

## SECTION 7 TOPIC SHEET – Applicants and their role in the consultation process Handbook page 2-12

Applicants are an important participant in the consultation process and have a unique relationship to the federal action agency during consultation. They have many specific privileges under the regulations that consultation biologists should be aware of. Below we discuss a few of these privileges and how they can influence the consultation process.

### **Applicant definition**

*“...refers to any person, as defined in section 3 of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action. (50 CFR 402.02)*

### **Applicant’s relationship with action agency**

It is imperative that the Service respect the unique relationship between an applicant and the federal action agency established in the regulations. Even though the applicant often has important information to contribute to the consultation, any communication or negotiation with the applicant must be conducted with the knowledge and approval of the federal action agency. The Service has a relationship with the applicant only through the federal agency. We must respect this arrangement.

### **Role in comments on the draft biological opinion (VERY IMPORTANT)**

*“The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service **through** [emphasis added] the Federal agency, although the applicant may send a copy of its comments directly to the Service” [(CFR 402.14 (g)(5))]*

The preamble to the regulations and the handbook are silent on how to handle the applicant’s comments and the Service has not issued guidance on this issue. Our recommendation is that because of the specific relationship mentioned earlier, actionable applicant comments on the draft biological opinion (BO) must come through the federal action agency with clear instructions on which comments the federal action agency would like addressed and how. The reason for this is that the applicant may provide comments and suggested revisions that are inconsistent with the federal action agency’s policy, authority, budgeting, other planning processes, or the biological evaluation/biological assessment on impacts of the project.

Therefore, if a federal action agency informs the Service that an applicant will be involved in the consultation – we should make sure to inform the action agency of how we expect them to handle comments from the applicant. (This also relates to any comments the action agency receives from a broader public.) Because the consultation process is between the Service and the federal action agency, the action agency is ultimately responsible for managing comments submitted to them regarding the consultation.

If the action agency neglects to take an active role in managing the applicant’s comments and merely forwards them to the Service, Service biologists may need to elevate the issue to supervisors or decision makers and enlist solicitor’s advice on the appropriate way to address the comments.

### **Role in take exemption, reasonable and prudent measures, terms and conditions, and monitoring.**

The exemption for take and responsibility to comply with reasonable and prudent measures (and implementing terms and conditions) and monitoring can extend to applicants.

*"[Incidental take statement] Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under (ii) above; and..." 50 CFR 402.14 (i)(1)(iii)*

*"In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45(FWS) and 222.23(d)(NMFS)." 50 CFR 402.14 (i)(3)*

The extent of the applicant's take exemption and responsibilities under the incidental take statement will depend on which parts of the action are responsibilities of the applicant and which are responsibilities of the federal action agency. These details (Who? What? When? and Where?) should be described during the early discussions and deconstruction of the proposed action, and clearly understood by all parties. Then the incidental take statement can identify those different responsibilities, as appropriate.

### **Additional areas where the Applicant has a role or privileges**

#### **Role in designation of non-Federal representative**

The applicant may serve as the designated non-federal representative for informal consultation. If they do not and the action agency would like to designate a non-Federal representative, the applicant and the action agency must agree on the choice. [See 50 CFR 402.08]

#### **Comments on draft evaluation or assessment**

The regulations allow for the applicant to provide information to the federal action agency during development of the biological assessment. [See (50 CFR 402.14 (d))]

#### **Appealing to the Endangered Species Committee (extremely rare event)**

If a Jeopardy opinion is issued (or Destruction or Adverse Modification) and no Reasonable or Prudent Alternative to the action can be developed, an applicant has the right to request an exemption from the prohibition under 7(a)(2) from the Endangered Species Committee. [See the Act section 7(g)(1)]

#### **Developing Reasonable and Prudent Alternatives (rare circumstance)**

If a Jeopardy (or Destruction or Adverse Modification) opinion is issued, the Service must try and develop a Reasonable or Prudent Alternative to the action that will not violate 7(a)(2). The applicant and the federal action agency are necessary partners in this effort. [See CFR 402.14 (g)(5)]

#### **Extending the 90 day consultation period**

If the Service or federal action agency desires to extend the 90 consultation period (no greater than 60 additional days), the regulations require the Service to submit a written statement with specific information to the applicant. The consultation period (90 days) cannot be extended for greater than 60 days without the consent of the applicant. [See CFR 402.14 (e)] Though not specified in the regulations, to respect the applicant-action agency relationship, the Service should work through the action agency in both of these situations.

#### **Extending the 45 day biological opinion delivery period**

The 45 day period cannot be extended without the action agency securing written consent of the applicant. [See CFR 402.14 (g)(5)]