

RESOURCE NOTES

NO. 43

DATE 09/18/00

Pilot Section 7 Consultation Process for Timber Harvest Right-of- Way Applications

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Background

Several California BLM Field Offices receive recurring permit applications for which the principal BLM action is issuance of a right-of-way grant authorizing the applicant to use an existing road for a commercial purpose (e.g., haul timber from private lands). Under Section 7 of the Endangered Species Act (ESA), BLM is required to consult with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) on discretionary actions that may affect listed threatened or endangered species. In determining whether a proposed action “may affect” a listed species, BLM is required to consider both the direct and indirect effects of the action. Thus, consultation with FWS (on terrestrial species) or NMFS (on anadromous species) is required when either the public or private component of the proposed action may affect a listed species. Because the biological opinions issued by FWS or NMFS often contain non-discretionary terms and conditions, BLM is in a quandary as to how to enforce the terms and conditions that relate to the private component of the action (e.g., timber harvest activities on the privately owned lands).

Discussion

In an effort to expedite the issuance of commercial haul rights-of-way

permits in situations where the principal effect on listed species is from harvesting timber on privately owned lands, BLM recently met with staff from NMFS, the California Department of Forestry (CDF), and federal agency legal counsel to develop a mutually acceptable process for ESA compliance. In California, all timber harvest activities require an “applicant” (land owner or timber company) to file a Timber Harvest Plan (THP) with CDF. Given this state agency regulatory authority over the private component of the action and the willingness of CDF to cooperate in the ESA consultation process, the following process was agreed to for all rights-of-way applications involving listed anadromous salmonids. (The FWS has not yet committed to this process for the terrestrial and aquatic species over which they have administrative jurisdiction.)

ESA CONSULTATION PROCESS FOR BLM RIGHTS-OF-WAY PERMIT APPLICATIONS

1. For all THPs that are within the range of a listed salmonid, CDF will condition the THP to achieve compliance with Section 9 of the ESA. This can be accomplished through Section 7 of the ESA if the project has a federal nexus (e.g., BLM rights-of-way) or through Section 10(a) of the ESA if the project requires incidental take authorization and does not have a federal nexus. THPs requiring federal access will be flagged and sent to the NMFS and BLM for review to facilitate Section 7 compliance in relation to salmonids.
2. If the review concludes that “take” of a listed salmonid will likely occur as a result of the

private component of the action, the NMFS, working through an Interdisciplinary Process with the CDF, will develop minimization measures to reduce the anticipated level of take. The THP will be modified to include these measures.

3. For THPs requiring federal access, the applicant will request a road rights-of-way permit from the BLM, and it will review both the THP and effects of the action occurring on public land. For those THPs that may affect listed salmonids, the BLM will complete a Biological Assessment (BA) for the completed action and submit it to the NMFS.
4. If “take” of a listed salmonid is anticipated from either the private or public land components of the action, the NMFS will issue a Biological Opinion (BO) with terms and conditions.

If “take” is anticipated from the private land action only, the BO will contain a single term and condition requiring the BLM to suspend the rights-of-way permit in the event elements of the THP that relate to incidental take of listed salmonids (i.e., minimization measures or standard clauses) are violated.

If incidental take of a listed salmonid is anticipated for the public land component, terms and conditions will be issued to minimize take for that component of the action.

5. Monitoring of the THP and rights-of-way permit will occur.

The CDF will monitor the THP and if violations occur,

THREATENED &
ENDANGERED
SPECIES



will notify the NMFS and BLM. The BLM will then suspend the rights-of-way permit per applicable regulations.

Independent of CDF monitoring, the BLM will monitor the public land component of the right-of-way permit, and if violations of the permit occur relative to that part of the action, BLM will suspend the rights-of way permit per applicable regulations.

6. Post Action Inspections (or close-outs) will occur.

Post Action Inspections (or close-outs) will be conducted to determine the final condition of resources once the action has

been completed. This will be implemented to ensure all necessary actions have been completed prior to the rights-of-way permit or THP expiration. If the post-action inspections identify problems, then the applicant will be responsible for any needed corrective measures.

Conclusion

The process described above is expected to expedite ESA compliance on some, but not all, of the rights-of-way applications BLM receives that involve listed threatened or endangered species. BLM's Arcata Field Office is currently pilot testing this process with CDF and NMFS on THPs in northwestern California. The ESA compliance

process developed for commercial haul rights-of-way may be applicable to other consultations in which the primary effects to listed species are associated with the private component of the action – if a State agency has sufficient regulatory authority to condition the permit and it is willing to cooperate in the Federal Section 7 consultation.

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