

## **Endangered Species Act (ESA) and Essential Fish Habitat (EFH) Post-Response Procedures**

The purpose of this document is to inform the Federal On-Scene Coordinator (FOSC) of the potential need to conduct consultations **after** the emergency response phase of an incident is over, though every effort should be made to engage the Services early on concerning potential or actual response actions. During the course of emergency response operations, an FOSC must document and track environmental compliance implementation procedures regarding ESA Section 7 and EFH including, but not limited to: Incident Command System (ICS) Form 232-CG Resources at Risk Summary reports, Incident Briefing Form (ICS 201), ESA/EFH Emergency Consultation checklists, etc. The FOSC must comply with consultation requirements for ESA Section 7 and EFH pursuant to 50 Code of Federal Regulations (CFR) § 402.05 and 50 CFR § 600.920.

During a response, the FOSC is responsible for directing response actions so that ESA listed species are not put at risk, or that formally designated Critical Habitats of ESA listed species and/or EFHs are not destroyed. This process is accomplished through pre-spill planning consultations, along with documenting the results of those consultations within Regional Contingency Plans and Area Contingency Plans, as appropriate. However, spill response remains incredibly dynamic and not all federal actions and impacts can be appropriately planned for. For actions not covered by a pre-spill consultation that are used, or are considered for use during an emergency response, the FOSC must follow ESA and/or EFH emergency response procedures and complete ESA and/or EFH consultations in collaboration with the Services once the emergency phase of the response has ended.

There are three criteria for evaluating the effects of response actions on ESA listed species and designated Critical Habitats, and two criteria for evaluating the effects of response actions on EFH. These criteria are used by the FOSC to determine the type of ESA consultation required with National Marine Fisheries Service (NMFS) and/or U.S. Fish and Wildlife Service (USFWS), and/or type of EFH consultation required with NMFS. Depending on the incident response, the FOSC may coordinate with the National Oceanic and Atmospheric Administration (NOAA) Scientific Support Coordinator (SSC), Department of the Interior (DOI) representative, subject matter experts, and/or the Services to determine whether response actions had one of the following effects.

For ESA listed species and designated Critical Habitats:

- (1) The action had **No Effect** (none at all, negative or positive);
- (2) The action **May Affect**, but was **Not Likely to Adversely Affect (NLAA)**, listed species or adversely modify or destroy designated Critical Habitat; or
- (3) The action **May Affect**, and was **Likely to Adversely Affect (LAA)**, listed species and likely adversely modified or destroyed designated Critical Habitat.

For EFH:

- (1) The action had **No Adverse Effect**; or
- (2) The action **May Adversely Affect (Adverse Effects)** are anything that changes the quality or quantity of EFH).

“No effect” or “no adverse effect” is the appropriate determination if the response actions occurred in an area where no ESA listed species and designated Critical Habitats occur and no EFH is present, or

if the action and the stressors of that action would not affect ESA listed species, designated Critical Habitats, or EFH. To assist with “no effect” determinations, the FOSC should ask whether ESA listed species or designated Critical Habitats were exposed to the action or the effects of the action. If not, then “no effect” is the appropriate determination. For example, if there is a seasonality to the presence of an ESA listed species, and the action occurs within the season where the species is not present during the time of response actions, then a “no effect” determination is acceptable. An example of this is nesting loggerhead sea turtles in the Gulf of Mexico. If shoreline cleanup is to occur at the time when there are no nests and no nesting activity, then the action would have no effect on loggerheads. However, it is important to check whether other sea turtle species may be nesting in the area. This “no effect” determination must be documented within the respective unit’s administrative record. Similarly, if the “no adverse effects” on EFH determination is made, this should also be documented.

If the FOSC determines that emergency response actions “may affect” ESA listed species and/or designated Critical Habitat—that is, species or designated Critical Habitats are likely to be exposed to the response actions—then the FOSC shall follow the consultation processes identified in 50 CFR § 402 during and following the emergency operations.

If the FOSC has made a “may affect” determination during an emergency response, the FOSC must engage in emergency consultation with USFWS and/or NMFS as soon as practicable. This engagement with the Services during the response will likely aid in reducing the likelihood of adverse effects on listed species and/or designated Critical Habitats and should help the FOSC meet their responsibility to engage in the post-response consultation once the response has ended. In accordance with the 2001 Memorandum of Agreement (MOA), these consultations shall remain active until the conclusion of emergency response operations.

Pursuant to 50 CFR § 402.14(c), the FOSC must submit a written request to the Services once the emergency response phase is over. The type of consultation and request to the Service(s) will depend upon the type of effects the response actions had on listed species and/or designated Critical Habitat. If the FOSC determines that the response actions were NLAA (*informal consultation*), the FOSC must then submit a letter to the Service(s) with the details below, their determination, and request concurrence on that NLAA determination. If the FOSC determines that the response actions were LAA, the FOSC must submit an initiation package (and/or Biological Evaluation) to begin *formal consultation* after the emergency phase of the response is over. This process is necessary to document and evaluate any adverse effects that may have occurred as a result of response actions. The FOSC cannot make a determination on jeopardy or adverse modification of critical habitat, this is the responsibility of the Services. Therefore, the FOSC must work with the Services to evaluate response actions determined LAA (by the FOSC), and if those response actions resulted in jeopardy or adverse modification of critical habitat. Due to the nature of emergency consultation, determinations of jeopardy or adverse modification of critical habitat are challenging to evaluate during a response. However, any recommendations provided by the Services during the response and the consultation, after the fact, must be documented in the resulting emergency BO and can be integrated into future response actions and response plans.

The following information must be provided to the Services in order to begin an informal or formal consultation:

- (1) A description of the agency response action(s) taken;
- (2) A description of the specific area that may have been affected by response actions to include listed species and designated Critical Habitat;
- (3) A description of Best Management Practices (BMPs)<sup>1</sup> that were followed, if applicable;
- (4) A description of the manner in which any ESA listed species or designated Critical Habitat may have been affected by the response action, and an analysis of any cumulative effect;
- (5) Any relevant reports, including environmental impact statements, environmental assessments, or biological evaluations prepared, if applicable; and
- (6) Any other relevant available information on the response action, listed species, or designated Critical Habitat.

Informal consultations conclude with a Letter of Concurrence from the Service(s). Formal consultations conclude with a Biological Opinion (BO) from the Service(s). For examples of template letters, BOs, or any additional ESA Section 7 templates or document, please refer to [NRT.org](http://NRT.org)<sup>2</sup>

FOR FURTHER GUIDANCE WITHIN THE U.S. Coast Guard (USCG), PLEASE CONSULT WITH:

*U.S. Coast Guard Natural Resources, COMDTINST 5090.3A (series)*

*Commanding Officer's Environmental Guide, COMDTPUB P5090.1 (series)*

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<sup>1</sup> BMPs may be actions already listed or applied within an applicable Regional Contingency Plan (RCP)/Area Contingency Plan (ACP), or BMPs may be recommendations from the Services for the actions taken during a specific incident.

<sup>2</sup> National Response Team (NRT) National Environmental Compliance (NEC) Homepage link:  
[https://nrt.org/Main/Resources.aspx?ResourceType=Endangered%20Species%20Act%20\(ESA\)%20Section%207&ResourceSection=2](https://nrt.org/Main/Resources.aspx?ResourceType=Endangered%20Species%20Act%20(ESA)%20Section%207&ResourceSection=2)