

NEBRASKA ADMINISTRATIVE CODE

Last Approved Date: October 9, 1998

Title 163 - Nebraska Game and Parks Commission

Chapter 4 Wildlife Regulations

012 Threatened and Endangered Species Consultation

The following regulations are prescribed by the Game and Parks Commission, State of Nebraska in accordance with Neb. Rev. Stat. §§ 37-301, 37-314, 37-701, 37-801 through 37-811 810, R.R.S. 1998, 37-314, R.R.S. 1999. For purposes of these regulations, unless context otherwise requires, the definitions found in Chapter 37, sections 202 through 247 of the Game Law, are used. These regulations are effective following enactment by the Commission, approval by the Attorney General and Governor, and when five days have elapsed since filing with the Secretary of State.

Rules related to the process of consultation between State agencies and departments and the Game and Parks Commission involving the effects of state actions on endangered and threatened species.

012.01 DEFINITIONS

012.01A Informal consultation - includes all contacts, correspondence, or discussions between the State agency or department and the Commission prior to formal consultation. This may involve, but is not limited to, the listed species (distribution, occurrence, habitat of listed species), the biological assessment, discussions on state actions or projects and their possible impacts on listed species.

012.01B Formal consultation - part of the consultation process which the State agency or department initiates after it is determined that its action may affect listed species or critical habitat. The formal consultation stage is initiated by a written request either from the State agency or department to the Commission or by written request from the Commission to the State agency or department, and results in a biological opinion written by the Commission.

012.01C Action - all activities, directly or indirectly causing modifications to land, water, or air, that are authorized, funded, or carried out, in whole or in part, by State agencies or departments that may affect listed species or their critical habitat.

012.01D Cumulative effects - direct and indirect effects of the State action under consideration together with the identifiable effects of actions that are interrelated or interdependent with the action. Indirect effects are those that are caused by the action and are later in time or farther in distance, but are still reasonably foreseeable. Interrelated actions are those that are part of a larger action. Interdependent actions are those that have no independent utility apart from the action.

012.01E Destruction or modification - a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for the survival or recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

012.01F Jeopardize the continued existence of - to engage in an action which reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of the survival or recovery of listed species within the State of Nebraska by reducing the reproduction, numbers, or distribution of a listed species or otherwise impacting the species.

012.01G Listed species - any species of wildlife which has been determined by the Commission to be endangered or threatened as defined in section 37-802 and under authority of section 37-806 of the Nongame and Endangered Species Conservation Act.

012.01H Proposed species - any species of wildlife that is proposed to be listed by the Commission under authority of section 37-806.

012.01I Reasonable and prudent alternatives by the Commission - refers to alternative actions that can be implemented in a manner consistent with the intended primary purpose of the action and which the Commission believes would avoid the likelihood of jeopardizing the continued existence of listed species and prevent the destruction or modification of critical habitat.

012.01J Critical habitat - any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species), the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion. Before designating any area as critical habitat, the Commission would (1) provide a review period for comments from State agencies and departments and (2) conduct a public hearing.

012.01K Proposed critical habitat - means habitat proposed to be designated for any listed or proposed species by the Commission under section 37-806.

012.01L Biological opinion - a written report prepared by the Commission concluding whether an action will jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat. Included would be reasonable and prudent alternatives, if any, to an action that would jeopardize the continued existence of listed species or result in the destruction or modification of its critical habitat.

012.01M Biological assessment - an investigation conducted by a State agency or department resulting in a written report that identifies listed species occurring in the area of proposed action and contains specific information describing a proposed project, its location and purpose, and data addressing possible impacts to listed species.

012.01N Incidental take - taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

012.02 THE CONSULTATION PROCESS

012.02A INFORMAL CONSULTATION - the process will normally begin with informal discussions and/or correspondence between the Commission and the State agency or department on questions involving listed species that arise with respect to an action. Each State agency or department should review its actions at the earliest possible time and determine whether any action may affect listed species or its critical habitat. The State agency or department should provide the Commission with information pertaining to the location of the proposed action, description of the action and its purpose and may request from the Commission information and advice on whether listed or proposed species may be present in the area affected by the proposed action. The Commission will respond within days of receipt of any written inquiry with a list of any such species that may be present and comments regarding possible affect of the proposed action.

012.02A1 If the State agency or department concludes that its action may affect a listed species or critical habitat, formal consultation should be initiated.

012.02A2 The State agency or department may agree to implement conservation conditions in order to avoid adverse impacts to the listed species. In such cases, if the State agency or department concludes that its action "May Affect, but is Not Likely to Adversely Affect" listed species, and if the Commission concurs, formal consultation shall not be initiated.

~~012.02A2~~ 012.02A3 Re-initiation or continuation of informal consultation can be requested by the State agency or department or by the Commission if:

1. The identified action is subsequently modified in a manner which was not previously considered;
2. New information reveals impacts of the identified action that may affect listed species or critical habitat in a manner not previously considered;
3. A new species is listed or critical habitat determined that is found to occur in the area affected by the identified action.

~~012.02A3~~ 012.02A4 The Commission believes that informal consultation is extremely important and feels that many potential problems and formal consultations can be prevented through early discussion on an informal basis. However, informal consultation is not a substitute for formal consultation.

012.02B BIOLOGICAL ASSESSMENT - the investigation and report should identify any listed species occurring in the area of proposed action and should describe the effects, including cumulative effects that the action may have on such species. The assessment should be designed to provide for the early discovery of impacts of proposed actions, to discover information needs and to develop additional information if needed.

012.02B1 To provide sufficient information for the Commission to develop a biological opinion, the assessment should include, but not be limited to: name of the project and applicant; location, including map; description of the proposed project and its purpose; data addressing possible direct or indirect impacts to listed species; important dates, i.e., estimated beginning and completion of project; and any other relevant information obtained from other studies on environmental impacts.

012.02B2 When conducting a biological assessment, the State agency or department should:

1. Determine if listed or proposed species are present or occur seasonally and whether suitable habitat exists within the area for either expanding the existing population or for potential reintroduction of the species. This may require an on-site inspection or survey of the area that could be affected, and/or a review and understanding of information concerning the listed species distribution, habitat needs, and biological requirements.
2. Review and analyze the effects of the action on the listed species, in terms of individuals and populations including consideration of the cumulative effects of the action on the listed species and their habitat. This may require the review of pertinent scientific literature and/or interviewing experts on the listed species at issue and others that possess knowledge relevant to evaluating effects of the action on the environment.
3. Analyze alternative actions that may provide conservation measures;
4. Conduct any studies or investigations necessary to fulfill the requirements of (1) through (3) above;
5. Review any other relevant information.

012.02B3 The Commission will provide assistance to the State agency or department in planning and conducting the biological assessment. This assistance will include providing biological data on the listed species and their habitat and furnishing information on the nature and scope of the work and the area to be studied, including recommendations on any studies or surveys that

may be necessary. However, the Commission is not obligated to fund or conduct any such studies or survey. The Commission will also assist the state agency or department with interpretation of biological data and in evaluating possible impacts of an action on listed species.

012.02B4 To avoid the necessity of conducting biological assessments for every agency action, assessments would be necessary only when an action, proposed within the range of a listed species, will involve a significant, physical alteration or modification of habitat required by a listed species. An assessment may also be conducted by the State agency or department if it would assist them in their section 37-807 responsibilities. The fact that a biological assessment will not be completed for all actions does not mean that listed species included in an action for which there is no biological assessment are without protection. State agencies and departments still have an obligation to review their actions to determine whether those actions may affect listed species or their critical habitat and to initiate formal consultation if they find that those actions may have an effect.

012.02B5 The Commission reserves the right to request that an agency conduct a biological assessment when insufficient information is available regarding an action and its potential impacts and to request any agency to enter into consultation.

012.02B6 The State agency or department in consultation with the Commission will determine when to initiate the biological assessment, the scope of the assessment, and the form or manner in which the assessment will be presented to the Commission. Once the biological assessment is initiated, it should be completed within 180 days, unless the agency and the Commission agree to a modified time period, and before the initiation of any State action which might have an irretrievable

or an irreversible adverse effect on endangered or threatened species or their critical habitat.

012.02B7 The completed biological assessment shall be forwarded to the Commission along with a summary of the results of the assessment. This summary should include a discussion of the study methods and materials used and any problems encountered.

012.02B8 The State agency or department may use the biological assessment in determining whether formal consultation is required.

1. If the biological assessment indicates that there are no listed species or critical habitat present or if listed species or critical habitat are present but will not be affected by the action then the State agency or department need not initiate formal consultation and the consultation process is terminated.
2. If the biological assessment indicates that listed species or critical habitat are present and may be affected by the action, then the State agency or department should initiate formal consultation.

012.02B9 The Commission may use the results of the biological assessment in determining whether to request the State agency or department to initiate formal consultation or in formulating a biological opinion.

012.02B10 For projects which require both a federal and state consultation, the Commission may use the biological assessment, prepared by the federal action agency, and the biological opinion, prepared by the U.S. Fish and Wildlife Service, to determine if formal consultation for the state action is necessary.

012.02C FORMAL CONSULTATION - If a State agency or department decides that its actions may affect listed species or critical habitat, the agency or department should initiate formal consultation. If a State agency or department decides that its actions will not affect listed species or critical habitat, formal consultation need not be initiated unless requested by the Commission.

012.02C1 Each State agency or department requesting formal consultation shall conduct the appropriate studies and provide the information necessary for an adequate review of the effects an action may have upon listed species or critical habitat. The Commission will provide relevant data and reports, and recommendations for additional studies or surveys. The Commission is not obligated to fund or conduct any such additional studies or surveys. The State agency or department may seek assistance from any source to obtain the information necessary for a review of the effects an action may have upon listed species or critical habitat. When the issuance of a permit or license or other form of state approval or authorization is the subject of the consultation, the Commission shall provide the applicant with the opportunity to submit information for consideration during the consultation.

012.02C2 A written request to initiate formal consultation will be submitted to the Commission by the State agency or department. Requests for formal consultation shall include: (a) a description of the action to be considered; (b) a description of the specific area that may be affected by the action; (c) a description of any listed species or critical habitat that may be affected by the action; (d) a description of the manner in which the action may affect any listed species or critical habitat and an assessment of any cumulative effects; (e) reports on the biological assessment or on other environmental studies; and (f) any other

relevant available information on the action, the affected listed species, or critical habitat. Any request for formal consultation may encompass, subject to the approval of the Commission, a number of similar individual actions within a given geographical area or administrative unit, or a segment of a comprehensive plan.

012.02C3 During the formal consultation, the Commission shall:

1. Review all relevant information provided by the State agency or department and information otherwise available. Such review may include an on-site inspection of the area affected by the action with representatives of the State agency or department or the applicant;
2. Evaluate the current status of the listed species or critical habitat;
3. Evaluate the impacts of the action and its cumulative effects on the listed species or critical habitat;
4. Formulate its opinion as to whether the action, taken together with its cumulative effects, will jeopardize the continued existence of listed species or result in the destruction or modification of critical habitat. In formulating its opinion, the Commission shall use the best scientific data currently available;
5. Discuss with the State agency or department and the applicant the availability of reasonable and prudent alternatives that would avoid violation of section ~~37-807~~ 37-806, and that the agency can take in implementing its action. The Commission will utilize the expertise of the State agency or department and the applicant in identifying these alternatives. If the Commission is unable to develop such alternatives, it will indicate that to

the best of its knowledge, there are no reasonable and prudent alternatives;

6. Consider the long term implication of resource utilization similar to that of the action on the survival and recovery of the listed species; and
7. Recommend programs that should be carried out by the State agency or department to conserve the listed species at issue.

012.02C4 Within 90 days after initiation of the formal consultation phase, the Commission shall provide the State agency or department with a written biological opinion. The biological opinion shall include: a summary of the information on which the opinion is based; a detailed discussion of the impacts of the action on listed species or critical habitat; the Commission's conclusion whether the action will jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat, and recommendations. Any biological opinion may include additional suggestions for modifications in the action which would enhance the conservation and protection of a listed species or critical habitat.

012.02C4a INCIDENTAL TAKE STATEMENT - During formal consultation, the Commission may issue an incidental take statement as part of the biological opinion, if the action may result in take of the listed species. An incidental take statement provides exemption from the taking prohibitions of Section 37-806 only when the State agency, department and/or applicant demonstrates clear compliance with terms and conditions of the incidental take statement.

012.02C4a(1) In order for incidental take to be authorized and lawful, the taking must: (a) not jeopardize the continued existence of listed species in Nebraska or destroy or

adversely modify designated critical habitat; (b) result from an otherwise lawful activity; (c) be incidental to the purpose of the action; and (d) be minimized and fully mitigated.

012.02C4a(2) In the incidental take statement, the Commission shall specify: (a) the amount or extent of take anticipated; (b) reasonable and prudent measures, including terms and conditions of implementation, to minimize and mitigate take; and (c) reporting and monitoring requirements that assure effectiveness of and compliance with terms and conditions as described.

012.02C4a(3) When intentional non-lethal take is described as part of the proposal in order to minimize anticipated incidental take, the biological opinion and incidental take statement shall serve as the authority for that take.

012.02C5 The biological opinion shall conclude one of the following:

1. The action will promote the conservation of listed species or critical habitat. Additional formal consultation shall be unnecessary and the consultation process shall terminate unless mutually agreed to otherwise. The Commission, to the extent feasible, may assist in carrying out such conservation programs if requested by the State agency or department.
2. The action will not jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat. Further consultation shall be unnecessary unless mutually agreed upon otherwise. Formal consultation is terminated upon the issuance of the biological opinion.

3. The action will jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat. The biological opinion shall include reasonable and prudent alternatives, if any, and further consultation shall be encouraged.
4. The Commission has determined that insufficient information exists concerning the listed species or critical habitat and/or the action. In this case, the Commission shall request an extension of the formal consultation. It is recommended that a State agency or department make no irreversible or irretrievable commitments of resources that would foreclose implementation of any reasonable and prudent alternative before additional and appropriate information is collected and prior to issuance of a biological opinion by the Commission.

12.02C5a If formal consultation is extended by mutual agreement, because of insufficient information, the State agency or department, with assistance as feasible from the Commission and other sources of expertise, shall then obtain additional information and conduct, as appropriate, surveys or studies to determine how the action may affect listed species or critical habitat. Upon receipt of the additional information, the Commission shall issue a biological opinion at the end of the mutually agreed period.

12.02C5b If no extension is mutually agreed to, the Commission shall reach a conclusion on whether the agency action will jeopardize the continued existence of listed species or result in the destruction or modification of critical habitat.

012.02C6 The Commission may request a State agency or department to enter into formal consultation if he identifies any action of that agency which has not received prior formal consultation and that may affect listed species or critical habitat. When such a request is made, the Commission shall forward to the State agency or department a written explanation of the basis for the request.

012.02C7 When a particular action involves more than one State agency or department, these agencies may, upon notification of the Commission, fulfill their biological assessment, conference, and formal and informal consultation responsibilities through a single lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action.

012.02C8 The consultation process may continue after the issuance of a biological opinion, if necessary, to discuss alternatives to the action. The consultation process will continue when necessary to allow an opportunity to consider any reasonable and prudent alternatives and will terminate upon the Commission's receipt of a written notice from the State agency or department stating their determination to proceed with, modify, or forego the action. Formal consultation may be extended for any reason upon mutual agreement of the Commission and the State agency or department.

012.02C9 Following the issuance of a biological opinion, the State agency or department shall determine whether to proceed with the action in light of its section 37-807 obligations and the Commission's biological opinion. When reasonable and prudent alternatives are included in the opinion, the State agency or department shall notify the

Commission in writing stating their determination to proceed with, modify, or forego the action, and which reasonable and prudent alternatives they are adopting.

012.02C10 Re-initiation of formal consultation may be requested by the State agency or department or by the Commission if:

1. New information reveals impacts of the identified action that may affect listed species or critical habitat in a manner not previously considered;
2. The identified action is subsequently modified in a manner which was not considered in the biological opinion; or
3. A new species is listed or critical habitat determined that may be affected by the identified action.

012.02D PROPOSED SPECIES AND PROPOSED CRITICAL HABITAT - in the event that the Commission may officially propose any species as an addition to the list of endangered and threatened species, the Commission shall inform the State agencies and departments with a written notice. Should the State agency or department, or the Commission, determine that such a species occurs in the action area and that the action by the State agency or department may affect such a species or the proposed critical habitat of any such species, it is highly recommended that the State agency or department confer with the Commission. Although conferring is not required under the Act, it might identify and resolve potential conflicts between an action and the conservation of proposed species and proposed critical habitat at an early point in the decision-making process. Potential impacts of the action on the proposed species or proposed critical habitat would be discussed through informal discussion between the State agency or department and the Commission. By consolidating conferences on proposed species/critical habitat with consultations conducted on listed species/critical habitat, additional procedural steps can be avoided so as to reduce the potential for delay. The

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Commission does not intend that any of the formal requirements for consultation be imposed on State agencies or departments with respect to proposed species or proposed critical habitats.

012.03 The Game and Parks Commission hereby delegates authority to the Director to consult with other State agencies and departments, to prepare and provide biological opinions on the effects of State actions on endangered and threatened species and their critical habitat, and to otherwise assist them in complying with the Nongame and Endangered Species Conservation Act. The Director may delegate such authority to appropriate staff personnel. Consultation and assistance shall be conducted and provided to other State agencies or departments according to the framework and procedures hereby established.