IN REPLY REFER TO
HDA-CA
Signed DRP Transmittal
Document # S49855

Will Kempton, Director
California Department of Transportation
P.O. Box 942874
Sacramento, CA 94274

Attention: Jay Norvell, Chief, Division of Environmental Analysis

Dear Mr. Kempton:

SUBJECT: Transmittal of Signed Final Dispute Resolution Process Flowchart

The Federal Highway Administration (FHWA) in cooperation with California Department of Transportation, and U.S. Fish and Wildlife Service is pleased to distribute the final version of the dispute resolution process flowchart and elevation ladder. The dispute resolution flowchart has been signed by all parties and is now effective. FHWA thanks you for your participation and effort in developing and refining this project streamlining tool. Please find enclosed an original signed copy for your records. In addition an electronic version including signatures will be distributed via email.

If you have any questions, please contact Dave Tedrick, Environmental Program Coordinator at (916) 498-5024 or via email to david.tedrick@fhwa.dot.gov

Sincerely,

For
Gene K. Fong
Division Administrator

Enclosure # S49567
SUBJECT: Joint Memorandum for the Dispute Resolution Process (DRP)

Attached is the flow chart and elevation ladder for the DRP that staffs from the three signatory agencies have been working on for several months. It is believed that this process will expedite Section 7 consultations pursuant to the Endangered Species Act.

Once all signatory parties have signed this memorandum, this process will be effective immediately.

Gene K. Fong
California Division Administrator
Federal Highway Administration

Steve Thompson
Acting California/Nevada Operations Manager
U.S. Fish and Wildlife Service

Will Kempton
Director
California Department of Transportation

Attachment
**Early Coordination & Courtesy Pre-BA Submittal Review**

- **Substantial Agreement on Methods and Effects?**
  - Yes: FHWA agrees with minor recommendations
  - No: FHWA disagrees

**Completion Criteria met?**

- Yes: FHWA concurs that no additional data needed for consultation
  - FWS notifies FHWA in writing within 30 days if:
    - (a) there is concurrence with findings of BA (acknowledgement letter), or
    - (b) action can be appended to a BO
  - FWS provides a courtesy critique of presubmittal BAs when requested at least 30 days prior to initiation of formal consultation.
  - FHWA will define (a) any deficiencies of completeness (6-elements criteria), (b) make note of any additional information recommendations to ensure effective and timely preparation of a biological opinion, and (c) provide feedback on analysis of effects as appropriate. Completeness of BA package should be established before formal consultation is initiated. A request for additional information beyond the “completeness” criteria or minor disagreements on effects analysis should not preclude the initiation of formal consultation.

**FHWA agrees with Request for More Info and provides timeframe**

- Yes: Clock extended
  - FWS notifies FHWA within 30 days of findings of BA (acknowledgement letter), or
  - action can be appended to a BO

**FWS Request Additional Data**

- Yes: FHWA responds (email or letter) within 14 days with approval or denial of extension (up to 60 days)

**Dispute Resolution Process for ESA Section 7 Consultations Communication Plan and Process Checks**

**Flow Chart Key**

- Defines a Process
- Denotes a Document
- Denotes a Data
- Indicates a Decision
- Reference to Jump to Another Page
- Process Flow

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The purpose of the dispute resolution flowchart is to represent some key points in the Section 7 consultation process; the intent is not to define a new consultation process. However, use of the dispute resolution process is not necessarily limited to the trigger points identified in this flowchart. This flowchart does not supersede any existing Federal regulations, and is intended to help clarify existing procedures already in place.

**Caltrans/FHWA makes the effect, no effect determine for projects. If a project “may impact” threatened and/or endangered species, or their critical habitat, then informal consultation may be initiated. Effective Informal Consultation includes early coordination between FWS and CT/FHWA on methods, analysis, and information to be included in the Biological Assessments (BA). The FWS will provide a courtesy critique of presubmittal BAs when requested at least 30 days prior to initiation of formal consultation. In this review, the FWS will define (a) any deficiencies of completeness (6-elements criteria), (b) make note of any additional information recommendations to ensure effective and timely preparation of a biological opinion, and (c) provide feedback on analysis of effects as appropriate. Completeness of BA package should be established before formal consultation is initiated. A request for additional information beyond the “completeness” criteria or minor disagreements on effects analysis should not preclude the initiation of formal consultation. However, where substantial issues are anticipated to delay consultation, early dispute resolution is an option to preclude later disagreements. Note: this early feedback will not influence jeopardy/non-jeopardy determinations, but rather is intended to facilitate the effective preparations of the information necessary for such decisions.

*** Once the dispute resolution process reaches 1st level management, the time taken to resolve any outstanding issues will not be counted against the overall 135 day timeframe to complete the biological opinion. The biological opinion timeframe will be extended proportional to the time required during the dispute resolution process.**
Dispute Resolution Process for ESA Section 7 Consultations
Communication Plan and Process Checks

FHWA requests draft (optional)

Yes

FHWA provides FWS a Response on Draft BO (Consultation timeframe is extended proportional to FHWA review time)

FWS agrees to incorporate substantial comments

Final BO is Issued by FWS

Yes

45 Days

Flow Chart Key

- Defines a Process
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- Denotes a Data
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- Reference to Jump to Another Page

FHWA agrees that the BO relied on the best scientific information available, and that the Terms and Conditions in the Incidental Take Statement comply with the minor change provision, and are implementable under FHWA’s legal authority and jurisdiction.

Reinitiate upon new Information (if necessary)
Dispute Resolution Process for ESA Section 7 Consultations

Elevation Ladder and Decision Points*

Begin Dispute Resolution

FHWA, Caltrans or FWS inform (email or letter) each other of specific disagreement needing elevation

Issue Clarified and Informal Solutions Sought within 7 calendar days

Informal Solution Found

No

Yes

Staff Prepare a Joint/Separate Issue Memo to Clarify positions and any timeline concerns **

1st level management Reviews and seeks Solution within 14 calendar days

1st Level Management Decision Found

No

Yes

1st Level Mgrs Prepare a Joint Issue Memo to Clarify Issues, document timeline agreements, and Brief 2nd Level Managers

2nd level management Reviews and seeks Solution within 14 calendar days

2nd Level Management Decision Found

No

Yes

2nd Level Mgrs Prepare a Joint Issue Memo to Clarify Issues and Brief 3rd Level Managers

3rd level management Reviews and Makes Decision in 14 calendar days

3rd Level Management Decision Found

Solutions Documented (i.e. meeting minutes) including decisions, action items, and timelines

Resume Consultation

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* The positions of responsibility for each level of management decision-making in this resolution page are referenced in the dispute resolution ladder.

** Once the dispute resolution process reaches 1st level management, the time taken to resolve any outstanding issues will not be counted against the overall 135 day timeframe to complete the biological opinion. The biological opinion timeframe will be extended proportional to the time required during the dispute resolution process.
Dispute Resolution Process for ESA Section 7 Consultations

This elevation process is not a substitute for the proper interaction and proactive resolution of issues by staff at the working level. However, if the parties cannot agree on the level of information needed to resolve a consultation at the 30 day letter stage, or if consultation deadlines are exceeded - 135 days* for formal consultations, 60 days for appending to a programmatic B.O., or 60 days for an informal consultation — then disputes should be quickly and automatically elevated.

Dispute Resolution Ladder

<table>
<thead>
<tr>
<th>Levels</th>
<th>USFWS</th>
<th>Caltrans</th>
<th>FHWA</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Assistant Field Supervisor or Designee</td>
<td>Office Chief or Project Manager</td>
<td>Team Leader</td>
</tr>
<tr>
<td>1</td>
<td>Field Supervisor</td>
<td>District Director or District Environmental Division Chief</td>
<td>Director, Project Development &amp; Environment</td>
</tr>
<tr>
<td>2</td>
<td>CNO Assistant Manager followed by the CNO Operations Manager or Designee</td>
<td>Chief Environmental Planner or Designee</td>
<td>Division Administrator or Designee</td>
</tr>
<tr>
<td>3</td>
<td>Assistant Director, Endangered Species or Designee</td>
<td>Director or Designee</td>
<td>Associate Administrator for Planning, Environment and Realty or Designee</td>
</tr>
</tbody>
</table>

Assumptions:

1. This is not intended to be a communication process or replace problem-solving and communications at project team level.
2. Staff are expected to communicate in an open and timely fashion, and do their best to resolve issues before elevating.
3. It is envisioned that most issues will be resolved at the first two levels.
4. Discussion Papers will be prepared for all issues that are elevated to the next level. The papers should clearly communicate positions of all sides, present all the alternatives identified, and discuss advantages and disadvantages of each. Agreement of any extension of time for consultation or information gathering should also be expressed in the Issue Memo.
5. Time to elevate is from the day one party concludes (and notifies the others) there is a disagreement which cannot be reconciled at their level and includes the time to prepare brief issue paper(s) on the matter. The issue paper(s) should state both sides and others must have a chance to review.
6. As necessary, each agency may call upon experts to assist with resolution of any issue.
7. At the 1st level alternative resolution options or solutions could be employed. If an impasse at the 2nd level occurs, the process recognizes the need to elevate to Washington D.C.
8. Resolution must be documented and available for future reference.

* The CNO Assistant Manager will first review and seek to resolve issues prior to elevation up to CNO Operations Manager. This will not affect the set timeframes established for the dispute resolution process.