

the need for structural alteration of water bodies or their associated floodplains and wetlands. Such methods may be either physical or managerial in character. Non-structural flood protection methods are measures which:

(a) Control the uses and occupancy of floodplains and wetlands, e.g., floodplain zoning and subdivision regulations;

(b) Preserve floodplain and wetland values and functions through public ownership, e.g., fee title, easements and development rights;

(c) Delay or reduce the amount of runoff from paved surfaces and roofed structures discharged into a floodway, e.g., construction of detention basins and use of flow restricting barriers on roofs;

(d) Maintain natural rates of infiltration in developed or developing areas, e.g., construction of seepage or recharge basins and minimization of paved areas;

(e) Protect streambanks and shorelines with vegetative and other natural cover, e.g., use of aquatic and water-loving woody plants;

(f) Restore and preserve floodplain and wetland values and functions and protect life and property through regulation, e.g., flood-proofing building codes which require all structures and installations to be elevated on stilts above the level of the base flood; and

(g) Control soil erosion and sedimentation, e.g., construction of sediment basins, stabilization of exposed soils with sod and minimization of exposed soil.

(3) *Avoid Filling in Floodplains*—As indicated above, the Executive orders place a major emphasis on not filling in floodplains in order to protect their natural values and functions. Executive Order 11988 states “agencies shall, wherever practicable, elevate structures above the base flood level rather than filling in the land.”

(d) *Additional Notification Requirement.* (1) *Final Notice*—Where it is not possible to avoid an impact to a floodplain or wetland and after all practicable mitigation measures have been identified and agreed to by the prospective applicant, a final notice of the proposed action must be published. This notice will either be part of the notice required for the completion of a Class II assessment or a separate notice if a Class I assessment or an EIS has been completed for the action. The notice will be published and distributed in the manner specified in §1940.331 of this subpart and contain the following information.

(a) A description of the proposed action, its location, and the surrounding area;

(b) A description of the floodplain or wetland impacts and the mechanisms to be used to mitigate them;

(c) A statement of why the proposed action must be located in a floodplain or a wetland;

(d) A description of all significant facts considered in making this determination;

(e) A statement indicating whether the actions conform to applicable State or local floodplain protection standards; and

(f) A statement listing other involved agencies and individuals.

(2) *Private Party Notification*—For all actions to be located in floodplains or wetlands in which a private party is participating as an applicant, purchaser, or financier, it shall be the responsibility of the approving official to inform in writing all such parties of the hazards associated with such locations.

4. *The Relationship of the Executive Orders to the National Flood Insurance Program.* The National Flood Insurance Program establishes the floodplain management criteria for participating communities as well as the performance standards for building in floodplains so that the structure is protected against flood risks. As such, flood insurance should be viewed only as a financial mitigation measure that must be utilized only after FmHA or its successor agency under Public Law 103-354 determines that there is no practicable alternative for avoiding construction in the floodplain and that all practicable mitigation measures have been included in the proposal. That is, for a proposal to be located in the floodplain, it is not sufficient simply to require insurance. The Agency’s flood insurance requirements are explained in subpart B of part 1806 of this chapter (FmHA Instruction 426.2). It should be understood that an applicant proposing to build in the floodplain is not even eligible for FmHA or its successor agency under Public Law 103-354 financial assistance unless the project area is participating in the National Flood Insurance Program.

[53 FR 36262, Sept. 19, 1988]

EXHIBIT D TO SUBPART G OF PART 1940— IMPLEMENTATION PROCEDURES FOR THE ENDANGERED SPECIES ACT

1. FmHA or its successor agency under Public Law 103-354 shall implement the consultation procedures required under Section 7 of the Endangered Species Act as specified in 50 CFR 402. It is important to note that these consultation procedures apply to the disposal of real property by FmHA or its successor agency under Public Law 103-354 and to all FmHA or its successor agency under Public Law 103-354 applications for financial assistance and subdivision approval, including those applications which are exempt from environmental assessments. (See §1940.310.) Unless repeated in this paragraph, the definitions for the terms utilized are found in 50 CFR 402.02.

2. State Directors shall ensure that State, District, and County Offices maintain current publications of listed and proposed species as well as critical habitats found in their respective jurisdictions.

3. When an application to FmHA or its successor agency under Public Law 103–354 involves financial assistance or permit approval from another Federal agency(s), the FmHA or its successor agency under Public Law 103–354 reviewer shall work with the other Agency to determine a lead Agency for the consultation process. When FmHA or its successor agency under Public Law 103–354 is not the lead Agency, the reviewer shall ensure that the lead Agency informs the appropriate Area Manager, U.S. Fish and Wildlife Service (FWS), or Regional Director, National Marine Fisheries Service (NMFS), of FmHA or its successor agency under Public Law 103–354's involvement.

4. Each disposal action, application for financial assistance or subdivision approval shall be reviewed by the FmHA or its successor agency under Public Law 103–354 official responsible for completing environmental assessments in order to determine if the proposal either may affect a listed species or critical habitat or is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of a proposed critical habitat.

a. For applications subject to environmental assessments, this review shall be accomplished as part of the assessment.

b. For those applications that are excluded from an environmental assessment, this review shall be documented as part of Form FmHA or its successor agency under Public Law 103–354 1940–22, "Environmental Checklist For Categorical Exclusions," and shall be accomplished as early as possible after receipt of the application and prior to approval of the application.

c. For applications subject to an environmental impact statement, FmHA or its successor agency under Public Law 103–354 shall request from the Area Manager, FWS, and the Regional Director, NMFS, a list of the proposed and listed species that may be in the area of the proposal. Within 30 days, the FWS and NMFS will respond to FmHA or its successor agency under Public Law 103–354 with this list. FmHA or its successor agency under Public Law 103–354 shall then conduct, as part of the process of preparing the draft environmental impact statement, a biological assessment of these species to determine which species are in the area of the proposal and how they may be affected. This biological assessment should be completed within 180 days or a time mutually agreed upon between FmHA or its successor agency under Public Law 103–354 and FWS or NMFS. Upon completion of the biological assessment, if FmHA or its successor agency under Public

Law 103–354 determines either that the proposal may affect a listed species or critical habitat or is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, the formal consultation procedures shall be initiated as specified in paragraph 7b below. To the extent practical, these procedures shall be concluded and their results reflected in the draft EIS. For all draft EISs in which FmHA or its successor agency under Public Law 103–354 determines there will be no effect upon a listed or proposed species or critical habitat and FWS or NMFS indicated the presence of such species upon the initial inquiry, a copy of the draft shall be provided to that agency for review and comment.

5. As indicated in paragraph 4 above, the focus of this review process is to determine if the proposal will affect a listed species or critical habitat or is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of a proposed critical habitat. Because this impact terminology is specific to the Act, it is important to understand its meaning.

a. To jeopardize the continued existence of a species means to engage in a project which reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild. The level of reduction necessary to constitute jeopardy would be expected to vary among listed species.

b. The destruction or adverse modification of a critical habitat means a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include but are not limited to those diminishing the following requirements for:

(i) Space for individual and population growth and for normal behavior;

(ii) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(iii) Cover or shelter;

(iv) Sites for breeding, reproduction, or rearing of offspring; and

(v) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

6. It is also important to note that the consultation procedures differ when the subject of the consultation is a listed species or critical habitat as opposed to a proposed species or critical habitat. The latter are defined as those that the Secretary of Interior or Commerce are considering for listing and have so

proposed through notification in the FEDERAL REGISTER. When listed species or critical habitats are involved, FmHA or its successor agency under Public Law 103-354 shall initiate formal consultation procedures whenever it determines that a proposed project may affect them, either beneficially or adversely. For proposed species or critical habitats, FmHA or its successor agency under Public Law 103-354 shall first determine if the proposed project is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Whenever this determination is made, FmHA or its successor agency under Public Law 103-354 shall confer with the appropriate agency identified in paragraph 7 of this exhibit and, in so doing, shall focus on (i) determining the status of the listing process, and (ii) attempting to cooperatively develop alternatives or measures for inclusion in the project that avoid or mitigate the identified adverse impacts. The results of this process shall be documented in the environmental review being done for the proposed project and, if this review is an environmental assessment, shall be an important factor in determining the need for an environmental impact statement. No action shall be taken by the approving official on the application until the requirement to confer on proposed species or critical habitat has been completed. Paragraphs 7 through 9 of this exhibit outline the formal consultation procedure for listed species or critical habitats.

7. In initiating the review process for a project, the list of species and critical habitats, including proposed, shall be examined to determine the potential for impacts. Projects planned within established communities are less likely to affect listed or proposed species or their critical habitat. Projects to be located in remote areas, heavily forested areas and/or previously undisturbed areas are more likely to affect these species. For projects located in such areas, the reviewer shall, at a minimum, discuss the project's potential impact on listed or proposed species with officials of the appropriate State wildlife protection agency or the Area Manager, FWS, or the Regional Director, NMFS, as appropriate. The latter organization generally has responsibility for marine species. The specific list of species under NMFS's jurisdiction can be found at 50 CFR 222.23(a) and 227.4. Such discussions shall be considered as informal consultations and are not a substitute for the required consultation process outlined below.

a. Whenever the reviewer, after reviewing the list and contacting appropriate experts, formally determines that the proposal will have no effect on a listed or proposed species or its critical habitat, these review procedures are completed, unless new information comes to light as discussed in paragraph 9 of

this exhibit, or consultation is requested by the appropriate Area Manager, FWS, or Regional Director, NMFS.

b. If the reviewer determines there may be an effect on a listed species or a critical habitat or is unable to make a clear determination, the reviewer shall so inform the SEC (assuming the reviewer is not the SEC). The latter shall either (i) convey a written request for consultation, along with available information to the appropriate Area Manager, FWS or Regional Director, NMFS, for the Federal region where the proposal will be carried out, or (ii) request Program Support Staff (PSS) to perform such consultation. FmHA or its successor agency under Public Law 103-354 shall initiate this formal consultation process and not the applicant. See paragraph 4.c. of this exhibit for initiating consultation where an environmental impact statement is being done for the application. Until the consultation process is completed, as outlined in 50 CFR 402.04, FmHA or its successor agency under Public Law 103-354 shall not approve the application. Should the need for consultation be identified after application approval, FmHA or its successor agency under Public Law 103-354 shall refrain from making any irreversible or irretrievable commitment of resources which would foreclose the consideration of modifications or alternatives to the identified activity or program.

8. Several possible responses may result from initiation of the formal consultation process with each requiring further specific actions.

a. Whenever the Area Manager, FWS, or Regional Director, NMFS, informs FmHA or its successor agency under Public Law 103-354 that insufficient information exists to conclude the consultation process, the SEC with assistance as feasible from the FWS or NMFS and State sources of expertise shall then obtain additional information and conduct, as needed, biological surveys or studies to determine how the proposal may affect listed species or their critical habitat. The cost and performance of such studies shall be handled in the same manner as in the preparation of an Environmental Impact Statement. (See §1940.336 of this subpart.)

b. Whenever the Area Manager, FWS, or Regional Director, NMFS, responds that the proposal will either promote the conservation of a listed species or is not likely to jeopardize the continued existence of a listed or proposed species or result in the destruction or adverse modification of its critical habitat, the FmHA or its successor agency under Public Law 103-354 reviewer shall formally make a similar determination, attaching the response as documentation. This concludes the formal consultation process unless new information comes to light as discussed in paragraph 9 of this exhibit.

c. Whenever the results of the consultation process include recommendations by the Area Manager, FWS, or Regional Director, NMFS, for modifications to the project which would enhance the conservation and protection of a listed species or its critical habitat, the State Director shall review these recommendations and require that they be incorporated into the project as either design changes or special conditions to the offer of assistance. If the State Director does not believe the recommendations can be so adopted, the Administrator shall be requested to review the recommendations and to assist in the further resolution of the matter.

d. Whenever the appropriate Area Manager, FWS, or Regional Director, NMFS, determines that the proposal is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the FmHA or its successor agency under Public Law 103-354 applicant shall be so informed and the project denied on this basis. However, if the State Director believes that funding or approval of the application is (i) of national, regional, or great local significance, and (ii) that there are no reasonable and prudent alternatives to avoiding the listed species impact, the State Director can request the Administrator, through PSS, to review the proposal and the results of the consultation process. Based upon this review, the Administrator shall either inform the State Director that a request for an exemption from section 7 of the Endangered Species Act is not warranted and the application shall be denied or, if the Administrator believes it is warranted, shall request an exemption from the Endangered Species Committee established by section 7(e) of the Act. No action shall be taken by the State Director on the application until the Administrator informs the State Director of the results of the exemption request.

9. Once completed, the consultation process shall be reinitiated by FmHA or its successor agency under Public Law 103-354 or upon request of the appropriate Area Manager, FWS, or Regional Director, NMFS, if:

a. New information or modification of the proposal reveals impacts that may affect listed or proposed species or their habitats; or

b. A new species is listed that may be affected by the proposal.

10. In completing the above compliance procedures, particularly when consulting with the referenced agencies, formally or informally, the preparer of the environmental review document will request information on whether any Category I or Category II species may be present within the project area. These are candidate species; they are presently under consideration for listing under section 4 of the Endangered Species Act. Cat-

egory I species are those for which FWS currently has substantial data on hand to support the biological appropriateness of proposing to list the species as endangered or threatened. Currently data are being gathered concerning essential habitat needs and, for some species, data concerning the precise boundaries of critical habitat designations. Development and publication of proposed rules on such species is anticipated. Category II comprises species for which information now in the possession of the FWS indicates that proposing to list the species as endangered or threatened is possibly appropriate but for which conclusive data on biological vulnerability and threat(s) are not currently available to presently support proposed rules. Whenever a Category I or II species may be affected, the preparer of the environmental review document will determine if the proposed project is likely to jeopardize the continued existence of the species. Whenever this determination is made, the same compliance procedures specified in paragraph 6 of this exhibit for a proposed species will be followed. The purpose of the requirements of this paragraph is to comply with the National Environmental Policy Act as well as Departmental Regulation 9500-4, Fish and Wildlife Policy, which specifies that USDA agencies will avoid actions which may cause a species to become threatened or endangered.

[49 FR 3727, Jan. 30, 1984, as amended at 53 FR 36266, Sept. 19, 1988]

EXHIBIT E TO SUBPART G OF PART 1940—
IMPLEMENTATION PROCEDURES FOR
THE WILD AND SCENIC RIVERS ACT

1. Each application for financial assistance or subdivision approval as well as the proposed disposal of real property by FmHA or its successor agency under Public Law 103-354 shall be reviewed to determine if it will affect a river or portion of it which is either included in the National Wild and Scenic Rivers System, designated for potential addition to the system, or identified in the Nationwide Inventory prepared by the National Park Service (NPS) in the Department of the Interior. The Nationwide Inventory identifies those river segments that, after preliminary review, appear to qualify for inclusion in the system. (For purposes of this subpart, river segments in the Nationwide Inventory shall be treated the same as segments within the system with the exception of paragraph 8.) For applications subject to environmental assessments, the review shall be accomplished as part of the assessment. For applications that are excluded from an environmental assessment, this review shall be documented as part of Form FmHA or its successor agency under Public Law 103-354 1940-