

Endangered Species Act Consultation for Flood Recovery Projects

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Endangered Species Act Consultation for Flood Recovery Projects (FRPs)

Section 10

- Project with No Federal nexus
- Consultation requires a Habitat Conservation Plan (HCP) or a Low Effect HCP (LEHCP)
- Significant timeframe for HCP, but may be expedited if LEHCP applies

Section 7

- Projects with Federal nexus (e.g., 404 Permit)
- Consultation *typically requires Applicant to prepare a Biological Assessment (BA)
 - *Not required if Programmatic BA has been prepared (e.g., EWP, Phase 2)
- USFWS reviews BA and then prepares a Biological Opinion (BO) or concurrence letter
- Timeframe can be well coordinated with 404 Permit process



Coordination with USFWS and Corps

- Region 6 Policy for Section 7 Consultation as of June 2015
 - Interim Chief using a strict application of Section 7 ESA regulations
 - **USFWS will only initiate consultation with the lead Federal agency or a designated non-Federal representative**
 - 50CFR 402.08 – “A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice...The ultimate responsibility for compliance with Section 7 remains with the Federal agency.”
- Request **non-Federal representative designation (Designee)** status in writing from the Corps, and if granted:
 - **Saves both agencies a lot of time** (we know our project better than they do);
 - **Designee may initiate informal consultation**
 - **Designee may make direct submittals to USFWS (data, BA, etc.)**
 - Corps shall furnish guidance and supervision and shall independently review and evaluate the scope and contents before you send to USFWS
 - **Designee may offer to assist USFWS in drafting BO by supplying all pertinent data**



Steps to ESA Section 7 - Informal Consultation

Optional process to determine whether formal consultation is needed:

- Determine if listed species are present - using USFWS **Information, Planning, and Conservation System (IPaC)**
 - If no listed species present: confirm onsite & request concurrence letter from USFWS.
 - If listed species are present: coordinate with USFWS to determine if the action may affect the species or their habitat:
 - Prepare Draft BA to consider and evaluate listed species:
 - May affect, not likely to adversely affect (e.g., the effects are beneficial, insignificant, or discountable) – If USFWS agrees with the determination, they typically provide a concurrence letter and no further consultation is required.
 - May affect, likely to adversely affect - must request initiation of formal consultation



Steps to ESA Section 7 - Formal Consultation

- Initiation request is made in writing to the USFWS (includes Draft BA) and they have 30-day review:
 - If BA deemed complete, consultation is initiated on date of receipt; or
 - If BA deemed incomplete, USFWS notifies applicant of the deficiencies.
- Draft BA (key points, not comprehensive)
 - Detailed project data, establish APE (including species buffers), mapping and calculations
 - Discussion of species considered and evaluated
 - If Effects Determination is “May affect”, then BA should include:
 - Alternatives analysis for impact avoidance and minimization;
 - Proposed impacts under Preferred and other alternatives; and
 - Habitat mitigation plan for preferred alternative, including Conservation Measures and BMPs.



Steps to ESA Section 7 - Formal Consultation

● USFWS consultation process and timeframes

● 90 days to consult with the agency and Applicant

● Can be extended, but no more than 60 days without the consent of the Applicant

● Can be minimized by providing a comprehensive BA

● 45 days to prepare and submit a Biological Opinion (BO)

● BO is typically submitted to the Federal agency/Designee within 135 days from the date formal consultation is initiated – provided BA is comprehensive

● BO Conditions, Habitat Mitigation Plan and Conservation Measures will be incorporated into the Special Conditions of the 404 Permit



*Expedited ESA Consultation Management for FRPs

● Prior to Project award –

- Do **limited desk-top assessment (IPaC)**
- **Initiate communication with Corps & USFWS** to establish timeframes, approach and expectations

● Upon Project award/initiation

- Request “**non-Federal Designee**” status from the Corps
- Establish **comprehensive APE** - confirm understanding of Project design and potential impacts with Team
- **Comprehensive desk-top assessment** to document baseline conditions – **also screen MBTA & BGEPA**
- **Field assessment** to confirm, clarify, and map baseline conditions - **also screen MBTA & BGEPA nests & habitat**

● Prior to Project design

- **Field assessment and habitat mapping completed** to assist in defining Project design parameters
- **Discuss impact avoidance & minimization** with Team
- **Option: Submit Draft BA to USFWS** with best available (conceptual) Project plans and impact data

* Based on experience during Lyons St. Vrain Design-Build FRP



*Expedited ESA Consultation Management for FRPs

● Concurrent with Project Design (particularly Design-Build)

- Submit Draft BA/BA Addenda as Design Plans progress

- Option: Submit Draft BA with Concept Plans

- Option: Submit BA Addendum at Preliminary Design

● Concurrent with Project 404 permitting

- BA completed and submitted

- Assist USFWS with BO to expedite 404 Permit approval

● Prior to Project construction

- Discuss BO conditions with Team and contractors, mark areas, monitor often, etc.

● During Construction

- Oversight and BMP management

*Based on experience during Lyons St. Vrain Design-Build FRP



Biological Assessment for FRPs

- Establish comprehensive APE – large enough to cover all potential aspects of Project activities, including primary and secondary effects, buffers, etc.
- Baseline: Address habitat conditions based on both pre-flood and post-flood conditions
- Project will result in better habitat and better connectivity for the species, but will constructing it cause take?
- If you substantiate that impacts will be insignificant and/or discountable, then USFWS can concur with a “may affect, not likely to adversely affect” determination.



Platte River Biological Assessment

- Triggered by potential depletion, so very important how we define "net increases for linear feet of stream, stream bank and wetlands created".
 - If Applicant can meet the following, then ESA consultation is not required:
 - Definition of restoration per the *Guidance Regarding Wetland Activities and Platte River Basin Depletions*; and/or
 - *De minimis threshold for Platte River species depletions consultations*.
 - Otherwise USFWS may require Formal Consultation for depletion.
- *De minimis threshold*: water-related activities in the Platte River basin resulting in less than 0.1 acre-foot/year of depletion in flow to the nearest surface water tributary to the Platte River system:
 - do not affect the Platte River target species, and
 - do not require ESA consultation for potential effects on those species.



CONCLUSIONS

- If available, a Programmatic BA will significantly expedite ESA review for FRPs:
 - EWP Phase 2 Programmatic BA
 - USFWS 2013 Programmatic BA – if Site conditions unchanged
- Otherwise, push the envelope and get well ahead of the project with the agencies to ensure that ESA Consultation fits within your project timeline.



References

IPaC database: <http://ecos.fws.gov/ipac/>

Section 7 Consultation Overview: <http://www.fws.gov/endangered/what-we-do/consultations-overview.html>

Section 7 Consultation Fact Sheet: <http://www.fws.gov/endangered/esa-library/pdf/consultations.pdf>

Section 7 Consultation Handbook: http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf

ESA Regulations and Policies: <http://www.fws.gov/endangered/laws-policies/regulations-and-policies.html#consultations>

ESA Consultation questions: USFWS Colorado Field Office, (303) 236-4773

South Platte depletions and Colorado's Depletions Plan: www.spwrap.org

ESA Consultations Involving Platte River Depletions: Information for Project Proponents in Colorado on the Platte River Recovery Implementation Program - <http://www.fws.gov/platteriver/Documents/Colorado%20Guidance%202015.pdf>





ADDITIONAL THOUGHTS
and
QUESTIONS?