ESA Consultations Involving Platte River Depletions: Information for Project Proponents in Colorado on the Platte River Recovery Implementation Program

U.S. Fish and Wildlife Service
Mountain-Prairie Region
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Purpose

The purpose of this document is to provide general guidance to water-related project proponents in **Colorado** regarding Endangered Species Act (ESA) consultations with the U.S. Fish and Wildlife Service (Service) on the effects of water-related activities in the Platte River Basin, and how the effects to listed species in Nebraska are addressed under the Platte River Recovery Implementation Program.[1]

History

Since 1978, the Service has consistently found through formal ESA Section 7 consultations with Federal agencies that actions resulting in depletions to flows in the Platte River system are likely to jeopardize the continued existence of one or more federally-listed threatened or endangered species and adversely modify critical habitat. The four federally-listed species that have been the focus of recovery efforts (the "target species") are the whooping crane (*Grus americana*), the northern Great Plains population of the piping plover (*Charadrius melodus*), the interior least tern (*Sternula antillarum*), and the pallid sturgeon (*Scaphirhynchus albus*).

In 2006, a landmark agreement was signed between the governors of Colorado, Nebraska and Wyoming and the U.S. Secretary of the Interior (Interior) to implement a basin-wide **Platte River Recovery Implementation Program** (Program). The purpose of this Program is to provide ESA compliance for water users in the Platte River basin upstream of the Loup River confluence in Nebraska for effects on the target species and critical habitat, while managing certain land and water resources to provide benefits for those species. This Program went into effect on January 1, 2007.[2]

This Program will continue for as long as this recovery effort is determined to be necessary and as long as the signatories agree to continue participating in the Program. Through this Program, the states and the federal government will provide land, water, and scientific monitoring and research to evaluate Program benefits for the target species. The effectiveness of various Program actions will be re-evaluated at the end of the Program's 'first increment' (approximately

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[1] ***Disclaimer:*** This document provides general guidance only; in case of disagreement or ambiguity with respect to Platte River Recovery Implementation Program Agreement documents or Fish and Wildlife Service policies, those Program documents and Service policies take precedence over statements made in this document.

[2] The complete set of documents associated with this Program is available at **www.platteriver.org**.

year 2020), and suitable actions for a subsequent Program increment will be determined at that time.

Significance of the Program for project consultations in Colorado

With or without the three-state Program, federal-nexus projects in the Platte River basin must undergo Section 7 ESA consultation with the Service for actions that may affect federally-listed species, including potential effects of project-related depletions. This requirement under the ESA does not change with implementation of the Platte River Program.

However, an important benefit of the Program for individual water-related projects in the South and North Platte River basins of Colorado will be to provide, in most cases, a **streamlined process** for addressing depletion-related impacts to the target species and whooping crane critical habitat. [3]

Prior to implementation of the Program in 2007, interim measures were in place to offset the impacts of project depletions to the target species until such time as a satisfactory Recovery Program was in effect to address those impacts. Typically, these "interim measures" included annual payments to the National Fish and Wildlife Foundation for management and/or acquisition of land or water to improve habitat conditions.

With the Program now in place, those interim measures are no longer needed, as participation in the Program provides ESA compliance for effects on the target species for all existing and, in most cases, new water-related activities.[4]

How do I "consult under the Program", and what are my obligations?

Because Interior and the three States believe that the cooperative, basin-wide Program will be the most effective means of protecting and restoring habitat for these species, a streamlined consultation process is available for those who agree to be covered by the Program.

Streamlined consultation is made possible by the **programmatic biological opinion of June 16, 2006**, which determined that the Program, including the continuation of existing and certain new water-related activities in the Platte River basin, is not likely to jeopardize the continued

[3] Note that programs targeting a specific geographic area and/or involving multiple individual actions of a similar nature commonly can be handled through a single consultation with the Service known as a *programmatic consultation*. For the sake of simplicity in this document, the term "project" is used, however it should be understood that "programs" also are potentially relevant to this discussion.

[4] The Program document defines "Existing water related activities" to include surface water or hydrologically-connected groundwater activities implemented on or before July 1, 1997. "New water-related activities" include new surface water or hydrologically-connected groundwater activities, including both new projects and expansion of existing projects, which are implemented after July 1, 1997. See page 2 of the Platte River Recovery Implementation Program for the complete definitions of these terms.

existence of the four target species nor adversely modify designated critical habitat in Nebraska.[5] Therefore, when an individual project is 'covered by the Program', this means its flow-related effects are considered to be already addressed under this 2006 programmatic biological opinion (PBO), including likely actions and effects evaluated in the Final Environmental Impact Statement (FEIS)[6]. The often laborious process of developing a stand-alone biological opinion (BO) addressing the incremental effects associated with an individual project can be replaced, under this Program, by a much simpler boilerplate 'tiered BO' confirming that the relevant water uses are covered.

Projects in the South Platte River Basin

For water-related activities in the South Platte River basin of Colorado which require a federal action (for example, a §404 permit) and/or involve federal monies, the project proponent needs to provide a **biological assessment** (BA) to the Service through the lead federal agency. For the downstream Platte target species in Nebraska, the three-page "Template Biological Assessment and Request for Formal Section 7 Consultation" should be used (link to template). A supplemental worksheet (link to worksheet) is provided to assist in completing the BA. A completed worksheet should be attached to the BA when submitting to Service.

Note that under this approach there is no requirement to quantify 'existing' and 'new' depletions associated with the project – historically, this often has been a labor-intensive step. However, there is a need to describe the *water sources* and *water uses* associated with the action. Questions regarding information needed for this BA may be directed to the Service or to the lead federal agency.

Typically, the project proponent or water user will also need to provide a **certificate of SPWRAP membership** along with the BA during consultation. The South Platte Water Related Activities Program, Inc. (SPWRAP) is a nonprofit corporation formed by Colorado water users to assist the State of Colorado in complying with its Program obligations (link to SPWRAP site). Funds provided by water users and SPWRAP members help support Colorado's participation in the Program. Colorado and SPWRAP have determined that for existing and new water related activities in the South Platte River basin of Colorado, including all of Larimer County, SPWRAP membership is required to rely on the Program for ESA compliance consistent with Colorado's *Plan for Future Depletions*.[7]

[5] The complete Programmatic Biological Opinion is available at **https://www.platteriverprogram.org/PubsAndData/ProgramLibrary/TC-R569PRRIP%20Biological%20Opinion.pdf**

[6] The Final EIS for the Platte River Recovery Implementation Program was published in May 2006, and may be accessed at **https://www.platteriverprogram.org/PubsAndData/ProgramLibrary/TC-R190%20PRRIP%20FEIS%20Volume%201.pdf**

[7] *Colorado's Plan for Future Depletions* (the "Colorado Plan") is available at **https://www.platteriverprogram.org/pubsanddata/programlibrary/platte%20river%20recovery%20implementation%20program%20document.pdf** as Attachment 5, Section 9. Note that some kinds of new water-related activities cannot be covered by the Colorado Plan, for example a major on-stream reservoir on the main stem of the South Platte River downstream of Denver, or new water supplies developed from native South Platte flows or wastewater exchange/reuse that collectively exceed 98,010 acre-feet during the February-July period. Membership in SPWRAP is *not* required for water-related activities conducted by Colorado State agencies. Water-related activities that are considered a federal rather than State of Colorado responsibility are *not covered* under the Colorado Plan, but may be addressed as described in the *Federal Depletions Plan* (same Web site, Attachment 5, Section 10).

For projects resulting in *one-time depletions* to Platte River flows, and for projects using *less than 25 acre-feet/year* of water ("minor users"), SPWRAP has established special membership categories that offer certification based on a one-time payment. For *ongoing depletions* associated with water uses exceeding 25 acre-feet/year, SPWRAP membership is needed and requires an annual payment based on water use.[8]

Questions about SPWRAP membership benefits and obligations should be directed to SPWRAP at: **http://www.spwrap.org/index_files/Page382.htm**.

Upon satisfactory completion of these steps, the Service can issue a 'tiered biological opinion' to the lead federal agency documenting that the project's water-related activities are covered by the Program and are not likely to jeopardize the continued existence of the target species or adversely modify critical habitat. (This is called a 'tiered' BO because it references and tiers off of the June 16, 2006 PBO).

Projects in the North Platte River Basin

For projects in the North Platte River basin of Colorado (*e.g*., North Park), the process of submitting a biological assessment is the same as for projects in the South Platte River Basin. However, SPWRAP membership is *not required* to obtain coverage under the Program.[9]

De minimis exceptions

The Service's policy is that water-related activities in the Platte River basin resulting in less than 0.1 acre-foot/year of depletions in flow to the nearest surface water tributary to the Platte River system have an insignificant effect on the Platte River target species, and thus do not require consultation with the Service for potential effects on those species. Similarly, detention basins designed to detain runoff for less than 72 hours, and temporary withdrawals of water (*e.g*., for hydrostatic pipeline testing) that return all the water to the same drainage basin within 30 days' time are considered to have an insignificant effect, and do not require consultation.

Alternatives to Program Participation

Seeking ESA coverage under the Platte River Recovery Implementation Program is entirely voluntary. Project proponents always have the option of seeking to offset their water-related impacts to the target species through stand-alone consultations with the Service that do not rely on the Program.

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[8] For additional information, visit www.spwrap.org.

[9] One exception: Program coverage for projects located in *Larimer County, Colorado*, currently requires SPWRAP membership, regardless of whether the project is located in the North Platte or South Platte River drainage.

However, should a project proponent opt not to seek coverage under the Program as described above, the lead federal agency/proponent will need to complete an independent Section 7 consultation on the effects of the project. Biological assessment information required by the Service to prepare a stand-alone biological opinion would include additional details on the timing, magnitude and frequency of depletions associated with the project. Project-specific conservation measures will be required to offset corresponding adverse effects on the species. In most cases, preparation of the BA and development and implementation of suitable conservation measures independent of the Program are likely to be substantially more costly and time-consuming for the project proponent and the federal agencies than participation in the Program as described above.

What are the possible risks or downsides to seeking Program coverage?

Program Continuity. Conceivably, any of the four signatories to the Program Agreement (the three governors and the U.S. Secretary of the Interior) could withdraw from the Agreement, or the state or federal participants could fail to meet their commitments under the Program. Should that occur, it is possible that the Program would no longer serve to provide ESA coverage for the target species. In such a situation, consultation on the effects of the project actions may need to be re-initiated. However, such a turn of events is considered unlikely, and should this occur Interior would seek practical and reasonable alternatives for project proponents who already had agreed in good faith to participate in the Program.

SPWRAP Commitments. As already discussed, Program coverage of many water projects in Colorado (under the Colorado Plan) is predicated on membership in SPWRAP. Costs and obligations associated with membership are established by that organization, and could change over time in response to Program funding and implementation efforts in Colorado.[10]

Basin-wide Water Activities (*North Platte Basin projects*). Program coverage of non-federal water projects in the North Platte basin of Colorado is predicated on total irrigated acreage and total water storage in that basin being maintained below certain thresholds set by the North Platte River Decree.[11] Should these thresholds be exceeded, strategies for addressing depletions associated with new water-related activities in the North Platte basin will need to be developed which satisfy obligations made under the Program Agreement. Conceivably, this could require some additional action on the part of the project proponent at that time.

[10] As of January 2007, the State of Colorado has already dedicated $7 million toward Colorado's share of Program costs, and legislation is pending to provide additional state funding.

[11] The North Platte River Decree was established by *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and modified by the Final Settlement Stipulation, March 13, 2001. The Colorado Plan also establishes limits to its coverage of municipal, industrial, piscatorial, wildlife and environmental uses in the North Platte basin; see that Plan for details.

New Federal depletions

'Federal depletions' are those associated with federal water-related activities wherein the water rights are held by a federal agency and that water is used for a primarily 'national benefit' (as opposed to supplying local users). Examples of new federal depletions may include, but are not limited to:

- New water storage facilities, impoundments, and consumptive water uses at National Wildlife Refuges, Waterfowl Production Areas, and National Fish Hatcheries;
- New consumptive water uses at National Forests, Parks, Monuments, Cemeteries, and Historic Sites, including recreational, habitat improvement, administrative, and emergency uses; and
- New depletions associated with activities at federal facilities that provide benefits that are primarily national in scope, such as national defense, national security, or national research and development activities (*e.g.*, U.S. military bases; U.S. National Renewable Energy Laboratory).

In these cases, although ESA coverage for the new or expanded water-related activity is not provided by the Colorado Plan, there may be opportunities to address small federal depletions by agency participation through SPWRAP, to the extent this approach is consistent with alternatives described in the Federal Depletions Plan.[12]

Situations may arise in which classification of project depletions as a "federal" or "non-federal" responsibility may not be obvious. In such cases, final classification of the project will be made by the Service in coordination with the U.S. Bureau of Reclamation and the State of Colorado, with oversight by the Program Governance Committee[13].

Am I covered for *all* Endangered Species Act impacts under the Program?

Not necessarily. Coverage provided by the Program is limited to the *off-site effect* of streamflow depletions on the *downstream target species* and the western prairie fringed orchid. Potential *on-site* or other *local* impacts to other federally-listed species (for example, impacts to the Wyoming Toad or the Preble's Meadow Jumping Mouse) are *not* covered by the Platte River Program. To the extent a project may affect one or more of those other federally-listed species, its effects will need to be assessed separately on a project-by-project basis during the ESA consultation process.

[12] **https://www.platteriverprogram.org/pubsanddata/programlibrary/platte%20river%20recovery%20implementation%20program%20document.pdf** Attachment 5, Section 10.

[13] The Platte River Governance Committee has ten members: two representatives from the U.S. Department of the Interior, one from each of the three states, one water-user representative from each of the three states, and two environmental-interest representatives. The Committee periodically meets to review Program progress, approve Program expenditures, oversee Program actions, and resolve Program disagreements.

Y Whom may I contact with my questions?

For questions about the **Section 7 ESA consultation process** in Colorado, contact the Colorado Field Office at the U.S. Fish and Wildlife Service: (303) 236-4773.

For questions about project coverage under **Colorado's Depletion Plan**, including participation in **SPWRAP**, contact information may be found at: www.spwrap.org.

For questions about **describing relevant water sources, uses, and/or estimating depletive effects** associated with a particular project, contact the USFWS Platte River hydrologist: (303) 236-4484.