

APPENDIX IV

Endangered Species Act Guidance and Eligibility Criteria

A. Background

In order to meet its obligations under the Clean Water Act and the Endangered Species Act (ESA), and to promote the goals of those Acts, the Environmental Protection Agency (EPA) is seeking to ensure the activities regulated by the NCCW General Permit do not adversely affect endangered and threatened species or critical habitat. Facilities applying for permit coverage must assess the impacts of their dewatering discharges and discharge-related activities on federally listed endangered and threatened species (“listed species”) and designated critical habitat (“critical habitat”) to ensure that those goals are met. For the purposes of this appendix, “discharge related activities” include: activities which cause, contribute to, or result in point source dewatering discharges; and measures including the siting, construction and operational procedures to control, reduce or prevent water pollution.

Prior to obtaining general permit coverage, applicants must meet the ESA eligibility provisions of this permit by following the steps in this appendix. EPA strongly encourages applicants to begin this process at the earliest possible stage to ensure the notification requirements for general permit coverage are complete upon Notice of Intent (NOI) submission.

Facilities seeking coverage also have an independent ESA obligation to ensure that their activities do not result in any prohibited “take” of listed species¹. The term “take” is used in the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. “Harm” is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. “Harass” is defined as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

Many of the measures required in the Dewatering General Permit and this appendix to protect species may also assist in ensuring that the applicant’s activities do not result in a prohibited take of species in violation of section 9 of the ESA. If the applicant has plans or activities in an area where endangered and threatened species are located, they may wish to ensure that they are protected from potential take liability under ESA section 9 by

¹ Section 9 of the ESA prohibits any person from “taking” a listed species unless: (1) the taking is authorized through an “incidental take statement” as part of completion of formal consultation according to ESA section 7; (2) where an incidental take permit is obtained under ESA section 10 (which requires the development of a habitat conversion plan; or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

obtaining an ESA section 10 permit or by requesting formal consultation under ESA section 7. Applicants that are unsure whether to pursue a section 10 permit or a section 7 consultation for takings protection should confer with the appropriate United States Fish and Wildlife Service (USFWS)² office or the National Marine Fisheries Service (NMFS), jointly referred to as the Services.

The following are species of concern in Massachusetts and New Hampshire related to the Endangered Species Act:

Massachusetts (13)

Dwarf wedgemussel (*Alasmidonta heterodon*)
Northeastern bulrush (*Scirpus ancistrochaetus*)
Sandplain gerardia (*Agalinis acuta*)
Piping Plover (*Charadrius melodus*)
Roseate Tern (*Sterna dougallii*)
Northern Red-bellied cooter (*Pseudemys rubriventris*)
Bog Turtle (*Glyptemys mühlenbergii*)
Small whorled Pogonia (*Isotria medeoloides*)
Puritan tiger beetle (*Cicindela puritana*)
American burying beetle (*Nicrophorus americanus*)
Northeastern beach tiger beetle (*Cicindela dorsalis*)
Atlantic Sturgeon (*Acipenser oxyrinchus*)*
Shortnose Sturgeon (*Acipenser brevirostrum*)*

New Hampshire (10)

Dwarf wedgemussel (*Alasmidonta heterodon*)
Northeastern bulrush (*Scirpus ancistrochaetus*)
Jesup's milk-vetch (*Astragalus robbinsii* var. *jesupii*)
Piping Plover (*Charadrius melodus*)
Roseate Tern (*Sterna dougallii*)
Kamer Blue Butterfly (*Lycaeides melissa samuelis*)
Canada Lynx (*Lynx Canadensis*)
Small whorled Pogonia (*Isotria medeoloides*)
Atlantic Sturgeon (*Acipenser oxyrinchus*)*
Shortnose Sturgeon (*Acipenser brevirostrum*)*

*These species are listed under the jurisdiction of NMFS, all others are listed under the jurisdiction of USFWS.

Any facility seeking coverage under the Dewatering General Permit must consult with the Services. EPA may designate the applicants as non-Federal representatives for the general permit for the purpose of carrying out formal or informal consultation with the Services. By terms of this permit, EPA has automatically designated operators as non-Federal representatives for the purpose of conducting formal or informal consultations. (See 50 CFR §402.08 and §402.13).

When listed species are present, permit coverage will only be available if EPA determines, or the applicant determines and EPA concurs, that the discharge and related activities will have “no affect” on the listed species or critical habitat, or the applicant determines that the discharge and related activities are “not likely to adversely affect” listed species or critical habitat and formal or informal consultation with the Services has been concluded and results in written concurrence by the Services that the dewatering discharge and related activities are “not likely to adversely affect” an endangered or threatened species or critical habitat.

² Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

B. ESA Eligibility Criteria for the U.S. Fish and Wildlife Service

Before submitting a notice of intent (NOI) for coverage under this permit, applicants must determine whether they meet the ESA eligibility criteria by following the steps in Sections B and C of this Appendix. Applicants that cannot meet the eligibility criteria in Sections B and C must apply for an individual permit.

The USFWS ESA eligibility requirements of this permit relating to the Dwarf wedgemussel, Northeastern bulrush, Jesup's milk-vetch, Sandplain gerardia, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Small whorled Pogonia, Roseate Tern, Canada Lynx, Puritan tiger beetle, Northeastern beach tiger beetle, American burying beetle, and Karner Blue Butterfly may be satisfied by documenting that one of the following criteria has been met:

USFWS Criterion A: No endangered or threatened species or critical habitat are in proximity to the discharges or related activities.

USFWS Criterion B: Formal or informal consultation with USFWS under section 7 of the ESA resulted in either a no jeopardy opinion (formal consultation) or a written concurrence by USFWS on a finding that the discharges and related activities are "not likely to adversely affect" listed species or critical habitat (informal consultation).

USFWS Criterion C: Using the best scientific and commercial data available, the effect of the discharges and related activities on listed species and critical habitat have been evaluated. Based on those evaluations, a determination is made by EPA, or by the applicant and affirmed by EPA, that the discharges and related activities will have "no affect" on any federally threatened or endangered listed species or designated critical habitat under the jurisdiction of the USFWS.

Steps to Determine if the USFWS ESA Eligibility Criteria Can Be Met

To determine eligibility, you must assess the potential effects of your discharges and related activities on listed species or critical habitat, PRIOR to completing and submitting a Notice of Intent (NOI). You must follow the steps outlined below and document the results of your eligibility determination.

The USFWS Information, Planning, and Conservation (IPaC) online system can be used to develop a preliminary determination of federally listed species or designated critical habitats within the action area of your discharge and related activities. Further information on IPaC is available on the Fish and Wildlife Services' website at <http://ecos.fws.gov/ipac/>. Instructions for using IPaC are available in an attachment to this Appendix (end of document).

Step 1 – Determine if you meet USFWS Criterion A:

You can certify eligibility, according to USFWS Criterion A, for coverage by this permit if, upon completing the IPaC online system process, you printed and saved the preliminary determination which indicated that federally listed species or designated critical habitats are not present in the action area.

If you have met USFWS Criterion A skip to Step # 4.

If you have not met USFWS Criterion A, go to Step # 2.

Step 2 – Determine if you meet USFWS Criteria B

You can certify eligibility according to USFWS Criteria B for coverage by this permit if you answer “Yes” to **all** of the following questions:

- 1) Does your action area contain one or more of the following species: Dwarf wedgemussel, Northeastern bulrush, Jesup’s milk-vetch, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Roseate Tern, Puritan tiger beetle, and Northeastern beach tiger beetle? (IPaC system may be used to answer this question)
- 2) Did your assessment of the discharge and related activities indicate that they “may affect” or are “not likely to adversely affect” listed species or critical habitat? ³
- 3) Did you contact the USFWS and did formal or informal consultation result in either a “no jeopardy” opinion by the USFWS (for formal consultation) or concurrence by the USFWS that your discharge and related activities would be “not likely to adversely affect” listed species or critical habitat (for informal consultation)? ³
- 4) Do you agree to implement all measures upon which the consultation was conditioned?

Use the guidance below Step 3 to understand effects determination and to answer these questions.

If you answered “Yes” to all four questions above, you have met eligibility USFWS Criteria B. Skip to Step 4.

If you answered “No” to any of the four questions above, go to Step 3.

Step 3 – Determine if you meet USFWS Criterion C

USFWS Criterion C: You can certify eligibility according to USFWS Criterion C for coverage by this permit if you answer “Yes” to **either** of the following questions:

- 1) Does your action area contain one or more of the following species: Canada Lynx, Sandplain gerardia, Small whorled Pogonia, Karner Blue Butterfly, and/or

³ See USFWS Effects Determination Guidance.

American burying beetle and **does not contain any of the following species:** Dwarf wedgemussel, Northeastern bulrush, Jesup's milk-vetch, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Roseate Tern, Puritan tiger beetle, and Northeastern beach tiger beetle? ⁴

- 2) Did the assessment of your discharge and related activities and indicate that there would be "no affect" on listed species or critical habitat ⁵ and EPA provided concurrence with your determination?

Use the guidance below to understand effects determination and to answer these questions.

*If you answered "Yes" to **either** question above, you have met eligibility USFWS Criterion C. Go to Step 4.*

If you answered "No" to both of the questions above, you are not eligible for coverage by this permit. You must submit an application for an individual permit for your NCCW discharges. (See 40 CFR 122.21).

Step 4 - Document results of the Eligibility Determination

Once the USFWS ESA eligibility requirements have been met, you shall include documentation of USFWS ESA eligibility in your NOI. Documentation for the various eligibility criteria are as follows:

- USFWS Criterion A: A copy of the IPaC generated preliminary determination letter indicating that no listed species or critical habitat is present within your action area. You shall also include a statement on how you determined that no listed species or critical habitat are in proximity to your discharges.
- USFWS Criterion B: A dated copy of the USFWS letter of concurrence on a finding of "no jeopardy" (for formal consultation) or "not likely to adversely affect" (for informal consultation) regarding the ESA section 7 consultation.
- USFWS Criterion C: A copy of the IPaC generated preliminary determination letter indicating that the only listed species in your action area are the Canada Lynx, Sandplain gerardia, Small whorled Pogonia, Karner Blue Butterfly and/or American burying beetle. OR a dated copy of the EPA concurrence with the operator's determination that the discharges and related activities will have "no affect" on listed species or critical habitat.

USFWS Effects Determination Guidance:

⁴ EPA has considered the effects of dewatering discharges and related activities on the Canada Lynx, Sandplain gerardia, Small whorled Pogonia, Karner Blue Butterfly and American burying beetle and determined that discharges in compliance with the Dewatering general permit will have no effect on these threatened or endangered species.

⁵ See USFWS Effects Determination Guidance.

If you are unable to certify eligibility under USFWS Criterion A, you must assess whether your discharges or related activities “may affect”, will have “no affect” or are “not likely to adversely affect” listed species or critical habitat. “Discharge-related activities” include: activities which cause, contribute to, or result in point source dewatering discharges; and measures including the siting, construction and operational procedures to control, reduce or prevent water pollution. Please be aware that no protection from incidental take liability is provided under this criterion.

The scope of effects to consider will vary with each facility. If you are having difficulty in determining whether your discharge is likely to cause adverse effects to a listed species or critical habitat, you should contact the USFWS for assistance. In order to complete the determination of effects it may be necessary to follow the formal or informal consultation procedures in section 7 of the ESA.

Upon completion of your assessment, document the results of your effects determination. If your results indicate that discharges and related activities will have “no affect” on threatened or endangered species or critical habitat and EPA concurs with your determination, you are eligible under USFWS Criterion C of this Appendix. Your determination may be based on measures that you implement to avoid, eliminate, or minimized adverse effects.

If the determination is “May affect” or “not likely to adversely affect” you must contact the USFWS to discuss your findings and measures you could implement to avoid, eliminate, or minimize adverse effects. If you and the USFWS reach agreement on measures to avoid adverse effects, you are eligible under USFWS Criterion B. Any terms and/or conditions to protect listed species and critical habitat that you relied on in order to complete an adverse effects determination, must be attached to your NOI.

In order to be eligible for this permit, the Dewatering discharges must be uncontaminated as described in the permit. The only effects from dewatering discharges and related activities which could pose an adverse effect include:

- *Toxicity:* In some cases, chlorine from potable water sources could be a part of the dewatering discharge. The permit requires discharges containing chlorine to be at the water quality standard for the receiving water, however chlorine may have toxic effects on listed species.

If endangered species issues cannot be resolved: If you cannot reach agreement with the USFWS on measures to avoid or eliminate adverse effects, you are not eligible for coverage under this permit. You must seek coverage under an individual permit.

C. The ESA Eligibility Criteria for the National Marine Fishery Service

Listed species under the jurisdiction of NMFS are the Atlantic Sturgeon and the Shortnose Sturgeon. EPA has reviewed available data for facilities previously covered under the dewatering general permit and determined that the terms of the permit

adequately prevent adverse effects or the take of listed species and adverse effects on critical habitat due to limited duration of the discharge, the limited volume of the discharge and minimal pollutant loading. For facilities seeking coverage under the dewatering general permit, EPA will review the information provided in the NOI and determine whether there are likely to be adverse effects. Information that must be included in the NOI related to endangered species under the jurisdiction of NMFS:

- Whether the discharge is in a marine water
- Whether there has been any previous formal or informal consultation with NMFS, and the result of the consultation.

EPA's biological assessment of listed species and critical habitat in consultation with NMFS is available on the dewatering general permit website at:

<http://www.epa.gov/region1/npdes/dewatering.html>

D. Submittal of Notice of Intent

Once the ESA eligibility requirements of Part B and C of this Appendix have been met, and you have determined NHPA eligibility (see Appendix III), you may submit the Notice of Intent. Signature and submittal of the NOI constitutes your certification, under penalty of law, of eligibility for permit coverage under 40 CFR 122.21.

E. Duty to Implement Terms and Conditions upon which Eligibility was Determined

You must comply with any terms and conditions imposed under the ESA eligibility requirements to ensure that your dewatering discharges and related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. If the ESA eligibility requirements of this permit cannot be met, then you may not receive coverage under this permit and must apply for an individual permit.

F. Services Information

United States Fish and Wildlife Service Office

National websites for Endangered Species Information:

Endangered Species home page: <http://endangered.fws.gov>

ESA Section 7 Consultations: <http://endangered.fws.gov/consultation/index.html>

Information, Planning, and Conservation System (IPAC):

<http://ecos.fws.gov/ipac/>

U.S. FWS – Region 5

Supervisor

New England Field Office

U.S. Fish and Wildlife Services

70 Commercial Street, Suite 300

Concord, NH 03301

National Marine Fisheries Service Office

Website: http://www.nmfs.noaa.gov/pr/species/esa_species.htm

National Marine Fisheries Service
Northeast Region, Protected Resource Division
Attn: Endangered Species Coordinator
One Blackburn Drive
Gloucester, MA 01930

Natural Heritage Network

The Natural Heritage Network comprises 75 independent heritage program organizations located in all 50 states, 10 Canadian provinces, and 12 countries and territories located throughout Latin America and the Caribbean. These programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. Developers, businesses, and public agencies use natural heritage information to comply with environmental laws and to improve the environmental sensitivity of economic development projects. Local governments use the information to aid in land use planning.

The Natural Heritage Network is overseen by NatureServe, the Network's parent organization, and is accessible online at: http://www.natureserve.org/nhp/us_programs.htm, which provides websites and other access to a large number of specific biodiversity centers.

New Hampshire Natural Heritage Inventory
Department of Resources & Economic Development
172 Pembroke Street, P.O. Box 30370
Concord, NH 03302
603.271.3623

APPENDIX IV- ATTACHMENT 1
U.S. Fish and Wildlife IPaC system instructions

Use the following protocol to determine if any federally listed species or designated critical habitats under USFWS jurisdiction exist in your action area:

Enter your project specific information into the “Initial Project Scoping” feature of the Information, Planning, and Conservation (IPaC) system mapping tool, which can be found at:

<http://ecos.fws.gov/ipac/>

- a. Indicate the action area⁶ for the facility by either:
 - a. Drawing the boundary on the map.
 - b. Uploading a shapefile.
 - c. Selecting the “State/county list” button and choosing your facility location.
Select “Continue”.

- b. Select your project type from the dropdown menu on the Activities step. If you do not have a specific activity of concern, select “**Other**”. Select “Continue” to generate a preliminary species list.

- c. On the “Trust Resources List” step, you will be provided a list of natural resources of concern, which will include an Endangered Species Act Species list. On this page, select the “Request an Official Species List” and follow the directions indicated. You will be provided with a preliminary species list in pdf format for your facility. Retain a copy of this letter for your records.

⁶ The action area is defined by regulation as all areas to be affected directly or indirectly by the action and not merely the immediate area involved in the action (50 CFR §402.02). This analysis is not limited to the "footprint" of the action nor is it limited by the Federal agency's authority. Rather, it is a biological determination of the reach of the proposed action on listed species. Subsequent analyses of the environmental baseline, effects of the action, and levels of incidental take are based upon the action area.

The documentation used by a Federal action agency to initiate consultation should contain a description of the action area as defined in the Services' regulations and explained in the Services' consultation handbook. If the Services determine that the action area as defined by the action agency is incorrect, the Services should discuss their rationale with the agency or applicant, as appropriate. Reaching agreement on the description of the action area is desirable but ultimately the Services can only consult when an action area is defined properly under the regulations.

For dewatering discharges or discharge related activities, the action area should encompass the following:

- The immediate vicinity of, or nearby, the point of discharge into receiving waters.
- The path or immediate area through which or over which the discharge flows to the receiving water, including areas in the receiving water downstream from the point of discharge.

The action area will vary with the size and location of the outfall pipe, the nature and quantity of the discharges, and the type of receiving waters, among other factors.