

Chapter 4.0: Consultation, Permit, and Review Requirements

In this Chapter:

- Laws and procedures to be met
- Studies and plans reviewed
- Permits needed

Several federal and state laws and administrative procedures must be met by the alternatives. This chapter lists and briefly describes requirements that would apply to elements of this project, actions taken to assure compliance with these requirements, and the status of consultations or permit applications.

4.1 Applicable Legislation

4.1.1 Endangered Species Act of 1973

The ESA of 1973 (7 U.S.C. 136; 16 U.S.C. 460 et seq.), as amended, requires that Federal agencies ensure that their actions do not jeopardize threatened or endangered species and their critical habitats. The FWS is responsible to ensure that other agencies plan or modify proposed actions so that they will have a minimum impact on listed species and their habitats. Consultation to this end is required by Section 7 of the ESA. MFWP and BPA prepared a biological assessment on the original proposal for this project and submitted it to FWS on April 19, 2002. As a result of this informal consultation, the FWS issued a letter of concurrence based on that assessment (see Appendix D). Pending modifications to the original proposal, BPA and MFWP will provide a project update to the FWS for comment, which will list any impacts to ESA-listed species. FWS will then decide if the proposed action is likely to place in jeopardy a listed species or produce an adverse modification of designated critical habitat.

4.1.2 Federal Insecticide, Fungicide and Rodenticide Act of 1996

The use of rotenone and antimycin are both regulated under FIFRA (7 U.S.C. 136 et seq.). The EPA has given the state authority to authorize short-term exemption of water quality standards, specifically for the purpose of applying an aquatic pesticide. MFWP would apply to MDEQ for a 308 permit which allows such exemption.

4.1.3 Fish and Wildlife Conservation Act of 1980

The Fish and Wildlife Conservation Act of 1980 (16 USC 2901 et seq.) encourages federal agencies to conserve and promote conservation of non-game fish and wildlife species and their habitats.

4.1.4 Montana Environmental Policy Act of 1971

The state of Montana has adopted an Environmental Policy Act (MEPA), which is intended to ensure that environmental values are considered during decision-making by state and local agencies. The objectives and requirements of MEPA are similar to those of NEPA. To this end, MFWP and MDEQ have followed the guidelines for preparing a

joint agency MEPA/NEPA EIS as per the Montana Legislative Environmental Policy Office (Mitchell 2002), and the M.C.A. 75-1-201.

4.1.5 Montana Water Quality Act

The Montana Code Annotated (2003) statute pertaining to water quality standards is:

75-5-308. Short-term water authorizations—water quality standards.

(1) Because these activities promote the public interest, the department may, if necessary, authorize short-term exemptions from the water quality standards for the following activities:

- (a) emergency remediation activities that have been approved, authorized, or required by the department; and
- (b) application of a pesticide that is registered by the United States environmental protection agency pursuant to 7 U.S.C. 136(a) when it is used to control nuisance aquatic organisms or to eliminate undesirable and nonnative aquatic species.

(2) An authorization must include conditions that minimize, to the extent practicable, the magnitude of any change in the concentration of the parameters affected by the activity and the length of time during which any change may occur. The authorization must also include conditions that prevent significant risk to public health and that ensure that existing and designated uses of state water are protected and maintained upon completion of the activity. Authorizations issued under this section may include conditions that require water quality or quantity monitoring and reporting. In the performance of its responsibilities under this section, the department may negotiate operating agreements with other departments of state government that are intended to minimize duplication in review of activities eligible for authorizations under this section.

(3) An authorization to use a pesticide does not relieve a person from the duty to comply with Title 80, chapters 8 and 15. The department may not authorize an exemption from water quality standards for an activity that requires a discharge permit under rules adopted by the board pursuant to 75-5-401.

MFWP will apply for a 308 permit that authorizes a short-term exemption from water quality standards.

4.1.6 National Environmental Policy Act of 1969

This DEIS is being prepared pursuant to the National Environmental Policy Act (42 U.S.C. 4321 et. seq.) and the Council of Environmental Quality (CEQ) Implementing Regulations (40 C.F.R. 1500-1517) that require Federal agencies to assess the impacts that their proposed actions may have on the environment. This DEIS will provide BPA and the FS with valuable information concerning impacts that the proposed action may, or may not have, and allow for informed decision-making.

4.1.7 Sensitive Wildlife Species

Federal laws and direction applicable to sensitive species include the National Forest Management Act of 1976 and Forest Service Manual 2670. Amendment 21 to the Flathead's LRMP has standards to conduct analyses to review programs and activities, to determine their potential effect on sensitive species, and to prepare a biological evaluation. It also states "adverse impacts to sensitive species or their habitats should be avoided. If impacts cannot be avoided, the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole will

be analyzed. Project decisions will not result in loss of species viability or create significant trends towards federal listing." Future conservation strategies for each species will present direction on maintaining habitat diversity and managing for population viability as required by the NFMA and LRMP Amendment 21. The USDA Forest Service is bound by federal statutes (Endangered Species Act, National Forest Management Act), regulation (USDA 9500-4), and agency policy (FSM 2670) to conserve biological diversity on National Forest System lands. A goal in LRMP Amendment 21 is to "ensure that Forest Service actions do not contribute to the loss of viability of native species."

4.1.8 Wilderness Act of 1964

A portion of this project is proposed to occur in The Bob Marshall Wilderness, designated in 1964 by the U. S. Congress (16 U.S.C. 1121 (note), P.L. 88-577). The Spotted Bear Ranger District on the Flathead National Forest manages approximately 70 percent of the designated wilderness. Management objectives are to:

- Maintain an enduring system of high quality wilderness representative of National Forest ecotypes;
- Perpetuate the wilderness resource for future generations;
- Provide opportunities for public use, enjoyment, and understanding of wilderness and the unique experiences dependent upon on a wilderness setting; and
- Maintain plants and animals indigenous to the area by protecting the natural dynamic equilibrium associated with natural, complete ecosystems.

Motorized vehicles, motorized equipment, mechanized trail vehicles, and helicopter landings are not conforming uses and are not permitted in the wilderness area by the public. However, the Forest Supervisor may authorize use of motorized equipment and chemical applications as deemed necessary for the administration of the area and its resources, such as the proposed action (FSM 2320, Direction for Wilderness, June 1990). See Chapter 3 for a detailed discussion.

The FS will determine whether to authorize the use of motorized equipment and chemical application to carry out the objectives of this project.

4.2 Related Plans, Studies, Assessments

- The Biological Assessment for South Fork Flathead Watershed Westslope Cutthroat Trout Conservation Program was prepared by MFWP and BPA, April 19, 2002, in anticipation of a forthcoming Environmental Assessment (EA) to examine the use of rotenone to remove hybrid fish that threaten westslope cutthroat trout populations. The BA was used to provide data on listed species and potential environmental impacts.
- The Bob Marshall/Great Bear Motorized Equipment EA was prepared by MFWP, 2001. Public Review Draft, April 18.
- The EA of Brook Trout Eradication in Devine Creek Lake was prepared by MFWP, 1994. Final Document.
- The Fish, Wildlife and Habitat Management Framework for the BMWC was prepared by the FS and MFWP, April 1995. It establishes overarching goals shared by the two agencies in the management of fish and wildlife on the

BMWC. The document provided guidance regarding fish population management, fish stocking, chemical treatment of exotic species, and the use of motorized equipment in wilderness.

- The Fisheries Management Plan for the South Fork Flathead River Drainage prepared by MFWP, May 1991, outlines fisheries management direction for the South Fork Flathead River drainage from the headwaters to Hungry Horse Dam. It discusses species-specific management for species of concern (e.g., bull trout, westlope cutthroat trout, and mountain whitefish).
- The Flathead National Forest Land and Resource Management Plan was prepared by FS, December 1985 (currently under revision). The forest plan was used to provide general information on the affected environment and resource management goals with its amended Recreation Management Direction (1987) for the Bob Marshall Wilderness Complex.
- The Memorandum of Understanding and Conservation Agreement for Westslope Cutthroat Trout in Montana was prepared by MFWP, May 1999. This agreement established shared conservation goals for the westslope cutthroat trout. Signatories of the document include federal and state agencies and conservation and industry organizations. The agreement provided context and direction for alternative development in this DEIS.
- The Restoration of Native Cutthroat Trout in Jewel Basin Lakes was prepared by MFWP, 1986. A preliminary environmental review.
- The Specialist Report for South Fork Flathead Watershed Westslope Cutthroat Trout Conservation Program EIS was prepared by MFWP, January 2003. With content originally prepared for the initial EA, this document was used extensively to provide technical data regarding the proposed action involving the use of piscicides and their application. Specific information regarding potential treatment sites was also gleaned from the document.
- The Wilderness Act and Fish Stocking: An Overview of Legislation, Judicial Interpretation and Agency Implementation was prepared by Aldo Leopold Wilderness Research Institute, Rocky Mountain Research Station, FS. This document examines the role of state wildlife and federal wilderness managers with regard to fish restocking and balancing recreational fishing opportunities with wilderness values.
- The Tom Tom Lake Fish Rehabilitation was prepared by MFWP, 2000. Public Review Draft.
- The Westslope Cutthroat Trout Restoration in Headwater Lakes in the Flathead Basin was prepared by MFWP, 2001.
- Fisheries Mitigation Plan for Losses Attributable to the Construction and Operation of Hungry Horse Dam, MFWP, Confederated Salish and Kootenai Tribes, March 1991.

4.3 Non-applicable Legislation

4.3.1 Bald Eagle Protection Act of 1940

The Bald Eagle Protection Act (16 U.S.C. 668-668d, June 8, 1940, as amended 1959, 1962, 1972, and 1978) prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions. Because a small number of bald eagles may reside within foraging distance of proposed project sites, there is a remote possibility of some short-term impact on bald eagles. However, because the Act only covers intentional acts, or acts in “wanton disregard” of the safety of golden or bald eagles, this project is not viewed as subject to its compliance.

4.3.2 Clean Water Act of 1972

The Clean Water Act requires that states protect the water quality of their rivers, streams, lakes, and estuaries. To accomplish this, Section 303(d) of the Clean Water Act requires that each state develop a list of water bodies that do not meet the standards. The 303(d) list is a means of identifying water quality problems. Once a stream is placed on the list, the Clean Water Act requires that the state develop a plan to reduce pollution. States must submit this list to the EPA every two years. The South Fork of the Flathead is included in Montana’s 2002 303(d) Impaired Waters Database for flow modification due to hydromodification (from Hungry Horse Dam). However, no proposed action discussed in this DEIS would impact that assessment in any way. Because of the short-term nature and transient effects of any piscicides above the reservoir, no additional water bodies would be added to the 303(d) list or require pollution plans.

4.3.3 Cultural Resources

Federal historic and cultural preservation acts include the National Historic Preservation Act of 1966 (16 U.S.C. 470, P.L. 95-515), the Archeological Resource Protection Act of 1979 (16 U.S.C. 470aa et seq., P.L. 96-95), the Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 et seq., P.L. 93-291), the American Antiquities Act of 1906 (16 U.S.C. 431-433), and the American Indian Religious Freedom Act of 1978 (42 U.S.C. 1996, P.L. 95-341 section 2). No activities proposed in this DEIS would adversely affect resources protected under these acts.

4.3.4 Executive Order (EO) on Environmental Justice

As discussed in EO 12898, alternatives would not adversely affect any minority or economically disadvantaged groups in the project area. For this reason, the alternatives would not defeat the intent of the EO on Environmental Justice.

4.3.5 Floodplain/Wetlands Assessment

In accordance with Department of Energy regulations on compliance with Floodplains/Wetlands environmental review requirements (10 CFR 1022.12), and EOs 11988 and 11990, BPA has determined that floodplains and wetlands would not be affected by this project. Although crews would be working within floodplains and possibly wetlands around the lakes during treatment times, there would be no impacts to the natural and beneficial floodplain and wetland values. There would be no effects to lives and property and no effects on the survival, quality, and function of the wetland. Alternatives to the proposal were considered, including the no action alternative. Within the alternatives, no proposed structures would be built.

4.3.6 Migratory Bird Treaty Act of 1918

The Migratory Bird Treaty Act (16 U.S.C. §§ 703-712, July 3, 1918, as amended 1936, 1960, 1968, 1969, 1974, 1978, 1986 and 1989) implements various treaties and conventions between the United States and other countries, including Canada, Japan, Mexico, and the former Soviet Union, for the protection of migratory birds. Under the act, “taking,” killing, or possessing migratory birds or their eggs or nests is unlawful. Most species of birds are classified as migratory under the act, except for upland birds such as pheasant, chukar, and gray partridge. The act contains several exemptions, such as waterfowl hunting. Many types of development result in the taking of migratory birds: collision with windows, for example, is a leading cause of death among songbirds. Taking may be allowed under a scientific permit if research is deemed beneficial to migratory birds.

4.3.7 Noise Control Act of 1972

The proposed project would not violate any local, state, or federal noise regulations (42 U.S.C. 4901 et seq.). Noise impacts in wilderness areas would be short-term and have no cumulative impacts on resources.

4.3.8 Resource Conservation and Recovery Act of 1976

The Resource Conservation and Recovery Act (RCRA) of 1976 (42 U.S.C. 6901 et seq.), as amended, is designed to provide a program for managing and controlling hazardous wastes. No hazardous materials covered by this Act would be used in this project. Any solid wastes would be disposed of according to state law and RCRA at an approved sanitary landfill.

4.3.9 Safe Drinking Water Act of 1974

The Safe Drinking Water Act (SDWA) (42 U.S.C. sec 300f et. seq.) is designed to protect the quality of public drinking water and its sources. SDWA was adopted in 1974. EPA sets standards for drinking water quality and oversees the states, localities, and water suppliers who implement those standards.

The proposed action would not affect a sole-source aquifer. No new injection wells would be required and no pollutants would be expected to reach drinking water supplies as mentioned in the 1974 Act (42 U.S.C. 300f et seq.). The nearest drinking water supply is in the town of Columbia Falls located approximately 10 miles downstream of Hungry Horse Dam. Under the proposed action, natural detoxification of piscicides and potassium permanganate should occur before they enter the reservoir; thus, there should be no risks to municipal drinking water supplies.

4.3.10 Treaty Rights and Trust Responsibility

Portions of the project area have been and continue to be used traditionally by Native American groups. To learn about potential effects on traditional cultural properties (TCPs) as well as other concerns of the tribes, BPA corresponded with potentially affected Indian tribes. None of the tribes contacted expressed any concerns about the project.

4.3.11 Wild and Scenic Rivers Act of 1968

Pursuant to the Wild and Scenic Rivers Act of 1968 (P.L. 90-542, as amended), the South Fork is designated as a Wild River Segment and is classified as Management Area 18 (Wild and Scenic River Corridor) in the Forest Management Plan. However, as there would be no impacts to the main stem of the South Fork, the proposed project would not compromise the protections afforded by the Wild and Scenic Rivers Act.

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