

## **SECTION 1000.00 - WILDLIFE, FISH, AND VEGETATION (DRAFT)**

### **SECTION 1010.00 - INTRODUCTION**

- 1010.01 Summary of Requirements.
- 1010.02 Abbreviations and Acronyms.
- 1010.03 Glossary

### **SECTION 1020.00 - APPLICABLE STATUTES AND REGULATIONS**

- 1020.01 National Environmental Policy Act.
- 1020.02 Federal
  - 1020.01.01 Endangered Species Act (ESA).
  - 1020.01.02 National Forest Management Act.
  - 1020.01.03 Fish and Wildlife Coordination Act.
  - 1020.01.04 Migratory Bird Treaty Act.
  - 1020.01.05 Executive Order 13186.
  - 1020.01.06 Bald and Golden Eagle Protection Act.
  - 1020.01.07 Magnuson-Stevens Act (MSA).
- 1020.03 Tribal Laws.
- 1020.04 State of Idaho.
  - 1020.04.01 Forest Practices Act.

### **SECTION 1030.00 - POLICY GUIDANCE**

### **SECTION 1040.00 - MOUS AND MOAS**

### **SECTION 1050.00 - TECHNICAL GUIDANCE**

- 1050.01 FHWA.
- 1050.02 ESA Procedures.
- 1050.03 Additional Guidance
  - 1050.03.01 4(d) Rule.
  - 1050.03.02 Additional Process Specifics
  - 1050.03.03 Revisions.
  - 1050.03.04 Section 9 Compliance.
  - 1050.03.05 References on ESA Compliance.
- 1050.04 Essential Fish Habitat (EFH) Consultation.
- 1050.05 Critical Fish Habitat Consultation.
- 1050.06 Projects on Federal Forest Land or Resource Areas—Biological Evaluations.
  - 1050.06.01 References on Biological Evaluations.
- 1050.07 Idaho Natural Heritage Program.
- 1050.08 Mitigation Measures.
- 1050.09 Other Useful Guidance
  - 1050.09.01 ITD Resource
  - 1050.09.02 FHWA Environmental Guidebook.

### **SECTION 1060.00 - PERMITS AND APPROVALS**

- 1060.01 Threatened and Endangered Species

### **SECTION 1070.00 - NON-ROAD PROJECT REQUIREMENTS**

### **SECTION 1080.00 - EXHIBITS**

- Exhibit 1000-1 Gray Wolf “No Jeopardy Statement”
- Exhibit 1000-2 Section 7 MOA on Procedures and BE/BA Format

## SECTION 1000.00 - WILDLIFE, FISH, AND VEGETATION (DRAFT)

### SECTION 1010.00 - INTRODUCTION

This section describes the policies and procedures related to wildlife, fish, and habitat that apply to ITD projects, particularly the implications of Endangered Species Act (ESA) species listings. It includes information on requirements related to threatened and endangered species, critical habitat, wildlife, fish, and vegetation.

ITD's primary goal is to provide safe, efficient, dependable and environmentally responsible transportation facilities and services. ITD is committed to preserving, protecting, and enhancing the state's natural resources while operating, maintaining, and improving the state's transportation system. Wildlife, fish, and sensitive plants require special consideration during project planning and development. In addition to ESA compliance, areas of particular concern include:

- Direct effects from construction such as noise disturbance or other disruption of habitat.
- Interference to essential wildlife functions such as wintering, foraging, migration, breeding and/or rearing.
- Degradation or loss of essential habitat.
- Habitat fragmentation and edge effects.
- Effects related to collisions between vehicles and animals.
- Loss of animal or plant populations.
- Impacts to wildlife food resources.
- Water quality impacts.
- Effects on migration or dispersal of organisms including mammals, reptiles, amphibians, fish, insects, and/or ground dwelling birds, where the project could create or exacerbate barriers to movement.

Sections on water quality ([Section 710.00](#)) and wetlands ([Section 1100.00](#)) are also relevant to consideration of fish and wildlife issues. Road projects are the focus of this section. However, these or similar policies, permits, and procedures also apply to other transportation projects.

**1010.01 Summary of Requirements.** If a transportation project involves federal funds or permits, or if it is on federal lands or connects to an existing federal project, it is said to have a federal nexus. If the project has a federal nexus, it must comply with NEPA and the ESA, particularly Section 7. All projects, regardless of funding source, must comply with Section 9 of the ESA.

**1010.02 Abbreviations and Acronyms.**

Abbreviations and acronyms specific to this chapter are listed below.

|       |                                                                 |
|-------|-----------------------------------------------------------------|
| BA    | Biological Assessment*                                          |
| BE    | Biological Evaluation*                                          |
| BO    | Biological Opinion                                              |
| BMP   | Best Management Practice                                        |
| BLM   | Bureau of Land Management                                       |
| EFH   | Essential Fish Habitat                                          |
| ESA   | Endangered Species Act                                          |
| ESU   | Evolutionarily Significant Unit                                 |
| HUC   | Hydrologic Unit Code                                            |
| IDFG  | Idaho Department of Fish and Game                               |
| NEPA  | National Environmental Policy Act                               |
| NFMA  | National Forest Management Act                                  |
| NMFS  | National Marine Fisheries Service (now known as NOAA Fisheries) |
| MSA   | Magnuson-Stevens Act                                            |
| NWP   | Nationwide Permit                                               |
| OHWM  | Ordinary High Water Mark or line                                |
| PBA   | Programmatic Biological Assessment                              |
| PHS   | Priority Habitats & Species                                     |
| PFMC  | Pacific Fishery Management Council                              |
| RPA   | Reasonable and Prudent Alternative                              |
| SIR   | Species Impact Report                                           |
| USFWS | U.S. Fish & Wildlife Service                                    |

\*These two documents are the same except a BA is required for an EIS while a BE is the correct nomenclature for all other NEPA documents and CEs. The Abbreviation may be used interchangeably in this chapter and where only BE is used, it assumes the BA in case of an EIS.

**1010.03 Glossary**

***Anadramous Fish***—Species that hatch in freshwater, mature in saltwater, and return to freshwater to spawn.

***Aquifer Recharge Area***—Area that has a critical replenishing effect on aquifers used for potable water.

***Baffle***—A flow-deflecting structure that provides low-velocity resting water for the passage of fish.

***Candidate Species***—Any species of fish, wildlife, or plant considered for possible addition to the list of endangered and threatened species. These are *taxa* for which the NOAA Fisheries or USFWS has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions.

***Cumulative Effects***—Effects of future state, local, or private actions reasonably certain to occur in the action area.

***Critical Habitat***—Specific area occupied by a listed species within its geographic range, which contains the physical or biological features essential to the conservation of the species and which may require special protection or management considerations.

***Endangered Species***—Any species that is in danger of extinction throughout all or a significant portion of its range.

***Evolutionarily Significant Unit***—A designation used by NOAA Fisheries Service for certain local salmon populations or “runs” which are treated as individual species under the Endangered Species Act. This is equivalent to the U.S. Fish and Wildlife Service (USFWS) “Distinct Population Segment” classification.

***Federal Nexus***—When the federal government is connected to a project either by owning land within the project limits, providing project funding, or by requiring a permit.

***Habitat***—Area where a plant or animal naturally or normally completes its life cycle.

***Incidental Take***—Take of listed species that results from, but is not the intention of, carrying out an otherwise lawful activity.

***Indirect Effects***—Effects caused by or resulting from the proposed action but that occurs later in time, including effects resulting from associated development and other activities that occur following improvements in transportation.

***Interdependent Effects***—Effects caused by actions that have no independent utility apart from the proposed action.

***Interrelated Effects***—Effects created by a proposed action that would not occur “but for” that action.

***Jurisdiction***—Governing authority that interprets and applies laws and regulations.

***Large Woody Debris***—Conifer or deciduous logs, limbs, or root wads of a certain diameter that interact with the stream channel and contribute to the habitat diversity of the stream.

***Late-Successional***—Stage in forest development that includes mature and old growth forest and associated plant and animal species.

***Listed Species***—Any species of fish, wildlife, or plant determined to be endangered or threatened under Section 4 of the ESA.

**Old Growth**—Forest stand with moderate to high canopy closure; a multi-layered, multi-species canopy dominated by large overstory trees; a high incidence of large trees with large, broken tops, and other indications of decadence; numerous large snags and heavy accumulations of logs and other woody debris on the ground.

**Programmatic Biological Assessment**—A BA designed to cover specific impacts or impacts on a number of projects where the impacts are negligible but greater than a 21 CFR 771.117(c) listed impact.

**Proposed Species**—Any species of fish, wildlife, or plant that is proposed by NOAA FISHERIES or USFWS for federal listing under Section 4 of the ESA.

**Species Impact Report**—A report covering possible impacts to species or habitat not listed as Threatened or Endangered but appearing on a project specific species list from FWS or other resource agency.

**Species List**—The list of threatened and endangered species provided by USFWS for a given area. Currently the list is provided by county.

**Take**—Defined under the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct,” including modification to a species' habitat.

**Threatened Species**—Any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

**Viability**—Ability of a population to maintain sufficient size so it persists over time in spite of normal fluctuations in numbers; usually expressed as a probability of maintaining a specific population for a defined period.

**Watershed**—Basin including all water and land areas that drains to a common body of water.

## SECTION 1020.00 - APPLICABLE STATUTES AND REGULATIONS

**1020.01 National Environmental Policy Act.** The National Environmental Policy Act (NEPA), 42 USC Section 4231, requires that all actions sponsored, funded, permitted, or approved by federal agencies undergo planning to ensure that environmental considerations such as impacts related to fish and wildlife are given due weight in project decision-making.

Federal implementing regulations are at 23 CFR 771 (FHWA) and 40 CFR 1500-1508 (CEQ). For details see [Section 200.00](#).

### 1020.02 Federal

**1020.01.01 Endangered Species Act (ESA).** The criteria for determining threatened and endangered plant and animal species is provided by the ESA of 1973, which is administered by NOAA Fisheries and USFWS. The goals of the ESA include species conservation, ecosystem conservation, and species recovery.

Section 4 of the ESA allows for the listing of species as threatened or endangered based on habitat loss or degradation, over utilization, disease or predation, inadequacy of

existing regulation mechanisms, or other human-caused factors. Section 4(d) allows for the enactment of regulations to provide for the protection and conservation of listed species. It may allow for the “take” of threatened species. Section 7 of the ESA requires each federal agency to ensure its actions to authorize, permit, or fund a project, do not jeopardize the continued existence of any threatened or endangered species. It describes consultation procedures and conservation obligations.

Section 9 of the ESA prohibits a “take” of listed species. “Take” is defined as to “harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect or attempt to engage in such conduct” (1532(18)). An exception to the “take” prohibition applies to endangered plants on non-federal lands, unless the taking is in knowing violation of state law (1538(a)(2)).

The habitat of listed species is also protected under Section 9. This prohibition is broadly defined and applies to privately and publicly owned lands. Under USFWS regulations, Section 9 applies to all threatened and endangered species. Under NOAA Fisheries regulations, Section 9 applies to all endangered species. NOAA Fisheries evaluates each threatened species under its jurisdiction on a species by species basis to determine whether or not the “take” prohibition will apply. Section 4d of the ESA allows for each service (USFWS and NOAA Fisheries) to develop special rules (4d rules) that apply a more appropriate level of protection for each threatened species. These protections may be less restrictive than those under Section 9.

Because of the habitat requirements of recently listed salmonids, planning processes under the ESA and the federal Clean Water Act (CWA) are becoming increasingly integrated. The U.S. Environmental Protection Agency (USEPA) and Idaho State Department of Environmental Quality (DEQ) are working to ensure that water quality permits and procedures meet the goals and requirements of the ESA. NOAA Fisheries, USFWS, and USEPA are increasing coordination efforts and are reviewing permit requirements, like those in Sections 402 and 404 of the CWA, which could affect listed salmonids. As a result, procedures and policies related to water quality could be modified. As these changes occur, updates will be made in [Section 710.00](#). Regulations pertaining to wetlands also overlap with ESA requirements because wetlands could be habitat for federally listed plants and animals. USFWS also has an important role in reviewing permits pertaining to wetlands. The details of wetland permitting are covered in [Section 1160.00](#). The ESA can be viewed at <http://www4.law.cornell.edu/uscode/>. Click Title 16, then Chapter 35, Endangered Species Act of 1973; Or go to <http://www.fws.gov/>. Click Endangered Species (near the top), then ESA & What We Do. The ESA is available in HTML and PDF formats.

**1020.01.02 National Forest Management Act.** The primary goal of the National Forest Management Act (NFMA, 16 USC 1604 (g)(3)(B)) is to maintain multiple use and species diversity on federal forest lands. The NFMA applies directly to lands administered by the U.S. Forest Service (USFS), but also provides direction for Bureau of Land Management (BLM) land management plans. The BLM and USFS have integrated NEPA requirements with their land management regulations.

The USFS has developed forest-specific “forest plans” which identify “species of concern” found within that forest. This list is comprised of several categories of species such as federally listed species, USFS sensitive species, survey and manage species, and

state-listed species. Forest plans can cover a wide range of species (e.g. slugs, lichens, mammals). Forest Service staff within each forest district decides which designated species to include on its species of concern list. Different requirements are associated with different species ranking; however, actions on federal land must always comply with the ESA.

The Northwest Forest Plan (NFP) is a management plan affecting federal forestlands within the range of the northern spotted owl in western Idaho, Oregon, and northern California. The standards and guidelines set forth in this plan supersede any existing forest plans within the range of the spotted owl. The NFP also applies directly to National Forests without existing, approved, forest plans within the range of the spotted owl. The goals of this plan include: maintaining late-successional and old growth habitat and ecosystems, maintaining biological diversity, restoring and maintaining ecological health of watersheds, and promoting District economic stability by providing a sustainable supply of timber and other forest products.

**1020.01.03 Fish and Wildlife Coordination Act.** The Fish and Wildlife Coordination Act (16 USC 661-667 (e)) authorizes the USFWS, NOAA Fisheries, and the Idaho Department of Fish and Game (IDFG) to investigate all proposed federal and non-federal actions needing a federal permit or license, which would impound, divert, deepen, or otherwise control or modify a stream or other body of water and to make mitigation or enhancement recommendations.

The primary goal of this act is to incorporate wildlife conservation with water resource development programs. The statute can be viewed at <http://www4.law.cornell.edu/uscode/>. Click Popular Names, then Part 13, then Fish and Wildlife Coordination Act.

**1020.01.04 Migratory Bird Treaty Act.** This federal law, administered by the USFWS, makes it unlawful to take, import, export, possess, sell, purchase, or barter any migratory bird, with the exception of the taking of game birds during established hunting seasons. The law also applies to feathers, eggs, nests, and products made from migratory birds. This law is of particular concern when birds nest on bridges, buildings and signs.

The statute can be viewed at <http://www.fws.gov/laws/lawsdigest/migtrea.html>

**1020.01.05 Executive Order 13186.** The Executive Order directs each Federal agency taking actions having or likely to have a negative impact on migratory bird populations to work with the U.S. Fish and Wildlife Service to develop an agreement to conserve those birds. The protocols developed by this consultation are intended to guide future agency regulatory actions and policy decisions; renewal of permits, contracts or other agreements; and the creation of or revisions to land management plans. In addition to avoiding or minimizing impacts to migratory bird populations, agencies will be expected to take reasonable steps that include restoring and enhancing habitat, preventing or abating pollution affecting birds, and incorporating migratory bird conservation into agency planning processes whenever possible.

At this time there is no MOA between FWS and FHWA directing the implementation of this Executive Order. Until such time as a MOA is signed, federally funded transportation projects will not be required to treat migratory bird impacts any differently than they have



been treated under the existing Migratory Bird Act.

<http://www.fws.gov/laws/lawsdigest/migtrea.html>

**1020.01.06 Bald and Golden Eagle Protection Act.** This federal law, administered by the USFWS, makes it unlawful to take, import, export, sell, purchase, or barter any bald or golden eagle, their parts, products, nests, or eggs. “Take” includes pursuing, shooting, poisoning, wounding, killing, capturing, trapping, collecting, molesting, or disturbing the eagles. Permits may be issued by the USFWS for scientific or exhibition use, or for traditional and cultural use by Native Americans. All ITD projects must be in compliance with the Bald and Golden Eagle Protection Act. The statute can be viewed at:

<http://www4.law.cornell.edu/uscode/>. Click Popular Names, then Part 3, select Bald

Eagle Protection Act. <http://www.fws.gov/laws/lawsdigest/baldegl.html>

**1020.01.07 Magnuson-Stevens Act (MSA).** Under the Fishery Conservation and Management act of 1976 (Magnuson Act), NOAA Fisheries was given legislative authority to regulate the fisheries of the United States. The Act also established eight District Fisheries Management Councils. These Councils prepared Fishery Management Plans (FMPs) to govern their management activities that were submitted to NOAA Fisheries for approval. In 1996, this Act was amended to emphasize the sustainability of the nation’s Fisheries and create a new habitat conservation approach. This habitat is called Essential Fish Habitat (EFH). The Act is now known as the Magnuson-Stevens Act.

The pacific salmon fishery management unit includes chinook (*Oncorhynchus tshawytscha*), coho (*Oncorhynchus kisutch*), and pink salmon (*Oncorhynchus gorbuscha*). This designation is not limited to federally listed species. Federal agencies must consult with NOAA Fisheries on all activities, or proposed activities, authorized, funded, or undertaken by the agency that may adversely affect EFH. Information on EFH can be found at the NOAA Fisheries homepage: <http://www.nmfs.noaa.gov/>.

**1020.03 Tribal Laws.** Projects on tribal lands may be subject to tribal laws that regulate fish, wildlife, and habitat. Projects not on tribal land could affect treaty reserved resources or species of tribal significance. The appropriate tribal biologist should always be contacted to discuss any regulations that may apply to the project.

#### **1020.04 State of Idaho.**

**1020.04.01 Forest Practices Act.** The Idaho 1974 Forest Practices Act (IDAPA 20.02.01) is directed towards timber harvesting and reforestation on nonfederal Forestland. It regulates forest management related activities such as road construction, pesticide and herbicide use, and work in waters of the United States. Forest Practices Application (FPA)/Notification procedures are detailed at <http://www.idahoforests.org/bmps.htm>. Forest Practices Board is conducting a comprehensive revision of the permanent forest practices rules based on the following goals on both state-owned and private forest lands:

- To provide ESA compliance for aquatic and riparian-dependant species.
- To restore and maintain riparian habitat to support a harvestable supply of fish.
- To meet the requirements of the CWA for water quality.



- To keep the timber industry economically viable in Idaho.

Information on the Forest Practices Act can be found at: <http://www3.state.id.us/idstat/TOC/38013KTOC.html>.

## **SECTION 1030.00 - POLICY GUIDANCE**

No policies are currently in force.

## **SECTION 1040.00 - MOUS AND MOAS**

See [Exhibit 1000-2](#), “Procedures Relating to Section 7 of the Endangered Species Act and Transportation Projects in Idaho.”

## **SECTION 1050.00 - TECHNICAL GUIDANCE**

**1050.01 FHWA.** [FHWA Technical Advisory T6640.8A](#) gives guidelines for preparing environmental documents, including water body modification and wildlife impacts, and threatened or endangered species. See [Exhibit 300-4](#) or click for online details, [FHWA Technical Advisory T6640-8A](#).

**1050.02 ESA Procedures.** All ITD projects are subject to Section 9 of the ESA (prohibited acts). If the project has a federal nexus such as federal funding or permitting, it is also subject to Section 7 of the ESA. ITD has made ESA compliance an agency-wide priority. Coordination between various ITD offices will increase the efficiency and effectiveness of the ESA analysis. ITD identifies potential impacts to listed or proposed species associated with a proposed action and then attempts to avoid, minimize, or mitigate for these impacts. For most actions, ITD conducts preliminary environmental reviews to identify likely impacts early in the project design. This approach allows for design adjustments if impacts to listed or proposed species are identified.

The following is the ITD/FHWA/FWSNOAA Fisheries Memorandum of Agreement on Section 7 of the ESA guidance for processing Biological Assessments and Biological Evaluations for formal and informal consultation.

### **PROCEDURES RELATING TO SECTION 7 OF THE ENDANGERED SPECIES ACT AND TRANSPORTATION PROJECTS IN IDAHO**

*Note: This section contains the operating instructions of the Memorandum with explanatory notes after certain sections. The entire Memorandum is not reproduced here. See [Exhibit 1000-2](#) for the unabridged Memorandum.*

#### **3. General Procedure for ESA Section 7 Consultation**

- a. Quarterly county lists of all Endangered, Threatened, Proposed and Candidate species will be sent by FWS to each ITD District, ITD Headquarters Environmental Section and the FHWA Idaho Division Office.

*(Note: By supplying a quarterly list, there should be no reason for not having a list that is less than 180 days old. When a list is included in any document, check the date to be certain it is within the 180-day requirement.)*

- b Early involvement in the development of projects will be initiated by ITD with FWS and NOAA Fisheries (the Services). All meetings will be coordinated through the ITD District Environmental Planner. In order to assure that all agencies can attend meetings and field reviews, early coordination is essential for all meetings. In addition to regular project coordination meetings, an annual meeting will be scheduled between each district and designated representatives of the Services to review the approved statewide Transportation Improvement Plan.

***(Note: Early involvement of the Services is essential for a quick turn around for concurrence. As soon as a project is sufficiently confirmed so that a Purpose and Need, a Project Description and a 651 Form can be drafted, contact the Services and discuss the project description, the species list and the probable impacts and determinations. Once the coordination is established with the Services, then a scope of work can be established for a consultant to begin environmental field work.)***

Written records are to be kept by FWS and NOAA Fisheries staff throughout project discussion and review. ITD District staff will maintain a complete project record including correspondence, meeting notes, telephone conversation logs and field notes. Meeting notes and other appropriate records will be provided to the Service liaisons for their acknowledgement or correction, which will provide verification of the agencies' understanding of the status of project development issues. Upon receipt of a draft BA, there will be a complete review and written record with explanation of issues identified. Revisions and subsequent review of later versions of the document will address issues identified in the previous reviews. ITD will clearly identify changes made to the original document to facilitate review of revised documents.

*(Note: During the development of the draft BE/BA with the Services, formal notes may not be exchanged. This development period is meant to be informal to speed up the development of the draft as much as possible. Once the draft is complete and forwarded to ITD, it then becomes a formal draft and will be forwarded to the Services. All information exchanged between ITD and the Services from that point on will be written or verified in writing.*

- c. If the District Environmental Planner and the FHWA Operations Engineer determine that a proposed federally-funded (or permitted) action will not effect (NE) listed species or critical habitat, consultation with the Services is not required under ESA. NE determinations will be developed by ITD and concurred upon by FHWA. ITD may, at their option, consult with the Services in developing NE determinations. A copy of the NE determinations agreed upon by ITD and FHWA and the FHWA concurrence will be included in the NEPA document for the project. There are two potential contexts for "no effect" determinations for individual projects. A) All species are no effect- in that case communication is internal to the transportation agencies. B) Some species are no effect, others are may affect—the BE/BA for the project will include "no effect" determinations with brief rationales.

*(Note: Since species lists are prepared county wide, there will generally be species or critical habitat listed that have no connection with the project. In this case the District Environmental Planner will identify these No Effect species/habitat and contact the FHWA Operations Engineer*

*for that district. If the Operations Engineer agrees that the No Effect determination is valid, then consultation for ESA is complete on those species/habitat. The written confirmation of the FHWA NE should be included in the BE/BA)*

*Under NEPA, FHWA has to be presented with documentation that the No Effect species have been considered. This can be accomplished by drafting a No Effect letter to FHWA for their concurrence and include it in the BE/BA and in a No Effect section in the NEPA document/Categorical Exclusion.*

*ITD recognizes that there is no requirement to include No Effect species in the BE/BA but has established the policy to include them in the BE/BA and then attach the BE/BA and concurrence letter to the NEPA document/Categorical Exclusion. Doing this will meet the requirements to consider these species for NEPA and eliminate the need for a separate analysis.)*

- d. A Biological Evaluation (BE) or Biological Assessment (BA) will be prepared for any species on which a NE determination cannot be supported by ITD and FHWA. In accordance with 50 CFR 402.12, listed and proposed species analysis will be prepared as a BE or, in the case of an EIS, a BA. As stated in the FHWA Guidance Memorandum dated February 20, 2002 (included in Appendix A), “candidate status does not provide a species protection under the listing process and neither consultation or conference, either formal or informal is required on Federal-aid highway projects for candidate species under the ESA Section 7 requirements.” The Services caution that should a candidate species become listed prior to or during the construction of a project, evaluation (including the possible need for the preparation of a BE/BA) would be necessary. The decision whether to include any candidate species in the BE/BA will be left to the discretion of ITD, who agrees to assume full responsibility to perform a possible re-evaluation if the candidate species becomes listed or proposed for listing prior to the completion of project construction. Candidate species will be addressed in the NEPA document under guidance of FHWA.

*(Note: ITD policy is to proceed with a project without consultation on a candidate species if it is reasonable to expect that the project can be completed prior to a listing action. Two cautions must be observed. First, if the project is obviously going to cause damage to a candidate species or its habitat, do not use the lack of consultation requirement as a license to proceed. ITD is keenly aware of its moral responsibility to consider all aspects of the environment regardless of lack of an over riding authority requiring that consideration. If this situation arises, contact the FHWA Operations Engineer and coordinate a plan of action. This plan may well involve coordinating with the Services.*

*Second, district project managers must be aware that the listing actions within the Services are largely initiated by litigation. There is no guarantee that a species may not be listed rapidly through an emergency court action.)*

Based upon the information and analysis developed in the BE/BA document, one of the following determinations will be made:

- (1) No Effect (NE)—A determination of NE is applicable if (a) there are no listed or proposed species or designated or proposed critical habitat occurring in the area, or (b) the project will have no impacts on the species (documentation of this is required). A NE determination is only appropriate when the proposed action will have no direct or indirect effect whatsoever on listed or proposed species. It

is anticipated that most NE determinations would be made prior to preparation of a BE/BA (as described in section 3.d above). No concurrence with the Services is required for a NE determination.

(2) May Affect, Not Likely to Adversely Affect—(NLAA)—This determination allows the project to proceed through informal consultation. A NLAA determination requires concurrence from the Services.

(3) Likely to Adversely Affect—(LAA)—This determination results in the need to advance to formal consultation procedures described below.

Guidance in making the correct determination of effect can be found in the FWS Snake river Basin Office Threatened, Endangered, Proposed and Candidate Species: Biological Information and Guidance manual and in the aquatic species matrices provided by the Services. In accordance with 50 CFR 402.12(f), FHWA, as the federal lead agency will determine the contents of the BE or BA. The BE/BA format is presented in Appendix B.  
*(Note: It may not always be wise to strive for a No Effect determination. In some cases, and especially for wide ranging species, it may be far simpler to assume that there may be a chance of the species passing through the project area than it is to prove they will not. This may be a remote possibility and the affect on the project could be virtually nil. For this type of impact ESA does not require mitigation for a NLAA and NEPA requires only that mitigation be considered.)*

- e Project documents shall include the most recent quarterly species lists provided by FWS (within 180 days of construction). This requirement may be satisfied by identifying the species and including the FWS Office Activity Tracking System (OALS) number of the District list.
- f ITD Districts shall develop draft BE/BAs in consultation with the Services as outlined in the ITD Environmental Process Manual.
- g. The Services shall review the completed BE/BAs submitted by ITD Headquarters and provide written concurrence or specific written comments regarding what is needed to obtain concurrence. This written response shall be transmitted to ITD Headquarters environmental Section, which will be responsible for transmitting the response to the district of origin. Copies of this written response will also be transmitted to FHWA by the Services.  
*(Note: See note under 3b)*
- h. If consultation has been concluded but additional species are listed or proposed (or critical habitat has been designated) prior to completion of construction, and the species (or designated critical habitat) occurs in the action area and a NE call cannot be made, ITD/FHWA must reinitiate consultation (formal or informal, as appropriate) with the Services. Reinitiating consultation for the new species will be accomplished in the same manner as the initial consultation. Species for which consultation has previously been concluded will not be re-addressed.
- i. All communications between consultants and the services must go through ITD.

*(Note: ITD policy is to strictly adhere to this requirement. There is no prohibition for the consultant to speak directly with the Services if the district is aware of the contact and receives a written summary of the contact. The district is responsible for managing the*

*project and must be part of any negotiations or instructions that may include adding additional work to the scope of the consultant contract.)*

### **Informal Consultation**

- a. Prior to starting the BE/BA, ITD District Staff (and their consultants, if relevant) will meet with the Services to discuss the project and determine the need to visit the project site with the regulatory agencies. Discussions may center on project description, potential effects, mitigation and enhancements, etc. Projects should be introduced at the annual meeting, as early in the project development process as possible. ITD Districts will inform and coordinate with ITD Headquarters, FHWA and the services in advance of site visits, project meetings and other relevant project actions.

*(Note: The production of a BE/BA is a joint effort between the district, the Services and the consultant. Although the consultant is not an official member of the Level 1 team, the consultant is performing the actual production of the BE/BA. The broader the involvement and better the communication between the three entities, the better the product and the quicker it will receive concurrence.)*

- b. The Services will review the completed BE/BA. The Services can also suggest measures to avoid or reduce impacts and can also suggest additions or changes that will benefit the species. If the Services do not concur with a NLAA determination, they will prepare written comments describing the specific reasons for disagreement, and may recommend initiating formal consultation.

*(Note: Review by the Services will be ongoing as the BE/BA is drafted. The district may send for review, to the Services, any portion of the BE/BA as the consultant drafts it or, after the initial meeting with the Services, the consultant may draft the entire BE/BA and send it through the district to the services for review. The process for reviewing any individual BE/BA will be established at the initial meeting with the Services. The draft may be submitted more than once until the Services agree that it is adequate for concurrence.)*

- c. The Services will respond to submittals of final BE/BAs with a letter indicating concurrence or non-concurrence within 30 days of receipt of the document. In the event that the services are unable to respond within 30 days, the Services will inform ITD as early as it is known to them and state the reasons for the delay and also the at what time a response can be expected.

*(Note: Once the Level 1 team, including the Services, is satisfied with the BE/BA, that final draft is sent to ITD HQ for a review as to policy, procedure and fiscal appropriateness of mitigation measures. When HQ is satisfied that there is no violation of policy or expenditures, the BE/BA is formally sent to the Services under a cover letter asking for concurrence. Since there has been a team effort in drafting the BE/BA there should be no reason to not expect concurrence within the statutory 30 days.)*

- d. When the Services concur with the determination of effects on listed species (and/or critical habitat) as presented in the BE/BA as NLAA, consultation under Section 7 is concluded with a letter of concurrence.

- e. If during informal consultation with the services, the project is anticipated to result in a determination of LAA for listed species or critical habitat, FHWA and ITD Headquarters will be notified by the District. The Services will work with ITD, FHWA and other agencies as appropriate on project modifications to reduce or avoid effects to listed species. If a NLAA determination cannot be reached through project modifications, then formal consultation is necessary for the project to continue.

## 5. Formal Consultation

- a. Guidelines for formal consultations are presented in chapter 4 of the Endangered Species consultation Handbook, *Procedures for Conducting Consultation and Guidance Under Section 7 of the Endangered Species Act*. FHWA is the lead agency for formal consultation.

(Note: The handbook can be found at  
<http://www.fws.gov/endangered/esa-library/pdf/TOC-GLOS.pdf>)

- b. In cases where ITD makes a determination of LAA or the Services do not concur with ITD's determination of NLAA, ITD will submit a BE/BA to FHWA as a basis to initiate formal consultation. Upon their approval, FHWA will submit the BE/BA to FWS and/or NOAA Fisheries with a request for formal consultation under ESA Section 7.
- c. Formal consultation concludes with a Biological Opinion (BO) issued by the FWS and/or NOAA Fisheries. The analysis in the BO will result in a determination of "either jeopardy" or "no jeopardy" to the species.

1.If a "jeopardy" BO is issued, options available to ITD/FHWA include: (1) drop the project, (2) accept the reasonable and prudent alternatives necessary to change the project to a "no jeopardy", or (3) develop their own alternative(s) and reinstate the consultation process. Prior to issuing a final BO with a jeopardy determination, the Services will work with ITD/FHWA to develop a reasonable and prudent alternative for the project.

(Note: The resolution of the formal consultation can work very much as does the drafting of the BE/BA. Informal interchange between the Services can be used to reach an agreeable resolution that is then formally submitted to the Services through ITD HQ. In this case, document all interchanges between the ITD, FHWA, the consultant and ITD.)

2.If a "No jeopardy" BO is issued, the ITD/FHWA can continue with the project as long as they incorporate the reasonable and prudent measures of the BO into the project.

- d. Formal consultation will be completed no later than 90 days after initiation, unless FHWA, FWS and/or NOAA Fisheries agree in writing to an extension beyond the 90 day period. Within 30 working days of the request for formal consultation, the Services will provide written acknowledgement of the consultation request and advise ITD and FHWA of any data deficiencies. The Services have 45 days after the conclusion of formal consultation to issue their BO. The BO will include an incidental take statement that assures protection from prosecution for take under the ESA, providing ITD and FHWA adhere to the reasonable and prudent alternative or measures.

*(Note: In fairness to the Services and considering the workload they are under, it may not always be realistic to insist on holding to the mandated timeline. If the Services cannot complete the reviews in the allotted time, they can either simply deny concurrence or ask for more information to extend the timeline. Work closely with the Services so they have all the needed data in a timely manner.)*

## **6. Elevation Process**

- a. The Districts will work directly with FWS and NOAA Fisheries liaisons on project level consultations. These “Level 1” groups should include the FWS and NOAA Fisheries liaisons, the District Environmental Planners and the District Project Managers. The ITD Headquarters Environmental Planners and FHWA Operations Engineers that are assigned to individual districts may be included as appropriate. (Note that there will be actions and issues not related to specific projects that would involve the Services liaisons working with ITD Headquarters staff and FHWA staff; for instance, programmatic consultations or procedural matters.)

*(Note: Although the project consultant is not officially a part of the Level 1 Team, include the consultant in all activities pertaining to the preparation of the BE/BA. If an elevation process is necessary, the District should take the lead in that process.)*

- b. The “Level 2” team operates at the policy and program level and would receive issues that the Level 1 team elevates for resolution. This group includes the District Engineer, the ITD HQ Environmental Section Manager, FHWA Field Operations Engineer, NOAA State Programs Manager and FWS Federal Activities Coordinator.

*(Note: Due to the schedules maintained by these administrators, be prepared for a 30 to 45 day waiting period for a resolution at this level.)*

- c. The “Level 3” executive level group includes the FHWA Division Administrator, ITD chief Engineer for development and FWS and NOAA Fisheries Office Supervisors. These four managers’ deputies may represent them in Level 3 matters, which include overall program management and resolution of issues elevated to them by the Level 2 group.

*(Note: Scheduling for a Level 3 meeting at this level may require 60 to 90 days.)*

- d. When Level 1 is not able to reach agreement, any member of the team may request the elevation of an issue. Full team consensus on elevation is not required to initiate elevation. The Level 1 team will cooperate to document the issues and each of the positions. That documentation will be provided to Level 2 within 30 days of the decision to initiate elevation.
- e. The Level 2 team will respond to the Level 1 team within 30 days to notify them of their resolution or planned action. The Level 2 team resolution will be returned to the Level 1 team for implementation. If resolution cannot be reached by the Level 2 team, the issue will be elevated to the Level 3 team.
- f. The Level 3 team will respond to the Level 2 team within 30 days to notify them of their resolution or planned action.



**Attachments** (*See in Exhibit 1000-8*)

Appendix A: FHWA Memorandum, February 20, 2002, "Management of the Endangered Species Act Environmental Analysis and Consultation Process".

Appendix B: Format for Biological Evaluation/Biological Assessment

**1050.03 Additional Guidance**

**1050.03.01 4(d) Rule.** In June 2000, NOAA Fisheries adopted a rule under Section 4(d) of the ESA. This rule prohibits the take of 14 salmon and steelhead in Evolutionarily Significant Units (ESUs) in the Pacific Northwest. Four of these ESUs are in Idaho (see <http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Sockeye/SOSNR.cfm>). The 4(d) rule was published July 10, 2000 (65FR 42422). The rule applies to any agency, authority, or private individual subject to U.S. jurisdiction. However, the take prohibition is not applied to threatened species when the take is associated with a NOAA Fisheries-approved program (one of the 13 "limits"). The 13 limits can be considered exceptions to the 4(d) take prohibition. NOAA Fisheries has determined that these programs, activities, and criteria will minimize impacts on threatened steelhead and salmon enough so additional federal protection is not needed. NOTE: If there is a federal nexus, Section 7 consultation is still required.

NOAA Fisheries will periodically monitor these activities to ensure they continue to qualify under the 4(d) limit. Entities that have been granted a take limit for their activities must conduct monitoring to ensure they remain consistent with the approved plan. The limits include:

- ESA Permits.
- Ongoing Scientific Research (expired March 7, 2001).
- Fish Rescue and Salvage Actions (limited to agency personnel or their designees).
- Fishery Management (limited to fishery management agencies).
- Artificial Propagation (federal or state hatcheries).
- Joint Tribal/State Plans (covering aspects of fishery management).
- Scientific Research Activities (either permitted or conducted by the state).
- Habitat Restoration (if part of a state certified watershed conservation plan).
- Water Diversion Screening (must comply with NOAA FISHERIES' Juvenile Fish Screening Criteria).
- Routine Road Maintenance (equivalent to or better than the Oregon State Department of Transportation program).
- Municipal, Residential, Commercial, and Industrial Development and Redevelopment.

## 1050.03.02 Additional Process Specifics

### 1. *No Effects*

If, during the preliminary evaluation, it is determined that there will be no impact to federally listed species (any listed species under NOAA Fisheries and/or USFWS jurisdiction) the project biologist or district Environmental Planner will prepare a “No Effect” statement.

- If the project involves determinations of both No Effect and May Effect, the No Effect statement will be included in the BE/BA that goes to the appropriate service.
- If the project involves only No Effect determinations, the No Effect will be included in the NEPA document or CE and will be cleared by FHWA, not the services. The process for clearing a No Effect with FHWA is the same process as is used by the Services.
- No effect letters/statements should be sent directly to FHWA and can be transmitted by e-mail to receive an informal approval prior to sending the completed environmental evaluation. Negotiating the No Effect approval with FHWA will be the same process as negotiating a draft BA approval with FWS prior to submitting the final draft through HQ for the concurrence.

A No Effect statement, section or letter should conclude with the following statement: ***“This determination satisfies our responsibilities under Section 7 (c) of the Endangered Species Act, and is included in this Environmental Evaluation for FHWA concurrence. ITD will continue to monitor any change in status of these species and will be prepared to re-evaluate potential project impacts if necessary.”***

### 2. *Programmatic Biological Evaluations/Assessments (Under Development)*

The purpose of PBE development is to streamline the Section 7 consultation process. PBEs are designed to receive advance concurrence from the Services on certain road maintenance, preservation, and improvement programs that are likely to be implemented in the future. They cover only those projects that can meet the effect determinations, project conditions, and conservation measures described in the PBE. USFWS and NOAA Fisheries species are addressed in separate PBEs. There are currently no PBEs for T & E Species in the ITD ESA process.

If the project can be addressed under a PBE, the project biologist ensures that the potential effects do not exceed anticipated levels and assigns the appropriate conservation measures which are to be included as part of the project. Photos and a vicinity map are attached to the determination form and it is sent to the appropriate. Individual project consultation with the Service is not necessary. After completion of the first ten projects covered under each PBE, ITD will meet with the Services to discuss the projects and the PBE process. Thereafter the meeting will be held annually. If any listed or proposed species or critical habitat is not covered under the PBE. The Services be consulted to see if an individual

BA is necessary. For controversial or high profile projects, the project biologist may choose to complete an individual BE even if the project is covered under the PBE. Projects that occur on federal lands may also require an individual BE.

### 3. *Individual Biological Evaluations (Assessments)*

A BE is an evaluation of the potential impact of a specific project on federally listed threatened, endangered, and proposed species and designated and proposed critical habitat. An individual BE must be prepared if the proposed activity has a federal nexus, could impact a listed Threatened or Endangered species or its critical habitat, and is not covered in part or entirely under an existing Programmatic BE. Several similar projects (such as bridge scour repair projects) can be “batched” into one BE to streamline the review process. The basic purpose of a BE is to evaluate potential effects and determine the need for consultation. (Note: A BA is the same thing as a BE except that a BA is prepared for an EIS, while the BE is prepared for EAs and Categorical Exclusions.) It is possible to have a project with only Candidate species and no listed Threatened, Endangered, or Proposed species. In this case the FWS does not require a BE/BA or consultation. The District Environmental Planner or consultant may choose to prepare a **Species Impact Report (SIR)**. This report will contain a current copy of the species list, a narrative concerning the likelihood of encountering the species on the project, the projected impact to the species or habitat and the proposed mitigation, if any. The Species Impact Report will be included as a section in the Environmental Evaluation package forwarded to FHWA. If there is no chance of impact to a candidate species, that information can be included in a No Effect letter following the procedure for No Effect determinations in the MOA in Section (2) above.

### 4. *Species of Concern*

The Conservation Data Center (CDC) may also have a list of species of concern, as may other resource agencies. These species of concern are not required to be covered under Section 7 of the ESA. Under NEPA, these species should be addressed. In setting up consultant contracts for ESA BEs, include as a part of the contract a requirement for the consultant to survey the ecological health of the project area. If there are areas of especially prime habitat or species that will be disproportionately impacted by the project, these impacts must be covered. They need not be covered by a BE. The Species Impact Report (SIR) is a good way to address these non listed, impacted species and habitats and the SIR should be included in the Environmental Evaluation. A formal determination is not required for this report since the species is not formally listed.

If there are no unusual or disproportionate impacts to non-listed species, a statement should be included in the Environmental Evaluation stating that the general ecology of the project area has been surveyed for environmental impact. The following is a suggested statement:

**“In addition to meeting the requirements of Section 7 of the Endangered Species Act, the project area has been surveyed by a professional biologist to determine if there are long lasting adverse impacts to the general site**

**ecology. No unusual or disproportionate impacts that may jeopardize unlisted species, species of concern or their habitat or long lasting adverse ecological impacts have been discovered.”**

#### **5. Submittal Process**

If consultant prepared, the draft BE (for informal consultation) should first be submitted to the Senior Environmental Planner of the district of origination. This assumes that the Services have been actively involved in preparation of the draft BE through coordination with the District Environmental Planner. Upon acceptance by the Environmental Planner, he will forward the BE to the ITD HQ Environmental Section Manager for review for policy and mitigation compliance. Upon acceptance by the Section Manager, the BE will be submitted to USFWS. Upon concurrence by USFWS the concurrence letter will be returned to ITD HQ for distribution to the district. The concurrence will be included in the Environmental Evaluation for forwarding to FHWA.

**1050.03.03 Revisions.** Draft BEs are often in a constant state of revision during preparation. Once the draft is completed to the satisfaction of the district and the Services it is sent to HQ as a final BE. In the event that a review by either of the Services requires revision to the BE, the BE will be returned to HQ with written comments. HQ may comment on the Services review or may forward the comments to the District for work with the consultant on the revisions. When the revisions are completed the BE will be returned to HQ for submittal to FWS, as it was in the original process. Include with the revision submittal will be a copy of the review comments and a separate sheet detailing how each review comment has been addressed or revised and the page number of the revision in the revised BE. It is important to include these sheets as the BE may have changed substantially and it is time consuming for the reviewer to try to relocate these revisions without the guidance of the revision sheet.

When submitting revisions, resubmit an entire document or check with the Services reviewer if it appears to be more efficient to send only the revised pages.

**1050.03.04 Section 9 Compliance.** Section 9 of the ESA prohibits the “take” of listed species. To ensure Section 9 compliance, projects with no federal nexus must avoid the take of threatened and endangered species. The take of threatened species may be allowed under certain circumstances if a 4d rule applies to the situation. Section 4(d) applies to states with cooperative agreements to manage wildlife resources under ESA.

**1050.03.05 References on ESA Compliance.** The references described below may be useful in understanding ESA requirements and preparing biological assessments:

***FHWA Guidance***—The *FHWA Guidelines for the Fulfillment of Interagency Cooperation Under Section 7 of the Endangered Species Act* (January 1988) describes Section 7 requirements and their relation to the federal highways program.

An earlier version of these guidelines is accessible in PDF format on FHWA’s *Environmental Guidebook* along with the Federal Interagency Memorandum of Understanding (MOU) for Implementation of the ESA (November 8, 1994) and other documents on endangered species online at FHWA’s web site: <http://www.fhwa.dot.gov/> Click FHWA Programs, then Environment, then Environmental Guidebook. Or go to

<http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

***USFWS Endangered Species Homepage***—This web site contains various useful documents such as the *ESA Section 7 Consultation* book and Recovery plans. Go to <http://endangered.fws.gov/>, then click ESA & What We Do.

***National Marine Fisheries Service Homepage***—Refer to this site for NOAA Fisheries species list requests. Other information on threatened and endangered species under NOAA Fisheries jurisdiction can be found here: <http://www.nwr.noaa.gov/>.

**1050.04 Essential Fish Habitat (EFH) Consultation.** For ITD projects with a federal nexus that may have an adverse effect on EFH, consultation is required. To streamline the process, EFH consultation can occur through the NEPA, EA, ESA, or other federal process agreed upon by NOAA Fisheries and the federal action agency. Since the BE contains a detailed analysis of project impacts to critical habitat and the environmental baseline, it should already address most requirements of the EFH impact analysis. The EFH section in the BE therefore is not expected to exceed one page in length. The EFH analysis should include:

- A brief introductory paragraph describing why addressing EFH is required.
- A definition of the EFH designation for the Fisheries potentially affected by the project.
- An identification of the fish species likely to occur in the project area and a brief description of their use of the project action area (significant prey species like Pacific sand lance should also be considered).
- A brief statement of potential impacts to EFH.
- A determination of effect for EFH (either “no effect” or “adverse effect”).

If the determination of effect is “adverse effect”, NOAA Fisheries must provide EFH conservation recommendations to the federal agency that submitted the environmental documentation. The federal action agency must then provide a detailed written response within 30 days after receiving them (or at least 10 days prior to final approval of the action, if a decision by the federal agency is required in less than 30 days). The written response must include a description of avoidance measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. If the response is inconsistent with the recommendations made by NOAA Fisheries, adequate justification for not following the recommendations by NOAA Fisheries must be provided. If the federal action agency determines that an action or will not affect EFH, no consultation is required.

For ITD projects with no federal nexus, EFH consultation is voluntary. In situations where non-federal actions occur in areas under a NOAA Fisheries-approved Conservation Plan, NOAA Fisheries participation in, and approval of the Plan would be combined with the EFH consultation and would constitute the NOAA Fisheries requirements of the Magnuson-Stevens Act for providing advisory conservation recommendations to state agencies. Included in this scenario would be coordination with Section 4(d) rulemaking, Section 4(f) recovery planning, and Section 10 permitting under the ESA.

**1050.05 Critical Fish Habitat Consultation.** The Endangered Species Act (ESA) requires the federal government to designate “critical habitat” for any species it lists under the ESA; in this case, salmon and steelhead. “Critical habitat” is defined as: (1) specific areas within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation.

Information on location of the critical habitat for Salmonids can be found at

<http://www.nwr.noaa.gov/Salmon-Habitat/Critical-Habitat/>. Or consult this information:

[Federal Register: February 16, 2000 (Volume 65, Number 32)]

[Rules and Regulations]

[Page 7764-7787]

From the Federal Register Online via GPO Access [wais.access.gpo.gov]

[DOCID:fr16fe00-25]

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 990128036-0025-02; I.D. 012100E]

RIN 0648-AG49

Designated Critical Habitat: Critical Habitat for 19

Evolutionarily Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho, and California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

Always begin consultation for Essential Fish Habitat with a meeting or conversation with NOAA Fisheries to ascertain the depth of information that will be needed to obtain concurrence. Consultation for FWS critical habitat is conducted just as it is for a listed species. Contact the Service before the field work is initiated in order to determine exactly what information is expected from the BE/BA. If a No Effect determination is obvious then the determination is forwarded to FHWA and no further consultation is required from FWS.

#### **1050.06 Projects on Federal Forest Land or Resource Areas—Biological**

**Evaluations.** The agency responsible for the affected forest (USFS) or resource area (BLM) should be contacted to obtain a species of concern list. Before any ground disturbing activity can occur, surveys must be performed for each managed species that may be present in the project area. Surveys may take up to a year to complete.

##### **1050.06.01 References on Biological Evaluations.**

*USFS Manual*—This manual, with further guidance on writing BEs, is online at

<http://www.fs.fed.us/im/directives/>. *BLM Homepage*—This site contains information on the Northwest Forest Plan, the National Forest Management Act, and species of concern: <http://www.or.blm.gov/>.

***FHWA Fish and Wildlife Coordination Flowchart***—This flowchart (December 1998) provides guidelines for compliance with the Fish and Wildlife Coordination Act

**1050.07 Idaho Natural Heritage Program.** The Conservation Data Center (CDC) is the Idaho office of the Natural Heritage Program and is a division of the Department of Fish and Game. The CDC collects data about existing native ecosystems and rare plant species in Idaho. It develops and recommends strategies for protecting native ecosystems and plant species most threatened in the state. Natural heritage data is part of ITD's BE review process. Impacts to natural heritage habitats and species should be evaluated during the project development phase.

**1050.08 Mitigation Measures.** ITD practice is to first avoid then minimize impacts to wildlife, fish, sensitive plants, and their habitat. Unavoidable impacts generally require mitigation, which is planned during project design. During the mitigation design, coordination between offices is necessary. The designer should work closely with the District environmental office. Mitigation can involve:

- Designing vertical and horizontal road alignment shifts and modifications to avoid sensitive habitats.
- Installing wildlife overpasses.
- Replacing culverts that impede fish passage.
- Including fish baffles in culverts.
- Reducing clearing limits to save significant trees and other native habitats.
- Installing wildlife reflectors or other measures to reduce vehicle/animal collisions.
- Habitat improvements including native plantings and placing large woody debris in streams.
- Providing wildlife fencing where accident statistics indicate the need.
- Replacement of destroyed or damaged habitat.

Long-term maintenance needs should be considered when designing sustainable mitigation systems.

## **1050.09 Other Useful Guidance**

### **1050.09.01 ITD Resource**

**ITD Environmental GIS Workbench**—(Under Development)

**1050.09.02 FHWA Environmental Guidebook.** In addition to its ESA information, FHWA's online Environmental Guidebook contains documents on wildlife, habitat, and ecosystems. Topics include biodiversity, ecosystem management, and ecological mitigation. See also Watershed Management and Endangered Species. Available on FHWA's web site: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.



## SECTION 1060.00 - PERMITS AND APPROVALS

### 1060.01 Threatened and Endangered Species

Because critical habitat of federally listed species is protected under the ESA, several permits that pertain primarily to water quality and wetlands also overlap with threatened and endangered species. The water quality permits, described in detail in [Section 760.00](#), include Section 401, 402 and 404 permits. The wetland permits are described in [Section 1160.00](#).

## SECTION 1070.00 - NON-ROAD PROJECT REQUIREMENTS

Rail, airport, or non-motorized transport systems are generally subject to the same policies, procedures, and permits that apply to road systems. Public-use airports must address specific wildlife hazards on or near airports. These issues are addressed in the Federal Aviation Administration (FAA) Publication, Hazardous Wildlife Attractants on or Near Airports (No. 150/5200- 33, May 1, 1997). See online at [http://wildlife-mitigation.tc.faa.gov/public\\_html/index.html](http://wildlife-mitigation.tc.faa.gov/public_html/index.html).

## SECTION 1080.00 - EXHIBITS

### ***Exhibit 1000-1 Gray Wolf “No Jeopardy Statement”***

Since the translocation of wolves from Canada, the population in Idaho south of Interstate Highway 90 is considered “*experimental, non-essential*” under Section 10 (j) of the Endangered Species Act. Under these circumstances, Federal action agencies are required to confer with the Fish and Wildlife Service (the Service) if their actions are likely to jeopardize the continued existence of gray wolves (50 CFR 17.83). The Service does not anticipate any actions that would result in a “likely to jeopardize the continued existence” determination for the reintroduced, experimental population of wolves.

***Exhibit 1000-2 Section 7 MOA on Procedures and BE/BA Format***

**Memorandum of Agreement**  
**on**  
**Procedures Relating to**  
**Section 7 of the Endangered Species Act and**  
**Transportation Projects In Idaho**

**1. Introduction**

Section 7(a)(1) of the Endangered Species Act (ESA) states that all Federal agencies shall utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species. Additionally, Section 7(a)(2) requires that all Federal agencies insure that their actions do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat of the listed species. This agreement outlines procedures to be followed by the signatory agencies in implementing Section 7 of the Endangered Species Act.

**2. Lead Agency—Delegation of Authority**

As lead agency for federal actions involving highway and related transportation projects, the Federal Highway Administration (FHWA) is ultimately responsible for ESA Section 7 compliance. Under implementing regulations for the Endangered Species Act, including 50 CFR 402.08, FHWA has delegated authority to the Idaho Transportation Department (ITD) for preparation of Biological Evaluations and Biological Assessments (BE/BA's) and for informal consultation with U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NOAA Fisheries). FHWA will be involved in project-specific cases as requested by ITD, FWS, or NOAA Fisheries, in accordance with other agreements among these agencies, and/ or on a periodic basis of their own determination for verification purposes. The following procedure outlines how the requirements of ESA Section 7 will be implemented.

**3. General Procedures for ESA Section 7 Consultation**

- a. Quarterly county lists of all Endangered, Threatened, Proposed, and Candidate species will be sent by FWS to each ITD District, ITD Headquarters Environmental Section and the FHWA Idaho Division office.
- b. Early involvement in the development of projects will be initiated by ITD with FWS and NOAA Fisheries (the Services). All meetings will be coordinated through the ITD District Environmental Planner. In order to assure that all agencies can attend meetings and field reviews, early coordination is essential for all meetings. In addition to regular project coordination meetings, an annual meeting will be scheduled between each district and designated representatives of the Services to review the approved Statewide Transportation Improvement Plan.

Written records are to be kept by FWS and NOAA Fisheries staff throughout project discussion and review. ITD District staff will maintain a complete project record including correspondence, meeting notes, telephone conversation logs, and field notes. Meeting notes and other appropriate records will be provided to the Service liaisons for their acknowledgement or correction, which will provide verification of the agencies' understanding of the status of project development issues. Upon receipt of a draft BA, there will be a complete review and written record with explanation of issues identified. Revisions and subsequent review of later versions of the document will address issues identified in the previous reviews. ITD will clearly identify changes made to the original document to facilitate review of revised documents.

- c. If the District Environmental Planner and the FHWA Operations Engineer determine that a proposed federally-funded (or permitted) action will not effect (NE) listed species or critical habitat, consultation with the Services is not required under ESA. NE determinations will be developed by ITD and concurred upon by FHWA. ITD may, at their option, consult with the Services in developing NE determinations. A copy of the NE determinations agreed upon by ITD and FHWA and the FHWA concurrence will be included in the NEPA document for the project. There are two potential contexts for "no effect" determinations for individual projects. A) All species are no effect- in that case communication is internal to the transportation agencies. B) Some species are no effect, others are may affect—the BE/BA for the project will include "no effect" determinations with brief rationales.
- d. A Biological Evaluation (BE) or Biological Assessment (BA) will be prepared for any species on which a NE determination cannot be supported by ITD and FHWA. In accordance with 50 CFR 402.12, listed and proposed species analysis will be prepared as a BE or, in the case of an EIS, a, BA. As stated in the FHWA Guidance Memorandum dated February 20, 2002 (included in Appendix A), "candidate status does not provide a species protection under the listing process and neither consultation or conference, either formal or informal is required on Federal-aid highway projects for candidate species under the ESA Section 7 requirements." The Services caution that should a candidate species become listed prior to or during the construction of a project, evaluation (including the possible need for the preparation of a BE/BA) would be necessary. The decision whether to include any candidate species in the BE/BA will be left to the discretion of ITD, who agrees to assume full responsibility to perform a possible re-evaluation if the candidate species becomes listed or proposed for listing prior to the completion of project construction. Candidate species will be addressed in the NEPA document under guidance of FHWA.

Based upon the information and analysis developed in the BE/BA document, one of the following determinations will be made:

- (1) No Effect (NE) - A determination of NE is applicable if: (1) there are no listed or proposed species or designated or proposed critical habitat occurring in the area, or (2) the project will have no impacts on the species (documentation of this is required). A NE determination is only appropriate when the proposed action will have no direct or indirect effect whatsoever on listed or proposed species. It is anticipated that most NE determinations would be made prior to preparation of a BE/BA (as described in section 3.d., above). No concurrence with the Services is required for a NE determination.

- (2) May affect but not likely to adversely affect (NLAA) - This determination allows the project to proceed through informal consultation. A NLAA determination requires concurrence from the Services.
- (3) Likely to adversely affect (LAA) - This determination results in the need to advance to formal consultation procedures described below.

Guidance in making the correct determination of effect can be found in the FWS Snake River Basin Office *Threatened, Endangered, Proposed, and Candidate Species: Biological Information and Guidance* manual and in the aquatic species matrices provided by the Services. In accordance with 50 CFR 402.12(f), FHWA, as the federal lead agency will determine the contents of the BE or BA. The BE/BA format is presented in Appendix B.

- e. Project documents shall include the most recent quarterly species lists provided by FWS (within 180 days of construction). This requirement may be satisfied by identifying the species and including the OALS tracking number of the District's list.
  - f. ITD Districts will develop draft BE/BAs in consultation with the Services as outlined in the ITD Environmental Process Manual.
- g. The Services shall review the completed BE/BA submitted by ITD Headquarters and provide written concurrence or specific written comments regarding what is needed to obtain concurrence. This written response shall be transmitted to ITD Headquarters Environmental Section, which will be responsible for transmitting the response to the District of origin. Copies of this written response will also be transmitted to FHWA by the Services.
- h. If consultation has been concluded but additional species are listed or proposed (or critical habitat has been designated) prior to completion of construction, and the species (or designated critical habitat) occurs in the action area and a NE call cannot be made, ITD/FHWA must reinitiate consultation (formal or informal, as appropriate) with the Services. Reinitiating consultation for the new species will be accomplished in the same manner as the initial consultation. Species for which consultation has previously been concluded will not be re-addressed.
- i. All communication between consultants and the Services must go thru ITD.

#### **4. Informal Consultation**

- a. Prior to starting the BE/BA, ITD District Staff (and their consultants, if relevant) will meet with the Services to discuss the project and determine the need to visit the project site with the regulatory agencies. Discussions may center on project description, potential effects, mitigations, and enhancement, etc. Projects should be introduced at the annual meeting, as early in the project development process as possible. ITD Districts will inform and coordinate with ITD Headquarters, FHWA, and the Services in advance of site visits, project meetings, and other relevant project actions
- b. The Services will review the completed BE/BA. The Services can also suggest measures to avoid or reduce impacts and can also suggest additions or changes that will benefit the species. If the Services do not concur with a NLAA determination, they will prepare written comments describing the specific reasons for disagreement, and may recommend modifications to the project that will result in a NLAA determination, or may recommend initiating formal consultation.
- c. The Services will respond to submittals of final BE/BAs with a letter indicating concurrence or non-concurrence within 30 days of receipt of the document. In the event that the Services are unable to respond within 30 days, the Services will inform ITD as early as it is known to them and state the reasons for the delay and also at what time a response can be expected.
- d. When the Services concur with the determination of effects on listed species (and/or critical habitat) as presented in the BE/BA as NLAA, consultation under Section 7 is concluded with a letter of concurrence.
- e. If during informal consultation with the Services, the project is anticipated to result in a determination of LAA for listed species or critical habitat, FHWA and ITD Headquarters will be notified by the District. The Services will work with ITD, FHWA, and other agencies as appropriate on project modifications to reduce or avoid effects to listed species. If a NLAA determination cannot be reached through project modifications, then formal consultation is necessary for the project to continue.

## **5. Formal Consultation**

- a. Guidelines for formal consultation are presented in Chapter 4 of the Endangered Species Consultation Handbook, *Procedures for Conducting Consultation and Guidance Under Section 7 of the Endangered Species Act*. FHWA is the lead agency for formal consultation.
- b. In cases where ITD makes a determination of LAA or the Services do not concur with ITD's determination of NLAA, ITD will submit a BE/BA to FHWA as a basis to initiate formal consultation. Upon their approval, FHWA will submit the BE/BA to FWS and/or NOAA Fisheries with a request for formal consultation under ESA Section 7.
- c. Formal consultation concludes with a Biological Opinion (BO) issued by the FWS and/or NOAA Fisheries. The analysis in the BO will result in a determination of either "jeopardy" or "no jeopardy" to the species.
  - 1. If a "jeopardy" BO is issued, options available to ITD/FHWA include: (1) drop the project, (2) accept the reasonable and prudent alternative necessary to change the project to a "no jeopardy", or (3) develop their own alternative(s) and

reinitiate the consultation process. Prior to issuing a final BO with a jeopardy call, the Services will work with ITD/FHWA to develop a reasonable and prudent alternative for the project.

2. If a “no jeopardy” BO is issued, ITD/FHWA can continue with the project as long as they incorporate the reasonable and prudent measures of the BO into the project.
- d. Formal consultation will be completed no later than 90 days after initiation, unless FHWA, FWS and/or NOAA Fisheries agree in writing to an extension beyond the 90-day period. Within 30 working days of the request for formal consultation, the Services will provide written acknowledgement of the consultation request, and advise ITD and FHWA of any data deficiencies. The Services have 45 days after the conclusion of formal consultation to issue their BO. The BO will include an incidental take statement that assures protection from prosecution for take under the ESA providing ITD and FHWA adhere to the reasonable and prudent alternative or measures.

## **6. Emergency Consultation**

In the event of an emergency such as a natural disaster that may effect listed species and/or designated critical habitats, ITD will inform FHWA of the event and the impacts on endangered species. FHWA will notify the Services of the event and request initiation of emergency consultation. Emergency consultation will be conducted as per Chapter 8 of the Endangered Species Consultation Handbook. It is recognized that ITD will respond to the emergency situation as appropriate to safeguard life, limb, and property, and some elements of emergency consultation may not be able to be conducted until after the emergency response effort has been begun. Emergency consultation is addressed in 50 CFR 402.05

## **7. Elevation Process**

- a. The Districts will work directly with FWS and NOAA Fisheries liaisons on project level consultations. These “Level 1” groups should include the FWS and NOAA Fisheries liaisons, the District Environmental Planners, and the District Project Managers. The ITD Headquarters Environmental Planners and FHWA Operations Engineers that are assigned to individual districts may be included as appropriate. (Note that there will be actions and issues not related to specific projects that would involve the Services liaisons working with ITD Headquarters staff and FHWA staff; for instance, programmatic consultations or procedural matters.)
- b. The “Level 2” team operates at the policy and program level and would receive issues that the Level 1 team elevates for resolution. This group includes the District Engineer, the ITD HQ Environmental Section Manager, FHWA Field Operations Engineer, NOAA State Programs Manager, and FWS Federal Activities Coordinator.
- c. The “Level 3” executive-level group includes the FHWA Assistant Division Administrator, ITD Assistant Chief Engineer for Development, and FWS and NOAA Office Supervisors. These four managers’ deputies may represent them in Level 3 matters, which include overall program management and resolution of issues elevated to them by the Level 2 group.
- d. When Level 1 is not able to reach agreement, any member of the team may request the elevation of an issue. Full team consensus on elevation is not required to initiate

elevation. The Level 1 team will cooperate to document the issues and each of the positions. That documentation will be provided to Level 2 within 30 days of the decision to initiate elevation.

- e. The Level 2 team will respond to the Level 1 team within 30 days to notify them of their resolution or planned action. The Level 2 team resolution will be returned to the Level 1 team for implementation. If resolution cannot be reached by the Level 2 team, the issue will be elevated to the Level 3 team.
- f. The Level 3 team will respond to the Level 2 team within 30 days to notify them of their resolution or planned action.

\*\*\* \*\* \* \*\* \*\*\*

Attachments:

**Appendix A:** FHWA Memorandum, February 20, 2002, "Management of the Endangered Species Act Environmental Analysis and Consultation Process"

**Appendix B:** Format for Biological Evaluation/Biological Assessment

It is agreed that the undersigned agencies will work together to implement Section 7 of the Endangered Species Act as outlined above. Additionally, procedures that are in place at the beginning of a project are the ones that will be used throughout the project, as legally appropriate. No later than September 1, 2003, the Management Team will evaluate the effectiveness of this agreement and modify as necessary.

**Federal Highway Administration:**

/s/ S.A. Moreno  
2/28/03

Division Administrator

---

Signature

Title

Date

**Idaho Transportation Department:**

/s/ Steven C. Hutchinson  
2/28/03

Acting Chief Engineer

---

Signature

Title

Date

**U.S. Fish and Wildlife Service:**

/s/ Jeff Foss  
2/28/03

Acting Project Leader



Signature

Title

Date

**NOAA Fisheries:**

/s/ Donald R Anderson  
2/28/03

Acting Branch Chief

---

Signature

Title

Date

## Appendix A

FHWA Memorandum, February 20, 2002,

“Management of the Endangered Species Act  
Environmental Analysis and Consultation Process”



# Memorandum

U.S. Department of Transportation  
Federal Highway Administration

Subject: **INFORMATION:** Management of the  
Endangered Species Act (ESA) Environmental  
Analysis and Consultation Process

Date: February 20, 2002

From: (Original signed by)  
James M. Shrouds  
Director, Office of Natural Environment  
HEPN-30

Reply to: Attn. of:

To: Division Administrators  
Federal Lands Highway Division Engineers

The following guidance is intended to address issues related to implementation of the ESA in the Federal-aid highway program. These issues are:

1. the interaction of the National Environmental Policy Act (NEPA) environmental analysis and ESA Section 7 consultation process,
2. the authority of FHWA divisions to delegate and manage the ESA Section 7 process, and
3. environmental analysis of candidate species for ESA listing.

### **Interaction Between NEPA and ESA**

The NEPA and the ESA Section 7 processes interact in the early phases of the environmental analysis of a project. The NEPA drives the evaluation of biological resources in the project area concurrent and interdependent with the ESA Section 7 consultation process. Evaluation of impacts to species federally-listed as endangered is required for all levels of NEPA documentation, and the detail of analysis is potentially the same, dependant on the scope of the project, ecological importance and distribution of the affected species, and intensity of potential impacts of the project. A CE determination through NEPA does not exempt any project from sufficient environmental analysis to determine the likely presence and potential impacts of the project on listed species, unless a programmatic determination to that effect has been made at the local level with the concurrence of the Fish and Wildlife Service/National Marine Fisheries Service (Services). A potential impact on species or habitat protected by the ESA does not

automatically require elevation of the NEPA documentation (CE, EA, EIS). This depends on the importance of the resources and the scope of the impacts.

The minimal biological evaluation (BE) under Section 7 for any Federal-aid project not addressed programmatically, is a request to the Services for information on the presence of listed or proposed species or critical habitat in the project vicinity. If the Services respond that protected species or habitat are known not to occur in the action area, the environmental analysis with respect to the ESA is complete and the FHWA concurs in writing with a no effect determination by the State DOT. The determination of no effect should be included in the NEPA documentation, including CEs. A "likely to effect determination" is appropriate when the action area of the proposed project includes areas known to be inhabited, or known to be potentially inhabited, by one or more listed species, or the action area includes designated critical habitat.

If the Services respond that protected species or habitat are known or likely to occur in the project action area, the State DOT has the option of entering informal consultation or directly requesting formal consultation. The process of informal consultation is optional and is described in 50 CFR § 402, Interagency Cooperation-Endangered Species Act of 1973, as Amended, Subpart B, Consultation Procedures. The endangered species analysis should be appropriate to the scope of the project. It may be prepared as a BE or a BA in the case of an EIS. A distinction is made between the process for submitting a BA (which occurs in accordance with Part 50 CFR § 402.12 for EIS projects) and the preparation of a BE (which is developed during informal consultation and may be used to initiate formal consultation for EAs and CEs).

In a BE the groundwork is established for a determination of "may affect, not likely to adversely affect" or "may affect, likely to adversely affect", which is initially made by the State DOT. An analysis of the action area, determination of distribution and occurrence of contributing habitat elements, biological characteristics of the species, and potential impacts of the project (including noise, disturbance, and other factors which could affect the behavior, reproduction, and general ecological functions of the species) should be discussed. The BE should include an "affect" determination for listed species or habitat. These conclusions should be supported by the information in the BE, including a discussion of potential mechanisms of impact on the species or habitat.

Sufficient information must be provided to the Services to make a "not likely to adversely effect" or "likely to adversely effect" determination in informal consultation, or a jeopardy/adverse modification or non-jeopardy/no adverse modification determination in formal consultation. Because the FHWA does not require elevation of NEPA documentation when a project is determined as "likely to adversely affect" a listed or proposed species, the preparation of a BE and formal consultation can be required for CEs and EAs. BEs submitted for formal consultation should contain the same biological information as a BA.

When a programmatic determination on classes of actions which are considered "not likely to adversely affect" listed or proposed species or critical habitat has been concurred in by the FHWA and the Services in writing, no further evaluation is required on these projects. Actions of this nature might include signing, striping, overlays, minor reconstruction, and similar activities which experience has shown to have insignificant, discountable, or beneficial effects on listed species.

#### **Consultation on Species or Critical Habitat Listed Under the Endangered Species Act - Delegation Authority**

50 CFR Section 402.08, Designation of Non-Federal Representative, allows Federal agencies to delegate informal consultation and preparation of BEs and BAs to a non-Federal representative. The FHWA (by letter to the Services dated August 7, 1986) did this, delegating informal consultation and preparation of BEs and biological assessments in the Federal-aid highway program to State DOTs. The ESA and 50 CFR § 402.08 require that the FHWA furnish guidance and supervision of the consultation process, concur in no effect determinations, and independently review and evaluate the scope and content of BAs. BEs, species lists, habitat descriptions, and other documentation prepared to assess the effects of both major and non-major Federal actions on listed and proposed species and habitats, both programmatic or individual, may be submitted by the State DOT directly to the Services' field office under the delegation authority, at the discretion of the FHWA division office. The FHWA division offices retain discretionary authority to review and participate in any stage of the ESA consultation process on a Federal-aid highway project, from NEPA evaluation of resources through formal consultation.

The FHWA policy encourages the State DOTs to be proactive in informal consultation, including modification of the proposed project where necessary to avoid adverse effects. If, during informal consultation, the State DOT obtains written concurrence from the Services that the action as proposed or modified is not likely to adversely affect listed or proposed species, or listed or proposed habitat, Section 7 requirements have been met. The authority of the FHWA to delegate informal consultation and preparation of BEs and BAs to the State DOTs is not discretionary on the part of the Services.

The ultimate responsibility for compliance with all Section 7 requirements in regard to federally funded highway projects remains with the FHWA. 50 CFR § 402 does not provide for delegation of formal consultation to a non-Federal representative. All formal consultation procedures with the Services must be carried out by the FHWA division office.

BAs include information concerning all species listed and proposed for listing under the ESA, designated and proposed critical habitat that may be present in the action area of the project, and the evaluation of potential effects of the project on such species and habitat. This information is described in detail in 50 CFR 402.12(f). BAs are prepared for major construction activities, typically EIS projects, and shall be independently reviewed by the FHWA division office, before being submitted to the Services' field office. This review must be carried out in a timely way to facilitate completion of the consultation requirements.

Re-initiation of consultation may be requested by the State DOT, the FHWA, or the Services after initial consultation is completed as made necessary by changes in the scope or design of the project, discovery of the presence of previously unknown listed species or critical habitat, or the listing of new species. Re-initiation of informal consultation can be done by the FHWA or delegated to the State DOT, at the discretion of the FHWA division. Formal consultation must be re-initiated by the FHWA.

### **Conference Process for Proposed Species**

Species and critical habitats proposed in the Federal Register for listing are subject to the conferencing process established in 50 CFR § 402.10, Conference on Proposed Species or Proposed Critical Habitat. Conference is a process of early interagency coordination, similar to consultation, involving informal or formal discussions between a Federal agency and the Services pursuant to Section 7(a)(4) of the ESA regarding the potential impact of a project or action on proposed species or proposed critical habitat. The conference procedure is designed to help Federal agencies identify and resolve potential conflicts between Federal projects and species

conservation by developing recommendations to minimize or avoid adverse effects on proposed species or proposed critical habitat.

Informal conference on proposed species or critical habitat may be carried out by the State DOTs. If a determination is made that a proposed Federal-aid highway project is likely to jeopardize a species or destroy, or adversely affect, critical habitat proposed for listing under the ESA authorities, a formal conference is required and must be initiated by the FHWA. During the conference process, the Services will make advisory recommendations on ways to avoid or minimize adverse effects. If agreed to by the FHWA division office and the Services' field office, the conference can be carried out under § 402.14, Formal Consultation. If those procedures are followed, and the species or critical habitat is listed prior to completion of the project, the Services have the option (in the absence of significant changes in the project or significant, new information on the species) of adopting the conference opinion as the biological opinion for the project. An incidental take statement issued with a conference opinion does not become effective unless the Services adopts the conference opinion as the biological opinion.

### **Candidate Species**

Candidate species are those species for which the Services have on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is currently precluded by one or more of several conditions. These species were formerly called Category 1 candidates. They are now referred to simply as candidate species. The Services emphasize that these candidate taxa are not proposed for listing, but that development and publication of proposed rules for listing of candidate species is anticipated. Species formerly classified as Category 2 and Category 3 candidate species are no longer classified as candidates. The Services maintain data on these species when feasible.

Categorization of a species as a candidate is strong evidence that the species is of special concern, and subject to the full protection of the listing process, if not at present, probably in the future. There are no absolute guidelines on how long it will take a species to go from the candidate list, to being proposed, to a final rule on listing. Impacts on candidate species should be addressed in Federal-aid highway project environmental documents. NEPA documents should identify candidate species as such, and describe any planned conservation measures. The Services encourage Federal agencies to consider implementing conservation measures for candidate species, as these measures may avoid the future necessity of listing. Proactive partnering with the Services to conserve candidate species might reduce future delays on Section 7 processes and/or result in future cost savings if listing can be avoided. However, candidate status does not provide species protection under the listing process, and neither consultation nor conference, formal or informal, is required on Federal-aid highway projects for candidate species under the ESA Section 7 requirements. Any interagency coordination on these species with respect to Section 7 of the ESA by the FHWA or the State DOT is discretionary. However, they have the same status as any other non-regulated resource issue under NEPA.

### **Emergency Listing**

The Services have the option, when they believe it is warranted, of initiating emergency listing procedures, which can result in a species being listed in less than 90 days. Emergency listing lasts 240 days, during which time the Services can usually complete final listing.

cc: Directors of Field Services

## Appendix B

### Format for

### Biological Evaluations (NEPA Categorical Exclusions and EAs) and Biological Assessments (EISs)

*The following is provided as a recommended guideline, although information should be presented in the order identified below. As projects vary in complexity, it is anticipated that the BE/BAs, under the guidance of the Level 1 team, may vary. Development of the BE/BA may not occur in the format order. Rather, it is anticipated that as additional information becomes available during the crafting of the BE/BA, the appropriate sections will be modified. Electronic copies of BE/BAs will be provided to ITD. Federally funded or permitted exploratory activities that may affect listed species and take place prior to project implementation must undergo Section 7 consultation.*

**A. Cover Page:** Name of project, project and key numbers, location (city, county, etc.), and date.

**B. Table of Contents (all pages must be numbered)**

**C. Executive Summary**

1. Brief summary of project (2 or 3 sentences)
2. In tabular format, identify the species, critical habitat, status, and effects determinations. Include the species list OALS Number.

**D. Project Description**

**1. Location:** Describe construction boundary, mileposts, State, county, TRS (include GPS coordinates if available). Include vicinity map (all maps and photographs must be first generation copies, legible and at a scale to be meaningful to the description of the activity).

**2. Definition of Action Area:** All areas affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. List all off-site use areas (i.e. materials sources, waste sites, mitigation sites, stockpiling areas) and locations. If the locations are not known, use criteria will be developed in the proposed action.

**3. Proposed Action:**

- a. Describe the anticipated steps involved in the action in expected or logical order and include diagrams that are useful. The intent of the proposed action section is to describe both what will be built and how it will be constructed. For example: 1. Dewater by.... 2 Remove old bridge by.... 3. Remove old abutments by... 4. Construct new abutments... 5. In-water equipment will be..... 6. Order of magnitude of quantities... Include description of actions for the entire action area. Describe criteria for off-site use areas which minimize potential effects.  
If the contractor proposes an alternative construction method other than that described in the BE/BA, concurrence from the Services is required.
- b. Identify Best Management Practices (BMPs), Erosion and Sediment Control, and other measures (i.e. work windows, construction techniques, avoidance) designed to minimize effects in this section.

c. Describe monitoring and reporting plan.

(NOTE: If there are multiple alternatives, different impacts caused by each substantially different alternative must be surveyed and detailed. A matrix is often the best method of depicting multiple impacts and alternatives. If the impacts are the same for each alternative, explain why there is no difference. All alternatives must be addressed.)

**E. Description of the species and their habitat**

Identify each species. Give brief rationales for “no effect” species. Include the following for species with other determinations (repeat for each species):

- a. Consultation with local Idaho Fish and Game and/or CDC, as appropriate
- b. Literature reviews
- c. Consultation with experts on species, as necessary
- d. Descriptions of the species and general habitat requirements
- e. Relationship of habitat in the project area to local populations
- f. Map of the project area at an appropriate scale to show vegetation types and important biological features, such as habitat for sensitive species, wetlands or unique plant assemblages
- g. Photographs keyed to locations labeled on the project map.
- h. Species information in Action Area; survey protocol used, by whom, etc.
- i. Identify designated or proposed Critical Habitat

**F. Environmental Baseline**

Describe the past and present effects of human actions on the species or critical habitat in the action area. Describe existing habitat conditions in detail. (Organize this by the matrix parameters, when available, so it logically leads to the matrix analysis). Use watershed analysis from the BLM or Forest Service where available, Fish and Game, or any other available scientific or commercial databases or information.

**G. Effects of the Action:** Include discussion of direct and indirect effects.

1. Direct Effects - Those effects caused directly by the proposed action.
2. Indirect Effects - Caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.
3. Include matrix analysis, if available. Include a short paragraph on each matrix parameter which describes why the proposed action will not affect that parameter (i.e. “This matrix parameter will not likely be adversely affected because...”). Include a separate matrix for each species. The correct matrix terminology (properly functioning, functioning at risk, or functioning at unacceptable risk) must be used.
4. Include a separate section for species not covered by matrix analysis. Provide the rationale for each determination.
5. Address interrelated, interdependent, and cumulative effects of the action.
  - a. Interrelated Effects - Those that are part of the larger action and depend on the larger action for their justification.
  - b. Interdependent Effects - Those that have no independent utility apart from the action under consideration.



- c. Cumulative Effects - Those effects of future State or private activities, not Federal activities, that are reasonably certain to occur within the action area.

#### **H. Determination of Effect**

A determination must include a clear statement of effect for each species. Example: “We conclude that the Smith Road Bridge Project may affect, but will not likely adversely affect aquatic species (bull trout, steelhead, and Chinook) because the matrix analyses above indicate all matrix parameters will be maintained or improved....” For terrestrial species and plants, summarize the highlights of the paragraph above with a clear explanation leading to a definitive statement of “may affect, but not likely to adversely affect”.

#### **I. References and personal communications cited**

*Example of citations used in text:*

The passive transport of males has also been observed by Leslie Brown (Santee Nature Center, personal communication) near Greenville, Oregon. Such a mating system would maintain genetic diversity in the population only as long as it remains connected (Smith 2001).

*ADVANCE \d 12Example of Literature Cited:*

Smith, D. M. 2001. Genetic subdivision and speciation in the western North American spotted frog complex, *Rana pretiosa*. *Evolution* 72:25-39.

*ADVANCE \d 12Example of Personal Communications (must be documented):*

Leslie Brown

Research Biologist

Santee Nature Center

4125 Willowtree Drive

Greenville, Oregon 85194

January 8, 2003 telephone communication (or email, site visit, etc)

#### **J. Appendices**

**Consultation History-** Document all site visits, meetings, phone calls, conversations, correspondence (including e-mails), etc.

**List of preparers**

**Other relevant information not contained in the textual body**

**Note:** If report is prepared by a consultant, consultant letterhead and logos must not be included in the report, cover/binding, figures or exhibits, etc.

