

APPENDIX C ENDANGERED SPECIES GUIDANCE

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 this general permit do not adversely affect endangered and threatened species or critical habitat. Applicants applying for permit coverage must assess the impacts of their stormwater 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 by following the steps in this Appendix¹.

Applicants also have an independent ESA obligation to ensure that their activities do not result in any prohibited “take” of listed species². The term “Take” is used in the ESA to include 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 this general permit and in these instructions 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 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) office or the National Marine Fisheries Service (NMFS), (jointly the Services).

Currently, there are 20 species of concern for applicants applying for permit coverage, namely the 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 rubriventis*), Bog Turtle (*Glyptemys muhlenbergii*), Small whorled Pogonia (*Isotria medeoloides*), Puritan tiger beetle (*Cicindela puritana*), American burying beetle (*Nicrophorus americanus*), Northeastern beach tiger beetle (*Cicindela dorsalis*), Northern Long-eared Bat (*Myotis septentrionalis*), Atlantic Sturgeon (*Acipenser oxyrinchus*), Shortnose Sturgeon (*Acipenser brevirostrum*), North Atlantic Right Whale (*Eubalaena glacialis*), Humpback Whale (*Megaptera novaengliae*), Fin Whale (*Balaenoptera physalus*), Kemp’s Ridley Sea Turtle (*Lepidochelys kempii*), Loggerhead Sea Turtle (*Caretta caretta*), Leatherback Sea Turtle (*Dermochelys coriacea*), and the Green Turtle (*Chelonia*

¹ 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.

² 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 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.

mydas). The Atlantic Sturgeon, Shortnose Sturgeon, North Atlantic Right Whale, Humpback Whale, Fin Whale, Loggerhead Sea Turtle, Kemp's Ridley Sea Turtle, Leatherback Sea Turtle and Green Turtle are listed under the jurisdiction of NMFS. The Dwarf wedgemussel, Northeastern bulrush, Sandplain gerardia, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Small whorled Pogonia, Roseate Tern, Puritan tiger beetle, Northeastern beach tiger beetle, Northern Long-eared Bat and American burying beetle are listed under the jurisdiction of the U.S. Fish and Wildlife Service.

Any applicant seeking coverage under this general permit, must consult with the Services where appropriate. When listed species are present, permit coverage is only available if EPA determines, or the applicant determines and EPA concurs, that the discharge or discharge related activities will have "no affect" on the listed species or critical habitat, or the applicant or EPA determines that the discharge or discharge 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 discharge is "not likely to adversely affect" an endangered or threatened species or critical habitat.

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 (See 50 CFR §402.08 and §402.13). By terms of this permit, EPA has automatically designated operators as non-Federal representatives for the purpose of conducting formal or informal consultation with the U.S. Fish and Wildlife Service. EPA has not designated operators as non-Federal representatives for the purpose of conducting formal or informal consultation with the National Marine Fisheries Service. EPA has determined that discharges from MS4s are not likely to adversely affect listed species or critical habitat under the jurisdiction of the National Marine Fisheries Service. EPA has initiated informal consultation with the National Marine Fisheries Service on behalf of all permittees and no further action is required by permittees in order to fulfill ESA requirements of this permit related to species under the jurisdiction of NMFS

B. The U.S. Fish and Wildlife Service ESA Eligibility Process

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

The USFWS ESA eligibility requirements of this permit relating to the Dwarf wedgemussel, Northeastern bulrush, Sandplain gerardia, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Small whorled Pogonia, Roseate Tern, Puritan tiger beetle, Northeastern beach tiger beetle, Northern Long-eared Bat and American burying beetle 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 stormwater discharges or discharge related activities.

USFWS Criterion B: In the course of formal or informal consultation with the Fish and Wildlife Service, under section 7 of the ESA, the consultation resulted in either a no jeopardy opinion (formal consultation) or a written concurrence by USFWS on a finding that the stormwater discharges and

discharge 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 stormwater discharge and discharge 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 stormwater discharges and discharge related activities will have “no affect” on any federally threatened or endangered listed species or designated critical habitat under the jurisdiction of the USFWS.

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

To determine eligibility, you must assess the potential effects of your known stormwater discharges and discharge 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.

Step 1 – Determine if you can meet USFWS Criterion A

USFWS Criterion A: You can certify eligibility, according to USFWS Criterion A, for coverage by this permit if, upon completing the Information, Planning, and Conservation (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. See Attachment 1 to Appendix C for instructions on how to use IPaC.

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 Can Meet Eligibility USFWS Criteria B

USFWS Criterion 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: Sandplain gerardia, Small whorled Pogonia, American burying beetle, Dwarf wedgemussel, Northeastern bulrush, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Roseate Tern, Puritan tiger beetle, and Northeastern beach tiger beetle?
AND
- 2) Did your assessment of the discharge and discharge related activities indicate that the discharge or discharge related activities “may affect” or are “not likely to adversely affect” listed species or critical habitat?
AND
- 3) Did you contact the USFWS and did the formal or informal consultation result in either a “no jeopardy” opinion by the USFWS (for formal consultation) or concurrence by the

USFWS that your activities would be “not likely to adversely affect” listed species or critical habitat (for informal consultation)?

AND

- 4) Do you agree to implement all measures upon which the consultation was conditioned?
- 5) Do you agree that if, during the course of the permit term, you plan to install a structural BMP not identified in the NOI that you will re-initiate informal or formal consultation with USFWS as necessary?

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 Can Meet Eligibility 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 both of the following question:

- 1) Does your action area contain one or more of the following species: Northern Long-eared Bat, Sandplain gerardia, Small whorled Pogonia and/or American burying beetle and **does not** contain one any following species: Dwarf wedgemussel, Northeastern bulrush, Piping Plover, Northern Red-bellied cooter, Bog Turtle, Roseate Tern, Puritan tiger beetle, and Northeastern beach tiger beetle?³
- OR
- 2) Did the assessment of your discharge and discharge related activities and indicate that there would be “no affect” on listed species or critical habitat and EPA provided concurrence with your determination?
- 3) Do you agree that if, during the course of the permit term, you plan to install a structural BMP not identified in the NOI that you will to conduct an endangered species screening for the proposed site and contact the USFWS if you determine that the new activity “may affect” or is “not likely to adversely affect” listed species or critical habitat under the jurisdiction of the USFWS.

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

If you answered “Yes” to both the question above, you have met eligibility USFWS Criterion C. Go to Step 4.

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

USFWS Effects Determination Guidance:

If you are unable to certify eligibility under USFWS Criterion A, you must assess whether your stormwater discharges and discharge-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 stormwater pollutant discharges; and measures to provide treatment for stormwater discharges 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 system. If you are having difficulty in determining whether your system 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 stormwater discharges or discharge 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 incorporated into your Storm Water Management Program (required by this permit) and implemented in order to maintain permit eligibility.

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

Effects from stormwater discharges and discharge-related activities which could pose an adverse effect 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 discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- *Habitat:* Excavation, site development, grading and other surface disturbance activities, including the installation or placement of treatment equipment may adversely affect listed species or their habitat. Stormwater from the small MS4 may inundate a listed species habitat.

- *Toxicity*: In some cases, pollutants in the stormwater may have toxic effects on listed species.

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 the Storm Water Management Program required by the permit. 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 stormwater system or 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 dated copy of the EPA concurrence with the operator’s determination that the stormwater discharges and discharge-related activities will have “no affect” on listed species or critical habitat.

C. Submittal of Notice of Intent

Once the ESA eligibility requirements of Part C of this Appendix have been met you may submit the Notice of Intent indicating which Criterion you have met to be eligible for permit coverage. Signature and submittal of the NOI constitutes your certification, under penalty of law, of eligibility for permit coverage under 40 CFR 122.21.

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 stormwater 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 Storm Water Management Program as required by this permit. 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.

E. 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

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, which provides websites and other access to a large number of specific biodiversity centers.

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 the following location:

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

- a. Indicate the action area¹ for the MS4 by either:
 - a. Drawing the boundary on the map or by uploading a shapefile.
Select “Continue”

- c. Click on the “SEE RESOURCE LIST” button and on the next screen you can export a trust resources list. This will provide a list of natural resources of concern, which will include an Endangered Species Act Species list. You may also request an official species list under “REGULATORY DOCUMENTS” Save copies and retain for your records

¹ 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 storm water 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 storm water flows from the municipality to the point of discharge into the receiving water. This includes areas in the receiving water downstream from the point of discharge.
- Areas that may be impacted by construction or repair activities. This extends as far as effects related to noise (from construction equipment, power tools, etc.) and light (if work is performed at night) may reach.

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