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March 9, 2022

Rosi Dennett AICP
Front Range Land Solutions
210 Lincoln St
Longmont, CO
80501

Via Email

Subject: Additional Information for The Town Of Lyons Regarding the Endangered Species Act

Dear Rosi:

I am writing this letter to offer clarification on the Endangered Species Act of 1973 (ESA – as amended). As noted in the email prepared by BOT member Brakenridge the U.S. Fish and Wildlife Service (USFWS) is tasked with enforcement etc. of the ESA. The USFWS has the final authority on federally listed species and Designated Critical Habitats. Under the ESA there are different ‘sections’ that mandate how the law is administered, with a distinction between public and private consultation. Section 7 of the ESA allows for consultation between federal agencies (e.g., FEMA, USACOE) and the USFWS in an expedited manner. Section 7 is unique because it has specific clauses which direct all agencies to help with the conservation of listed species. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the USFWS to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. If a project is determined through early scoping (most importantly starting with a habitat assessment – if no habitat is present, a species can’t be present) to have both suitable habitat AND the potential to either impact the species indirectly through habitat modification or directly through take then formal consultation between the action agency and the USFWS will occur.

When there is potential to impact a listed species a Biological Assessment (BA) is prepared. One of the purposes of the biological assessment is to help make the determination of whether the proposed action is “likely to adversely affect” listed species and critical habitat. A BA is composed of the following sections:

- Description and Proposed Action
- Introduction
- Consultation History
- Proposed Management Action
- Species Considered and Species Evaluated
- Environmental Baseline
- Effects of the Action
- Conclusion
- Recommendations and Conservation Measures
- Mitigation Measures
- Effect Determination

With sufficient description of the proposed action and detailed information about the species impacted a ‘effect determination’ is possible. Effects are listed as follows:

- Beneficial effects – effects that are wholly positive, without any adverse effects, on listed species or designated critical habitat.

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- Direct effects – the direct or immediate effects of the project on the species or its habitat. Direct effects result from the agency action including the effects of interrelated actions and interdependent actions.
- Indirect effects – are caused by or result from the proposed action, are later in time, and are reasonably certain to occur. Indirect effects may occur outside of the area directly affected by the action.
- Cumulative effects – section 7 regulations require the Federal action agency to provide an analysis of cumulative effects. Future Federal actions requiring separate consultation are not considered in the cumulative effects section. Past and present impacts of non-Federal actions are part of the environmental baseline.

From this an ‘effect determination’ is made. Definitions used as part of the effect determination are legal terms and must be used correctly and are as follow:

- **No effect** – no effect on a listed species or designated critical habitat will occur. A BA is **not** prepared for No effect projects.
- **May affect, not likely to adversely affect** – the effects are expected to be discountable, insignificant, or completely beneficial. Insignificant effects relate to the size of impacts and should never reach the scale where take occurs. Discountable effects are those that are extremely unlikely to occur.
- **May affect, likely to adversely affect** – If any adverse effect to listed species, individuals or the population level, 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. Formal section 7 consultation is required to determine how and if a project may proceed.
- **Likely to jeopardize/adversely modify critical habitat** – Don’t ever get a project to this point!

Once a BA is presented to the USFWS they review it and then issue a Biological Opinion that contains a “take permit”, and other important information. The take permit allows the legal take of a specified number of individuals. The take permit only allows for actions that are incidental (not pre-meditated) and only associated with the specific action identified in the BA.

That is the process for how species protected under the ESA are consulted on with the USFWS. How does all this apply to Lyons?? First, regarding the Preble’s Meadow Jumping Mouse (PMJM), there was no suitable, occupied, or federally Designated Critical Habitat within Lyons prior to the flood and now post-flood. The USFWS was aware of this and was not requiring habitat assessments prior to any projects. Any consultation that would have been required post-flood would have been completed either between the USFWS and the USACOE or FEMA. Regardless, consultation was not required after the flood during the recovery efforts.

I want to provide additional thoughts and opinions regarding the request made by Planet Bluegrass to provide temporary camping at their property located between the St. Vrain River and Apple Valley Road. This stretch of the river has undergone significant change in the last nine years and now is in an early successional stage of plant community development. This area has been recolonized by both native and non-native (some invasive) plant species (no native plant communities are present).

The site offers suitable habitat as part of a home range for a number of wildlife species but it is not critical to the survival of any. Mule deer use it year-round as well as common species. Avian nesting habitat is limited because of the lack of a developed understory with a shrub component and the lack of large mature trees. The amount of time that camping would be allowed is very short and in my opinion would not have a deleterious impact on wildlife that currently use it because at the time of the year

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when camping would occur wildlife are in a time of plenty and are not compressed into small, critical habitat types.

Please contact me if you have questions.

Sincerely,

A handwritten signature in blue ink that reads "Jerry Powell, M.S.".

Jerry Powell, M.S.
Certified Ecologist