

## **Region 6 Endangered Species Listing Guidance**

### **Holding Public Hearings for Proposed Listing Actions**

Public hearings have both an official and an unofficial function. Officially, their only purpose is to afford the public an opportunity to provide oral comments on a proposed action. However, they also provide the public with an opportunity to gain more information on a proposal and its potential impacts, as well as provide a first-hand impression of the personnel and the operation of the Fish and Wildlife Service. Satisfactorily serving both these functions requires proper staffing and diligent preparation for the hearing.

#### **HEARING FORMAT**

All that is required of the Service is that we provide a formal forum where oral comments can be presented and become part of the official record. However, when we're arranging a public hearing we should always try to use it as an educational and informational tool, as well.

One way to do this is to precede the actual hearing with an information session. For example:

- 6:30 - 7:00 PM - Presentations (15 minutes each) by FWS (overview of the ESA and the listing process) and species expert (biology and threats; species expert can be FWS)
- 7:00 - 7:30 PM - Question & answer session
- 7:30 - 7:45 PM - Break
- 7:45 - 9:30 PM - Formal hearing (continue until 10:00 if needed)

Another approach is to have an informal open house precede the formal hearing that will allow one-on-one discussions between knowledgeable Service personnel and the public. The open house could start off with a presentation on the species and the ESA, in order to give the public some background to help them ask more substantive questions during the subsequent one-on-one session.

If you use one of these approaches, be sure that your hearing announcements make it clear that presentations or an open house will precede the hearing itself. Keep the presentation/Q&A or open house session short (one hour is best) so that folks will be inclined to come for both it and the hearing. The goal is to educate the commenter's before they present their oral comments during the hearing.

The presentations and the Q & A session do not have to be part of the hearing record, so the hearing officer and court reporter do not need to attend those parts of the program.

One concern with holding a large-audience Q & A session is that this provides an opportunity for individuals to try to monopolize the microphone and to stir up the emotions of the audience. Others may mistakenly use it as a forum to give their comments.

This can be minimized by limiting each questioner to one or two questions and having a facilitator/hearing officer who can control speakers who attempt to go beyond asking relevant questions.

If a very large audience is expected, consider holding a hearing in the afternoon, taking a dinner break and then reopening the hearing again in the evening. Afternoon sessions may have merit in special situations, but they are generally poorly attended. In nearly all cases, an afternoon session should be followed by an evening session, because the latter is convenient for many more people.

## HEARING STAFF

The minimum hearing staff consists of a hearing officer, a court reporter, a Service employee (perhaps a presenter), and a minimum of one or two other individuals (Service, DNR, or other Federal agency employees) to staff the registration table and handle issues that arise. Preferably, there will also be a Service manager, and another Service employee or two present. The roles are as follow:

**Hearing Officer** - to make the official greeting, outline the hearing procedures, and conduct the hearing. The hearing officer should be a good meeting facilitator and should project an unbiased demeanor. The ideal official is someone other than a Service employee serve as hearing officer; try to get someone from the Field Solicitors office to handle the role, or use a contractor or some other non-Service facilitator. They will be seen as being (and probably are) more objective and unbiased than a Service employee, and thus may be better able to keep the hearing proceeding smoothly.

The second choice is to use a Service employee who is outside of the ES program and outside of the review and decision-making chain of command for the action. While still a Service employee, their stated distance from the issue at hand should portray them as being reasonably fair and objective in the public's eye.

The hearing officers opening remarks should cover these points:

- call the hearing to order
- welcome the public
- explain who s/he is and how s/he is distanced from the subject of the hearing
- announce the purpose of the hearing (*i.e.*, to provide the public with an opportunity to provide verbal comments on the proposal)
- describe the structure and format of the hearing
- explain the signup for speakers & give another opportunity to sign up; set time limit for individual comments & ask for written copies of comments, if available;
- give the address and closing date for subsequent written comments; mention the mailing list signup; and the purpose of the Court Reporter. Ask speakers to give and spell their name, address, and affiliation with any organization on whose behalf they are speaking.
- hearing transcript will be available for public inspection by appointment at Service offices in Denver and [*local ES field office*] after [*date*]. Give phone numbers (use RO number: 303-236-7400)

- close the opening remarks by reiterating purpose of the meeting; stress that it's not a debate or an adversarial proceeding, nor will a decision be made at, or immediately after, the hearing. Rather, the decision will be made after a review of all comments, verbal and written, and new data received during the comment period. Individuals who attempt to turn it into an adversarial situation will relinquish their opportunity to provide verbal comments.

The hearing officer will call names of those who signed up to comment, and after all have spoken, will close the hearing no earlier than at the announced ending time. The hearing can be extended if there are still a few individuals who desire to speak. It is customary to allow elected officials to comment first, but this is not required; try to restrict them to the specified time limit.

**Species Expert** - to provide biological background on status, trends, threats; doesn't have to be a Service employee, and if not, this needs to be clearly stated.

**ESA Expert** - to present an overview of the Endangered Species program and briefly describe the rulemaking process and the implications of the proposal. This should be a Service employee; a Regional Office listing biologist is recommended, both because of their experience and to show RO interest in the public comments.

**Court Reporter** - The Service must document every word that is said over the microphone during the hearing. It's also useful to have the entire proceedings tape-recorded; normally the court reporter will do this on their own, but a Service recording should also be considered.

**Service Managers** - to represent the Service at a higher level; preferably this will be an ARD, Ecological Services Field Office Supervisor, ES Program Supervisor, or other upper management official that is introduced and will listen closely to the testimony. This individual could preside during the presentation/Q & A portion of the program.

**Security** - preferably in uniform! Always contact the local law enforcement authorities in advance; alert them to the hearing and the anticipated level of controversy, and suggest that a uniformed officer or a marked patrol car be visible at the start of the session. If they will not be present, know how to contact them quickly. If we have an LE office nearby they may be willing to appear.

**Other Service Folks** - to staff the registration table, keep an eye on the crowd, run errands, and handle minor emergencies. Avoid using volunteers from NGOs (to avoid appearance of favored access to the Service's decision-making process), but staff from state/tribal conservation/natural resources departments are fine. Recruit staff from the local ES field office, other nearby Service facilities, and from External Affairs.

## HEARING FACILITY

The location and size of the hearing room will be dictated by the range of the species and the estimated number of attendees. We are only required to hold one hearing (and only if requested) but multiple requests from a wide geographic area almost dictate that we hold several hearings. Try to pick a location that is reasonably convenient for the requesters or is centrally located within the species' range. If in doubt as to the number of attendees, pick a room that you expect to be too large. And be sure the *Federal Register* notice and all other announcements contain the address and/or clear directions to the location.

### Have several tables:

**Registration Table** - outside the hearing room itself, or it may be inside if the hearing room is sufficiently large so that late-comers won't be disruptive to the hearing; staff this table at least 15 minutes before the advertised starting time. Here attendees sign up to speak, get on a mailing list, and can pick up fact sheets and/or the *Federal Register* listing proposal. A second table will be useful if there are a lot of outreach materials.

**Hearing Officer Table/Podium** - could have a separate table up front, or a podium and chair; alternatively, can be seated at the Service table.

**Service Representative Table** - up front and perhaps off to the side; Service manager and an ESA staffer should sit here; a non-Service species expert could sit here, too, but be sure she/he is identified (repeatedly) as non-Service.

**Court Reporter Table/Podium** - up front and off to the side.

### Microphones

Hearing officer and Service tables should each have a microphone. One or two additional standing or portable microphones should be available for the public's use.

## SCHEDULING HEARINGS WITHIN THE COMMENT PERIOD

Public hearings **MUST** occur within an open comment period. If necessary, the comment period will be extended or reopened so that it encompasses the hearing(s). The comment period must extend at least 10 days past the day of the hearing.

If a hearing was not announced in an earlier *Federal Register* notice, a separate notice will have to be published to announce it and any accompanying extension/reopening of the comment period. Notification letters and paid newspaper notices are also required, similar to what was done in conjunction with the initial *Federal Register* notice of the proposal.

The *Federal Register* notice of the hearing must be published at least 15 days prior to the date of the hearing. Paid newspaper notices and mail/email notifications should use a similar schedule.

## MISCELLANEOUS

Arranging for court reporter:

- ❖ If the time-frame allows, arrange for a Service review of a draft of the transcript before it's finalized.
- ❖ Be sure we can either (1) subsequently make all the copies that we need of the transcript, or (2) purchase a specified number of copies up front (say 10-15) and have made arrangements to buy additional copies, if needed, at a reasonable price.
- ❖ Get an electronic copy of the transcript.
- ❖ Ask the reporter to arrive at least 20 minutes prior to the start of the hearing to set up, be introduced to Service attendees, and be briefed on the expectations for the hearing.

Service presentations should focus on three topics:

- ❖ Background on the species - biology and threats.
- ❖ Explanation of the listing or other rulemaking process and how the public is involved.
- ❖ What the regulation would mean for the species and people (including the purpose of the Act, how recovery plans are prepared and implemented, section 7, critical habitat or whatever else is directly relevant to the proposed regulation).

Slides, transparencies, photos, videos, and handouts displaying maps, the species and its habitat, time-frames, etc., make it much easier for the public to understand what is being proposed, what the impacts might be, and how they can be involved in the listing process. Posting larger maps on the wall is very useful.

The staff at the registration desk should cordially greet and register the public. Consider using pre-prepared registration cards with check-off boxes for attendees to sign up to (1) present oral testimony and (2) get on a mailing list.

Set a time limit for individual verbal comments and enforce it! If you ask folks to sign up to speak as they enter the hearing, you subsequently can set the individual time limit based upon the number of sign-ups. Then if there is time left after the sign-ups speak you can allow others to speak or give earlier speakers additional time.

Ask for a written copy of all comments to ensure they are properly entered into the administrative record. Those individuals who did not bring a written copy should be encouraged to prepare them and send them to the appropriate Service office by the comment period deadline.

It is useful to have pre-prepared comment sheets that can be filled out and turned in at the hearing; they should also have a mailing address for those wishing to mail them later. It is also a good idea to post the mailing address (and email and fax number, if comments can be submitted via these means), along with the closing date for comments, in large letters on the wall. Alternatively, the addresses and fax number can be passed out on small cards or sheets of paper located at the registration table.

There is no requirement or obligation for the Service to conduct a question and answer session.

While these can be very useful to clear up misunderstandings, such sessions can easily become overly confrontational and non-constructive. One way of avoiding this is to control access to the microphone by having a Service employee keep their hands on the microphone. And be sure to state that questions must be limited to the proposed action.

The hearing must remain open during the entire time advertised, even if there is no one else in the room except Interior Department employees and the recorder. Someone may show up five minutes before the advertized closing time, and they must be provided the opportunity to speak.

## **Holding Public Meetings during the Formal Public Comment Period**

These must be carefully arranged and conducted, because:

- they are not easily distinguished by the general public from formal public hearings, and the public may incorrectly believe that the public meeting is the proper way to get comments (especially verbal comments) to the Service;
- if not properly advertised and run, they can constitute, or be construed to constitute, improper *ex parte* communication by providing information to the attendees that is not available to the general public, or by allowing a certain party or parties to provide the Service with information related to the agency decision-making that is not available for other interested parties to review, comment, or respond; and
- they can also violate the Federal Advisory Committee Act if a meeting provides a non-governmental special interest group with special access for input into a Service listing decision.

Public meetings during comment periods may be acceptable if any of the following apply:

- The sole purpose of the meeting is to provide background information and not to receive input from the meeting attendees,
- they are open to the general public and are advertised at least locally, or
- a written record of the Service's complete presentation is admitted into the public record.

In all cases, the attendees must be clearly informed at the beginning of the meeting that verbal comments on the proposed rule are not to be provided at the meeting, but instead should be submitted in writing to the appropriate address or presented verbally at a public hearing.

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