

Appendix D - Endangered Species Act Requirements

Eligibility Criteria

You must certify in your NOI that you meet one of the eligibility criteria below. Guidance is provided below on the steps you should take to determine which eligibility criterion applies to discharges from your construction site. 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.

EPA Note: These eligibility criteria are draft, and subject to change as EPA continues its consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service.

- Criterion A. No federally-listed threatened or endangered species or their designated critical habitat are likely to occur in your site's action area as defined in Appendix A.
- Criterion B. The construction site's discharges were already addressed in another operator's valid certification of eligibility for the same construction project under eligibility Criterion A, B, C, D, or E 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 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 effluent limitations or conditions upon which the other operator's certification was based. If your certification is based on another operator's certification under Criterion C, it is valid only if you have documentation showing that the other operator had certified under Criterion C, and you 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 are likely to occur in or near your site's "action area," and your site's discharges are not likely to adversely affect listed threatened or endangered species, or critical habitat. To make this certification, you must document: 1) what species and/or habitat are listed in the county or region; 2) their location in your relation to your discharges; 3) what the species' habitat needs are; 4) where the project site is in relation to those species and/or habitat; and 5) how it was determined that your discharge is not likely to adversely affect any listed species or critical habitat.
- Criterion D. Coordination between you and the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (together, the "Services") has been concluded. The coordination must have addressed the effects of your site's discharges 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 is not likely to adversely affect listed species or critical habitat. You must include copies of the correspondence between yourself and the Services.

- 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 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) 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 are not likely to adversely affect federally-listed species or federally-designated habitat.
- 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 on federally-listed species and federally-designated critical habitat; or

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. Documentation must be kept with your SWPPP.