Chapter 3 – Compliance Requirements

Now that we have evaluated the impacts of federal actions on the human environment we need to evaluate each project being proposed for WSFR funds to determine the effects of federal actions of the project on endangered species and their designated critical habitat.

Section 7 of Endangered Species Act (ESA) is to ensure all federal agencies apply all authorities they have to carry out the purposes of the ESA.

Section 7 requires that all Federal agencies must not authorize, fund or carry out an action that is likely to jeopardize the existence of a listed species or adversely modify their designated critical habitat.

Depending on the species being considered.....states will either be working with the Service or the National Oceanic and Atmospheric Administration (NOAA) as a consulting partner in the review process. NOAA has jurisdiction over marine species and anadromous fish. The Service has jurisdiction over terrestrial and freshwater species. The consulting partner has a main responsibility to provide useful regulatory and biological information, discuss potential affects of actions and reduce the action agency’s legal risk.

In the WSFR program...the state grantee is considered the applicant and the Service is considered the action agency. When a federal agency other than the Service cooperates with the Ecological Services of the U.S. Fish and Wildlife Service for Section 7 reviews, the process is called Interagency Cooperation......one federal agency cooperating with NOAA or the Service.

Intra-service consultation is when one branch within the Service consults with another branch within the Service...in this case WSFR consulting with Ecological Services of the U.S. Fish and Wildlife Service.

Intra-service consultation requires that candidate and proposed species be reviewed as well as Threatened and Endangered species. The process for reviewing impacts to Candidate and proposed species is called going to “Conference” rather than “Consultation”. Going to conference is slightly less rigorous.

The results of review for effects of federal actions on listed species will determine the level of consultation required.

A No Effect determination means No consultation required.
A May effect but NOT Likely to adversely effect determination means an Informal consultation is required.

And A May effect and IS Likely to adversely effect means you need a Formal consultation.

A good analysis for effects will involve the following steps:

First, identify all stressors (physical, chemical and biotic) caused by the actions being taken such as an increase or decrease in temperature, noise, turbidity, soil compaction, or exposure to contaminants. Where, when, and how long will the stressors occur?

Next, determine if species will be exposed to the stressors.

Finally, determine the likely response of the species if exposure to stressors will occur. Examples of response include (no response, alarm, avoidance, displacement, abandonment, reduced fecundity, or reproductive failure).

The possible outcomes of analyzing for effects include:

No Effect;

May affect but Is Not likely to adversely affect; and

May affect and Is likely to adversely affect.

Let’s consider some situations to help us discern the proper determination of effects on listed species.

If a listed species is not present at the project site and the nature of the work will not cause ground disturbance, the sensible determination is a No Effect.

A No Effect may be applied if there are no species present during the time period in which ground disturbance is taking place and the work is non-destructive. If listed species are discovered after work begins, the discovery of the species must be reported within 24 hours of the occurrence to Ecological Services of the U.S. Fish and Wildlife Service.

If a Species is Present in the area of potential effect you can still result in a No Effect recommendation as long as:

The activity will not affect a listed species or critical habitat. For example, the action is strictly administrative work.

A more sensible recommendation if a species is present is a May Effect but Is Not Likely to Adversely Affect: Meaning a “take” is not likely. Effects are expected to be
discountable….(take is highly unlikely to occur), insignificant or (so small that the effect can’t be measured) or the effect will be completely beneficial.

Take means: To hunt, harass, harm, pursue, shoot, wound, trap, capture, collect or kill or attempt to engage in any of the above.

If Take is likely…the correct recommendation would be a May Effect and is Likely to Adversely Affect.

A No Effect requires no further review…no concurrence is required from the consulting agency.

A May Effect But Not Likely to Adversely Affect requires informal consultation that results in a concurrence letter from the consulting agency. Most regions allow informal consultation to be done between the state grantee and the region’s WSFR grant specialist…no need to involve Ecological Services.

A May Effect and Is Likely to Adversely Affect requires Formal consultation. This process is done with Ecological Services. The Ecological Services office has 30 days to concur with the recommendation, 90 days to consult and 45 days to write a biological opinion. The biological opinion will specify whether or not the proposed action will jeopardize the existence of a listed species or adversely modify their designated critical habitat.

Remember the importance of documenting your review process. If there is no documentation of your review process….. in the mind of a judge….. it’s as if the review never occurred. Without documentation you are vulnerable to being in violation of the Administrative Procedures Act which prohibits making decisions that are arbitrary and capricious.