

Attachment 4: Template for Biological Assessment**Attachment 5: Template for Programmatic Biological Opinion Compliance Letter****Summary**

The U.S. Fish and Wildlife Service (Service) will work with Federal Highway Administration and state Department of Transportation agencies (Agencies) to expedite programmatic consultations by identifying procedures and establishing mechanisms for implementing future projects and associated conservation activities. Through the mechanism of early, coordinated reviews, there will be parallel environmental reviews, fewer environmental conflicts, better species protection, better decision documents, reduced costs, greater predictability and certainty for all parties, and reduced time to implement needed transportation projects. As the Agencies, specifically state Department of Transportation agencies, utilize this guidance for projects, they maintain a continuing Federal nexus (*i.e.*, Federal involvement or funding), therefore, informal or formal consultation under section 7 of the Act will always be required when listed or proposed species and/or designated or proposed critical habitat may be affected by projects. In addition, although a state Department of Transportation agency may be designated as a non-Federal representative, under 50 CFR §402.08, to conduct information gathering or preparation of a biological assessment, the Federal Highway Administration is required to maintain the lead in the consultation process.

The overall purpose of these expedited programmatic consultations is similar to that described for early consultation in 50 CFR §402.11(a): “to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions,” thus producing more positive environmental results and increasing the efficiency of the consultation process. This will be accomplished through: (1) utilizing applicable plans and guidance to design projects that avoid or minimize adverse effects on listed, proposed, and candidate species, and reduce levels of incidental take of these species; and (2) enabling the section 7 review process to proceed quickly and efficiently. This programmatic consultation guidance will facilitate the implementation of the Transportation Equity Act for the 21st Century.

Introduction

Service Field Offices (FO), and Regional Offices, as appropriate, will work with the Agencies to establish agreements to develop criteria to be used to design and implement projects and associated conservation actions within a specific geographic area in a manner consistent with requirements of sections 7(a)(1) and 7(a)(2) of the Endangered Species Act of 1973, as amended (Act). The Service Director’s Order 108 gives guidance on how to establish these agreements. This Order provides uniform guidance for implementing reimbursable funding agreements between the Service and State Departments of Transportation. A critical part of this Order is cooperative Service participation “in the pre-scoping and scoping stages of transportation planning, when environmental concerns can be resolved most effectively.” Thus, the Service would be initially engaged by the Agencies at the earliest stage of planning efforts and then would remain engaged throughout the process. A key element to this

early engagement will be the identification of funds that will finance dedicated staff from the various agencies to focus on these tasks.

Once these procedures are designed and agreed upon, the Agencies, with the assistance of Service staff, will jointly develop biological assessments to be used for the purpose of completing programmatic section 7 consultations on future projects. These consultations should be completed at the FO level, if possible, because the FO possesses baseline information files, biological expertise, and the lead responsibility for various listed, proposed, and candidate species. Where this is not practical, and/or where the species lead is not in a single location, multiple FO's may complete joint programmatic consultations. In certain instances, it may be appropriate for Regional Offices to become actively involved.

Establishing Interdisciplinary Teams. The Service and the Agencies will establish interdisciplinary teams for planning and scoping transportation projects as an important initial step in the programmatic consultation process. A model for establishing these teams can be found in the July 1999, *Streamlined Consultation Procedures for Section 7 of the Endangered Species Act*, developed for Regions 1, 4, 5, and 6 of the U.S. Forest Service, the Northwest and Southwest Regions of the National Marine Fisheries Service, the California, Idaho, Montana, and Oregon/Washington Offices of the Bureau of Land Management, and Regions 1 and 6 of the Service. In this guidance document, Level 1 teams and Level 2 teams are formed to expedite the consultation process. The Level 1 teams are composed of biologists, botanists, and engineers designated by their agencies. Their role is to design programs and procedures that minimize adverse impacts to listed, proposed, and candidate species and designated and proposed critical habitat. Level 2 teams are composed of mid-level managers or staff supervisors. Their role is monitoring the performance of the Level 1 teams, resolving issues, and, when appropriate, elevating unresolved issues to the Regional Executive level. The general role of these interdisciplinary Level 1 and 2 teams is described in Attachment 1. An April 17, 2000 update to these general roles is also included in Attachment 1. The finalized August 30, 2000 Memorandum of Agreement between the above agencies that incorporates most of these concepts is described in the "Other Consultation Related Processes" on page 20.

The ability of the Service to provide staff for these teams will be commensurate with funding provided through reimbursable funding agreements discussed in more detail below.

Expediting the consultation process. Expediting the consultation process involves the following basic steps:

- (A) Service FO and the Agencies participating in early planning, project design meetings, and the review of preliminary determinations of effect;
- (B) jointly preparing a programmatic biological assessment to deal with foreseeable projects in the geographic area;

- (C) Service preparation of a programmatic biological opinion with the Agencies assisting;
- (D) using the programmatic biological opinion as a guidance document for the Agencies avoidance/minimization of adverse effects of project actions and for implementation of proactive, off-site habitat replacement/conservation;
- (E) the Agencies preparing site-specific project information for determining application to the programmatic consultation with Service assisting; and, if applicable, inserting this information into a template biological assessment; otherwise, a separate formal section 7 consultation is initiated; and,
- (F) Service FO determining appropriateness of use of programmatic with the Agencies assisting; and, if appropriate, using a template compliance letter, appended to the programmatic biological opinion; otherwise, completing a separate, formal, section 7 consultation.

Developing programmatic strategies. The Service and the Agencies will develop strategies through programmatic consultations to ensure listed species conservation in a particular geographic area within the context of the Agencies' future activities. This can be accomplished by implementing the following key steps in biological assessments (expanded guidance for each of these key steps is provided later in this document):

- (1) to the extent practicable, identify likely future needs of the Agencies (*e.g.*, general location of future projects, types of future projects, time lines for completion of projects, timing of project activities, *etc.*);
- (2) identify listed and proposed species and critical habitat likely to be impacted;
- (3) identify published draft and finalized recovery plans, biological studies, and biological opinions (programmatic or otherwise) conducted within the geographic area that may help establish range-wide status of the species;
- (4) identify relevant regional guidance that has undergone section 7 consultation;
- (5) jointly develop general strategies for addressing species conservation needs (*e.g.*, if appropriate, identify goals and objectives to conserve species and/or identify different biological "zones" where similar activities may impact listed species differently, thus resulting in differing conservation actions, or batch projects by biotic communities or other relevant ecological delineation in which they occur where activities may impact ecological processes affecting a broad suite of habitats and habitat functions);

- (6) jointly identify direct effects, indirect effects, interdependent and interrelated actions, and cumulative effects to be added to the environmental baseline;
- (7) jointly develop avoidance and minimization procedures, such as seasonal restrictions or erosion control measures, *etc.*, to remove or reduce the risk of direct impacts to listed and proposed species and their critical habitat;
- (8) jointly group actions according to the appropriate effect determinations: “No effect” (NE), “Not likely to adversely affect” (NLAA), or “May affect/likely to adversely affect” (LAA); a determination can be made on the need for formal consultation (*e.g.*, activities having NE would not need any consultation and those NLAA would need informal but not formal consultation); those projects LAA will need to have a determination on whether they will jeopardize or not jeopardize listed species;
- (9) jointly develop methods to offset impacts to listed species and their critical habitat;
- (10) if appropriate, jointly determine limits on levels of allowable impact, numbers of individuals of a listed species that may be taken, and amounts of habitats that may be affected or destroyed (with critical habitat, include destroyed or adversely modified) for a specified interval (*e.g.*, seasonally, annually, biennially, *etc.*); a limit may be set for the lifetime of the programmatic biological opinion on the amount of take for a particular species or the amount of affected or destroyed (and/or adversely modified) habitat allowable; and,
- (11) jointly develop monitoring that will allow project actions (including the implementation of associated conservation actions) to be tracked and allow detection of adverse effects, level of incidental take, and effectiveness of avoidance/minimization measures and conservation measures.

Where possible, programmatic consultations should allow for multiple methods of achieving a desired conservation result. This will provide project proponents with options for project designs that provide flexibility over time. For example, seasonal restrictions may be the most effective means of avoiding and minimizing direct impacts to a listed species during the time of reproduction, but other factors, such as suitable weather for construction activities, may necessitate carrying out project activities during the reproductive season. In such situations, it may be appropriate to develop procedures allowing construction activities during important listed species reproductive periods, while minimizing impacts on reproduction through actions increasing reproductive success of the species in another area. The limits identified in (10) above may play an important role in this process. The Service and the Agencies can refine decision-making on the best approach as site-specific information becomes available. Note: as the number of options and potential combinations of project designs increase, increased future contact between the Agencies and the Service may be appropriate.

Once programmatic consultation processes are completed, the Agencies will establish the appropriate mechanisms, programs, and reimbursable funding agreements to carry them out (*e.g.*, third-party agreements, conservation and training programs, joint preparation of biological assessments). As projects are developed, these projects will be submitted to the appropriate Service FO for review to ensure that the project is consistent with the requirements of the programmatic consultation.

The need for a programmatic incidental take statement. The criteria for take to be incidental is that it must be incidental to the action, be a legal action, and must not result in jeopardy. If sufficient information is available to determine the number of individuals that will be incidentally taken, or to quantify the amount of take via other means (*e.g.*, acres of habitat impacted), then an incidental take statement may be written at the programmatic level. Otherwise, preparation of an incidental take statement should be deferred to site-specific consultation when more detailed information is available.

Conserving candidate species. The Service will encourage the Agencies to incorporate conservation actions for candidates and other declining species into transportation projects. Initiating or expanding conservation efforts before a species and its habitat are critically imperiled increases the likelihood that simpler, more cost-effective conservation options will still be available and that conservation will ultimately be successful. Listing species may be unnecessary through implementing early conservation, or species may be listed as threatened rather than endangered. This allows Federal agencies increased flexibility in maintaining ongoing and future operations.

In some cases, an Agency may incorporate conservation efforts for candidate or other declining species in hopes of influencing listing decisions. The Service has recently published a draft Policy for the Evaluation of Conservation Efforts When Making Listing Decisions [65 **FR** 37102]. This policy was proposed in order to ensure consistent and adequate evaluation of formalized conservation efforts when making listing decisions. We have also proposed this policy to facilitate the development of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary. The policy provides guidance only for evaluating the certainty of implementation and effectiveness of formalized conservation efforts such as those contained in conservation agreements, conservation plans, *etc.*, or incorporated into project descriptions. Should this policy be finalized, and should an Agency desire to influence a listing decision through implementation of conservation efforts for candidate or other declining species, the Service will inform the Agency of the policy's criteria for evaluating future and/or voluntary conservation efforts. However, we will still encourage the incorporation of conservation efforts for candidate and other declining species into transportation projects even when such efforts do not satisfy the policy's evaluation criteria or when such efforts are insufficient to affect a listing decision (see language in policy).

Candidate Conservation Agreements without assurances (CCAs) have been effective mechanisms for conserving declining species, particularly candidate species, and have, in some instances, made listing unnecessary. The Virgin spinedace (*Lepidomeda mollispinis*) is an example of a species that was not listed due to adequate protection provided by a CCA. The Virgin spinedace was proposed by the

Service in May 1994 for listing as a threatened species, but the proposal was withdrawn in lieu of implementation of a multi-agency “Virgin Spinedace Conservation Agreement and Strategy” that will ensure that the conservation needs of the fish are met. Examples of other withdrawals of proposed listings or removals of candidate status due to CCAs include: the Pecos pupfish (*Cyprinodon pecosensis*), proposed listing withdrawn in March 2000; the Arizona bugbane (*Cimicifuga arizonica*), candidate status removed October 1999; the Umpqua mariposa lily (*Calochortus umpquaensis*), candidate status removed September 1999; and the spotted frog - Wasatch and west desert populations (*Rana luteiventris*) -, proposed listing withdrawn April 1998.

The Agencies’ deliverables. In summary, the Agencies need to supply the Service with the following, in the order that they are listed here, to complete the programmatic consultation process:

- (1) Interagency agreement that should include a funding mechanism to accomplish staffing, training programs, and conservation measures, as appropriate;
- (2) A request for a species list to allow project effects to be assessed;
- (3) A biological assessment with a determination on level of effect to determine appropriate consultation process (*i.e.*, informal or formal, programmatic or site-specific); and,
- (4) A request for concurrence on NLAA determinations or initiation of formal consultation for: (a) programmatic; or (b) independent site-specific section 7 consultation.

Avoiding irreversible and irretrievable commitment of resources. Section 7(d) of the Act requires: “After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative (RPA) measures which would not violate subsection (a)(2).” Thus, the Agencies must review all actions to ensure that funds are not spent or actions implemented that would preclude the ability of a project to offset its effects. Avoidance and minimization of impacts are the most important methods of reducing project related effects on listed species. Therefore, the Agencies, particularly the State DOT’s, should maximize their use of biological information to avoid and minimize impacts to listed species in the beginning of the highway planning process. The Agencies must not plan, design, fund, or implement actions on highway projects so as to diminish the Service’s opportunities to examine alternate routes, designs, needs, or methods to achieve project purposes, to avoid impacts to listed species, or to conserve other important fish and wildlife resources.

Procedures for Implementing Programmatic Consultation Strategies

Establishing programs and procedures. As a first step, the Service and the Agencies should have an