

Guidance for Including “Applicants” in ESA Section 7 Consultation Forest Service – Rocky Mountain Region

The Endangered Species Act (ESA) of 1973 allows the action agency to consult on special uses at the request of, and in cooperation with, the prospective permit or license applicant, subject to guidelines that the Secretary may establish (Section 7(a)(3)). An applicant is broadly defined as “any person...who requires formal approval or authorization from a federal agency as a prerequisite to conducting the action.”¹

In April 2004, the Washington Office issued a memo summarizing the role and involvement of applicants in ESA Section 7 consultations on federal actions. This paper is intended to provide additional explanation and procedural details of how and when applicants can participate in ESA Section 7 interagency consultation or conference.

A. Applicant Status

Determining whether a person qualifies for applicant status under ESA Section 7 is the responsibility of the federal action agency (i.e., Forest Service), not the regulatory agency (i.e., U.S. Fish and Wildlife Service (FWS)). The Forest Service should notify holders of, or applicants for, contracts, permits, licenses, etc. that authorize the use or occupancy of National Forest System lands (e.g., timber harvesting, grazing, mining, or other special uses) of the opportunity to request ESA Section 7 applicant status, if the proposed activity may affect federally protected species or habitats. This notification should occur early in the environmental analysis process.

A *prospective* applicant must submit their request in writing to the Forest Service and certify that he/she has a definite proposal, and intends to implement the proposal if it is authorized. The Forest Service should routinely grant applicant status, if the authorized or proposed use would likely be affected by the results of ESA Section 7 consultation. Once applicant status has been granted by the Forest Service, the applicant must be identified to the FWS.

Under the ESA, the entitlements are as follows for applicants:

- (1) entitled to submit information for consideration during ESA Section 7 consultation;
- (2) must be informed by the Forest Service of the estimated length of any extension of the 180-day timeframe for preparing a Biological Assessment (BA), along with a written statement of the reasons for the extension;
- (3) must concur with any extension of formal consultation of more than 60 days (beyond the normal 90-day period);
- (4) entitled to review draft Biological Opinions (BO), and to provide comments on the draft BO to the Forest Service;
- (5) entitled to have the FWS discuss the basis of the ESA Section 7 determination with them and to have the FWS seek the applicants’ expertise in identifying reasonable and prudent

¹The full definition is: “Any person (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) [ESA §3(12)] who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” [50 CFR §402.02]

- alternatives to the action if jeopardy or adverse modification of critical habitat is likely;
and
(6) entitled to have the FWS provide them with a copy of the final BO (Consultation Handbook, at page 2-13).

B. Pre-Applicant “Early Consultation”

A *prospective* applicant can request “early” or informal consultation or conferencing from the Forest Service if they believe listed or proposed species or critical habitats may be affected, and they wish to address those concerns early in project development. The applicant may submit information that is relevant to the Forest Service’s analysis.

The informal consultation process. Informal consultation is an optional process designed specifically to help an applicant and the Forest Service determine whether adverse effects to listed species or habitats are likely, and therefore whether formal consultation with the FWS is needed. Agencies and applicants are encouraged to start with informal consultation whenever possible, to allow for early consideration of listed species in project design, and be able to resolve problems as they are identified. Informal consultation includes all discussions, correspondence, etc., between the FWS, the Forest Service, and the applicant, and has no specified timeframe for completion. The only hard timeline is for preparation of a BA for major construction activities (see below).

The success of informal consultation hinges on strong communications and full information exchange among the Forest Service, FWS and the applicant, with respect to the details of the proposed action, effects anticipated by the applicant and Forest Service, and feasibility of modifying a project to avoid those effects. Without a clear description and appropriate analysis of a project’s effects, the FWS cannot provide concurrence on “not likely to adversely affect” determinations.²

Preparation of a Biological Assessment. Preparation of a Biological Assessment (BA) is only required for major federal actions, but can be prepared for any action where effects to listed species or critical habitat are likely. The Forest Service may prepare the BA, or it may designate the applicant or a non-Federal representative (often a consultant) to prepare it. Regardless of who prepares it, the Forest Service is responsible for the content of the BA and its findings of effect(s). The BA should be completed within 180 days of initiation of consultation, or other period as mutually agreed between the agencies. The deadline must not be extended unless the Forest Service provides the applicant in writing with the projected length of the extension and reasons. Failure to start the BA within 90 days requires FWS confirmation of the species list. This can be done by phone, with a note to the project file summarizing the conversation.

A ‘preliminary’ Biological Opinion can be issued by FWS as an outcome of early consultation, and can then be confirmed as a final Biological Opinion after formal consultation, if no significant changes in the proposed action or the information used. The preliminary Biological Opinion does not constitute authorization of incidental take. *Note: Once the preliminary Biological Opinion has been released to the applicant, it is no longer exempt from Freedom of Information Act (FOIA) requests by the public.*

² Section 7 Handbook §3.2

C. Applicant Formal Consultation

Role of the agencies and applicant. The Forest Service is ultimately responsible for compliance with the ESA and defining the role of the applicant in the Section 7 process. All communications between the applicant and FWS should include the Forest Service.

In meeting their respective responsibilities under the ESA, the Forest Service and FWS must ensure the applicant receives the opportunities they are entitled to in the consultation process (listed above).

The formal consultation process. When the Forest Service determines in the BA that a proposed action is likely to adversely affect listed species or likely to adversely modify designated critical habitat, or the FWS cannot reach concurrence with a “not likely to adversely affect” determination during the informal stage, formal consultation is initiated.

The regulations define timelines for completing the various steps of formal consultation and the overall consultation process. Unless otherwise mutually agreed, the consultation must be concluded within 90 calendar days of initiation, and the Biological Opinion including the incidental take statement completed within 45 days after that.

The initial 90-day period is dedicated to coordination among the agencies and applicant to provide the FWS a more complete assessment or verification of the status of the species and/or critical habitat involved; the scope of the proposed action and area likely to be affected directly or indirectly; the adverse effects likely to result in jeopardy to the species and/or adverse modification of critical habitat; develop reasonable and prudent alternatives; identify adverse effects not likely to jeopardize listed species, but which constitute "take" under ESA Section 9; develop reasonable and prudent measures, and terms and conditions for the incidental take statement as appropriate; and identify conservation recommendations, as appropriate.

An extension of the consultation beyond the 90 days may be requested by either federal agency, if FWS needs more time to receive or analyze data or prepare the final Biological Opinion, or the Forest Service and applicant need more time to provide data or to review a draft Opinion. Both agencies must agree to the extension, and the FWS must inform the applicant in writing of the reasons why a longer period is required, the information required to complete the consultation, and the estimated date on which the consultation will be completed.³ The consultation cannot be extended for more than 60 days without the consent of the applicant.

Use of best available information. The ESA requires the Forest Service to provide the best scientific and commercial data available to describe the proposed action and anticipated impacts to listed and proposed species and critical habitats. Where significant information gaps exist, there are two options:

- 1) Extend the due date of a BO to allow more time for data collection and analysis, or
- 2) The FWS proceeds with developing the BO using available information and erring on behalf of the species when evaluating the extent of effects.

These options are to be discussed and agreed to by the Forest Service and applicant. The Forest Service will be advised that any new information that becomes available later could trigger the need to reinitiate consultation.

³ ESA §7(b)(1)(B) and 50 CFR §402.14(e)

Applicant and Forest Service role in developing reasonable and prudent alternatives. The reasonable and prudent alternatives are those the Forest Service and applicant may take to avoid the likelihood of jeopardy to a species or adverse modification of designated critical habitat. The applicant and the Forest Service are to be given every opportunity to help develop these alternatives, since they are best able to know which ones would achieve the purpose of the action, be within legal authorities and jurisdictions, and are economically and technologically feasible.⁴

Irreversible and Irrecoverable commitment of resources. The Section 7(d) restriction on the Forest Service and the applicant making irreversible and irretrievable commitment of resources (e.g., letting a contract) remains in effect from the moment a “may affect” determination is made until the Forest Service advises the FWS which reasonable and prudent alternative would be implemented in the event of a jeopardy or adverse modification determination.⁵

Applicant and Forest Service responsibilities to terms and conditions. FWS policy requires an incidental take statement be issued as part of all formal consultations involving listed animals.⁶ The FWS defines the anticipated level of incidental take and any reasonable and prudent measures deemed necessary to minimize that take.

The incidental take statement provides an exemption from the ESA section 9 “taking” prohibitions, but *only* when the Forest Service and applicant comply with the terms and conditions implementing the reasonable and prudent measures. Failure to implement the terms and conditions constitutes a violation of ESA. Given the legal culpability of the Forest Service, the agency may deny or revoke an authorization if the applicant fails to agree or comply with the terms and conditions. The Forest Service needs to provide a copy of the incidental take statement to the applicant, or include the language of the terms and conditions in the permit itself if they are to be implemented by the applicant. The Forest Service, in cooperation with the applicant, must monitor and report the progress of the action and its impact on the species to the FWS as specified in the incidental take statement.⁷

Release of draft documents. There are no specific requirements or policies regarding release of draft BAs and preliminary effects determinations. There is a clear need for early, regular and fully-informed coordination among federal agencies and applicants, in order to as completely as possible inform the consultation, resolve conflicts, and design the project to minimize adverse effects.

Once released to an applicant, the documents can no longer be considered an interagency memorandum exempt from FOIA disclosure.⁸

The Forest Service and applicant are entitled to receive a draft Biological Opinion or conference report from the FWS. This helps inform the negotiations and resolution of conflicts. There is no formal procedure to request draft documents, and the Forest Service can request them by a phone call. An applicant must request the draft documents through the Forest Service. Comments by the Forest Service or applicant must be submitted in writing by the Forest Service to the FWS.

Disposition of final Biological Opinion.⁹ Upon completion, the Biological Opinion is sent to the Forest Service and the applicant by the FWS.

⁴ Section 7 Handbook §4.5(A)

⁵ Sect. 2.2(B), p. 2-7

⁶ Section 7 Handbook §4.5(B)

⁷ 50 CFR §402.14(i)(3)

⁸ Section 7 Handbook §1.2(F)

⁹ Sect. 4.9, p. 4-65