

Threatened and Endangered Species – Federal

Contact

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Purpose (Legal Basis)

Endangered Species Act of 1973, as amended (Act)

The Act is a federal law that instructs all Federal departments and agencies to: "...conserve endangered species and threatened species and to utilize their authorities in furtherance of the purposes of this Act." Which translates to mean that they must ensure: "...that any action they authorize, fund, or carry out is not likely to **jeopardize** the continued existence of a listed species or result in the destruction or **adverse modification** of designated critical habitat." To fulfill these obligations they must use the best scientific and commercial data available.

The Role of OES - Designated Non-Federal Representative

Due to limitations in staff, time, resources and expertise, federal agencies have the ability to designate a non-federal representative under the Act. The designated staff then has the authority to conduct informal consultations or prepare biological assessments. The non-federal representative must be designated by written notice. (FHWA in accordance with 50 CFR 402.08 designated OES biologists as the non-federal representative for informal consultations including the preparation of biological assessments – 2004)¹.

Note: For FHWA actions that require formal consultation, FHWA is the lead and all formal correspondence must be processed through them (OES will provide FHWA with the information necessary to enter into the formal consultation process).

Threshold Criteria

The decision tree (page 3) allows the District to determine when coordination with OES is necessary. The two key questions are:

- 1) Is this a federal action?
- 2) Is FHWA the lead federal agency?

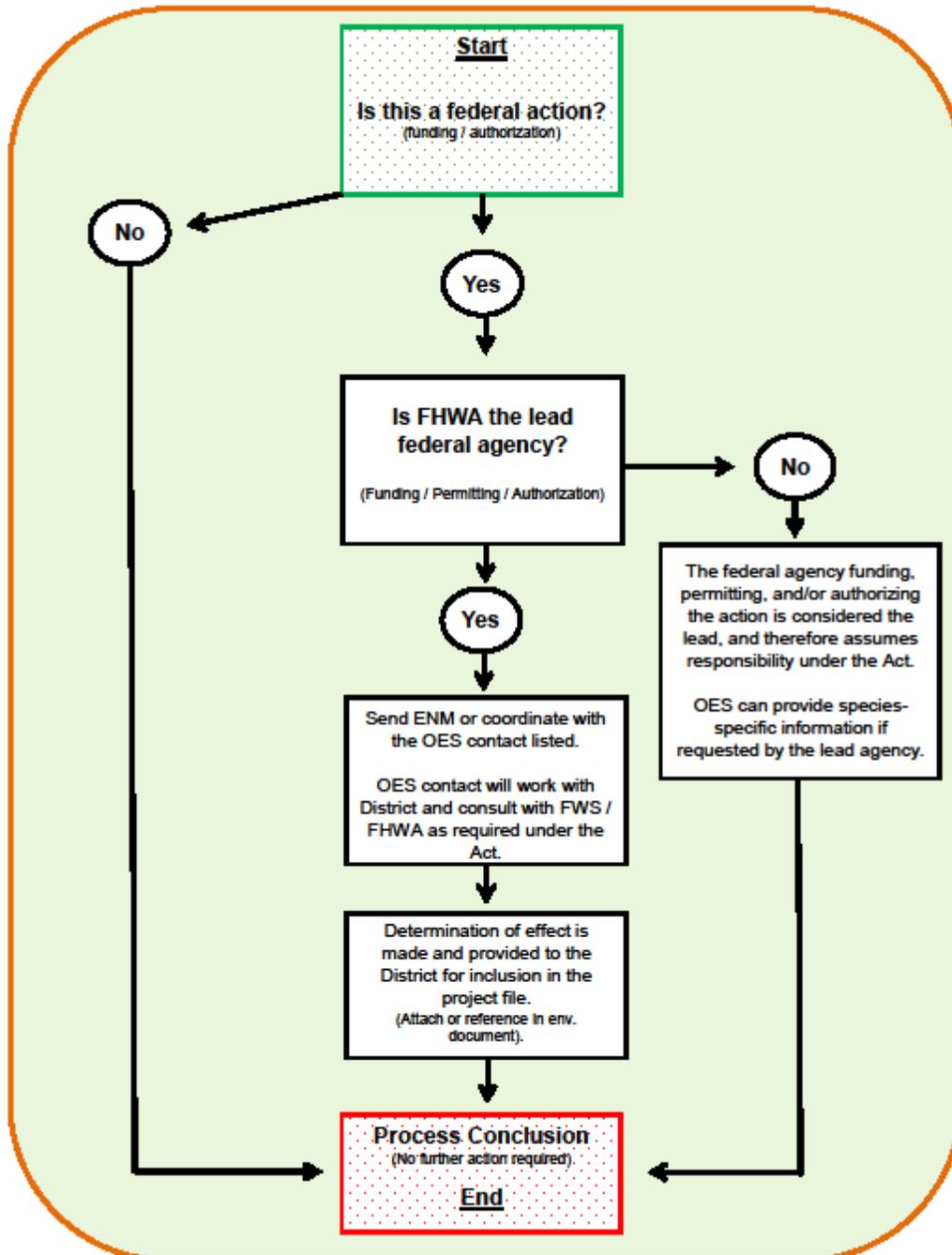
Actions funded with state/local funds that do not require a federal permit/authorization are considered to be state projects and therefore, No Action Required.

If FHWA funds, provides an approval and/or authorization on an action FHWA is then considered the lead federal agency under the Act and is responsible for all provisions and consultation requirements. Use decision tree to determine if coordination with OES is necessary.

If there is an action that is being funded by the state but requires a federal permit of some type, or involves funding from some federal agency other than FHWA, that funding or permitting agency is considered to be the lead federal agency and therefore assumes responsibility under the Act Coordination with OES is not required (Note :OES can provide species information if requested by the lead)

¹ As of this time, only the FHWA has officially designated MnDOT (OES biologists) to act on their behalf. This means if the action you are working on is acquiring funds from some federal agency other than FHWA, MnDOT cannot conduct consultations and the responsibility falls on the funding federal agency.

ESA Decision Tree – District Coordination Process



Relationship to the HPDP

According to the FHWA *“The NEPA and the ESA Section 7 processes interact in the early phases of the environmental analysis of a project. The NEPA drives the evaluation of biological resources in the project area concurrent and interdependent with the ESA Section 7 consultation process. Evaluation of impacts to species federally-listed as endangered is required for all levels of NEPA documentation, and the detail of analysis is potentially the same, dependant on the scope of the project, ecological importance and distribution of the affected species, and intensity of potential impacts of the project...”*

The first steps are the same regardless of the class of action

Use the ESA Decision Tree – District Coordination Process

- 1) Determine if the project is federal action.
- 2) Determine if FHWA is the lead federal agency
- 3) Coordinate with the OES contact as needed.

Class I Action - Environmental Impact Statement (EIS)

Scoping Documents

- 1) Use the ESA decision tree.
- 2) Identify federally-listed species or designated critical habitat within the project county (ies) and if necessary commit to a more detailed analysis during the DEIS process.

Draft Environmental Impact Statement (DEIS)

- 1) Carry forward any relevant information that was found during the scoping process.
- 2) Due to the complexity of the action, the potential for impacts to federally-listed species/designated critical habitat, and any required field evaluations, it may not be possible to make the determination of effect prior to the publication of the DEIS. In this case the DEIS should describe the coordination between agencies and steps being undertaken in order to come to a determination.
- 3) The determination of effect must be included (or at least referenced) in the FEIS
- 4) Any official correspondence between agencies (FHWA, FWS, MnDOT) is part of the administrative record and should be included in the project file.

Federal Final Environmental Impact Statement (FEIS)

- 1) If not already incorporated in the DEIS the FEIS will need to include (or reference) the determination of effect.
- 2) The document needs to describe the steps taken in making this determination.
- 3) Any official correspondence between agencies (FHWA, FWS, MnDOT) is part of the administrative record and should be included in the project file.

Record of Decision (ROD)

- ❖ FHWA will not issue the ROD until the provisions of the ESA have been met.

Class II Action Categorical Exclusions (CE)

- 1) Use ESA decision tree.
- 2) The document must include (or reference) the determination of effect.
- 3) The document needs to describe the steps taken in making this determination.
- 4) Any official correspondence between agencies (FHWA, FWS, MnDOT) is part of the administrative record and should be included in the project file.

Class III Action Environmental Assessment (EA)

- 1) Use ESA decision tree.
- 2) Due to the complexity of the action, the potential for impacts to federally-listed species/designated critical habitat, and any required field evaluations, it may not be possible to make the determination of effect prior to the publication of the EA. In this case the EA should describe the coordination between agencies and steps being undertaken in order to come to a determination.
- 3) The determination of effect must be included (or referenced) in the Findings.
- 4) Any official correspondence between agencies (FHWA, FWS, and MnDOT) is part of the administrative record and should be included in the project file.

Findings of Fact and Conclusions

- 1) If not already incorporated into the EA, the Findings will need to include (or reference) the determination of effect.
- 2) The document needs to describe the steps taken in making this determination.
- 3) Any official correspondence between agencies (FHWA, FWS, and MnDOT) is part of the administrative record and should be included in the project file.

Finding of No Significant Impact (FONSI)

- ❖ FHWA will not issue the FONSI until the provisions of the ESA have been met.