



FEMA

August 18, 2010

MEMORANDUM FOR: Regional Division Directors
Regions I - X

A handwritten signature in black ink, appearing to read "Doug Bellomo".

FROM: Doug Bellomo, P.E.
Director, Risk Analysis Division

SUBJECT: Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change

EFFECTIVE DATE: All Conditional Letter of Map Change submittals received as of October 1, 2010

Background: The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend. Congress passed the ESA in 1973 with recognition that the natural heritage of the United States was of “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.” Congress understood that, without protection, many of our nation’s living resources would become extinct. Species at risk of extinction are considered endangered, whereas species that are likely to become endangered in the foreseeable future are considered threatened. At present approximately 1,900 species are listed as threatened or endangered under the ESA. The U.S. Department of Interior’s Fish and Wildlife Service and the U.S. Department of Commerce’s National Marine Fisheries Service (collectively known as “the Services”) share responsibility for implementing the ESA.

Section 7 of the ESA requires each federal agency to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction of adverse modification of designated critical habitat¹.

Section 9 of the ESA prohibits anyone from “taking” or “harming” endangered wildlife and similar prohibitions are generally extended through regulations for threatened wildlife. If an action might harm² a threatened or endangered species, an incidental take authorization is required from the Services under Sections 7 or 10 of the ESA.

Issue: Conditional Letters of Map Change (LOMCs) are issued before a physical action occurs in the floodplain and are FEMA’s comments as to whether the proposed project would meet minimum National Flood Insurance Program (NFIP) requirements and how the proposed changes would impact the NFIP maps. Because Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) and Conditional Letters

¹ In accordance with Section 4 of the ESA, critical habitat includes specific areas essential to conservation of a species and those areas which may require special management considerations or protection.

² Harm can arise from “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” [50 CFR Part 17.3].

of Map Revision (CLOMRs) are submitted to FEMA prior to construction, there is an opportunity to identify if threatened and endangered species may be affected by the potential project. If potential adverse impacts could occur, then the Services may require changes to the proposed activity and/or mitigation.

For LOMC requests involving floodplain activities that have already occurred, private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA’s process. These requests do not provide the same opportunity as Conditional LOMCs for FEMA to comment on the project because map changes are issued only after the physical action has been undertaken.

The following table provides a general summary of FEMA’s ESA requirements.

| Request | ESA-related Action | ESA Requirement Related to FEMA Process |
|----------------------------------|---|---|
| <i>Conditional LOMC Requests</i> | | |
| CLOMA | No physical modification to floodplain is proposed. | ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations. |
| CLOMR-F | Proposed placement of fill in the floodplain. | ESA compliance must be documented to FEMA prior to issuance of CLOMR-F. FEMA must receive confirmation of ESA compliance from the Services. |
| CLOMR | Proposed modifications of floodplains, floodways, or flood elevations based on physical and/or structural changes. | ESA compliance must be documented to FEMA prior to issuance of CLOMR. FEMA must receive confirmation of ESA compliance from the Services. |
| <i>LOMC Requests</i> | | |
| LOMA | No physical modification to floodplain has occurred. | ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations. |
| LOMR-F | Placement of fill in floodplain has occurred. | ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations. |
| LOMR | Modifications of floodplains, floodways, or flood elevations have occurred based on physical and/or structural changes. | ESA compliance is required independently of FEMA’s process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA’s regulations. |

Action Taken: For CLOMR-F and CLOMR applications, the submittal will be reviewed based on:

- Required data elements cited in the NFIP regulations
- Required data elements cited in the MT-1 and MT-2 Application/Certification Form instructions
- Demonstrated compliance with the ESA

The CLOMR-F or CLOMR request will be processed by FEMA only after FEMA receives documentation from the requestor that demonstrates compliance with the ESA. The requestor must demonstrate ESA compliance by submitting to FEMA either an Incidental Take Permit, Incidental Take Statement, “not likely to adversely affect” determination from the Services or an official letter from the Services concurring that the project has “No Effect” on listed species or critical habitat. If the project is likely to cause jeopardy to listed species or adverse modification of critical habitat, then FEMA shall deny the Conditional LOMC request. This Procedure Memorandum will not change the review process for Conditional Letters of Map Amendment (CLOMA), Letter of Map Amendment (LOMA), Letter of Map Revision based-on Fill (LOMR-F), or Letter of Map Revision (LOMR) applications. In addition, FEMA’s Cooperating Technical Partners will be required to comply with this Procedure Memorandum.

Attachment:

Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

Cc: See Distribution List

Distribution List (electronic distribution only):

Office of Chief Counsel

Risk Analysis Division

Risk Reduction Division

Environmental and Historic Preservation Unit

Regional Mitigation Divisions

Regional Environmental Officers

Legislative Affairs Division

Production and Technical Services Contractors

Customer and Data Services Contractor

Cooperating Technical Partners

Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

This document supplements the Federal Emergency Management Agency's (FEMA's) Procedure Memorandum No. 64. It highlights additional resources and frequently asked questions to help guide Conditional Letter of Map Revision (CLOMR) and Conditional Letter of Map Revision based on Fill (CLOMR-F) applicants in the Endangered Species Act (ESA) compliance process. The following sections identify helpful web resources, while the final section includes responses to frequently asked questions.

NATIONAL FLOOD INSURANCE PROGRAM AND LETTERS OF MAP CHANGE

Additional information about the National Flood Insurance Program (NFIP) and Letters of Map Change (LOMC) is available from FEMA.

NFIP: <http://www.fema.gov/hazard/flood/info.shtm>

LOMCs: <http://www.fema.gov/hazard/map/lomc.shtm>

ESA OF 1973

Additional information about the ESA and Endangered Species Programs is available from the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). These two agencies, collectively known as "the Services," share responsibility for implementing the ESA and assisting all individuals (public and private) in the ESA compliance process.

NMFS: <http://www.nmfs.noaa.gov/pr/laws/esa/>

USFWS: <http://www.fws.gov/conservation/whatwedo.html>

GETTING STARTED WITH ESA COMPLIANCE AND WHO TO CONTACT

CLOMR and CLOMR-F applicants are responsible for demonstrating to FEMA that ESA compliance has been achieved prior to FEMA's review of a CLOMR or CLOMR-F application. The applicant may begin by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely affect the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

NMFS Regional Offices: <http://www.nmfs.noaa.gov/regional.htm>

USFWS Office Directory: <http://www.fws.gov/offices/>

DEMONSTRATING COMPLIANCE WITH THE ESA

If species may be affected adversely by the project, the applicant (as a non-Federal entity) would be required to obtain compliance through the Section 10 process. This process includes applying for an Incidental Take Permit (ITP) and preparing a habitat conservation plan (HCP). Additional information about Section 10 requirements and the permit application process is available from NMFS and USFWS.

ITPs and NMFS: http://www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm

ITPs and USFWS: <http://www.fws.gov/conservation/hcp/hcpplan.html>

HCPs and NMFS: <http://www.nwr.noaa.gov/Salmon-Habitat/Habitat-Conservation-Plans/Index.cfm>

HCPs and USFWS: <http://www.fws.gov/conservation/hcp/index.html>

NMFS Permit applications: http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm

USFWS Permit application: <http://www.fws.gov/forms/3-200-56.pdf>

To demonstrate to FEMA that ESA compliance has been achieved, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat. If the project is likely to cause jeopardy of a species’ continued existence or adverse modification to designated critical habitat, then FEMA shall refuse to review the CLOMR or CLOMR-F request without prior project approval from the Services. If a Federal entity is involved in a proposal or project for which a CLOMR or CLOMR-F has been requested, then the applicant may coordinate with that agency to demonstrate to FEMA that Section 7 ESA compliance has been achieved through that other Federal agency.

Frequently Asked Questions

For which map change applications does FEMA require demonstrated ESA compliance?

FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only.

Why is ESA compliance required before FEMA can review my CLOMR or CLOMR-F application?

All individuals in this country (private and public) have a legal responsibility to comply with the ESA. FEMA recognizes that potential projects for which a CLOMR or CLOMR-F has been requested may affect threatened and endangered species. As a result, FEMA requires documentation to show that potential projects comply with the ESA before a CLOMR or CLOMR-F application can be reviewed.

Why does FEMA not require demonstration of ESA compliance for other LOMC applications?

Many LOMC requests involve floodplain activities that have occurred already. As a result, FEMA does not have the opportunity to comment on these projects in terms of ESA compliance prior to the physical changes taking place. Private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA’s process.

What will FEMA require from CLOMR and CLOMR-F applicants to demonstrate ESA compliance?

As part of the CLOMR or CLOMR-F application, the requestor must provide an ITP, an Incidental Take Statement, a “not likely to adversely affect” determination from the Services, or an official letter from the Services concurring that the project has “No Effect” on proposed or listed species or designated critical habitat.

How much time will be required to achieve ESA Compliance?

The timeframe needed to achieve ESA compliance will depend entirely on the complexity of the project, the extent to which species may be affected by the project, the quality of biological analyses conducted by the applicant, and the review process as determined by the Services. Therefore, we recommend that LOMC applicants coordinate with the Services as soon as possible within the project development process.

Who is available to answer my questions about ESA compliance?

NMFS and the USFWS both have staff available around the country to answer questions about threatened and endangered species and ESA compliance. Refer to the *NMFS Regional Offices* and *USFWS Office Directory* links on Page 1 of this guidance document to identify the nearest available Service office. FEMA does not have staff available to assist with this process.

How do I determine if there are threatened or endangered species or critical habitat in my project area?

The applicant may begin by contacting a local Service office, state wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F would adversely affect the species.

Do I need to hire a biologist for this process?

While hiring a biologist may be unnecessary, doing so may help facilitate the process. Biologists familiar with subject species and the regulatory process can help adequately complete many of the studies required as part of the Section 10 process and fulfill other Section 10 requirements.

How are the following ESA-related terms defined?

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct and may include habitat modification or degradation.

“Harm” can arise from significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

“Section 7” requires all Federal agencies, in consultation with USFWS or NMFS, to use their authorities to further the purpose of the ESA and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.

“Section 10” lays out the guidelines under which a permit may be issued to non-Federal parties to authorize prohibited activities, such as take of endangered or threatened species.

“ITP” or incidental take permit is a permit issued under section 10(a)(1)(B) of the ESA to a non-Federal party undertaking an otherwise lawful project that might result in the “take” of an endangered or threatened species. Application for an incidental take permit is subject to certain requirements, including preparation by the permit applicant of a HCP.

“HCP” or habitat conservation plan is a legally binding plan that outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. It usually includes measures to minimize impacts and may include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area. An HCP is required before an incidental take permit may be issued to non-Federal parties.

Other ESA-related terms not described here may be defined on the following website:

<http://www.fws.gov/endangered/pdfs/glossary.pdf>