

ESA Consultations Involving Platte River Depletions: Information for Project Proponents in Nebraska on the Platte River Recovery Implementation Program

U.S. Fish and Wildlife Service
Mountain-Prairie Region
January 16, 2020 – Subject to Updates



Purpose

The purpose of this document is to provide general guidance to proponents of federally funded or federally regulated water-related projects in **Nebraska** regarding Endangered Species Act (ESA) consultations with the U.S. Fish and Wildlife Service (Service) on the effects of these water-related activities in the Platte River Basin, and how their effects to federally listed species in Nebraska are addressed under the Platte River Recovery Implementation Program.¹ (Note: Water-related activities that do not involve federal funding or federal permits, but do involve state funding or state permits, may require consultation on effects to state listed threatened or endangered species pursuant to Nebraska’s Nongame and Endangered Species Conservation Act. Contact Nebraska Game and Parks Commission for further information.

History

Since 1978, the Service has consistently found through formal section 7 consultations with federal agencies that actions resulting in depletions to flows in the Platte River system are likely to jeopardize the continued existence of one or more federally listed threatened or endangered species and adversely modify critical habitat. The four federally listed species that have been the focus of recovery efforts (the “target species”) are the whooping crane (*Grus americana*), the northern Great Plains population of the piping plover (*Charadrius melodus*), the interior least tern (*Sternula antillarum*), and the pallid sturgeon (*Scaphirhynchus albus*).

In 2006, a landmark agreement was signed between the governors of Colorado, Nebraska and Wyoming and the U.S. Secretary of the Interior to implement a basin-wide **Platte River Recovery Implementation Program** (Program). The purpose of this Program is to provide ESA compliance for water users in the Platte River basin upstream of the Loup River confluence in Nebraska for effects on the target species and critical habitat, while managing certain land and water resources to provide benefits for those species. This Program went into effect on January 1, 2007.²

¹ **Disclaimer:** This document provides general guidance only; in case of disagreement or ambiguity with respect to Platte River Recovery Implementation Program Agreement documents or Fish and Wildlife Service policies, those Program documents and Service policies take precedence over statements made in this document.

² The complete set of documents associated with this Program is available at https://platteriverprogram.org/program-library?field_document_category_ref_target_id=All&field_document_focus_area_ref_target_id=All&field_document_type_ref_target_id=All&field_document_species_ref_target_id=All&title=program+document&=Apply

This Program will continue for as long as this recovery effort is determined to be necessary and as long as the signatories agree to continue participating in the Program. Through this Program, the states and the federal government will provide land, water, and scientific monitoring and research to evaluate Program benefits for the target species. The effectiveness of various Program actions will be re-evaluated at the end of the Program's 'first increment', and suitable actions for a subsequent Program increment will be determined at that time.

Significance of the Program for section 7 consultations in Nebraska

With or without the three-state Platte River Recovery Implementation Program, federal-nexus projects in the Platte River basin must undergo section 7 ESA consultation with the U.S. Fish and Wildlife Service for actions that may affect federally listed species, including potential effects of project-related depletions. This requirement under the ESA does not change with implementation of the Program.

However, an important benefit of the Program for individual water-related projects in the Platte River basin of Nebraska above the Loup River confluence will be to provide, in most cases, a **streamlined process** for addressing depletion-related impacts to the target species and whooping crane critical habitat.³

Prior to implementation of the Program in 2007, interim measures were in place for projects needing to offset the impacts of depletions to the target species until such time as a satisfactory recovery Program was in effect to address those impacts. Typically, these "interim measures" included annual payments to the National Fish and Wildlife Foundation for management and/or acquisition of land or water to improve habitat conditions. With a recovery Program now in place, those interim measures are no longer needed, as participation in the Program provides ESA compliance for effects to the target species from all existing and, in most cases, new water-related activities.⁴

³ Note that programs targeting a specific geographic area and/or involving multiple individual actions of a similar nature commonly can be handled through a single consultation with the Service known as a *programmatic consultation*. For the sake of simplicity in this document, the term "project" is used, however it should be understood that "programs" also are potentially relevant to this discussion.

⁴ The Program document defines "Existing water related activities" to include surface water or hydrologically-connected groundwater activities implemented on or before July 1, 1997. "New water-related activities" include new surface water or hydrologically-connected groundwater activities, including both new projects and expansion of existing projects, which are implemented after July 1, 1997. See page 2 of the Platte River Recovery Implementation Program for the complete definitions of these terms.

How do I “consult under the Program”, and what are my obligations?

Because Interior and the three states believe that the cooperative, basin-wide Program will be the most effective means of protecting and restoring habitat for these species, a streamlined consultation process is available for those who agree to be covered by the Program.

Streamlined consultation is made possible by the **programmatic biological opinion of June 16, 2006 and supplemented on August 27, 2018**, which determined that the Program, including the continuation of existing and certain new water-related activities in the Platte River basin, is not likely to jeopardize the continued existence of the four target species nor adversely modify designated critical habitat in Nebraska.⁵ Therefore, when an individual project is ‘covered by the Program’, its flow-related effects are considered already addressed under this 2006 programmatic biological opinion (PBO), which evaluated likely actions and effects included in the Final Environmental Impact Statement (FEIS) and supplemental **Environmental Assessment and Finding of No Significant Impact in 2018**. As a result, the often laborious process of developing a stand-alone biological opinion (BO) addressing the incremental effects associated with an individual project can be replaced, under this Program, by a much simpler boilerplate ‘tiered BO’ confirming that the relevant water uses are covered. (This is called a ‘tiered’ BO because it references and tiers off of the June 16, 2006 PBO).

For water-related activities in the **Program area** (which for this document is defined as the South Platte, North Platte, and Platte river basins of Nebraska upstream of the Loup River confluence) which require a federal action (for example, a §404 permit) and/or involve federal monies, the project proponent, working with the lead federal agency in the consultation process, needs to take the following procedural steps to be ‘covered by the Program’:⁶

Existing water-related activities in the Program Area

Program documents specify that surface water and groundwater activities in Nebraska “that were begun prior to July 1, 1997, and are not expanded after that date ... will have Endangered Species Act coverage under the Platte River Recovery Implementation Program as long as such as a Program continues to exist”.⁷

Such ‘existing water-related activities’ thus qualify for streamlined consultation under the Program, should the project proponent choose to be covered by the Program. Normally, no

⁵The complete Programmatic Biological Opinion is available at https://platteriverprogram.org/sites/default/files/PubsAndData/ProgramLibrary/USFWS%202006_PRRIP%20Biological%20Opinion.pdf

⁶These steps are more thoroughly spelled out in the *Nebraska New Depletion Plan* (the “Nebraska Plan”), which is available at: <https://platteriverprogram.org/sites/default/files/2019-07/Program%20Document%20Final%20-%20print.pdf> as Attachment 5, Section 8

⁷This language is extracted from the first page of the *Nebraska New Depletion Plan*

estimate of depletions to the Platte River system will be requested by the Service for these consultations. However, the Service will need confirmation from the corresponding Natural Resource District (NRD) or the Nebraska Department of Natural Resources verifying that the action qualifies as an existing activity.

In addition, a **biological assessment (BA)** will need to be provided by the lead federal agency. For the target species in Nebraska, the two-page “Template Biological Assessment and Request for Formal Section 7 Consultation” should be used ([link](#)) This BA must describe the *water sources* and *water uses* associated with the action. Questions regarding information needed for this BA may be directed to the Service or to the lead federal agency.

Upon satisfactory completion of these steps, the Service can issue a ‘tiered biological opinion’ to the lead federal agency documenting that the project’s existing water-related activities are covered by the Program and are not likely to jeopardize the continued existence of the target species nor adversely modify critical habitat.

New water-related activities in the Program Area

The Nebraska New Depletions Plan (Nebraska Plan) provides a consultation process for new water-related activities in the Program Area that seek ESA coverage under the Program. New water-related activities include surface water or hydrologically connected groundwater activities implemented after July 1, 1997, including new projects and expansion of existing projects. Process steps were developed to guide proponents of such projects through the consultation process (Attachment A). Note that this process applies to the expansion of existing water use as well as new water projects. In general, the following steps are required to address new surface water-related activities within the Program area and new groundwater-related activities within the 28%-in-40-years zone of the Program area which may affect the quantity or timing of water reaching the Platte River system.⁸

- The lead federal agency provides a **biological assessment (BA)** describing the proposed federal action including estimated amounts, timing, and locations of depletions to the Platte River that will be caused by the proposed activity. In cases of depletions associated with groundwater use, the state’s COHYST model and associated maps and datasets will be acceptable tools for making these estimates.⁹

⁸ The 28%-in-40-years line is defined on the basis of the estimated quantity and timing of depletions to Platte River flows associated with groundwater withdrawal. New and expanded uses of groundwater outside of the 28%-in-40-years zone of the Program Area do not require mitigation for adverse effects on Program-defined target flows. Maps illustrating these zones are available from the Nebraska Department of Natural Resources and included on the Web page www.fws.gov/platteriver.

⁹ COHYST is an acronym for the Platte River Cooperative Hydrology Study. COHYST was developed by a group of Nebraska water-related interests.

- If the new water-related activity is one for which a **permit** is required from the Nebraska DNR or from a Natural Resource District with land that is subject to the Nebraska Plan, the lead federal agency must confirm that the corresponding entity has been granted a permit in conformance with LB962, and the BA must specifically identify and describe the means for offsetting depletions in conformance with the Nebraska Plan.¹⁰ Under this scenario, a ‘streamlined consultation’ occurs in which the Service issues a ‘tiered biological opinion’ to the lead federal agency documenting that the project’s water-related activities are covered by the Program and are not likely to jeopardize the continued existence of the target species nor adversely modify critical habitat.
- If no such permit is required, the Service will assess whether Nebraska’s New Depletions Plan otherwise provides offsets for this new water-related activity. (For example: the Nebraska Plan provides offsets for depletions associated with new or expanded gravel mining operations). If satisfactory offsets are provided, a streamlined consultation can be initiated and the Service can issue a tiered biological opinion confirming ESA coverage under the Program.
- If no DNR or NRD permit is required and if Nebraska’s New Depletions Plan does not provide a satisfactory offset for this activity, the Service will work with the project proponent, the lead federal agency, the local NRD and the Nebraska DNR to determine whether the project proponent is able to otherwise provide mitigation for the depletive effects of their action in the amounts and at the times and locations required. In this case, an agreement may be needed which commits the project proponent to the necessary mitigative actions. If no such solution is identified, an evaluation may be made as to whether the Nebraska Plan could be modified to provide the necessary offsets. However, approval by the Platte Governance Committee would be required before such changes could be made.¹¹

New and existing water-related activities outside the Program Area

New and existing water-related activities that are located in the Platte River basin but outside of the North Platte, South Platte, or Platte River basins upstream of the Loup River confluence (*i.e.*,

¹⁰Legislative Bill 962 (LB962), which was passed by the Nebraska state legislature in 2004, amended the Nebraska Ground Water Management and Protection Act to include a more proactive approach to the state’s integrated management of surface and groundwater use. Under LB962, the affected NRDs must develop an integrated surface water and groundwater plan to assess water resource use in their District and to prevent or mitigate for new depletions to the Platte River system as described in the Nebraska Plan. More information about LB962 is available at www.dnr.state.ne.us/LB962/LB962Implementation.html.

¹¹The Platte River Governance Committee has ten members: two representatives from the U.S. Department of the Interior, one from each of the three states, one water-user representative from each of the three states, and two environmental-interest representatives. The Committee periodically meets to review Program progress, approve Program expenditures, oversee Program actions, and resolve Program disagreements.

outside of the Program Area) do not have the option of being covered by the Platte River Recovery Implementation Program. For this reason, the effects of such projects will need to be assessed on an individual, case-by-case basis. These include water-related activities in the Loup River, Elkhorn River, and Salt Creek basins, and any other tributary affecting Platte River flows only downstream of the Loup River confluence near Columbus.

For both existing and new water-related activities, estimates of depletive effects associated with the proposed project action will need to be calculated. In cases where the average annual depletive effect on the nearest tributary to the Platte River system is less than 25 acre-feet per year during the months of February through July, a streamlined consultation process is currently available under a “minor depletions biological opinion” prepared by the Service for such projects in the Platte River basin exclusive of the Program area. For more information about consultation options for water-related projects, contact the Nebraska Field Office of the U.S. Fish and Wildlife Service: (308) 382-6468.

Alternatives

Seeking ESA coverage under the Platte River Recovery Implementation Program is entirely voluntary. Project proponents always have the option of seeking to offset their water-related impacts to the target species through alternative means.

Should a project proponent within the Program area opt not to seek coverage or be unable to obtain coverage under the Program as described above, the proponent will need to complete an independent section 7 consultation on the effects of the project. Biological Assessment (BA) information required by the Service to prepare a stand-alone biological opinion would, in this case, include details on the timing, magnitude and frequency of depletions associated with both existing and new water-related project actions. Project-specific conservation measures will be required to offset corresponding adverse effects on the species, and may be more costly in terms of time and money than measures required under the Program.

What are the possible risks or downsides to seeking Program coverage?

Program Continuity. Conceivably, any of the four signatories to the Program Agreement (the three governors and the U.S. Secretary of the Interior) could withdraw from the Agreement, or the state or federal participants could fail to meet their commitments under the Program. Should that occur, it is possible that the Program will no longer serve to provide ESA coverage for the downstream target species. In such a situation, consultation on the effects of the project actions may need to be re-initiated. However, such a turn of events is considered unlikely, and should this occur the Department of the Interior would seek practical and reasonable alternatives for project proponents who already had agreed in good faith to participate in the Program.

New Federal depletions

‘Federal depletions’ are those associated with federal water-related activities wherein the water rights are held by a federal agency and that water is used for a primarily ‘national benefit’ (as opposed to supplying local users). Examples of new federal depletions may include, but are not limited to:

- New water storage facilities, impoundments, and consumptive water uses at National Wildlife Refuges, Waterfowl Production Areas, and National Fish Hatcheries;
- New consumptive water uses at National Forests, Parks, Monuments, Cemeteries, and Historic Sites, including recreational, habitat improvement, administrative, and emergency uses; and
- New depletions associated with activities at federal facilities that provide benefits that are primarily national in scope, such as national defense, national security, or national research and development activities (*e.g.*, U.S. military bases; U.S. National Renewable Energy Laboratory).

In these cases, ESA coverage for the new or expanded water-related activity cannot be provided by the Nebraska Plan. Project proponents may opt to seek ESA coverage via procedures outlined in the Federal Depletions Plan.¹²

Situations may arise in which classification of project depletions as a “federal” or “non-federal” responsibility may not be obvious. In such cases, final classification of the project will be made by the Service in coordination with the U.S. Bureau of Reclamation and the State of Nebraska, with oversight by the Platte River Program’s Governance Committee.

Am I covered under the Program for *all* impacts pursuant to the Endangered Species Act?

Not necessarily. Coverage provided by the Program is limited to the *off-site effect* of streamflow depletions on the *downstream target species and other species addressed in the programmatic biological opinion*, such as the western prairie fringed orchid. Potential *on-site* or other *local* impacts to other federally listed species (for example, impacts to the American burying beetle) are *not* covered by the Platte River Program. These effects will need to be addressed separately in the biological assessment on a project-by-project basis.

¹² <https://platteriverprogram.org/sites/default/files/2019-07/Program%20Document%20Final%20-%20print.pdf> Attachment 5, Section 10.

🕒 Whom may I contact with my questions?

For questions about the **Section 7 ESA consultation process** in Nebraska, contact the Nebraska Field Office at the U.S. Fish and Wildlife Service: (308) 382-6468.

For questions about project coverage under **Nebraska's Depletion Plan**, including compliance with Nebraska water law, contact the Nebraska Department of Natural Resources: (308) 471-2899, or your local Natural Resources District (NRD):

- North Platte NRD (308) 632-2749
- South Platte NRD (308) 254-2377
- Twin Platte NRD (308) 535-8080
- Central Platte NRD (308) 385-6282
- Tri-Basin NRD (308) 995-6688

For questions about **describing relevant water sources, uses, and/or estimating depletive effects** associated with a particular project, contact the Service Platte River hydrologist: (303) 236-4484.

AGENCY/

ATTACHMENT A

A key detailing process steps in the Nebraska Depletion Plan (NDP) flow chart for section 7 consultations.

This section is intended to explain and illustrate: (1) how consultations between FWS and federal action agencies will proceed when section 7 ESA consultations are required on proposed new water related activities in Nebraska; (2) the function of this plan relative to such consultations; and (3) how the role of the State and any other party with responsibility for implementing any depletion offsets or other required reasonable and prudent alternatives will interact when such consultations are required. The term “new water related activity” is defined in footnote 3 to item I.A.2 of the Program Document, but for purposes of the Nebraska Depletion Plan (NDP), it applies only to new water related activities for which consultation occurs after the initiation of the Program.

Step A. Does the proposed project use federal monies or need federal authorization?

Yes – Go to Step C

No – Go to Step B

Step B. Does the proposed project use state monies or need state authorization?

Yes – Project may require consultation under the Nebraska Nongame and Endangered Species Conservation Act. Contact the Nebraska Game and Parks Commission for further information or go to Step C.

No – Proposed project does not require federal and/or state consultation for Platte River depletion-related effects <Stop>

Step C. Does the project occur in the Platte River basin?

Yes – Go to Step D

No – Proposed project will not result in a Platte River depletion. <Stop>

Step D. Is the project in the Platte River basin upstream of the confluence with the Loup River?

Yes – Go to Step F

No – Project is outside the scope of the Program. Project proponent must assess the average annual depletions over the life of the NWRA in the February through July time period. Go to Step E

Step E. Are the average annual depletions greater than 25 acre feet?

Yes – Project proponent must offset the timing and amount of Feb-July depletions. <Stop>

No - Project proponent can currently use offset option available for lower Platte River depletions under the minor depletions biological opinion<Stop>

Step F. Is the NWRA one for which DNR or an NRD requires permits?

Yes – FWS and federal action agency have streamlined consultation regarding depletions covered by the NE Depletions Plan; NDP to serve as ESA compliance for NWRA to that extent. Go to Step H

No – Go to Step G

Step G. Is the NWRA of another type for which offsets are provided by NE Depletions Plan?

Yes – Service and federal action agency have streamlined consultation regarding depletions covered by the NE Depletions Plan; NDP to serve as ESA compliance for NWRA to that extent. Go to Step H

No - NE Depletions Plan would need to be modified to provide offsets. Project proponent will need to offset the timing and amount of depletions if NDP not modified.¹⁵ <Stop>

Surface Water and Groundwater Considerations

Step H. Does the NWRA involve the use of surface water, groundwater¹⁶, or both?

Surface water only – Go to Step I

Ground water only – Go to Step J

Both surface water and groundwater – Go to Steps I and J

Neither – no depletions consultation is required. <Stop>

Step I. Does the NWRA account for 0.1 acre feet/year or less of new depletions to the Platte River (or the nearest tributary to the Platte), or is it a temporary use which returns all water to the Platte River within 30 days¹⁷?

Yes – Service policy is to exempt surface water use by the project from further ESA Section 7 consultation for projects whose effects are within either of these *de minimis* standards. <Stop>

No – Go to Step K.

Step J. Are the groundwater impacts located within the 28/40 area?

Yes – Go to Step K

No – Groundwater use by the project is determined to have a minimal impact to Platte River flows during the first Program increment. The respective NRD will issue a variance letter. <Stop>

Other Exemptions

Step K. Is the NWRA a restoration project according to Service guidelines? ¹⁸

Yes – Service policy is to exempt project activities from further ESA section 7 consultation if the activity will result in the restoration of a wetland, or otherwise establishes land cover that approximates site conditions prior to human development. <Stop>

No – Go to Step L

¹⁵ The Program Document allows for GC approval of changes in any state's depletion plan for the purpose of broadening ESA coverage under that plan. FWS and state concurrence on any such proposed amendment to this plan will be required before GC action is requested.

¹⁶ Includes any changes in land cover, e.g., borrow pits with exposed surface water.

¹⁷ See www.fws.gov/platteriver for additional information on *de minimis* standards.

¹⁸ See www.fws.gov/platteriver for definitions and examples of a restoration project.

Step L. Will the NWRA be used to as mitigation for wetland loss?

Yes – Service policy is to exempt project activities from further ESA section 7 consultation if the activity will be used as mitigation for wetland loss. <**Stop**>

No – The project proponent shall coordinate proposed activities with DNR. A letter of variance is needed from the DNR. A letter of variance may also be needed from the NRD if the NWRA depletes groundwater. <**Stop**>