H A R R I S C O U N T Y

Public Infrastructure Department **1001 Preston, 7th Floor**
Architecture & Engineering Division **Houston, Texas 77002**
(713) 755-5370

April 20, 2011

Endangered Species Act Compliance for CLOMRs
Guidance Memo

Introduction:

Per FEMA's Procedural Memorandum 64 Endangered Species Act (ESA) compliance must be documented to FEMA prior to issuance of either a Conditional Letter of Map Revision (CLOMR) or Conditional Letter of Map Revision based-on fill (CLOMR-F). FEMA must receive confirmation of ESA compliance from the [U.S. Fish and Wildlife (USFWS)] Service. A copy of the Procedural Memorandum can be found in Appendix A. Harris County has requested project specific Threatened and Endangered Species reviews from the Clear Lake Ecological office of the USFWS as directed by FEMA's Procedural Memorandum. An example letter from Harris County to USFWS is located in Appendix B. Since Harris County is not a Federal agency and FEMA has not designated Harris County as a non-federal representative for FEMA those request have been answered with a standard "*no-response*" letter. An example letter back from USFWS is located in Appendix C. To our knowledge project sponsors may be requested by FEMA to further explain ESA compliance in a six point format. An example of this FEMA request is located in Appendix D.

ESA Compliance Submittal:

In light of this information the following items must be submitted in addition to the threatened & endangered species report:

1. HC's letter to USFWS requesting clearance (or opinion),
2. Threatened & Endangered Species Report, and
3. USFWS response "guidance letter".
4. Letter from Consultant (as described below).

Additional Data Required for CLOMR:

a) A description of the action that could affect an endangered species.
b) A description of the specific area that may be affected by the action proposed in the CLOMR submittal.
c) A description of any listed species or critical habitat that may be affected by the proposed action in the CLOMR submittal.
d) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects.
e) Provide all supporting documentation including but not limited to environmental assessments, biological evaluations, threatened and endangered species reports

(including any stand alone species specific reports) and copies of all state and federal coordination efforts.

f) Any other relevant available information on the action, the affected listed species, or critical habitat.

All letters/reports should be submitted to the Harris County PID-AED Project Manager for review. If there are any questions please contact your Project Manager.

Thank you,

Nick J. Russo III
Team Leader-Environmental Services
713-755-2804
Nick.Russo@hcpid.org

APPENDIX A
FEMA PM Memo 64

U.S. Department of Homeland Security
500 C Street SW
Washington, DC 20472

FEMA

August 18, 2010

MEMORANDUM FOR: Regional Division Directors
Regions I - X

FROM: Doug Bellomo, P.E.
Director, Risk Analysis Division

SUBJECT: Procedure Memorandum 64 – Compliance with the Endangered Species Act (ESA) for Letters of Map Change

EFFECTIVE DATE: All Conditional Letter of Map Change submittals received as of October 1, 2010

Background: The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend. Congress passed the ESA in 1973 with recognition that the natural heritage of the United States was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." Congress understood that, without protection, many of our nation's living resources would become extinct. Species at risk of extinction are considered endangered, whereas species that are likely to become endangered in the foreseeable future are considered threatened. At present approximately 1,900 species are listed as threatened or endangered under the ESA. The U.S. Department of Interior's Fish and Wildlife Service and the U.S. Department of Commerce's National Marine Fisheries Service (collectively known as "the Services") share responsibility for implementing the ESA.

Section 7 of the ESA requires each federal agency to insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction of adverse modification of designated critical habitat[1].

Section 9 of the ESA prohibits anyone from "taking" or "harming" endangered wildlife and similar prohibitions are generally extended through regulations for threatened wildlife. If an action might harm[2] a threatened or endangered species, an incidental take authorization is required from the Services under Sections 7 or 10 of the ESA.

Issue: Conditional Letters of Map Change (LOMCs) are issued before a physical action occurs in the floodplain and are FEMA's comments as to whether the proposed project would meet minimum National Flood Insurance Program (NFIP) requirements and how the proposed changes would impact the NFIP maps. Because Conditional Letters of Map Revision based-on Fill (CLOMR-Fs) and Conditional Letters

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[1] In accordance with Section 4 of the ESA, critical habitat includes specific areas essential to conservation of a species and those areas which may require special management considerations or protection.

[2] Harm can arise from "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" [50 CFR Part 17.3].

of Map Revision (CLOMRs) are submitted to FEMA prior to construction, there is an opportunity to identify if threatened and endangered species may be affected by the potential project. If potential adverse impacts could occur, then the Services may require changes to the proposed activity and/or mitigation.

For LOMC requests involving floodplain activities that have already occurred, private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA's process. These requests do not provide the same opportunity as Conditional LOMCs for FEMA to comment on the project because map changes are issued only after the physical action has been undertaken.

The following table provides a general summary of FEMA's ESA requirements.

Request	ESA-related Action	ESA Requirement Related to FEMA Process
Conditional LOMC Requests		
CLOMA	No physical modification to floodplain is proposed.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
CLOMR-F	Proposed placement of fill in the floodplain.	ESA compliance must be documented to FEMA prior to issuance of CLOMR-F. FEMA must receive confirmation of ESA compliance from the Services.
CLOMR	Proposed modifications of floodplains, floodways, or flood elevations based on physical and/or structural changes.	ESA compliance must be documented to FEMA prior to issuance of CLOMR. FEMA must receive confirmation of ESA compliance from the Services.
LOMC Requests		
LOMA	No physical modification to floodplain has occurred.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
LOMR-F	Placement of fill in floodplain has occurred.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.
LOMR	Modifications of floodplains, floodways, or flood elevations have occurred based on physical and/or structural changes.	ESA compliance is required independently of FEMA's process. The community needs to ensure that permits are obtained per requirement under Section 60.3(a)(2) of FEMA's regulations.

Action Taken: For CLOMR-F and CLOMR applications, the submittal will be reviewed based on:

- Required data elements cited in the NFIP regulations
- Required data elements cited in the MT-1 and MT-2 Application/Certification Form instructions
- Demonstrated compliance with the ESA

The CLOMR-F or CLOMR request will be processed by FEMA only after FEMA receives documentation from the requestor that demonstrates compliance with the ESA. The requestor must demonstrate ESA compliance by submitting to FEMA either an Incidental Take Permit, Incidental Take Statement, "not likely to adversely affect" determination from the Services or an official letter from the Services concurring that the project has "No Effect" on listed species or critical habitat. If the project is likely to cause jeopardy to listed species or adverse modification of critical habitat, then FEMA shall deny the Conditional LOMC request. This Procedure Memorandum will not change the review process for Conditional Letters of Map Amendment (CLOMA), Letter of Map Amendment (LOMA), Letter of Map Revision based-on Fill (LOMR-F), or Letter of Map Revision (LOMR) applications. In addition, FEMA's Cooperating Technical Partners will be required to comply with this Procedure Memorandum.

Attachment:
Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

Cc: See Distribution List

Distribution List (electronic distribution only):

Office of Chief Counsel

Risk Analysis Division

Risk Reduction Division

Environmental and Historic Preservation Unit

Regional Mitigation Divisions

Regional Environmental Officers

Legislative Affairs Division

Production and Technical Services Contractors

Customer and Data Services Contractor

Cooperating Technical Partners

Guidance for Compliance with the Endangered Species Act for Conditional Letters of Map Change

This document supplements the Federal Emergency Management Agency's (FEMA's) Procedure Memorandum No. 64. It highlights additional resources and frequently asked questions to help guide Conditional Letter of Map Revision (CLOMR) and Conditional Letter of Map Revision based on Fill (CLOMR-F) applicants in the Endangered Species Act (ESA) compliance process. The following sections identify helpful web resources, while the final section includes responses to frequently asked questions.

NATIONAL FLOOD INSURANCE PROGRAM AND LETTERS OF MAP CHANGE

Additional information about the National Flood Insurance Program (NFIP) and Letters of Map Change (LOMC) is available from FEMA.

NFIP: http://www.fema.gov/hazard/flood/info.shtm
LOMCs: http://www.fema.gov/hazard/map/lomc.shtm

ESA OF 1973

Additional information about the ESA and Endangered Species Programs is available from the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). These two agencies, collectively known as "the Services," share responsibility for implementing the ESA and assisting all individuals (public and private) in the ESA compliance process.

NMFS: http://www.nmfs.noaa.gov/pr/laws/esa/
USFWS: http://www.fws.gov/endangered/whatwedo.html

GETTING STARTED WITH ESA COMPLIANCE AND WHO TO CONTACT

CLOMR and CLOMR-F applicants are responsible for demonstrating to FEMA that ESA compliance has been achieved prior to FEMA's review of a CLOMR or CLOMR-F application. The applicant may begin by contacting a local Service office, State wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F request would adversely affect the species. These entities are also available to discuss questions pertaining to listed species and ESA compliance.

NMFS Regional Offices: http://www.nmfs.noaa.gov/regional.htm
USFWS Office Directory: http://www.fws.gov/offices/

DEMONSTRATING COMPLIANCE WITH THE ESA

If species may be affected adversely by the project, the applicant (as a non-Federal entity) would be required to obtain compliance through the Section 10 process. This process includes applying for an Incidental Take Permit (ITP) and preparing a habitat conservation plan (HCP). Additional information about Section 10 requirements and the permit application process is available from NMFS and USFWS.

ITPs and NMFS: http://www.nmfs.noaa.gov/pr/permits/faq_esapermits.htm
ITPs and USFWS: http://www.fws.gov/endangered/hcp/hcpplan.html
HCPs and NMFS: http://www.nwr.noaa.gov/Salmon-Habitat/Habitat-Conservation-Plans/Index.cfm
HCPs and USFWS: http://www.fws.gov/endangered/hcp/index.html
NMFS Permit applications: http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm
USFWS Permit application: http://www.fws.gov/forms/3-200-56.pdf

To demonstrate to FEMA that ESA compliance has been achieved, the requestor must provide an ITP, an Incidental Take Statement, a "not likely to adversely affect" determination from the Services, or an official letter from the Services concurring that the project has "No Effect" on proposed or listed species or designated critical habitat. If the project is likely to cause jeopardy of a species' continued existence or adverse modification to designated critical habitat, then FEMA shall refuse to review the CLOMR or CLOMR-F request without prior project approval from the Services. If a Federal entity is involved in a proposal or project for which a CLOMR or CLOMR-F has been requested, then the applicant may coordinate with that agency to demonstrate to FEMA that Section 7 ESA compliance has been achieved through that other Federal agency.

Frequently Asked Questions

For which map change applications does FEMA require demonstrated ESA compliance?
FEMA requires applicants to demonstrate compliance for CLOMRs and CLOMR-Fs only.

Why is ESA compliance required before FEMA can review my CLOMR or CLOMR-F application?
All individuals in this country (private and public) have a legal responsibility to comply with the ESA. FEMA recognizes that potential projects for which a CLOMR or CLOMR-F has been requested may affect threatened and endangered species. As a result, FEMA requires documentation to show that potential projects comply with the ESA before a CLOMR or CLOMR-F application can be reviewed.

Why does FEMA not require demonstration of ESA compliance for other LOMC applications?
Many LOMC requests involve floodplain activities that have occurred already. As a result, FEMA does not have the opportunity to comment on these projects in terms of ESA compliance prior to the physical changes taking place. Private individuals and local and state jurisdictions are required to comply with the ESA independently of FEMA's process.

What will FEMA require from CLOMR and CLOMR-F applicants to demonstrate ESA compliance?
As part of the CLOMR or CLOMR-F application, the requestor must provide an ITP, an Incidental Take Statement, a "not likely to adversely affect" determination from the Services, or an official letter from the Services concurring that the project has "No Effect" on proposed or listed species or designated critical habitat.

How much time will be required to achieve ESA Compliance?
The timeframe needed to achieve ESA compliance will depend entirely on the complexity of the project, the extent to which species may be affected by the project, the quality of biological analyses conducted by the applicant, and the review process as determined by the Services. Therefore, we recommend that LOMC applicants coordinate with the Services as soon as possible within the project development process.

Who is available to answer my questions about ESA compliance?
NMFS and the USFWS both have staff available around the country to answer questions about threatened and endangered species and ESA compliance. Refer to the *NMFS Regional Offices* and *USFWS Office Directory* links on Page 1 of this guidance document to identify the nearest available Service office. FEMA does not have staff available to assist with this process.

How do I determine if there are threatened or endangered species or critical habitat in my project area?
The applicant may begin by contacting a local Service office, state wildlife agency office, or independent biologist to identify whether threatened or endangered species exist on the subject property and whether the project associated with the CLOMR or CLOMR-F would adversely affect the species.

Do I need to hire a biologist for this process?

While hiring a biologist may be unnecessary, doing so may help facilitate the process. Biologists familiar with subject species and the regulatory process can help adequately complete many of the studies required as part of the Section 10 process and fulfill other Section 10 requirements.

How are the following ESA-related terms defined?

"Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct and may include habitat modification or degradation.

"Harm" can arise from significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

"Section 7" requires all Federal agencies, in consultation with USFWS or NMFS, to use their authorities to further the purpose of the ESA and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.

"Section 10" lays out the guidelines under which a permit may be issued to non-Federal parties to authorize prohibited activities, such as take of endangered or threatened species.

"ITP" or incidental take permit is a permit issued under section 10(a)(1)(B) of the ESA to a non-Federal party undertaking an otherwise lawful project that might result in the "take" of an endangered or threatened species. Application for an incidental take permit is subject to certain requirements, including preparation by the permit applicant of a HCP.

"HCP" or habitat conservation plan is a legally binding plan that outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. It usually includes measures to minimize impacts and may include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area. An HCP is required before an incidental take permit may be issued to non-Federal parties.

Other ESA-related terms not described here may be defined on the following website:
http://www.fws.gov/endangered/pdfs/glossary.pdf

APPENDIX B
Example Letter Harris County to USFWS

H A R R I S C O U N T Y

Public Infrastructure Department **1001 Preston, 7th Floor**
Architecture & Engineering Division **Houston, Texas 77002**
(713) 755-5370

DATE

Mr. Stephen D. Parris
Field Supervisor
Clear Lake ES Field Office
U.S. Fish and Wildlife Service –
Southwest-Region 2
17629 El Camino Real #211
Houston, Texas 77058-3051

SUBJECT: Endangered Species Act Section 7 Consultation
[PROJECT NAME & LIMITS]

Dear Mr. Parris:

Per our conversation on October 18, 2010, with Ms. Donna Anderson of your office, I am enclosing the *U.S. Department of Homeland Security (USDHS) - Federal Emergency Management Agency's (FEMA) Procedural Memorandum 64 – Compliance with Endangered Species Act (ESA) for Letters of Map Change* dated August 18, 2010 and effective October 1, 2010. The Procedure Memorandum 64, for a "proposed modification of floodplain, floodways, or flood elevations based on physical and/or structural change" states that "ESA compliance must be documented to FEMA prior to issuance of CLOMR" and "FEMA must receive confirmation of ESA compliance from the Services" [USFWS/NMFS].

An application for a Conditional Letter of Map Revision (CLOMR) for the ***[PROJECT NAME]*** project was recently submitted by Harris County to FEMA. However, Harris County received notification that the application would not be approved without documentation of ESA compliance. Enclosed is the [*Endangered Species Investigation* dated November 12, 2009, in which Harris County's environmental consultant, ***[NAME]*** indicates that there are [***no endangered or threatened species or critical habitat located within the project limits. Additionally, the Texas Parks and Wildlife Department (TPWD), on [DATE], reviewed the project and found that the "project activity as proposed indicates minimal impacts to fish and wildlife resource" (see enclosed)***]*.

In order to satisfy the new FEMA requirements, Harris County is requesting a project specific review and concurrence letter that the ***[PROJECT NAME]*** project will have "No Effect" on any federally listed species and/or critical habitat. Harris County anticipates bidding this project in ***[DATE]***; therefore, your immediate attention to this matter would be appreciated.

Draft

If you have any questions regarding this project, please contact ***[STAFF member],*** Environmental Planner, at (713) 755-***[XXXX]***. If you would like to discuss general procedures established by your agency to handle these types of requests from Harris County, please contact me at (713) 755-2804.

Sincerely,

Nick J. Russo III
Team Leader - Environmental Services

Enclosures
CC: Donna Anderson, USFWS Clearlake Office
[***Consultant]***
[Consultant]
[***Precinct]***
Scott A. Owen, HCPID
Central File

APPENDIX C
Example Letter from USFWS

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Division of Ecological Services
17629 El Camino Real #211
Houston, Texas 77058-3051

April 2008

This responds to your request for threatened and endangered species information in the Clear Lake Ecological Services Field Office's area of responsibility. According to Section 7(a)(2) of the Endangered Species Act and the implementing regulations, it is the responsibility of each federal agency to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any federally listed species. Therefore, we are providing information to assist you in meeting your obligations under the Endangered Species Act.

A county by county listing of federally listed threatened and endangered species that occur within this office's work area can be found at http://www.fws.gov/southwest/es/EndangeredSpecies/lists/ListSpecies.cfm. You should use the county by county listing and other current species information to determine whether suitable habitat for a listed species is present at your project site. If suitable habitat is present, a qualified individual should conduct surveys to determine whether a listed species is present.

After completing a habitat evaluation and/or any necessary surveys, you should evaluate the project for potential effects to listed species and make one of the following determinations:

No effect – the proposed action will not affect federally listed species or critical habitat (i.e., suitable habitat for the species occurring in the project county is not present in or adjacent to the action area). No coordination or contact with the Service is necessary. However, if the project changes or additional information on the distribution of listed or proposed species becomes available, the project should be reanalyzed for effects not previously considered.

Is not likely to adversely affect – the project may affect listed species and/or critical habitat; however, the effects are expected to be discountable, insignificant, or completely beneficial. Certain avoidance and minimization measures may need to be implemented in order to reach this level of effects. You should seek written concurrence from the Service that adverse effects have been eliminated. Be sure to include all of the information and documentation you used to reach your decision with your request for concurrence. The Service must have this documentation before issuing a concurrence.

Is likely to adversely affect – adverse effects to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable, insignificant, or beneficial. If the overall effect of the proposed action is beneficial to the listed species but also is likely to cause some adverse effects to individuals of that species, then the proposed action "is likely to adversely affect" the listed species. An "is likely to adversely affect" determination requires formal Section 7 consultation with this office.

Regardless of your determination, the Service recommends that you maintain a complete record of the evaluation, including steps leading to the determination of affect, the qualified personnel conducting the evaluation, habitat conditions, site photographs, and any other related articles.

TAKE PRIDE IN AMERICA

The Service's Consultation Handbook is available online to assist you with further information on definitions, process, and fulfilling Endangered Species Act requirements for your projects at http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm.

If we can further assist you in understanding your obligations under the Endangered Species Act, please contact Kathy Nemec, Edith Erfling, or Catherine Yeargan at 281/286-8282.

Sincerely,

Stephen D. Parris

Stephen D. Parris
Field Supervisor, Clear Lake Field Office

APPENDIX D
Example FEMA-“Additional data required”

Federal Emergency Management Agency

Washington, D.C. 20472

Summary of Additional Data Required to Support a
Conditional Letter of Map Revision (CLOMR)

Case No.: 11-06-1080R

Requester: Mr. Gregory Frank

Community: Harris County

Community No.: 480287

The issues listed below must be addressed before we can continue the review of your request.

1. Please provide a document addressing the following points regarding the ESA compliance.
    a. Please provide a description of the action that could affect an endangered species
    b. Please provide a description of the specific area that may be affected by the action proposed in the CLOMR submittal
    c. Please provide a description of any listed species or critical habitat that may be affected by the proposed action in the CLOMR submittal
    d. Please provide a description of the manner in which the proposed action may affect any listed species or critical habitat and an analysis of any cumulative effects
    e. Please provide relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared
    f. Please submit any other relevant available information on the action, the affected listed species, or critical habitat.

Please send the required data directly to us at the address shown at the bottom of this page. For identification purposes, please include the case number referenced above on all correspondence.