

United States  
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Agriculture

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File Code: 2670/2210/1920  
Route To:

Date: March 21, 1996

Subject: USDI Fish and Wildlife Service/USDA Forest Service Coordination and  
Range Permittee Involvement in the ESA Applicant Process.

To: Forest Supervisors

Enclosed is a letter to the California Farm Bureau Federation and the California Cattlemen's Association which was jointly signed by the Regional Forester and Wayne White, California State Supervisor of the U.S. Fish and Wildlife Service (FWS). It responds to questions about the applicant process under the Endangered Species Act, and clarifies the coordination that will take place between the Forest Service and the FWS during the formal consultation process. It also discusses where permittees may be involved as applicants, and encourages permittees to participate in range allotment planning through the NEPA process.

Please make sure that the appropriate resource staff personnel receive this letter and that they communicate its contents with range permittees when questions arise.

You may call Anne Bradley at (415)705-2882 or Linda Parker at (415)705-1161 if you have specific questions.

/s/ Jim Lawrence (for)  
REGIONAL FORESTER TEAM

Enclosure

cc: Steve Bishop  
Lydia Grimm, OGC

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File Code: 2210

Date: April 3, 1996

Mr. Dan Byrne and Mr. Willy Hagge  
Region 5 Grazing Strategy Group  
1221 H. Street  
Sacramento, CA 95818-1910

Dear Mr. Byrne and Mr. Hagge:

The U.S. Fish and Wildlife Service (FWS) and the Forest Service recently sent you a letter clarifying the roles of the Agencies and permittees under the applicant provision of the Endangered Species Act. In that letter the FWS and the Forest Service encouraged your constituents to view the NEPA process as an important place to voice concerns and provide input to the allotment planning process. Early involvement is strongly encouraged by the Forest Service and offers permittees the best opportunity to address issues regarding allotment management. The following explains some of the opportunities available for public involvement in the allotment planning process.

**Preliminary Planning Activities**

Prior to the NEPA analysis and decision, there is ample opportunity for useful discussion between national forest managers and permittees. Section 504 of Public Law 104-19 (the Rescissions Act) requires the national forests to produce and make available a quarterly schedule of proposed NEPA analyses so that permittees will be informed well in advance when NEPA analysis is scheduled for their allotments. In some cases, before the NEPA analysis is initiated, forests may choose to develop landscape or watershed level analyses to assess existing resource condition. The existing condition is then compared with the desired condition for the allotment, which is based on direction from the Forest Land and Resource Management Plan. Permittees may be asked at this stage of planning to provide information about the existing condition of the allotment. An accurate assessment of the existing condition is important so that we can adequately identify management opportunities that can help us achieve the desired condition. Permittees can also assist forest managers by discussing livestock management techniques they have used and the results achieved.

**NEPA Analysis Process and Pre-decisional Comments**

After NEPA analysis has been initiated, there are two well-defined steps where permittees can be involved:

**Public Scoping:** Once a proposed action has been developed, the interested and potentially affected public, including permittees, will be notified and asked to provide any points of discussion, debate or dispute about the proposed action and its likely effects. This is called the public scoping phase of NEPA analysis. Comments from scoping may be used to refine the proposed action and, where appropriate, to prepare management alternatives which will be analyzed. Information useful in the NEPA analysis is timely, site specific, and within the scope of the analysis being conducted, i.e. comments should be focussed on the management proposal for the allotment in question. If the permittee has concerns about management systems or mitigations being proposed, this would be a good time to raise those concerns with the Forest Service.

Public scoping is the point in the analysis where the permittee may visit with the interdisciplinary team, including the biologist or botanist, if there are questions about the biological assessment or biological evaluation being prepared for the allotment. Biologists/botanists will identify any species which are federally endangered, threatened, proposed for listing, or species which have been designated as sensitive by the Forest Service. In the case of federally listed species, informal consultation with the U.S. Fish and Wildlife Service will begin at this stage. This is the time for permittees to share with the biologists/botanists information they may have concerning these species or to suggest potential management actions that may minimize impacts to the species or their habitat.

**Pre-decisional Comments:** These are comments on the environmental analysis document solicited from the public before the final NEPA decision is issued. If an Environmental Impact Statement (EIS) is prepared, a draft EIS will be released for public review and comment in accordance with regulations found at 40 CFR 1500-1508. If an Environmental Assessment is prepared, no draft document is prepared. However comments on the EA are solicited and they will be addressed in an appendix to the EA prior to issuing a final decision, in accordance with the appeals rule found at 36 CFR 215. It is particularly important that permittees provide comments on the draft EIS or the EA during the comment period if they believe that these documents do not respond to their concerns.

**After the NEPA Decision**

**Appeals:** The permittee may choose to appeal the final NEPA decision, including the terms and conditions of the grazing permit, under regulations found at either 36 CFR 215, or at 36 CFR 251, subpart C, but not both.

Permittees should receive notice of the right of appeal under 36 CFR 251, subpart C, at the same time the notice of decision is given under 36 CFR 215. While administrative appeal of decisions is a right of a permittee, I strongly encourage your constituents to become involved in the planning process well before this stage. Information provided up front leads to better decisions.

**AMP/AOI:** Subsequent to the NEPA decision, an allotment management plan (AMP) and the annual operating instructions (AOI) are prepared based on the decisions made through the NEPA analysis. The details of implementing the NEPA decision are written here and subsequently become a part of the permittee's term grazing permit. The permittee has an opportunity to be involved in any implementation details not addressed in the NEPA analysis. This is also the place to work with Forest Service resource managers when NEPA analysis of an allotment is not scheduled for completion for several years. Working together at this stage, permittees and resource managers can make great strides in improving allotment conditions.

**Monitoring:** Once a decision is implemented, monitoring is a necessary step to assure that resource goals and objectives are being met. Permittees are responsible for compliance with the terms and conditions of their permits, including allowable use standards. It is important that they become knowledgeable about the monitoring techniques used by forest permit administrators to check compliance.

It is Forest Service policy to make every effort to to work collaboratively with range permittees to address concerns and to develop the best possible management strategy for the grazing allotments we administer. I hope this letter clarifies where and how permittees can best participate in the allotment planning process.

Sincerely,

/s/ James A. Lawrence (for)  
G. LYNN SPRAGUE  
Regional Forester

cc: Lydia Grimm, OGC  
Kathy Clement

A. Bradley: jy: 04/02/96  
I concur J. Yee 04/02/96  
I concur: A. Bradley 04/02/96  
I concur: L. Decker 04/02/96  
I CONCUR: R. Andrews 04/02/96  
I concur: W. Fallins 04/03/96

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File Code: 2670  
Route To:

Date: January 19, 1996

Subject: Endangered Species Act Section 7 Consultation - Applicants

To: Forest Supervisors

Enclosed is the September 20, 1995 letter (Chief's letter) from the Washington Office regarding applicant status in Section 7 consultation under the Endangered Species Act (ESA). This direction was discussed at the ESA training sessions held this fall. The intent of this letter is to document what is expected regarding applicants in the consultation process and provide consistency through out the Region. Emphasis is given to key points in the regulations and Chief's letter.

Who is an applicant?

"Applicants" are those persons (including, among others, individuals, corporations, partnerships, trusts, and associations) who require formal approval or authorization from the Forest Service as a prerequisite to conducting an action covered by the ESA, 50 CFR 402.02.

Please refer to the Chief's letter for the specific policy on who is qualified to be an applicant. In most cases an applicant will be the contract or permit holder directly affected by a consultation that requests to participate in the process. It is a legal status provided under the ESA. It is interpreted by the Forest Service to only apply to formal consultation.

Who is responsible for conferring applicant status?

The Forest Supervisors have been delegated formal consultation authority. The responsibility for including applicants in the consultation process is included with this authority.

How does someone become an applicant?

It is our policy to inform any qualified person(s) of their right to be an applicant at the same time we initiate formal consultation. The qualified person(s) must then request to be an applicant in the consultation. This needs

to be documented. When the request is received, the person(s) is considered an applicant in the consultation.

What rights do applicants have in the consultation?

Applicants have an opportunity to submit written information for consideration during the consultation, to consent to any extensions of the consultation period beyond 60 days or the conclusion of consultation beyond 45 days, to obtain a copy of and submit written comment on a draft Biological Opinion if one is issued, and to discuss the Biological Opinion and the reasonable and prudent alternatives (if a jeopardy opinion is to be issued) with the FWS/NMFS and Forest Service. See 50 CFR 402 for more specifics.

What is the Forest Service's responsibility to applicants?

The Forest Service has chosen to inform all qualified person(s) of their option to be an applicant when formal consultation is initiated.

The Forest Service is responsible for conferring applicant status on qualified person(s) requesting to be an applicant.

The Forest Service should share all pertinent information and communications regarding the consultation with the applicants. This may include inviting applicants to meetings and conference calls with the FWS/NMFS, and providing copies of written material pertinent to the consultation. (Written material that is shared becomes available for public requests through the Freedom of Information Act.)

The Forest Service must provide any applicant the opportunity to submit information for consideration during the consultation. The Forest Service will share this information with the FWS/NMFS. Our contact with the FWS in Sacramento indicates that they will not accept information directly from the applicant.

The Forest Service must obtain the written consent of the applicant for an extension of the 45-day period in which the FWS/NMFS are required to deliver a BO at the conclusion of formal consultation.

What responsibilities do FWS/NMFS have regarding applicants?

The FWS/NMFS are responsible for discussing their review of relevant information, the basis for any finding in the BO, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued). The FWS/NMFS will give appropriate consideration to any beneficial actions taken by the applicant in formulating the BO, 50 CFR 402.14.

The FWS/NMFS must submit a written statement to the applicants if there is going to be a delay in the consultation beyond the 90 days period. The FWS/NMFS cannot extend the consultation period more than 60 days without the consent of the applicant. Within 45 days of the conclusion of formal



consultation, the FWS/NMFS must deliver a BO to the Forest Service and applicant, unless the Forest Service obtains the written consent of the applicant for an extension to a specific date.

The regulations and policies regarding applicants are broad in nature, with only a few specific requirements outlined above. It will be up to the Forests to determine how best to involve applicants in their formal consultation. The Regional Office and Office of General Counsel will continue to assist will specific questions that arise.

/s/Philip H. Bayles for  
REGIONAL FORESTER TEAM

Enclosure

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File Code: 2670  
Route To : 2200-3

Date: September 20, 1995

Subject: Endangered Species Act Section 7 Consultations

To: Regional Foresters and Station Directors

There have been numerous questions from the field regarding the Forest Service interpretation of applicant status for purposes of Section 7 Consultation under the Endangered Species Act (ESA). On July 1, 1993, we issued a letter clarifying that a holder of a timber sale contract or forest products sale permit would qualify as an applicant pursuant to 50 CFR 402. At that time, we acknowledged that the Section 7 Consultation regulations did not directly address holders of either contracts or other authorizations to use National Forest System (NFS) lands and indicated that additional clarification and a possible change in position would be forthcoming. The following guidance adjusts the Forest Service position as to treatment of qualified apparent high bidders for timber sale contracts and recognizes as applicants those who apply for or hold authorizations for use and occupancy of NFS lands. This letter replaces the July 1, 1993, letter.

Who is an applicant?

In an effort to ensure consistency in interpretation and application of the ESA, it is our interpretation that under 50 CFR 402, applicant status would be conferred only on qualified apparent high bidders for or holders of timber sale contracts, or applicants for or holders of permits as described under a-n below, only if such holder is: (1) directly affected by the results of the consultation and (2) the permitted activity at issue is specifically referred for formal consultation. The determination of "directly affected" would turn on whether the formal consultation could affect the use or instrument authorized by the issuance of the permit. Circumstances where applicant status would be conferred include, but are not limited to the following:

(a) Timber sale contracts, 36 CFR 223.

(b) Forest product sale permits, 36 CFR 223, with the following limitations. It is the agency's position that holders of personal use sale permits and short duration commercial product permits for miscellaneous products such as, but not limited to, sand and gravel, mushrooms, firewood, boughs, and christmas trees will not be considered to have applicant status.

(c) Permits for ingress and egress to intermingled and adjacent private lands across NFS lands, 36 CFR 212.8 and 212.10.

(d) Permits and occupancy agreements on national grasslands and other lands administered under the provisions of title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(e) Term grazing permits issued under 36 CFR 222, subpart A.

(f) Mining plans of operations under 36 CFR 228, subpart A.

(g) Mining operating plans for the Sawtooth National Recreation Area (SNRA) issued under 36 CFR 292.17 and 292.18.

(n) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay, and other similar materials) under 36 CFR 228, subpart C.

(i) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR 251, subpart A.

(j) Special use authorizations issued under 36 CFR 251, subpart B.

(k) Permits for uses in wilderness areas issued under 36 CFR 293.

(l) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act of 1979 and 36 CFR 296.

(m) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(n) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR 292, subpart C, and the Hells Canyon National Recreation Area pursuant to 36 CFR 292, subpart E.

#### Applicant Rights

As noted in the July 1993, letter, applicants, as defined above, should be informed by the Forest Service of their opportunity to request applicant status when they are notified that the contract or permit has been submitted for formal consultation or conference.

You will need to determine the best procedure for incorporating applicants into your ongoing formal consultations. It is essential that thought be given in how best to accommodate applicants into the formal consultation process for the most beneficial results. Lack of careful groundwork with applicants could cause delays in the consultation process, increase burdens on agency personnel, and impact other programs. In some instances, parties requesting applicant participation can have their concerns resolved without actually formalizing their status.

Applicant status provides applicants an opportunity to submit written information for consideration during the consultation, to consent to any extensions of the consultation period beyond 60 days, to obtain a copy of and submit written comment to the Fish and Wildlife Service or the National Marine Fisheries Service (service agency) on the draft Biological Opinion, and to discuss the Biological Opinion and the reasonable and prudent alternatives with the service agency(ies) and the Forest Service. For specific requirements see 50 CFR 402.

If you have questions about specific situations affecting your Region, please contact your respective Staff Director in the Washington Office and your local OGC Office.

/s/ Sterling J. Wilcox  
for  
JACK WARD THOMAS  
Chief