

Steps and Suggestions for Applicant Participation in ESA Section 7 Consultation

PRE-APPLICANT or EARLY CONSULTATION PHASE

1. Inform the individual early of their options, especially if their project(s) appear to have “Likely to Adversely Affect” (LAA) potential for proposed or listed species. Experience shows this requires some detailed discussions with prospective applicants. If you are not 100% certain how the project will unfold, plan a field visit. Relying on phone conversations can lead to avoidable misunderstandings, frustration, and future distrust or hostility. Once you are clear on the proposal, you can visit with the USFWS biologist to confirm whether or not the project will be heading to formal consultation. (If project appears to cause Jeopardy or to Adversely Modify Critical Habitat, a reasonable and prudent *alternative* must be developed by the applicant with approval by the USFWS.)
2. Often, projects can be designed in a way that reduces potential impacts. Encourage avoidance/minimization of adverse impacts whenever feasible, with a “NLAA” as the ultimate goal. Clearly explaining the “brass tacks” of the formal consultation requirements (due proposed action impacts) for a prospective applicant is everything at this stage. The applicant may have some big decisions to make, and it is important that there is not confusion. Your relationship will suffer greatly if you come back later with a new requirement or set of rules because you missed something that requires formal consultation. Trust is still being created between everyone.
3. Never allow prospective applicants to move forward with open-ended or vague project proposals. Specific purpose and need statements combined with detailed project plans that include timing of operations and understandable descriptions of the entire proposed action and their processes *are critically essential*.
4. Finally, use this pre-applicant period as the instruction phase. Most private individuals/organizations have little idea what is required or what to do under ESA Section 7 or NEPA. Have meetings with the prospective applicant to explain their options and the consequences of their decisions. The requirements under ESA Sections 7 and 10 are very different, and few will choose to do a Habitat Conservation Plan under Section 10 if other options exist. However, if USFWS feels that the proposed action on private land will not lead to incidental take, participating as a Section 7 applicant may not be their best choice.

APPLICANT or (FORMAL) CONSULTATION PHASE

1. Generally, only proposed actions on private land that will cause “take” will have an applicant continuing on in this process. Larger or better funded projects may have a consultant writing or analyzing biological impacts. Make sure all of the

applicants' representatives are fully cognizant of all the requirements, timelines, options and consequences of choices. At this point, one should never hear comments like "I did not know or was not aware of this".

2. Have the timeline in writing between both agencies and the applicant. This can be especially critical if the applicant is in a hurry or has a self-imposed deadline to begin the project. Negotiate for fish, wildlife, botany, archaeological and any other surveys that can inform decision making or may be needed. Surveys on private land may not be worth the cost and delay to the applicant. Provide them with a realistic cost: benefit assessment (*never* try to frighten or bluff an applicant into optional surveys). It is important not to appear as if you have an agenda or are adding unneeded requirements. Goodwill throughout the process can help when negotiating for minimizing effects, mitigation measures, or reasonable and prudent measures.
3. Focus on clear expectations of both the applicant and USFWS. Everyone needs to understand what is occurring, when it is expected to happen, how the analyses will be conducted and all other expectations. Have these expectations in writing, and changes should be mutually consented between everyone. Timeline extensions (for draft BO) beyond 60 days must be agreed to by the applicant (statutory requirement of ESA). If the applicant has been kept informed, the need for extensions will be clear and should not be problematic. (For example, the applicant decides to do some wildlife surveys to reduce an assumed level of incidental take; they must make this decision knowing it will delay the BA and the consultation process.)
4. If the applicant has chosen to review or have their consultant review the draft BO, be certain they know it becomes subject to FOIA as soon as it is released to the applicant or their representative. If Forest Service personnel have kept everyone informed, the content of the BO should not be a surprise, and the questions will be clarifying ones. (If the reaction is "What the heck is this, I thought you said...", then the rest of the process and negotiations will probably become unpleasant.)
5. After the draft BO is released, set up a meeting with the applicant, consultant, and appropriate USFS and USFWS personnel, to make any necessary changes or additions to the proposed project and draft BO. (Jeopardy or Adverse Modification to Critical Habitat should have been addressed in the pre-applicant phase, with the project being moved, cancelled, or a *reasonable and prudent alternative* developed before moving into the applicant phase, as negotiated between USFWS and the applicant.) This meeting is the time to finalize the reasonable and prudent alternative to avoid Jeopardy or Adverse Modification of Critical Habitat, as well as *reasonable and prudent measures* to avoid or minimize incidental take, which should have been discussed throughout the applicant process. The reasonable and prudent alternative should come from the applicant, unless they refuse to participate. Reasonable and prudent alternatives must be compatible with the fundamental purpose of the proposed action and be

economically and technically feasible to implement. Reasonable and prudent measures to avoid or minimize incidental can only include actions that occur within the action area, and involve only minor changes to the project, such as the timing of noisy activities.

6. The final step is getting a final BO from the USFWS. Both the Forest Service and applicant should receive hardcopies for their project files.