

Chapter 38

THREATENED AND ENDANGERED SPECIES

MDT ENVIRONMENTAL MANUAL

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Chapter 38

THREATENED AND ENDANGERED SPECIES

38.1 OVERVIEW

The purpose of the Federal *Endangered Species Act (ESA)* is to protect and recover imperiled species and the ecosystems upon which they depend. In Montana, the *ESA* and associated implementing regulations are administered by the Interior Department's US Fish and Wildlife Service (USFWS). USFWS has primary responsibility for terrestrial and freshwater organisms.

Under the *ESA*, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. "Threatened" means a species is likely to become endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For purposes of the *ESA*, species include subspecies, varieties and, for vertebrates, distinct population segments.

The *ESA* also requires the designation of "critical habitat" for listed species when "prudent and determinable." Critical habitat includes geographic areas that contain the physical or biological features that are essential to the conservation of the species and may need special management or protection. Critical habitat designations affect only Federal agency actions or Federally funded or permitted activities. Federal agencies are required to avoid "destruction" or "adverse modification" of designated critical habitat.

Section 7 of the *ESA* requires Federal agencies to use their legal authorities to promote the conservation purposes of the *Act* and to consult with the USFWS, as appropriate. Action agencies are to ensure the effects of actions they authorize, fund or carry out will not jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat.

Section 7(a)(1) provides that all Federal agencies shall, in consultation with and with the assistance of the USFWS, use their authorities to carry out programs for the conservation of endangered and threatened species. Section 7(a)(2) requires each Federal agency, in consultation with and with the assistance of the USFWS, to ensure that any action authorized, funded or carried out by the agency (agency action) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species that is determined to be critical. Section 9 discusses acts that are prohibited with respect to any listed endangered species of fish or wildlife, including taking any such species or violating any regulation pertaining to such species or to any listed threatened species of fish or wildlife.

The analyses and consultations for *ESA* compliance are accomplished and documented in coordination with the analyses and coordination for compliance with the *National Environmental Policy Act (NEPA)* (42 USC 4321, et seq.) and the *Montana Environmental Policy Act (MEPA)* (MCA 75-1-101, et seq.).

This Chapter provides guidance and procedures for addressing threatened and endangered species impacts of proposed projects, including coordination and consultation with USFWS and

documentation of the threatened and endangered species compliance information in the NEPA/MEPA documentation for the project.

See [Chapter 36 “Plant Communities/Vegetation”](#) and [Chapter 37 “Terrestrial Wildlife Impacts”](#) for additional guidance and procedures.

38.2 LAWS, REGULATIONS AND GUIDANCE

38.2.1 16 USC 1531-1541 “Endangered Species”

These *United States Code* (USC) Sections codify the provisions of the *Endangered Species Act* (ACT) of 1973, as amended. Section 7 of the *Act* (16 USC 1536) requires Federal agencies proposing major construction activities to complete a biological assessment to determine the effects of the proposed action on listed and proposed threatened and endangered species. A major construction activity is defined as “a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the *National Environmental Policy Act*.” If a biological assessment is not required, the Federal agency is still required to review its proposed activities to determine whether listed species may be affected. If such a determination is made, formal consultation with the USFWS is required.

The primary implementing rules for the *Act* are provided in Title 50 of the *Code of Federal Regulations* (CFR), Part 17 “Endangered and Threatened Wildlife and Plants” and 50 CFR 402 “Interagency Cooperation – Endangered Species Act of 1973, as Amended.” The regulations in 50 CFR 17 include provisions for permitting “incidental taking” of listed species. Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant for Federal funding, permits, etc. In accordance with 16 USC 1532(19) “...‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap capture or collect, or to attempt to engage in any such conduct.”

38.2.2 23 USC 139 “Efficient Environmental Reviews for Project Decision-Making”

For projects involving preparation of an environmental impact statement and for environmental assessments being prepared in accordance with the FHWA “SAFETEA-LU Environmental Review Process Final Guidance,” this part of the USC requires that, at appropriate times during the study process, the lead agency or agencies for the project collaborate with agencies serving as participating agencies to determine the methodologies to be used and the level of detail required for assessing impacts, including threatened and endangered species impacts. See [Chapters 11 “Preparing Environmental Documentation,” 13 “Environmental Assessment/FONSI”](#) and [14 “Environmental Impact Statement/ROD”](#) for further guidance on this requirement.

38.2.3 MCA 87-5-101, et seq. “Nongame and Endangered Species”

These Parts of the *Montana Code Annotated* (MCA) establish policy and authority for the Department of Fish, Wildlife and Parks (FWP) to administer requirements for:

- protection of species or subspecies of wildlife indigenous to Montana that may be found to be endangered within the State to maintain and, to the extent possible, enhance their numbers; and
- assist in the protection of species or subspecies of wildlife that are considered to be endangered elsewhere by prohibiting the taking, possession, transportation, exportation, processing, sale or offer for sale or shipment within Montana of species or subspecies of wildlife unless those actions will assist in preserving or propagating the species or subspecies.

Implementing rules are provided in *Administrative Rules of Montana* (ARM) Section 12.5.201 “Endangered Species List” and ARM 12.2.501 “Nongame Wildlife in Need of Management.”

38.2.4 USFWS Mountain-Prairie Region “Endangered Species Program” Website

This website, which is accessible via the USFWS Mountain-Prairie Region home page, contains links to information on the USFWS Endangered Species Program for the Mountain-Prairie Region, including several ways of searching for information on species in the Region, including the following:

- by State,
- by county within any of the eight States included in the Region,
- by species name,
- by candidate and proposed species, and
- by USFWS State Field Office website.

38.2.5 USFWS “Montana Ecological Services Field Office” Website

This website, which is accessible via the USFWS Mountain-Prairie Region website, contains office location, contact information and links to information, including endangered species, Federal activities, news and information, etc.

38.2.6 “Montana Natural Heritage Program” Website

This website provides information on Montana’s species and habitats, emphasizing those of conservation concern. The website includes links to information that can be useful in evaluating wildlife aspects for proposed projects (e.g., distribution of Montana’s animal and plant species; Montana Species of Concern, which are plants and animals potentially at risk; habitat, ecology, reproduction, range and distribution of Montana’s animals; natural communities in Montana and the Montana Noxious Weed Program).

38.2.7 FWP “Montana’s Threatened and Endangered Species” Website

This website, accessible via the FWP home page, provides information on Montana’s threatened and endangered species and includes links for:

- USFWS Threatened, Endangered and Candidate Species in Montana; and
- USFWS Endangered, Threatened, Proposed and Candidate Species by Montana Counties.

38.2.8 “Montana DNRC Forested State Trust Lands – Habitat Conservation Plan (HCP)” Website

This website, accessible via the Department of Natural Resources and Conservation (DNRC) home page, provides information on the HCP that DNRC has prepared as part of an application

for Incidental Take Permits for situations on DNRC lands where otherwise lawful activities might result in the “take” (i.e., harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing or collecting of any threatened or endangered species) of a Federally-listed species. The HCP specifies the species and geographic area to be covered and the conservation strategies that are to be followed to avoid, minimize and/or mitigate incidental take.

38.2.9 FHWA Technical Advisory T 6640.8A

The Technical Advisory, dated October 30, 1987, provides the following guidance for addressing threatened and endangered species impacts in environmental documents.

38.2.9.1 Information Gathering

The State Highway Agency must obtain information from the USFWS to determine the presence or absence of listed and proposed threatened or endangered species and designated and proposed critical habitat in the proposed project area (50 CFR 402.12(c)). The information may be:

- a published geographical list of species or critical habitat,
- a project-specific notification of a list of species or critical habitat, or
- substantiated information from other credible sources.

Where the information is obtained from a published geographical list, explain the reasons why this would satisfy the coordination with DOI. If there are no species or critical habitat in the proposed project area, the *Endangered Species Act* requirements have been met.

38.2.9.2 Proposed Species/Proposed Critical Habitat

Where a proposed species or a proposed critical habitat may be present in the proposed project area, conduct an evaluation or, if appropriate, a biological assessment on the potential impacts to identify whether any such species or critical habitat are likely to be adversely affected by the project. Informal consultation with USFWS should be undertaken during the evaluation.

If the project is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, the State Highway Agency, in consultation with the FHWA, must confer with USFWS to attempt to resolve potential conflicts by avoiding, minimizing or reducing the project impacts (50 CFR 402.10(a)). If the preferred alternative is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, a conference with USFWS must be held to assist in identifying and resolving potential conflicts.

38.2.9.3 Listed Species/Designated Critical Habitat

Where a listed species or a designated critical habitat may be present in the proposed project area, a biological assessment must be prepared to identify any such species or habitat which are likely to be adversely affected by the proposed project (50 CFR 402.12). Informal

consultation should be undertaken or, if desirable, a conference held with USFWS during preparation of the biological assessment.

In selecting an alternative, jeopardy to a listed species or the destruction or adverse modification of designated critical habitat must be avoided (50 CFR 402.01(a)).

38.3 PROCEDURES

38.3.1 Information Gathering

The Preliminary Field Review (PFR) is the initial step in evaluating threatened and endangered species impacts for a proposed project. The Design Team (DT) notifies and invites appropriate MDT personnel, including the District Biologist (DB) within the MDT Environmental Services Bureau (ESB), to the field review. The ESB Project Development Engineer (PDE) reviews the list of ESB attendees and includes others as necessary to ensure appropriate ESB personnel are in attendance. The DB participates in the PFR to make a preliminary evaluation of available information on the project scope and the potential for impacts to threatened or endangered species and/or designated critical habitat. Following the field review, the DT prepares a PFR Report summarizing the issues discussed during the PFR, including threatened and endangered species issues. The DT distributes the final PFR Report for review and comment. Within ESB, the PDE serves as the document champion to collect and coordinate comments from the other Sections. The PDE compiles the comments into a PFR review memorandum for signature by the Environmental Services Bureau Chief.

For projects where a consultant is preparing the environmental document, the consultant is generally responsible for conducting the DB's activities including addressing biological resource issues and preparing the Biological Resource Report (BRR). For MDT projects, the DB evaluates the project scope, biological resource issues identified during the PFR and staff availability to determine whether to assign a consultant (term consultant) to perform the analyses and fieldwork for preparing the BRR. The DB uses the "Term Contract" procedures documented in the *MDT Consultant Services Manual* to select, negotiate and administer environmental consultant projects.

For projects subject to the requirements of 23 USC 139 "Efficient Environmental Reviews for Project Decision-Making," the DB, in cooperation with FHWA, collaborates with participating agencies in determining the appropriate methodologies to be used and the level of detail required in the analysis of threatened and endangered species impacts of project alternatives.

Based on the project scope and field observations during the PFR, the DB performs a field and literature review to gather information on wildlife resources, including listed and proposed threatened and endangered species, and designated and proposed critical habitats at the project site and/or along the project corridor. The DB (or a consultant through the DB) requests information from biologists with FWP, DNRC, USFWS Montana Field Office, US Forest Service, Bureau of Land Management and any other pertinent agencies that have a management or regulatory interest in the wildlife, fish, critical habitats, rare and/or sensitive species, wetlands, rivers, streams and other water resources the project may affect.

The objective of the information gathering for threatened and endangered species is to address the following topics for each listed or proposed species potentially involved with the proposed project:

- species description,
- status and distribution,
- life history and habitat requirements,
- reasons for decline, and
- environmental baseline/occurrence in the project area.

The DB documents the information obtained regarding each of the above topics in the “Threatened and Endangered Species” section of the BRR for the project.

The DB also obtains information on candidate species. These are species of plants and animals for which USFWS has sufficient information on their biological status and threats to propose them as endangered or threatened under the *ESA*, but for which development of a proposed listing regulation is precluded by other higher priority listing activities. Candidate species receive no statutory protection under the *ESA*; however, USFWS encourages cooperative conservation efforts for these species because they are, by definition, species that may warrant future protection under the *ESA*. The DB documents the information on candidate species in the “Sensitive Species of Special Concern” section of the BRR for the project; see [Chapters 36 “Plant Communities/Vegetation”](#) and [37 “Wildlife Impacts”](#) for further guidance. The DB monitors the status of candidate species for any changes affecting their protection under the *ESA* (e.g., change in status to a proposed or listed species).

38.3.2 Analysis and Findings

Throughout the design process, the DB coordinates with the Design Team (DT) on an ongoing basis to evaluate project impacts to wildlife resources, including threatened and endangered species and critical habitat, and measures for avoiding and/or minimizing those impacts. The DB or consultant documents the results of the evaluations in the BRR in accordance with the following:

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Introduction:

Methods:

Results: (by species)

List all Federally-listed, proposed and candidate threatened and endangered species and critical habitats present within the area affected by the proposed project. Provide the following:

- species description,
- status and distribution,
- life history and habitat requirements,
- reason for decline,
- environmental baseline/occurrence in project area,
- effects of the action/impacts analysis,
- cumulative effects analysis,
- recommended conservation measures, and
- determination of effect.

The DB also monitors USFWS information on species and critical habitat, on an ongoing basis, for any changes in status including any emergency listing (i.e., listing that is effective immediately upon publication of notice in the *Federal Register*; used for emergencies posing a significant risk to the well-being of a species of fish, wildlife or plant) or delisting (i.e., removal of species from the endangered and threatened species list and from protection under the *ESA*).

If a delisting action for a species involved with a project becomes final while consultation with USFWS is in progress, the DB and FHWA will coordinate with USFWS to terminate the consultation for the delisted species in accordance with 50 CFR 402.13(a) or 50 CFR 402.14(l)(3).

38.3.2.1 Informal Consultation

38.3.2.1.1 General

If the results of information gathering for threatened and endangered species indicate the project may affect listed or proposed threatened or endangered species or designated or proposed critical habitat for threatened or endangered species, the DB, in cooperation with the FHWA Division Office, contacts the USFWS Montana Field Office to initiate informal consultation according to the *ESA* implementing regulations in 50 CFR 402.13. The purpose of the informal consultation is to assist in determining whether formal consultation (for effects on listed species or designated critical habitat) or a conference (for effects on proposed species or proposed critical habitat) is required. This is accomplished by:

- clarifying whether and, if so, what listed or proposed species and/or designated or proposed critical habitats are in the project area;
- determining what effects the action will have on these species and/or critical habitats; and
- exploring ways to modify the project to avoid or minimize adverse effects on the species and/or critical habitats.

Based on preliminary analyses and the results of informal consultation with USFWS, the DB determines whether the project may affect threatened or endangered species or their critical habitat.

38.3.2.1.2 No Effect Determination

If the DB determines the project will not affect threatened or endangered species or critical habitat, the DB documents the basis for the “No Effect” determination in the project file. The DB also coordinates with the PDE to incorporate the results of the threatened and endangered species analyses and consultation in the environmental documentation for the project.

38.3.2.1.3 May Affect Determination

If the DB determines the project may affect threatened or endangered species or critical habitat, the DB prepares a Biological Assessment (BA) to document listed and proposed species and designated and proposed critical habitat that may be present in the area of the proposed project and the evaluation of potential effects of the action on the species and habitat. The BA includes information on the following:

- results of on-site field work and information gathering to determine the presence of listed or proposed threatened and endangered species and/or designated or proposed critical

habitat (e.g., species description, status and distribution, environmental baseline/ occurrence in the project area);

- results of literature review for threatened and endangered species and critical habitat (e.g., life history and habitat requirements, reasons for decline);
- analysis of the effects of the action on the species and habitat, including consideration of cumulative effects and the results of any related studies;
- analysis of alternatives considered for the proposed action;
- recommended conservation measures; and
- effect determination for each species.

The DB provides the BA to the Environmental Resources Section Supervisor (ERSS) for review and comment.

Based on the information in the BA, the DB determines if the project is likely to adversely affect threatened or endangered species or critical habitat.

38.3.2.1.4 May Affect, Not Likely to Adversely Affect Determination

If the information in the BA results in a finding of “May Affect, Not Likely to Adversely Affect” threatened or endangered species or their critical habitat, the DB continues informal consultation with the USFWS. The DB forwards the BA directly to the USFWS Montana Field Office with a request for a Letter of Concurrence in the effect determination.

The USFWS Montana Field Office reviews the BA and may coordinate with the DB to address questions or suggest modifications to the project to ensure it will not adversely affect threatened or endangered species or critical habitat. When satisfied with the basis for the determination that the project will not adversely affect threatened or endangered species or critical habitat, the USFWS provides a Letter of Concurrence. The letter confirms that no further action is necessary for compliance with *ESA* Section 7 implementing regulations and concludes the informal consultation process.

Upon receipt of the Letter of Concurrence from USFWS, the DB provides copies of the BA and Letter of Concurrence to the DT. If necessary, the DB coordinates with the PDE to document the information from the BA and the Letter of Concurrence in the environmental assessment (EA) or environmental impact statement (EIS) for the project.

38.3.2.1.5 May Affect, Likely to Adversely Affect Determination

If the information in the BA results in a finding of “May Affect, Likely to Adversely Affect” listed or proposed threatened or endangered species or designated or proposed critical habitat, the DB requests initiation of formal consultation; see [Section 38.3.2.2](#).

38.3.2.2 Formal Consultation

The DB prepares a letter to transmit the BA and other relevant project reports and information (e.g., the environmental documentation prepared for compliance with the *National Environmental Policy Act/Montana Environmental Policy Act*) to the FHWA Division Office with a request for initiation of formal consultation with USFWS. The DB ensures the information transmitted to FHWA complies with the requirements of 50 CFR 402.14(c). In accordance with the regulation, the information must include the following:

- a description of the action to be considered;
- a description of the specific area that may be affected by the action;
- a description of any listed species or critical habitat that may be affected by the action;
- a description of the manner in which the action may affect any listed species or critical habitat and any analysis of any cumulative effects; relevant reports, including any environmental impact statement, environment assessment or biological assessment prepared; and
- any other relevant available information on the action, the affected listed species or critical habitat.

The USFWS reviews the BA and accompanying information and may coordinate with the DB to address questions or suggest modifications to the project to avoid jeopardizing the continued existence of any threatened or endangered species or resulting in the destruction or adverse modification of critical habitat.

Formal consultation is complete with the issuance of a biological opinion. This will occur within 90 days after initiation of formal consultation unless the time is extended in accordance with the provisions of 50 CFR 402.14(e). *Note: For projects requiring a Section 404 permit from the Corps of Engineers (COE) that also involve formal consultation, COE will not issue the permit until USFWS issues its biological opinion.*

38.3.2.3 Biological Opinion

USFWS delivers its biological opinion to FHWA and FHWA forwards the biological opinion to MDT. The biological opinion includes:

- a summary of the information on which the opinion is based;
- a detailed discussion of the effects of the action on listed species or critical habitat; and
- the USFWS opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a jeopardy biological opinion); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a no jeopardy biological opinion).

A jeopardy biological opinion includes reasonable and prudent alternatives, if any. If USFWS is unable to develop alternatives, it indicates in the biological opinion that to the best of its knowledge, there are no reasonable and prudent alternatives.

In cases where the USFWS concludes that an action will result in incidental take of listed species, it provides with the biological opinion, a statement on the incidental take, in accordance with 50 CFR 402.14(i).

USFWS may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

Following issuance of a biological opinion, MDT, in cooperation with FHWA, determines how to incorporate reasonable and prudent alternatives included in the biological opinion and/or conservation recommendations provided with the biological opinion. As necessary, MDT coordinates with other agencies and entities (e.g., US Forest Service, Bureau of Land Management, Tribes, State and local government agencies) in evaluating reasonable and prudent alternatives, conservation measures and other mitigation for threatened and endangered species impacts. See [Chapters 36 “Plant Communities/Vegetation”](#) and [37 “Terrestrial Wildlife Impacts”](#) for further discussion of mitigation measures.

If MDT, in consultation with FHWA, determines it cannot comply with the *ESA* Section 7 requirement for avoiding actions that jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, it may apply for an exemption, in accordance with procedures in 50 CFR 451. If the exemption is denied, the action is not eligible for Federal funding.

Re-initiation of formal consultation is required if:

- the amount or extent of taking specified in the incidental take statement is exceeded,
- new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,
- the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion, or
- a new species is listed or critical habitat designated that may be affected by the identified action.

If necessary, the DB coordinates with the PDE for the project to incorporate the information and recommendations from the biological opinion in the environmental documentation for the project; see [Chapters 11 “Preparing Environmental Documentation,”](#) [12 “Categorical Exclusion,”](#) [13 “Environmental Assessment/FONSI”](#) and [14 “Environmental Impact Statement/ROD.”](#)

The DB reviews the Scope of Work Report and coordinates with the DT on the nature and extent of any unavoidable threatened and endangered species impacts. If USFWS issued a jeopardy biological opinion, MDT, through FHWA, must notify USFWS of its final decision on the action.

38.3.3 **Mitigation and Commitments**

The DB conducts the following to ensure mitigation and commitments are included in the design documents:

1. **Design**. The DB coordinates with the DT to incorporate measures in the project plans for avoiding and minimizing impacts to threatened and endangered species and critical habitat. The DB participates in the Plan-in-Hand Review for the project to address threatened and endangered species issues and associated impact avoidance and minimization measures.
2. **Special Provisions**. To the extent possible, the DB should prepare the contract documents using the *MDT Standard Specifications* to minimize the need for special provisions. The DB prepares any special provisions necessary to implement avoidance, minimization, mitigation and/or conservation measures for the project's threatened and endangered species impacts. The DB coordinates with the DT and the MDT Contract Plans Bureau to ensure the special provisions associated with the threatened and endangered species impacts are accurately reflected in the final engineering plan documents.
3. **Final Plan Review**. The DB coordinates with the DT to review the final project plans to ensure that measures for avoidance and minimization of threatened and endangered species impacts have been incorporated. The DB ensures that conservation measures and special provisions associated with the threatened and endangered species impacts are accurately reflected in the plans. The DB coordinates with the DT and the MDT Contract Plans Bureau to implement any needed changes.
4. **Construction**. The DB coordinates with Construction personnel and the District Environmental Engineering Specialist to ensure the special provisions and design elements concerning threatened and endangered species and associated conservation measures are implemented during project construction.

