

## Endangered Species Act: Consultation Guidance for Washington State

Prepared in collaboration with the U.S. Fish and Wildlife Service.  
For use in Washington State only.

24 CFR Part 58, 24 CFR Part 50

### Purpose

The purpose of this checklist is to assist HUD and HUD's responsible entities (REs) in meeting their Endangered Species Act obligations. The checklist is designed to help you determine whether a proposed HUD assisted project has potential to affect federally listed species or designated critical habitat, and the process to follow based on those effect determinations. The guidance contained herein is specifically for U.S. Fish and Wildlife Service (FWS) trust resources.

In September 2020, National Marine Fisheries Service (NMFS) issued its Endangered Species Act Section 7 Formal Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the U.S. Department of Housing and Urban Development Housing Programs in Washington, otherwise known as a "programmatic" biological opinion.<sup>1</sup> HUD and REs must consider both this Fish & Wildlife Consultation Guidance document AND the NMFS Washington State Programmatic when considering the effects of a HUD assisted project on listed species and/or habitat.

HUD must ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species in the wild or destroy or adversely modify its critical habitat. HUD staff and REs, as a part of an environmental review, must consider potential impacts of the HUD-assisted project to endangered and threatened species and critical habitats. The review must evaluate potential impacts not only to any listed species but also to any proposed endangered or threatened species and critical habitats. This responsibility is cited in environmental procedures at 24 CFR 58.5(e) and 24 CFR 50.4(e).

### ESA Section 7 Consultation Background

The ESA directs all Federal agencies to utilize their authorities to conserve species listed as threatened or endangered (ESA Section 2(c)(1)), and to consult with "the Services" - NMFS and FWS - to ensure that their actions will not jeopardize listed species, or adversely modify habitat designated as critical for listed species.

The Services share responsibility for assisting federal agencies in implementing the ESA. FWS trust resources under the ESA include birds, amphibians, plants, insects, terrestrial reptiles, terrestrial mammals, most freshwater fish, and a few marine mammals. In Washington, FWS

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<sup>1</sup> The programmatic is a separate document from this consultation guidance which you are reading. The programmatic can be found at the Region X Environmental website <https://www.hud.gov/states/shared/working/r10/environment>

trust resources include bull trout and designated bull trout critical habitat located in three recovery units (the Coastal, Mid-Columbia, and Columbia Headwaters recovery units). NMFS manages the remainder of listed marine mammals, as well as anadromous fish such as salmon and steelhead. For NMFS information and guidance on how to consider NMFS listed species and habitat, consult the Washington State Programmatic found here <https://www.hud.gov/states/shared/working/r10/environment>.

Before HUD or the RE consults with NMFS and FWS, they must make a preliminary analysis of the project activity and/or whether listed species and/or habitat are present. HUD or the RE can then make one of three determinations of effect for each relevant<sup>2</sup> listed species:

- **“No effect”** is the appropriate conclusion if the proposed action will not affect listed species/critical habitat at all. If a “no effect” determination is made, the Federal agency (or the RE) should not contact FWS and/or NMFS for concurrence.
- When effects to listed species are expected to be insignificant or discountable, or wholly beneficial, the action agency should make a **“not likely to adversely affect”** determination and contact FWS, for written concurrence with that determination. The thresholds for reaching a finding of Not Likely to Adversely Affect are important:
  - ✓ *Insignificant effects* relate to the size of the impact and should never reach the scale where take occurs. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. *Harm* can arise if habitat is altered in a manner that diminishes important species behavior, such as breeding, feeding, or sheltering, to the degree that it injures the species. *Harass* includes those activities that alter a species behavior in a manner that increases the likelihood of it being injured. Based on best judgment, a person would not be able to meaningfully measure, detect, or evaluate insignificant effects.
  - ✓ *Discountable effects* are those that are extremely unlikely to occur. Based on best judgment, a person would not expect discountable effects to occur.
- Unless all effects that are likely to occur as a direct or indirect result of the proposed action, or its interrelated or interdependent actions, are insignificant, discountable, or beneficial, then the action agency should make a determination of **“likely to adversely affect.”** The Federal agency/HUD must initiate formal consultation with FWS.

The **effects of the action** (direct and indirect) are not limited to the immediate area involved in the action (“footprint” or project area). Instead, the effects of the action more typically extend to a larger **action area**, which encompasses all of the action’s direct and indirect effects to the physical, chemical, and biological environment. Direct effects include sources of sound and visual

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<sup>2</sup> By “relevant” we mean, identified on the County-wide list as occurring or potentially occurring in the County of interest.

disturbance during construction. Indirect effects occur later in time (i.e., post-construction) and may include air emissions, storm or process water discharges, sources of sound and visual disturbance (e.g., lighting), etc. The effects of interrelated and interdependent actions must also be considered (e.g., site access and staging, sourcing of materials, disposal of wastes). Some actions may have indirect effects to the pattern or rate of land use conversion or development, and those potential effects must also be considered.

## **Procedure for a No Effect Determination**

A determination of “**no effect**” to federally listed species and critical habitat fulfills HUD’s and the RE’s obligation to ensure actions it authorizes, funds, or carries out do not jeopardize the continued existence of listed species or adversely modify designated critical habitat. “**No effect**” determinations do not require coordination with or approval from the FWS and/or NMFS.

Use the guidance below to help you determine whether the project qualifies for a “no effect” determination; if, for any species or critical habitat under FWS jurisdiction, there is the potential for a significant exposure or measurable effect, the project does not qualify. The guidance provided herein is for FWS only and may not be used to document a determination of “no effect” for species or habitats managed by NMFS.

### **Step 1: Obtain Species List & Determine Critical Habitat**

You must obtain a species list for the entire action area of your project. The action area encompasses all of the effects of the project, not just those that occur within the construction footprint. Project effects may include those that extend beyond the project site itself, such as noise, air pollution, water quality, stormwater discharge, visual disturbance. Effects to habitat must also be considered, including the project’s effects on roosting, feeding, nesting, spawning and rearing habitat, overwintering sites, and migratory corridors.

Go to <http://ecos.fws.gov/ipac/> for a list of species; the area of interest/action area can be identified using the ‘tools’. Please note that this list includes listed, proposed *and* candidate species. Consideration of project effects on candidate species is optional, unless effects are very large; however, candidate species may become listed as endangered or threatened species during the period of construction. If you have questions, contact the appropriate FWS field office to discuss the species list for your area.

### **Step 2: Determine Effect**

**Question 1: Does suitable habitat for any listed or proposed species under FWS jurisdiction, or designated critical habitat, occur in the action area; is it possible that any listed or proposed species would be exposed or affected?**

Consider all effects of the project within the action area. The action area encompasses all the effects of the project, including those that occur beyond the boundaries of the property (such as noise, air pollution, water quality, stormwater discharge, visual disturbance).

- NO, the project action area and all effects are outside the range of listed or proposed species and designated critical habitat.** Therefore, the project will have *No Effect* on ESA-listed or proposed species and designated critical habitat.
  - Record your determination of *No Effect* for each relevant species and critical habitat, and maintain this documentation in your Environmental Review Record.
  - Attach a statement explaining how you determined that your project's effects do not extend to, and therefore will have no effect on, listed or proposed species or designated critical habitat.
  
- YES, the project action area does include habitats that may support ESA-listed or proposed species, or designated critical habitat, under FWS jurisdiction.**
  - Continue to Question 2.

**Question 2: Is the project activity listed in Table A and does it meet all of the required parameters?**

- YES, the activity is listed in Table A and meets all of the required parameters.** Therefore, you can determine the project will have *No Effect* on ESA-listed or proposed species and/or designated critical habitat.
  - Record your determination of *No Effect* and maintain this documentation, including the official species list and map of your project location, in your Environmental Review Record.
  - Attach a statement to your determination explaining how your project met the required parameters in Table A.
  
- NO, the project description does not match a project description in Table A and all of the specified parameters.**
  - Continue to Question 3.

**Question 3: Do you have some other basis for a *No Effect* determination, for example a biological assessment or other documentation from a qualified professional that you concur with?**

- YES, the project has professional documentation for *No Effect* determination.**
  - Record your determination of *No Effect* and maintain this documentation, including the official species list and map of your project location, in your Environmental Review Record.
  - Attach the biological assessment or other professional documentation.
  
- NO, the project does not have professional documentation for a *No Effect***

**determination and *may affect* a listed species.**

- The project *may affect* listed or proposed species, or designated or proposed critical habitat. Consultation with the FWS may be required. **CONTACT THE FWS TO DETERMINE THE APPROPRIATE EFFECTS DETERMINATION AND LEVEL OF CONSULTATION REQUIRED.** Contact information is provided below.

**Table A.**

Potential “No Effect” Activity	Required Parameters and/or Conditions
<p><b>Interior rehabilitation</b></p>	<ul style="list-style-type: none"> <li>▪ For existing structures only.</li> <li>▪ Access and staging, source sites, and disposal sites have been assessed as part of the proposed action.</li> <li>▪ Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site.</li> </ul>
<p><b>Landscape repair<sup>*1*</sup></b>, including adding sprinkler systems</p> <p><sup>*1*</sup> Species under FWS jurisdiction include some that occur in the previously disturbed and built environment; HUD and its responsible entities must evaluate potential effects to all of the FWS species that occur, or potentially occur, in the action area; contact the nearest FWS Field Office with any related questions.</p>	<ul style="list-style-type: none"> <li>▪ Access and staging, source sites, and disposal sites have been assessed as part of the proposed action.</li> <li>▪ Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site.</li> <li>▪ The project or activity involves a previously disturbed, developed or partially developed, site or property/properties.</li> <li>▪ Does not remove streamside/riparian vegetation or trees.</li> <li>▪ Does not increase the amount of impervious/hard surface; or, will fully infiltrate any resulting runoff.</li> <li>▪ Does not result in wetland fill.</li> </ul>
<p><b>Exterior rehabilitation</b>, including:</p> <ul style="list-style-type: none"> <li>▪ Replacing exterior paint or siding,</li> <li>▪ Replace/repair roof<sup>*1*</sup>,</li> </ul>	<ul style="list-style-type: none"> <li>▪ For existing structures only.</li> <li>▪ Access and staging, source sites, and disposal sites have been assessed as part of the proposed action.</li> </ul>

<ul style="list-style-type: none"> <li>▪ Reconstruct/repair existing curbs, sidewalks, or other concrete structures<sup>*2*</sup>,</li> <li>▪ Repair existing parking lots (pot holes, repainting lines, etc.)<sup>*2*</sup>.</li> </ul> <p><sup>*1*</sup> Does not include galvanized material unless it has been sealed or otherwise contained so that it will not leach into storm water.</p> <p><sup>*2*</sup> Species under FWS jurisdiction include some that occur in the previously disturbed and built environment; HUD and its responsible entities must evaluate potential effects to all of the FWS species that occur, or potentially occur, in the action area; contact the nearest FWS Field Office with any related questions.</p> <p><sup>*3*</sup> Points of discharge must be a minimum of ¼ mile from waterbodies that support ESA-listed species or proposed/designated critical habitat.</p>	<ul style="list-style-type: none"> <li>▪ 3) Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site.</li> <li>▪ 5) Does not remove streamside/riparian vegetation or trees.</li> <li>▪ 6) Does not increase the amount of impervious/hard surface; or, will fully infiltrate any resulting runoff.</li> <li>▪ 7) Does not result in wetland fill.</li> <li>▪ 8) Does not/will not discharge new or additional sources of storm or waste water to wetlands or waterbodies that support ESA-listed species<sup>*3*</sup>.</li> <li>▪ 9) If located within a Special Flood Hazard Area, does not reduce the amount of flood storage capacity or remove native riparian vegetation.</li> </ul>
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**Table A Continued:**

Potential “No Effect” Activity	Required Parameters and/or Conditions
<p><b>New construction</b> <sup>*1,2*</sup></p> <p><sup>*1*</sup> Does not include galvanized material unless it has been sealed or otherwise contained so that it will not leach into storm water.</p> <p><sup>*2*</sup> Species under FWS jurisdiction include some that occur in the previously disturbed and built environment; HUD and its responsible entities must evaluate potential effects to all of the FWS species that occur, or potentially occur, in the action area; contact the nearest FWS Field Office with any related questions.</p> <p><sup>*3*</sup> Points of discharge must be a minimum of ¼ mile from waterbodies that support ESA-listed species or proposed/designated critical habitat.</p>	<ul style="list-style-type: none"> <li>▪ Access and staging, source sites, and disposal sites have been assessed as part of the proposed action.</li> <li>▪ Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site.</li> <li>▪ The project or activity involves a previously disturbed, developed or partially developed, site or property/properties.</li> <li>▪ Does not remove streamside/riparian vegetation or trees.</li> <li>▪ Does not result in wetland fill.</li> <li>▪ Does not/will not discharge new or additional sources of storm or waste water to wetlands or waterbodies that support ESA-listed species <sup>*3*</sup>.</li> <li>▪ If located within a Special Flood Hazard Area, does not reduce the amount of flood storage capacity or remove native riparian vegetation.</li> <li>▪ Complies with all state and local building codes, including storm water regulations.</li> <li>▪ Project design will fully infiltrate any resulting runoff; or, runoff is treated, detained (as necessary according to state and local requirements), and discharged to wetlands and/or waterbodies that do NOT support ESA-listed species <sup>*3*</sup>.</li> </ul>



## Initiating Section 7 Consultation

**HUD and or a RE should NOT contact FWS if a No Effect Determination has been reached.**

If all of the direct and indirect effects of the action are insignificant, discountable, or entirely beneficial, it is *not likely to adversely affect* listed species, and the section 7 consultation for the project will remain informal and relatively simple. Concurrence from FWS on a May Affect, Not Likely to Adversely Affect determination is the most common outcome of consultation for HUD-funded projects.

If the effects of the action on listed species and/or critical habitat are not discountable, insignificant, or beneficial, (i.e., likely to adversely affect), formal consultation must be initiated. In such cases, a formal consultation must be completed prior to committing resources to the project, by which the FWS assesses the action's potential to jeopardize the listed species, result in the destruction or adverse modification of critical habitat, or cause an incidental take of a listed species.

At any stage in making your determination, you may wish to contact the appropriate HUD Environmental Staff or FWS field offices for technical assistance. Contact information is available at:

For Technical Assistance contact the environmental staff at HUD:

Brian Sturdivant  
Regional Environmental Officer  
Region X  
[Brian.Sturdivant@hud.gov](mailto:Brian.Sturdivant@hud.gov)

Technical Assistance from FWS:

Ryan McReynolds  
U.S. Fish and Wildlife Service, Lacey WA  
Consultation & Conservation Planning Division  
[ryan\\_mcreynolds@fws.gov](mailto:ryan_mcreynolds@fws.gov)  
360.753.6047

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

To initiate informal or formal consultation:

HUD's requests for consultation should be addressed to:

WA State Supervisor (Brad Thompson)

ATTN: Federal Activities Branch,

and submitted electronically to email address: [WashingtonFWO@fws.gov](mailto:WashingtonFWO@fws.gov)