

Endangered Species Act: Consultation Guidance for Washington State

(Prepared in collaboration with the U.S. Fish and Wildlife Service and National Marine Fisheries 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 in meeting their Endangered Species Act obligations. The checklist is designed to help you determine whether a proposed project will have an effect to federally listed species or designated critical habitat, and the process to follow based on that effect determination.

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" to ensure that their actions will not jeopardize listed species, or adversely modify habitat designated as critical for listed species.

The Services - NMFS and FWS - 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. NMFS manages the remainder of listed marine mammals, as well as anadromous fish such as salmon and steelhead.

Before federal agencies consult with NMFS and FWS, they make a preliminary analysis of the project activity and/or whether listed species and/or habitat are present, then Federal agency makes one of three determinations of effect for 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 is not obligated to 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 and/or NMFS, as appropriate, for written concurrence with that determination. The thresholds for reaching 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, where 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: (1) be able to meaningfully measure, detect, or evaluate insignificant effects;

✓ Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not expect discountable effects to occur.

- If adverse effects are likely to occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, then the action agency should make a determination of “**likely to adversely affect**.” The Federal agency must initiate formal consultation with FWS and/or NMFS as appropriate.

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 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 Section 7 Determination

A determination of “**no effect**” to federally listed species and critical habitat fulfills HUD’s and the responsible entity’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 U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq., as amended; ESA).

Use the guidance below to help you determine whether the project qualifies for a “no effect” determination. The guidance provides separate sections for USFWS and NMFS to emphasize the need to consider both. The process is basically the same.

Part A: Consultation with National Marine Fisheries Service

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. Note that project effects include those that extend beyond the project site itself, such as noise, air pollution, water quality, stormwater discharge, visual disturbance; effects to habitat must be considered, including the project's effects on roosting, feeding, nesting, spawning and rearing habitat, overwintering sites, and migratory corridors.

For NMFS species and designated or proposed critical habitat go to:

http://www.westcoast.fisheries.noaa.gov/habitat/critical_habitat/critical_habitat_on_the_wc.html
or http://www.westcoast.fisheries.noaa.gov/protected_species/species_list/species_lists.html

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 (contact the local USFWS field office in this case). However, candidate species may become listed as endangered or threatened species during the period of construction. If you have questions, contact the appropriate USFWS field office¹ to discuss the species list for your area.

No ESA-listed fishes or designated or proposed critical habitats covered by National Marine Fisheries Service (NMFS) currently (February 2018) fall within Adams, Ferry, Lincoln, Pend Oreille, or Spokane Counties . Is the project located within one of these counties?

- ☐ **YES, the project is within one of these counties.** Therefore, there is no need to consult with NMFS. Consultation with Fish and Wildlife Service may still be necessary.
 - ☐ Record your determination of No Effect on species or habitats covered by NMFS, and maintain this documentation in your Environmental Review Record.
 - ☐ Attach a statement to your determination explaining that your project is not located within one of the counties covered by NMFS.
 - ☐ Consultation with FWS may still be necessary. CONTINUE TO PART C.
- ☐ **NO, the project is located outside these counties.** Continue to Step 2.

Step 2: Determine Effect

Question 1: Would the project effects overlap with federally-listed or proposed species or designated or proposed critical habitat covered by NMFS?

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 and all effects are outside the range of listed or proposed species and designated critical habitat covered by NMFS.** Therefore, the project will have *No Effect* on ESA-listed or proposed species or designated critical habitat.
 - ☐ Record your determination of *No Effect* on species or habitats covered by USFWS, and maintain this documentation in your Environmental Review Record.
 - ☐ Attach a statement explaining how you determined that your project's effects do not overlap with species or habitat covered by NMFS.
- ☐ **YES, project effects may overlap with ESA-listed or proposed species or designated critical habitat covered by USFWS.** Therefore, your project could affect species and habitat.
 - ☐ 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 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 USFWS may be required. CONTACT NMFS TO DETERMINE THE APPROPRIATE EFFECTS DETERMINATION AND LEVEL OF CONSULTATION REQUIRED. Contact information is provided below.

Part B: Consultation with Fish and Wildlife Service

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. Note that project effects include those that extend beyond the project site itself, such as noise, air pollution, water quality, stormwater discharge, visual disturbance; effects to habitat must 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 by project area. 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 (contact the local USFWS field office in this case). However, candidate species may become listed as endangered or threatened species during the period of construction. If you have questions, contact the appropriate USFWS field office² to discuss the species list for your area.

Step 2: Determine Effect

Question 1: Would the project effects overlap with federally-listed or proposed species or designated or proposed critical habitat covered by USFWS?

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 and all effects are outside the range of listed or proposed species and designated critical habitat covered by USFWS.** Therefore, the project will have *No Effect* on ESA-listed or proposed species or designated critical habitat.
 - ☐ Record your determination of *No Effect* on species or habitats covered by USFWS, and maintain this documentation in your Environmental Review Record.
 - ☐ Attach a statement explaining how you determined that your project's effects do not overlap with species or habitat covered by USFWS.
- ☐ **YES, project effects may overlap with ESA-listed or proposed species or designated critical habitat covered by USFWS.** Therefore, your project could affect species and habitat.
 - ☐ 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 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 USFWS may be required. CONTACT THE USFWS 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
Interior rehabilitation	<ul style="list-style-type: none"> ▪ 1) For existing structures only. ▪ 2) Access and staging, source sites, and disposal sites have been assessed as part of the proposed action. ▪ 3) Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site.
Landscape repair^{*1*} , including adding sprinkler systems ^{*1*} 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.	<ul style="list-style-type: none"> ▪ 2) Access and staging, source sites, and disposal sites have been assessed as part of the proposed action. ▪ 3) Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site. ▪ 4) The project or activity involves a previously disturbed, developed or partially developed, site or property/properties. ▪ 5) Does not remove streamside/riparian vegetation or trees. ▪ 6) Does not increase the amount of impervious/hard surface; or, will fully infiltrate any resulting runoff. ▪ 7) Does not result in wetland fill.
Exterior rehabilitation , including: <ul style="list-style-type: none"> ▪ Replacing exterior paint or siding, ▪ Replace/repair roof^{*1*}, 	<ul style="list-style-type: none"> ▪ 1) For existing structures only. ▪ 2) Access and staging, source sites, and disposal sites have been assessed as part of the proposed action. ▪ 3) Waste materials are recycled or otherwise disposed of in a properly

<ul style="list-style-type: none"> ▪ Reconstruct/repair existing curbs, sidewalks, or other concrete structures^{*2*}, ▪ Repair existing parking lots (pot holes, repainting lines, etc.)^{*2*}. <p>^{*1*} Does not include galvanized material unless it has been sealed or otherwise contained so that it will not leach into storm water.</p> <p>^{*2*} 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>^{*3*} Points of discharge must be a minimum of ¼ mile from waterbodies that support ESA-listed species or proposed/designated critical habitat.</p>	<p>permitted sanitary or hazardous waste disposal site.</p> <ul style="list-style-type: none"> ▪ 5) Does not remove streamside/riparian vegetation or trees. ▪ 6) Does not increase the amount of impervious/hard surface; or, will fully infiltrate any resulting runoff. ▪ 7) Does not result in wetland fill. ▪ 8) Does not/will not discharge new or additional sources of storm or waste water to wetlands or waterbodies that support ESA-listed species^{*3*}. ▪ 9) If located within a Special Flood Hazard Area, does not reduce the amount of flood storage capacity or remove native riparian vegetation.
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Table A Continued:

Potential “No Effect” Activity	Required Parameters and/or Conditions
<p>New construction ^{*1,2*}</p> <p>^{*1*} Does not include galvanized material unless it has been sealed or otherwise contained so that it will not leach into storm water.</p> <p>^{*2*} 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>^{*3*} 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"> ▪ 2) Access and staging, source sites, and disposal sites have been assessed as part of the proposed action. ▪ 3) Waste materials are recycled or otherwise disposed of in a properly permitted sanitary or hazardous waste disposal site. ▪ 4) The project or activity involves a previously disturbed, developed or partially developed, site or property/properties. ▪ 5) Does not remove streamside/riparian vegetation or trees. ▪ 7) Does not result in wetland fill. ▪ 8) Does not/will not discharge new or additional sources of storm or waste water to wetlands or waterbodies that support ESA-listed species ^{*3*}. ▪ 9) If located within a Special Flood Hazard Area, does not reduce the amount of flood storage capacity or remove native riparian vegetation. ▪ 10) Complies with all state and local building codes, including storm water regulations. ▪ 11) 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 ^{*3*}.

Initiating Section 7 Consultation

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 and/or NMFS on a May Affect, Not Likely to Adversely Affect determination is the most common outcome of consultation for HUD-funded projects.

However, 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 initiated prior to committing resources to the project, by which the FWS and/or NMFS assess the action's potential to jeopardize the listed species, to result in the destruction or adverse modification of critical habitat, or to result in incidental take of a listed species.

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

National Marine Fisheries Service

To initiate informal or formal consultation:

- For projects west of the Cascades: Email address: owco.wa.consultationrequest@noaa.gov
This is a general email inbox that is monitored by NMFS for consultation requests.

For General Questions:

- Eastern Washington (509) 962-8911
- North Puget Sound (206) 526- 6150
- Central Puget Sound (360) 753-9530
- Coastal Washington/Lower Columbia River (360) 753- 9530

U.S. Fish and Wildlife Service

To initiate informal or formal consultation:

HUD's requests for consultation should be addressed to the WA State Supervisor (Brad Thompson), ATTN: Federal Activities Branch, and submitted electronically to email address: wfwoclap@fws.gov

For General Questions:

- Lacey Field Office & State Supervisor (360) 753-9440 (Attn: CCP Division, Federal Activities Branch)
- Central WA / Wenatchee Field Office (509) 665-3508
- Eastern WA / Spokane Field Office (509) 891-6839