

12.0 Effect Determination Language

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12.0 Effect Determination Language

Chapter Summary

- *No effect* (NE) means no effect whatsoever, including any beneficial, highly improbable, or insignificant effects that may result from the project.
- *Not likely to adversely affect* (NLTA) is the appropriate determination if direct effects and delayed consequences of a federal project (including any interrelated and interdependent activities) are expected to be discountable, insignificant, or completely beneficial.
- *Likely to adversely affect* (LTA) is the appropriate determination if any adverse effect on listed species may occur as a direct or indirect result of a project (including any interrelated or interdependent actions), and these effects are not discountable, insignificant, or entirely beneficial.
- Effect determination language to use for listed species and designated critical habitat:
 - The project will have **no effect** on *[name of species or critical habitat]* because . . .
Provide rationale for this effect determination.
 - The project **may affect** *[name of species or critical habitat]* because . . .
Provide reasons why this species or critical habitat may be affected.
 - But the project **is not likely to adversely affect** *[name of species or critical habitat]* because . . .
Provide rationale for this effect determination.
 - (or)
 - And the project **is likely to adversely affect** *[name of species or critical habitat]* because . . .
Provide rationale for this effect determination.
- Effect determination language to use for proposed species:
 - The project **will not jeopardize the continued existence** of *[name of proposed species]* because . . .
Provide rationale for this jeopardy call.

- However, in the event that *[name of proposed species]* becomes listed prior to completion of the project, a provisional effect determination is provided:
The project **may affect** *[name of proposed species]* because . . .
Provide reasons why this species may be affected.
- But the project **is not likely to adversely affect** *[name of species]* because . . .
Provide rationale for this effect determination.
- (or)
- And the project **is likely to adversely affect** *[name of proposed species]* because . . .
Provide rationale for this effect determination.
- The jeopardy call language for proposed species is **will** or **will not jeopardize the continued existence** of *[name of proposed species]*.
- A jeopardy call is made at the species level, not the individual level. Jeopardy occurs when an action reduces the likelihood of both the survival and recovery of a listed species in the wild by reducing reproduction, numbers, or distribution of that species. (Impacts on individuals but not on the survival of the species as a whole do not warrant a jeopardy call.) Projects that receive a jeopardy call are not likely to be constructed.
- The provisional effect determination for proposed species can be NE, NLTAA, or LTAA, as explained above for listed species.
- Effect determination language to use for proposed critical habitat:
 - The project **will not destroy or adversely modify** proposed *[name of proposed critical habitat]* critical habitat because . . .
Provide rationale for adverse modification call.
 - If *[name of proposed critical habitat]* is designated prior to completion of this project, a provisional effect determination for critical habitat is provided:
The project will have **no effect** on *(name of proposed critical habitat)* because . . .
Provide rationale for this effect determination.
 - The project **may affect** *[name of proposed critical habitat]* because . . .
Provide reasons why critical habitat may be affected.

- But the project **is not likely to adversely affect** [*name of proposed critical habitat*] because . . .
Provide rationale for this effect determination.

(or)

- And the project **is likely to adversely affect** [*name of proposed critical habitat*] because . . .
Provide rationale for this effect determination.

- The adverse modification language for proposed critical habitat is **will** or **will not destroy or adversely modify** proposed [*name of proposed critical habitat*].

- An adverse modification call is made for a species' critical habitat as a whole. Adverse modification of critical habitat is not allowed under the ESA and occurs when the functionality of the habitat or of the physical and biological features is changed to such an extent that the habitat no longer serves the intended conservation role for the species.

- The provisional effect determination can be NE, NLTAA, or LTAA, as explained above for designated critical habitats.

This chapter provides guidance for making effect determinations for species and habitat. Common flaws in making effect determinations are discussed, as are issues of debate. Flowcharts are provided to illustrate the effect determination process for terrestrial species and critical habitat. BA writing samples are included to show examples of effectively written effect determinations.

12.1 Common Flaws in Making Effect Determinations

The preamble to the ESA Section 7 regulations states that projects found to have beneficial, insignificant, or discountable effects on listed species may be approved by the Services through the informal consultation process. Service approval is contingent upon the BA (or BE) providing an adequate justification for the effect determination. The Services cannot concur with an effect determination without adequate supporting information. Insufficient supporting material often delays the informal consultation process.

Frequently, a BA concludes with effect determinations that may not be wrong but simply are not justified with supporting evidence and rationale in the BA. The BA should lead the reviewer through a discussion of effects to a logical, well-supported conclusion.

For example, certain arguments might justify a NLTAA determination but do not support the often-chosen NE determination. A NE determination means that there will be absolutely no effect, not that a small effect will occur or that an effect is unlikely to occur. If effects are insignificant (in size) or discountable (meaning they are extremely unlikely to occur), a NLTAA determination is probably appropriate. An action that results in only beneficial effects on a particular species does not qualify for a NE determination; rather, a NLTAA determination is appropriate.

Three types of inappropriate arguments commonly used in BAs to support effect determinations are discussed below in an excerpt adapted from *Biological Assessment Preparation and Review*, proceedings of a 1993 workshop (updated in 1998) sponsored by the USFWS; Resources Northwest, Inc.; and the Washington chapter of the Wildlife Society.

The Displacement Approach

This relates to the argument that removal of habitat or disturbance of individuals warrants a NLTAA or NE determination because individuals can simply go elsewhere. Except for wide-ranging species such as grizzly bears and gray wolves, this argument is usually unacceptable. When the argument is used, some rationale must be provided to indicate that adequate refugia are available and the impact will not occur during denning or nesting periods. In any case, a *no-effect* call in these situations is usually inappropriate. The species will be affected but, depending on the situation, perhaps not adversely so.

The Not-Known-to-Occur-Here Approach

Stating that the species is *not known to occur here* suggests that no surveys—or inadequate surveys—cover the area. Unless adequate surveys have been conducted or adequate information sources have been referenced, the “not known” statement is difficult to interpret. It raises the questions *Have you looked?* and *How have you looked?*

Rather than “not known,” the operative phrase is “known not.” A determination of NE or NLTAA must pass a *known-not-to-occur-here* test. The BA must show that the species is *known not to occur here*.

Always reference information sources. Have you queried the Washington Department of Fish and Wildlife's Priority Habitats and Species database, for example? Species occurrence information that is generated through one day/year surveys or wildlife observation cards (which more closely reflect the location of people, for example) are usually inadequate to justify species absence. In situations where wide-ranging species are difficult to census (e.g., grizzly bear and gray wolf), it is advisable to assume species presence if the habitat is present.

The timing of surveys is also important. Consider the life history of the species when scheduling surveys. Many plants are only identifiable while flowering, for example.

An example of making an inappropriate effect determination based upon the assumption that a species is “not known to occur here” is a no-effect determination for bull trout within Lake Washington. Bull trout have access to and have been historically documented in Lake Washington; however, their occurrence in the lake is so rare that it is unlikely they would be exposed to impacts associated with in-water work in the Lake Washington system. When potential impacts are considered discountable rather than impossible, as in this example, an effect determination of NLTAA, rather than NE, is appropriate.

The Leap-of-Faith Approach

The leap-of-faith approach refers to the assumption of some project biologists that the Services reviewer is familiar with the project and its location, so that there is no need to fully explain the impact the project may have on listed species. There is little or no connection or rationale provided to lead the reader from the project description to the effect determination. Reviewers cannot assume conditions that are not presented in the BA. A BA that contains such assumptions leaves both the project proponent and the Services at risk of being challenged by third parties who do not necessarily share in or trust the good working relationship between the Services and project biologists.

12.2 Determinations for Species

The process for making an effect determination is illustrated in the flowchart presented in Figure 12-1. Figure 12-1 illustrates this process for terrestrial species.

12.2.1 Effect Determinations for Listed Species

When the process of assessing project impacts upon each species is completed, one of three effect determinations must be made: NE, NLTAA, or LTAA. The Effects Analysis section of the BA must provide sufficient information to substantiate the effect determination. Often a project biologist summarizes the impacts to support the effect determination, as illustrated in the effect determination language examples below.

12.2.1.1 No Effect Determinations for Listed Species

If a project will have no effect whatsoever (not a minimal effect or a long-term beneficial effect) on a listed species, a NE determination is appropriate. NE means no effect whatsoever, including no beneficial, highly improbable, or insignificant effects will result from the project. An example of this language is provided below for a listed species:

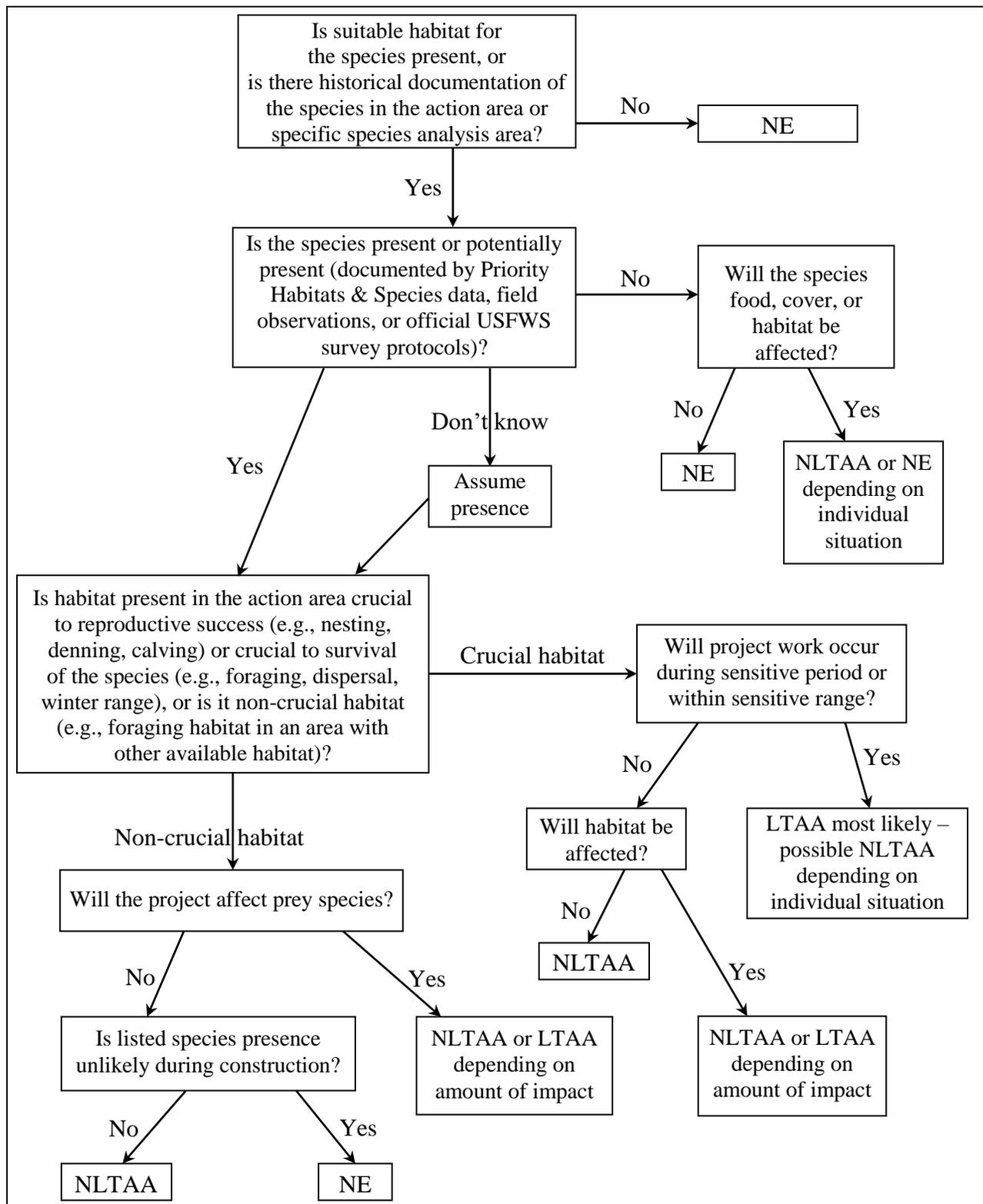


Figure 12-1. Making effect determinations for terrestrial species.

Northern spotted owl: No effect.

The project will have **no effect** on northern spotted owls because:

- ◆ No suitable nesting habitat occurs in the project action area.
- ◆ The nearest breeding occurrence is more than 6 miles away.
- ◆ Habitat present in the vicinity of the project is not suitable for foraging or dispersal.

12.2.1.2 May Affect, Not Likely to Adversely Affect Determinations for Listed Species

If direct effects and delayed consequences from a federal project (including any interrelated and interdependent activities) are expected to be discountable, insignificant, or completely beneficial, the appropriate conclusion is NLTAA for listed species. *Insignificant* indicates that the impact of an action never reaches the level where *take* occurs or where adverse modification of critical habitat occurs. *Discountable* indicates that it is extremely unlikely that impacts will occur.

A USFWS example of this NLTAA language is provided below for a listed species:

The project may affect but is not likely to adversely affect bull trout. A *may-affect* determination is warranted because the project involves ground-disturbing activities in a water body that may support bull trout, and it is upstream of forage fish habitat. A *not likely to adversely affect* determination is warranted, because bull trout are not expected to be present during construction, and because sediment from the project is not expected to reach the forage fish spawning habitat.

Two additional examples of NLTAA language are provided below for listed species. This bullet format, compared to the paragraph format above, is preferred by WSDOT.

Example 1:

The project **may affect** marbled murrelet because:

- ◆ Suitable nesting habitat is present in the mature conifer forest within 0.25 mile of the project.
- ◆ Construction activities will occur during the marbled murrelet nesting season.

The project is **not likely to adversely affect** the marbled murrelet because:

- ◆ A survey of the area in 2019 resulted in no marbled murrelet detections. It is unlikely that marbled murrelets will be exposed to the project activities.
- ◆ No marbled murrelet suitable habitat will be removed as a result of this project.

- ◆ The potential marbled murrelet suitable habitat (approximately 500 feet from the project site) is within the distances associated with project activity harassment threshold (328 feet to 0.25 mile for construction-generated noises).

Example 2:

The project **may affect** Columbian white-tailed deer because:

- ◆ Suitable deer foraging habitat is present within the action area.
- ◆ Suitable habitat will be removed within the new roadway corridor and will be altered with establishment of the proposed waste site.

The project is **not likely to adversely affect** the Columbian white-tailed deer because:

- ◆ The only known populations of Columbian white-tailed deer in Washington State are located within the Julia Butler Hansen National Wildlife Refuge, on Puget and Crims islands, and translocated populations at Ridgefield National Wildlife Refuge and Cottonwood Island within the Columbia River corridor. The nearest of these populations is located more than 12 miles west and south of the project site. It is highly unlikely that Columbian white-tailed deer will be exposed to project activities.

12.2.1.3 May Affect, Likely to Adversely Affect Determinations for Listed Species

If any adverse effect on listed species may occur as a direct or indirect result of a project (including any interrelated or interdependent actions), and these effects are not discountable, insignificant, or completely beneficial, the appropriate conclusion or effect determination for a proposed action is LTAA. If the overall effect of the proposed action is beneficial to the listed species (or its designated critical habitat) but is also likely to cause some adverse effects, even in the short term, then the project merits an LTAA determination for listed species and critical habitat.

If incidental *take* is anticipated to occur as a result of the proposed action, an LTAA determination must be made. An LTAA determination requires formal consultation with the Services. An effect determination is made at the individual level rather than the species level (i.e., the determination is based on impacts on individual members of the species, even when survival of the species as a whole is not affected). An example of language for a project that will adversely affect listed species is provided below:

The project **may affect** Puget Sound Chinook salmon because:

- ◆ Suitable Chinook rearing habitat is present within the action area.
- ◆ Suitable rearing habitat will be destroyed as a result of the project.

- ◆ Water quality will be temporarily degraded as a result of in-water work.

The project is **likely to adversely affect** Puget Sound Chinook salmon because:

- ◆ Chinook salmon are known to rear in the immediate vicinity of the bridge site during the time of year when project activities will occur.
- ◆ Construction of the bridge will require placement of four large (6-foot-diameter) concrete piles in the canal.
- ◆ The old bridge may or may not be removed. If it is removed, the removal will have a long-term beneficial effect on water quality, but will have short-term adverse impacts on water quality due to suspension of sediments and potential resuspension of creosote.

12.2.2 Effect Determinations for Proposed Species

For proposed species that are addressed in the BA, the project biologist should provide a summary of the Analysis of Effects section. The BA should then provide the appropriate jeopardy determination for proposed species by concluding that the project is *likely to jeopardize the continued existence of the (name of species)*, or that the project *is not likely to jeopardize the continued existence of the (name of species)*. A jeopardy call is made at the species level, not the individual level.

Jeopardy – to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing reproduction, numbers, or distribution of that species. [50 CFR 402.02]

The BA should also provide a conditional or provisional effect determination (NE, NLTAA, or LTAA) in the event that the species becomes listed prior to project completion. The rationale upon which this determination is made should be justified with a summary of relevant supporting evidence (e.g., specific information from field surveys agency coordination).

A project may be granted an incidental *take* permit for individuals, but not for a species as a whole, unless approved by the Endangered Species Committee. The role of the Endangered Species Committee and its process is discussed in detail in the DETERMINATIONS FOR CRITICAL HABITAT section below. A statement acknowledging the impact of the proposed action upon individuals also may be included.

An example of the language that may be used in the jeopardy determination is provided below:

The project **will not jeopardize the continued existence** of proposed wolverine because:

- ◆ Impacts on wolverine will not be sufficient to preclude both the survival and recovery of the population as a whole.

- ◆ Baseline conditions of the habitat and connectivity will be maintained.
- ◆ However, if wolverine becomes listed prior to completion of the project, a provisional effect determination is provided below.

The project **may affect** wolverine because:

- ◆ Suitable high-elevation habitat is present within the action area.
- ◆ Project construction may result in a temporary barrier to movement.

The project **is likely to adversely affect** wolverine because:

- ◆ The proposed project will be constructed within suitable high-elevation habitat, and is likely to create a barrier to movement.

12.3 Determinations for Critical Habitat

A statement summarizing anticipated impacts related to project actions must also be made for designated and proposed critical habitat in the project action area. Designated and proposed critical habitat must be addressed in the BA in order to meet ESA requirements.

The process by which a project biologist should make an effect determination for critical habitat is illustrated in Figure 12-2.

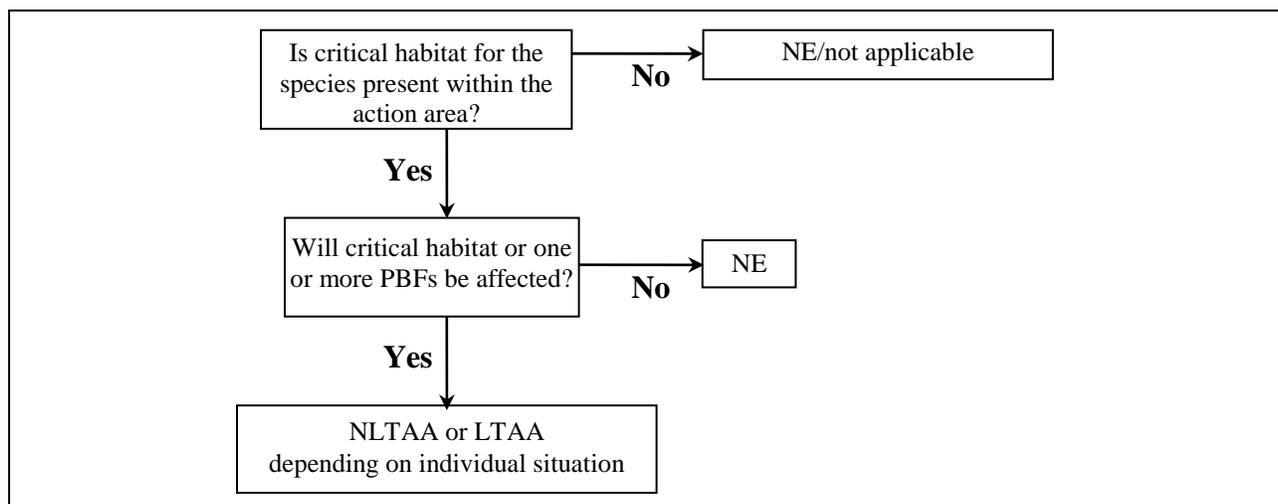


Figure 12-2. Making effect determinations for critical habitat.

The effect determination for critical habitat is one of the three standard determination categories: NE, NLTAA, or LTAA. The NLTAA determination is appropriate for projects that will have insignificant, discountable or entirely beneficial impacts upon critical habitat. This determination

(NLTAA) will result in informal consultation. Projects meriting a LTAA determination for critical habitat require formal consultation.

For species such as salmon, steelhead, bull trout, and Canada lynx, the rationale upon which the critical habitat effect determination is made should reference the physical and biological features that may be affected and why they may or may not be adversely affected, and should justify the effect determination with a summary of relevant supporting evidence (e.g., information from field surveys and agency coordination). For example, if the critical habitat present contains six PBFs and only three PBFs may be affected by the project, then the effects of the action on each of the three PBFs should be clearly stated in the rationale.

For a no effect determination, none of the PBFs would be impacted by the project. Projects potentially affecting one or more PBFs will fall in a NLTAA or LTAA category for critical habitat. If anticipated impacts are insignificant, discountable or entirely beneficial, NLTAA is the appropriate determination. Projects anticipating adverse impacts to any PBF will result in a LTAA determination for critical habitat. For other species such as northern spotted owl and marbled murrelet, an effect to critical habitat can result even if none of the physical and biological features are affected.

Based on the effect determination and the information provided in the BA, the Services must determine if the project action will destroy or adversely modify designated critical habitat. Adverse modification to critical habitat occurs when the habitat characteristics or the necessary habitat elements are changed to such an extent that the habitat no longer serves the intended conservation role for the species.

A LTAA effect determination by a project biologist for critical habitat within the project action area may or may not merit an adverse modification call by the Services. The formal responsibility for making an adverse modification call on designated critical habitat rests with the Services. NMFS has developed guidance regarding the application of the “destruction or adverse modification” standard under Section 7(a)(2) of the ESA. The guidance instructs biologists to avoid referencing or using the regulatory definition provided in 50 CFR 402.02, which appears below:

Destruction or Adverse Modification – A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR 402.02]

Instead, the guidance instructs biologists to consider the statutory concepts embodied in Sections 3 (the definitions of critical habitat and conservation), 4 (the procedures for delineating and adjusting areas included in a designation, and 7 (the substantive standard in paragraph (a)(2) and the procedures in paragraph (b)).

This guidance letter outlines the process NMFS biologists are to follow in making an adverse modification call to critical habitat. This process is summarized below:

- Discuss the entire critical habitat area in terms of the biological and physical features that are essential to the conservation of the species. More specifically: Identify and discuss the physical and biological features (PBFs)¹ of the critical habitat, the current condition and the factors responsible for that condition.
- Describe the conservation role of individual critical habitat units, PBFs, and/or areas identified as essential to the conservation of the species.
- For critical habitat designations that pre-date the requirement for identification of PBFs, the best available scientific and commercial data should be used to determine these elements or habitat qualities.
- Conservation is defined in Section 3 of the ESA as:

The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

- Conservation activities outside of critical habitat should not be considered when evaluating effects to critical habitat.
- Discuss the relationship of the affected units or specific areas in the action area to the entire designated or proposed critical habitat with respect to conservation of the listed species, unless the final rule designating critical habitat has already done so.
- Characterize the direct effects and delayed consequences of the action and those of interrelated and interdependent actions on the proposed or designated critical habitat. Describe how the PBFs or habitat elements essential to the conservation of the species are likely to be affected and how that will influence the function and conservation role of the affected critical habitat units or areas.

¹ PBF is interchangeable with primary constituent element (PCE).

- If cumulative effects are being considered, the analysis should focus on how the function and conservation role of critical habitat units or areas will be affected.
- In concluding this analysis, discuss whether critical habitat (or PBFs) would remain functional to serve the intended conservation role for the species.

To facilitate the Services assessment, or as a courtesy to the Services, the action agency may choose to provide a provisional adverse modification call in its BA accompanying the effect determination. The guidance summarized above should be followed when completing this adverse modification evaluation.

A project determined by a Service biologist to adversely modify designated critical habitat, which is the equivalent of a jeopardy call for a listed species, cannot be conducted without modifications in accordance with a reasonable and prudent alternative (RPA) or permission from the Endangered Species Committee. As outlined in Section 7 of the ESA, an exemption to the statute can be granted only by applying to the Endangered Species Committee. This committee, composed of seven government officials including the secretary of the interior, is authorized to overrule the actions or decisions of the Services in order to grant relief from actions taken under the ESA. The committee has authority to decide that the public interest favors an action that has an adverse impact on a species (in its entirety) or results in the complete extirpation of a species.

The Endangered Species Committee is discussed below in the LTAA example provided for proposed critical habitat, as well as in the text of the ESA, which is provided on the reference compact disc accompanying this document.

12.3.1 Effect Determinations for Designated Critical Habitat

The project biologist must make an effect determination for each designated critical habitat occurring in the project action area. As indicated above, this determination consists of one of the three standard effect determinations: NE, NLTAA, or LTAA.

12.3.1.1 No Effect Determinations for Designated Critical Habitat

The text below provides an example of language that may be used for a *no effect* on designated critical habitat:

A **no effect** determination is warranted for spotted owl critical habitat because:

- ◆ The project does not occur within designated spotted owl critical habitat.

A second example appears below:

The project occurs within designated spotted owl critical habitat in the Gifford Pinchot National Forest. However, a **no effect** determination is warranted for spotted owl critical habitat because:

- ◆ Habitat within the action area is unsuitable for spotted owl nesting, dispersal or foraging.
- ◆ The project will not result in physical habitat impacts.
- ◆ Noise generated by the project will not exceed background conditions.
- ◆ None of the PBFs will be affected by the proposed project.

12.3.1.2 Not Likely To Adversely Affect Determinations for Designated Critical Habitat

The text below provides an example of language that may be used for a NLTAA project that occurs within designated critical habitat but does not affect suitable habitat or physical and biological features:

A **may effect** determination is warranted for spotted owl critical habitat because:

- ◆ The project occurs within designated spotted owl critical habitat in the Gifford Pinchot National Forest.
- ◆ The project will result in habitat impacts within this designated critical habitat area because it requires vegetation removal (brush removal immediately adjacent to the roadway to maintain sight distance standards to improve safety).

A **not likely to adversely affect** determination is warranted for spotted owl critical habitat because:

- ◆ All vegetation that will be removed is directly adjacent to the highway within the right-of-way.
- ◆ The forested edge habitat on either side of the roadway right-of-way is unsuitable for nesting, roosting, and foraging, but does provide suitable dispersal habitat.
- ◆ Noise generated by the project will be elevated above background conditions within the unsuitable habitat area, but these noise levels will not extend to the suitable habitat located in the interior of the surrounding stands.

The text below provides a second example of NLTAA language for a project that lies within critical habitat. The potential for the project to impact the critical habitat is discountable:

A **may effect** determination is warranted for Snake River sockeye salmon critical habitat because:

- ◆ The project lies within designated critical habitat.
- ◆ The project crosses a stream that flows into this critical habitat.
- ◆ The following PBFs for critical habitat are present in the project action area: spawning, rearing, and migration

The project is **not likely to adversely affect** designated Snake River sockeye salmon critical habitat because:

- ◆ Proposed project activities will not add any additional impervious surface area or affect existing stormwater treatment BMPs or facilities.
- ◆ In-water work will occur during an appropriate work window when listed species are less likely to be present.
- ◆ Increases in turbidity will be temporary, and will be minimized through the implementation of BMPs.
- ◆ Although construction vehicles may use existing pull-outs for parking during hours of construction and for temporary staging areas, all of these sites are more than 500 feet from the tributary stream, and no activity will extend beyond the developed portion of the roadway (zone 2).
- ◆ No clearing, grubbing, or ground-disturbing activity is included as part of the proposed action.

12.3.1.3 Likely To Adversely Affect Determinations for Designated Critical Habitat

The text below provides an example of language that may be used for a LTAA project that occurred within one designated critical habitat area and was located within 1 mile of a second designated critical habitat area:

A **may effect** determination is warranted for spotted owl critical habitat because:

- ◆ The project occurs within designated spotted owl critical habitat in the Gifford Pinchot National Forest.
- ◆ The project will result in habitat impacts within this designated critical habitat area because it requires the removal of 20 trees (10 of which are 6 to 10 inches in diameter at breast height, 10 of which are 36 or more inches in diameter at breast height).

A **likely to adversely affect** determination is warranted for spotted owl critical habitat because:

- ◆ Up to 10 potentially suitable nesting trees will be removed.
- ◆ The nesting and roosting physical and biological features will potentially be affected by the proposed project.

During formal consultation, if the Services determine that a project will adversely modify the designated critical habitat, the project warrants an adverse modification call from the Services. The project then cannot proceed without approval from the Endangered Species Committee. The project proponent must then submit to the secretaries of Interior and Commerce a petition to overrule standard ESA practices (or to overrule a decision made under the ESA by the Services that prevents project implementation). Upon receipt of the petition, these agencies are required to notify the governors of the affected states that the governors may recommend individuals to be appointed to the Endangered Species Committee. The Interior and Commerce secretaries also must publish receipt of the petition in the Federal Register.

Under the law, during the 20-day period following receipt of the petition, the secretaries must determine whether the project proponent has carried out in good faith its responsibilities under the ESA with a “reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives.” The secretaries also must determine whether the parties submitting the petition have met all legal requirements. Following these initial determinations, a public hearing must be held and a summary report must be submitted within 140 days. The full Endangered Species Committee must decide within 30 days whether to grant an ESA exemption.

12.3.2 Effect Determinations for Proposed Critical Habitat

For proposed critical habitat, the project biologist must conclude whether the proposed project actions would *adversely modify* this habitat. The project biologist must use the proper language when presenting this conclusion by specifically stating whether the action will or will not *destroy or adversely modify* designated critical habitat. The project biologist should substantiate this claim with a summary of relevant findings or documentation.

In addition, the project biologist should provide a conditional or provisional effect determination (NE, NLTAA, or LTAA), in the event that critical habitat is designated prior to initiation or completion of the project.

12.3.2.1 Will Not Destroy or Adversely Modify/Not Likely to Adversely Affect Determination for Proposed Critical Habitat

An example is provided below of *will not destroy or adversely modify* language for proposed critical habitat, followed by a provisional *may affect, not likely to adversely affect* determination. Please note that this example involves an imaginary species.

The project will not destroy or adversely modify proposed blue-footed flying squirrel critical habitat because:

- ◆ Anticipated habitat impacts within this proposed critical habitat area will affect non-suitable habitat and will not affect any PBFs.
- ◆ The conservation role of the habitat for the species will not be altered by the proposed project.

If blue-footed flying squirrel critical habitat is designated prior to completion of this project, a provisional effect determination for critical habitat is the following: The project **may affect but is not likely to adversely affect** blue-footed flying squirrel critical habitat.

A **may effect** determination is warranted for proposed blue-footed flying squirrel critical habitat because:

- ◆ The project will result in habitat impacts within the proposed critical habitat area because it requires the removal of 20 small trees (all of which are 6 to 10 inches in diameter at breast height, i.e., non-suitable habitat).

A **not likely to adversely affect** determination is warranted for blue-footed flying squirrel critical habitat because:

- ◆ All trees that will be removed are directly adjacent to the highway, and removal will not appreciably diminish the conservation value of the critical habitat.
- ◆ No suitable nesting trees will be removed.
- ◆ No physical and biological features will be affected by the proposed project.

12.3.2.2 Will Not Adversely Modify/Likely to Adversely Affect Determination for Proposed Critical Habitat

An example of adverse modification language, a *likely to adversely affect* determination, and supporting evidence for proposed critical habitat are provided below. Please note that this example involves an imaginary species.

The project will not destroy or adversely modify proposed blue-footed flying squirrel critical habitat because:

- ◆ Despite project impacts to ten potential nesting trees, impacts to habitat will not appreciably diminish the value of the critical habitat for conservation of the species because:
 - The trees to be removed are located on the perimeter of the stand
 - Changes to the size of the existing stand of suitable habitat will be insignificant
 - The existing stand's proximity and/or connection to other sizeable stands of suitable habitat will remain unchanged.

A **may effect** determination is warranted for blue-footed flying squirrel critical habitat because:

- ◆ The project occurs within blue-footed flying squirrel critical habitat in the Gifford Pinchot National Forest.
- ◆ The project will result in habitat impacts within this designated critical habitat area because it requires the removal of 20 trees (10 of which are 6 to 10 inches in diameter at breast height, 10 of which are 36 or more inches in diameter at breast height).

A **likely to adversely affect** determination is warranted for blue-footed flying squirrel critical habitat because:

- ◆ Up to 10 suitable nesting trees will be removed.
- ◆ The nesting PBF will potentially be affected by the proposed project.

During a formal conference, if the Services determine that a project will adversely modify the designated critical habitat, the project warrants an adverse modification call by the Services. The project then cannot proceed without approval of the Endangered Species Committee. This process is described above in the section titled EFFECT DETERMINATIONS FOR DESIGNATED CRITICAL HABITAT.