



### Basic Information

SOP Title:	Endangered Species Act (ESA) – Considerations of Candidate and Proposed Species and Proposed Critical Habitat	Date	September 16, 2022
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Short Description of Procedure:	To clarify Idaho Transportation Department procedures for evaluating and determining effects of project actions on candidate and proposed species as well as proposed critical habitat.		

### Related Documents

Title of Document	Hyperlink (if applicable)
Programmatic Biological Assessment	<a href="#">2022 Programmatic Biological Assessment</a>
Biological Resources Personnel Qualifications	<a href="#">Biological Resources Personnel Qualifications</a>
2003 FHWA/ITD MOU with Services (2022 revision pending)	
Effects Determination Supplemental Guidance	

**Replaces November 2012 memorandum on candidate species.**

### Procedure

**Background.** Under Section 7 of the Endangered Species Act (ESA), proposed species and proposed critical habitat receive no statutory protection unless the project’s action has the potential to jeopardize the continued existence of a species or adversely modify proposed critical habitat. Candidate species also receive no statutory protection under Section 7. However, to reduce risk, Idaho Transportation Department (ITD) will complete conferencing activities for all candidate and proposed species and proposed critical habitat that have the potential to be impacted. Additionally, the US Fish and Wildlife Service (USFWS) encourages cooperative conservation efforts for candidate and proposed species and proposed critical habitat because they may warrant future protection under the ESA. Candidate and proposed species as well as proposed critical habitat are sensitive biological resources that must be discussed in the National Environmental Policy Act (NEPA) document including Conferencing results and commitments, if applicable.

**Risk.** Evaluating effects to candidate and proposed species and proposed critical habitat reduces the risk of project schedule delays in the event species status is elevated to threatened or endangered or proposed critical habitat is designated before the project’s completion. If the District or LHTAC chooses not to conference because the project is short-lived or little to no ground disturbance will occur, they assume all potential financial and temporal responsibility if the project must be delayed because a species becomes listed, therefore requiring consultation.

**When to Conference:** If additional candidate and proposed species or proposed critical habitat not already addressed in the Programmatic Biological Assessment (PBA), could incur potential impacts, a separate simplified Biological Evaluation (BE) or other biological document may be required. **If a candidate species is the sole species on the original USFWS Information for Planning and Consultation (IPaC) list during initial approval or the sole species added to the IPaC during re-evaluation, requesting to conference or reinitiating conference is not required but should still be addressed in the NEPA documentation (See below).** However, if a BE or Biological Assessment (BA) is already being prepared for ESA listed species and designated critical habitat, candidate and proposed species and proposed critical habitat should be included in the impact analysis of that biological document.

### **Project Considerations**

Considering these questions will help you decide if conferencing is needed for the project or there are likely no impacts to candidate and proposed species or proposed critical habitat.

- Does the project have a potential to significantly impact sensitive or protected species or habitat, including listed, candidate, or proposed species and proposed or designated critical habitat, recovery area, or Essential Fish Habitat?
- Will the project have ground disturbance?
- Is the project considered short-term or long-term (more than a year or multiple construction seasons)?
- Could avoidance, minimization, or conservation/mitigation measures be implemented to compensate for potential impacts?
- Is a candidate or proposed species the only species or only newly added species to the USFWS IPaC list?

## **ITD Process for Candidate and Proposed Species and Proposed Critical Habitat**

### **Evaluate**

Generate a IPaC species list for your project area, include all areas with potential impact from all project actions. Besides ESA listed species, evaluate all candidate and proposed species and proposed critical habitat on the IPaC species list.

Evaluate all potential impacts to candidate and proposed species and proposed critical habitat based on project actions. Consider the following:

- Are there current or historical occurrences of the species in or near the action area?
- Overall, is the species' food, cover, or habitat present in the action area and has a potential to be affected?
  - Is habitat crucial to reproductive success (e.g., nesting, denning, calving) present and may be affected?
  - Is habitat crucial to the survival of the species (e.g., foraging, dispersal, winter range) present and may be affected?
  - Are prey or vegetation resources required for diet present and may be affected?
  - Is non-crucial habitat (e.g., secondary habitat-not preferred habitat, but still suitable) present and may be affected?
  - Will project actions occur during a sensitive period (e.g., mating, nesting, hyperphagia (a period of increased caloric/food intake), hibernation) or within a sensitive range (e.g., critical habitat, recovery area)?

Refer to the Effects Determination Supplemental Guidance on how to appropriately evaluate biological resources in order to make effects determinations.

### **Effects Determination Language**

Based on the evaluation using the best scientific data available, make an appropriate determination of effects on candidate or proposed species. If critical habitat is proposed for the species, evaluate impacts to the habitat and make an

effects determination for the proposed critical habitat. Include the rationale or justification for that effects determination in the environmental document.

### No Impacts Anticipated

- No effect or no jeopardy statements do not exist for candidate or proposed species, therefore, include a “*not likely to jeopardize the continued existence (no effect) of the species*” statement. When using the same not likely to jeopardize language, the no effect in parentheses supports the differentiation between species that may be impacted and species that will not be impacted.
- Include a “*not likely to destroy or adversely modify (no effect)*” statement for proposed critical habitat.
- No conference is required.
- Example text: The project actions are not likely to jeopardize the continued existence and will have no effect on (insert candidate or proposed species) or is not likely to destroy or adversely modify and will have no effect on proposed critical habitat for (insert candidate or proposed species).
- Include rational or justification on how you got to this effect determination.

### Discountable, Insignificant, or Beneficial Impacts Anticipated

- Include a “*not likely to jeopardize the continued existence of the species*” statement for candidate or proposed species or a “*not likely to destroy or adversely modify*” statement for proposed critical habitat.
- Request informal conference and include analysis in the BE for all effects that may affect in a discountable, insignificant, or beneficial way, but are not likely to adversely affect proposed or candidate species or proposed critical habitat.
- Example text: The project actions are not likely to jeopardize the continued existence of (insert candidate or proposed species) or is not likely to destroy or adversely modify proposed critical habitat for (insert candidate or proposed species). In the event that the species becomes listed or critical habitat is designated, ITD will request in writing to the USFWS to adopt the conference concurrence as a standard concurrence.
- Include rational or justification on how you got to this effect determination.

### Adverse Impacts to Species Anticipated

- Include a “*not likely to jeopardize the continued existence of the species*” statement for candidate or proposed species or a “*not likely to destroy or adversely modify*” statement for proposed critical habitat.
- Request formal conference and include analysis in the BA for all effects that may affect, likely to adversely affect proposed or candidate species or proposed critical habitat.
- Example text: The project actions are not likely to jeopardize the continued existence of (insert candidate or proposed species) or is not likely to destroy or adversely modify proposed critical habitat for (insert candidate or proposed species). In the event that the species becomes listed or critical habitat is designated, ITD will request in writing to the USFWS to adopt the conference opinion as a standard opinion.
- Include rational or justification on how you got to this effect determination.

**Note:** Jeopardize the continued existence of a species means “...to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”

## **Conference**

### Informal Conferencing

According to USFWS, informal conferencing is not required for candidate or proposed species; however, most ITD projects are long-lived, and informal conferencing eliminates the risk of having to initiate consultation once a candidate or proposed species becomes listed or proposed critical habitat is designated. Request informal conference (BE or PBA) if project actions are *not likely to jeopardize the continued existence of candidate or proposed species or are not likely to destroy or adversely modify of proposed critical habitat*. The BE will discuss effects to candidate or proposed species or proposed critical habitat that are not likely to adversely affect. Following informal conference, USFWS will issue a conference concurrence. A conference concurrence can be adopted as a standard concurrence when the proposed or candidate species is listed or proposed critical habitat is designated, provided no significant new information is developed and no significant changes to the action are made that would alter the content of the concurrence. Adoption of the

conference concurrence should be requested by ITD in writing. Please note that USFWS is not required and may choose not to initiate voluntary conferencing on candidate or proposed species or proposed critical habitat.

**Formal Conferencing**

Formal conferencing is required when project actions are *likely to jeopardize proposed species or destroy or adversely modify proposed critical habitat*. Formal conference is not required for candidate species, however ITD is electing to consider candidate species similar to proposed species. Therefore, request formal conference (BA or PBA) if project actions *are not likely to jeopardize the continued existence of candidate or proposed species or are not likely to destroy or adversely modify of proposed critical habitat*. The BA will discuss effects to candidate or proposed species or proposed critical habitat that are likely to adversely affect. Following formal conference, a conference opinion consisting of the same format and contents as a final Biological Opinion (BO) will be issued by USFWS. The conference opinion will include terms and conditions on ways to minimize or avoid adverse effects, avoid jeopardy, or adverse modification. If the candidate or proposed species becomes listed, or proposed critical habitat is designated prior to project completion, a conference opinion can be adopted as a standard opinion, provided no significant new information is developed and no significant changes to the action are made that would alter the content of the opinion. Adoption of the conference opinion should be requested by ITD in writing. An incidental take statement is provided with a conference opinion; however, it does not take effect until a species is listed or critical habitat becomes designated and USFWS adopts the conference opinion as a standard BO. Please note that USFWS is not required and may choose not to initiate voluntary conferencing on candidate or proposed species or proposed critical habitat.

	<b>Informal Conference</b>	<b>Formal Conference</b>
<b>When Required per ITD</b>	If discountable, insignificant, or beneficial impacts to candidate or proposed species or proposed critical habitat will occur.	If adverse effects to candidate or proposed species will occur.
<b>Language</b>	Not likely to jeopardize the continued existence or not likely to destroy or adversely modify.	Not likely to jeopardize the continued existence or not likely to destroy or adversely modify.
<b>Length of Process</b>	No designated timeframe.	No designated timeframe; however, USFWS will try to abide by consultation timeframe.
<b>Documentation</b>	Conference concurrence; potential to be adopted as standard concurrence. All BA BMPs are required.	Conference opinion; potential to be adopted as standard BO, at which time incidental take statement becomes valid. All BA BMPs are required, and Terms and Conditions are recommended under the conference opinion but required if the opinion is adopted as a BO.

Note: If candidate and proposed species or proposed critical habitat *as well as* ESA listed species or designated critical habitat are present and may be impacted, conference will occur concurrently with consultation and a combined Letter of Concurrence or BO will be issued by USFWS.

**Conference Reinitiation**

Reinitiation of Conference is triggered for any of the following conditions that occur prior to completion of project:

- New information reveals effects of the action that may affect candidate or proposed species or proposed critical

habitat in a manner or to an extent not previously considered.

- The identified project action(s) is subsequently modified in a manner that causes an effect to the candidate or proposed species or proposed critical habitat that was not considered in the conference opinion or written concurrence.

If a candidate or proposed species or proposed critical habitat from the original IPaC species list was included in the initial conferencing activity and subsequently becomes listed or is designated, ITD will request in writing to the USFWS to adopt the conference concurrence or opinion as a standard concurrence or opinion. The conference concurrence or opinion can be adopted as a standard concurrence or opinion provided no significant new information is developed and no significant changes to the action are made that would alter the content of the concurrence or opinion.

Note: Be sure to monitor the candidate or proposed species and proposed critical habitat listing or designation status at final design review, PS&E, during construction, or as needed.

#### **NEPA Documentation (ITD 654)**

- Generate an IPaC species list for your project area (and buffer where applicable). If possible, include all areas with potential indirect and direct impact from all project actions.
- Document candidate and proposed species and proposed critical habitat in the Categorical Exclusion (Cat Ex or CE) Determination under the section reserved for Biological Resources.
- Discuss the presence or absence of the species, habitat including proposed or designated critical habitat, potential impacts, and conservation measures, if applicable -or- if the candidate or proposed species or proposed critical habitat is addressed in a BE/BA, reference the BE/BA discussion -or- reference the 2022 PBA if invoked.
  - A separate biological document, including an impact analysis and effects determination may be required for candidate or proposed species or proposed critical habitat not already addressed in the PBA.
- Include a jeopardize statement (not likely to jeopardize) for candidate or proposed species and an adverse modification statement (not likely to destroy or adversely modify) for proposed critical habitat.
- Analogous to ESA listed species or designated critical habitat, you may not have project actions with impacts that are “likely to jeopardize”, LAA, or “likely to adversely modify” in a CE.

#### **NEPA Re-evaluation (ITD 674)**

- Regenerate IPaC species list for your project area (and buffer where applicable). If possible, include all areas with potential indirect and direct impacts from all project actions.
- Follow Conference reinitiation process, if warranted.
- Document and evaluate the addition of any candidate or proposed species and any proposed critical habitat, potential impacts to those resources, and document any new conservation measures in the Environmental Re-evaluation under the section reserved for Changes and/or New Findings.
- If the candidate or proposed species or proposed critical habitat is addressed in a BE/BA, reference the BE/BA discussion -or- reference the PBA if invoked.
- Include a jeopardize statement and/or an adverse modification statement as stated above under NEPA documentation section.