

Appendix D Endangered Species Act 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 and critical habitat. Applicants applying for permit coverage must assess the impacts of their storm water 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 Appendix at the earliest possible stage to ensure the notification requirements for general permit coverage are complete upon NOI submission.

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 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 takings 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)¹ office or the National Marine Fisheries Service (NMFS), (jointly the Services).

There are four species of concern for applicants applying for permit coverage, namely the dwarf wedgemussel, the shortnose sturgeon, the bog turtle, and the northern redbelly cooter. The shortnose sturgeon is listed under the jurisdiction of NMFS and the dwarf wedge mussel, the bog turtle and the northern red-bellied cooter are listed under the jurisdiction of the USFWS.

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

- Connecticut River from North Cumberland to Dalton, New Hampshire (Coos County)
- Connecticut River from Haverhill to Lyme, New Hampshire (Grafton County)
- Connecticut River from Lebanon to North Walpole, New Hampshire (Grafton and Sullivan Counties)
- Ashuelot River from the Surry Mountain Flood Control Project in Surry to Swanzey, New Hampshire (Cheshire County)

¹ Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

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- South Branch of the Ashuelot River in East Swanzey, New Hampshire (Cheshire County)
- Mill River from Whately to Hatfield, Massachusetts (Hampshire County)
- Fort River in Amherst, Massachusetts (Hampshire County)
- 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:

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

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

- Bodies of water in the Towns of Egremont and Sheffield (Berkshire County), Massachusetts

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

- Bodies of water occurring within the following boundaries of the Towns of Plymouth and Carver (Plymouth County), Massachusetts, west of Route 3 and north of Route 25; east of Router 58 and south of Route 44
- Bodies of water in the Towns of Bourne and Sandwich, MA (Barnstable County), and
- Bodies of water in the Town of Raynham, MA (Bristol County)

Information is available at: <http://www.fws.gov/newengland/index.htm>

Any applicant seeking coverage under this general permit, which discharges to these rivers, must consult with the Services. EPA may designate the applicants as non-Federal representatives for the general permit for the purpose of carrying out informal consultation with NMFS and USFWS. By terms of this permit, EPA has automatically designated operators as non-Federal representatives for the purpose of conducting informal consultations. (See 50 CFR §402.08 and §402.13). Coverage under this permit is only available if the applicant contacts the Services to determine that discharges are not likely to adversely affect listed species or critical habitat and informal consultation with the Services has been concluded and results in written concurrence by the Services that the discharge has no affect or is not likely to adversely affect an endangered or threatened species. Applicants discharging to areas listed above in Section A must certify eligibility with Criteria F.

B. The ESA Eligibility Process

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

C. The ESA Eligibility Criteria

The ESA eligibility requirements of this permit may be satisfied by documenting that one or more of the following criteria has been met.

Criterion A: No endangered or threatened species or their designated critical habitat are likely to occur in proximity to the storm water discharges or discharge related activities.

Criterion B: In the course of a separate federal action involving the municipality, the municipality has concluded either formal or informal consultation with the FWS and/or the NMFS under section 7 of the ESA. The consultation must have addressed the effects of the municipalities storm water discharges, allowable non-stormwater discharges, and stormwater discharge related activities on federally-listed threatened or endangered species and federally-designated critical habitat; and must have resulted in either (1) a biological opinion finding of no jeopardy to federally-listed species or destruction/adverse modification of federally-designated critical habitat; or (2) a written concurrence from the Service(s) with a finding that the municipality's stormwater discharges and allowable non-stormwater discharges 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 and that authorization addresses the effects of the storm water discharges and discharge related activities on listed species and critical habitat.

(Eligibility under this criterion is not likely.) This criterion involves a municipality's activities being authorized through the issuance of a permit under section 10 of the ESA and that authorization addresses the effect of the municipality's storm water discharges and discharge related activities on listed species and designated critical habitat. Municipalities 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 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 A of this appendix, but does occur in an area in which federally-listed threatened or endangered species or their designated critical habitat is likely to occur. Using the best scientific and commercial data available, the effect of the

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storm water discharge and discharge related activities on listed species and critical habitat have been evaluated. Based on those evaluations a determination is made by the permittee and affirmed by EPA that the storm water discharges and discharge related activities are not likely to adversely affect any federally threatened or endangered listed species or designated critical habitat.

Criterion E: The storm water discharges and discharge related activities were addressed in another operator's certification of eligibility that includes the municipality's storm water activities.

Criterion F: Eligibility under the criterion is restricted to a municipality which discharges to an area listed in section A of this Appendix with federally listed species.

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

To determine eligibility, you must assess (or have previously assessed) the potential effects of your known storm water discharges and discharge related activities on listed species or critical habitat, PRIOR to completing and submitting a NOI. Previous assessments from FWS are valid for a period of one year. You must follow the steps outlined below and document the results of your eligibility determination.

Step One – Determine if you can meet Criterion “A”

You can certify eligibility, according to Criterion A, for coverage by this permit if you can answer “No” to all of the following questions:

- Are there any Endangered Species in your project area? Are there any Critical Habitats in your project?
- Are there any Endangered Species or Critical Habitat in proximity to your storm water discharges?

Use the guidance on the FWS website (<http://www.fws.gov/newengland/index.htm>) to answer the questions above.

Check for Listed Endangered Species in Your Project Area

Look at the latest state species list to see if any listed species are found in your project area. The latest species listing can be found on the FWS website referenced above. If you are located in proximity to the border of a county or your municipality or activity is 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.

Check for Critical Habitat in Your Project Area

Some (but not all) listed species have designated critical habitat. Exact locations of such habitat are provided in the endangered species regulations at 50 CFR part 17 and part

226. To determine if the discharge locations or activities are within designated critical habitat, you should either:

- Review those 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 Massachusetts Natural Heritage & Endangered Species Program (NHESP). Heritage programs gather, manage and distribute detailed information about the biological diversity found within their jurisdiction. They frequently have the most current information on listed species and critical habitat. Contact information for the NHESP provided in section H of this Appendix.

Check for Proximity to your Discharge locations or municipal activities

You must determine whether listed species or critical habitat are in proximity to your storm water discharges or discharge related activities. 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 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.
- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.
- Located in the area of the municipality where construction activities by the municipality are planned.

The area in proximity to be searched/surveyed for listed species 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. 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 outfall. These methods may include:

- Conducting visual inspections.
- Contacting the nearest State Wildlife Agency or USFWS Offices. Many endangered and threatened species are found in well defined habitats. This information is frequently known to state or federal wildlife.
- Contacting local/regional conservation groups such as natural heritage programs (see section G below). These groups inventory species and their locations maintain lists of sightings and habitats.
- Conducting a formal biological survey.

If you answered “No” to the questions above, you have met ESA eligibility Criteria A. Download the letter found on the FWS website <http://www.fws.gov/newengland/index.htm> and maintain the letter as part of the SWMP and skip to Step 5.

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

Step Two – Determine if You Can Meet Eligibility Criteria “B”, “C” or “E”

You can certify eligibility according to Criteria B for coverage by this permit if you answer “Yes” to all of the following questions:

- Has consultation under ESA section 7 already been completed for discharges from your municipality²?
- Did the previously completed ESA section 7 consultation consider all currently listed species and critical habitat and address your storm water discharges and discharge-related activities?
- Did the ESA section 7 consultation result in either a “no jeopardy” opinion by the Service (for formal consultation) or concurrence by the Service that your activities are “not likely to adversely affect” listed species or critical habitat?
- Do you agree to implement all measures upon which the consultation was conditioned?

If you answered “Yes” to all four questions above, you have met ESA eligibility Criteria B. Skip to Step 5.

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

You can certify eligibility according to Criterion C for coverage by this permit if you can answer “Yes” to all of the following questions:

- Has an ESA section 10 permit already been issued for discharges from your storm sewer system³?
- Does your ESA section 10 permit consider all currently listed species and critical habitat, and address your storm water discharges and discharge-related activities for you system?

If you answered “Yes” to the two questions above, you have met ESA eligibility Criteria C. Skip to Step 5.

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

² 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 Section 404, application for individual NPDES permit, etc.) addressed the effect of your storm water discharges and discharge related activities on listed species and critical habitat. (See 50 CFR 402.13).

³ You have a permit under section 10 of the ESA and that authorization addresses the effects of your storm water discharges and discharge-related activities on listed species and critical habitat. You must follow USFWS procedures when applying for an ESA section 10 permit (See 50 CFR 17.22(b)(1)).

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You can certify eligibility according to Criterion E for coverage by this permit if you can answer “Yes” to all of the following questions:

- Did another operator previously certify ESA eligibility for your system⁴?
- Did the other operator’s certification of eligibility consider all currently listed species and critical habitat and address your storm water discharges and discharge-related activities?
- Do you agree to implement all measures 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 system 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 system, you should provide your own independent endangered species assessment and certification.

If you answered “Yes” to all three questions above, you have met ESA eligibility Criteria E. Skip to Step 5.

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

Step Three – Determine if You Can Meet Eligibility Criterion “D”

You can certify eligibility according to Criterion D for coverage by this permit if you answer “Yes” to all of the following questions:

- Have you determined that your storm water discharges and discharge related activities are “not likely to adversely affect” listed species or critical habitat, and have you received concurrence from the appropriate Service?
- Do you agree to implement all measures upon which the determination was conditioned?

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

If you answered “Yes” to both questions above, you have met ESA eligibility Criterion D. Go to Step 5.

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 storm water discharges. (See 40 CFR 122.21).

⁴ 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 system and must address the effects from your storm water discharges and discharge-related activities on listed species and critical habitat.

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If you are unable to certify eligibility under Criterion A, B, C, or E, you must assess whether your storm water discharges and discharge-related activities are likely to adversely affect listed species or critical habitat. “Discharge-related activities” include: activities which cause, contribute to, or result in point source storm water pollutant discharges; and measures to provide treatment for storm water discharges including the siting, construction and operational procedures to control, reduce or prevent water pollution. Please be aware that no protection from incidental takings 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 appropriate office of the USFWS, NMFS, or NHESP for assistance. In order to complete the determination of effects it may be necessary to follow the consultation procedures in section 7 of the ESA (See Criterion B information above, and the FWS section 7 consultation website).

Upon completion of your assessment, document the results of your effects determination. If adverse effects are not likely, you are eligible under Criterion D. Go to Step 5 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”, you must contact the USFWS or NMFS to discuss your findings and measures you could implement to avoid, eliminate, or minimize adverse effects. If you and the Service(s) reach agreement on measures to avoid adverse effects, you are eligible under criterion “D”. 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 or NMFS on measures to avoid, eliminate or reduce adverse effects, and the likely adverse effects cannot be otherwise addressed through meeting the other criteria, then you are not eligible for coverage under this permit. You must seek coverage under an individual permit.

Effects from storm water discharges and discharge-related activities which could pose an adverse effect include:

- *Hydrological:* Storm water 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 storm water 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

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adversely affect listed species or their habitat. Storm water from the small MS4 may inundate a listed species habitat.

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

Step Four – Determine if You Can Meet Eligibility Criterion “F”

You can certify eligibility according to Criterion F for coverage by this permit if you can answer “Yes” to all the following questions:

- Does your facility discharge to one of the nine areas in Section A with federally-listed endangered species?
- Did you contact the Services and receive written concurrence that are not likely to adversely affect listed species or critical habitat?

If you answered “Yes” to both questions above, you have met ESA eligibility Criteria F. Go to step 5.

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

Step Five – Submit NOI and Document Results of the Eligibility Determination

Once the ESA eligibility requirements have been met, and you have determined National Historic Preservation Act (NHPA) eligibility (see Appendix E), you may submit the NOI. Signature and submittal of the NOI constitutes your certification, under penalty of law, of eligibility for permit coverage.

You must include documentation of ESA eligibility in the Storm Water Management Program required by the permit. Documentation for the various ESA eligibility criteria are as follows:

- Criterion A: A copy of the most current state species list pages for the state where your storm water discharges and storm sewer system are located. You must also include a statement on how you determined that no listed species or critical habitat are in proximity to your storm water system or discharges.
- Criterion B: A copy of the USFWS and/or NMFS, as appropriate, biological opinion or concurrence on a finding of “unlikely to adversely affect” regarding the ESA section 7 consultation.
- Criterion C: A copy of the USFWS and/or NMFS, as appropriate, letter transmitting the ESA section 10 authorization.
- Criterion D: A copy of the appropriate Services’ concurrence with the operator’s determination that the storm water discharges and discharge-related activities were not likely to adversely affect listed species.

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- Criterion E: A copy of the documents originally used by the other operator of your system to satisfy the documentation requirements of Criteria A, B, C, or D.
- Criterion F: A copy of the appropriate Services' concurrence that the discharge is not likely to adversely affect an endangered or threatened species.

E. 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 storm water 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.

F. United States Fish and Wildlife Service Office

National websites for Endangered Species Information:

USFWS Endangered Species home page: <http://endangered.fws.gov>

ESA Section 7 Consultations: <http://endangered.fws.gov/consultation/index.html>

U.S. Fish and Wildlife Service
New England Field Office
U.S. Fish and Wildlife Services
70 Commercial Street, Suite 300
Concord, NH 03301-5087
(603) 223-2541

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

G. National Marine Fisheries Service Office

Website: http://www.nmfs.noaa.gov/pr/species/esa_species.htm

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

Northeast Regional Office

National Marine Fisheries Service
Protected Resource Division
55 Great Republic Drive
Gloucester, MA 01930
(978) 281-9300

H. Natural Heritage Network

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

In Massachusetts, the Natural Heritage Program is part of the Massachusetts Division of Fisheries and Wildlife and can be contacted at:

Massachusetts Division of Fisheries and Wildlife
Natural Heritage & Endangered Species Program
1 Rabbit Hill Road
Westborough, MA 01581
(508) 389-6360
<http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm>