

**ATTACHMENT D****MAG580000****NHG580000****ENDANGERED SPECIES ACT REVIEW****A. Background**

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 for Publicly Owned Treatment Works (POTWs) and other treatment works treating domestic sewage (collectively “facilities”) do not adversely affect endangered and threatened species and critical habitat. Facilities seeking general permit coverage must assess the impacts of their wastewater 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, facilities must meet the ESA eligibility provisions of this permit. EPA strongly recommends that facilities follow the provisions in this Attachment at the earliest possible stage to ensure the notification requirements for general permit coverage are complete upon submission.

Facilities seeking coverage under this general permit also have an independent ESA obligation to ensure that their activities do not result in any prohibited “takes” of listed species.<sup>1</sup> Many of the measures required in this general permit and in these instructions to protect species may also assist in ensuring that the facilities’ activities do not result in a prohibited take of species in violation of section 9 of the ESA. If the facility has plans or activities in areas where endangered and threatened species are located, it may wish to ensure that it is protected from potential liability for a taking under ESA section 9 by obtaining an ESA section 10 permit or by requesting formal consultation under ESA section 7. Facilities seeking coverage that are unsure whether to pursue a section 10 permit or a section 7 consultation for takings protection should confer with the appropriate office of the U.S. Fish and Wildlife Service (USFWS)<sup>2</sup> or National Marine Fisheries Service (NMFS) (collectively “the Services”).

There are two listed species of concern for this general permit, namely the dwarf wedgemussel and the shortnose sturgeon. The dwarf wedgemussel is listed under the jurisdiction of USFWS and the shortnose sturgeon is listed under the jurisdiction of NMFS.

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<sup>1</sup> 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.

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

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

1. Connecticut River from Northumberland to Dalton, New Hampshire (Coos County).
2. Connecticut River from Lebanon to North Walpole, New Hampshire (Grafton and Sullivan Counties).
3. Ashuelot River from the Surry Mountain Flood Control Project in Surry to Swanzey, New Hampshire (Cheshire County).
4. South Branch of the Ashuelot River in East Swanzey, New Hampshire (Cheshire County).
5. Mill River from Whately to Hatfield, Massachusetts (Hampshire County).
6. Fort River in Amherst, Massachusetts (Hampshire County).
7. Mill River south of State Route 10 in Northampton, Massachusetts (Hampshire County).

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

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

All facilities seeking coverage by this general permit, including owners and operators of facilities discharging into any of the nine identified areas where the endangered dwarf wedgemussel and shortnose sturgeon are found, must determine whether they meet one or more of the ESA eligibility criteria (see Section C, below) before submitting an NOI. A facility that cannot meet any of the ESA eligibility criteria must apply for an individual permit.

## B. ESA Eligibility Criteria

A facility seeking coverage by this general permit must demonstrate that it meets one or more of the following criteria:

- Criterion A: No endangered or threatened species or critical habitat are in proximity to the facility or the points where authorized discharges reach the receiving waters.
- Criterion B: (1) In the course of a separate federal action involving the facility, formal or informal consultation with the Fish and Wildlife Service and/or the

National Marine Fisheries Service under Section 7 of the ESA has been concluded and that consultation addressed the effects of the wastewater discharges and discharge-related activities on listed endangered or threatened species and critical habitat; and (2) The consultation resulted in either a no jeopardy opinion or a written concurrence by USFWS and/or NMFS with a finding that the wastewater discharges and discharge-related activities are not likely to adversely affect listed endangered or threatened species or critical habitat.

**Criterion C:** The activities are authorized under Section 10 of the ESA and that authorization addresses the effects of the wastewater discharges and discharge-related activities on listed endangered or threatened species and 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 assessing the appropriate websites ([www.fws.gov](http://www.fws.gov) and [www.nmfs.noaa.gov](http://www.nmfs.noaa.gov)) or by contacting the appropriate regional office.)

**Criterion D:** The wastewater discharges and discharge-related activities have already been addressed in another operator's certification of eligibility, which includes the facility's activities.

## C. Steps To Determine ESA Eligibility

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 You Can Meet Eligibility Criterion “A”

**Criterion A.** You are eligible for coverage by this permit under Criterion A if you can answer “No” to all of the following questions:

- Are there any Endangered Species in your county? Are there any Critical Habitat Areas in your county?
- Are there any Endangered Species or Critical Habitat Areas in proximity to your facility or discharge locations?

Use the provisions below to answer these questions, and to: “*Check for Listed*

*Endangered Species in Your County,” “Check for Critical Habitat in Your County,” and “Check for Proximity to Your Facility or Discharge Locations.”*

*If you answered “No” to the questions above, you have met ESA eligibility Criterion A. Skip to Step 3.*

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

***Check for Listed Endangered Species in Your County.***

Look at the latest county species list to see if any listed species are found in your county. If you are located in proximity to the border of a county or your 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 de-listed periodically, you will need the most current list at the time you are conducting your endangered species assessment. See <http://cfpub.epa.gov/npdes/stormwater/esa.cfm>.

***Check for Critical Habitat in Your County.***

Some (but not all) listed species have designated critical habitat. Exact locations of such habitat is provided in the endangered species regulations at 50 CFR part 17 and part 226. To determine if the facility or 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](http://www.access.gpo.gov) ; or
- Contact the appropriate office of USFWS or NMFS. The relevant offices of the Services for the areas covered by this permit are listed in sections “E” and “F” of this Attachment; 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 section “G” of this Attachment.

***Check for Proximity to Your Facility or Discharge Locations.***

You must determine whether listed species or critical habitat are in proximity to your facility or wastewater discharges. 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 wastewater flows from the facility to the point of discharge into 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 facility, the nature and quantity of the wastewater discharges, and the type of receiving waters. You should use the method(s) 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 facility. 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. That information is frequently known to state or federal wildlife agencies.
- Contacting local/regional conservation groups such as natural heritage programs (see section G 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.

## **Step 2. Determine If You Can Meet Eligibility Criteria “B”, “C”, or “D”**

**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 facility<sup>3</sup>?

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<sup>3</sup> 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 wastewater and discharge-related activities?
- Has there been no substantial change, since that previous consultation, in (1) the nature and amount of your wastewater 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 (for formal consultations) or a concurrence by the service that your activities would be “unlikely to adversely affect” listed species or critical habitat?
- Do you agree to implement all measures, if any, upon which the concurrence was conditioned?

*If you answered “Yes” to all five questions above, you have met ESA eligibility Criterion B. Skip to Step 3.*

*If you answered “No” to any of the five questions above, check to see if you can meet Criteria C or D.*

**Criterion C.** You are eligible for coverage by 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 facility<sup>4</sup>?
- Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your wastewater discharges and discharge-related activities?
- Has there been no substantial change, since that previous consultation, in (1) the nature and amount of your wastewater 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 3.*

<sup>4</sup> You have a permit under section 10 of the ESA and that authorization addresses the effects of your wastewater discharges and discharge-related activities on listed species and critical habitat. You must follow the applicable procedures of USFWS or NMFS (see 50 CFR 17.22(b)(1) or 222.22) when applying for an ESA section 10 permit.

*If you answered “No” to either of the two questions above, check to see if you can meet Criterion D.*

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

- Did another facility operator previously certify ESA eligibility for your facility<sup>5</sup>?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your wastewater and discharge-related activities?
- Has there been no substantial change, since that previous consultation, in (1) the nature and amount of your wastewater 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 conditioned?

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 facility since the other operator's endangered species assessment was done. If you do not believe that the other operator's certification adequately assessed current circumstances, you may not rely on that prior certification as a basis for meeting these ESA review criteria.

*If you answered “Yes” to all four questions above, you have met ESA eligibility Criterion D. Go to Step 3.*

*If you answered “No” to any of the four questions above, you are not eligible for coverage by this permit. You must submit an application for an individual permit to EPA (see 40 CFR 122.21).*

### **Step 3. 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 NHPA eligibility (see Attachment C), you may submit the Notice of Intent (NOI).

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<sup>5</sup> 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 facility and must address the effects from your wastewater discharges and discharge-related activities on listed species and critical habitat.

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 in the Discharge Management Program required for the facility. Documentation required for the various ESA eligibility criteria are as follows:

**Criterion A:** A copy of the most current county species list pages for the county(ies) where your facility and discharges 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:** A copy of the Service(s)' biological opinion or concurrence on a finding of "unlikely to adversely effect" regarding the ESA Section 7 consultation.

**Criterion C:** A copy of the Service(s)' letter transmitting the ESA Section 10 authorization.

**Criterion D:** A copy of the documents originally used by the other operator of your facility to satisfy the documentation requirements of Criteria A, B, or C.

#### **D. 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 discharges 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 permit. If you cannot meet any of the ESA eligibility requirements of Part III.K.4, you may not be covered by this general permit and must apply for an individual permit.

#### **E. U.S. 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/consultations/index.html>

*U.S. FWS Region 5*

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

## **F. National Marine Fisheries Service Office**

*Website:* [http://www.nmfs.noaa.gov/pr/species/esa\\_species.htm](http://www.nmfs.noaa.gov/pr/species/esa_species.htm)

### *Northeast Regional Office*

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

## **G. 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 on-line at: [http://www.natureserve.org/nhp/us\\_programs.htm](http://www.natureserve.org/nhp/us_programs.htm), which provides website and other access to a large number of specific biodiversity centers.

Massachusetts Natural Heritage & Endangered Species Program  
Division of Fisheries and Wildlife  
Route 135  
Westborough, MA 01581  
508/792-7270

New Hampshire Natural Heritage Inventory  
Department of Resources & Economic Development  
172 Pembroke Street, P.O. Box 30370  
Concord, NH 03302  
603/271-3623