U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
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Mr. Jeff Morales, Director
California Department of Transportation
1120 N Street
Sacramento, California 95814

Attention: Gary R. Winters
Chief, Division of Environmental Analysis

Dear Mr. Morales:

SUBJECT: **Conducting Endangered Species Act Consultations with the Services**

Title 50 Code of Federal Regulations, Section 402.08 (50CFR § 402.08), entitled, *Designation of Non-Federal Representative*, allows Federal agencies to delegate Informal Consultation and preparation of biological studies to a non-Federal representative. The Federal Highway Administration (FHWA), by letter to the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) dated August 7, 1986, has previously delegated Informal Consultation for projects funded by the Federal-aid highway program to the California Department of Transportation (Department). This delegation of authority provides for the Department to perform certain aspects of consultation, acting on behalf of the FHWA for Endangered Species Act (ESA) consultation, and cannot be further delegated to local agencies or their consultants. This letter addresses areas of uncertainty, improves consistency and clarity in the consultation process, and promotes opportunities for enhanced inter-agency dialogue during Formal and Informal Consultation.

Under the delegation of authority, and in accordance with Section 7 of the ESA and implementing regulation 50 CFR § 402.08, the FHWA encourages the Department to be proactive in Informal Consultation, including modification of the proposed project where necessary to avoid or minimize adverse effects. Through Informal Consultation, biological studies and other documentation prepared to assess the effects of Federal actions on listed and proposed species and critical habitats, may be submitted by the Department directly to the Services' field office. The ultimate responsibility for compliance with all Section 7 requirements pertaining to Federally-funded highway projects remains with the FHWA. Therefore, staff from our office may become involved during Informal Consultations in situations where there is a reasonable potential for adverse effects.

No Effect Determinations: The Department may make a "No Effect" determination on threatened or endangered species or their critical habitat, after a Department biologist concludes any of the following:

- The Services did not identify any listed species or designated critical habitat within the project's action area.
- The Services may have identified listed species or designated critical habitat in the project area, but the project's field surveys and/or existing information demonstrate that there is no suitable habitat or designated critical habitat in the project's action area.
- Suitable habitat may be identified, however, there is no reasonable evidence of the presence of listed species.
- The type and scope of the project is such that it would have no effect on listed species or their critical habitat.

The Department is encouraged to request technical assistance from the Service if it is determined by a Department biologist that additional information (relevant to the project's effect on known listed species or habitat within the project area) is needed prior to reaching a "No Effect" determination. All "No Effect" determinations must be documented within the final Environmental Impact Statement (EIS), Environmental Assessment (EA), or supporting documentation for the Categorical Exclusion (CE). The FHWA will concur in the "No Effect" determination through approval of the NEPA document and no Section 7 consultation will be necessary.

Informal Consultation: Not Likely to Adversely Affect (NLAA) Determination: Typically, if it is determined through Informal Consultation between the Department and the Services', that the transportation project MAY have an effect, but it is "Not Likely to Adversely Affect" (NLAA) listed species and/or their critical habitat, the Department or the local project proponent may be requested, as a condition of the concurrence in the NLAA determination, to implement Best Management Practices, and/or protective measures during project construction, and/or perform restoration and enhancement of disturbed natural habitat resulting from construction activities.

Consultation with FHWA will not be necessary for acceptance of typical or routine protective measures for construction related activities, including pre-construction surveys, as described by the Services. However, FHWA recognizes the possibility for the Department to pursue the development and incorporation of various mitigation approaches during Informal Consultation with the Services. Therefore, when the following mitigation efforts are considered for incorporation into transportation projects, FHWA Transportation Engineer and/or Environmental Specialist shall be involved early, and as often as appropriate during negotiations with the Service(s):

- Research studies and/or long term habitat replacement monitoring
- Mitigation involving land acquisition
- Purchase of credits from an existing mitigation bank

Note: The Department's decision to "Infer Presence" of a species within a transportation project shall involve early coordination with FHWA staff. All decisions will be documented and available upon request.

Our objective for involvement during consultation will be to provide adequate assurance that mitigation measures and public expenditures are appropriate and provide for adequate safeguards for successful implementation of the mitigation efforts. Federal-aid eligibility determinations for mitigation efforts resulting from Federal-aid actions will be at the discretion of FHWA Division Office. As a part of Informal Consultation, the Department may submit the Biological Evaluation (BE) directly to the Service(s) requesting their concurrence in "Not Likely to Adversely Affect" determination.

Informal Consultation: FHWA Review of Biological Assessments (BA) for EIS projects
The biological study shall be labeled Biological Assessment (BA) if the study supports consultation for a major Federal-aid project (defined by 40 CFR 1508.27) as an action that significantly affects the quality of the human and natural environment and requires an EIS, and Biological Evaluation (BE) if the study supports consultation for all other Federal-aid projects.

By regulation, CFR § 402.08, the FHWA will continue to provide independent reviews and evaluation of the scope and content of all Biological Assessments (BAs) for Federal-aid projects that require an EIS before being submitted to the Services' field office. It is anticipated that all complete BAs provided to FHWA for review and transmittal to Service(s) will be carried out in a timely way, in most cases within 30 days of receipt at FHWA. Biological Evaluations (BEs) may be sent directly to the Services' field offices with a request for a concurrence letter.

Information within biological studies (BA or BE) will address all species listed and proposed for listing under the ESA, designated and proposed critical habitat that may be present in the action area of the project, and the evaluation of potential effects of the project on such species and habitat. More specific guidance on information requirements is described in 50 CFR 402.12 (f). The use of standardized biological document templates, for both the Department and local projects, is encouraged.

Informal Consultation Concludes when either of the following occurs:

- The Department obtains written concurrence from the Service(s) that the action, as proposed or modified, is not likely to adversely affect listed or proposed species, or listed or proposed critical habitat; or
- A determination is made that Formal Consultation is required.

Formal Consultation: 50 CFR § 402 does not provide for delegation of Formal Consultation to a non-Federal representative. As Federal lead for ESA consultation, FHWA Division staff will continue to carry out all Formal Consultation procedures with the Service(s) commencing with submittal of the Biological Assessment (BA) and requesting initiation of Formal Consultation with the Service(s) and culminating in the "Biological Opinion" (BO) issued by the Service(s) to the FHWA. We encourage the Department to assist us with the review of draft BO; and when requested, promptly supply additional information to facilitate completion of the BO.

Re-initiation of Consultation. Subsequent changes in the scope or design of the project, discovery of the presence of previously unknown listed species or critical habitat, or the listing of new species may require the re-initiation of ESA consultation. The Department may re-initiate Informal Consultation. However, Formal Consultation must be re-initiated by the FWHA.

We commend your work in establishing biological document templates and other management efforts aimed at the delivery of high quality biological studies and support documents. We are supportive of efforts to work jointly toward full delegation of Informal Consultation, and we are willing to work together to institutionalize a QC/QA (Quality Control/Quality Assurance) system of checks and balances that will provide assurances that Informal Consultations, for State and local agency sponsored projects, are performed adequately. If you have any questions that we may clarify concerning the existing interagency agreement for conducting ESA Section 7 consultations, please contact our Environmental Program Manager, Scott McHenry at (916) 498-5854.

Sincerely,

/s/ David A. Nicol
For: Michael G. Ritchie
Division Administrator

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