

STREAMLINING APPROVAL OF "NO EFFECT" BIOLOGICAL ASSESSMENTS

Working with the local U.S. Fish and Wildlife Service (USFWS) office and Federal Highway Administration - Kentucky Division (FHWA), the Kentucky Transportation Cabinet (KYTC) has executed a Programmatic Agreement for streamlining the review and approval of Biological Assessments (BAs) prepared for highway projects.

In accordance with Section 7 of the Endangered Species Act, KYTC routinely evaluates the potential impact of its projects on species, or habitat for species, that are listed as either threatened or endangered by the USFWS. Field investigations are conducted to ascertain potential project effects often resulting in findings that either the species is not present in the project vicinity, that habitat for the species in question is not present, or that through specified construction measures the project will have no effect or is not likely to adversely affect threatened or endangered species. In such instances, the FHWA has agreed that these documents may be coordinated directly with the USFWS. This delegation by FHWA to KYTC streamlines the BA review and approval process.

MEMORANDUM OF UNDERSTANDING
Between the
Federal Highway Administration and the
Kentucky Transportation Cabinet
Determinations of No Effect Pursuant to Section 7
Of the Endangered Species Act

WHEREAS, the Kentucky Transportation Cabinet (KYTC) and the Federal Highway Administration (FHWA) participate in numerous projects that are not defined as "major construction activities"; and

WHEREAS, many of these projects lie within the range of federally listed (listed) endangered or threatened species, or species proposed for such listing; and

WHEREAS, in accordance with Section 7(a)(2) of the Endangered Species Act, consultation with the U.S. Fish and Wildlife Service (USFWS) is not required for these projects, provided that the federal action agency (FHWA) determines that the action will have no effect on listed species or their critical habitat; and

WHEREAS, by definition, projects evaluated under a Categorical Exclusion (CE)(23 CFR 771.117), developed in accordance with the National Environmental Policy Act (NEPA), are considered to have only minimal impacts and are not considered to be a major construction activity.

NOW, THEREFORE, the FHWA and KYTC agree to the following protocol for determinations of "No Effect" to listed species and/or their critical habitat as a result of highway projects meeting 23 CFR 771.117.

PROTOCOL

Section I. NO EFFECT PROJECTS BY DEFINITION

The following categories of projects are considered to have No Effect to listed species. Although listed species may exist within the vicinity of these types of projects, it is highly unlikely that the species, critical habitat or habitat as defined in the KYTC Habitat Assessment Manual (HAM) would be affected by the nature of the undertaking. Should a project in the list involve the removal of habitat as defined in the HAM, the project shall be evaluated in accordance with Section II of this Agreement.

1. General highway maintenance, including filling potholes, crack sealing, mill and resurfacing, joint grinding/milling, etc.
2. Guardrail replacement where no new bank stabilization is required.
3. The replacement of traffic signals within existing ROW.
4. The installation or maintenance of signs or pavement markings within the existing ROW.
5. General pavement marking or "line painting" projects.
6. The installation of raised pavement markers.

Memorandum of Understanding
 No Effect Determinations
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7. Mowing or brush removal/trimming projects within existing ROW.
8. Improvements to existing KYTC/County maintenance facilities.
9. Study-type projects (i.e. feasibility studies, etc.).
10. Installation of new fencing, signs, small passenger shelters, traffic signals and railroad warning devices where no habitat, as defined in the HAM, occurs.
11. Acquisition of scenic easements.
12. Transfer of federal lands pursuant to USC 317 when the subsequent action is not an FHWA action.
13. Track and rail-bed improvements, maintenance activities or acquisition.
14. Bridge deck overlays, bridge deck replacements and other maintenance activities, including bridge painting projects provided the project doesn't involve any work within or involve impacts to streams, rivers, scenic river corridors or other habitat as defined in the HAM.
15. Disposal of excess ROW parcels wholly contained in recent Major Project Acquisitions.

Section II. PROCEDURES FOR DETERMINATION OF EFFECT

For CE project types not determined by their nature to have No Effect, the KYTC/FHWA shall evaluate the potential for the project to impact listed species. This will be accomplished through adherence to the protocol established herein. Projects requiring CE Level 3 evaluation, prepared in accordance with the KYTC CE Manual, shall require consultation with USFWS.

1. Following authorization of Design funds for the project, the District Environmental Coordinator (DEC) shall review the project scope, location, type of action, schedule, etc. and its potential for ground disturbing activities.
2. The DEC shall gather listed species data using the USFWS county listing and information available and maintained on web sites by Kentucky State Nature Preserves Commission (KSNPC) and Kentucky Department of Fish and Wildlife Resources (KDFWR). USFWS web data shall be reviewed to identify the habitat(s) that may be used by the species identified.
3. The DEC shall conduct an on-site visit for the purpose of identifying whether habitat exists within the project corridor for species identified in previous steps. The assessment shall consider the characteristics of species' habitat as outlined in the HAM.
4. When no habitat is found to be present, the DEC shall prepare a No Effect Finding, in accordance with Appendix A, to document the basis for the conclusions.
5. Should habitat be found to be present within the project corridor, the DEC shall coordinate its findings with DEA and request evaluation of the project by an appropriate Subject

Matter Expert (SME) in the KYTC Division of Environmental Analysis, by submittal of the CE Assistance Request Form. The information provided shall include, at a minimum:

- A. Location map, plan sheets, ROW plans or other available information that will fully describe the project limits, or corridor, that will require assessment by the SME including easements, crossings, detours, etc.;
 - B. Identification of the listed species for which habitat may/does exist;
 - C. Additional or other supporting information that may assist the SME in their understanding of the project and preparation for habitat assessment, including photographs of the project area and any other required species specific information identified in the HAM for the species in question.
6. If the SME reviews the information provided and can conclude that no habitat exists, the SME shall notify the DEC, in writing, of the finding. The DEC shall then prepare the No Effect Finding.
 7. If it is determined that potential habitat for a "known" listed species is present, the SME shall determine the necessity for an on-site visit and, when appropriate, shall conduct the habitat assessment. The SME shall evaluate the habitat present within the project corridor and make a determination as to whether the project, and its related loss of potential habitat, may affect the species. Such determination shall consider the specific characteristics of the habitat present, availability of additional habitat in the surrounding area, distance to confirmed species locations, etc. Based upon the information collected, the SME shall determine whether a species survey is warranted. If no species survey is necessary in order to confidently determine No Effect, the SME shall prepare the No Effect Finding and submit it to the DEC for inclusion in the CE.
 8. If the SME determines that a species survey is needed, the DEA SME shall conduct, or have conducted, any required species surveys. All such surveys shall be designed to meet appropriate protocols in effect at the time of sampling. The results of the survey shall be assimilated in a Biological Assessment (BA).
 9. Should disagreement arise between the DEC and the SME regarding the applicability of a No Effect finding, the KYTC Director of Division of Environmental Analysis shall be notified. The Director shall attempt to resolve the dispute, with FHWA's assistance as necessary. If the dispute can not be resolved, FHWA shall determine the required course of action.
 10. BAs concluding No Effect shall be transmitted to the FHWA for concurrence. The FHWA shall provide written concurrence with the BA, to KYTC, for inclusion in the CE. If concurrence can not be given, FHWA shall notify the KYTC Director of Division of Environmental Analysis and request consultation with the Project Team to further discuss the issue. FHWA shall determine what additional information is required in order to issue concurrence and a plan/schedule for preparation of the additional data shall be developed and implemented.
 11. BAs concluding Not Likely to Adversely Affect shall be directly coordinated with the USFWS with a copy to FHWA. BAs concluding May Affect shall be forwarded to FHWA

for consultation with USFWS. The transmittal letter for all BAs shall identify any specific avoidance, minimization, and/or mitigation measures that shall be employed to minimize the potential for the project to take a listed species.

12. KYTC shall submit a list annually to USFWS and FHWA, identifying projects that have been determined to have No Effect. Information provided shall include KYTC Item Number, County(ies), Project Type, Route Number, Species considered and whether Sampling was conducted to make final determinations.
13. No Effect determinations and Biological Assessments completed pursuant to this agreement will be considered valid for a period of five (5) years. The period of validity shall be subject to the project scope remaining constant, the species list for the area remaining constant and there being no change to the project environment that may have potentially created new habitat.
14. When KYTC/FHWA projects are reevaluated prior to major federal project actions (authorization of right of way, utility or construction funds), KYTC shall consult with the USFWS species list to ensure that no new species have been listed in the project area and that the species status ("known"/"potential") has not changed. If a new species has been listed, reassessment of the area will be undertaken to first determine whether habitat exists for the newly listed species and, secondly, to determine whether a BA is required pursuant to the provisions of steps 3-11 above. If a species status has changed from "potential" to "known" since the previous evaluation of the project, the DEC shall assess the potential of the project to affect the species in accordance with Section II of this agreement.

Section III: DISAGREEMENT RESOLUTION

It is the intent of this Agreement that all disputes and issues be solved at the lowest grade level of the respective agencies. For resolution of disputes, the KYTC Chief Environmental Program Administrator (CEPA) and the FHWA Environmental Program Manager shall attempt to resolve all disputes that may arise. A collaborative decision will be made within 14 working days of conflict identification. Elevation to higher levels for dispute resolution shall only be a last resort.


Section IV: EVALUATION

Full compliance with this Agreement will be determined through a process review to be jointly conducted by FHWA and KYTC DEA staff. The results of such reviews will be used to determine what Agreement modifications, if any, may be appropriate. The first review shall occur within the first six months of full implementation of this Agreement. A second process review will occur one year after the initial review. Subsequent reviews will be scheduled, as needed.

Section V: REVISION AND TERMINATION

This Agreement and its appendices may be revised by mutual consent of both parties or terminated by either party within 30 days of written notification. If any part of this Agreement is determined to be in conflict with existing state or federal laws or regulations, it does not invalidate the remainder of the Agreement.

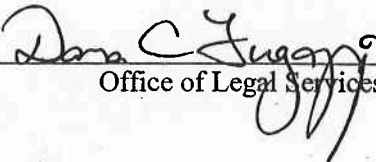
KYTC Approval:



Bill Nighbert, Secretary

09/23/05
Date

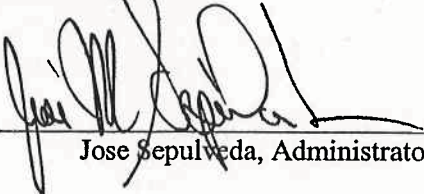
Approved as to Form and Legality:



Office of Legal Services

8/31/05
Date

FHWA Approval:



Jose Sepulveda, Administrator

9/27/05
Date

**Appendix A
Content of a No Effect Finding**

Project Description: The type of project being developed should be fully described. This includes identification of the project type as defined in the Six Year Plan, the quadrangle maps for the area to be affected, as well as any additional description needed to accurately document the work to be conducted and areas to be impacted. The description must include the location and extent of the improvement, as well as any areas that can reasonably be expected to be impacted by the activity. This should also include descriptions of cross road improvements, required easements and any other areas that were considered in the evaluation.

Listed Species: The sources used and the listed species identified must be documented. Species should list both scientific and common names and listed status (rare, threatened, endangered, proposed or candidate).

Site Description: The area(s) that will be impacted by the project is to be investigated and all available habitats identified and described. Man-built intrusions within the area should also be described. Description should include land forms, waterways, vegetation (trees, shrubs and grasses), wetlands, land uses, etc. These should be done in conformance with guidance in the Habitat Assessment Manual.

Methodologies: The methods for assessing the habitat are to be documented. The person(s) who investigated the area, time spent on the survey including office research, and the dates upon which the field survey was conducted must be noted as well as the resources used (web sites, topographic maps, geologic maps, area photos, soil maps, Habitat Assessment Manual).

Results: Available habitat in the area shall be compared with those habitats commonly used by the listed species, as identified in the Habitat Assessment Manual. If habitat for any listed species is found to be present within the project area, the No Effect Finding is not applicable and consultation with the DEA SME must be initiated.

Recommendations: If habitat for the identified listed species is not present, the DEC shall complete the memo with a finding of No Effect based upon lack of habitat. The recommendation must include the following language:

The project has been assessed in accordance with the provisions of Section 7 of the Endangered Species Act, and KYTC recommends a finding that the project will have No Effect on any listed species or their critical habitat.

KYTC Signature

Date

In accordance with the provisions of Section 7 of the Endangered Species Act, FHWA has determined that the project will have No Effect on any listed species or their critical habitat and Section 7(a)(2) consultation with the Service is not required.

FHWA Signature

Date