

short, joint letter should be routed down communicating this information. This letter will become part of the administrative file for each agency. If the determination does not resolve the issue, an appeal may be made to the Directors, or equivalent, office of each agency. The elevation should not take more than 30-days so as to maintain the momentum of the consultation process. Issues that might be elevated would be process issues but might include effects determinations, information needs for biological assessments, and disagreement on compliance with management plans and/or the programmatic consultation. Non-discretionary actions mandated by law should not be elevated (*e.g.*, determinations of jeopardy or adverse modification).

### **Other Consultation Related Processes**

**Anadromous fish guidance.** In the July 1999, *Streamlined Consultation Procedures* referred to in regard to Interagency teams, a watershed-scale strategy is discussed for dealing with anadromous fish. The Agencies should use this strategy to deal with projects that affect anadromous fish and their habitat. A key document developed by NMFS in collaboration with the Service, Forest Service, and BLM as a method to evaluate effects of human activities on these fish and their habitat is the September 4, 1996, *Making Endangered Species Act (Act) Determinations of Effect for Individual or Grouped Actions at the Watershed Scale*. The document is based on a “Matrix of Pathways and Indicators,” a tool for characterizing environmental baseline conditions for anadromous fish habitat and predicting the effect of human activities on these conditions. The matrix of pathways and indicators provides generalized ranges of functional values for aquatic, riparian, and watershed elements that collectively describe properly functioning conditions for aquatic habitat essential to the long-term survival of anadromous fish. The Service has developed a similar matrix for bull trout (*Salvelinus confluentus*).

“Essential fish habitat” (EFH) is defined in Section 3(10) of the Magnuson-Stevens Fishery Conservation and Management Act, as amended in 1996 (MSFCMA), as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity”. This language is interpreted in the 1997 Interim Final rule 62 **FR** 66551, section 600.10 Definitions. The amendments require NMFS to identify EFH, actions that would adversely affect EFH, and actions to conserve EFH. They also require NMFS, in coordination with the Fish Management Committees, to consult on and recommend conservation and enhancement measures for actions undertaken by any federal agency that may adversely affect EFH. Federal agencies are required to consult with NMFS regarding any activity or proposed activity, authorized, funded, or undertaken by the agency, that may adversely affect EFH (Section 305(b)(2) of the MSFCMA). The trigger for an EFH consultation is when a Federal action is likely to adversely affect EFH. Since some EFHs may not have any listed species in them, or, if they do, those species may not be adversely affected by every project, consultations over adverse impacts to those EFHs are still required by the MSFCMA even if consultations may not be required by the Act.

**Secretarial Order 3206.** This order was signed on June 5, 1997 by the Secretaries of Interior and Commerce to clarify responsibilities of their respective agencies when actions taken under the authority

of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or American Indian tribal rights. It also acknowledges the trust responsibility and treaty obligations of the United States towards tribes and its government-to-government relationship in working with tribes.

The Order does not alter the legal or regulatory responsibilities of Department of the Interior (DOI) or Department of Commerce (DOC) agencies. The Order requires DOI/DOC agencies to “consult” with, and seek the participation of, affected tribes to the maximum extent practicable when their planned actions involving the Act may affect Indian lands, tribal trust resources, or tribal rights. This tribal consultation includes “providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes.” The Order requires DOI/DOC agencies to use tribal conservation and management plans that both govern activities on Indian lands and that address the conservation needs of listed species. Under the Order, if a DOI/DOC agency determines that conservation restrictions affecting tribes are necessary to protect listed species, the affected tribes shall be given written notification of such as far in advance as practicable.

**Clean Water Act.** The Service and EPA are attempting to integrate efforts to protect the aquatic environment (*i.e.*, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”) under the Clean Water Act (CWA) with efforts to protect at-risk species and habitats under the Endangered Species Act, and to prevent the need to list new species. Both Acts share the goal of maintaining and restoring ecosystem integrity. An example of an ongoing activity to integrate the Endangered Species Act and the CWA includes:

*The development of a MOA between the Service, NMFS, and EPA that explains how the three agencies will work together to achieve the complementary goals of the Endangered Species Act and the CWA. The MOA addresses four general areas: (1) national procedures for interagency coordination and elevation of issues to speed decisions; (2) national consultation on existing water quality criteria for aquatic species, and a national research and data gathering plan; (3) improved consultation procedures for EPA approval of state and tribal water quality standards; and, (4) national programmatic consultation on state and tribal National Pollutant Discharge Elimination System permitting programs.*

**National Environmental Policy Act and the Endangered Species Act.** The National Environmental Policy Act (NEPA) process usually precedes Endangered Species Act consultation because NEPA involves scoping issues and developing several alternative actions. With the early involvement of the Service FO in this expedited programmatic consultation process, the NEPA and the Endangered Species Act process will be essentially concurrent processes. This should facilitate alternative creation and selection and will expedite both processes. In certain instances, the draft Environmental Impact Statement (EIS) may have sections that duplicate the biological assessment, while the final EIS may incorporate the biological opinion as an appendix. Additionally, this will concurrently expedite Fish and Wildlife Coordination Act responsibilities and add assurance that an amended Record of Decision due

to changes made through the Endangered Species Act consultation will not be necessary.

**U.S. Army Corps of Engineers Highway Methodology Workbook and Supplement.** In October 1993, the US Army Corps of Engineers New England Division published, “The Highway Methodology Workbook, Integrating Corps Section 404 Permit Requirements with Highway Planning and Engineering and the NEPA EIS Process” and in September 1999, a supplement was published entitled, “Wetland Functions and Values, *A Descriptive Approach*.” The purpose of these two documents was to expedite Agency environmental compliance with the Corps Section 404 permitting process and to provide “a way to systematically but quickly review and evaluate alternatives with participation by the Federal resource agencies, the applicant, and FHWA (where FHWA funding is involved).” The supplement provides guidance “on how to identify and display wetland functions and values . . .” and has useful color illustrations and photographs that are helpful in displaying wetland functions and values. The methodology described in these two pamphlets have proven helpful in New England in expediting the Corps Section 404 permitting process with Department of Transportation projects and may prove helpful in the programmatic biological opinion process when the geographic area that is the subject of the biological assessment/opinion contains wetland habitats and species.

**Memorandum of Agreement, Endangered Species Act Section 7 Programmatic Consultations and Coordination among Bureau of Land Management, Forest Service, National Marine Fisheries Service, and Fish and Wildlife Service.** The goal of the August 30, 2000 MOA is to improve the efficiency and effectiveness of plan and programmatic level section 7 consultation processes under the Act, and enhance conservation of imperiled species while delivering appropriate goods and services provided by lands and resources managed by the signatory agencies. In particular, this MOA outlines guidance and procedures for section 7 consultations and consideration of candidate species conservation in land management plans and other programmatic level proposals. The MOA is effective immediately and the expectation is that it will be fully implemented within 1 year of the final signature date.

After the 9<sup>th</sup> Circuit Court of Appeals ruled in *Pacific Rivers Council vs. Thomas* (1994), that Forest Service Land and Resource Management Plans “constitute continuing agency action requiring consultation under 7(a)(2) of the Endangered Species Act,” the four signatory agencies determined that a process was needed to better facilitate completion of the increased programmatic consultation workload in an effective and timely manner. The MOA meets this objective by establishing a “streamlined” procedure for completing section 7 programmatic consultations on land use plans and other programmatic-level documents (*e.g.*, Land and Resource Management Plans, Resource Management Plans, Management Framework Plans). The MOA establishes a general framework for an efficient interagency cooperation process during plan development and provides guidelines and procedures for formal and informal consultations, and consideration of candidate species conservation during plan development. The key to the cooperative process is early interagency communication, coordination, and concurrence on participation, timelines, information needs, and analyses. Intensive up-front coordination among the agencies will allow for early identification and resolution of issues prior to

the consultation.

### **Glossary**

**action** – all activities or programs of any kind authorized, funded, or carried out, in whole or part, by Federal agencies in the United States (50 CFR §402.02).

**action area** – all areas to be affected directly and/or indirectly by the Federal action and not merely the immediate area involved in the action(50 CFR §402.02).

**anadromous fish** – moving from the ocean to freshwater to spawn.

**applicant** – any person who requires formal consultation or authorization from a Federal agency before conducting an action(50 CFR §402.02).

**biological assessment** – an evaluation of the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and . . . to determine whether formal consultation or a conference is necessary (50 CFR §402.02).

**biological zone** – an area defined by biological and physical elements including vegetation, terrain, altitude, hydrology, and air temperature, *etc.* that cause species to develop unique adaptations including foraging behaviors, reproductive behaviors, prey selection, or morphological characteristics such as body size or coloration.

**candidate species** – plant and animal taxa for which the Service has enough scientific information to support proposing them for listing under the Act.

**Candidate Conservation Agreements without assurances** -- agreements between the Service and other federal agencies that are effective mechanisms for conserving declining species, particularly candidate species, and have, in some instances, precluded or removed any need to list some species.

**conservation bank** – established with a specific number of conservation credits designated to off-set impacts to a specific species, or “suite” of species that utilize similar habitats, allowing “banking” of replacement habitat for future needs. Conservation banking may entail habitat protection, restoration, enhancement, or creation followed by setting aside the habitat in perpetuity.

**critical habitat** – refers to an area designated in 50 CFR Part 17 or 226 as critical to listed species. It identifies constituent elements that are biological and physical attributes essential to the species’ conservation, such as: space; food, water, and nutrition; cover or shelter; reproduction; and special

habitats.

**cumulative effects** – effects of future State, Tribal, local or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR §402.02).

**designated non-federal representative** – a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment (50 CFR §402.02).

**destruction or adverse modification of designated critical habitat** -- a direct and/or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species (50 CFR §402.02).

**effects of the action** – direct and/or indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action (50 CFR §402.02).

**environmental baseline** – includes past and present impacts to all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

**Directors Order 108** – 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.”

**essential fish habitat** -- those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.

**incidental take** – take that results from, and is not the purpose of, carrying out an otherwise lawful activity; it must not result in jeopardy (50 CFR §402.02).

**incidental take statement** – a statement in the bo that identifies, among other things, the impact of incidental take, RPM to minimize such impacts, and terms and conditions to implement RPMS (50 CFR §402.14(i))

**indirect effects** – those that are caused by the proposed action and are later in time, but are still reasonably certain to occur (50 CFR §402.02).

**interdependent actions** – those that have no independent utility apart from the action under consideration (50 CFR §402.02).

**interrelated actions** – those that are part of a larger action and depend on the larger action for their justification (50 CFR §402.02).

**jeopardy** – an action that would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and/or recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR §402.02).

**likely to adversely affect listed species and critical habitat**– species, and possibly habitat are present and there is likely to be a significant affect.

**may affect, but is not likely to adversely affect listed species or critical habitat** – effects are insignificant, discountable, or beneficial.

**not likely to adversely affect listed species/critical habitat** – effects are insignificant or discountable.

**reasonable and prudent alternative(s)** -- are developed during formal consultation and must be consistent with the intended purpose of the action and with the scope of the Federal agency’s legal authority; is economically and technologically feasible; and does not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (50 CFR §402.02).

**reasonable and prudent measures** – mandatory actions that the Service believes necessary and appropriate to minimize the impacts; *i.e.*, amount or extent, of incidental take (50 CFR §402.02).

**Section 7(a)(1) of the Endangered Species Act** -- requires Federal agencies to, “utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of [listed] species . . .”

**Section 7(a)(2) of the Endangered Species Act** – states that Federal agencies shall consult with the Service to insure that any actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.

**Section 7(d) of the Endangered Species Act** – requires that “the Federal agency and the permit or license applicant . . . 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 measures which would not violate subsection (a)(2).”

**Section 9 of the Endangered Species Act** – prohibits the take of endangered and threatened species, respectively, without special exemption.

**take** – is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harass is defined by the regulations at 50 CFR §17.3 as actions that create the likelihood of injury to listed species by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Harm is defined by the regulations at 50 CFR §17.3, as actions that actually kill or injure listed species. Such actions may include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined at 50 CFR §17.3 and 50 CFR §402.02 as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with an Incidental Take Statement.

**TEA-21** – Transportation and Equity Act for the 21<sup>st</sup> Century that was passed on June 9, 1998 and provided \$203 billion for upgrading and improving the Nation’s transportation infrastructure through the year 2003. Section 1309 provides for “environmental streamlining” measures involving various Federal agencies, particularly the Service.

**terms and conditions** – specific methods to accomplish reasonable and prudent measures identified in the incidental take statement to minimize such impact, that are only minor changes to the proposed action (cannot alter basic design, location, scope, duration, or timing). These are non-discretionary and must be complied with by the Federal agency or applicant (50 CFR §402.02).