



## NEPA Endangered Species Guidance

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### Introduction

Pursuant to 23 United States Code 327 and the implementing Memorandum of Understanding (MOU) executed on XX, the Maine Department of Transportation (MaineDOT) has assumed, and the Federal Highway Administration (FHWA) has assigned its responsibilities under the National Environmental Policy Act (NEPA) for highway projects and Local Agency Program (LAP). MaineDOT's assumption includes all highway projects in Maine with FHWA federal funding or other FHWA federal action. This assumption of FHWA responsibilities or NEPA Assignment includes responsibility for environmental review, interagency consultation, and approval of NEPA actions. MaineDOT will be the Lead Federal Agency for MaineDOT-sponsored highway projects.

The following provides guidance for endangered species and provides the process for identifying and determining the appropriate level of coordination that is required.

The Endangered Species Preservation Act of 1966 was established to provide the means for limited protections to native animal species listed as endangered and threatened. In 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed and later in 1973, the US Congress passed the Endangered Species Act (ESA). The ESA defines "endangered" and "threatened", expanded the types of species receiving protection, prohibited "take" on all endangered species, required federal agencies to use their authorities to conserve listed species and consult on "may affect" actions, and prohibited federal agencies from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its "critical habitat." It is administered by the Department of the Interior's U.S. Fish and Wildlife Service (USFWS) and the Commerce Department's National Marine Fisheries Service (NMFS). The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish such as salmon. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, help to recover species and do not jeopardize the existence of any listed species. The ESA further requires Federal agencies (e.g., Federal Highway Administration or its designee) to document their effect determination by coordinating with USFWS or NMFS through informal or formal consultation. A Biological Assessment (BA) is required when a project results in an adverse effect on a listed species or critical habitat, and specific elements are required in the BA (50 CFR §402.12(f)). Consultation under Section 7 of the ESA requires that there is a federal nexus for the project. The federal action agency with the nexus serves as the lead in consultation.

MaineDOT is a non-federal designated representative for the Federal Highway Administration (FHWA) and can act as the action agency when making no-effect determinations and engaging informal consultation. When a project has two action agencies, a lead agency must be designated (§ 402.07 Designation of the lead agency.) This will remain in place under NEPA assignment for projects that are not included in the assignment program.

FHWA is a participant in multiple programmatic consultation agreements for listed species in Maine. These processes streamline Section 7 consultation by setting specific parameters for each agreement. If the project meets the parameters of the program, the submittals on each project are abbreviated and the review time is reduced. This guidance document defines the process for MaineDOT to document the appropriate assessment of impacts to ESA-listed species for NEPA on behalf of FHWA. MaineDOT will work



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with the signatories in order to act as FHWA in these agreements under NEPA Assignment.

MaineDOT Senior Environmental Manager and Biologist are responsible for assessing and ensuring compliance with the Endangered Species Act and consulting directly with USFWS and NMFS under NEPA Assignment (23 U.S.C. 327). MaineDOT has the responsibility of FHWA under NEPA assignment. MaineDOT is FHWA in this document, except for projects not under NEPA assignment (e.g., border projects).

Endangered species information is provided to and discussed with the Team Leader. This information is incorporated into the overall NEPA decision.

### 1.0 Endangered Species Initial Project Question and Documentation

The following question is required to be answered by the MaineDOT Biologist:

1. Do any Federally listed threatened or endangered species or Critical Habitat occur in the proposed project location?

A MaineDOT Biologist screens projects using the best available commercial and scientific data. This may include the use of the USFWS and NOAA online mapping tool as well as other data that is available from state resource agencies. The Team Leader will communicate with the Biologist about whether an Army Corps permit application will be submitted for the project. If a permit is needed, the Team Leader will need a consultation code that is generated from the USFWS Information for Planning and Consultation (IPaC) online tool.

Due to the northern long-eared bat (NLEB), whose range is throughout the state Maine; the response to this question is always "Yes".

A Yes response to Question 1 indicates the project will require an effects determination (go to 2.0). Potential Federal species presence will be documented in MaineDOT's ProjEx database and any backup documentation will be saved to MaineDOT's Environmental CPD e-file.

### 2.0 Federal Endangered and Threatened Species (Section 7) Assessment

The MaineDOT Biologist and Team Leader will review the scope of work with the Project Manager to determine whether there may be potential impacts to listed species or critical habitats (e.g. clearing, or in-stream work). If necessary, they will identify avoidance measures or alternatives to the project that will avoid or minimize adverse effects. The MaineDOT Biologist will assess the effects and determine the consultation level.

MaineDOT, FHWA, and the Army Corps of Engineers are participants in a Section 7 No Effect Agreement whereby the MaineDOT is delegated to determine that an action will have no effect on a species. Under NEPA Assignment the MaineDOT Biologist will make all no-effect determinations. See Section 4.

An effect and consultation level graphic is on the following page.



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### Effect and Consultation Level

Effect	Consultation Level with USFWS
No Effect (NE)	None
May affect, is not likely to adversely affect (NLAA) following active programmatic consultation	Project Notification Form/Verification Form from appropriate programmatic consultation.
May affect, is not likely to adversely affect (NLAA)	Concurrence request and informal consultation
May affect, is likely to adversely affect (LAA) following active programmatic consultation	Project Notification Form/Verification Form from appropriate programmatic consultation.
May affect, is likely to adversely affect (LAA)	Biological Assessment and formal consultation

A no-effect determination concludes the Federal ESA assessment. Any “may affect” determination requires consultation with the USFWS or NMFS (go to 3.0). The MaineDOT Biologist will coordinate consultation and is responsible for submitting consultation documentation. All actions will be processed and documented in MaineDOT’s ProjEx database and MaineDOT’s Environmental CPD e-file.

### 3.0 Federal ESA Coordination, Review, and Approval

MaineDOT will initiate coordination and communication with the USFWS or NMFS as early in the process as possible. This coordination may involve technical assistance requests, document reviews, conversations, and potential site visits. Following coordination, the MaineDOT Biologist will submit the consultation documentation to the agencies.

#### 3.1 Informal Consultation

The USFWS and NMFS have a goal to respond with a letter of concurrence for informal consultation after 30 days of receiving the request. Avoidance and minimization measures that relate directly to avoiding an adverse effect can be discussed with and proposed by the action agency. In an informal consultation process, the USFWS and NMFS cannot require the action agency to comply with anything except what is proposed by the action agency. Once MaineDOT has received a letter of concurrence, consultation is concluded.

#### 3.2 Formal Consultation

Adverse effects on a listed species result in the need for formal consultation. MaineDOT drafts a BA using coordination from the USFWS or NMFS and the action agency. The BA is submitted directly to USFWS or NMFS after a quality review. USFWS or NMFS will review the BA to ensure the information is complete and send correspondence to the action agency when consultation begins. Consultation occurs within 90 days and the USFWS/NMFS receives an additional 45 days to issue a biological opinion. The issuance of a biological opinion concludes consultation.

#### 3.3 Reinitiating Consultation

Any changes to the proposed action require review from the federal action agency to determine if reinitiating consultation is necessary (§ 402.16 Reinitiation of [formal consultation](#))

All actions will be processed and documented in MaineDOT’s ProjEx database and MaineDOT’s Environmental CPD e-file with species, effect, consultation, and document information.



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All ESA commitments are tracked in ProjEx.

### 4.0 Links and Agreements

Endangered Species Act: <https://www.law.cornell.edu/uscode/text/16/chapter-35>

Interagency Coordination, Consultation Procedures – Biological Assessments 50 CFR 402.12: <https://www.law.cornell.edu/cfr/text/50/402.12>

Information for Planning and Consultation (IPaC): <https://www.fws.gov/ipac/>

Atlantic Salmon Programmatic Biological Opinion and User’s Guide  
<https://www.maine.gov/mdot/maspc/>

Northern Long-eared Bat Programmatic Biological Opinion and User’s Guide: <https://www.fws.gov/midwest/endangered/section7/fhwa/pdf/UserGuideFHWAibatNLEBRevDec2016.pdf>

AASHTO Practitioner’s Handbook for Section 7  
<https://environment.transportation.org/resources/practitioners-handbooks/complying-with-section-7-of-the-endangered-species-act-for-transportation-projects/>

**MaineDOT’s Environmental Office utilizes the following agreements and internal documents related to Federal Endangered Species and effects determination. These documents are available on the Environmental Office Common Drive:**

NMFS/FHWA programmatic agreement for effects on Sturgeon and Salmon

MaineDOT/FHWA/ACOE No Effect Agreement, updated: January 2019

Atlantic Salmon Programmatic Agreement