

## APPENDIX 2 ENDANGERED SPECIES ACT REVIEW AND REQUIREMENTS

### 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 the 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. All facilities seeking coverage must assess the impacts of their 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 seeking coverage must meet the ESA eligibility provisions of this permit. Facilities seeking coverage should follow the instructions in this Appendix at the earliest possible stage to ensure that the notification requirements for general permit coverage are complete upon submission.

Facilities seeking coverage 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 seeking coverage activities do not result in a prohibited taking 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 taking liability 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 taking protection, should confer with the appropriate U.S. Fish and Wildlife Service (USFWS)<sup>2</sup> office or the National Oceanic & Atmospheric Administration Fisheries Service (NOAA Fisheries), collectively referred to as "the Services".

There are four listed species of concern to facilities seeking coverage applying for permit coverage, namely the shortnose sturgeon, the dwarf wedge mussel, the bog turtle, and the northern redbelly cooter. The shortnose sturgeon is listed under the jurisdiction of NOAA Fisheries and the dwarf wedgemussel, the bog turtle, and the northern redbelly cooter are listed

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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 NOAA Fisheries instead.

under the jurisdiction of the U.S. Fish and Wildlife Service.

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. Connecticut River from Haverhill to Piermont, NH (Grafton County)
4. Ashuelot River from the Surry Mountain Flood Control Project in Surry to Swanzey, New Hampshire (Cheshire County).
5. South Branch of the Ashuelot River in East Swanzey, New Hampshire (Cheshire County).
6. Mill River from Whately to Hatfield, Massachusetts (Hampshire County).
7. Fort River in Amherst, Massachusetts (Hampshire County).
8. 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:

9. Merrimack River from the Essex Dam in Lawrence, Massachusetts to the Merrimack River's mouth (Essex County).
10. Connecticut River from Turners 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** (*Clemmys muhlenbergii*), is found in the following areas in Massachusetts:

11. bodies of water in the Towns of Egremont and Sheffield (Berkshire County), MA.

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

12. bodies of water occurring within the following boundaries: in the Towns of Kingston, Plymouth, Carver, and Middleborough (Plymouth County) MA.

All facilities seeking coverage by this general permit, including owners and operators of facilities discharging into any of the eleven identified areas where the endangered dwarf wedgemussel,

shortnose sturgeon, bog turtle, northern redbelly cooter 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. The ESA Eligibility Criteria**

A facility seeking coverage under this general permit must demonstrate that it meets one or more of the following criteria. See also ESA Section 7 Consultation Handbook posted on the USFWS website <http://www.fws.gov/northeast/endangered/>. Current species listing are also available at that site.

- Criterion A: No endangered or threatened species or critical habitats are in proximity to the point 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 NOAA Fisheries under Section 7 of the ESA has been concluded and that consultation addressed the effects of the 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 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 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: Using the best scientific and commercial data available, the effects of the discharges and discharge related activities on listed species and critical habitat have been evaluated. Based on those evaluations, a determination is made by the applicant and affirmed after review by EPA that the discharges and discharge related activity are likely to have no adverse effect on any federally threatened or endangered listed species or designated critical habitat and the Services have concurred with this finding.

Criterion E: The discharges and discharge-related activities have already been addressed in another operator's certification of eligibility, which includes the facility's activities covered under this general permit.

### **C. The Steps to Determine if the ESA Eligibility Criteria Can Be Met**

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 most current county species listing (see web site link below) and 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 Discharge Locations.*"

*If you answered "No" to the questions above, you have met ESA eligibility Criterion A. Skip to Step 4.*

*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 site or 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. For the latest county species list go to <http://www.fws.gov/northeast/endangered/>.

***Check for Critical Habitat in Your County.*** 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 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 Fish and Wildlife Service (FWS) or NOAA Fisheries office. A list of FWS and NOAA Fisheries offices for the areas of permit coverage is found in Sections E and F of this Appendix; 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 Appendix.

***Check for Proximity to Your Discharge Locations.*** You must determine whether listed species or critical habitat are in proximity to your 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.

The area in proximity to be searched/surveyed for listed species will vary with the size and location of the site, the nature and quantity of the discharges, and the type of receiving waters. You should use the methods 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 site. These methods may include:

- Conducting visual inspections. This method may be particularly suitable for sites that are smaller in size or sites located in non-natural settings such as highly urbanized areas where there is little or no natural habitat. For other sites, a visual survey may not be sufficient to determine whether listed species are in proximity.
- Contacting the nearest State Wildlife agency, USFWS, or NMFS offices. Many endangered and threatened species are found in well-defined areas or habitats. That information is frequently known by 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. Sites with extensive discharges 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 "E"**

**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 site<sup>3</sup>?
- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat and address your discharge and related activities?
- Has there been no substantial change, since that previous consultation, in:
  - (1) the nature and amount of your discharge 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 4.*

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

**Criterion C.** You are eligible for coverage by this permit under Criterion C if you can answer

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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 site or facility discharges and discharge-related activities on listed species and critical habitat. (See 50 CFR 402.13).

"Yes" to all of the following questions:

- Has an ESA Section 10 permit already been issued for discharges from your site<sup>4</sup>?
- Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your discharges and related activities at your site?
- Has there been no substantial change since that previous consultation in:
  - (1) the nature and amount of your discharge 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 4.*

*If you answered "No" to any of the three questions above, check to see if you can meet Criterion E, or Go to Step 3.*

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

- Did another site or facility operator previously certify ESA eligibility for your site or facility<sup>5</sup>?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your discharge and related activities?

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<sup>4</sup> You have a permit under section 10 of the ESA and that authorization addresses the effects of your discharges and 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)).

<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 site or facility and must address the effects from your discharges and related activities on listed species and critical habitat.

- Has there been no substantial change since that previous consultation in:
  - (1) the nature and amount of your discharge 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 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 site 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 E. 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 Criterion "D"**

**Criterion D.** You can certify eligibility, according to Criterion D, for coverage by this permit if you can answer "Yes" to all of the following questions:

- Have you determined that your site's discharges and related activities are "likely to have no adverse affect" on any listed species or critical habitat, and you have reached agreement with the appropriate Services office on the determination and/or any measures to avoid, eliminate, or minimize adverse effects?
- Do you agree to implement all measures upon which the determination was conditioned?

*If you answered "Yes" to the both questions above, you have met ESA eligibility Criterion D. 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 individual application for your discharges to EPA. (See 40 CFR Section 122.21)*

#### **Step 4. 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 National Historic Preservation Act (NHPA) eligibility (See Appendix 3), you may submit the Notice of Intent (NOI). Signature and submittal of the NOI constitutes your certification, under penalty of law, of your eligibility for permit coverage. Copies of the most current species list page by county is available at <http://www.fws.gov/northeast/endangered/>

You must include documentation of ESA eligibility with the NOI. 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 site or 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 site or facility or discharge locations.

**Criterion B:** A copy of the USFWS's and/or NMFS's, 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's and/or the NMFS's, as appropriate, letter transmitting the ESA Section 10 authorization.

**Criterion D:** Documentation of how you determined adverse effects on listed endangered or threatened species and critical habitat were unlikely and that the USFWS and/or NMFS, as appropriate, have concurred with this finding.

**Criterion E:** A copy of the documents originally used by the other operator of your site or facility (or area including your site) to satisfy the documentation requirement of Criteria A, B, C or D.

#### **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 discharges and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. If the ESA eligibility requirements of the permit cannot be met, then you may not be covered under this permit and must apply for an individual permit.

## **E. U.S. Fish and Wildlife Service Website and Office Information**

### National Websites for Endangered Species Information

Endangered Species Homepage:

<http://www.fws.gov/northeast/endangered/>

### Mailing Address

Supervisor, U.S. FWS Region 5  
New England Field Office  
US Fish and Wildlife Service  
70 Commercial St., Suite 300  
Concord, NH 03301

## **F. NOAA Fisheries Service Website and Office Information**

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

### Mailing Address:

NOAA 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 Bureau  
Department of Resources & Economic Development  
172 Pembroke Street, P.O. Box 1856  
Concord, NH 03302-1856  
603/271-3623

#### **H. Endangered Species Act – County Species List**

Attached is the US Fish and Wildlife Service (USF&W) listing of federally endangered and threatened species for counties in Massachusetts and New Hampshire. If you are located close to the border of a county or your site is located in one county and your discharge points are located in another, you must look under both counties. The New Hampshire and Massachusetts lists were updated on 9/27/2007. Species listed below with a status of both endangered (E) and threatened (T) are generally either endangered or threatened within the specified county. Designation of critical habitat (CH) does not mean that the county constitutes critical habitat, only that CH has been designated for that species.

Please note that species are listed and de-listed periodically. To get the most current list at the time you are conducting your endangered species assessment, see the USF&W Endangered Species Home Page at <http://www.fws.gov/northeast/endangered/>.

**FEDERALLY LISTED ENDANGERED AND THREATENED SPECIES  
IN MASSACHUSETTS**

Only Plymouth County has federally-designated Critical Habitat in Massachusetts. The following are federally-listed species by county:

Common Name	Species	Status	County/General Distribution
Shortnose sturgeon <sup>1</sup>	<i>Acipenser brevirostrum</i>	E	Atlantic coastal waters and Connecticut and Merrimack Rivers
Eastern cougar	<i>Felis concolor cougar</i>	E	Entire state/historic
Indiana bat	<i>Myotis sodalis</i>	E	Berkshire/historic
Bald eagle	<i>Haliaeetus leucocephalus</i>	D <sup>2</sup>	Barnstable, Berkshire, Essex, Franklin, Hampden, Hampshire, Plymouth, Worcester
Piping plover	<i>Charadrius melodus</i>	T	<b>Nesting:</b> Barnstable, Essex, Plymouth, Dukes, Nantucket, Bristol (coastal beaches only) <b>Migratory:</b> Atlantic Coast
Roseate tern	<i>Sterna dougallii dougallii</i>	E	<b>Nesting:</b> Barnstable, Plymouth, Dukes (coastal islands) <b>Migratory:</b> Atlantic Coast
Bog turtle	<i>Clemmys muhlenbergii</i>	T	Berkshire
Dwarf wedgemussel	<i>Alasmodonta heterodon</i>	E	Hampshire, Franklin (Connecticut River watershed)
Puritan tiger beetle	<i>Cicindela puritana</i>	T	Hampshire (Connecticut River floodplain)
Northeastern beach tiger beetle	<i>Cicindela dorsalis dorsalis</i>	T	Barnstable, Duke (coastal beaches only)
American burying beetle	<i>Nicrophorus americanus</i>	E	Dukes, Nantucket (Penikese & Nantucket Isl.) reintroduced populations
Small whorled pogonia	<i>Isotria medeoloides</i>	T	Hampshire, Essex, Hampden, Worcester, Middlesex
Sandplain gerardia	<i>Agalinus acuta</i>	E	Barnstable, Duke
Northeastern bulrush	<i>Scirpus ancistrochaetus</i>	E	Franklin

<sup>1</sup> Principal responsibility for this species is vested with the National Marine Fisheries Service.

<sup>2</sup> Delisted. Protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

**FEDERALLY LISTED ENDANGERED AND THREATENED SPECIES**  
**IN NEW HAMPSHIRE**

There is no federally-designated Critical Habitat in New Hampshire. The following are federally-listed species by county:

Common Name	Species	Status	County/General Distribution
Shortnose sturgeon <sup>1</sup>	<i>Acipenser brevirostrum</i>	E	Atlantic coastal waters
Bald eagle	<i>Haliaeetus leucocephalus</i>	D <sup>2</sup>	<b>Nesting:</b> Belknap, Coos, Merrimack, Cheshire, Sullivan, Strafford <b>Migratory/ wintering:</b> entire state
Piping plover	<i>Charadrius melodus</i>	T	<b>Nesting:</b> Rockingham (coastal beaches)
Roseate tern	<i>Sterna dougallii dougallii</i>	E	<b>Nesting:</b> Isles of Shoals <b>Migratory:</b> Atlantic Coast
Canada lynx	<i>Lynx canadensis</i>	T	Coos
Eastern cougar	<i>Felis concolor cougar</i>	E	Entire state/historic
Gray wolf	<i>Canis lupus</i>	E	Historic
Dwarf wedgemussel	<i>Alasmidonta heterodon</i>	E	Cheshire (S. Branch Ashuelot, Ashuelot River) Sullivan (Connecticut River main stem), Grafton (Connecticut River main stem), Coos (Connecticut River main stem, Johns River)
Puritan tiger beetle	<i>Cicindela puritana</i>	T	Extirpated (Connecticut River floodplain)
Karner blue butterfly	<i>Lycæides melissa samuelis</i>	E	Merrimack (Concord, Pembroke)
Jesup's milk-vetch,	<i>Astragalus robbinsii var. jesupi</i>	E	Sullivan (Plainfield, Charlestown)
Small whorled pogonia	<i>Isotria medeoloides</i>	T	Belknap, Strafford, Grafton, Merrimack, Rockingham, Carroll, Hillsborough
Northeastern bulrush	<i>Scirpus ancistrochaetus</i>	E	Sullivan

<sup>1</sup> Principal responsibility for this species is vested with the National Marine Fisheries Service.

<sup>2</sup> Delisted. Protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.