

Appendix D - Endangered Species Act Requirements

The purpose of this guidance is to assist you in complying with the requirements in Part 1.1.e of the permit requiring you to demonstrate that you meet one of the criteria listed in this appendix with respect to the protection of any and all species that are federally-listed as endangered or threatened under the Endangered Species Act (ESA) or of habitat that is federally-designated as "critical habitat" under the ESA in order to be eligible for coverage under this permit.

This guidance provides you information on the following:

- **Section D.1:** ESA Eligibility Criteria
- **Section D.2:** Guidance for Determining Which ESA Criteria Applies

D.1 ESA Eligibility Criteria

You must certify in your NOI that you meet one of the eligibility criteria listed below in order to be eligible for coverage under this permit. You must also specify in the NOI the basis for your selection of the applicable eligibility criterion.

Note: (1) Regardless of the criterion selected, you must provide documentation in your SWPPP that is sufficient to support your determination that you satisfy the requirements of the particular criterion. (2) While coordination between you and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (together, the "Services") is not necessarily required in all cases, EPA encourages you to coordinate with the Services and to do so early in the planning process prior to submitting your NOI.

Criterion A. No federally-listed threatened or endangered species or their designated critical habitat(s) are likely to occur in your site's "action area" as defined in Appendix A of this permit.

Criterion B. The construction site's discharges and discharge-related activities were already addressed in another operator's valid certification of eligibility for your action area under eligibility Criterion A, C, D, E, or F and there is no reason to believe that federally-listed species or federally-designated critical habitat not considered in the prior certification may be present or located in the "action area". To certify your eligibility under this Criterion, there must be no lapse of NPDES permit coverage in the other operator's certification. By certifying eligibility under this Criterion, you agree to comply with any effluent limitations or conditions upon which the other operator's certification was based. You must include in your NOI the tracking number from the other operator's notification of authorization under this permit. If your certification is based on another operator's certification under Criterion C, you must provide EPA with the relevant supporting information required of existing dischargers in Criterion C in your NOI form.

Criterion C. Federally-listed threatened or endangered species or their designated critical habitat(s) are likely to occur in or near your site's "action area," and your site's discharges and discharge-related activities are not likely to adversely affect listed threatened or endangered species or critical habitat. This determination may include consideration of any stormwater controls and/or management practices you will adopt to ensure that your discharges and discharge-related activities are not likely to adversely affect listed species and critical habitat. To make this certification, you must include the following in your NOI: 1) any federally listed species and/or designated habitat located in your "action area"; and 2) the distance between your site and the listed species or designated critical habitat (in miles). You must also include a copy of your site map with your NOI.

Criterion D. Coordination between you and the Services has been concluded. The coordination must have addressed the effects of your site's discharges and discharge-related activities on federally-listed threatened or endangered species and federally-designated critical habitat, and must have resulted in a written concurrence from the relevant Service(s) that your site's discharges and discharge-related activities are not likely to adversely affect listed species or critical habitat. You must include copies of the correspondence between yourself and the Services in your SWPPP and your NOI.

Criterion E. Consultation between a Federal Agency and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service under section 7 of the ESA has been concluded. The consultation must have addressed the effects of the construction site's discharges and discharge-related activities on federally-listed threatened or endangered species and federally-designated critical habitat. The result of this consultation must be either:

- i. a biological opinion that concludes that the action in question (taking into account the effects of your site's discharges and discharge-related activities) is not likely to jeopardize the continued existence of listed species, nor the destruction or adverse modification of critical habitat; or
- ii. written concurrence from the applicable Service(s) with a finding that the site's discharges and discharge-related activities are not likely to adversely affect federally-listed species or federally-designated habitat.

You must include copies of the correspondence between yourself and the Services in your SWPPP and your NOI.

Criterion F. Your construction activities are authorized through the issuance of a permit under section 10 of the ESA, and this authorization addresses the effects of the site's discharges and discharge-related activities on federally-listed species and federally-designated critical habitat. You must include copies of the correspondence between yourself and the Services in your SWPPP and your NOI.

You must comply with any applicable terms, conditions, or other requirements developed in the process of meeting the eligibility criteria in this section to remain eligible for coverage under this permit. Documentation of these requirements must be kept as part of your SWPPP (see Part 7.2.14.1).

D.2 Guidance for Determining Which Criterion Applies

Part 1.1.5 of the permit requires that you meet one of the six criteria listed above in order to be eligible for coverage under the permit.

You must follow the procedures in Steps 1 through 6 to determine the ESA criterion under which your site is eligible for permit coverage.

D.2.1 Step 1 - Determine if Your Discharges and Discharge-Related Activities Were Already Addressed in Another Operator's Valid Certification that Included Your Action Area.

- **If your discharges and discharge-related activities were already addressed in another operator's valid certification that included your action area** (e.g., a general contractor or developer may have completed and filed an NOI for the entire action area with the necessary ESA certifications (Criterion A, C, D, E, or F)), *you may select eligibility Criterion B on your Notice of Intent form.*

By certifying eligibility under Criterion B, you must comply with any terms and conditions imposed under the eligibility requirements of Criterion A, C, D, E, or F to ensure that your discharges and discharge-related activities are protective of listed species and/or critical habitat.

Note: If you are unable to meet these eligibility requirements, then you may either establish eligibility under one of the other criterion, or you may consider applying to EPA for an individual permit.

Under Criterion B, you must provide documentation in your SWPPP of any of these terms and conditions, as well as the other operator's basis for establishing eligibility. You must also provide a description of the basis for your selection of Criterion B on your NOI form, including the eligibility criterion (A, C, D, E, or F) that was certified to by the previous operator, and must provide the Tracking Number from the other operator's notification of authorization under this permit.

If your certification is based on another operator's certification under criterion C, you must provide the documentation required in the NOI for criterion C, namely: 1) what federally listed species and/or designated habitat are located in your "action area"; and 2) what is the distance between your site and the listed species or designated critical habitat (in miles).

- **If discharges and discharge-related activities from your site were not addressed in another operator's valid certification that included your action area**, you must follow the applicable procedures in Steps 2 through 5 below.

D.2.2 Step 2 - Determine if Listed Threatened or Endangered Species or their Designated Critical Habitat(s) are Likely to Occur in your Site's Action Area

You must determine, to the best of your knowledge, whether species listed as either threatened or endangered, or their critical habitat(s) (see definitions of these terms in Appendix A), are located in your site's action area. To make this determination, you should first determine if listed species and/or critical habitat are expected to exist in your county or township. The local offices of the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and State or Tribal Heritage Centers often maintain lists of federally listed endangered or threatened species on their internet sites. For FWS

terrestrial and aquatic species information, you can use FWS' on-line mapping tool, the Information, Planning, and Consultation (IPAC) System, located at <http://www.fws.gov/ipac/>.

Note: To determine the field office that corresponds to your project site, visit <http://www.fws.gov/angered/regions/index.html> and <http://www.nmfs.noaa.gov/> (under the left tab for "Regions").

In most cases, species and/or critical habitat lists allow you to determine if any such species or habitat exists in your county or township. You can also find critical habitat designations and associated requirements at 50 CFR Parts 17 and 226. <http://www.access.gpo.gov>.

- ***If there are listed species and/or critical habitat in your county or township***, you should contact your local FWS, NMFS, or State or Tribal Heritage Center to determine if the listed species are known to exist in your action area and if any critical habitat areas have been designated that overlap your action area.
 - If your local FWS, NMFS, or State or Tribal Heritage Center indicates that these species and/or critical habitat could exist in your action area, you must:
 - Do **one or more** of the following:
 - Conduct visual inspections. This method may be particularly suitable for construction sites that are smaller in size or located in non-natural settings such as highly urbanized areas or industrial parks where there is little or no natural habitat, or for construction activities that discharge directly into municipal stormwater collection systems.
 - Conduct a formal biological survey. In some cases, particularly for larger construction sites with extensive stormwater discharges, biological surveys may be an appropriate way to assess whether species are located in the action area and whether there are likely to be adverse effects to such species. Biological surveys are frequently performed by environmental consulting firms. A biological survey may in some cases be useful to conduct in conjunction with Steps Two, Three, or Four of these instructions.
 - If required, conduct an environmental assessment under the National Environmental Policy Act (NEPA). Some construction activities might require review under NEPA for specific reasons, such as federal funding or other federal involvement in the project. Note: Coverage under the CGP does not trigger such a review for individual projects/sites. EPA has complied with NEPA in the issuance of the CGP.

and

- Follow the instructions in Steps 3 – 5 below, as applicable. Note that many but not all measures imposed to protect listed species under these steps will also protect critical habitat. Thus, meeting the eligibility requirements of this CGP may require measures to protect critical habitat that are separate from those to protect listed species.
- **If there are no listed species in your county or township and no critical habitat areas in your action area, you may check eligibility criterion A on your NOI form.** You must also provide a description of the basis for the criterion selected on your NOI form and provide documentation supporting the criterion selected in your SWPPP.

D.2.3 Step 3 - Determine if the Construction Activity's Discharges or Discharge-Related Activities Are Likely to Adversely Affect Listed Threatened or Endangered Species or Designated Critical Habitat

If in Step 2 you determine based on communication with your local FWS, NMFS, or State or Tribal Heritage Center, or other determination, that listed species and/or critical habitat could exist in your action area, you must next assess whether your discharges or discharge-related activities are likely to adversely affect listed threatened or endangered species or designated critical habitat.

Potential adverse effects from discharges and discharge-related activities include:

- *Hydrological.* Stormwater discharges may cause siltation, sedimentation or induce other changes in receiving waters such as temperature, salinity or pH. These effects will vary with the amount of stormwater discharged and the volume and condition of the receiving water. Where a stormwater discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely. Construction activity itself may also alter drainage patterns on a site where construction occurs that can impact listed species or critical habitat.
- *Habitat.* Excavation, site development, grading, and other surface disturbance activities from construction activities, including the installation or placement of stormwater controls, may adversely affect listed species or their habitat. Stormwater may drain or inundate listed species habitat.
- *Toxicity.* In some cases, pollutants in stormwater may have toxic effects on listed species.

The scope of effects to consider will vary with each site. If you are having difficulty determining whether your project is likely to adversely affect listed species or critical habitat, or one of the Services has already raised concerns to you, you should contact the appropriate office of the FWS, NMFS or Natural Heritage Center for assistance.

- **If adverse effects to listed threatened or endangered species or their critical habitat are not likely, then you may select eligibility criterion C on the NOI form.** You must provide the following specific information on your NOI form: 1) what federally listed species and/or designated habitat are located in your "action area"; and 2) what is the distance between your site and the listed species or

designated critical habitat (in miles). You must also provide a copy of your site map with your NOI.

- ***If adverse effects to listed threatened or endangered species or their critical habitat are likely***, you must follow Step 4 below.

D.2.4 Step 4 - Determine if Measures Can Be Implemented to Avoid Adverse Effects

If you make a preliminary determination in Step 3 that adverse effects from your construction activity's discharges or discharge-related activities are likely to occur, you can still receive coverage under eligibility criterion C of the CGP if appropriate measures are undertaken to avoid or eliminate the likelihood of adverse effects prior to applying for CGP coverage.

These measures may involve relatively simple changes to construction activities such as re-routing a stormwater discharge to bypass an area where species are located, relocating stormwater controls, or by modifying the "footprint" of the construction activity. If you are unable to ascertain which measures to implement to avoid the likelihood of adverse effects, you must coordinate or enter into consultation with the FWS and/or NMFS, in which case you would not be eligible for coverage under eligibility criterion C, but may instead be eligible for coverage under eligibility criterion D, E, or F (described in more detail in Step 5).

- ***If you are able to install and implement appropriate measures to avoid the likelihood of adverse effects***, then you may check eligibility criterion C on the NOI form. The measures you adopt to avoid or eliminate adverse affects must be implemented for the duration of the construction project and your coverage under the CGP. You must also provide a description of the basis for the criterion selected, and the following specific information on your NOI form: 1) what federally listed species and/or designated habitat are located in your "action area"; and 2) what is the distance between your site and the listed species or designated critical habitat (in miles).
- ***If you cannot ascertain which measures to implement to avoid the likelihood of adverse effects***, you must follow the procedures in Step 5.

D.2.5 Step 5 - Determine if the Eligibility Requirements of Criterion D, E, or F Can Be Met

If in Step 4 you cannot ascertain which measures to implement to avoid the likelihood of adverse effects, you must contact the FWS and/or NMFS. You may still be eligible for CGP coverage if any likely adverse effects can be addressed through meeting criterion D, E, or F.

- **Criterion D:** You have coordinated with the Services and have addressed the effects of your site's discharges on federally-listed threatened or endangered species and federally-designated critical habitat, which resulted in a written concurrence from the relevant Service(s) that your site's discharges are not likely to adversely affect listed species or critical habitat.

If you have met the requirements of criterion D, *you may select eligibility criterion D on the NOI form*. You must provide a description of the basis for the criterion selected on your NOI form and must include copies of the correspondence between you and the applicable Service in your SWPPP.

- **Criterion E:** Formal or informal ESA section 7 consultation is performed with the FWS and/or NMFS and that consultation addresses the effects of your discharges and discharge-related activities on federally-listed and threatened species and designated critical habitat. In order to be eligible for coverage under this permit, consultation must result in a “no jeopardy opinion” or a written concurrence by the Service(s) on a finding that your stormwater discharge(s) and stormwater discharge-related activities are not likely to adversely affect listed species or critical habitat (For more information on consultation, see 50 CFR §402). If you receive a “jeopardy opinion,” you may continue to work with the FWS and/or NMFS and your permitting authority to modify your project so that it will not jeopardize listed species or designated critical habitat.

Note that most consultations are accomplished through informal consultation. When conducting informal ESA section 7 consultation as a non-federal representative, you must follow the procedures found in 50 CFR Part 402 of the ESA regulations. You must notify FWS and/or NMFS of your intention and agreement to conduct consultation as a non-federal representative.

Consultation may occur in the context of another federal action at the construction site (e.g., where ESA section 7 consultation was performed for issuance of a wetlands dredge and fill permit for the project or where a NEPA review is performed for the project that incorporates a section 7 consultation). Any terms and conditions developed through consultations to protect listed species and critical habitat must be incorporated into the SWPPP. As noted above, operators may, if they wish, initiate consultation with the Services at Step Four.

Whether ESA section 7 consultation must be performed with either the FWS, NMFS or both Services depends on the listed species that may be affected by the operator’s activity. In general, NMFS has jurisdiction over marine, estuarine, and anadromous species. Operators should also be aware that while formal section 7 consultation provides protection from incidental takings liability, informal consultation does not.

If you have met the requirements of criterion E, *you may select eligibility criterion E on the NOI form.* You must provide a description of the basis for the criterion selected on your NOI form and must include copies of the correspondence between yourself and the Services in your SWPPP.

- **Criterion F:** Your construction activities are authorized through the issuance of a permit under section 10 of the ESA, and that authorization addresses the effects of your discharge(s) and discharge-related activities on federally-listed species and designated critical habitat. You must follow FWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for FWS and §222.22 for NMFS). Application instructions for section 10 permits for FWS and NMFS can be obtained by accessing the FWS and NMFS websites (<http://www.fws.gov> and <http://www.nmfs.noaa.gov>) or by contacting the appropriate FWS and NMFS regional office.

If you have met the requirements of criterion F, *you may select eligibility criterion F on the NOI form.* You must provide a description of the basis for the criterion selected on your NOI form and must include copies of the correspondence between yourself and the Services in your SWPPP.