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436.01 Fish, Wildlife, and Vegetation Policies and Regulations

Sensitive wildlife, fish, plants, and their habitat require special consideration during project planning and development. Many federal, state, and local regulations apply to projects that may affect natural resources. The Washington State Department of Transportation's (WSDOT) policy is to follow and comply with all federal and state mandated regulations ([RCW 47.04.280](#)). Therefore, WSDOT biologists are involved in all stages of project development, evaluating potential adverse effects and recommending impact avoidance or minimization measures.

Projects with a federal nexus, meaning they have federal funding, requires a federal permit, or takes place on federal lands, must follow the most prominent laws; the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). All projects, regardless of funding source, must comply with Section 9 of the ESA, the State Environmental Policy Act (SEPA) ([RCW 43.21C](#)), Migratory Bird Treaty Act (MBTA), Marine Mammal Protection Act (MMPA), Bald and Golden Eagle Protection Act (BGEPA), and local ordinances.

The main focus of this chapter is to summarize regulations associated with fish, wildlife, and vegetation resources.

436.02 Addressing Fish, Wildlife, and Vegetation in the NEPA/SEPA Process

NEPA, [42 USC 4321](#), requires that all major actions sponsored, funded, permitted, or approved by federal agencies undergo planning to ensure that environmental considerations such as impacts related to fish and wildlife are given due weight in decision making. Federal implementing regulations are at [23 CFR 771](#) (FHWA) and [40 CFR 1500-1508](#) (NEPA). WSDOT's policy is to follow all guidance and direction provided by the federal lead agency on NEPA related documents. The analysis of impacts to fish, wildlife and vegetation can be recorded directly in the project's environmental document. In rare cases when warranted by the nature of the project, the analysis can be documented in separate Fish, Wildlife, and Vegetation [discipline reports](#). Templates and checklists provide document requirements for WSDOT projects. For additional details on NEPA procedures (see Chapters [400](#) and [412](#)).

436.03 Working with Endangered and Threatened Species

Both the state and federal agencies regulate threatened and endangered species in Washington. WSDOT complies with the ESA, which is administered by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS). The USFWS is primarily responsible for terrestrial and freshwater species, while NMFS responsibilities lie mainly with marine wildlife and anadromous fish. Significant sections of the Act include:

- **Section 4** of the ESA allows for the listing of species as threatened or endangered based on habitat loss or degradation, over utilization, disease or predation, inadequacy of existing regulation mechanisms, or other human caused factors. Section 4(d) allows for the promulgation of regulations to provide for the protection and conservation of listed species. It may allow for “take” of threatened species.
- **Section 7** of the ESA requires each federal agency to ensure actions it carries out, authorizes, permits, or funds do not jeopardize the continued existence of any threatened or endangered species. It describes consultation procedures and conservation obligations.
- **Section 9** of the ESA prohibits a “take” of listed species. “Take” is defined as to “harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect or attempt to engage in such conduct” (1532(18)). Through regulations, the term “harm” is defined as “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” Section 4(d) of the ESA allows for each service (USFWS and NMFS) to develop special rules (4(d) rules) to conserve species listed as threatened. These protections allow some take of threatened species that does not interfere with survival and recovery.
- **Section 10** of the ESA lays out guidance on permits that may be issued to authorize “take” as defined in Section 9.
 - Section 10(a)1(A) allows permits for take of listed threatened or endangered species for scientific research or purposes of propagation or survival.
 - Section 10(a)1(B) allows permits for incidental take of threatened or endangered species through the development and approval of Habitat Conservation Plan (HCP).

WSDOT has made ESA compliance an agency wide priority. Therefore, all WSDOT projects are required to comply with Section 9 of the ESA (prohibited acts). If the project has a federal nexus, such as federal funding, permitting, or is on federal lands, it is also subject to Section 7 of the ESA. Projects located on lands covered by an HCP must comply with rules defined in the plan. Standard maintenance operations are covered under Section 4(d) Rules for fish species under NMFS jurisdiction.

WSDOT identifies potential effects to listed or proposed species and critical habitats associated with a proposed action and then attempts to avoid, minimize, or eliminate these effects. For some actions, WSDOT conducts preliminary environmental reviews to identify likely effects early in the project design. This approach allows for design adjustments if effects to listed or proposed species or critical habitats are identified.

436.03(1) Maintenance Activities and the ESA Section 4(d) Rule

In July 2000, NMFS adopted a rule under Section 4(d) of the ESA (65 FR 42422), which allows take of threatened fish species. Under this rule, the take prohibition is not applied to threatened species when the take is associated with one of NMFS's 13 approved programs or limits. The 13 limits can be considered exceptions to the 4(d) take prohibition. NMFS has determined that these programs, activities, and criteria contribute to species conservation and therefore it is not necessary to impose take prohibitions. NMFS updates the rule to include new species listed as threatened. The rule applies to any agency, authority, or private individual subject to U.S. jurisdiction that applies for coverage under the rule. In 2003, WSDOT applied for and received approval as part of the [Regional Road Maintenance Program \(RRMP\)](#) for take exception under the 4(d) rule.

Note: If there is a federal nexus, Section 7 consultation is still required.

WSDOT's routine, unscheduled, and emergency/disaster maintenance activities are covered under the Routine Road Maintenance limit along with 29 other cooperating agencies. The program defines general practices (such as adaptive management, monitoring, and training) and specific Best Management Practices that WSDOT uses to avoid adverse effects to aquatic environments.

436.03(2) ESA Section 7 Compliance

All projects with a federal nexus are subject to Section 7 of the ESA and an analysis is required to ensure compliance with the ESA. The project biologist – either a WSDOT biologist or a consulting biologist – conducts a preliminary evaluation to determine the level of project effects on listed species or designated critical habitat. Depending on the level of effect, preparation of a “[no effect](#)” letter or a biological assessment (BA) will be required. Templates are required for projects with FHWA as the lead action agency. WSDOT has developed extensive guidance and protocols for [ESA Section 7 Compliance](#).

There are three primary types of documentation that can be completed: No Effect Letter or Assessment, Programmatic Biological Assessment, or Individual Biological Assessment. For each listed species evaluated, a BA must arrive at one of three conclusions:

- The action will have “no effect” on the species.
- The action “may affect, not likely to adversely affect” the species.
- The action “may affect, likely to adversely affect” the species.

BAs prepared for WSDOT must follow [specific guidance](#) developed through cooperative agreements and in collaboration with FHWA, NMFS, and USFWS. The guidance standardizes analyses, improves consistency and facilitates quality control reviews. The guidance is updated regularly and the website should be checked regularly for current guidance. Guidance includes:

- [BA Preparation Seminars](#) taught regularly by WSDOT.
- Consulting biologists on contract with WSDOT must be [qualified to write BAs](#) for WSDOT.
- Required methods for [analyzing the effects of stormwater](#) on ESA listed fish species.

- Identifying the extent of [aquatic and terrestrial noise](#) effects.
- Required method for analyzing [delayed consequences](#) of a project.

BAs are submitted to the appropriate Service (USFWS or NMFS) depending on the species addressed. A non-federal agency (such as WSDOT) designated by a federal action agency may submit a BA for informal consultation. During informal consultation, the Service reviews the BA and ascertains if they concur with the effect determination conclusions. If the agency concurs in writing, then no further consultation is needed. The agency may request additional information before giving concurrence and the project biologist should respond to such requests within two weeks. However, if the Service does not concur with the effect determinations, the consultation enters formal consultation at the request of the federal action agency.

Formal consultation involves a “may affect, likely to adversely affect” determination for one or more listed species or designated critical habitats. Formal consultation packages are submitted to the Service(s) by the federal action agency (i.e., FHWA, FTA, U.S. Army Corps of Engineers). During formal consultation, NMFS/USFWS may recommend modifications to eliminate or reduce adverse effects. If effects can be reduced to an insignificant or discountable level, then consultation proceeds informally. Formal consultation ends when NMFS/USFWS issues a biological opinion (BO). The ESA mandates that BOs be completed within 135 days, although extensions are possible at the request of the consulting Service. However, formal consultations typically take much longer (averaging 300 days or more) and this timeline should be factored into project schedules. Questions on current consultation timelines can be directed to the Environmental Services Office [Fish and Wildlife Program](#).

436.03(3) ESA Section 9 Compliance

Section 9 of the ESA prohibits take of listed species. Section 4(d) protective rules for threatened species may apply Section 9 take prohibitions to threatened species. There may be an “exception” from the prohibitions if a program adequately protects listed species. In other words, the 4(d) rule can “limit” the situations to which the take prohibitions apply. Many of WSDOT maintenance activities are covered under existing Section 4(d) rules. All projects are required to conduct an ESA review. If during the review it appears that incidental take cannot be avoided, the project will be modified or a federal nexus identified for Section 7 consultation.

436.04 Working on Public Lands

Specific regulations apply to projects located on public lands. These projects may include a federal nexus as described previously, or not. In either case, public land managers (US Forest Service (USFS), Bureau of Land Management (BLM), Washington State Department of Natural Resources (DNR), National Park Service (NPS), and others) may require additional review to meet their regulatory obligations and mission goals. WSDOT policy encourages coordination and cooperation with public land agencies and adherence to their regulations.

[National Forest Management Act](#) (NFMA, 16 USC 1604 (g)(3)(B)) requires the Secretary of Agriculture to assess forest lands, develop a management program based on multiple use, sustained-yield principles, and implement a resource management plan for each unit of

the National Forest System. The [NFMA](#) applies directly to lands administered by the USFS, but also provides direction for BLM land management plans. The BLM and USFS have integrated NEPA requirements with their land management regulations. In 2008, the USFS implemented new planning rules that offer a more strategic approach to land management plan development, amendment, and revision, as well as expanded public involvement.

The USFS has developed forest specific “forest plans” which identify “species of concern” found within each forest. Species lists are comprised of several categories of species such as federally listed species, USFS sensitive species, survey and manage species, and state listed species. Forest plans can cover a wide range of species (mollusks, lichens, mammals, and others). Individual forest staff or regional foresters decide which designated species to include on its species of concern list. Project requirements are associated with species ranking. However, actions on federal land must always comply with the ESA (see [Section 436.03](#)).

[Northwest Forest Plan \(NWFP\)](#) is a management plan affecting federal forest lands within the range of the northern spotted owl in western Washington, Oregon, and northern California. The standards and guidelines set forth in this plan supersede any existing forest plans within the range of the spotted owl. All WSDOT projects occurring on federal forest lands within the range of the northern spotted owl must follow the standards and guidelines within the [NWFP](#).

WSDOT projects that involve federal forest lands must comply with regulations under the NFMA and the NWFP. The USFS policy (FSM 2670.32) states that all programs and activities will be reviewed in a Biological Evaluation (BE) to determine the potential effect of such proposed activities on sensitive species. Guidance for developing BEs is located in the [USFS Manual](#) or the [BLM Policy Manual](#). In most cases, WSDOT BA formats and programmatic documents can meet USFS and BLM requirements by adding in information on sensitive species. Further, the policy states that impacts of such activities must be avoided or minimized and any permitted activities must not result in a loss of viability or create significant trends towards Federal listing. Similar to the USFS policy, the BLM Manual 6840 describes policy regarding special status species on BLM lands. Lists of special status and sensitive species for USFS and BLM as well as recent policy can be obtained from the [Interagency Special Status/Sensitive Species Program](#).

The regional or state office of the federal agency responsible for the affected federal lands should be contacted to obtain a species of concern (special status or sensitive) list, information on necessary surveys and other guidance on needed documentation. Depending on the federal land ownership, this could include, but is not limited to, coordination with BLM, USFS, or NPS. Before any ground disturbing activity can occur, surveys may be required for each managed species that may be present in the project area.

436.05 Protecting Birds

Two federal regulations administered by the USFWS mandate WSDOT’s responsibilities to minimize impacts to protected bird species.

The [Migratory Bird Treaty Act \(MBTA\)](#) makes it unlawful to take, import, export, possess, sell, purchase, or barter any migratory bird, with the exception of the taking of game birds during established hunting seasons. The law also applies to feathers, eggs, nests, and products made

from migratory birds. This law is of particular concern when birds nest on bridges, buildings, signs, illumination, and ferry dock structures. WSDOT has developed guidance on avoiding active nests during highway construction, bridge maintenance, bridge inspection, and other relevant activities to ensure compliance with the MBTA. See Regional or Headquarters biology staff on how to proceed if guidance is necessary.

The [Bald and Golden Eagle Protection Act](#) (BGEPA), similar to the MBTA, makes it unlawful to take, import, export, sell, purchase, or barter any bald or golden eagle, their parts, products, nests, or eggs. "Take" includes pursuing, shooting, poisoning, wounding, killing, capturing, trapping, collecting, molesting, or disturbing eagles. All WSDOT projects must be in compliance with the BGEPA. To avoid potential disturbance to bald eagles, the National Bald Eagle Management Guidelines (guidelines) provide recommendations that will likely avoid take for a list of activities. WSDOT biologists and consultants address compliance with the BGEPA through a [Bald Eagle form](#) that documents compliance with the National Bald Eagle Management Guidelines. If take is unavoidable, contact regional or headquarters biologists on how to proceed.

State law also requires authorization to handle, kill, or collect wildlife of the state. The Washington State Department of Fish and Wildlife (WDFW) administers this law under [RCW 77.12.240](#) and applies to all wildlife. If you believe your project may require take of state wildlife, including birds, amphibians, reptiles, invertebrates, and mammals, contact the Environmental Services Office [Fish and Wildlife Program](#).

436.06 Considering Fisheries Resources

Fishery Conservation and Management Act (Magnuson-Stevens Act) – Under the Fishery Conservation and Management Act of 1976, NMFS was given legislative authority to regulate the fisheries of the United States. In 1996, this Act was amended to emphasize the sustainability of the nation's fisheries and create a new habitat conservation approach called [Essential Fish Habitat](#) (EFH). In 1999 and 2000, the Pacific Fishery Management Council (PFMC) added provisions for the protection of EFH to three Fishery Management Plans (Coastal Pelagics, Groundfish, and Pacific Coast Salmon) in the Pacific Northwest. Federal agencies, and agencies working on their behalf, must consult with the NMFS on all activities, or proposed activities, authorized, funded, or undertaken by the agency that have or may have an adverse effect to EFH. The WSDOT [Biological Assessment Preparation Manual](#) contains a chapter detailing WSDOT procedures for completing EFH consultations with NMFS.

Construction in State Waters – A Memorandum of Agreement (MOA) between WSDOT and WDFW addresses transportation construction work in state waters. The purpose of the MOA is to establish and promote mutual agreement of the needs and mandates of the respective agencies, to facilitate the consistent and efficient administration of Hydraulic Project Approvals (HPAs) for transportation projects under [RCW 77.55](#) (Construction Projects in State Waters), and [WAC 220-660](#) (Hydraulic Code Rules); to ensure that fish passage at transportation projects is facilitated through [RCW 77.57](#) (Fishways, Flow, and Screening); and facilitate the implementation of the WSDOT Chronic Environmental Deficiency Program. As an element of this agreement, the legislature tasked WDFW and WSDOT in 2004 with

developing a series of programmatic [General Hydraulic Project Approvals \(GHPAs\)](#) for common maintenance and construction activities.

436.07 Protecting Marine Mammals

The [Marine Mammal Protection Act](#) establishes responsibilities for conservation and management to protect marine mammals. It establishes a moratorium on the taking and importation of marine mammals and marine mammal products. The MMPA defines “take” as “to hunt, harass, capture, or kill” any marine mammal or attempt to do so. WSDOT projects that involve marine waters, as well as the Columbia River up to Bonneville Dam, must consider potential effects of project activities and operation on marine mammals. If a project will impact marine mammals, a permit request for incidental harassment may be required from NOAA. Contact the Environmental Services Office [Fish and Wildlife Program](#) for additional information and guidance.

436.08 Habitat Considerations

[WSDOT State Habitat Connectivity Policy](#) – On July 23, 2007, the Secretary of Transportation signed an Executive Order called “Protections and Connections for High Quality Natural Habitats.” This WSDOT policy provides guidance on how considerations for ecological sustainability will be built into the long term planning and day to day work of WSDOT transportation professionals. Contact the Environmental Services Office Fish and Wildlife Program for additional information and guidance.

Shoreline Management Acts (SMA) [RCW 90.58](#) – Its purpose is “to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” The Act establishes a broad policy of shoreline protection, which includes fish and wildlife habitat. The SMA uses a combination of policies, comprehensive planning, and zoning to create a special zoning code overlay for shorelines. Under the SMA, each city and county can adopt a shoreline master program that is based on state guidelines but tailored to the specific geographic, economic and environmental needs of the community. Master programs provide policies and regulations addressing shoreline use and protection as well as a permit system for administering the program.

Local Comprehensive Plans and Critical Area Ordinances (CAO) – [Washington’s Growth Management Act of 1990 \(GMA\)](#) requires counties and cities to take a comprehensive, cooperative approach to land use planning. The focus of the GMA is to avoid unplanned growth, and conserve natural resources, while allowing for economic development. Under the GMA, counties, cities, and towns must classify, designate, and regulate critical areas through Critical Areas Ordinances (CAOs). Any of the five types of critical areas may serve as fish, wildlife, or sensitive plant habitat:

- Wetlands
- Aquifer recharge areas
- Frequently flooded areas
- Geologically hazardous areas
- Fish and wildlife habitat conservation areas

All regulated habitat areas should be identified during the project development phase. Some local jurisdictions may have fish and wildlife habitat regulation inventory maps. These maps identify what types of habitat the jurisdiction regulates, indicate where all the inventoried habitat areas are, and identify the regulations relating to the management and development of these areas. If available, these maps, as well as mitigation requirements and wetland reports, should be reviewed to identify critical areas and associated regulatory requirements.

The GMA also requires counties and cities that meet certain population and growth rate criteria to adopt planning policies and comprehensive plans. WDFW makes recommendations for comprehensive plan contents related to fish and wildlife habitat and critical area regulations, but local jurisdictions develop the final plans and regulations. The result is inconsistencies in regulations among jurisdictions. Unless the local laws conflict with state law, WSDOT must be consistent with local critical areas regulations. Local planning departments should be contacted to determine requirements that could affect a project.

436.09 Coordinating With Tribes on Fish, Wildlife, and Vegetation Resources

Projects on tribal lands may be subject to tribal laws that regulate fish, wildlife, and habitat. Projects not on tribal land could affect treaty reserved resources or species of tribal significance. The appropriate tribal biologist should be contacted to discuss any regulations that may apply to the project. Contact the [WSDOT Tribal Liaison](#) for more information or guidance.

436.10 Mitigation and Other Policies

Many WSDOT policies are in development or apply to fish, wildlife, and vegetation resources in obscure ways. This section covers some of the nonstandard regulations that may apply to projects.

Non-Road Project Requirements – Ferry, rail, airport, or non-motorized transport systems are subject to the same policies, procedures, and permits that apply to road systems, but are generally funded under different authorities such as Federal Transit Administration (FTA), Federal Railway Administration (FRA), or Federal Aviation Administration (FAA). Each of these federal agencies may have slightly different approaches for document preparation, review, and submittal procedures or overall process goals and directives with regard to fish, wildlife, and vegetation resources.

WSF must follow strict guidelines in order to work in nearshore environments (see [Section 436.06](#)). These guidelines include avoidance of eelgrass and forage fish spawning habitat, restrictions on construction materials, and specific BMPs for removal of creosote treated wood associated with docks, pilings, and piers. In addition, some regulations may be more applicable to non-road projects. For example, ferry projects occur within marine waters and require consideration of regulations under the MMPA and the Shoreline Protection Act.

Public use airports must address specific wildlife hazards on or near airports. These issues are addressed in the Federal Aviation Administration (FAA) Publication, [Hazardous Wildlife Attractants On or Near Airports](#) (No. 150/5200-33B, August 28, 2007).

436.11 Abbreviations and Acronyms

BA	Biological Assessment
BE	Biological Evaluation
BGEPA	Bald and Golden Eagle Protection Act
BO	Biological Opinion
BMP	Best Management Practice
BLM	Bureau of Land Management
CAO	Critical Area Ordinance
EFH	Essential Fish Habitat
ESA	Endangered Species Act
GHPA	General Hydraulic Project Approval
HCP	Habitat Conservation Plan
HPA	Hydraulic Project Approval
MBTA	Migratory Bird Treaty Act
MMPA	Marine Mammal Protection Act
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NOAA	National Oceanic and Atmospheric Administration
NWFP	Northwest Forest Plan
NMFS	National Marine Fisheries Service
PFMC	Pacific Fishery Management Council
RRMP	Regional Road Maintenance Program
Service(s)	United States Fish and Wildlife Service and National Marine Fisheries Service
USFS	United States Forest Service
USFWS	United States Fish and Wildlife Service
WDFW	Washington State Department of Fish and Wildlife
WDNR	Washington State Department of Natural Resources
WNHP	Washington Natural Heritage Program

436.12 Glossary

Candidate Species – Any species of fish, wildlife, or plant considered for possible addition to the list of endangered and threatened species. These are *taxa* for which NMFS or USFWS has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions.

Critical Habitat – Under the Endangered Species Act, (1) the specific areas within the geographic area occupied by a federally listed species on which are found physical or biological features essential to conserving the species, and that may require special protection or management considerations; and (2) specific areas outside the geographic area occupied by a federally listed species when it is determined that such areas are essential for the conservation of the species.

Effects of the Action (ESA)- Effects that are caused by the proposed action and are later in time, but are still reasonably certain to occur. ([50 CFR 402.02](#))

Endangered Species – Any species which is in danger of extinction throughout all or a significant portion of its range.

Federal Nexus – A project with a federal nexus either has federal funding, requires federal permits, or takes place on federal lands.

Habitat – The physical or natural environment where a species or population may live.

Incidental Take (ESA) – Take of listed species that results from, but is not the intention of, carrying out an otherwise lawful activity.

Jurisdiction – Governing authority which interprets and applies laws and regulations.

Listed Species – Any species of fish, wildlife, or plant which has been determined to be endangered or threatened under Section 4 of the ESA.

Programmatic Biological Assessment – A biological assessment that establishes conditions allowing multiple actions on a program, regional or other basis to proceed through streamlined consultation processes with the Services.

Proposed Species – Any species of fish, wildlife, or plant that is proposed by NMFS or USFWS for federal listing under Section 4 of the ESA.

Take – Defined under the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct,” including modification to a species’ habitat.

Threatened Species – Any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Viability – Ability of a population to maintain sufficient size so it persists over time in spite of normal fluctuations in numbers; usually expressed as a probability of maintaining a specific population for a defined period.

Watershed – Basin including all water and land areas that drain to a common body of water.