

# INSTRUCTIONAL MEMORANDUMS

## To Local Public Agencies



To: Counties and Cities	Date: May 2, 2016
From: Office of Local Systems	I.M. No. 3.111
Subject: Threatened and Endangered Species	

**Contents:** This Instructional Memorandum (I.M.) includes guidelines and procedures for a Local Public Agency (LPA) to understand and comply with the requirements of the [Endangered Species Act](#) (ESA) as it applies to its listed species and critical habitats on Federal-aid projects. Specifically, Section 7 of the Act, called “Interagency Cooperation” is the mechanism to ensure actions taken do not jeopardize the existence of any federally threatened or endangered species. This I.M. also includes guidelines and procedures for compliance with 571 Iowa Administrative Code (IAC) [Chapter 77](#), Endangered and Threatened Plant and Animal Species. Section 7 procedures apply to all Federal-aid projects. Iowa Code section [481B](#) and 571 IAC [Chapter 77](#) applies to all Federal-aid and non-Federal-aid projects.

This I.M. also includes the following attachment:

[Attachment A](#) - Section 7 Process Flowchart

### Acronyms

- BA - Biological Assessment
- BMP - Best Management Practices
- CE - Categorical Exclusion
- DNR - Department of Natural Resources
- DOE - Determination of Effect for Threatened and Endangered Species for Local Public Agencies form ([Form 760005](#))
- DOT - Department of Transportation
- EA - Environmental Assessment
- EIS - Environmental Impact Statement
- ESA - [Endangered Species Act](#)
- FHWA - Federal Highway Administration
- LPA - Local Public Agency
- USFWS - United States Fish and Wildlife Service

### Introduction

The purpose of the ESA is to conserve “the ecosystems on which threatened and endangered species depend” and to also conserve and recover listed species. Under the law, species listed as either threatened or endangered are provided protection and regulated by the USFWS.

Section 7 of the ESA is the mechanism by which the FHWA or its designees ensure the actions taken will not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. This is achieved through consultation with the USFWS, which may take two forms, informal consultation or formal consultation.

A list of federally listed threatened and endangered species in Iowa can be found on the [USFWS Midwest Region](#) website. A list of State threatened and endangered species can be found in 571 IAC [Chapter 77](#), Endangered and Threatened Plant and Animal Species.

**NOTE:** The Determination of Effect for Threatened and Endangered Species for Local Public Agencies (DOE) form ([Form 760005](#)) should be included with the Concept Statement submittal, as per [I.M. 3.105](#), Concept Statement Instructions. If the Concept Statement submittal has not been completed, the DOE form ([Form 760005](#)) may be submitted independently but must include a general description of the work, location of the project, and photos of the surrounding impact area. For additional information see [Office of Location and Environment Section 7](#).

## Evaluation of Species and Habitats

1. Determine what species to look for:
  - a. Review the list of state species/critical habitat on the [Iowa DNR](#) website. As an alternative, the LPA may request the Iowa DNR to review for species or habitat in the project area. The Iowa DOT has developed a [sample letter of request to the DNR](#) for this purpose. Instructions are also available on the [Iowa DNR](#) website. However, this service is provided by the Iowa DNR as staffing and workload allows, and reviews may take up to 30 days to complete.
  - b. Review the list of Federal species/critical habitat on the [USFWS](#) website.
2. Using the information gathered in the previous step, evaluate the habitat characteristics. Species-specific information is available on the [Iowa DNR](#) and [USFWS](#) websites. It will describe the habitats needed for each species.
3. Determine if there are species or habitats in the project area that may be impacted.

## Determination of Effect

Following evaluation of the project area, the LPA needs to determine the effect of the intended action on any federal or state listed species or listed habitat using the Determination of Effect for Threatened and Endangered Species for Local Public Agencies (DOE) form ([Form 760005](#)). There are four categories of effect:

- *No effect* – consultation with USFWS is not required
- *May affect, not likely to adversely affect* - This includes good effects. Informal Consultation with USFWS is required.
- *May affect, likely to adversely affect* – Harm to the species is likely to occur. Formal Consultation with USFWS may be required in the form of a Biological Assessment (BA).
- *Jeopardy* – Harm to the species will occur, Formal Consultation with the USFWS is required, requires changing the project by using reasonable and prudent alternatives to avoid jeopardy.

Step 1 - If the LPA finds that no species or habitats are in the project area, complete the DOE form ([Form 760005](#)) and indicate that there is “No Effect”. The LPA shall submit the completed DOE form ([Form 760005](#)) with the Concept Statement, and Section 7 is complete.

If the LPA finds there are species or habitats in the project area, move on to the next step.

Step 2 - The LPA determines if there are measures that can be taken to avoid potential impacts to species or habitats. If there are, the LPA shall document the avoidance measures when completing the DOE form ([Form 760005](#)) and indicate that there is “No Effect”. The LPA shall submit the completed DOE form ([Form 760005](#)) with the Concept Statement, and Section 7 is complete.

If measures cannot be taken to avoid potential impacts to the species or habitats, move on to the next step.

Step 3 - The LPA shall determine if there are measures that can be taken to minimize potential impacts to species or habitats. If more in-depth habitat assessments are needed, contact a qualified professional.

To determine the measures that will be necessary to minimize impacts to a Federally listed species, an Informal Consultation will be required. To initiate an Informal Consultation, the LPA shall submit a letter requesting an Informal Consultation to the Office of Location and Environment including a DOE form ([Form 760005](#)), a copy of the response letter from the Iowa DNR (if received), and any other relevant project information. The Office of Location and Environment will contact USFWS for consultation. Concurrence from USFWS concludes Informal Consultation. For State listed species, the LPA shall forward project information and documentation to Iowa DNR. Review by the Iowa DNR will also conclude state level consultation. All agency responses will be included in NEPA documentation.

If measures can be taken to minimize potential impacts and the USFWS concurs and/or the Iowa DNR

has reviewed the consultation, note such measures when completing the DOE form ([Form 760005](#)) and indicate “May Affect – Not likely to adversely affect”. Section 7 is complete.

If measures can be taken to minimize potential impacts but USFWS does not concur or Iowa DNR does not agree, the LPA, Office of Location and Environment, and FHWA will evaluate whether the non-concurrence supports further study including:

- a. Additional habitat surveys.
- b. Presence/absence surveys.
- c. Collection of other additional data.
- d. Whether to prepare a BA and request formal consultation through FHWA.

If measures cannot be taken to minimize potential impacts to species or habitats, a Formal Consultation will be required. A Formal Consultation requires the LPA to complete a Biological Assessment (BA) and submit a request for formal consultation to the LPA Section 7 Specialist, Office of Location and Environment. The LPA Section 7 Specialist will work with FHWA to enter into formal consultation with the USFWS.

### **Species-Specific Guidance**

The following information is provided as guidance for commonly encountered issues with certain species. This guidance is not exhaustive or comprehensive. Please see the [USFWS](#) web site for more information.

#### Endangered Bats

The map of counties designated as within the range of the Indiana bat may be found at the USFWS [Iowa Bat Range Map](#) website. Refer to the USFWS [Indiana Bat Summer Survey Guidelines](#) for additional guidance. When tree clearing is required in areas meeting criteria for Indiana bat habitat, the LPA should take steps to avoid impacts to Indiana bat habitat and to minimize impacts that are unavoidable. The LPA should plan for clearing trees after September 30 and prior to April 1, to avoid direct harm to the Indiana bats. See Iowa DOT Standard Specification 2101.01, A. If significant tree clearing of Indiana bat habitat is necessary, mitigation may be required.

#### Topeka Shiner

The map of counties designated as within the range of the Topeka shiner may be found at the [Topeka Shiner Range and Designated Critical Habitat in Iowa](#) website.

For projects located within a stream designated as critical habitat for the Topeka shiner, consultation between Iowa DOT and USFWS will be required. When working in areas meeting criteria for Topeka shiner habitat, the LPA should take steps to avoid impacts to Topeka shiners and to minimize impacts that are unavoidable. The LPA should plan for avoiding activities in the stream between May 15 and July 31, which is the primary spawning period for Topeka shiners. Insert Iowa DOT Standard Note [281-6](#) into the project plans, which restricts project activities within the stream between these dates.

#### Bald Eagle

The Bald eagle is no longer listed as threatened or endangered by USFWS or the Iowa DNR; however, the Bald eagle remains protected under the [Bald and Golden Eagle Protection Act of 1940](#) and the [Migratory Bird Treaty Act of 1918](#). The Iowa DNR recommends limiting disturbance of known nesting sites and winter roosts by creating a minimum 0.25 mile no disturbance buffer zone. The [National Bald Eagle Management Guidelines](#) offer additional measures for avoiding impacts to bald eagles.

#### Migratory Birds

Migratory birds, their occupied nests, and their eggs are protected from disturbance or destruction in Iowa by the [Migratory Bird Treaty Act of 1918](#). To protect migratory birds, do not conduct construction activities where active nests are present between the dates April 1 and July 15 inclusive or until the birds have fledged and left the structure. If evidence of migratory bird nesting is discovered after beginning work, or in the event that migratory bird nests become established, immediately stop work and notify the Engineer. Remove and properly dispose of all non-active, existing migratory birds nests and monitor weekly to prevent the establishment of active nests. Contact the [Iowa DNR](#) with any questions.