



## TxDOT ENV Standard Operating Procedure

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Subject: Steps and procedures for utilization of a Regional Habitat Conservation Plan (rHCP) for Section 7 Consultation under the Endangered Species Act

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**Department Policy and Procures Manuals & Document References:** USFWS, NMFS. March 1998. Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act.

### Purpose

When there is a federal nexus on a proposed project and federally-listed species or designated critical habitat are present, section 7 of the Endangered Species Act (ESA) applies and consultation with the United States Fish and Wildlife Service (USFWS) is required. Regional habitat conservation plans (rHCPs) are usually created under section 10 of the ESA for non-federal projects. Even if an agency participates in an rHCP, it still must meet the requirements of section 7 of the ESA if there is a federal nexus.

During formal or informal section 7 consultation, TxDOT may determine that participating in an rHCP is advantageous to offset potential effects to federally protected species or habitat. Typically, an rHCP would be used under two circumstances:

- When “take” is anticipated, an incidental take permit is required and issued by USFWS and voluntary conservation measures (VCMs) are needed to offset the anticipated effects of the action. In this situation, the cost effectiveness of rHCP fees compared to other mitigation measures would be demonstrated and documented.
- When participation in the rHCP assists in reducing the potential effects from “likely” to “not likely” to adversely affect federally protected species or habitat and it is cost effective to do so in comparison to other conservation measures.

In either case, the use of an rHCP is a Voluntary Conservation Measure (VCM) as part of section 7 consultations. The incidental take and “no surprises” portions of the section 10 permit associated with the rHCP do not apply.

An rHCP is a planning document that is a mandatory component of an incidental take permit application under section 10 of the ESA. The rHCP typically covers a large geographic area, multiple landowners and multiple species. A local or regional authority is typically the applicant and permittee, and often administers the plan. Participation in the plan is voluntary. It is intended to be used for non-federal projects, but it can be used for federal projects, with some restrictions, as a VCM in a section 7 consultation.



The section 10 permitting process is used for activities that have no federal funding, permit, oversight, approval or nexus. If the project has any federal funding, permit, oversight, approval or nexus, then consultation is required under section 7 of the ESA. There is no coordination process with the USFWS for projects when the determination is “no effect” on a federally listed species.

This Standard Operating Procedure (SOP) is provided to outline the use of an rHCP as a VCM during a section 7 consultation.

## **Personnel**

Entities proposing to construct projects that will use federal funds that are required to consult with USFWS under section 7 of the ESA for impacts to species that are covered by an available rHCP, such as ENV, Districts, Regional Mobility Authorities, and local governments.

## **Detailed Process for Performing:**

- 1) For federal projects that have the potential to affect federally-listed threatened or endangered species, or adversely modify designated critical habitat, the TxDOT will determine the extent of the potential effects and make one of the following effect determinations:
  - a. may affect, not likely to adversely affect (NLAA)
  - b. may affect, likely to adversely affect
- 2) Based on the determination of effect, the following consultation with USFWS will be required:
  - a. Informal consultation - NLAA
  - b. Formal consultation – required when a project is “likely to adversely affect” (i.e., take)
- 3) Informal Consultation
  - a. The federal agency or designated non-federal representative (in this case, TxDOT) submits a letter to USFWS, requesting concurrence for the NLAA determination. The letter should clearly describe the potential effects to the species and include sufficient information to justify the NLAA determination, or otherwise meet the requirements of the *Program Level Agreement for Biological Evaluations and for the Development of Further Endangered Species Act Programmatic Agreements Between the Federal Highway Administration, USFWS, and TxDOT, 2005 (PAFBE)*.
  - b. If USFWS concurs with the NLAA determination, they will provide a written letter of concurrence. At that point, coordination is complete and the project may proceed\*, assuming all other pending coordination is complete.
  - c. If USFWS does not concur, then formal consultation will be required.
  - d. At any time, any changes to the project, habitat or status of the species require validation of the previous consultation and most likely require additional consultation. New listings or changes in the law or statues require validation of the previous consultation or additional consultation and may require halting construction until additional consultation is completed.
- 4) Formal Consultation
  - a. TxDOT will prepare a Biological Assessment (BA) for the project. ENV will review BA and collaborate with the District to complete revisions. ENV will submit the BA to FHWA.



- b. FHWA will review the BA and provide comments (if any) to TxDOT for revisions. Once comments have been satisfactorily addressed by TxDOT, FHWA will submit the BA to USFWS, initiating formal consultation.
  - c. Once USFWS has decided that they have received complete information from FHWA, USFWS will have 90 days\*\* to formulate a Biological Opinion (BO) and submit it to FHWA. FHWA and TxDOT will have 45 days\*\* to review the BO and collaborate with USFWS to suggest any changes. By the end of the 45 days\*\*, USFWS will deliver the Final BO to FHWA. Commitments will be incorporated into the projects EPIC and PS&E to be implemented per requirements and may include post construction monitoring. This step will end the formal consultation process.
- 5) Participation in an rHCP
- a. ENV or the District must determine whether an rHCP is available for the geographic area, and whether the federally listed species that are potentially affected by the project are addressed in the rHCP.
  - b. ENV, the District or FHWA must determine whether the proposed activities are consistent with the participation requirements of the rHCP.
  - c. If an rHCP is available and addresses the species in question, and the activities are consistent with the requirements of the rHCP, then the federal agency (or designated representative) may choose to participate in the rHCP in order to offset effects to federally listed species from a proposed transportation project as a VCM. If participation is chosen, the agency or representative should request a preliminary determination from the rHCP permit administrator regarding the amount of mitigation and fees that are anticipated.
  - d. The federal agency or its designated non-Federal representative must complete Section 7 consultation with USFWS. If take is anticipated, FHWA (or the federal agency) must complete formal section 7 consultation. The anticipated mitigation and fees must be included as part of the VCMs.
  - e. Even if an rHCP is used as conservation measure, incidental take authorization comes from the section 7 consultation and not from the section 10 permit associated with the rHCP. Likewise, the “No Surprises” clause normally associated with a section 10 permit does not apply to federal projects.
  - f. Once section 7 consultation is completed, the federal agency or designated representative will proceed to the purchase of participation certificates from the rHCP administrator. This step can occur after completion of consultation to ensure that VCM (i.e., mitigation) is not altered due to changes in design, schedule or any other factor that modifies the project.

\*Proceeding implies there are no changes to the projects design, concept and scope, or changes in land use, right of way needs, etc. It also implies there are no new species listed in the study area for the proposed project and that the latest list search is “current.”

\*\* Timelines for formal consultation are found in Fig. 4-1 of the *March 1998. Endangered Species Consultation Handbook*. Timelines in the handbook are estimations and may be exceeded by USFWS. TxDOT cannot proceed with construction until coordination is complete, regardless of the amount of time it takes.