

Consultation Letters

To satisfy the National Environmental Policy Act (NEPA), letters are prepared to “consult” with the various Federal Agency for their area of expertise. The Texas Historical Commission (SHPO), United States Fish and Wildlife Service (USFWS), Corps of Engineers, National Park Service, Texas Park and Wildlife, and others are among the groups contacted.

What appears to be widely occurring now is that a standardized letter is mailed out to each Agency explaining the scope of the project with a request for a written response. The consulting Agency will either, not respond within 30 days, provide a return letter, or stamp the original letter with “No effect” and return it. Mitigation measures may be provided by the consulting Agency to address their environmental concerns.

It is recommended that the standardized letter include a clear, concise, and inclusive project description including, site location, and street address. This is surprisingly often missing and only a vague generic narrative provided. The consulting Agency needs **comprehensive** information to adequately review the project.

A project map of the area or town from Google map or similar source showing the site would be helpful. Site photos with a simple site plan showing the point of view locations would also assist consulting Agencies. RD staff will be familiar with all this information because of hands on involvement, but a desk review by an outside Agency is difficult without **specific** data.

According to the regulations, USDA RD must first make a determination about the effect on any environmental issue based on preliminary findings or studies and then contact the consulting Agency for concurrence or inquire if they require “Formal Consultation” to resolve any environmental issues. The difference between what is typically now occurring and what the regulations require is subtle but important.

With cutbacks in staffing, some Agencies are finding it difficult to reply to letters from RD staff which have a “No effect” determination or which does not offer any determination of effect. While this is “technically correct” with the regulations, it goes against what has become the common process in producing environmental reports.

Like other Agencies, USDA RD has limited staff, expertise, and time for the environmental process. USDA RD must make the best professional decisions under the constraints presented. This could include making decisions on the determination of effect that the consulting Agency may later dispute or request modifications. This is acceptable, should be expected on some projects, and is a part of NEPA. Consultation is a process with improvements to the ER throughout the exchange of information until it is acceptable.

It is difficult to determine how each Agency or how each state area within an Agency will want to “consult”. Some may continue the same process that has occurred for years. Others may require strict application of the regulation protocol. Address the issue as required for each project. The level of the environmental process should be appropriate for the level of project complexity and extent of potential environmental impact. In any approach, document replies or the lack of a reply and include this documentation within the ER.

To help resolve the NEPA compliance issue USDA RD should make a determination of effect for each specific environmental issue and then send a letter to the appropriate review Agency requesting concurrence. This may require slight modifications of a standardized letter for each

Agency's area of review. To put it in very simple terms, letters should not be going out requesting, "What do you think?", but they should be sent as, "This is what we think. Do you concur?".

If there is indication that there may be an effect, include reasonable mitigation measures based on similar previous projects with similar environmental issues. There appears to be only a limited number of mitigation measures applied to most of RD projects. However, this is going to be challenging for some complicated projects and may require outside specialist, if feasible. A limited budgeted project which is the normal for the Agency may have to proceed with a determination based on information that is readily available.

For example, if a site is a vacant city lot not located anywhere near any historical structures based on a review of the records, then the letter to SHPO may indicate a "No effect" determination, include the typical "notification upon a cultural find" mitigation measure, and request concurrence.

Another example, if a large site is at the edge of town with a narrow documented wetland along the very back of the property, then the letter to the Corps of Engineers may indicate a "May affect – Not likely to adversely affect" determination, include a "Construction shall not occur within the wetland delineation" mitigation measure, include maps or site photos, and request concurrence.

Fortunately, most of RD projects typically will have a "No effect" determination or have a "May affect - Not likely to adversely affect" determination which require mitigation measures. If a project has a "May affect – Likely to adversely affect", then "Formal Consultation" will be required, but this is very rare for RD projects. The determination of effect for any specific environmental issue will only be one of the three listed here and underlined.

If Formal Consultation is requested by the consulting Agency, then expect additional mail correspondence and meetings. This takes time and Owners will need to consider their options if Formal Consultations are required. They may elect to choose a different site to avoid the issue.

If the consultation proceeds, then it will continue until a resolve can be determined. The final outcome could range from additional mitigation measures being applied, modification to the scope of work for the project, a Memorandum of Understanding (MOU) between the parties, or the consulting Agency not concurring with any solutions which could lead to future legal environmental issues. Fortunately, the scale and type of most of the projects the Agency reviews has little, if any, environmental impact.