

# THREATENED AND ENDANGERED SPECIES AND PROGRAMMATIC BIOLOGICAL ASSESSMENT



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## THREATENED AND ENDANGERED SPECIES OF NORTH DAKOTA

- Interior Least Tern
- Whooping Crane
- Black-Footed Ferret
- Gray Wolf
- Poweshiek Skipperling
- Piping Plover (DCH)
- Western Prairie Fringed Orchid
- Dakota Skipper (DCH)
- Rufa Red Knot
- Northern Long-Eared Bat
- Sasquatch




## WHAT'S ON THE HORIZON??

- Three Bee Species (Rusty Patched Bumblebee, Yellow Banded Bumblebee and Western Bumblebee)
- Two Butterfly Species (Regal Fritillary and Monarch Butterfly)
- Moose
- Sturgeon Chub and Sicklefin Chub
- Little Brown Bat
- Golden Winged Warbler





## ENDANGERED SPECIES ACT (ESA)



- 1972 – President Nixon declared that conservation efforts towards preventing extinction of species were inadequate
- Congress responded with the Endangered Species Act
  - Signed into law in 1973
  - Under the ESA, a species may be listed as threatened or endangered.
    - **Endangered-** Species is threat of extinction throughout all or a significant portion of its range
    - **Threatened-** Species likely to become endangered within the foreseeable future
    - **Candidate –** Any species that are undergoing a USFWS status review
    - **Proposed –** Species that are found to warrant listing as either threatened or endangered

## SECTION 7 OF THE ESA

- Section 7 of the ESA directs that each Federal agency must, in consultation with the USFWS ensure that any action it funds, authorizes, or carries out will not jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.
  - **FHWA/USACE**
    - IF Federal agency determines no effect to listed species no consultation required
  - **Informal Consultation** – When a project may affect a species but potential effects are insignificant or discountable (i.e. highly unlikely or unmeasurable).
    - >90% of NDDOT projects
    - Concurrence letter issued by USFWS
  - **Formal Consultation** – When a project is likely to affect a species (i.e. harass, harm, or directly injure a species or directly impact critical habitat)
    - USFWS will prepare a Biological Opinion to determine whether a project will jeopardize the continued existence of a listed species.

## NDDOT CURRENT PROCESS

- If species or critical habitat are present in the county, there are three scenarios:
  - **FHWA Review Not Required**- Based on review criteria, no effect to species, thus no further action required. Species table included in environmental document to comply with ESA
  - **FHWA Review Required** –Section 7 affect determination package must be prepared in order to recommend a “no effect” determination to FHWA. FHWA must review and sign. Document attached to environmental document to comply with ESA
    - Section 7 Affect Determination Package Timeline – 1 -2+ Months
  - **Biological Assessment Required** – “No Effect” determination cannot be reached
    - Typical timeline for Biological Assessments: 2 – 6+ months
    - Formal consultations take longer – Very few projects
- Current process intended to be temporary until a programmatic agreement was put into place

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – WHAT IS IT?

- Comprehensive document that analyzes the effects of the NDDOT transportation program on T&E species within North Dakota.
- Describes the implementation process for use of the document to fulfill Section 7 ESA requirements
- Describes NDDOT project types in detail
  - Including new road construction and all types of roadway improvement projects
- Describes life history of all currently listed species (habitat, breeding, threats, current status)
- Identifies stressors and response for each species / critical habitat as a result of roadway projects
  - I.E. Noise, visual, water quality impacts, habitat alteration, lighting, etc and how species respond to those effects
- Provides conservation measures to be implemented to reduce potential effects
  - I.E. Species surveys, avoidance/timing restrictions, general BMP's. etc.
- Provides effect determination for each species and critical habitat.

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – HOW?

- Worked with many NDDOT staff as well as FHWA and USFWS to develop a Deconstruction Matrix
- Excel table for each species that compiles list of all major phases and sub-phases
  - Project Development (surveys, data gathering, bidding, project prep)
  - Utility Relocations
  - New Road Construction or Reconstruction
    - Site Prep
    - Earthwork/Grading
    - Installation of Drainage Features
    - Roadway Surfacing and Finishing
    - Guardrail
    - Workzone Traffic Control
    - New Bridge Construction / Bridge Demolition
  - Road/ROW Maintenance
  - Slide Abatement/Bank Stabilization/Flood-Scour-Sinkhole Repair/Landslide Correction
  - Bridge Painting/Preservation/Rehab
  - Drainage Improvement
- Breaks phases and sub-phases into activities and sub activities
- Matrix also describes stressor and response for species and conservation measures
- Used the matrix as a reference to help build the PBA

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – HOW?

- Created a Memorandum of Understanding between FHWA and NDDOT
- FHWA and NDDOT Responsibilities
- NDDOT Tasks and Products
  - Preparation of programmatic biological assessment
- FHWA and NDDOT Agreements
  - FHWA delegates informal section 7 consultation responsibilities to the NDDOT. Informal consultations conducted either through PBA or project specific BA
    - Ability of NDDOT to make No Effect determinations on FHWA's behalf
    - Approve projects under the programmatic biological assessment on FHWA's behalf
    - Consult directly with USFWS for informal consultations
- Mutual Agreements
- Term, Renewal, and Termination Clause

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – WHAT DOES IT DO?

- Streamlines the Section 7 ESA process.
  - Preparation of individual biological assessments involve repetitive analysis and consultation procedures on routine projects with predictable impacts
- PBA facilitates a standardized approach to making effect determinations for all Federally involved transportation projects in North Dakota.
- Predictable patterns and timeframes for ESA compliance work
  - Speed up project delivery
  - Reduce individual project review time
  - Eliminate individual project review from FHWA/USFWS
- Allows staff to focus efforts on more complex projects with greater concerns for T&E species

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – HOW DOES IT WORK?

- Determine project type and all work activities
  - A revised T&E table will be used to screen projects that may need a biological assessment
  - Projects where adverse effects are anticipated, separate biological assessment will be prepared (i.e. new bridge construction within Missouri River).
- **If one or more species require review**
  - A no effect determination package will be needed – or –
  - A biological assessment will be necessary
    - If scope of work activities fit within the scope of the programmatic biological assessment:
      - Project submittal form will be used

## PROGRAMMATIC BIOLOGICAL ASSESSMENT - PROCESS

- Kick off meeting
  - Between the parties responsible for the environmental document
    - Bridge/Design/District/Local Government/Materials and Research
    - ETS Biologist
    - Some instances FHWA and USFWS
    - Objective to confirm the listed species, discuss potential conservation measures and to identify whether the project fits the scope of the PBA
    - Can be phone call or meet in person
- Project Submittal Package – filled out, maps attached
- Internal Review
  - Ensure filled out properly
  - Appropriate conservation measures selected
  - Signature

## PROGRAMMATIC BIOLOGICAL ASSESSMENT – PROJECT SUBMITTAL FORM

- Fillable PDF Form used to document project and comply with ESA under the PBA
  - Project Number / PCN
  - Roadway / Project Limits
  - Legal Description
  - Year of construction / Approximate Duration
  - County or Counties
  - Species / Critical Habitat that may be present
  - ROW information (inside existing ROW / additional ROW required)
  - Wetland Mitigation Required
  - Temporary Bypass Required
  - Amount of Ground Disturbance
  - Description of Project
  - Applicable Conservation Measures
  - Affect Determination for Species / Critical Habitat
  - Project Approval Form
    - Form to be included in environmental document
    - Summarizes species and effect determinations as well as conservation measures
    - ETS Signature



## NORTHERN LONG-EARED BAT

- **Three ways to comply with Section 7 for this species**
  - NDDOT Programmatic BA
    - Must implement appropriate conservation measures
    - No delays if this method is used
  - FHWA/USFWS Range Wide Programmatic Consultation for the NLEB
    - Must use USFWS submittal form and implement appropriate conservation measures
    - Two week period
  - Final 4(d) Rule Streamlined Consultation Process
    - Must use streamlined consultation form
    - Conservation measures recommended, but not required
    - May not last, USFWS currently being sued over the rule
    - Takes 30 days

## PROGRAMMATIC BIOLOGICAL ASSESSMENT - WHEN?

- Memorandum of Understanding complete
  - FHWA and NDDOT legal review complete
  - Ready for signature
- Programmatic Biological Assessment near completion
  - USFWS final review has just finished and some minor comments will be addressed
  - Programmatic concurrence from USFWS is forthcoming
- Anticipate to have concurrence and signatures near the 1<sup>st</sup> of the year
  - Current projects and projects that occur before the PBA is implemented will follow current process.
  - Updated Section 7 guidance will be released at the same time
- **Reminder-** Always check the references and forms page for most current versions of documents

## Thanksgiving Trivia



# QUESTIONS??

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## NEW LUNCH AND LEARN WEBSITE

visit: [www.dof.nd.gov/LunchAndLearn.htm](http://www.dof.nd.gov/LunchAndLearn.htm)

### NDDOT Lunch and Learn Program

The North Dakota Department of Transportation (NDDOT) offers a Lunch and Learn Program which focuses on project development across the state. Participants are invited to attend these informational meetings on a variety of topics including Right of Way, Environmental Services, Cultural Resources, Technical Services, Consultant Agreement Services and other related fields. The NDDOT will offer these presentations at no cost to interested personnel.

#### Who Should Attend?

Anyone who is involved with project development in North Dakota is welcome to attend. (Employees of the NDDOT, Consultants, Resource Agencies, Cities, Counties and FHWA)

#### Where:

In Bismarck at Central Office and video conferencing is available at each NDDOT District Office. Conference call-in is also available.

#### Registration:

- [Register for the upcoming Lunch and Learn events](#)



#### Questions or Comments

- [Contact Event Administrator](#)

#### Related Links

- [Event Schedule PDF](#)
- [Instructions to join meeting via conference call PDF](#)

#### Past Events



- [Environmental Topic: Threatened and Endangered Species & Programmatic Agreement - 11/23/2016 PDF](#)
- [Environmental Topic: NEPA & Programmatic Agreement - 9/21/2016 PDF](#)
- [ROW: Negotiation Strategies - 7/20/2016 PDF](#)
- [ROW: Condemnations - 5/18/2016 PDF](#)