

Midas Gold Idaho Briefing Document on Non-Federal Representative Status and draft Biological Assessment

December 13, 2019

In August of 2017, Midas Gold Idaho, Inc. formally requested to be granted applicant status by the U.S. Forest Service. In December of the same year, USFS approved Midas Gold's applicant status and provided a general description of the roles and the ESA process. Applicant status provides Midas Gold with certain rights and responsibilities but applies to the ESA Section 7 formal consultation process but does not apply to the earlier stages of the Section 7 consultation process under the Act, such as informal consultation and biological assessment preparation.

Given Midas Gold's more limited role earlier in the process, in January 2018, it applied for Non-Federal Representative designation under 50 CFR §402.08 by the United States Forest Service (USFS) in order to participate in an appropriate role in developing an efficient and thorough Section 7 consultation process between USFS, the other Federal action agencies and the Services for the Project. USFS subsequently designated Midas Gold as a Non-Federal Representative in March 2018 and, in September 2018, determined that it would be most efficient and appropriate for Midas Gold to draft the initial version of the Biological Assessment.

Non-Federal Representative status is commonly granted to applicants and other stakeholders by many federal agencies (e.g., USFS, BLM, FERC, DOE, BIA) as a means of allowing the project proponent to be at the table and participate with regulatory and natural resource management agencies through the multi-year technical review of projects to make sure that the applicant's considerable knowledge and experience with a project is available to all parties at the table.

Midas Gold therefore sought the designation so that the company may participate in the informal consultation process of Section 7 under the Endangered Species Act and provide direct information to those at the table about its years of studies related to the project.

Without non-federal representative status, Midas Gold would not have been included in conversations directly related to the company's proposed project and the agencies, services and other stakeholders would not otherwise have had direct access to this knowledge and information.

By law and formal agency guidance, Section 7 consultation is recognized as a cooperative and iterative effort that needs all parties at the table. Non-federal representative status is allowed, encouraged and commonly used, so that entities other than the federal regulators can directly engage one another to seek ways to avoid and minimize effects on federally-listed species. When all parties can directly engage with one another, it creates a more efficient process that is more successful in identifying potential concerns and identifying solutions.

Within the *Forest Service Guidance for Including Applicants* document, it clearly states *"There is a clear need for early, regular and fully informed coordination among federal agencies and applicants, in order to as completely as possible inform the consultation, resolve conflicts and design the project to minimize adverse effects."*

Government is not intended to work behind closed doors. Any applicant, whether it is the project proponent or other interests are encouraged to be at the table to participate in informal consultation.

Being granted non-federal representative status takes no authority away from the decision-making authority held by the lead federal agency or the U.S. Fish and Wildlife Service and NOAA, the federal decision-making agencies under the Endangered Species Act.

Functionally, with Midas Gold acting as a non-federal representative, it means we are helping coordinate the informal consultation process. So far, this has included (monthly) informal consultation sessions with the U.S. Forest Service, Army Corps of Engineers, Environmental Protection Agency, U.S. Fish and Wildlife Service and the National Oceanographic and Atmospheric Administration (NOAA) Fisheries, state agencies and tribal entities. In our limited capacity, we cannot do anything without the formal permission of the U.S. Forest Service. Before we arrange a single meeting or send out a single agenda, everything must be done with the prior approval of the U.S. Forest Service.

In preparing for the informal consultation process, Midas Gold vigorously advocated, successfully, for the Tribes and state agencies be involved and around the table so that their input, experience and knowledge is brought to the table early and comprehensively. This has proven to be a valuable step as these agencies and tribes have provided information and insights during the informal consultation meetings.

As is common practice when an applicant is granted NFR status, Midas Gold is writing the draft Biological Assessment. Leading up to the preparation of the document, Midas Gold has been able to work with all the stakeholders in the informal consultation process to compile the data, analysis and recommendations made by the group. The U.S. Forest Service can then use this information to create the final Biological Assessment which is then submitted to U.S. Fish and Wildlife Service and NOAA Fisheries for consideration in drafting their Biological Opinions, which are the final decision-making documents.

- ESA is designed to allow applicant involvement up to and including applicant preparation of a *draft BA*; there are multiple steps that ensure the completeness and appropriateness of the analysis in the draft BA;
- A draft BA prepared by an applicant is not *the* final BA; the BA must be reviewed and accepted by the USFS and they then make it the USFS BA;
- BA is an information document, not a decision document; the Biological Opinions from the Services are the decision documents; ESA decisions are made and concurred by the Services
- During ESA formal consultation, the draft BOs are then provided back to the lead federal agency and the applicant for consideration and discussions and negotiations;
- When there is an effect on the species, informal consultation is followed by formal consultation which is under the regulatory purview and decision-making of the Services

The draft BA must be reviewed and approved by the U.S. Forest Service, which maintains all authority to edit, rewrite or disapprove the final BA. The Biological Opinion, which is the decision document, is prepared solely by the responsible services.

The Biological Assessment is similar in nature to the thousands of other pages of reports and analysis the U.S. Forest Service has received from Midas Gold, Midas Gold's consultants, and AECOM, the USFS third party consultant. Staff at the agency use this information to formulate their final analysis, but only after they have assessed and agreed with the content and analysis.

The U.S. Forest Service was initially leaning to declining Midas Gold's request to be granted non-federal representative status. However, after conversations with the multiple other agencies and services involved, the U.S. Forest Service granted Midas Gold non-federal representative status because it is a commonly used practice and would be beneficial to the preparation of the Biological Assessment.

CONTEXT:

The designation is granted under 50 CFR 402.08 by the United States Forest Service.

The U.S. Forest Service is not the only entity to grant such status on a regular basis. In fact, the Bureau of Land Management (BLM) commonly grants NFR status and has the recipient write the biological assessment in regulatory review of everything from Habitat Conservation Plans to Section 7 consultation and analysis. Citation below if needed.

- j. Designation of non-Federal Representative. The BLM may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment under 50 CFR Part 402.08. However, the ultimate responsibility for compliance with Section 7 of the ESA remains with the BLM. 6840 - SPECIAL STATUS SPECIES MANAGEMENT, .21E5i(4)(B)

U.S. Forest Service, "Guidance for Including "Applicants" in ESA Section 7 Consultation Forest Service – Rocky Mountain Region"

https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd496394.pdf

Natural Resource Conservation Service, Preparing a Biological Assessment

https://efotg.sc.egov.usda.gov/references/public/NM/BA_Guidance.pdf

Non-Federal Representatives may be involved in consultation or conference processes (may obtain species lists, prepare BAs, and provide information to the Service). However, NRCS must formally designate the non-Federal representative in writing (provided to the Service). (GM 190 Part 410.22(E)(10))

Federal Energy Regulatory Commission: Hydropower Licensing and Endangered Species: A Guide for Applicants, Contractors, and Staff

https://www.ferc.gov/industries/hydropower/gen-info/guidelines/esa_guide.pdf

Applicant's Role--Under designation as a non-federal representative, applicants are responsible for conducting studies, developing and supplying information, attending meetings, ensuring that pertinent ESA information is maintained in a project file, preparing a draft biological assessment (optional), participating in informal consultation with the Service, and keeping the Commission staff apprised of their actions.

Federal Aviation Administration, 1050.1F Desk Reference

https://www.faa.gov/airports/environmental/environmental_desk_ref/media/desk-ref-chap8.pdf

(7) Designated non-Federal representative. A person or consultant a Federal agency designates to act as its representative and on its behalf during informal consultation. The person or consultant may also prepare a biological assessment (BA) on the agency's behalf, but the Federal agency remains responsible for the BA's content and effects finding (50 CFR Section 402.02).

Consultation under the ESA consists of discussions between the action agency, the applicant (if any), and USFWS and NOAA Fisheries Service. For example, prior to initiating formal consultation or requesting concurrence, agencies and applicants may engage in a period of technical assistance to discuss the project and develop avoidance, minimization, and conservation measures.

Example Applicant-Prepared Draft Biological Assessments

Yuba County Water Agency, Yuba River Development Project, FERC Project No. 2246

http://www.ycwa-relicensing.com/Relicensing%20Documents/Relicensing%20Documents%2010%20-%20Amended%20Final%20License%20Application/Vol%20IV%20-%20Draft%20BA%20and%20EFH/APDBA/04_Amended%20FLA%20BA%20Section%201_Introduction_4-3-2017.pdf

La Grange Hydroelectric Project FERC No. 14581 Final License Application Attachment E Applicant-Prepared Biological Assessment for California Central Valley Steelhead (*Oncorhynchus Mykiss*) Distinct Population Segment http://www.lagrange-licensing.com/Documents/20171011-31_P-14581-000_31_LG_FLA_AttE_Biological%20Assessment_171011.pdf

This Draft BA is intended to serve as the basis for consultation under Section 7 of the ESA for ESA-listed species under the jurisdiction of NMFS.

<https://documents.coastal.ca.gov/reports/2019/11/Th14a/Th14a-11-2019-appendix.pdf>

Biological Assessment for Aggregate Extraction Operations in the Eel, South Fork Eel, Van Duzen, and Trinity Rivers, Humboldt County, California. Stillwater Sciences, February 2015 Lower Eel River Gravel

Mining and Extraction Activities Biological Assessment (Western Snowy Plover and Yellow Billed Cuckoo), prepared by Gary S. Lester, LACO Associates February 28, 2015

http://alaska-Ing.com/wp-content/uploads/2017/04/Alaska-LNG-RR3_AppxC_041417_public.pdf

Draft Biological Assessment For The Apple Valley 173 Project (Tract 16979), San Bernardino County, California http://tws-west.org/events/2013/esa_workshop/Part_F/2005-030%20AV%20173%20Draft%20BA%207-19-06.pdf

Consultant prepared BA for BIA and Southern Ute Indian Tribe for the North Carracas Plan of Development. https://www.suitdoe.com/wp-content/uploads/sites/9/2018/02/Appendix_H_Biological_Assessment.pdf

Department of Energy, Keystone XL Project Applicant - Prepared Biological Assessment Final

The DOS appointed Keystone and its subcontractors to act as its designated non-federal representatives for Section 7 Consultation and to prepare the applicant-prepare BA

https://foia.state.gov/searchapp/DOCUMENTS/FOIA_Nov2017/F-2011-0214103/DOC_OC05327746/C05327746.pdf

Biological Assessment, Midnite Mine – Revision 2 Midnite Mine Spokane Tribe of Indians Reservation Stevens County, WA Revision 2, September 2014 Prepared For: U.S. Environmental Protection Agency Prepared On Behalf of: Newmont USA, Limited and Dawn Mining Company Prepared By: Worthington Miller Environmental, LLC 201 Linden Street, Suite 301 Fort Collins, Colorado 80525

<https://semspub.epa.gov/work/10/500009636.pdf>

