

# INSTRUCTIONAL MEMORANDUMS

## To Local Public Agencies



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| To: Counties and Cities                    | Date: July 7, 2023 |
| From: Local Systems Bureau                 | I.M. No. 4.110     |
| 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 projects. Section 7 of the Act, called “Interagency Cooperation” is the mechanism used on Federal-aid projects to ensure actions taken do not jeopardize the existence of any federally threatened or endangered species. Section 10 of the Act, called “Exceptions”, is the mechanism for all non-Federal-aid projects. 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; Section 10 procedures apply to all non-Federal-aid projects. Iowa Code section [481B](#) and 571 IAC [Chapter 77](#) applies to all projects.

This I.M. also includes the following attachments:

- [Attachment A](#) - Threatened and Endangered Species Process for Non-Federal-aid Projects Flowchart
- [Attachment B](#) - Threatened and Endangered Species Process for Federal-aid Projects Flowchart
- [Attachment C](#) - Avoidance and Minimization Measures for Threatened and Endangered Bats

### 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 760005](#))
- DOT - Department of Transportation
- EA - Environmental Assessment
- EIS - Environmental Impact Statement
- ESA - [Endangered Species Act](#)
- FHWA - Federal Highway Administration
- LPA - Local Public Agency
- NLEB - Northern Long-eared Bat
- PCN - Pre-Construction Notice
- USACE - United States Army Corps of Engineers
- 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 10 of the ESA applies to non-Federal-aid projects and, if warranted, allows the LPA to secure a permit from the USFWS for the taking of a threatened or endangered species. However, when a 404 Permit from the USACE is needed, the USACE will consult with USFWS on behalf of the LPA, and include any provisions to protect threatened and endangered species in the 404 permit.

For Federal-aid projects, 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.

## Evaluation of Species and Habitats

For all projects regardless of funding, the LPA must review the state and federal lists of protected species/critical habitat and evaluate if any are present in the project area and may be impacted by the project.

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. 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.

To assist LPAs in complying with both federal and state law, the Determination of Effect for Threatened and Endangered Species for Local Public Agencies (DOE) form ([Form 760005](#)) has been developed. For all projects regardless of funding, the LPA must complete the DOE form and place the completed form in the LPA project file. For Federal-aid projects, the DOE form should also be included with the Concept Statement submittal, as per [I.M. 3.020](#), Concept Statement Instructions. If the Concept Statement submittal has not been completed, the DOE form 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 [Location and Environment Bureau Section 7](#). For non-Federal-aid projects being let through the Iowa DOT, the LPA must also submit the DOE form to the Iowa DOT Administering Bureau.

## 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. For state-listed species, coordination with the Iowa DNR may be 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). For state-listed species, coordination with the Iowa DNR may be required.
- *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. For state-listed species, coordination with the Iowa DNR may be required.

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”. For non-Federal-aid projects, the DOE form should be placed in the project file. For those non-Federal-aid projects being let through the Iowa DOT, submit the DOE form to the Iowa DOT Administering Bureau. For Federal-aid projects, 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 to the next step.

Step 2 – If the LPA determines the species or habitats within the project area will not be impacted by the project, complete the DOE form ([Form 760005](#)) and indicate that there is “No Effect”. Note that every feasible alternative to avoid impacting species or habitat should be pursued. For non-Federal-aid projects, the

DOE form should be placed in the project file. For those non-Federal-aid projects being let through the Iowa DOT, submit the DOE form to the Iowa DOT Administering Bureau. For Federal-aid projects, the LPA shall submit the completed DOE form ([Form 760005](#)) with the Concept Statement, and Section 7 is complete.

If the LPA determines the species or habitats present within the project area will be impacted by the project, indicate the species being impacted and move 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.

For non-Federal-aid projects:

If the project requires a 404 permit from the USACE, submit the DOE form ([Form 760005](#)) with the Pre Construction Notice (PCN). The USACE will consult with USFWS on behalf of the LPA and include any provisions to protect threatened and endangered species in the 404 permit. For state-listed species, the LPA will still need to coordinate with the Iowa DNR.

If the project does not require a 404 permit from the USACE, the LPA shall consult with USFWS and for state-listed species, the LPA shall coordinate with the Iowa DNR.

For Federal-aid projects:

To determine the measures that will be necessary to minimize impacts to a Federally listed species, an Informal Consultation with USFWS will be required. To initiate an Informal Consultation, the LPA shall submit a letter requesting an Informal Consultation to the Location and Environment Bureau 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 Location and Environment Bureau 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 the project may affect Indiana Bat or Northern Long-eared Bat, additional project impact details will be required to finalize the determination. See Species-Specific Guidance about Threatened and Endangered Bats below.

If measures can be taken to minimize potential impacts but USFWS does not concur or Iowa DNR does not agree, the LPA, Location and Environment Bureau, 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, Location and Environment Bureau. The LPA Section 7 Specialist will work with FHWA to enter into formal consultation with the USFWS.

Step 4 - The LPA shall describe the project's impacts and include relevant maps and or plan sets depicting the areas of impact and displaying areas with measurements (acreage) for each impact area. Total acreage of impacts should also be listed.

If the project will impact bat habitat, additional details about the distance from the existing edge of pavement will be needed for informal consultation with USFWS. The determination may change based on the distance from the road where tree clearing will be located. See Species-Specific Guidance for Threatened and Endangered Bats below.

## 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.

### Threatened and Endangered Bats

The map of counties designated as within the range of the Indiana bat may be found on the [Iowa DOT Indiana Bat Range Map](#). Refer to the USFWS [Indiana Bat Summer Survey Guidelines](#) for additional guidance. The Northern Long-eared Bat (NLEB) is listed as Federally Endangered; all counties in Iowa are within the range of the NLEB. When tree clearing is required in areas meeting criteria for Threatened and Endangered bat habitat, the LPA should take steps to avoid impacts to bat habitat and to minimize impacts that are unavoidable.

As a minimization measure, the LPA should plan for clearing trees after October 1 and prior to March 31. For avoidance and minimization measures, see Attachment C to this I.M. According to the Range-wide Programmatic Agreement for Indiana Bat and Northern Long-eared Bat for transportation projects, tree clearing located within 100 feet of the existing edge of road pavement and is conducted during the inactive season shall reach a “May affect, not likely to adversely affect” determination and not require mitigation. However, if tree clearing exceeds the 100 feet limit from the existing edge of pavement, a “May affect, likely to adversely affect” determination can be reached which would require bat habitat mitigation. Tree clearing beyond 300 feet from the existing edge of pavement will also require bat habitat mitigation. Therefore, the acreage and distance from the road where tree clearing will occur should be documented on the DOE Form. The Location and Environment Bureau will use this information during their informal consultation and communicate mitigation requirements as necessary. In addition, if the project includes bridge replacement within 1,000 feet of suitable bat habitat, a Bridge/Structure Bat Assessment Form is required. Attach the Bridge/Structure Bat Assessment Form with the DOE Form submittal.

### 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 refers to Iowa DOT Standard Specification 1107.18.B.3.

### 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. Refer to Iowa DOT Standard Specification 1107.18.C. 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.