

# Memorandum

**To:** DISTRICT DEPUTY DIRECTORS FOR ENVIRONMENTAL ANALYSIS AND DISTRICT DEPUTY DIRECTORS FOR PLANNING

**Date:** July 19, 2024

**From:** JEREMY KETCHUM   
Chief  
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**Subject: NEPA PROCESS IMPROVEMENT TEAM—PERMANENT IMPLEMENTATION: FLEXIBILITY IN TIMING OF OBTAINING BIOLOGICAL APPROVALS UNDER FESA SECTION 7**

In May 2021, the NEPA Process Improvement Team (Team) Steering Committee 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 (Section 7) and National Environmental Policy Act (NEPA) processes. The flexibility was rolled out as an initial implementation with the understanding that in three years the proposal would be reviewed to assess its effectiveness for Caltrans and our transportation and resource agency partners.

In May 2024, the review of the initial phase of the proposal was completed. The assessment revealed that the flexibility in timing has yielded benefits for project delivery and has been favorably received by our Section 7 agency partners. Now that the review of the initial phase has been completed, the determination has been made that the flexibility will be permanent, and districts wishing to utilize this flexibility will no longer need to notify their HQ Environmental Coordinator. Any needed tracking will be done through the biological interagency relations processes and meetings.

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), remain in effect. These guidance documents address both projects on the State Highway System as well as Local Assistance projects. The guidance documents still must be adhered to for a project to enter into this initial implementation phase.

Thank you for your work in making the flexibility in Section 7 timing a success; we look forward to continuing to build on that success. If you have any questions regarding this memorandum, please contact Shawna Pampinella, as the Office Chief responsible for biological compliance, at (916) 856-8182, or Kelly Hobbs, as 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**  
**July 2024**

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 the 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 to initiate formal/informal consultation during PS&E.

### **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 to initiate formal/informal consultation after FED.

## **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 the California Department of Fish and Wildlife (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 Approval Flexibility  
Timing Processes  
NEPA Process Improvement Team  
Biological Sub-team  
June 2024**

**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