

ATTACHMENT D

ENDANGERED SPECIES ACT REQUIREMENTS

I. 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 this General Permit do not adversely affect endangered and threatened species and critical habitat. Applicants applying for permit coverage must assess the impacts of their 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. Prior to obtaining General Permit coverage, applicants must meet the ESA eligibility provisions of this Permit. EPA strongly recommends that applicants follow the guidance in this Attachment at the earliest possible stage to ensure the notification requirements for General Permit coverage are complete upon NOI submission. A facility that cannot meet any of the ESA eligibility criteria must apply for an individual permit.

Applicants also have an independent ESA obligation to ensure that their activities do not result in any prohibited “takes” of listed species¹. Many of the measures to protect species required in this General Permit and these instructions may also assist in ensuring that the facilities seeking coverage activities do not result in a prohibited taking of species in violation of Section 9 of the ESA. If the applicant has plans or activities in areas where endangered and threatened species are located, they may wish to ensure that they are protected from potential takings liability under ESA Section 9 by obtaining an ESA Section 10 permit (Incidental Take Permit) or by requesting formal consultation under ESA Section 7. Facilities seeking coverage that are unsure whether to pursue a Section 10 Incidental Take Permit or a Section 7 consultation for takings protection, should confer with the appropriate U.S. Fish and Wildlife Service (USFWS)² office or the National Marine Fisheries Service (NMFS), (collectively, “the Services”).

There are four species of concern, found in the areas listed below, that should be noted by owners and operators of facilities seeking coverage under the General Permit. These species of concern include the **shortnose sturgeon**, the **dwarf wedge mussel**, the **bog turtle**, and the **northern redbellied cooter**. The **shortnose sturgeon** is listed under the

¹ Section 9 of the ESA prohibits any person from “taking” a listed species (e.g., harassing or harming it) unless: (1) the taking is authorized through a “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 conservation plan); or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

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

jurisdiction of the National Marine Fisheries Service and the **dwarf wedgemussel**, the **bog turtle**, and the **northern redbelly cooter** are listed under the jurisdiction of the U.S. Fish and Wildlife Service.

The federally-listed endangered **dwarf wedgemussel** (*Alasmidonta heterodon*) is found in the following areas in Massachusetts and New Hampshire:

- Connecticut River from Northumberland to Dalton, NH (Coos County).
- Connecticut River from Haverhill to Lyme, NH (Grafton County)
- Connecticut River from Lebanon to North Walpole, NH (Grafton and Sullivan Counties).
- Ashuelot River from the Surry Mountain Flood Control Project in Surry to Swanzey, NH (Cheshire County).
- South Branch of the Ashuelot River in East Swanzey, NH (Cheshire County).
- Mill River from Whately to Hatfield, MA (Hampshire County).
- Fort River in Amherst, MA (Hampshire County).
- Mill River south of State Route 10 in Northampton, MA (Hampshire County).

The federally-listed endangered **shortnose sturgeon** (*Acipenser brevirostrum*) is found in the following areas in Massachusetts:

- Merrimack River from the Essex Dam in Lawrence, MA to the Merrimack River's mouth (Essex County).
- Connecticut River from Turners Falls, MAs (Franklin, Hampshire, and Hampden Counties) to the Connecticut River's mouth, Connecticut (Hartford, Middlesex, and New London Counties).

The federally-listed threatened **bog turtle** (*Clemmys muhlenbergii*), is found in the following areas in Massachusetts:

- wetlands and waters in the Towns of Egremont and Sheffield (Berkshire County), MA.

The federally-listed endangered **northern redbellied cooter** (*Pseudemys rubriventris*) is found in the following areas in Massachusetts:

- bodies of water occurring within the following boundaries: in the Towns of Kingston, Plymouth, Carver, Middleborough, Wareham, Lakeville, Bridgewater and Rochester (Plymouth County), MA.
- bodies of water in the Towns of Bourne and Sandwich (Barnstable County), MA.
- bodies of water in the Town of Raynham (Bristol County), MA.

Maps are available at:

http://www.fws.gov/northeast/newenglandfieldoffice/EndangeredSpecConsultation_Project_Review.htm

Applicants discharging to areas listed above must consult with the Service(s) and certify eligibility with Criterion F to obtain authorization to discharge under the POTW GP. By terms of this General Permit, EPA has automatically designated operators as non-Federal representatives for the purpose of conducting informal consultations with NMFS and USFWS (See 50 CFR §402.08 and §402.13).

II. The ESA Eligibility Criteria

Facility owners/operators seeking coverage under this General Permit must demonstrate that the discharge for which permit coverage is being sought meets one or more of the following criteria:

- Criterion A:** No federally-listed threatened or endangered species or their designated critical habitat are likely to occur in the vicinity of the discharge.
- Criterion B:** In the course of a separate federal action involving the facility, formal or informal consultation with the USFWS and/or NMFS under Section 7 of the ESA has been concluded. The consultation must have addressed the effects of the discharges and discharge-related activities on federally-listed threatened or endangered species and their critical habitat, and must have resulted in either (1) a biological opinion finding no jeopardy to federally-listed species or destructive/adverse modification of federally-designated critical habitat; or (2) a written concurrence from the Service(s) with a finding that the discharges and discharge-related activities are not likely to adversely affect federally-listed species or federally-designated critical habitat.
- Criterion C:** The activities are authorized under Section 10 of the ESA (Incidental Take) and that authorization addresses the effects of the discharges and discharge-related activities on federally-listed threatened or endangered species and federally-designated critical habitat. (Facilities must follow USFWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for USFWS and §222.22 for NMFS). Application instructions for Section 10 permits can be obtained by accessing the appropriate websites (www.fws.gov and www.nmfs.noaa.gov) or by contacting the appropriate regional office.)
- Criterion D:** The discharge does not occur in an area listed in Section I of this Attachment, but does occur in an area in which federally-listed threatened or endangered species or their designated critical habitat are likely to occur. Using the best scientific and commercial data available, the effect of the discharge and discharge-related activities on listed species and critical habitat have been evaluated. Based on those evaluations, the applicant is able to determine, with concurrence from the appropriate Service(s), that the discharge is “not likely to affect”

any federally threatened or endangered listed species or designated critical habitat. Any conditions or prerequisites the Service(s) deem necessary to achieve the “not likely to adversely effect” determination become eligibility conditions for coverage by the General Permit.

Criterion E: The discharges and discharge-related activities have already been addressed in another operator’s valid certification of eligibility, which includes the facility’s activities covered by the POTW GP. To certify eligibility under this criterion there must be no lapse of coverage in the other operator’s certification. By certifying eligibility under this criterion, you agree to comply with any measures or controls upon which the other operator's certification was based. You must comply with any applicable terms, conditions, or other requirements developed in the process of meeting the eligibility requirements of the criteria in this Section to remain eligible for coverage under this permit.

Criterion F: The discharge occurs in an area listed above in Section I and, using the best scientific and commercial data available, the effect of the discharge and discharge-related activities on the species of concern has been evaluated. Based on the evaluations, the applicant is able to determine, with concurrence from the appropriate Service(s), that the discharge is “not likely to affect” the species of concern or area in which the species is found. Any conditions or prerequisites the Service(s) deem necessary to achieve the “not likely to adversely effect” determination become eligibility conditions for coverage by the General Permit.

III. The Steps to Determine if the ESA Eligibility Criteria Can Be Met

To determine eligibility, you must determine whether endangered or threatened species or critical habitat are in proximity to your facility or the points where its discharges reach the receiving waters 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.

Step 1. Determine if federally-listed threatened or endangered species or federally-designated critical habitat are present

Use Section I of this Attachment, other related attachments, and the provisions below to determine whether federally-listed species are likely to occur in any areas affected directly or indirectly by the discharges.

Criterion A. If after reviewing all pertinent information you can answer “No” to the following questions, then you are eligible for coverage under this permit under Criterion A.

- Are there any Endangered Species and/or Critical Habitat Areas in your project area?
- Are there any Endangered Species and/or Critical Habitat Areas in proximity to your facility or discharge locations?

Provisions for Determining Eligibility for Criterion A

Check for Listed Endangered Species in Your Project Area. Look at the latest state/county species list (**Attachment E**) and the areas listed in Section I of this Attachment to see if any listed species are found in your project area. If you are located in proximity to the border of a county or your site or facility is located in one county and your discharge points are located in another, you must look under both counties. Since species are listed and delisted periodically, you will need to refer to the most current list at the time you are conducting your endangered species assessment, which is available at <http://cfpub.epa.gov/NPDES/stormwater/esa.cfm>.

Check for Critical Habitat in your project area. Only Plymouth County has federally-designated Critical Habitat in Massachusetts. Exact locations of such habitats are provided in the endangered species regulations at 50 CFR Part 17 and Part 226. To determine if discharge locations are within designated critical habitat, you should either:

- Review the regulations (50 CFR Parts 17 and 226) that specify critical habitat. These regulations can be found in many larger libraries or via the Government Printing Office website, www.access.gpo.gov ; or
- Contact the Natural Heritage Program for your state. Heritage programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. They frequently have the most current information on listed species and critical habitat. Contact information for the Heritage program is provided in Part VII of this Attachment.

Check for Proximity to Your Discharge Locations. You must determine whether listed species or critical habitat are in proximity to your discharge(s). Listed species and critical habitat, including those in adjacent counties, are in proximity when they are:

- Located in the path or immediate area through which or over which the wastewater discharged from the facility flows to the receiving water. This includes areas in the receiving water downstream from the point of discharge.
- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.
- Located in the area of a facility where construction activities are planned.

The area in proximity to be searched/surveyed for listed species will vary with the size and location of the site, the nature and quantity of the discharges, and the type of receiving waters. You should use the methods which allow you to determine, to the

best of your knowledge, whether listed species, including those in adjacent counties, are in proximity to your particular site. These methods may include:

- Conducting visual inspections. This method may be particularly suitable for facilities that are smaller in size or facilities located in non-natural settings such as highly urbanized areas where there is little or no natural habitat. For other facilities, a visual survey may not be sufficient to determine whether listed species are in proximity.
- Contacting the nearest State Wildlife Agency or appropriate USFWS or NMFS office. Many endangered and threatened species are found in well-defined areas or habitats. Such information is frequently known to state or federal wildlife agencies.
- Contacting local/regional conservation groups such as natural heritage programs (see Section “VII” below). These groups inventory species and their locations and maintain lists of sightings and habitats.
- Conducting a formal biological survey. Some facilities may choose to conduct biological surveys as the most effective way to assess whether listed species are located in proximity and whether there are likely adverse effects.

If you answered “No” to the questions above, you have met ESA eligibility Criterion A. Download the letter found on the FWS website referenced above, maintain the letter as part of the your site records, and skip to Step 4.

If you answered “Yes” to either of the questions above, go to Step 2.

Step 2. Determine if the discharge is covered by a previous Section 7 consultation, a Section 10 permit, or a certification of eligibility

Determine if the discharge is eligible under Criteria B, C, or E because of a previously completed ESA Section 7 consultation, a previously-issued ESA Section 10 permit, or because the activities were already addressed in another discharger’s certification of eligibility as follows:

Criterion B. You are eligible for coverage by this permit under Criterion B if you can answer “Yes” to all of the following questions:

- Has consultation under ESA Section 7 already been completed for discharges from your facility³?

³ A formal or informal ESA Section 7 consultation on this or another federal action (e.g., new source review under NEPA, application for a dredge and fill permit under CWA Sec. 404, application for an individual NPDES permit, etc.) addressed the effects of your facility’s discharges and discharge-related activities on listed species and critical habitat. (See 50 CFR §402.13)

- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat and address your discharge and related activities?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?
- Did the ESA Section 7 consultation result in either a “no jeopardy” opinion by the Service(s) (for formal consultations) or a concurrence by the Service(s) that your activities are “not likely to adversely affect” listed species or critical habitat?
- Do you agree to implement all measures, if any, upon which the consultation was conditioned?

If you answered “Yes” to all five questions above, you have met ESA eligibility Criterion B. Skip to Step 4.

If you answered “No” to any of the five questions above, check to see if you can meet Criteria C or E, or go to Step 3.

Criterion C. You are eligible for coverage under this permit under Criterion C if you can answer “Yes” to all of the following questions:

- Has an ESA Section 10 permit already been issued for discharges from your facility⁴?
- Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your discharge and discharge-related activities at your site?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?

If you answered “Yes” to the three questions above, you have met ESA eligibility Criterion C. Skip to Step 4.

If you answered “No” to any of the three questions above, check to see if you can meet Criterion E, or go to Step 3.

⁴ You have a permit under Section 10 of the ESA and that authorization addresses the effects of your discharges and related activities on listed species and critical habitat. You must follow FWS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1)).

Criterion E. You are eligible for coverage under this permit under Criterion E if you can answer “Yes” to all of the following questions:

- Did another site or facility operator previously certify ESA eligibility for your site or facility⁵?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your discharge and related activities?
- Has there been no substantial change, since that previous consultation, in:
 - (1) the nature and amount of your discharge and discharge-related activities,
 - (2) the characteristics of the receiving water, and
 - (3) the status of listed species and their critical habitat?
- Do you agree to implement all measures, if any, upon which the other operator's certification was based?

Before you rely on another operator's certification, you should carefully review that certification along with any supporting information. You also need to confirm that no additional species have been listed or critical habitat designated in the area of your site since the other operator's endangered species assessment was done. If you do not believe that the other operator's certification provides adequate coverage for your facility, you should provide your own independent endangered species assessment and certification.

If you answered “Yes” to all four questions above, you have met ESA eligibility Criterion E. Skip to Step 4.

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

Step 3. Determine if the activities are not likely to adversely affect federally-listed threatened or endangered species or federally-designated critical habitat

If the discharge is to an area where federally-listed threatened or endangered species or federally-designated critical habitat are likely to occur and the discharge activities are not already covered by a previous Section 7 consultation, a Section 10 permit, or a certification of eligibility, then the permittee must analyze the effects of the discharge activities on federally-listed threatened or endangered species or federally-designated critical habitat. The permittee must then receive concurrence from the appropriate

⁵ In order to meet the permit eligibility requirements by relying on another operator's certification of eligibility, the other operator's certification must apply to the location of your site or facility and must address the effects from your discharges and related activities on listed species and critical habitat.

Service(s) that the discharge is not likely to adversely affect listed species or critical habitat because they are not exposed to the effects, are not likely to respond to the effects, or their responses to the effects are not sufficient to reduce an individual's chances of surviving and reproducing or diminish the amount or suitability of constituent elements of critical habitat.

Contact with the Service(s) should be initiated at a minimum of thirty (30) days prior to submitting the NOI to allow for adequate time in reviewing all pertinent information and issuing a decision.

Criterion D. You can certify eligibility, according to Criterion D, for coverage under this permit if you can answer "Yes" to all of the following questions:

- Does the discharge occur in an area, other than those areas listed in Section I of this Attachment, where federally-listed threatened or endangered species or federally-designated critical habitat are likely to occur?
- Have you contacted the Services to determine what additional appropriate measures can be undertaken to avoid or eliminate the likelihood of adverse effects?
- Have you received a written letter or memorandum from the Services concluding that the discharge is consistent with the "not likely to adversely affect" determination for the General Permit?
- Do you agree to implement all measures to avoid or eliminate adverse effects, per the Service's requirements or recommendations?

If you answered "Yes" to all four questions above, you have met ESA eligibility Criterion D. Go to Step 4.

If you answered "No" to any of the four questions above, check to see if you can meet Criterion F.

Criterion F. You can certify eligibility, according to Criterion F, for coverage by this permit if you can answer "Yes" to all of the following questions:

- Does the discharge occur in an area listed in Section I of this Attachment where one of the four species of concern is likely to occur?
- Have you contacted the Services to determine what additional appropriate measures can be undertaken to avoid or eliminate the likelihood of adverse effects?
- Have you received a written letter or memorandum from the Services concluding that the discharge is consistent with the "not likely to adversely affect" determination for the General Permit?

- Do you agree to implement all measures to avoid or eliminate adverse effects, per the Service's requirements or recommendations?

If you answered "Yes" to all four questions above, you have met ESA eligibility Criterion F. Go to Step 4.

If you answered "No" to any of the four questions above and are not eligible for Criterion A, B, C, D, or E then you are not eligible for coverage by this permit. You must submit an individual application for your discharges to EPA. (See 40 CFR 122.21)

Step 4. Submit Notice of Intent and Document Results of the Eligibility Determination.

Once you have demonstrated that you meet one or more of the ESA eligibility criteria and have determined National Historic Preservation Act (NHPA) eligibility (see Attachment C to the General Permit), you may submit the Notice of Intent (NOI). Signature and submittal of the NOI constitutes your certification, under penalty of law, of your eligibility for permit coverage.

You must include documentation of ESA eligibility with the NOI. Documentation required for the various ESA eligibility Criterion are as follows:

Criterion A - No federally-listed threatened or endangered species or federally-designated critical habitat are present: A copy of the most current state species list pages for the state in which your facility and discharge(s) are located. You must also include a statement on how you determined that no listed species or critical habitat are in proximity to your facility or discharge locations.

Criterion B – Section 7 consultation completed with the Service(s) on a prior project: A copy of the USFWS and/or NMFS, as appropriate, biological opinion or concurrence on a finding of "unlikely to adversely effect" regarding the ESA Section 7 consultation.

Criterion C – Activities are covered by a Section 10 Permit: A copy of the USFWS and/or the NMFS, as appropriate, letter transmitting the ESA Section 10 authorization.

Criterion D - Concurrence from the Service(s) that the discharge is "not likely to adversely affect" federally-listed species or federally-designated critical habitat (not including the four species of concern identified in Section I of this Attachment): A copy of the USFWS and/or the NMFS, as appropriate, concurrence with the applicant's determination that the discharge is "not likely to adversely affect" listed species.

Criterion E – Activities are covered by certification of eligibility: A copy of the documents originally used by the other operator of your facility to satisfy the documentation requirement of Criteria A, B, C or D.

Criterion F - Concurrence from the Service(s) that the discharge is “not likely to adversely affect” species of concern, as identified in Section I of this Attachment: A copy of the USFWS and/or the NMFS, as appropriate, concurrence with the applicant’s determination that the discharge is “not likely to adversely affect” listed species.

IV. 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 wastewater discharge(s) and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. You must incorporate such terms and conditions into your facility’s Discharge Management Program as required by the General Permit. If the ESA eligibility requirements of the permit cannot be met, then you may not be covered under this General Permit, and must apply for an individual permit.

V. U.S. Fish and Wildlife Service Offices

Endangered Species Home Page: <http://endangered.fws.gov>

ESA Section 7 Consultations: <http://www.fws.gov/endangered/what-we-do/faq.html>

US Fish and Wildlife Service
New England Field Office
70 Commercial St., Suite 300
Concord, NH 03301

Phone: (603) 223-2541

Website: http://www.fws.gov/newengland/EndangeredSpec-Consultation_Project_Review.htm.

New England Field Office Endangered Species Review Streamlining Procedures:
<http://www.fws.gov/newengland/EndangeredSpec-Consultation.htm>

VI. National Marine Fisheries Services

Endangered Species Home Page: http://www.nmfs.noaa.gov/pr/species/esa_species.htm

ESA Section 7 Consultations: <http://www.nmfs.noaa.gov/pr/consultation/>

National Marine Fisheries Service
Northeast Regional Office
Protected Resource Division
55 Great Republic Drive
Gloucester, MA 01930
Phone: (978) 28-19116
Website: http://www.nero.noaa.gov/prot_res/

VII. 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 website and other access to a large number of specific biodiversity centers.

Massachusetts Division of Fisheries and Wildlife
Natural Heritage & Endangered Species Program
1 Rabbit Hill Road
Westborough, MA 01581
Phone: (508) 792-7270
Website: <http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm>

New Hampshire Division of Forests and Lands
Natural Heritage Bureau
172 Pembroke Street
P.O. Box 1856 Concord, NH 033021856
Phone: (603) 271-3623
Website: <http://www.nhdfl.org/aboutforestsandlands/bureaus/naturalheritagebureau/>