

March 2014 - Level II Team Question

– Assigned to Chris Keefe for further information gathering and discussion:

In recent weeks, the BLM has been approached by external or NGOs with request for greater involvement in BLM/FWS coordination and consultation proceedings. Particularly, with respect to greater involvement in agency Section 7 Consultation as part of ESA compliance.

I have reviewed ESA Regulations as well as supplemental USFWS and BLM guidance documents, including:

- 50 CFR §402 regulations;
- US Fish and Wildlife Service’s Consultation Handbook (March 1998); and
- BLM’s 6840 Policy Manual regarding Special Status Species Management (December 2008).

Below, I provide a few pertinent excerpts upon which I based the bulk on my review and consideration. The result of my review is that I recommend that where qualifying applicant status can be established, BLM should encourage the involvement of our partners in informing the Section 7 process. Further, I recommend that where applicant status is designated, the BLM may choose to provide a form of these same excerpts in explaining roles and responsibilities of our applicants and to help in understanding more about the process as an Applicant. Conversely, where applicant status is not established, I recommend that it would be inappropriate to involve such non-applicant in the section 7 consultation process.

These following excerpts provide some of the important discussion points management should consider in establishing qualification and designation of “applicant status”.

50 CFR §402.2.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from Federal agency as a prerequisite to conducting the action.

Remaining discussions of applicant status in the 402 regulations describe generally the responsibilities of the Service to include such an applicant in discussions, agency reliance on the applicant’s expertise in developing reasonable and prudent measures and alternatives, etc.

The US Fish and Wildlife Service’s Consultation Handbook discusses the identification and determination of applicants on page 2-12 as follows:

(E) Role of the Permit or License Applicant

Identification of an applicant

The Services do not determine formally whether or who is an applicant for a Federal agency action, although the regulations and their preamble provide guidance. For purposes of this discussion, the Federal action involves the approval of a permit or license sought by the applicant, together with the activities resulting from such permission. The action agency determines applicant status, including requests arising from prospective applicants in early consultations. The action agency also determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the Act and the section 7 regulations. Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations, including land management planning and other program level consultations. However, users who are party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later

consultation or reinitiation when a new species is listed or new critical habitat is designated) may participate as applicants in the section 7 process. Services nonetheless should try to work with that party, although the procedural opportunities afforded to applicants will not apply to that party.

Applicant's role in the consultation process

If the Federal agency identifies an applicant, the Services and the action agency meet their obligations to that party as outlined in 50 CFR§402 through the following:

- the action agency provides the applicant an opportunity to submit information for consideration during the consultation;
- the applicant must be informed by the action agency of the estimated length of any extension of the 180-day timeframe for preparing a biological assessment, along with a written statement of the reasons for the extension;
- the timeframes for concluding formal consultation cannot be extended beyond 60 days without the applicant's concurrence;
- the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- the Services will discuss the basis of their biological determination with the applicant and seek the applicant's expertise in identifying reasonable and prudent alternatives to the action if likely **jeopardy** or **adverse modification** of critical habitat is determined; and
- the Services provide the applicant with a copy of the final biological opinion.

The Services do not work directly with or take comments directly from the applicant without the knowledge or consent of the action agency [50 CFR 402.14(g)(5)].

BLM MANUAL 6840 – SPECIAL STATUS SPECIES MANAGEMENT – (Public) 12/12/2008

From Manual pg-Section 6840.1F8

8. Applicants, Designation of non-Federal Representatives, and Early Consultation.

a. Applicant. An applicant is defined as any person who requires formal approval or authorization (such as for permits, licenses, leases, or letters of authorization or approval) from the BLM as a prerequisite to conducting an action. An applicant can be an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States. The applicant is involved in the ESA conference or consultation process if the applicant's specific action that requires approval or authorization by the BLM may affect a federally threatened, endangered, or proposed species.

(1) The BLM shall identify and determine who is an applicant for the purposes of ESA consultation. The BLM does not typically identify applicants in association with programmatic consultations, (e.g., land use plan-level consultation) because no specific action that may require authorization or approval is involved. Under programmatic consultations, the BLM usually

retains the discretion to provide formal authorization or approval for more specific actions. If consultation for a more specific action is required, applicants for that specific action will be identified at that time.

(2) The BLM shall promptly inform FWS and/or NMFS if there is an applicant identified for a project that has been or will be submitted for consultation.

(3) The BLM shall notify known applicants promptly of their opportunities for participation in the consultation and/or conference process.

(a) The BLM shall provide any applicant the opportunity to submit information for consideration during the consultation process and should provide the same opportunity during the conference process.

(b) If, after receipt of or concurrence with the species list received from the FWS and/or NMFS, a required BA will not be completed within the 180-day period, the BLM shall provide the applicant with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary. An extension is not allowed unless the BLM notifies the applicant before the 180-day deadline. Once initiated, consultation involving an applicant must be concluded within 90 days, unless the FWS and/or NMFS and the BLM mutually agree to extend the consultation, provided that the FWS and/or NMFS submits to the applicant, before the close of the 90 days, a written statement setting forth: (1) the reasons why a longer period is required, (2) the information that is required to complete the consultation, and (3) the estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant.

(c) If requested by the applicant, the BLM should request a copy of the draft biological opinion from the FWS and/or NMFS, provide a copy to the applicant, and forward any applicant comments to the FWS and/or NMFS.

(d) The BLM should encourage the FWS and/or NMFS to discuss the basis for the biological determination in the biological opinion to enhance the applicant's understanding of the outcome. The BLM may also involve the applicant in discussions with the FWS and/or NMFS to develop reasonable and prudent alternatives to the proposed action in instances where a proposed action is determined to be likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

b. Designation of non-Federal Representative. For each consultation involving an applicant, the appropriate BLM line manager will consider designating the applicant as the non-Federal Representative for purposes of conducting informal consultation and/or preparing a biological assessment under 50 CFR Part 402.08. In making this determination, the line manager should evaluate (1) whether the applicant has sufficient expertise to prepare a biological assessment, or can reasonably secure such expertise, and (2) whether such designation is advantageous to the government.

The BLM can assign the non-Federal representative to prepare the biological assessment, conduct informal consultation, or both. The non-Federal representative may be an applicant, contractor or other party as appropriate. The non-Federal Representative is not permitted to conduct formal consultation beyond preparation of a biological assessment, and shall not subject the BLM to any obligation without specific consent of the agency. The BLM shall furnish available information pertaining to the consultation, guidance, and supervision to the extent required, and must independently review and evaluate the scope and contents of the biological assessment prepared by the non-Federal Representative.

Even with designation of a non-Federal Representative, the ultimate responsibility for compliance with Section 7 of the ESA remains with the BLM. Although there are similarities, a non-Federal representative is not the same as an applicant. Whereas an applicant has the opportunity to participate in consultation alongside the BLM, a non-Federal representative acts in the BLM's place to prepare the BA and/or conduct informal consultation.

(1) The BLM shall provide written notice to the FWS and/or NMFS if it designates a non-Federal representative.

(2) An applicant may be designated as the non-Federal representative. If an applicant is involved and is not the designated non-Federal representative, then the applicant and the BLM must agree on the choice of the designated non-Federal representative.

(3) The BLM shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the BA prepared by the designated non-Federal representative. If the BLM review finds the BA prepared by a non-Federal representative is inadequate, it should either be returned to the preparer for corrections, or revised by the BLM before submission to the FWS and/or NMFS.

(4) Written correspondence requesting concurrence or formal consultation shall be prepared by the appropriate BLM official.