

Guidance for Endangered Species Act Biological Assessments and Section 7 Formal Consultation/Conference

This document provides guidance on Endangered Species Act biological assessments and the Section 7 formal consultation/conference process when FHWA serves as the lead federal agency for the project. It is intended to supplement [FDM Chapter 24-10](#) until the FDM can be updated. Please see the FDM for more discussion on Endangered Species Act process and a detailed description of biological assessments and their contents.

Need

- Section 7 **formal consultation** ([FDM 24-10-10-1.7](#)) is necessary when a proposed action “may affect and is likely to adversely affect” any listed species or critical habitat under the Endangered Species Act.
- Section 7 **formal conference** ([FDM 24-10-10-1.8](#)) is strongly recommended when a proposed action is anticipated to result in a “may affect and is likely to adversely affect” determination for a proposed species or critical habitat upon final listing and there is unlikely to be sufficient time for formal consultation after listing occurs.
- A **biological assessment** (BA) ([FDM 24-10-10-1.11](#)) must be prepared for Section 7 formal consultation and conferencing. Additionally, “major construction activities” (i.e., projects with a NEPA Environmental Impact Statement) need a BA prepared even if the project does not require formal consultation/conference for any species/critical habitat.
- Situations that are likely to trigger a “may affect and is likely to adversely affect” determination and formal consultation/conference:
 - Federal mussel presence and in-water work and/or actions that could negatively affect water quality; federal mussel relocation.
 - Actions within 0.5 mile of a known federal bat hibernaculum (i.e., cave, mine) that cause stressors to bats (e.g., tree removal, noise, ground disturbance, lighting, structure work).
 - Impacts to high quality rusty patch bumble overwintering or nesting habitat exceeding 0.25 acre that occur when the bee is likely to be present in those habitats.
- Coordinate with the region environmental coordinator (REC) and BTS-ESS ecologist to confirm formal consultation/conference and BA preparation is necessary. Items to discuss:
 - Species/critical habitat triggering need for a biological assessment
 - Project scope, alternatives, mitigation strategies
 - Project schedule and other constraints
 - BA preparation and consultation procedures

Timelines

- **Integration into NEPA process:**
 - Formal consultation must be initiated with USFWS prior to approval of the NEPA draft Environmental Report (ER), draft Environmental Assessment (EA) and Draft Environmental Impact Statement (DEIS). Formal consultation must be complete prior to the signature of a final ER, EA Finding of No Significant Impacts (FONSI), and Final Environmental Impact Statement (FEIS) or combined FEIS/Record of Decision (ROD).
 - It is strongly encouraged to have formal consultation completed prior to signature of a NEPA Categorical Exclusion Checklist (CEC). However, provided the BA has been

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submitted to USFWS and formal consultation is ongoing, project teams, in coordination with FHWA and BTS-ESS ecologist, may decide to sign the document prior to completion of consultation. The WisDOT project team and FHWA must assess risk of proceeding without having consultation complete. This should be discussed well in advance of the anticipated document signature date.

- Timing and expectations for formal conference should be discussed with the BTS-ecologist and FHWA.
- **Data collection/field studies:** Any necessary species surveys (e.g., mussels) and/or habitat mapping (e.g., rusty patched bumble bee) need to be completed before the biological assessment can be drafted ([FDM 24-10-10-1.4](#)). Consultant contract coordination and scoping can take several weeks. These surveys and assessments generally have specific and sometimes limited windows for completion within the growing season. Coordinate with the REC to understand what is required for a specific project early in project scoping/design.
- **Overall BA/consultation process (approx. 10 – 15 months):** The overall process of preparing for and engaging in Section 7 formal consultation/conference takes a considerable amount of time. The project team must be aware that it **cannot be expedited** and must adjust the project schedule accordingly. Timelines for individual steps are further discussed below.
- **Biological assessment scoping/work order (approx. 1 month):** BAs are not currently prepared by WisDOT staff. A design consultant (or subconsultant) with prior ESA BA drafting experience/comprehensive training or BTS-ESS ecological services consultant can be used to write the BA. Allow sufficient time for scoping meetings and scope review.
- **Biological assessment preparation (minimally 4-6 months):** A biological assessment must be prepared to initiate formal consultation/conference with USFWS. Expect that BA preparation will minimally take 4-6 months. Large or complex projects will require more time (e.g., multiple species with adverse effects, large project footprints, extensive impacts to species). This timeframe includes:
 - Drafting/editing the BA
 - WisDOT region/central office and FHWA reviews of the document
 - Pre-consultation meeting with USFWS
- **Formal consultation/conference (minimally 4.5 months):** Once FHWA submits the final BA to USFWS, formal consultation/conference is initiated. Regulatorily (50 CFR § 402.14), USFWS is allotted 135 days (about 4.5 months) to respond to this request and prepare their biological/conference opinion. USFWS can ask for a 60-day extension.

Biological Assessment Preparation

Determine document preparer:

- The individual preparing the BA must have prior experience and/or comprehensive training on the preparation of Endangered Species Act BAs and be knowledgeable about the species involved.
- Project teams may use the design contract consultant/subconsultant or a BTS-ESS Ecological Services Contract consultant. For the latter, submit request to [BTS-ESS Contract Manager](#).

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Scope work order:

- A scoping meeting and at least one check in meeting during BA drafting is required. These meetings should include the BA preparer, project team and BTS-ESS ecologist. Additional check in meetings may be beneficial to resolve issues during drafting/editing phase.
- Assume at least 3 BA drafts to be prepared during the review process.
- Include realistic preparation and review timelines (see BA review section below). Add schedule float if possible.

BA contents/template:

- Currently, WisDOT/FHWA do not have a specific, required template. An [older FHWA template](#) may be used as a starting point (be sure to read the template instructions). The REC can also ask BTS-ESS ecologist for recent WisDOT BA examples.
- Regardless of template/format, all BAs must contain the contents described in 50 CFR § 402.12(f) and § 402.14(c). Additionally, BAs must address all species/critical habitats in the official species list.
 - If consultation for some species/critical habitats was completed through an automated IPaC determination key (d-key), detailed discussion for those species/critical habitats is not needed. However, there must be discussion of the d-key consultation process previously completed, acknowledgement of those effect determinations throughout the document (e.g., executive summary, effect determination table), and attachment of the d-key consistency/concurrence letter(s).
 - FHWA/FRA/FTA NLEB transportation programmatic determination key “may affect and is likely to adversely affect” verification and resolution of any MN-WI Endangered Species d-key “may affect” results should be bundled into the BA and not separate email requests to FWS.
- Complete project information is needed to make effect determinations, quantify incidental take or habitat surrogates, and develop a compensatory mitigation strategy, if required. The total impacts required to construct the project must be considered, including the potential for disturbance due to construction access and staging, real estate requirements including structure demolition, and utility relocations caused by the project. Specific quantities may be needed (e.g., acreage of tree removal, area of in-water disturbance, area and type of wetland fill). Design work may need to be more detailed in some impacted locations than what is typical for an environmental document. This would be necessary to appropriately assess effects to species/habitat for the BA (e.g., design of bridge piers, abutments, and scour mitigation for mussels, or tree clearing limits for bats).
- The BA must contain sufficient avoidance and minimization measures to reduce effects/incidental take of affected species. The need for compensatory mitigation to offset remaining unavoidable impacts should be discussed with BTS-ESS and FHWA during BA drafting and as needed, and with USFWS as needed during a pre-consultation meeting. Compensatory mitigation may be accomplished through a payment to an established in-lieu program (ILF) if one exists, on-site/near-site habitat preservation/establishment/restoration, or other means as determined appropriate by USFWS, FHWA and WisDOT.

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- Compensatory mitigation will be consistently expected for adverse impacts/relocation of federal mussels. The cost of ecosystem services lost by mussel bed injury is determined through a Habitat Equivalency Analysis model (HEA)). This is the starting point for the compensatory mitigation discussion with USFWS. It is anticipated that most WisDOT projects will make a mitigation payment to the mussel ILF that USFWS is developing with The Conservation Fund, a non-profit organization.
- Compensatory mitigation may be required for northern long-eared bat if the project is outside of the scope of the FHWA, FRA, FTA NLEB transportation programmatic biological opinion and NLEB Rangewide determination key, and occurs within an area of documented NLEB captures, acoustic records or hibernacula. The Conservation Fund has an operational NLEB ILF program in WI that establishes a mitigation cost based on acreage/location of suitable habitat clearing.
- Avoidance, minimization, and compensatory mitigation measures must be compiled and listed in bulleted format near the end of the document per USFWS request. Species mitigation/relocation plans should be attached to the BA.
- Limit WisDOT specific jargon/references. If those terms are necessary, provide sufficient explanation/description to facilitate USFWS understanding of the term.

BA Review Process

- The BA preparer (consultant) must prepare a comment response matrix or directly responds to comments in the review document so it's clear how substantive comments were addressed. Providing a track changes version can also be helpful to view revisions.
- When sharing documents with BTS-ESS ecologist, FHWA, and USFWS, ensure the Box link sharing is set to "anyone with the link". Adding WisDOT/FHWA as Box editors can also be helpful.

Region Review

- The region environmental coordinator must review the BA. A 2 week review time is recommended but is subject to the REC's preference.
- Regions may elect to have the project manager/designer participate in the review. This is recommended in the case of complex projects or projects with the potential for frequent design changes.

BTS-ESS Ecologist Review

- REC submits draft BA with region comments to BTS-ESS ecologist for review. Allow a minimum of 2 weeks for review.
- Revisions are returned to the REC, who coordinates with the BA preparer (or WisDOT PM, in the case of a design sub-consultant) on necessary edits.
- Complete additional review/editing until a clean draft is ready for FHWA review.

FHWA Review

- BTS-ESS ecologist submits a clean draft BA to FHWA for review. Allow a minimum of 30 days for review.

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- Revisions are returned to BTS-ESS ecologist/REC. REC coordinates with the BA preparer/WisDOT PM and BTS-ESS ecologist on necessary edits until final draft is ready for resubmittal to FHWA.

Pre-consultation Meeting

- A meeting between USFWS, FHWA and WisDOT region/BTS-ESS is recommended prior to initiating formal consultation/conference.
- It is preferable to hold this meeting after the first draft of the BA has been reviewed by WisDOT. In cases where a species has not been formally consulted on previously, BTS-ESS, FHWA, and REC may determine that this meeting should be held earlier to seek guidance from USFWS.
- Discuss the role of meeting coordinator/facilitator, timing, and agenda with BTS-ESS ecologist and FHWA. Regions may elect to have the consultant BA preparer/species experts participate in this meeting.
- Meeting goals:
 - Brief USFWS on the project and need for consultation/conference
 - Discuss proposed effect determinations and mitigation measures
 - Understand USFWS expectations for any compensatory mitigation
 - Outline schedule and become aware of any potential USFWS review delays

Consultation with USFWS

- FHWA initiates and leads formal consultation with USFWS. FHWA also submits the biological assessment to USFWS for EIS projects not requiring formal consultation/conference.

For formal consultation/conference:

- FHWA prepares a cover letter to USFWS requesting initiation of formal consultation/conference. FHWA may ask the BTS-ESS ecologist/REC to review the letter prior to submittal to USFWS.
- FHWA submits BA and cover letter to USFWS and copies BTS-ESS/REC/PM. This starts the 135-day consultation/conference timeline.
- USFWS may reach out with comments/questions on the BA during their review. Follow up coordination is completed via email or a meeting, as appropriate.
- The formal consultation process is complete when USFWS provides the Biological Opinion (BO) with an Incidental Take Statement (ITS). Conference ends with issuance of a Conference Opinion (CO), which needs to be adopted by USFWS as the BO once the species/critical habitat is listed.
- Any mitigation requirements must be fulfilled on the timeline agreed on during consultation and as required by the BO's Reasonable and Prudent Measures and Terms and Conditions.

For EIS projects not requiring formal consultation/conference:

- FHWA prepares a cover letter to USFWS requesting USFWS review and to provide concurrence on the BA. FHWA may ask the BTS-ESS ecologist/REC to review the letter prior to submittal to USFWS.
- FHWA submits BA and cover letter to USFWS and copies BTS-ESS/REC/PM. This starts the 30-day timeline.

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- Unless USFWS disagrees with the “not likely to adversely affect” determinations (prompting the need for formal consultation), the process will end with USFWS concurring on the BA’s effect determinations.

Additional Reminders/Tips

- Confirm species reviews are valid during the review/final BA: WDNR Natural Heritage Inventory (NHI) review within 1 year and IPaC Official Species list within 3 months.