

Memorandum

*Making Conservation
a California Way of Life*

To: DISTRICT DEPUTY DIRECTORS FOR
ENVIRONMENTAL ANALYSIS AND
DISTRICT DEPUTY DIRECTORS FOR PLANNING

Date: April 9, 2021

From: PHILIP J. STOLARSKI *Philip J. Stolarski*
Chief
Division of Environmental Analysis

DEE LAM 
Chief
Division of Local Assistance

Subject: NEPA PROCESS IMPROVEMENT TEAM: CHANGES TO SPECIES LIST REQUIREMENTS

The NEPA Process Improvement Team (Team) Steering Committee has approved a proposal by the Team to modify Caltrans' requirements related to obtaining species lists as part of our Federal Endangered Species Act (FESA) Section 7 process.

Effective immediately, Caltrans will no longer require that a species list be obtained for every project. Instead, the Team has created a flowchart, which is attached to this memorandum, to guide biologists in determining when a species list is required. For those project types for which a species list is not required, biologists can choose to obtain a species list as tool if it is helpful to their work.

The Team also approved a change to the requirement that species lists be no older than 180 days for draft and final environmental documents for projects with "No Effect" and "May Affect" findings. Effective immediately, for projects that require Section 7 consultation, new species lists must be obtained if the Biological Assessment (BA) preparation has not begun within 90 days of obtaining the list, or if the BA has not been submitted to U.S. Fish and Wildlife Service and/or National Marine Fisheries Service within 180 days of obtaining the list.

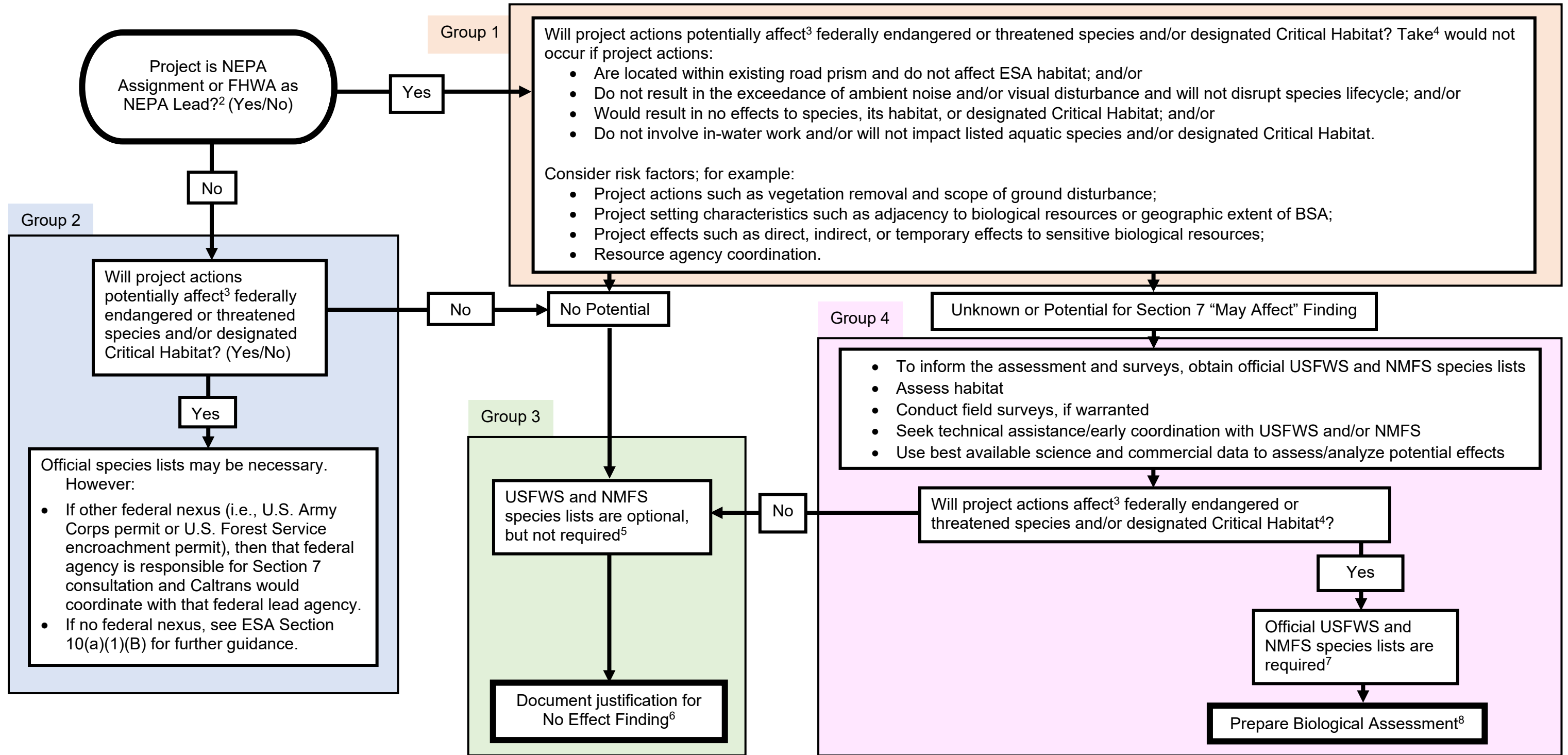
Thank you for your continuing professionalism and diligence in delivering projects for Caltrans and our project delivery partners. If you have any questions regarding this memorandum, please contact Jennifer Gillies, Office Chief responsible for biological compliance, at (916) 599-5570, or Kelly Hobbs, Office Chief responsible for Local Assistance environmental compliance, at (916) 838-9085.

Attachments:

1. FESA Species List Decision Tree Flow Chart Final
2. FESA Species List Decision Tree Flow Chart Final ADA

c: Jeremy Ketchum, Assistant Chief, Division of Environmental Analysis, Caltrans
Jennifer Gillies, Office Chief, Division of Environmental Analysis, Caltrans
Kelly Hobbs, Office Chief, Division of Local Assistance, Caltrans
Kelly Dunlap, NEPA Process Improvement Team Lead, Division of
Environmental Analysis, Caltrans

Decision Tree for Determining Need for Official USFWS and NMFS Species Lists under Section 7 of Federal Endangered Species Act¹



¹The purpose of this decision tree is to guide the decision whether USFWS and NMFS species lists should be obtained. This decision tree does not preclude a biologist from using USFWS and NMFS lists in the assessment of the project. Official and unofficial species lists for USFWS species are obtained at <https://ecos.fws.gov/ecos> and from NMFS at https://archive.fisheries.noaa.gov/wcr/maps_data/california_species_list_tools.html

²Refer to the "Lead Agency Decision Tree for FHWA or Caltrans (as Assigned) Actions" in Chapter 38 of Volume 1 of the SER

³Effects of the (project) action, per the Endangered Species Act of 1973 (ESA), as defined in 50 CFR 402.02.

⁴"Take" as defined in the federal ESA and associated federal regulations.

⁵If additional information is necessary to make the effect determination, the biologist may obtain NMFS species list and an unofficial or official USFWS species list for the assessment and administrative record. Note that NMFS does not have an unofficial list. An official USFWS species list is needed for all "may effect" findings. An unofficial species list can be used for a No Effect finding or if seeking technical assistance from USFWS.

⁶The Endangered Species Consultation Handbook (1998) states that "a no effect finding can only be concluded if it has been determined that the proposed action will not affect a listed species or designated Critical Habitat." All ESA findings must be based on best available scientific and commercial data. The ESA finding must be repeatable, meaning that another biologist would arrive at the same conclusion with the same data, and defensible, meaning there is a clear evidence-based argument for the finding. Ensure finding is repeatable and defensible through clear documentation of methods and findings. The following are example projects that could potentially have but are not predetermined to have No Effect findings: pedestrian, median concrete barrier (no veg), and guardrail upgrades; slab, fencing, fiber optic vaults, and existing signs and lights repair/replacement; pavement rehab/overlays; operational improvements (CCTV, VDS, loop ramps); maintenance facility security (cameras, fencing), and striping.

⁷A new official species list is required if BA preparation has not begun within the 90 days of obtaining the list or BA has not been submitted within 180 days (CFR §402.12(e) and §402.12(i)).

⁸Technically, if a project may affect but is not likely to adversely affect (MA,NLAA), a BA is not needed for informal consultation, and a letter of concurrence (LOC) of MA,NLAA is issued. However, Caltrans typically prepares a BA when seeking concurrence with any may affect findings in order to demonstrate best available scientific and commercial data were used to reach a conclusion. If a BA is being prepared, an official species list needs to be included.

Decision Tree for Determining Need for Official USFWS and NMFS Species Lists under Section 7 of Federal Endangered Species Act¹

NEPA Assignment or FHWA as NEPA Lead²?

- a. If yes, the project is under NEPA Assignment or has FHWA as NEPA Lead, then go to Group 1
- b. If no, the project is not under NEPA Assignment or does not have FHWA as NEPA Lead, then go to Group 2

Group 1

1. If the project is under NEPA Assignment or has FHWA as NEPA Lead, then will project actions potentially affect³ federally endangered or threatened species and/or designated Critical Habitat?
 - Take⁴ would not occur if project actions:
 - Are located within existing road prism and do not affect ESA habitat; and/or
 - Do not result in the exceedance of ambient noise and/or visual disturbance and will not disrupt species lifecycle; and/or
 - Would result in no effects to species, its habitat, or designated Critical Habitat; and/or
 - Do not involve in-water work and/or will not affect listed aquatic species and/or designated Critical Habitat.
 - Consider risk factors; for example:
 - Project actions such as vegetation removal and scope of ground disturbance;
 - Project setting characteristics such as adjacency to biological resources or geographic extent of BSA;
 - Project effects such as direct, indirect, or temporary effects to sensitive biological resources;
 - Resource agency coordination.

¹ The purpose of this decision tree is to guide the decision whether official USFWS and NMFS species list should be obtained. This decision tree does not preclude a biologist from using USFWS and NMFS lists in the assessment of the project. Official and unofficial species lists for USFWS species are obtained at <https://ecos.fws.gov/ecos> and from NMFS at https://archive.fisheries.noaa.gov/wcr/maps_data/california_species_list_tools.html

² Refer to the “Lead Agency Decision Tree for FHWA or Caltrans (as Assigned) Actions” in Chapter 38 of Volume 1 of the SER.

³ Effects of the (project) action, under the federal Endangered Species Act of 1974 (ESA), as defined in 50 CFR §402.02.

⁴ “Take” as defined in the federal ESA and associated federal regulations.

- a. If no, the project will not potentially affect federally endangered or threatened species and/or designated Critical Habitat, then go to Group 3
- b. If it is unknown or if there is potential that the project will affect federally endangered or threatened species or affect Critical Habitat, then go to Group 4.

Group 2

1. If the project is not under NEPA Assignment or does not have FHWA as NEPA Lead, then will project actions potentially affect³ federally endangered or threatened species and/or designated Critical Habitat?
 - a. If no, project actions will not potentially affect³ federally endangered or threatened species and/or designated Critical Habitat, then go to Group 3.
 - b. If yes, project actions will potentially affect federally endangered or threatened species and/or designated Critical Habitat, then official species lists may be necessary. However:
 - If other federal nexus (i.e., U.S. Army Corps permit or U.S. Forest Service encroachment permit), then that federal agency is responsible for Section 7 consultation and Caltrans would coordinate with that federal lead agency.
 - If no federal nexus, see ESA Section 10(a)(1)(B) for further guidance.

Group 3

1. If the project actions have no potential to affect³ a federally endangered or threatened species and/ or designated Critical Habitat, then USFWS and NMFS species lists are optional, but not required⁵. Document justification for a No Effect Finding.⁶

⁵ If additional information is necessary to make the effect determination, the biologist may obtain NMFS species list and an official or unofficial USFWS species list for the assessment and administrative record. Note that NMFS does not have an unofficial list. An official USFWS species list is needed for all “may effect” findings. An unofficial species list can be used for a No Effect finding or if seeking technical assistance from USFWS.

⁶ The Endangered Species Consultation Handbook (1998) states that “a no effect finding can only be concluded if it has been determined that the proposed action will not affect a listed species or designated critical habitat.” All ESA findings must be based on best available scientific and commercial information. ESA findings must be repeatable, meaning that another biologist would arrive at the same conclusion with the same data, and defensible, meaning there is a clear evidence-based argument for the finding. Ensure finding is repeatable and defensible through clear documentation of methods and findings. The following are example projects that could potentially have but are not predetermined to have No Effect findings: pedestrian, median concrete barrier (no veg), and guardrail upgrades; slab, fencing, fiber optic vaults, and existing signs and lights repair/replacement; pavement rehab/overlays; operational improvements (CCTV, VDS, loop ramps); maintenance facility security (cameras, fencing); and striping.

Group 4

1. If it is unknown or there is potential that project actions will affect³ federally endangered or threatened species and/or designated Critical Habitat, then:
 - To inform the assessment and surveys, obtain official USFWS and NMFS species lists
 - Assess habitat
 - Conduct field surveys, if warranted
 - Seek technical assistance/early coordination with USFWS and/or NMFS
 - Use best available scientific and commercial data to assess/analyze potential effects

Will project actions affect³ federally endangered or threatened species and/or designated Critical Habitat?

- a. If yes, project actions will affect federally endangered or threatened species and/or designated Critical Habitat, then official USFWS and NMFS species lists are required⁷. Prepare a Biological Assessment⁸.
- b. If no, project actions will not affect federally endangered or threatened species and/or designated Critical Habitat, then go to Group 3.

⁷ A new official species list is required if BA preparation has not begun within the 90 days of obtaining the list or BA has not been submitted to USFWS and/or NMFS within 180 days (CFR §402.12(e) and §402.12(i)).

⁸ Technically, if a project may affect but is not likely to adversely affect (MA,NLAA), a BA is not needed for informal consultation, and a letter of concurrence (LOC) of MA,NLAA is issued. However, Caltrans typically prepares a BA when seeking concurrence with any may affect findings in order to demonstrate best available science and commercial data were used to reach a conclusion. If a BA is being prepared, an official species list(s) needs to be included.