



FDM 24-10-1 Introduction

May 17, 2022

This section discusses the requirements for identifying and evaluating effects upon rare species and habitats. The Legal Requirements portion will discuss the background and legal framework for federal and state threatened and endangered species legislation. The subsequent Procedures and Impact Assessment section will discuss the roles, processes, determination of impacts, and documentation required for compliance.

FDM 24-10-5 Legal Requirements

May 17, 2022

5.1 Federal Law: The Endangered Species Act of 1973 (ESA) (16 U.S.C. § 1531-1544; Title 50 of the CFR)

5.1.1 Definitions

- Endangered means a species is in danger of extinction throughout all or a significant portion of its range
- Threatened means a species is likely to become endangered in the foreseeable future.
- Critical Habitat includes specific geographic areas that contain the physical or biological features that are essential to the conservation of the listed species and may require special management or protection. Not all listed species or species proposed to be listed have designated critical habitat. Suitable habitat for a species may exist beyond what is designed as critical habitat.
- Candidate means a species that is under consideration for listing, but not yet listed or formally proposed for listing. The ESA does not offer legal protection for these species, but conservation measures can be incorporated into the proposed project under NEPA to protect these species.
- Proposed for listing means USFWS has begun the formal listing process for a candidate species.
- The ESA defines take as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or attempt to engage in any such conduct. Harm includes significant habitat modification or degradation where it kills or injures wildlife by significantly impairing essential behavioral patterns.
- Purposeful take occurs when the reason for the activity or action is to conduct some form of take. For instance, conducting a research project that includes collecting and putting bands on bats is a form of purposeful take. Intentionally killing or harming listed species is also purposeful take and is prohibited.
- Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. For example, harvesting trees can kill roosting bats, but the purpose of the activity is not to kill bats.
- Projects that contain a federal nexus are those that receive federal funding, permits, or other authorization. Many WisDOT projects have a federal nexus, most often federal funding through the Federal Highway Administration (FHWA) and/or the need for a Clean Water Act Section 404 permit for aquatic resource impacts.
- Action area refers to all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action. As a result, the action area may be larger than the project footprint.
- Programmatic consultation is a standardized and streamlined approach to Section 7 consultation, which includes an impact assessment, and avoidance, minimization, and mitigation of impacts. The FHWA, FRA, FTA Programmatic Consultation for Transportation Projects affecting Northern Long-eared Bat or Indiana Bat Range-wide is an example of this type of consultation.

5.1.2 Overview

The federal Endangered Species Act (ESA) (16 U.S.C. § 1531-1544) is designed to provide a means to conserve threatened and endangered species and ecosystems on which they depend. This law requires that federal agencies seek to conserve threatened and endangered species and further the purposes of the ESA. They are required to consult with the U.S. Fish and Wildlife Service (USFWS) to ensure their actions do not jeopardize the continued existence of any listed species or species proposed to be listed or result in the destruction or adverse modification of its critical habitat.

Relevant Sections of the Endangered Species Act

<p>Section 4: Determination of endangered species and threatened species (16 U.S.C. § 1533; 50 CFR Part 424)</p>	<p>Allows for the listing of species as threatened or endangered. Section 4(d) can allow USFWS to increase protection for threatened species and streamline consultation.</p>
<p>Section 7: Interagency cooperation (16 U.S.C. § 1536; 50 CFR §402)</p>	<p>Describes consultation procedures and requires that federal agencies and projects with a federal nexus do not jeopardize the continued existence of any listed or proposed species. Also describes conservation obligations.</p>
<p>Section 9: Prohibited acts (16 U.S.C. § 1538; 50 CFR Part 17)</p>	<p>Prohibits take of listed animal species and describes prohibited activities for listed plants.</p>
<p>Section 10: Exceptions (16 U.S.C. § 1539; 50 CFR Part 17)</p>	<p>Provides guidance on permits that may be issued to authorize take, as defined in Section 9. Used to authorize impacts resulting from non-federal projects or projects without a federal nexus.</p>

5.1.3 Section 4: Determination of Endangered Species and Threatened Species

ESA Section 4 (50 CFR Part 424) outlines the process by which species are designated as threatened or endangered and dictates that these species receive protections under federal law.

Species proposed for listing are identified through listing petitions from the public or through the USFWS candidate assessment process. To be considered for listing, species must meet one of five criteria:

1. There is the present or threatened destruction, modification, or curtailment of its habitat or range.
2. An overutilization for commercial, recreational, scientific, or educational purposes.
3. The species is declining due to disease or predation.
4. There is an inadequacy of existing regulatory mechanisms.
5. There are other natural or manmade factors affecting its continued existence.

Petitioned species are reviewed and evaluated by USFWS through a formal listing process: 90-day finding, 12-month finding, proposed listing rule and final listing rule. This process includes two public comment periods. At the first three milestones, USFWS may discontinue the listing process if data shows listing is not warranted. If USFWS determines that the listing is warranted, there are two paths forward: continue to list the species through the federal rulemaking process or determine the listing is warranted but precluded by higher listing priorities. The species becomes a candidate species after a positive 90-day finding and remains a candidate until it is either determined listing is not warranted or it is in the formal listing process. With the latter option, it becomes a proposed species.

Species identified through the USFWS assessment process that have sufficient justification to list, become candidate species. USFWS either follows the federal rulemaking process, which includes a public comment period, to list the species as threatened or endangered or determines that the listing is warranted but precluded from doing so by higher listing priorities. In the latter option, the species remains a candidate.

Candidate species are not legally protected under the ESA but receive a higher conservation priority from USFWS. Candidates are assigned priority numbers based on the magnitude and immediacy of threats to it and its taxonomic distinctiveness. These species are reviewed annually and can be reprioritized or removed from candidate status due to successful conservation efforts.

Once a candidate species is in the formal listing process, it is considered a species proposed for listing. USFWS may determine that there are areas of habitat that are essential to the conservation of the species and may propose them as critical habitat. Areas that are not currently occupied but are likely needed for a successful species recovery may also be included in critical habitat.

The ESA does not automatically provide Section 9 protections to threatened species that were listed after September 26, 2019. Section 4(d) of the ESA gives USFWS the authority to write special rules for threatened (but not endangered) species to provide tailored Section 9 protections to aid in species conservation and to streamline compliance for actions that may result in low levels of take but will not threaten a species continued existence. This is referred to as a species-specific Section 4(d) Rule. A species-specific Section 4(d) Rule is generally proposed along with the proposed listing of a species as threatened. This area of the ESA has changed over time. At the time of writing this FDM section, a blanket Section 4(d) Rule does not exist for species added after September 26, 2019. Consult current ESA regulations within 50 CFR Part 17 for further guidance.

The ESA allows for emergency listing of species if there is significant immediate risk of survival. USFWS publishes an emergency listing, and it is valid for 240 days. During this time, the species is provided full ESA protections as USFWS works through the standard evaluation and listing process for the species. Emergency listings are rare.

5.1.4 Section 7: Interagency Cooperation (Consultation)

All federal agencies and programs with a federal nexus are mandated under Section 7 (50 CFR §402) to consult with USFWS before taking any action that has the potential to affect a listed species or designated critical habitat. Consultation may be informal or formal and is further discussed in Section 10.1.1. No effect determinations are made by the federal agency or its designated non-federal representative (WisDOT) and do not require consultation with USFWS or concurrence on the determination.

5.1.5 Section 9: Prohibitions

Section 9 of the ESA (within 50 CFR Part 17) prohibits take of listed animal species at all life stages. However, there may be an “exception” from prohibitions if a Section 4(d) Rule has limited the situations in which such take prohibitions of threatened species apply. WisDOT actions that do not have a federal nexus must still adhere to Section 9. The project may require a Section 10 (federal) Incidental Take Permit if species take is anticipated and a Section 4(d) Rule limiting take situations does not exist for the species.

Take prohibitions do not extend to listed plants. The ESA includes other prohibitions for plants including importing, exporting, and transporting; removal and possession, malicious damage or destruction on federal land; and removal, damage, destruction on any land if in knowing violation or any state law or regulation or state criminal trespass law. See [FDM 24-10-10.1.9](#) for more detail.

5.1.6 Section 10: Exceptions (Permits)

Section 10 (within 50 CFR Part 17) mandates that projects without a federal nexus must obtain a Section 10(a)(1)(B) Incidental Take Permit (ITP) when undertaking otherwise lawful projects that might result in take of a federally listed species, unless a Section 4(d) Rule limiting take situations exists for the species. Project proponents must also design, implement, and secure funding for a Habitat Conservation Plan (HCP) that minimizes and mitigates harm to the impacted species during the proposed project.

It is relatively rare that WisDOT projects need to undergo the Section 10 (non-federal) ITP process. This is due to the low number of projects without a federal nexus, as well as the generally low scope nature of these projects.

5.2 State Law: Wisconsin State Statute 29.604, Administrative Rule Chapter NR 27 and NR 10.02

5.2.1 Definitions

- Endangered is a legal designation for any species whose continued existence as a viable component of the state's wild animals or wild plants is determined by the Department of Natural Resources (DNR) to be in jeopardy on the basis of scientific evidence.
- Threatened is a legal designation for species of wild animals or wild plants which appears likely, within the foreseeable future, to become endangered.
- Special concern species are those species about which some problem of abundance or distribution is suspected but not yet proven. It is not a legal designation. The main purpose of this category is to focus attention on certain species before they become threatened or endangered.
- Protected wild animal is a legal designation under NR10.02 which prohibits take, attempt to take, transport, possession of a listed animal or its carcass unless authorized by DNR.
- Take means shooting, shooting at, pursuing, hunting, catching, or killing any wild animal or the cutting, rooting up, severing, injuring, destroying, removing, or carrying away any wild plant. In the state definition, “take” only includes harm to the species itself, whereas in the federal definition “take” includes harm to the species and its habitat.

- Incidental take is the unintentional loss of individual endangered or threatened animals or plants that does not put the overall population of the species at risk.

5.2.2 Overview

Wisconsin's Endangered Species Law (Wisconsin Statutes Section 29.604) was signed into law in 1972 and aims to conserve "endangered or threatened wild animals and wild plants within their respective jurisdictions to assure their continued survival."

Chapter NR 27 of the Wisconsin Administrative Code contains the rules necessary to implement Section 29.604, governs the taking, transportation, possession, processing, or sale of any state listed plant or animal, and contains the list of threatened and endangered species. The current reference for state listed threatened and endangered species is linked below:

<https://p.widencdn.net/byxof6/ER001>

Additionally, NR10.02: Protected Wild Animals, contains species for which take, attempt to take, transport, or possession of a listed animal or its carcass is prohibited unless authorized by DNR.

https://docs.legis.wisconsin.gov/code/admin_code/nr/001/10/i/02

5.2.3 Protections

Take of state listed endangered or threatened wild animals without a DNR permit or authorization is prohibited on both public and private property. However, take of state listed plants without a permit or authorization is only prohibited on public property. Most WisDOT projects occur on public ROW and do not qualify for forestry, agriculture, or utility exemptions, so protections for state listed plants would apply.

The state special concern designation does not offer specific protections for species. However, other protective laws and regulations such as NR 10.02, the Migratory Bird Treaty Act and/or the federal Endangered Species Act may apply. This means that special concern species may be fully protected or have no protection. If no additional regulatory protection applies to a special concern species, conservation actions are voluntary. Similarly, natural communities and animal concentration sites are not protected by law, but voluntary actions such as construction fencing, and avoidance windows are strongly recommended. Following the spirit of the DNR/DOT Cooperative Agreement, project teams should attempt to accommodate these recommendations and protect special concern species, natural communities, and animal concentration sites whenever possible. These recommendations may include actions such as surveys, avoidance windows or habitat restoration.

5.2.4 Natural Heritage Inventory

The Wisconsin Natural Heritage Inventory (NHI) tracks the locations and viability of endangered, threatened, and special concern species, natural communities, and animal concentration sites, and compiles them into the NHI Working List.

<https://dnr.wisconsin.gov/topic/NHI/WList>

FDM 24-10-10 Procedures and Impact Assessment

May 17, 2022

10.1 Endangered Species Act: Federally Listed Species

This section discusses the procedures federal and non-federal projects must follow to comply with the federal Endangered Species Act.

10.1.1 Roles

FHWA is the lead federal agency for Endangered Species Act (ESA) Section 7 consultation for WisDOT's federal-aid projects. FHWA leads the formal consultation process, but generally does not actively participate during informal consultation.

WisDOT serves as the designated non-federal representative for ESA Section 7 no effect determinations and informal consultation for its federal-aid projects. WisDOT assists FHWA with formal consultation. WisDOT is the lead agency for projects without a federal nexus.

The WisDOT region environmental coordinator (REC) works with the project designer throughout the ESA process. The REC is responsible for initiating and leading coordination with USFWS during informal consultation.

The Wisconsin Department of Natural Resources (DNR) completes Natural Heritage Inventory reviews for WisDOT and may provide guidance due to their technical expertise with federal species; however, DNR is not responsible for federal ESA consultation or effect determinations. See [FDM 24-10-5.2](#) and [FDM 24-10-10.2](#) for

state regulations and process.

10.1.2 Action Area

The action area under the Endangered Species Act refers to all geographic areas to be affected directly or indirectly by the agency action and not only the immediate area involved in the action. As a result, the ESA action area may be larger than the project footprint. Consider how far the effects of noise, light, vibration and other stressors from the proposed action may extend in aquatic and terrestrial environments when developing the preliminary action area.

A project's action area begins to be established during the environmental scope certification process in the project definition phase. The Risk-Based Environmental Scoping Template (RBEST) may be used during this process. The action area is further defined during NEPA/WEPA as the project's alternatives are developed and project scope is more clearly defined. The action area may change over the course of a project based on alterations to scope and/or changes to listed species in the project area.

10.1.3 Official Species List and Natural Heritage Inventory

The USFWS Information for Planning and Consultation (IPaC) website is the starting point for the Section 7 (federal) and non-federal processes under the federal Endangered Species Act.

<https://ecos.fws.gov/ipac/>

The WisDOT region environmental coordinator or project designer creates an IPaC project file and geographically defines the project's preliminary action area. The action area should be drawn broadly at this point to ensure it includes the full extent of the project's effects on listed species. It can be adjusted in the future when more is learned about the project's scope and potential stressors on listed species. The user generates an Official Species List (OSL) for the action area and retains a copy in the project file. The OSL is also included in the project's environmental document. The OSL is valid for 90 days and should be verified/updated (if older than 90 days) before key milestones including initiating consultation with USFWS and draft and final NEPA document approvals. See [FDM 24-10-10.1.12](#) for the OSL update process.

A Natural Heritage Inventory (NHI) review of the project's action area must be completed by DNR. This review is provided in the Initial Review Letter and includes information on occurrences of both federal and state listed species in the project area. Procedures and impact assessment for state listed species is described in [FDM 24-10-10.2](#). An updated NHI review must be requested from the DNR transportation liaison when the previous NHI review is more than 1 year old, when new federal or state species or critical habitat are listed, or when the project scope changes.

10.1.4 Impact Assessment

An assessment of the proposed action's effects is necessary to ensure that agency actions do not jeopardize the continued existence of any federally listed species or their designated critical habitat. The ESA states that, "to be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." Effects of the proposed action may occur later in time and may include consequences occurring outside the immediate project area.

The ESA requires consideration of cumulative impacts for a proposed action that "may affect and is likely to adversely affect" a listed species or designated critical habitat. In the context of ESA, cumulative impacts are reasonably certain future actions taken only by state or private entities. Under NEPA, projects may also be required must consider cumulative impacts to threatened and endangered species. NEPA cumulative effects are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions, regardless of what agency or person undertakes such actions. See [FDM Chapter 20: Environmental Documents](#) for more detail on NEPA requirements.

The impact assessment should consider the environmental baseline or condition of the action area without the consequences caused by the proposed action. It must identify potential physical, chemical, or biological stressors to the listed species that may result directly or indirectly from the action. The assessment needs to consider the proposed action's effects on all life stages of the species, including any host plants or animals. Additionally, the effects must be assessed at the scale of an individual of the species, not upon the species population.

The lack of NHI occurrences within the action area does not alone mean a "no effect" determination can be made for a species. A suitable habitat assessment may need to be completed at this time. The need for survey should be made in consultation with the WisDOT region environmental coordinator, WisDOT ecologist, DNR transportation liaison, and/or DNR conservation biologist, as needed.

Suitable habitat for animals is considered habitat that contains ecological characteristics that support breeding, feeding, resting, or sheltering. Suitable habitat for plants is considered habitat that contains the appropriate environmental (e.g., light, water, nutrients, soil, etc.) and climatic conditions for growth and reproduction. Suitable habitat doesn't necessarily imply high-quality habitat and it may exist in locations without a critical habitat designation.

If suitable habitat is present within the action area, a species presence/absence survey may be appropriate. Survey protocols vary between species and surveys must be conducted during the appropriate time of year. Additionally, for some species, one survey may not be sufficient to prove species absence or to determine that the proposed action would have no effect on the species. Assuming species presence in areas of suitable habitat may be a more appropriate and potentially efficient option for some projects or species when compared to conducting presence/absence surveys. The need for survey and interpretation of the survey results should occur in consultation with the WisDOT region environmental coordinator, WisDOT ecologist, DNR transportation liaison, DNR conservation biologist and/or USFWS, as needed.

Survey results for federally listed species and suitable habitat are incorporated into ESA effect determinations and any required consultation. Surveys and ESA consultation/coordination must be completed prior to the approval an environmental document. This will ensure any necessary avoidance and minimization commitments, further described below, are incorporated into the environmental document.

Analysis of critical habitat needs to consider how the proposed action will affect the physical and biological features of the critical habitat and how the species is likely to respond to changes to its habitat.

Avoidance and minimization measures (AMMs) should be implemented to reduce or eliminate potential effects of the proposed action on the species or critical habitat. Examples include tree clearing restrictions, avoiding construction during specific timeframes, and exclusion fencing during construction. AMMs are species and habitat specific, and implementation should be discussed with the WisDOT region environmental coordinator, WisDOT ecologist, DNR transportation liaison, DNR conservation biologist and/or USFWS, as needed.

These measures must be included in the environmental document as commitments to ensure they are properly incorporated into the project design, plans and construction contract. Additionally, any measures being implemented should be communicated to the DNR transportation liaison and DNR conservation biologist if the species is also state listed (see [FDM 24-10-10.2.1](#)).

10.1.5 Effect Determinations

After carefully considering the proposed project's actions and consequences, an effect determination must be made for all federally listed species and designated critical habitats included in the Official Species List. Effect determinations are also made for species and critical habitat proposed for listing. Candidate species appearing in the OSL do not require an effect determination. WisDOT requires that effect determinations are also made for projects without a federal nexus to guide the federal take decision.

Federal effect determinations and any required ESA consultation must be completed prior to the approval of the NEPA environmental document. Any required coordination with USFWS for non-federal projects regarding federal species take must also be completed prior to the approval of the WEPA environmental document ([FDM 24-10-10.1.9](#)).

Any species that is also state listed requires DNR coordination to determine if take will occur under state regulations, see [FDM 24-5-10.2](#).

There are three possible effect determinations for federally listed species and designated critical habitat: "no effect", "may affect, but is not likely to adversely affect" and "may affect and is likely to adversely affect".

A "**no effect**" determination means the proposed action will have no consequences, positive or negative, upon the listed species or designated critical habitat. If there is insufficient evidence to support an unequivocal finding of "no effect", a "may affect" determination should be made instead. A "no effect" determination does not require USFWS coordination or concurrence. See [FDM 24-10-10.1.11](#) for required documentation for "no effect" determinations.

A "**may affect but is not likely to adversely affect**" determination means that all consequences of the proposed action upon the listed species or designated critical habitat are beneficial, insignificant, or discountable. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact and include those effects that are undetectable, not measurable, or cannot be evaluated. Discountable effects are those extremely unlikely to occur.

Proposed "may affect but is not likely to adversely affect" determinations for projects with a federal nexus require informal Section 7 consultation with USFWS and written concurrence on the determination.

Non-federal projects with a proposed “may affect but is not likely to adversely affect” determination need to be coordinated with USFWS to determine if the project will result in federal species take and/or critical habitat harm, requiring a Section 10(a)(1)(B) incidental take permit. These projects are rare and should be discussed with the WisDOT region environmental coordinator and WisDOT ecologist, as needed.

A “**may affect and is likely to adversely affect**” determination means that listed species are likely to be exposed to the proposed action or its environmental consequences and will respond in a negative manner to the exposure. This determination can also apply when the proposed action will negatively affect the essential physical and biological features of designated critical habitat.

Proposed “may affect and is likely to adversely affect” determinations for projects with a federal nexus trigger the need for formal Section 7 consultation with USFWS and requires a biological assessment or biological evaluation. During this consultation, USFWS may recommend modifications to eliminate or reduce adverse effects.

Non-federal projects with proposed “may affect and is likely to adversely affect” determinations need to be coordinated with USFWS to determine if the project will result in federal species take and/or critical habitat harm, requiring a Section 10(a)(1)(B) incidental take permit. These projects are rare and should be discussed with the WisDOT region environmental coordinator and WisDOT ecologist, as needed.

Alternately, adverse effects to proposed species may result in a “**likely to jeopardize**” determination. Adverse effects to proposed critical habitat may result in a “**likely to result in destruction or adverse modification**” determination. Projects with a federal nexus anticipating either of these determinations must initiate a Section 7 conference with USFWS (see [FDM 24-10-10.1.8](#)).

10.1.6 Section 7 Informal Consultation

Section 7 informal consultation (50 CFR § 402.13) is required for projects with a federal nexus that “may affect” a federally listed species or critical habitat. For projects without a federal nexus, see [FDM 24-10-10.1.9](#). WisDOT is the designated non-federal representative and engages in informal consultation with USFWS. Informal consultation is completed during NEPA and must be concluded prior to the approval of the NEPA environmental document.

Informal consultation for the threatened northern long-eared bat is currently completed in IPaC, utilizing either the FHWA, FRA, FTA Programmatic Consultation for Transportation Projects affecting NLEB or Indiana Bat determination key (preferred) or the Northern Long-Eared Bat (NLEB) Consultation and 4(d) Rule Consistency determination key.

Link to the User’s Guide for the Range-wide Programmatic Consultation for Indiana Bat and Northern Long-Eared Bat:

<https://www.fws.gov/media/users-guide-range-wide-programmatic-consultation-indiana-bat-and-northern-long-eared-bat>

The determination key will provide one of the following results: “no effect”, “may affect, but is not likely to adversely affect”, “may affect and is likely to adversely affect”, or the project is outside of the scope of the programmatic consultation determination key. If the project is outside of the scope of the programmatic, see informal consultation process below.

A consistency letter is generated in IPaC for a programmatic “no effect” determination. This letter is saved to the project file and attached to the environmental document. No coordination with USFWS is needed for NLEB.

A concurrence verification letter is generated in IPaC for a programmatic “may affect, but is not likely to adversely affect” determination and is submitted to USFWS through IPaC for review. It must be saved to the project file and attached to the environmental document. If USFWS does not contact the submitter within 14 days after submission of the programmatic determination the informal consultation process for NLEB is considered complete and ESA Section 7 responsibilities have been fulfilled for this species. These determinations frequently have agreed upon avoidance and minimization measures that must be adhered to and they must be incorporated into the environmental document commitments.

A consistency letter is generated in IPaC for a programmatic “may affect and is likely to adversely affect” determination and is submitted to USFWS through IPaC for verification. USFWS will respond within 30 days. A verification letter must be received from USFWS before ESA Section 7 consultation can be considered complete. Documentation of consultation is saved to the project file and attached to the environmental document. These determinations will have agreed upon avoidance and minimization measures that must be adhered to and they must be incorporated into the environmental document commitments.

To begin the informal consultation process for NLEB outside of the FHWA, FRA, FTA programmatic

consultation, other federally listed species and/or critical habitat, WisDOT provides USFWS specific information on the proposed action and its effects on the species or critical habitat. If the proposed action meets the major construction criteria, a biological assessment must be prepared. Otherwise, the contents of a biological evaluation should be submitted. See FDM 24-10-10.1.11 for a description of documentation types.

The WisDOT region environmental coordinator initiates informal consultation with USFWS during NEPA by emailing the documentation to Darin_Simpkins@fws.gov (or current USFWS contact – check with WisDOT ecologist) and requesting USFWS's concurrence on the proposed “may affect, but is not likely to adversely affect” determination(s).

During informal consultation, USFWS may suggest alterations to the proposed action, including avoidance and minimization measures, to reduce the impacts to the species or critical habitat. This may allow USFWS to concur on a “not likely to adversely affect” determination. These measures must be incorporated into the environmental document as commitments to ensure implementation. USFWS may also recommend conservation measures. These are voluntary but WisDOT should consider these measures and implement them when reasonable and appropriate.

USFWS attempts to respond to informal consultation submittals within 60 days (or 30 days for major construction activities with a biological assessment) but may extend the review period up to 120 days. The informal consultation process is not complete until USFWS concurs on the proposed “may affect, but is not likely to adversely affect” determination(s) or the formal consultation process is initiated (see [FDM 24-10-10.7](#)). Documentation of consultation correspondence and concurrence must be saved to the project file and attached to the environmental document. Any agreed upon avoidance and minimization measures must be incorporated into the environmental document commitments to fulfill ESA Section 7 responsibilities.

10.1.7 Section 7 Formal Consultation

Formal consultation (50 CFR § 402.14) is necessary when a federal action “may affect and is likely to adversely affect” a listed species or designated critical habitat. Formal consultation is completed during NEPA once the preferred alternative has been selected. This process is not often encountered by WisDOT projects, as such, a detailed discussion of the process is not included in this chapter. If an adverse effect determination is anticipated, the WisDOT region environmental coordinator should engage the WisDOT ecologist and FHWA in project impact discussions early in project design.

WisDOT or its consultant prepares the formal consultation initiation package which includes either a biological assessment or biological evaluation. See [FDM 24-10-10.1.11](#) for document requirements. FHWA is provided the consultation package for review and comment. Allow sufficient time in the schedule for revisions. Once complete, FHWA submits the formal consultation package to USFWS and requests to initiate formal consultation.

Once USFWS has confirmed receipt of a complete consultation initiation package, the agency has 135 days to complete consultation (90 days for consultation and 45 days to prepare a biological opinion), unless a 60-day extension is agreed upon by the FHWA and WisDOT.

USFWS prepares a biological opinion, which includes the project description, findings, and generally, an incidental take statement. This document officially determines whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. It is USFWS policy to provide the benefit of the doubt to the species if it's unclear if the proposed action's effects are adverse. The incidental take statement includes reasonable and prudent measures that must be implemented to minimize the impacts of any anticipated take. If the proposed action exceeds the parameters of the incidental take statement or cannot implement the reasonable and prudent measures, formal consultation must be reinitiated by FHWA.

Any conservation measures recommended in the biological opinion are voluntary. WisDOT should be consider these measures and implement them when reasonable and appropriate.

Formal consultation concludes with USFWS issuing a biological opinion. Section 7 responsibilities continue through implementation of the proposed action in compliance with the biological opinion.

10.1.8 Section 7 Conference

A Section 7 conference is legally required under the Endangered Species Act (50 CFR § 402.10) if a proposed action with a federal nexus is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If an adverse effect to a proposed species or critical habitat is anticipated, the WisDOT region environmental coordinator should involve the WisDOT ecologist and FHWA in project impact discussions early in project design.

Conference will be integrated with formal consultation for listed species or critical habitat, if applicable. If

conference is required, USFWS will prepare a conference opinion for any species or critical habitat proposed for listing. The conference opinion may be included in a biological opinion if one exists.

10.1.9 ESA Coordination for Non-Federal Actions Under Section 9

Proposed actions without a federal nexus (non-federal) do not follow the Section 7 consultation process, but rather focus on whether any of the following will occur:

- take of a federally listed animal species
- a prohibited act for federally listed plant species
- harm to a critical habitat

Evaluation of the above criteria and any required coordination with USFWS occurs during WEPA and must be concluded prior to the approval of the WEPA environmental document.

Animals

The Endangered Species Act Section 9 prohibits take of endangered animals (50 CFR § 17.21) and threatened animals that were listed on or prior to September 26, 2019 unless a Section 4(d) Rule applies to that species (50 CFR § 17.31).

Determination of federally listed animal species take ultimately rests with WisDOT, the non-federal agency. To aid in the decision-making process on take, WisDOT makes internal effect determinations for its non-federal projects to guide when non-federal projects need to be coordinated with USFWS. The effect determinations are not a USFWS requirement, as the ESA focuses on whether or not take will occur for non-federal actions. WisDOT coordinates proposed non-federal actions with “may affect, but is not likely to adversely affect” and “may affect, and is likely to adversely affect” determinations for animal species with USFWS as described later in this section unless sufficient conservation measures and policy are in place to avoid take (e.g., highway mowing completed per policy).

Plants

The ESA does not prohibit take of listed plants. However, the ESA Section 9 (within 50 CFR Part 17) does include prohibited acts for endangered plants and threatened plants that were listed on or prior to September 26, 2019. These prohibited acts include importing/exporting, interstate/foreign commerce, and sale/offer for sale. The ESA further prohibits listed plant removal and reduction to possession and maliciously damaging or destroying the species within an area of federal jurisdiction without a permit. If the proposed non-federal action is occurring on federal land, coordination is needed with federal agency with jurisdiction over the land. The federal agency with jurisdiction may be responsible for completing Section 7 consultation with USFWS for listed plant impacts on the federal land. The WEPA environmental document must explain how the proposed non-federal action complies with ESA Section 9 prohibitions and document coordination with the federal agency.

For all areas regardless of ownership, the ESA prohibits removal, cutting, digging up, damaging, or destroying listed plant species (as described above) in knowing violation of any state law or regulation or in the course of any violation of a state criminal trespass law. In Wisconsin, take of state listed plants is prohibited on public land without a state permit or authorization ([FDM 24-10-10.2](#)). All federally listed plants in Wisconsin are also state listed as threatened or endangered (except for Mead’s Milkweed, which is considered extirpated). As such, the ESA prohibitions in this paragraph would apply on any public land, including rights-of-way. If impacts to listed plants are appropriately coordinated with DNR through the process described in [FDM 24-10-10](#) and any applicable authorization is received for state take of listed plants, then WisDOT would not be in violation of the ESA prohibitions for federally listed plants. No coordination would be necessary with USFWS. The WEPA environmental document must explain how the proposed non-federal action complies with ESA Section 9 prohibitions for listed plants and document coordination with DNR.

Critical Habitat

Take does not occur for impacts to critical habitat unless the proposed action meets all three harm criteria:

- likely to result in significant habitat modification or degradation
- the modification or degradation significantly impairs essential behavior patterns, including breeding, feeding, or sheltering
- as a result of the above, it is likely there will be an actual injury or death to a listed species

Coordination with USFWS is needed for the proposed non-federal action impacts upon critical habitat if the above criteria are not clear or if all three criteria are met. See the coordination process described below. Impacts to critical habitats should be sufficiently discussed in the WEPA environmental document, including the

assessment of the above criteria and documentation of coordination with USFWS as necessary

USFWS Coordination Process

Any required coordination with USFWS occurs during WEPA and must be concluded prior to the approval of the WEPA environmental document.

Coordination for the threatened northern long-eared bat for non-federal projects currently cannot be completed in IPaC. The FHWA, FRA, FTA Programmatic Consultation for Transportation Projects affecting NLEB or Indiana Bat determination key cannot be used for non-federal projects. Follow the general coordination process discussed below for NLEB.

Proposed non-federal actions that receive an internal “no effect” determination would not result in take of a listed animal species and/or harm a critical habitat. These projects do not need to be coordinated with USFWS. See [FDM 24-10-10.1.11](#) for how to document “no effect” determinations.

The WisDOT region environmental coordinator must coordinate with USFWS for all proposed non-federal actions that receive an internal “may affect but is not likely to adversely affect” determination for other federally listed animal species (i.e., all species excluding plants) or critical habitat. The correspondence should clearly identify the project as a non-federal action. Contents of the non-federal coordination email should contain all elements of the biological evaluation (see [FDM 24-10-10.1.11](#)), with the exception of the effect determinations. The intent of the coordination is to determine if the proposed action will cause species take and/or critical habitat harm, not to receive USFWS concurrence on effect determinations. A statement that species take and/or critical habitat harm is not anticipated should be included in lieu of effect determinations. The non-federal coordination email is sent to Darin_Simpkins@fws.gov (or current USFWS contact – check with WisDOT ecologist).

USFWS may suggest alterations to the proposed action, including avoidance and minimization measures, to reduce the likelihood of take. These measures must be incorporated into the WEPA environmental document as commitments to ensure implementation. USFWS will provide guidance on whether take is likely to occur. If take is not reasonably likely to occur, coordination is complete. Documentation of coordination with USFWS must be saved to the project file and included in the environmental document.

If a proposed action without a federal nexus is reasonably likely to take a federally listed animal species (“may affect and is likely to adversely affect” determination”) and/or harm a critical habitat, the WisDOT region environmental coordinator should engage the WisDOT ecologist in project impact discussions early in project design before contacting USFWS. These projects are rare. Coordination with USFWS will follow a similar process to above but also will require additional steps to prepare a Habitat Conservation Plan and apply for a Section 10(a)1(A) Incidental Take Permit. See [FDM 24-10-10.1.10](#) for further information on these steps.

Any species that is also state listed requires DNR coordination to determine if take will occur under state regulations, see [FDM 24-5-10.2](#).

10.1.10 Section 10(a)1(A) Incidental Take Permit and Habitat Conservation Plan

Proposed actions without a federal nexus (non-federal) that are reasonably likely to take a federally listed animal species (internal “may affect and is likely to adversely affect” determination) and/or harm critical habitat, require an Endangered Species Act Section 10(a)1(A) incidental take permit (ITP) (50 CFR § 222.307). The ITP authorizes take of a listed animal species that is anticipated to occur incidental to an otherwise lawful activity. A Habitat Conservation Plan (HCP) must accompany a Section 10 permit application.

These proposed non-federal actions must be coordinated with the WisDOT ecologist and USFWS prior to preparing a HCP or federal ITP application. WisDOT or its consultant will prepare the HCP. Since WisDOT projects requiring federal incidental take permits are rare, this FDM chapter will not provide a discussion on HCP contents, ITP application process and HCP implementation. See the WisDOT ecologist for more information.

See [FDM 24-10-10.2.2](#) for information on the state incidental take authorization process for state listed plants and animals.

10.1.11 Documentation

A **biological assessment** (BA) is required under 50 CFR § 402.12 for any project with a federal nexus involving “major construction activities”, which are considered to be projects for which a NEPA Environmental Impact Statement (EIS) is prepared. Its preparation is not dictated by the proposed action’s effects or the type of ESA Section 7 consultation needed.

A biological assessment contains:

- Summary of the proposed action
- Alternatives considered

- Description of the action area
- Identification of proposed/listed species and proposed/designated critical habitat that may be present in the action area
- Description of the environmental baseline
- Analysis of the proposed action's potential effects on species and critical habitat
- Discussion of cumulative effects (only necessary for adverse effects/formal consultation)
- Section 7 effect determinations for each species and critical habitat
- Supporting documentation, which may include a literature review and views of experts

The ESA regulation does not specify a specific format but has recommended elements (see 50 CFR §402.12(f)). The BA must use the best scientific and commercial data available, or which can be obtained during consultation.

WisDOT does not have a specific BA template. See the WisDOT ecologist for further guidance on format and examples.

FHWA's current BA template is available at:

<https://www.environment.fhwa.dot.gov/ESAWebTool/Site/Template.aspx>

WisDOT or its consultant prepares the biological assessment. It should be a standalone document. BAs containing "may affect and is likely to adversely affect" determination(s) must request initiation of formal consultation and require WisDOT ecologist and FHWA review prior to submittal to USFWS. See [FDM 24-10-10.1.7](#) for the Section 7 formal consultation process.

BAs containing "may affect, but is not likely to adversely affect" determinations are sent to USFWS electronically by the WisDOT region environmental coordinator and must request USFWS concurrence on those determinations. See FDM 24-10-10.1.6 for the Section 7 informal consultation process. The BA is a standalone document attached to an email.

The BA and consultation should be summarized in the body of the NEPA EIS and included in the EIS appendix once consultation with USFWS is complete.

A **biological evaluation** (BE) is a generic term for other "may affect" documentation. It is prepared for proposed actions with a federal nexus which "may affect" proposed/listed species or proposed/designated critical habitat, but do not meet the "major construction activities" criteria to require a BA.

The biological evaluation can also be prepared for proposed actions without a federal nexus (non-federal). See [FDM 24-10.1.9](#) for discussion of adjustments to this documentation and the non-federal coordination process.

A biological evaluation does not have a specific format, but USFWS recommends providing similar contents to a BA. It should minimally include:

- Description of the proposed action, including location, purpose, duration, and timing
- Specific components of the action and how they will be carried out
- Description of the effects of the action
- Summary of measures to avoid, minimize and offset effects of the action
- Maps, displays and/or plans depicting all areas to be affected by the proposed action
- IPaC official species list
- Available information such as the presence, abundance, density or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.
- Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat.

WisDOT or its consultant prepares the biological evaluation. BEs containing "may affect but is not likely to adversely affect" determinations for projects with a federal nexus are sent to USFWS electronically by the WisDOT region environmental coordinator and must request USFWS concurrence on those determinations. See [FDM 24-10-10.1.6](#) for the Section 7 informal consultation process. Depending on the complexity of the evaluation, the BE may be incorporated directly into the email or as a standalone document attached to an email.

BEs containing a “may affect and is likely to adversely affect” determination for projects with a federal nexus must include a request to initiate formal consultation. The WisDOT ecologist and FHWA must be contacted for coordination and review prior to submittal of the BE to USFWS. See [FDM 24-10-10.1.7](#) for the Section 7 formal consultation process.

The BE is included as an attachment in a Categorical Exclusion Checklist (CEC), Environmental Report (ER), or Environmental Assessment (EA) following conclusion of Section 7 consultation or non-federal coordination. The Threatened, Endangered and Protected Resources factor sheet should also be completed. A biological evaluation cannot be prepared for a NEPA EIS, see biological assessments above. A BE can be prepared for a WEPA EIS. The BE and non-federal coordination should be summarized in the body of the WEPA EIS and included in the EIS appendix once coordination with USFWS is complete.

“No effect” determinations. Projects with a federal nexus that are documented with a NEPA CEC, ER, or EA do not require preparation of standalone ESA effect determination document for “no effect” determinations. These determinations can be documented solely in the environmental document. The Threatened, Endangered and Protected Resources factor sheet should be completed. The environmental document must include the “no effect” determination, justification for the finding, and any relevant documentation or correspondence (e.g., DNR coordination) for each proposed or listed species and proposed or designated critical habitat. “No effect” determinations made for a project documented with an EIS must be included in a BA, see above.

Projects without a federal nexus (non-federal) do not require preparation of standalone ESA effect determination document for “no effect” determinations that lead to “no take” decisions. The Threatened, Endangered and Protected Resources factor sheet should be completed for WEPA CEC, ER, or EA documents. The environmental document must include the “no effect”/“no take” decisions, justification for the finding, and any relevant documentation or correspondence (e.g., DNR coordination) for each listed species and designated critical habitat. This information is incorporated into the body of a WEPA EIS and attachments as appropriate.

[FDM 24-10-10.2.4](#) describes confidentiality requirements for species that are both federal and state listed.

10.1.12 Updates and Scope Changes

An updated version of the Official Species List (and NLEB or other species verification letters, if applicable) should be obtained from IPaC at key project milestones: prior to the final NEPA review and approval, prior to submitting a Clean Water Act Section 404 permit application, within 1 year of project letting, if a scope change occurs, and if new species or critical habitat is listed or proposed for listing within Wisconsin. An updated Natural Heritage Inventory (NHI) review must also be requested from the DNR transportation liaison at these milestones if the previous review is more than 1 year old and/or was not conducted for the current project scope.

New species or critical habitat identified in the updated Official Species List require effect determinations to be made and potentially USFWS consultation or coordination, following the processes described earlier in this chapter. If there are changes to the proposed action or new NHI occurrences within the project action area, WisDOT needs to determine if the effect determinations for federally listed species remain valid.

Confirmation of “no effect” and “may affect but is not likely to adversely affect” determinations must be documented in the project file and any applicable environmental document re-evaluation. If a previous “no effect” or “may affect but is not likely to adversely affect” determination is no longer valid, follow the Section 7 consultation process discussed in this chapter for projects with a federal nexus or the non-federal coordination process for projects without a nexus.

The USFWS biological opinion will outline the criteria for re-initiating the formal consultation process. Failure to implement reasonable and prudent measures and/or exceeding the parameters of the incidental take statement require re-initiation of consultation. Similarly, for non-federal projects that have obtained a Section 10 incidental take permit, the permit will discuss the process for re-coordination with USFWS.

Correspondence and consultation documentation must be saved to the project file and included in any applicable environmental document re-evaluation.

10.1.13 Emergency Consultation/Coordination

For projects that require an emergency response/repair to protect human life and property resulting from “situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.” (50 CFR §402.05), USFWS should be contacted as soon as feasible through the process described below to fulfill Endangered Species Act responsibilities. Repairs that will be completed later in time and do not meet the criteria above must follow the standard USFWS consultation/coordination processes discussed in this chapter.

Send an email to Darin Simpkins at Darin_Simpkins@fws.gov (or current USFWS contact – check with WisDOT ecologist) providing the following information:

- Project location description and map
- Brief description and date of event of triggering emergency response
- Description of the emergency response action (completed and to be completed) and timelines
- IPaC Official Species List

USFWS will respond with recommended actions that may be implemented to minimize the impacts to any listed species or designated critical habitat in the area. These actions should be incorporated when feasible. If the USFWS evaluation indicates that the emergency response procedures may result in jeopardy/adverse modification, and no means of reducing or avoiding this impact are available, USFWS will advise the WisDOT of this and document this conclusion. WisDOT will not stop or delay their emergency response because of this notification. In such a situation, WisDOT, USFWS and FHWA (as applicable) will discuss actions to remediate the effects once the emergency is under control.

After the emergency is under control, WisDOT will notify USFWS what conservation measures it was able to implement during the emergency response and if the response resulted in any incidental take or destruction/adverse modification of critical habitat. If neither occurred, USFWS provides a written response, concluding informal consultation.

If incidental take of a species and/or adverse modification of critical habitat occurred as a result of the emergency response/repair, WisDOT notifies USFWS. If the repair effort had a federal nexus, FHWA submits a request to USFWS to initiate Section 7 formal consultation process. Repair efforts without a federal nexus require non-federal coordination with USFWS led by WisDOT.

USFWS will prepare an after-the-fact biological opinion to cover any incidental take or destruction/adverse modification that occurred during the emergency response and document the final impacts to the listed species or critical habitat. It may contain suggestions for after-the-fact remediation including reasonable and prudent alternatives or mitigation measures. ESA responsibilities are fulfilled with the completion with the implementation of any requirements from the biological opinion.

This emergency consultation/coordination process follows USFWS guidance:

https://www.fws.gov/sites/default/files/documents/508_Emergency%20consultation%20handout.pdf

Any species that is also state listed requires DNR coordination to determine if take will occur under state regulations, see [FDM 24-5-10.2](#).

10.2 Wisconsin's Endangered Species Law: State Listed Species

This section discusses the procedures all projects must follow to comply with the state Endangered Species Law.

10.2.1 DNR Project Review Process

The endangered species review process for improvement projects is initiated when WisDOT notifies DNR of a project through the submittal of the DNR Project Coordination Request form and supplemental materials. This request is submitted when the project scope has been established and, for most projects, after areas of ground disturbance have been identified. This allows DNR to provide more specific comments in the Initial Review Letter (IRL). The request can be sent earlier in project development; however, recoordination with DNR will likely be necessary when more project details are available.

DNR transportation liaisons use the Natural Heritage Inventory (NHI) database to review the proposed project area. The NHI database produces a list of known occurrences of state and federally listed species, state special concern species, natural communities, and animal concentration sites. The NHI review is considered valid for 1 year.

DNR evaluates the project's potential to impact NHI resources based on the information provided by WisDOT and other supplemental information, such as desktop and/or field review of the project location. Depending on the level of project detail provided to DNR, time of year the review is occurring, and/or staff time availability, a detailed review may not be feasible. DNR may defer the evaluation to when more detailed scope information is available, or when a field review can be completed. WisDOT must follow up with DNR if the impacts upon NHI resources have not been determined in the IRL.

If the NHI review results in no species or locations of concern, DNR includes a statement in the IRL that there are no known listed species or suitable habitat that could be impacted by the project. This does not necessarily fulfill all WisDOT/FHWA responsibilities under the federal Endangered Species Act if the species is also federally listed (see [FDM 24-10-10.1](#)).

If NHI resources are within the project area, DNR may be able to comment on the likelihood to impact those resources if sufficient project scope and habitat information are available. DNR may propose avoidance measures such as avoiding ground disturbance in suitable habitat or restricting the timing of tree clearing. If WisDOT is able to implement the required measures, no further coordination with DNR is needed for the species. There may be federal Endangered Species Act consultation/coordination requirements if the species is also federally listed.

DNR may also provide recommended or voluntary measures to reduce impacts. These are commonly provided for special concern species, natural communities, or animal concentration sites. While WisDOT does not have a legal obligation to implement these recommendations, under the spirit and intent of the DNR/DOT Cooperative Agreement, WisDOT will implement these measures when feasible. Consideration should be given to design conflicts, environmental constraints, project schedule conflicts, magnitude of additional costs, ect.

DNR may note that more detailed project information must be provided before the liaison can determine if impacts to listed species may occur as a result of the project. DOT is responsible for follow up coordination with DNR to provide additional information on project scope and disturbance.

DNR may indicate that a field survey is needed to evaluate suitable habitat or confirm presence/absence of a species. DOT and DNR may be able to complete a joint field review depending on complexity of the project, safety of the project location, staff expertise and availability. If joint field review is not feasible, DOT will ensure that the field survey is completed by qualified staff. This includes trained/certified WisDOT staff or consultants. Some species require the surveyor to hold an Endangered/Threatened (E/T) Species Permit.

Results of surveys will be shared with the DNR transportation liaison. If surveys are negative for suitable habitat or species, generally no requirements or commitments will be required from DNR's perspective, as species take is not anticipated. WisDOT would expect to receive confirmation of this from the transportation liaison. Habitat and species surveys are typically only valid for 1-5 years and may need to be repeated if project activities do not begin before the survey timeframe ends.

If surveys identify suitable habitat or are positive for species, the transportation liaison will provide avoidance and minimization measures to avoid species take from the state's perspective. If these measures cannot be implemented, state incidental take coverage is required through a broad incidental take authorization or individual incidental take authorization.

The federal ESA process also needs to be followed for any species that is federally listed, see [FDM 24-5-10.1](#).

10.2.2 State Incidental Take Permit/Authorization

Project teams must implement protected species avoidance and minimization measures whenever possible. However, if take avoidance is not practicable, an Incidental Take Permit or Authorization is required.

Incidental Take Permits (ITP) are used for activities not conducted by the DNR and not conducted, funded, or approved by another state agency. An Incidental Take Authorization (ITA) is needed for activities that are being conducted by the DNR itself or being conducted, funded, or approved by another state agency, such as WisDOT.

Incidental Take Permits/Authorizations (ITP/A) are a means by which DNR allows the unintentional and unavoidable taking of state listed endangered or threatened species while conducting otherwise lawful activities. These permits may only be issued if the project minimizes and mitigates for impacts to the species and does not jeopardize the survival of that species. The project cannot be likely to result in the destruction or adverse modification of a habitat that is critical to the continued existence of the endangered and threatened species within the state.

Broad Incidental Take Permit/Authorizations (BITP/A) have been created for certain activities or species. These BITP/A still require minimization and/or mitigation measures. There are currently five types of Broad Incidental Take Permit/Authorizations:

- [Grassland and savanna management BITP/A](#)
- [Bats BITP/A](#)
- [Wood turtle BITP/A](#)
- [No/low impact activities BITP/A](#)
- [Common activities BITP/A](#)

If the project is not covered by a Broad Incidental Take Authorization, WisDOT must prepare an Individual ITA application and submit it to DNR. Individual ITAs must include a conservation plan, which details measures to avoid, minimize and, if necessary, mitigate impacts to the protected resource. Mitigation measures are only

required if there is a permanent loss of habitat, such as a road expansion, but are not required for temporary loss of habitat, such as grading and immediately re-seeding a hillside. Mitigation involves creating new habitat or restoring current habitat, usually onsite or near site, but could also take the form of paying into a DNR mitigation fund if it is not possible to mitigate on or near the project area.

Upon receipt of the Individual ITA application, DNR determines if the compensation plan is complete and conducts a jeopardy assessment to determine whether the proposed take may be authorized. If take is allowable, DNR posts a 30-day public notice. If DNR determines that no significant modifications to the project or its mitigation measures are required as a result of the public notice, DNR signs the ITA, and the project can proceed. All necessary avoidance, minimization, and mitigation measures must be included in the environmental document commitments. These commitments are integrated into project plans, special provisions, and contract language, as appropriate, so they are carried forward into construction.

10.2.3 Documentation

WisDOT documents compliance with state protected species laws in the NEPA/WEPA environmental document. For CECs, ERs, EAs, the Threatened, Endangered and Protected Resources factor sheet should be completed. The document must also include any relevant documentation or correspondence with DNR. See [FDM 24-10-10.2.4](#) below for confidentiality requirements.

10.2.4 Confidential Information

Per Wisconsin Statutes Section 23.27 3(b), Natural Heritage Inventory (NHI) data is confidential and not subject to Wisconsin's open records law. State species information must be redacted before it is made available to the public. This includes redacting information from Initial Review Letters and other DNR correspondence that is included in an environmental document or other public documents that WisDOT produces. State listed species should be generalized to taxa group when discussed the document.

If a species is both federal and state listed, basic information about the species does not need to be redacted from the Initial Review Letter if it is already publicly available. For example, language regarding rusty patched bumble bee high potential zone or Karner blue butterfly high potential range within the project area does not need to be redacted, as this information is publicly available on USFWS's website. These species must be redacted from the IRL if more detailed information on species occurrence within the project area is described. The USFWS official species list, environmental document text, or other non-DNR attachments do not need federally listed species redacted.

10.2.5 Updates and Scope Changes

An updated Natural Heritage Inventory (NHI) review must be requested from the DNR transportation liaison at the following project milestones if the previous review is more than 1 year old: prior to the final NEPA review and approval, prior to submitting a Clean Water Act Section 404 permit application, and within 1 year of project letting. Additionally, the NHI review should be renewed if a scope change occurs or if new species or critical habitat is listed or proposed for listing within Wisconsin.