



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION IX**

**75 Hawthorne Street**

**San Francisco, CA 94105-3901**

JUL 22 2016

Keith E. Kawaoka, D. Env.  
Deputy Director for Environmental Health  
Hawaii Department of Health  
1250 Punchbowl Street, 3<sup>rd</sup> floor, Room 325  
Honolulu, Hawaii 96823

**SUBJECT:** Designation of Non-federal Representative for Consultations under Section 7 of the Endangered Species Act and Section 305(b) of the Magnuson-Stevens Act

Dear Mr. Kawaoka:

The U.S. Environmental Protection Agency Region 9 (EPA) provides capitalization grants to state agencies under the Clean Water State Revolving Fund (CWSRF) program and the Drinking Water State Revolving Fund (DWSRF) program. The Hawaii Department of Health (DOH) administers Hawaii's CWSRF and DWSRF programs, which are capitalized by federal grants, state match funds, loan repayments, and other earnings of the fund. These programs provide loans and subgrants to eligible entities for CWSRF and DWSRF projects. Projects supported with funds directly made available by federal capitalization grants, called federally-assisted projects, must comply with a number of federal legal requirements, including the consultation requirements of Section 7 of the Endangered Species Act (ESA) and Section 305(b) of the Magnuson-Stevens Act (MSA).

The ESA regulations, at 50 CFR Section 402.08, allow federal agencies to designate a non-federal representative to initiate the consultation process or prepare a biological assessment pursuant to ESA Section 7. Similarly, 50 CFR Section 600.920(c) allows a federal agency to designate a non-federal representative for purposes of initiating the consultation process with the National Marine Fisheries Service (NMFS) under Section 305(b)(2) of the MSA on the potential impacts of a project on essential fish habitat (EFH). Under each regulation, ultimate responsibility for compliance with the ESA and MSA rests with the federal action agency.

EPA is designating DOH as its non-federal representative under 50 CFR Section 402.08 (for the ESA) and under 50 CFR Section 600.920(c) (for the MSA). The purpose of this letter is to lay out respective roles and responsibilities for EPA and DOH as our agencies work together to assure efficient and effective compliance with the ESA and MSA for CWSRF and DWSRF projects in Hawaii.

## **Consultation Under the ESA**

### **Biological Assessments (BAs) and Biological Evaluations (BEs)**

Section 402.08 provides that the non-federal representative can “conduct informal consultation or prepare a biological assessment.” If a BA is prepared by the designated non-federal representative, the federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope, contents and findings of effect of the BA. EPA will continue to provide independent review and evaluation of the scope and content of all BAs or BEs prepared by DOH, before DOH submits the BAs or BEs to the Service(s).

Information within BAs or BEs 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.

### **No Effect Determinations**

DOH may make a "no effect" determination on threatened or endangered species or their critical habitat, if DOH determines any of the following:

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

All "no effect" determinations must be documented. EPA is encouraging DOH to request technical assistance from the Service(s), if DOH determines that additional information (relevant to the project's effect on listed or proposed species or habitat within the project area) is needed prior to reaching a "no effect" determination. DOH will submit a copy of each “no effect” determination, along with related documentation, to the EPA SRF project officer by mail or email at the time of the “no effect” final determination.

### **Informal Consultation: Not Likely to Adversely Affect (NLAA) Determinations**

Pursuant to 50 CFR Sections 402.13 and 402.14, informal consultation concludes when either of the following occurs:

- EPA determines that the action, as proposed or modified, is not likely to adversely affect listed or proposed species, or listed or proposed critical habitat and obtains written concurrence from the Service(s); or
- EPA determines that formal consultation is required.

Typically, where EPA has made an NLAA determination, DOH or the local project proponent (i.e., loan or subgrant recipient) 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.

### **Formal Consultation**

50 CFR Section 402 does not provide for designation of formal consultation to a non-federal representative. As federal lead for ESA consultation, EPA will continue to carry out all formal consultation procedures with the Service(s) commencing with submittal of the BA/BE and requesting initiation of formal consultation with the Service(s) and culminating in the "biological opinion" issued by the Service(s) to EPA.

### **Re-initiation of Consultation**

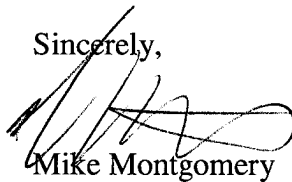
Subsequent changes in the scope or design of a project funded under the CWSRF or DWSRF programs, discovery of the presence of previously unknown listed species or critical habitat, or the listing of new species may require the re-initiation of ESA consultation. Only EPA can reinitiate formal consultation.

### **Consultation Under the MSA**

Consistent with 50 CFR Section 600.920, EPA and DOH anticipate that most requirements of consultation under the MSA will be consolidated with ESA or similar environmental review procedures. See 50 CFR Section 600.920(f)(1). DOH will provide EPA with copies of any written (mail or email) communications with NMFS regarding MSA consultations. EPA may, at its own discretion or upon request from DOH, become involved in an MSA consultation as necessary to reach a satisfactory conclusion of the consultation. As noted, EPA retains ultimately responsible for compliance with the MSA.

EPA looks forward to working with DOH to implement this designation as described above. If you have any questions regarding this designation, please contact Doug Eberhardt, Infrastructure Section Chief at (415) 972-3420.

Sincerely,



Mike Montgomery

Assistant Director, Water Division

