

APPENDIX

I

FEMA ENVIRONMENTAL DESK REFERENCE

FEMA GUIDELINES FOR ENDANGERED SPECIES ACT COMPLIANCE

I

Overview of the Endangered Species Act

The Endangered Species Act (ESA) makes it unlawful to "take" any endangered species of fish or wildlife. This applies to everyone, including private citizens and government agencies. Violations may result in project injunctions and possibly even in individual prosecutions. (This is often referred to as Section 9 enforcement).

Take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." [18 USC 1532(19)] "Take" determinations do not apply to listed plants. "Harass" and "harm" are further defined in the regulations at 50 CFR 17.3 as follows:

Harass- "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, and sheltering."

Harm- "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering."

The ESA also requires any Federal Agency that funds, authorizes, or carries out an action to ensure that their action is not likely to jeopardize the continued existence of any endangered or threatened species (including plant species) or result in the destruction or adverse modification of designated critical habitat. Violations may result in project injunctions, and except for violations involving only plant species, possibly in individual criminal prosecutions.

Agency action is "any action authorized, funded, or carried out by" a federal agency [16 U.S.C. 1536(a)(2)].

The ESA sets forth a three step consultation process with the United States Fish and Wildlife Service (often referred to as a Section 7 consultation). During consultation, an agency is forbidden to make any "irreversible or irretrievable" commitment of resources.

The Three-Step Consultation Process.

STEP 1 - Initial Review of Project Area/Actions

The first step requires that, when an agency proposes to take an action where it has reason to believe that threatened or endangered or its critical habitat may be present, it must inquire of the U.S. Fish and Wildlife Service (FWS) whether an threatened or endangered species "may be present" in the action area. FWS should respond within 30 days.

If FWS determines that no threatened or endangered species are located in the proposed project area or in close proximity to it, then the consultation is completed. If the answer is that threatened or endangered species or habitat may be present, then the agency moves to the second step.

STEP 2 - FWS Requests Additional Information

The agency must respond to FWS's requests for additional information. FWS will likely require that a Biological Evaluation (BE) be prepared to determine whether an threatened or endangered species is likely to be affected by the action. For major federal actions significantly effecting the environment (typically projects which require an Environmental Impact Statement (EIS)), FWS will likely require a more detailed biological Assessment (BA). The biological assessment may be used as part of an Environmental Assessment or Environmental Impact Statement.

If the agency determines from the BE or BA that threatened or endangered species or its habitat may likely be affected by such action, then the agency must begin step three of the consultation process.

Steps 1 and 2 are combined later under the heading "informal consultation."

STEP 3 - Formal Consultation

Step three is that the federal agency must initiate a written request to FWS for formal consultation. Formal consultation consists of FWS issuing a "biological opinion" which often will include species impact mitigation. Formal consultation is completed when FWS issues this biological opinion.

Details regarding FEMA procedure to implement this three step process follows on the next page.

II FEMA's Internal Procedures for Endangered Species Act Compliance

A point of contact environmental reviewer (ER) should be established for ESA review (Regional environmental officer, where appropriate, or lead program environmental reviewers). A clear summary of contacts and dates should be kept on procedural checklist or in project file summaries. Written consultation letters should be placed in the project files. Verbal consultation should be documented in writing. This documentation should provide sufficient detail including name and position of FWS employee contacted, and summary and conclusion, if any, of conversation.

If more than one federal agency is involved in an action, all agencies should develop a coordination mechanism to ensure that the requirements of the Act are carried out for all agencies.

If FEMA personnel or a FEMA consultant has any reason to believe that threatened or endangered species may be present at a project site proposed for FEMA funding then the ER should inform the all other participating federal agencies.

A. INFORMAL CONSULTATION

1. Initial Review of Project Area/Actions - STEP 1

If FEMA has any reason to believe that threatened or endangered species may be present at a project site proposed for FEMA funding or in close proximity to the site, then the ER should initiate informal consultation with the U. S. Fish and Wildlife Service (FWS). The request for informal consultation may be oral or written. FWS should respond to this request in writing within 30 days.

Generally, for any action that has the potential to cause direct or indirect physical effects on the environment, it is recommended that initial informal consultation be initiated with FWS to determine if species are present in the area and to determine the potential for the action to have an effect on the physical environment.

***Emergency Situations:** Informal Consultation occur in an expedited manner in emergency situations. Emergency situations include Acts of God, Disasters, Casualties, National Defense or Security Emergencies. The ER or environmental point of contact for the emergency should submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats to the FWS as soon as practicable. All contact between FEMA and FWS should be documented in written form whenever possible.*

2. Request for Additional Information - STEP 2

a. Request for Additional Information

If FWS indicates that threatened or endangered species may be present and may be adversely affected by a project, then it is likely that FWS will request preparation of a Biologic Evaluation (BE) or Biologic Assessment (BA). FEMA should, whenever feasible, fully cooperate and comply with the requests of FWS. (See section III, for Biological Evaluation and Assessment Preparation Guidelines)

b. FEMA Procedure

If FWS requests additional information (a BE or BA), then the ER should notify the program office and project reviewer that ESA compliance is ongoing and provide information on the status of further investigation. The ER should also notify the program office and project reviewer when ESA compliance is complete.

The ER should also mail to the applicant, via the state grantee agency (when appropriate) the status of ESA compliance in relation to project approval. For example, Public Assistance would notify the applicant that the DSR is suspended pending environmental review.

The ER should also coordinate procurement of contracts, task orders, interagency agreements, DSR's, or voluntary services from agencies to appropriately comply with the information and analysis requirements of ESA.

c. Conclusions of BE or BA

The BE or BA should arrive at one of three possible conclusions, namely that the proposed project will have "no effect," or will "not likely adversely affect" or will "likely adversely affect." The ER will use the BE or BA's conclusions to determine if formal consultation (Step 3) is necessary.

i. Determination of: "No Effect"

If the conclusion of the BE or BA is that the proposed project will have "no effect" on threatened or endangered species, then informal consultation is concluded and no further action is necessary. FWS concurrence is not required. The ER should notify the program office and project reviewer that ESA compliance is complete.

ii. Determination of: "Not Likely to Adversely Effect"

If the conclusion of the BE or BA is that the proposed project will "not likely adversely affect," then the ER should forward the BE or BA to FWS to get written concurrence of the BE or BA's conclusion. Upon written concurrence, informal consultation is concluded and no further action is necessary. The ER should notify the program office and project reviewer that ESA compliance is complete. If Fish and Wildlife does not concur, skip to section B. 3. below.

iii. Determination of: "Likely to Adversely Effect"

If the conclusion of the BE or BA, however is that the proposed project will "likely adversely affect," then FEMA must enter into formal consultation with FWS.

B. FORMAL CONSULTATION - Step 3

1. Issuance of Biologic Opinion

If the conclusion of the BE or BA is that the proposed project will "likely adversely affect," then FEMA must enter formal consultation with FWS. Formal consultation consists of FWS issuing a "biological opinion." Formal consultation is completed when FWS issues a biological opinion.

Obtaining a biological opinion from the U.S. Fish and Wildlife Service puts the requesting agency in a strong legal position. It has complied with the procedural requirements of ESA. More over, courts will generally uphold the agency's compliance with the substantive provisions of the ESA if the agency acts in conformity with the biological opinion.

If this consultation procedure is not followed, the likely court intervention would be the issuance of an injunction. Courts have said, however, that an agency need not follow FWS's recommendations. It may fashion alternatives to FWS's modifications. The agency, however, "does so subject to the risk that [it] has not satisfied the standard" of ESA. In order to prevail, the agency must show that it took alternative, reasonably adequate steps to insure compliance with ESA.

FEMA may request an exemption to the biological opinion from the USFWS. Such requests should be undertaken by the regional environmental officer, regional program office directors, or Regional Director.

Emergency Situations: Formal consultation shall be initiated as soon as practicable after the emergency is under control. The USFWS will issue a Biological Opinion including the information and recommendations given during the emergency informal consultation. [Emergency informal consultations are discussed above at II.A.].

The ER should forward the BE or BA to FWS with a written request for formal consultation. FWS will normally use the BE or BA to determine its biological opinion.

2. Determination of: "Not Adversely Jeopardize" and "Not Likely to Modify"

If FWS's biological opinion concludes that the proposed project will "not adversely jeopardize" threatened or endangered species and "not likely to modify" critical habitat, then formal consultation is concluded and no further action is necessary. The ER should notify the program office and project reviewer that ESA compliance is complete.

3. Determination of: "Likely to Jeopardize" and/or "Likely to Modify"

If FWS's biological opinion concludes that the project is "likely to jeopardize" threatened or endangered species and/or is "likely to modify" critical habitat, the biological opinion lists reasonable or prudent mitigation and/or alternatives. The biological opinion will also include a permit allowing "incidental take" of the threatened or endangered species, provided mitigation measures are implemented. If a decision is made by FEMA, the state, and applicant to proceed with the project as designed, FEMA must ensure that the sub grantee incorporate the requirements of the biological opinion into the planning, design, and construction of the proposed project. Conditions should be placed within grants that require compliance with stipulations in the biological opinion.

The ER should submit a copy of FWS's biological opinion to the applicant (via the State when appropriate) and require that the applicant comply with conditions and mitigation of the biological opinion. After receiving sufficient written assurances that applicant will comply with the terms of the biological opinion, the ER should notify the program office and project reviewer that ESA compliance is complete.

The ER should monitor compliance by further requiring that the applicant submit brief periodic reports (monthly or quarterly should suffice) indicating how it has complied with the requirements in the biological opinion. The state grantee agency and FWS should be utilized to the greatest practicable degree to help ensure compliance. The ER should suspend applicant's DSR or hold funding if compliance issues exist and are not satisfactorily resolved.

4. Determination of: "Will Jeopardize Continued Existence"

If, in the relatively uncommon event, that the project would jeopardize the continued existence of the species, despite mitigation, then no incidental take permit will be issued and the project should be halted. This also concludes formal consultation.

III

Biological Evaluation and Biological Assessment Guidelines

A Biological Evaluation (BE) or a Biological Assessment (BA) needs to be prepared when the United States Fish and Wildlife Service (FWS) requests it as part of informal consultation pursuant to the Endangered Species Act (ESA).

The FWS will often request the preparation of a BA as part of informal consultation for a major federal construction project significantly affecting the environment. A construction project which is a major federal action significantly affecting the environment is a project normally requiring an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act. A BE will usually be requested by the FWS as part of informal consultation for a construction or other type of project not requiring an EIS. A BE is a less detailed and less formal version of a Biological Assessment.

These guidelines are intended as a guide and not every item will be applicable to every BE or BA. In addition, there is no minimum or maximum page requirement for a BE or BA. The BE and often the BA, however, typically should be no longer than several pages. Key factors include the size and nature of the project and the number of species affected.

The preparer of the Biological Evaluation (BA) or Biological Assessment (BE) should contact FWS and the state equivalent wildlife agency, and any other appropriate source prior to preparing the study. The purpose of this contact is to determine whether FWS or other entity may be able to provide information, prior surveys, other experts to contact, and other time saving information.

A. BIOLOGICAL EVALUATIONS (Less detailed and comprehensive)

The following topics should be considered in a BE requested by the U.S. Fish and Wildlife Service as a result of informal consultation:

1. Project Description

A description of the proposed project area in sufficient detail so that the USFWS may locate the project area. (This description will likely have already been prepared and used by the FWS to determine that a BE would be necessary during the earlier stage of informal consultation).

A brief description of the proposed project activities. In other words, describe the construction and actions contemplated for the affected area.

2. Information and Analysis of Effects

Any other relevant information requested by the USFWS which would aid in the consultation process. The USFWS may request much of the information normally contained in a BA, perhaps in somewhat less detail, including an on-site survey by a biologist. If the USFWS request includes an on-site survey by a biologist, the BE should follow the format for the analysis section for the BA as it appears below. The level of detail in the BE, however, would depend on FWS's request which in turn should depend on the circumstances of the proposed project.

3. Conclusion

Determine how the action may affect each listed species and habitat. One of three conclusions should be reached, No Effect, Not Likely to Adversely Effect, or Likely to Adversely Effect. The conclusion in a BE should briefly discuss mitigation where appropriate (see BA guidance for this section. The BA is likely to focus more heavily on mitigation.

- a) **No effect:** This conclusion should be reached only if the proposed action has no potential for adversely affecting any listed species or modifying or destroying critical habitat either directly or indirectly.
- b) **Not likely to adversely affect:** This conclusion should be reached if the effects of the proposed action are beneficial, discountable, marginal, or insignificant.
- c) **Likely to adversely affect:** This conclusion should be reached if any adverse effects to listed species or modification or destruction of critical habitat are reasonably likely to occur as a result of the proposed action.

B. BIOLOGICAL ASSESSMENTS (Greater detail and more comprehensive)

The following outline/topics should be considered when preparing a BA requested by FWS as a result of informal consultation:

1. Introduction

a. Objectives of the BA

The BA should provide a brief summary of the objectives of the assessment.

b. Description of the Proposed Action

Briefly describe the proposed action including amount of acres impacted. Briefly describe, if known, the need for the proposed action and alternative actions under consideration. Describe how the agency action will be implemented, including tools or methods that will be used. Include a discussion on how the site will be accessed. Consider, when appropriate, other aspects of the action including the time frame, short term versus long term disturbance, ancillary facilities, and water and/or material sources.

c. Description of Survey Methods Used

Describe survey methods clearly, and whenever possible, in nontechnical language. Indicate who did the survey, including name and qualifications. Indicate what time of the day and year the survey was conducted. When appropriate, consider in the context of the next section below, the relationship between time of the survey and the life cycle/active period of the species. For example, indicate whether a plant or animal is less or more likely to be found at the project site at the time of the survey.

In addition, include when applicable, a list of specialists, literature, and other sources consulted. This may be done in this section or as an appendix.

d. Analysis of the Effects of the Proposed Action

i. Species Considered

The BA should also identify all listed species in the general vicinity for which the "may affect" standard applies, or acknowledge that such species have been consulted on separately. The BA should also include total acreage of species habitat that may be affected by the proposed action.

If species that may potentially occur in the area are not included in the BA, explain why. (For example, the Festering Bogs Lime lives along the edges of eutrophic lakes. Surveys indicate this type of habitat does not occur in the action area). Provide biological data on listed species. Literature and/or other documents containing such information, or any other information, may be incorporated by reference (as may any documentation in the BA). Describe the species in terms of overall range and population status. Include the number of known sub-populations within and when appropriate, adjacent to the action area.

ii. Habitat Conditions

Describe habitat conditions both on-site, and when appropriate, on adjacent land. Habitat conditions which may need to be considered include topography, vegetation, condition/trends, and recreational or other uses.

Also include, when appropriate or known, past land management in the action area. This refers to such things as habitat improvements or loss of habitat/individuals caused by previous actions and data on historical, current, and possible reasonable future land uses.

Comment on accessibility of the habitat and its continuity with other suitable habitat, versus its degree of fragmentation from natural and human-induced barriers. Present the view of recognized experts on the species, if appropriate. Local and state wildlife organizations and entities are often good sources of free information.

Discuss other land resource allocations and designations, both within, and when appropriate, adjacent to the proposed action area, such as Wilderness Areas, National Wildlife Refuges, State Parks, Areas of Critical Environmental Concern, Management Areas, etc.

iii. Analysis

Evaluate all effects of the proposed action as it relates to the species and its habitat. Include maps, whenever available, showing the species or habitat in relation to the action area. Consider, where appropriate, the effects of alternatives of the proposed action which are under consideration.

Indicate the amount of habitat that is likely to be removed or altered due to the proposed project. Estimate the number of individuals that may be taken directly or indirectly by the proposed action. Estimate what percent of the population will be affected as a result of the proposed action.

Consider direct, indirect, cumulative, and beneficial effects. Effects also include those caused by interrelated and interdependent actions.

Direct Effects are effects caused by actual construction or occupation, such as roadways and other development. Evaluate the action in terms of existing condition versus post-action condition (quantity and quality of habitat, fragmentation). Consider short and long term effects.

Indirect Effects are effects caused by the proposed action and are later in time or farther removed in distance, but still are reasonably certain to occur. Evaluate such indirect effects as appropriate and pertinent, such as additional road development, increased road traffic, changes in livestock use, downstream effects, etc.

Cumulative Effects are impacts from past, present, and future (reasonably certain to occur) state, local, and private actions. Note that the definition of cumulative impacts is different for the Endangered Species Act than under National Environmental Policy Act (NEPA). ESA's definition does not include impacts from other federal actions because such actions would be evaluated through future ESA consultations.

Interrelated actions are part of the larger action and depend on the larger action for their justification. For example, exploratory activities for mineral location - the BA should consider effects of mining the mineral if minerals are discovered in search area.

Interdependent actions are actions which would not occur but for the proposed action, having no independent utility apart from the action under consideration. For example, a right of way into a housing development when the right of way would not be necessary but for the housing development; then consider the effect of the right of way and the housing development.

e. Conclusions

Determine how the action may affect each listed species and habitat. One of three conclusions should be reached, No Effect, Not Likely to Adversely Effect, or Likely to Adversely Effect.

f. Consideration of Mitigation

Describe and delineate locations of those measures that avoid or lessen adverse effects and those measures that enhance the species' present condition. Provide proposals for on and/or off site mitigation measures when possible. Include maps showing off-site mitigation areas if such areas are identified for mitigation purposes. Consider, where appropriate, mitigation in the context of alternatives to the proposed action which are under consideration or which should be considered. If an Environmental Assessment (EA) or EIS is being required, NEPA requires the consideration and evaluation of these viable alternatives.