

## Frequently Asked Questions (12 February 2016)

### **BACKGROUND ON THE INFORMAL PROGRAMMATIC CONSULTATION**

On April 17, 2015 the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Authority (FTA), and the US Fish and Wildlife Service (FWS) finalized the range-wide informal programmatic consultation for the Indiana bat (Ibat) and northern long-eared bat (NLEB). A concurrence letter from the FWS and the biological assessment (BA) can both be found on the FWS website (<http://www.fws.gov/midwest/endangered/section7/fhwa/index.html>). The consultation covers actions that are expected to result in classifications of “no effect” and “may affect, not likely to adversely affect” (NLAA) with and without avoidance and minimization measures (AMMs). The consultation does not address certain actions that may affect the bats that are not fully analyzed. Additional coordination with the appropriate field office is necessary to make a final effect determination on these types of projects. A User’s Guide and related background materials (e.g., effects analysis matrix, AMMs, and the project submittal form) are available on the FWS [website](#) for this project.

### **GENERAL QUESTIONS ON USE OF THE INFORMAL PROGRAMMATIC CONSULTATION**

#### **Q: When does the informal programmatic consultation take effect?**

A: The informal programmatic consultation became effective upon the FWS issuance of the letter of concurrence on April 17, 2015.

#### **Q: Can agencies use existing consultation procedures in lieu of the programmatic informal consultation?**

A: FWS expects their Field Offices to use this informal programmatic consultation to consult on all projects that fall within the bounds of the programmatic.

While the FWS cannot require agencies to use the informal programmatic consultation, we would like to support consistency in consultation standards across the species’ range. To do so, we recommend using the standard project submittal form and standard operating procedures (SOP).

The purpose of the informal programmatic consultation is to offer time- and cost-saving benefits. In order to use a different procedure, agencies will need to work with FWS Field Offices (and in the case of DOTs their FHWA Division Offices) to reach an agreement that the alternative procedure satisfies the agency’s consultation requirements and that the standards are consistent with the programmatic informal consultation.

#### **Q: What is the anticipated consultation timeframe for projects that are categorized as “may affect, not fully analyzed”?**

A: We anticipate that the request for consultation for the “not fully analyzed” category could be delayed to allow for coordination to resolve uncertainties. Additional projects are expected to fall within the scope of the programmatic informal consultation once additional information is provided and reviewed by Field Offices. For other informal consultations that ultimately do not fit within the programmatic, FWS’s general policy would remain in effect—to respond to requests for concurrence within 30 days of receipt. If the agency determines up-front that a project in this category is “may affect likely to adversely affect” (LAA) or, if upon review of additional information, the Field Office determines LAA, agencies should

follow the range-wide formal programmatic consultation if applicable (expected to be available in the spring 2016) or existing formal consultation processes.

**Q: Do State DOTs need an official designation from their FHWA Division Offices for consultation under the BA?**

A: Yes, however, FHWA has designated the State DOTs to act as their non-Federal representative regarding this Endangered Species Act (ESA) consultation. State DOTs should coordinate with their appropriate FHWA Division Office regarding local implementation procedures. FHWA may withdraw a State DOT's non-Federal designation.

**Q: Some FHWA Division Offices currently seek written FWS concurrence for all “no effect” determinations. However, the User’s Guide states that when “the transportation agency documents no effect on the project submittal form for their files, no coordination is required, and the consultation concludes.” How should this be reconciled when using the programmatic consultation?**

A: In the BA, FHWA identified activities it determined would have “no effect” on the two listed bat species and (Ibat) critical habitat, and requested concurrence with the determinations of NLAA for additional activities. FWS has concurred with FHWA's determination. For those projects consistent with the “no effect” determination in the BA, no further coordination is required. The “no effect” determination and its rationale should be documented in the project file. The project submittal form can be used to document this decision, if needed. If a FHWA Division already has a procedure in place with a FWS Field Office to review “no effects” determinations, then that procedure may be followed.

**Q: Does the term “existing road/rail surface” include the operational right-of-way (ROW) or only the space between the edges of pavement?**

A: ROW refers to the distance between the edge of pavement (or other road surface) or rail ballast.

**Q: Do agencies need to report on projects that involve percussive activities if those activities are restricted to the existing road surface? How are percussive activities defined?**

A: If the percussive work does not occur within suitable habitat (this includes bridges with evidence of bat use), then agencies are not expected to report on this activity. A list of percussive activities is provided in the BA. There is no minimum weighted decibel (dBA) level for an activity to be considered percussive.

Q: If a project does not conform to the list of activities covered in the range-wide programmatic informal consultation, can agencies still engage FWS Field Offices in informal consultation?

A: The programmatic informal only applies to a suite of activities that FHWA/FRA/FTA and FWS have determined predictably have no effect or are NLAA bats. If a project does not fit into the terms of the BA, but is NLAA with respect to bats, it is still possible to conduct an informal consultation with the respective FWS Field Office. Because of the comprehensive effects analysis of transportation actions accompanying the BA, we expect that most actions that are categorized as NLAA will fit into the programmatic. An effects analysis is available on the FWS [website](#).

**Q: What is the best approach under the NLEB final 4 (d) rule for informal consultation?**

A: If a project meets the requirements for inclusion in the informal programmatic agreement (as discussed in the BA and User's Guide) and both the Ibat and NLEB may be affected, we recommend using the

informal programmatic agreement to employ a single consultation process for both species. If Ibats are not present (e.g., the project is outside the Ibat range or summer survey results for Ibat are negative), then the agency may use either the informal programmatic agreement if the requirements are met (i.e., NLAA) or use the final 4(d) rule framework. However, there are multiple benefits of continuing to use the existing range-wide informal consultation for the NLEB including shorter timeframes for review and an existing full effects analysis previously completed as part of the programmatic.

**Q: If the majority of a project occurs within 100 feet of the edge-of-road/rail surface, but small section(s) extend outside of the 100 feet (e.g., a curve cut-off), can the range-wide informal programmatic agreement be used?**

A: If the project occurs predominately within 100 feet of the edge-of-pavement and the agency provides additional information to their local FWS Field Office that: a) no habitat exists in the work area outside the 100 feet, b) no trees will be cut outside the 100 feet, or c) no bats are present (e.g., through a bat survey using [the Range-wide Indiana Bat Summer Survey Guidance](#)), then the project can be “folded back” into the range-wide informal programmatic agreement.

## **TREES**

**Q: What should agencies do for projects that involve tree clearing during a time frame that is not covered in the BA (i.e., the summer months)?**

A: If an agency cannot implement AMMs for tree clearing (i.e., winter tree clearing), then the agency’s options are to either conduct a presence/absence (P/A) survey, use the range-wide formal programmatic consultation if applicable (expected to be available in the spring 2016) or conduct a site-specific consultation with the appropriate FWS Field Office. If the consultation is only for NLEB, then use of the final 4 (d) framework is appropriate.

**Q: If trees do not have features for suitable roosting, are they still considered suitable habitat (note that suitable foraging habitat may have different characteristics than suitable roosting habitat)?**

A: Since suitable features can be very difficult to assess (especially with larger numbers of trees), all trees that meet the minimum diameter at breast height (DBH) criteria are considered suitable roosting habitat. In specific cases where only a few trees are concerned and an agency would like to exclude those trees as suitable habitat based on relevant characteristics (e.g., exfoliating bark or cracks and crevices), then the agency should coordinate with the local FWS Field Office to determine if it is practical to use the informal programmatic agreement.

**Q: How is “urban area” as it relates to habitat defined in the BA?**

A: In addition to urban centers where there is virtually no habitat, high-density neighborhoods and subdivisions typically do not provide suitable habitat. However, agencies should coordinate with their local FWS Field Office to define “urban” as it relates to areas not suitable for Ibats and NLEBs in their state (see [The Rangewide Indiana Bat Summer Survey Guidance](#)).

**Q: How is “documented foraging habitat” determined?**

A: Documented foraging habitat is identified using acoustic surveys or radio telemetry.

**Q: What does “avoiding known maternity roost trees” mean relative to the range-wide informal programmatic consultation?**

A: In order to use the range-wide informal programmatic agreement, agencies must avoid clearing documented maternity roost trees or other trees within 0.25 miles of any documented maternity roost (note that in rare cases the documented maternity roost may be a structure rather than a tree) any time of year without additional site-specific consultation. Since the informal consultation arrives at a NLAA designation, 0.25 miles differs from the distance given in the NLEB 4 (d) rule (which exempts take). Note that the final 4 (d) rule for NLEB require restricts tree clearing within 150 feet of a known, occupied maternity roost tree during the months of June and July (non-volant season for pups).

**BRIDGES**

*Please note that there is revised bridge assessment guidance on the FWS website.*

**Q: Will a bridge replacement project in which bats are not using the bridge result in a “no effect” determination?**

A: Yes, if the bridge is not used by bats, it is appropriate for the agency to make a “no effect” determination.

**Q: If removing a bridge with no signs of bat use results in a “no effect” determination, why does removal of a tree with no signs of bat use (i.e., negative P/A survey) result in a determination of NLAA?**

A: Although FWS is aware that some bridge types may be inherently unsuitable bat habitat, there is currently insufficient data to make effect determinations based solely on bridge type. For trees, DBH and structural features, such as exfoliating bark, are evaluated to determine suitability. Therefore, bridges with no signs of bat use are not considered suitable habitat and actions affecting them are determined to be “no effect” rather than NLAA. There is ongoing research to determine whether some bridge types are not suitable based on certain characteristics (e.g., material, design, etc.) similar to how trees under 3” DBH are not considered suitable habitat for the NLEB.

**Q: Can agencies and FWS Field Offices collaborate to identify bridge types of concern based on their experience?**

A: Per the previous FAQ, the agencies and FWS have used the best available science in making determinations of effect in the informal programmatic consultation. Ongoing efforts to gather information on this issue may allow the agencies to make more specific determinations about the suitability of some bridge types that can be integrated into the BA. This information may be used to modify the consultation.

**Q: Does a bridge need to be near suitable forested habitat to be considered suitable habitat itself?**

A: No, however, it is unlikely that a bridge would be used by bats without suitable habitat within several miles. For now, bridges are defined as suitable habitat if there are bats present or signs of bats using the bridge (e.g., guano piles).

**Q: Is there a minimum diameter for pipes or culverts to be considered suitable habitat?**

A: Bats and NLEBs have been found to roost in pipes and culverts. There is currently no minimum size that defines suitability of a pipe as habitat.

**Q: Is there a specific season during which bridges should be assessed to determine presence or can the bridge bat assessment occur at any time of year?**

A: No. Signs of bat use (e.g., urine stains, guano piles) are visible year-round, therefore there is no designated season for bridge bat assessments. A bridge bat assessment conducted under conditions that might preclude the ability to see potential signs of bat use (e.g., heavy snow cover, high water), however, may be determined invalid.

**Q: What steps should an agency take if they find evidence of bats during bridge construction, but are unsure of the bat species?**

A: The agency should either assume presence of Ibat/NLEB or should conduct a more thorough evaluation of the site (e.g., visual inspection of bats on bridge or more intensive surveys) to determine what species are using the bridge.

**Q: What additional considerations should be made if an agency plans to demolish a building or other structure as part of a transportation project?**

A: Structures should be evaluated using the same protocol as bridges; if a structure shows signs of use by bats, the agency should perform an additional assessment.

**Q: Does completing the bridge bat assessment form meet the P/A requirement for structure work? Does it still meet the requirement if there is forested habitat in the vicinity?**

A: Yes, the bridge bat assessment form satisfies the requirement for bridges and structures in informal consultation.

**Q: Who can perform a bridge bat assessment?**

A: General qualifications for individuals performing bridge bat assessments are posted on the FWS [website](#) for the range-wide programmatic consultation. Requirements vary by Field Office, however, and in some States, DOT biologists are able to perform the assessment, while in others Field Offices require a qualified bat biologist perform the assessment. Agencies should reach out to their local FWS Field Office to determine the specific requirements.

**Q: Can any bridge work be done during the active bat season on a bridge that has been determined to be suitable habitat (i.e., evidence of bat usage was discovered)?**

A: Yes, above deck work that does not drill down to the underside of the bridge deck or include percussives (vibration) or noise levels above background traffic is allowed. Below deck work that is conducted away from roosting bats and does not involve percussives or noise level above background traffic (e.g., wing-wall work, abutment, beam end, scour, or pier repair) and which does not disturb the bats also falls under the informal programmatic agreement.

**Q: Are there specific requirements related to preserving suitable roosting habitat when working on a bridge that has been determined to be suitable habitat?**

A: Yes, see Bridge AMM 5. It states that State DOTs should “ensure suitable roosting sites remain after any bridge work is completed.” Suitable roosting sites may be incorporated into the design of a new bridge.

## **HABITAT ASSESSMENT (TREES AND BRIDGES)**

**Q: What source of information should agencies consult regarding documented roosts or foraging habitat?**

A: Agencies should consult the local FWS Field Office or State Resource Agencies. At this time FHWA and FWS do not have any planned range-wide data sharing activities.

**Q: What guidance should agencies consult for habitat assessment protocols, such as the appropriate time-of-year and time-of-day to conduct assessments?**

A: [The Rangewide Indiana Bat Summer Survey Guidance](#) provides information on habitat assessments, including definitions of what qualifies as habitat and guidance on how to identify habitat. The Ibat guidance also presently applies to NLEB. Habitat assessments should occur during the day, when visibility is highest, and should ideally occur when trees do not have foliage. If there are trees that meet the minimum DBH criteria for suitable roosting habitat on a project site, it is likely that the site will be considered suitable habitat. In this case, a State DOT should coordinate with the local FWS Field Office prior to conducting habitat assessments.

**Q: Can new surveys be used to demonstrate that former bat habitat is no longer occupied (e.g., if white nose syndrome (WNS) has caused declines in a population)?**

A: One year of negative surveys is not generally sufficient to invalidate a previous positive survey. Even when following FWS survey protocols, individual surveys are not sufficient to determine if a site is still occupied. In addition, both Ibats and NLEBs show a high level of fidelity to maternity sites in some cases even as habitat becomes degraded. To address these challenges, agencies should coordinate with their local FWS Field Office to determine what is required in order to determine if existing surveys are still valid. The FWS is currently pursuing the potential for developing surveys that should be sufficient to use in areas with prior documented presence.

**Q: For acoustic surveys, does the person collecting field data need to be a qualified biologist, or does that requirement only apply to the individual analyzing the survey results?**

A: See the [Rangewide Indiana Bat Summer Survey Guidance](#) for information on qualifications.

**Q: Do bridge surveys have to be conducted or repeated seven days before work begins on a bridge project?**

A: No, this initial requirement of the range-wide informal programmatic consultation has been changed. A valid survey within the required time period (yearly for an assessment of the bridge itself and generally two years if the bridge is evaluated using the [Rangewide Indiana Bat Summer Survey Guidance](#)) is sufficient.

**Q: How should agencies address inability to survey an entire bridge when portions of the bridge are inaccessible or unsafe to access during the inspection?**

A: If portions of the bridge are unsafe to assess or are inaccessible, we recommend that inspectors avoid those sections and base their determination on the portion of the bridge that is safe to assess. If possible, a partial assessment should be combined with evening-night observation. If the entire bridge (or a significant portion) is unsafe, evening-night observation should be used to determine if bats are using the

bridge. This approach is similar to an emergence survey for a tree (see Appendix E in the [Rangewide Indiana Bat Summer Survey Guidance](#)). Finally, we expect the range-wide formal programmatic agreement to allow for some take of listed bats in cases where: 1) it is not practical to assess bat use of a bridge and presence is assumed; or 2) it is not practical to avoid take on a bridge that is known suitable habitat. For projects where the only listed bat potentially affected is the NLEB, the final 4 (d) rule precludes the need for assessment.

## **AVOIDANCE AND MINIMIZATION MEASURES**

*Note that if the only species potentially affected is NLEB, it may be appropriate to use the final 4 (d) framework in place of the informal programmatic agreement.*

**Q: Do agencies need to meet all four tree removal AMMs for tree removal projects to use the informal consultation?**

A: Yes, agencies must apply all applicable AMMs.

**Q: When an activity is included in the BA, do all of the AMMs for that particular activity (e.g., tree removal) need to be instituted to determine NLAA?**

A: Yes, agencies must apply all applicable AMMs.

**Q: Will projects that are classified as NLAAs with no AMMs require coordination with FWS?**

A: Yes, but the projects can be batched. Agencies should submit the project submittal form to their respective FWS Field Office in order to make use of the informal programmatic consultation.

**Q: If an agency is unable implement all applicable AMMs, should the agency consult with the respective FWS Field Office?**

A: Yes. If they cannot implement the applicable bridge and tree removal AMMs, a negative P/A survey would typically allow a project to stay within the confines of the informal programmatic agreement. If there are signs of bats using a tree, bridge, or structure, then a site-specific consultation with the Field Office is required.

**Q: Does tree removal AMM #2 mean that no tree cutting can occur during the active season?**

A: No. However, to fit under this programmatic informal agreement, tree clearing cannot occur in the active season. If a project does not fit within the informal programmatic consultation, agencies may be able to use the range-wide formal programmatic consultation (expected to be available in spring 2016) or may conduct project-specific consultations with their FWS Field Office.

**Q: Can any work be done within 0.5 mile of a known hibernaculum and still fall under the range-wide informal programmatic agreement?**

A: Yes, there are three classes of actions that can occur within 0.5 mile of a known hibernaculum and fall under the informal programmatic consultation: 1) activities (anywhere, including within 0.5 mile of hibernacula) that do not involve construction, such as bridge assessments, property inspections, development of planning and technical studies, property sales, property easements, and equipment purchases; 2) activities (anywhere, including within 0.5 mile of hibernacula) completely within the existing road/rail surface (e.g., road line painting) which do not involve percussives or other activities that



increase noise above existing traffic/background levels; and 3) minor maintenance activities, such as mowing around storm water basins.

**Q: Are Water Quality and Wetland/Stream Protection AMMs mandatory?**

A: The Water Quality and Wetland/Stream Protection AMMs have been removed from the BA and included as part of the Proposed Action. This is a change in the informal programmatic agreement reflecting FWS assessment that these AMMs are not requisite to get to NLAA in all but a very small number of instances and are generally implemented as part of standard best management practices or mandated by other State or Federal regulatory agencies.

**Q: How is bat use of a structure addressed in the range-wide informal programmatic agreement?**

A: A new AMM (Structure AMM 4) has been added and states “if bat activity is observed (or signs of frequent bat activity), agencies will avoid removing structures unless there are concerns about human health/safety/property and coordinate with a nuisance wildlife control officer and the local USFWS Field Office.”

**TRACKING AND REPORTING REQUIREMENTS**

**Q: How should the project submittal form be accessed? Is the form part of the Information, Planning, and Conservation (IPaC) system?**

A: Agencies should access the latest version of the form on the FWS [website](#). At present, the form cannot be accessed via IPaC.

**Q: Are agencies required to use the project submittal form, or can they use other project screening tools to report information for the programmatic consultation to FWS?**

A: Agencies are encouraged to use the project submittal form and other tools developed specifically for the consultation, as these were designed to minimize effort and capture the required information. Agencies may, however, use other methods if they coordinate with their local FWS Field Office and if such methods provide adequate project information.

**Q: Is a project submittal form required for every project?**

A: Yes, the form is required to use the informal consultation, unless projects are being batched, in which case multiple projects that meet a specific determination can be included in a single form. States should pay particular attention to ensure that all projects submitted under one form meet the criteria of the informal consultation to avoid requests for additional information from FWS Field Offices and project delays.

**Q: Is the use of the IPaC system required?**

A: We recommend that you coordinate with your local FWS Field Office. Some Field Offices may require the use of the IPaC system when coordinating projects.

**Q: Can consultants submit the project submittal form to FWS Field Offices?**



A: Generally yes, however State DOTs should work with their local FHWA Division Office to determine the appropriate role for consultants and communicate the preferred process to their local FWS Field Office.

**Q: There is no distinction in the User's Guide's SOPs for "no effect" and NLAA projects. Are agencies expected to follow the process in Section 3.1 for "no effect" projects?**

A: No, agencies will continue to make their own determination of "no effect" as is current practice. The informal programmatic consultation does not require agencies to report to FWS on "no effect" projects. Agencies are encouraged to use the project submittal form internally to maintain an administrative record for their "no effect" projects. State DOTs may also need to coordinate with their respective FHWA Division Office to ensure that "no effect" projects meet the parameters of the informal programmatic consultation.

## **OTHER AGENCIES**

**Q: Will the U.S. Army Corps of Engineers accept this informal programmatic consultation in their review of permit applications, or do agencies still need to secure a coordination letter from FWS?**

A: If FHWA is not the lead Federal agency for a project, then the State DOT will still need to conduct their own project review. If another Federal agency is involved, they would consult with the FWS. If FHWA is the lead Federal agency, then the U.S. Army Corps of Engineers should accept the consultation, although they may request additional information. A copy of the FWS concurrence letter is available on the FWS [website](#) for this project.

## **UPDATES AND REVISIONS**

**Q: Do FHWA and FWS plan to provide a response to comments already submitted on the BA?**

A: FHWA and FWS reviewed comments submitted on the BA and other comments provided during approximately the first six months of implementation of the range-wide informal programmatic agreement. Those comments were formally evaluated by the two agencies in November 2015. An updated User's Guide and other updated consultation products (e.g., project implementation form) will be placed on the FWS [website](#) in early 2016.

**Q How will updates to the BA and User's Guide be issued or publicized?**

A: All updates, including the substantive revision of the BA, which will accompany the range-wide formal programmatic agreement (expected in the spring of 2016) will be posted to the FWS [website](#).