Consistency Determination from CDFW if appropriate. If the Local Agency plans to pursue a CDFW 2081(b) Incidental Take Permit for a dual-listed species, the Caltrans biologist should explore a Consistency Determination option.

**Federal Endangered Species Act Section 7 and Biological Opinion
Timing Processes
NEPA Process Improvement Team
Biological Sub-team
May 2021**

For Projects on the State Highway System

1. K-Phase Processes

- Identify the permitting strategy--Should the Biological Opinion (BO) timeline be pushed out to Plans, Specifications, and Estimates (PS&E)?
- Based on the Federal Endangered Species Act Section 7 (Section 7) consultation strategy, resource support costs accordingly in the 0 or 1 phase (or both).
- Plan for the project's mitigation needs related to Section 7 consultation. Estimate support and capital costs for mitigation needs based on assumptions. Document the risks. NOTE: If pushing out Section 7 consultation to PS&E, risk increases with regards to adequate planning of project's mitigation needs related to Section 7.
- Coordinate with Project Coordinator/Generalist on Environmental Document strategy
 - i. This would be the first opportunity to identify the potential strategy to obtain a BO in PS&E

2. 0-Phase Processes

- Attain concurrence from the Project Development Team (PDT) if proposing to obtain the BO in the 1-phase
- Conduct field surveys and evaluate resources associated with the project site
- Work with design team on early alternative recommendations or design variations to avoid & minimize impacts to listed species (document for inclusion in the Natural Environment Study (NES) and Biological Assessment (BA) as "measures to minimize harm")
- Prepare Draft BA, using most current design information, with proposed effects determinations and conduct peer and Senior review
- If obtaining BO in 1-phase, initiate Technical Assistance with the Services using the Draft BA (This technical assistance is to inform the NES and environmental document)
 - i. Review probable species
 - ii. Review proposed project / action
 - iii. Review potential Avoidance & Minimization measures
 - iv. Discuss if project is appropriate for established programmatic agreements, Programmatic Letter of Concurrence (PLOC), or to be appended to an existing Programmatic Biological Opinion (PBO)

- v. Review and seek feedback on design alternatives
- vi. Review and discuss effects determinations
- vii. Review and discuss mitigation for impacts
- If obtaining BO in 1-phase, Technical Assistance must be documented and included in the draft environmental document or final environmental document
- If obtaining BO in 0-phase, follow established process
- Regardless of strategy for BO, coordinate with the Mitigation Specialist to start to develop a mitigation strategy
 - i. On-site restoration strategies
 - ii. Advance Mitigation credits
 - iii. Develop off-site mitigation concept /proposal

3. 1-Phase Processes

- Initiate Section 7 consultation considering the timelines for the process, time for negotiation and conflict resolution, and time necessary to incorporate any measures from the BO into the plans and specifications for the project (include considerations if a Consistency Determination from CDFW is appropriate)
- Update resource surveys and impact analysis as needed
- Finalize mitigation commitments
- Conclude Section 7 consultation upon issuance of the BO
- Notify Environmental Coordinator/Generalist and their Senior to reconcile the environmental document with the effects determinations and terms and conditions in the BO
- Draft PS&E specifications for the contract
- Finalize the Mitigation/Monitoring plans

For Local Assistance Projects

1. Preliminary Environmental Study (PES) Phase

- Identify the permitting strategy--Should the Biological Opinion (BO) timeline be pushed out to Final Design?
- Based on the Federal Endangered Species Act Section 7 (Section 7) consultation strategy, resource support costs accordingly
- Plan for the project's mitigation needs related to Section 7 consultation. Estimate costs for mitigation needs based on assumptions. Document the risks. NOTE: If pushing out Section 7 consultation to Final Design, risk increases with regards to adequate planning of project's mitigation needs related to Section 7.
- Coordinate strategy for environmental document
 - i. This would be the first opportunity to identify the potential strategy to obtain a BO in final design

2. Environmental Document Processes

- Attain concurrence from the District Local Assistance Engineer (DLAE) and Caltrans Senior Environmental Planner if proposing to obtain the BO in Final Design
- Conduct field surveys and evaluate resources associated with the project site
- Work with the Local Agency on early alternative recommendations or design variations to avoid & minimize impacts to listed species (document for inclusion in the Natural Environment Study (NES) and Biological Assessment (BA) as “measures to minimize harm”)
- Prepare Draft BA, using most current design information, with proposed effects determinations and conduct peer and Senior review
- If obtaining BO in Final Design, initiate Technical Assistance with the Services using the Draft BA (This technical assistance is to inform the NES as applicable and environmental document)
 - i. Review probable species
 - ii. Review proposed project / action
 - iii. Review potential Avoidance & Minimization measures
 - iv. Discuss if project is appropriate for established programmatic agreements; Programmatic Letter of Concurrence (PLOC) or to be appended to an existing Programmatic Biological Opinion (PBO)
 - v. Review and seek feedback on design alternatives
 - vi. Review and discuss effects determinations
 - vii. Review and discuss mitigation for impacts
- If obtaining BO in Final Design, Technical Assistance must be documented and included in the draft environmental document or final environmental document
- If obtaining BO in Final Design, follow established process
- Regardless of strategy for BO, coordinate with the Local Agency to start to develop a mitigation strategy
 - i. On-site restoration strategies
 - ii. Advance Mitigation credits
 - iii. Develop off-site mitigation concept /proposal

3. Final Design Processes

- Initiate Section 7 consultation considering the timelines for the process, time for negotiation and conflict resolution, and time necessary to incorporate any measures from the BO into the plans and specifications for the project (include considerations if a Consistency Determination from CDFW is appropriate)
- Update resource surveys and impact analysis as needed
- Finalize mitigation commitments
- Conclude Section 7 consultation upon issuance of the BO

- Reconcile the environmental document with the effects determinations and terms and conditions in the BO and prepare NEPA re-evaluation as needed. For local assistance this will likely be done during the revalidation phase as the project moves into the next federal milestone.
- Ensure Local Agency incorporates environmental commitments into their project.