

ESA Eligibility Worksheet for the EPA 2021 Pesticide General Permit: Endangered Species Procedures for Decision-Makers

Introduction

The Eligibility Criterion Selection Worksheet below may be helpful in selecting and documenting your eligibility criteria with respect to the protection of Federally listed threatened and endangered species and Federally designated “critical habitat” under the Endangered Species Act (ESA) from discharges and discharge-related activities authorized under 2021 Pesticide General Permit (PGP). This is important because Section 9 of the ESA prohibits take (e.g., harm or harassment) of ESA-listed fish and wildlife species unless the take is authorized or exempt under the ESA.

The criteria are based on National Marine Fisheries Service (NMFS) Listed Resources of Concern as provided at <https://www.epa.gov/npdes/pesticide-permitting-ESA-procedures>. While coordination with NMFS is not necessarily required in all cases, EPA encourages you to coordinate with NMFS, to document that coordination, and to do so early in the planning process prior to submitting your Notice of Intent (NOI).

Please note that your activities may also overlap with Federally listed threatened and endangered species and Federally designated critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service (FWS). To determine if any of these ESA-protected resources are within areas that may be affected by your discharges or discharge-related activities, see Information for Planning and Consultation (IPaC) at <https://ipac.ecosphere.fws.gov/>. If your activities may affect any ESA-protected resources under FWS jurisdiction, please contact the appropriate FWS office (as provided in IPaC based on your action area) for technical assistance. PGP activities must be in compliance with the ESA in order to be eligible for coverage.

Contents

1. Assessing the Effects of Your Discharge and Discharge-Related Activities	2
2. Eligibility Criterion Selection Worksheet Instructions	2
3. Eligibility Criterion Selection Worksheet	2
STEP 1: DETERMINE IF NMFS LISTED RESOURCES OF CONCERN ARE PRESENT IN THE PEST MANAGEMENT AREA.....	2
STEP 2: DETERMINE IF A PREVIOUS ESA-RELATED ACTION HAS ALREADY BEEN COMPLETED FOR YOUR ACTIVITIES.....	4
STEP 3: DETERMINE IF THE PESTICIDE APPLICATION IS IN RESPONSE TO A DECLARED PEST EMERGENCY SITUATION.....	5
STEP 4: DETERMINE IF THE PESTICIDE APPLICATION IS NOT LIKELY TO RESULT IN ANY SHORT OR LONG TERM ADVERSE EFFECTS TO NMFS LISTED RESOURCES OF CONCERN.....	6

1. Assessing the Effects of Your Discharge and Discharge-Related Activities

You must meet at least one of the criteria (i.e., criterion A-F) in Part 1.1.2.4 of the PGP to be eligible for coverage under this permit. You must follow the procedures below to certify eligibility to discharge to waters of the United States containing any NMFS Listed Resources of Concern as defined in Appendix A of the PGP. You must follow the procedures in this appendix to determine under which of the eligibility criteria, if any, you qualify. NMFS Listed Resources of Concern for the PGP are provided at <https://www.epa.gov/npdes/pesticide-permitting-ESA-procedures>.

When evaluating the potential effects of your activities, you must consider effects to NMFS Listed Resources of Concern within each pest management area identified in your Notice of Intent (NOI) that contains such Resources. Discharges not meeting at least one of these criteria are not eligible for coverage under this permit. No discharges to waters of the United States containing NMFS Listed Resources of Concern are eligible for coverage under the PGP unless those discharges are specifically identified and certified on a complete and accurate NOI form submitted to EPA. These discharges will be authorized 30 days after EPA posts the NOI on the Internet at <https://www.epa.gov/npdes/pesticide-permitting> unless EPA notifies you otherwise within the 30-day period or unless the discharges are in response to a Declared Pest Emergency Situation, in which case the discharges are authorized immediately for a period of at least 60 days from the date this discharge began.

2. Eligibility Criterion Selection Worksheet Instructions

Follow the step-by-step instructions within the worksheet to determine your eligibility under Part 1.1.2.4 of the PGP. The worksheet requires that you answer questions in a sequential order so that you can select the correct eligibility criterion. Keep a copy of this completed worksheet to support your eligibility determination and if applicable, submit it with your NOI. See Part 1.1.2.4 of the PGP for a list of the six eligibility criteria (A-F).

3. Eligibility Criterion Selection Worksheet

STEP 1: *DETERMINE* IF NMFS LISTED RESOURCES OF CONCERN ARE PRESENT IN THE PEST MANAGEMENT AREA

First, you must determine whether any discharges from your pesticide application activities in any pest management areas are likely to overlap directly with any NMFS Listed Resources of Concern, as identified at <https://www.epa.gov/npdes/pesticide-permitting-ESA-procedures>. The website provides maps where the NMFS Listed Resources of Concern (use the NOAA species maps) are present and contact information for regional NMFS offices in those areas.

Step 1: Determine if NMFS Listed Resources of Concern are Present in the Pest Management Area

- I have confirmed there are NMFS Listed Resources of Concern in my Pest Management Area. **Read Step 1.A. below and proceed to Step 2.**
 - NMFS Listed Resources of Concern.
- I have confirmed there are **no** NMFS Listed Resources of Concern in my Pest Management Area. **Read Step 1.B. below. You are done with this worksheet.**

STEP 1.A. If you determine that any of your discharges are to waters of the United States containing NMFS Listed Resources of Concern, you should note the list of pesticides below and proceed to Step 2.

If your Pest Management Area overlaps with waters where NMFS' Listed Resources of Concern occur and you expect to discharge residues from the application of pesticides or those pesticides that a NMFS' biological opinion has determined the labeled use would jeopardize the continued existence of ESA-listed species and/or adversely modify designated critical habitat, it is in your best interest to contact your regional NMFS office or the Office of Protected Resources in Silver Spring, Maryland and request "technical assistance on potential pesticide applications from an ESA section 7 biologist." As of October 2023, these pesticides include:

2,4-D
Carbaryl
Chlorothalonil
Diflubenzuron
Diuron
Fenbutatin Oxide
Naled
Oryzalin
Pendimethalin
Propargite

Check the Pesticide Permitting [ESA Procedures webpage](#) for the most up to date list of pesticides that a NMFS' biological opinion has determined the labeled use would jeopardize the continued existence of ESA-listed species and/or adversely modify designated critical habitat.

STEP 1.B. If you determine that no discharges from your pesticide application activities are to waters of the United States containing NMFS Listed Resources of Concern, you can certify that the activity meets Criterion A (select Criterion A under the Endangered Species Protection section of the NOI and submit the supporting documentation with the NOI). In this case, you do not have to further consider any requirements related to eligibility criteria B-F. Note that if you are not otherwise required to submit an NOI, you do not need to submit an NOI merely to

document that you meet eligibility Criterion A. However, if you are required to submit an NOI anyway, you should document on the NOI that you meet eligibility Criterion A.

STEP 2: DETERMINE IF A PREVIOUS ESA-RELATED ACTION HAS ALREADY BEEN COMPLETED FOR YOUR ACTIVITIES

For each discharge to waters of the United States containing NMFS Listed Resources of Concern, Decision-makers should determine whether they are eligible under either Criterion B or C because of a previously completed ESA Section 7 consultation, or a previously issued ESA Section 10 permit, respectively as follows:

- The effects of your activities have been addressed in a consultation under ESA Section 7 on a separate Federal action and the consultation resulted in a concurrence by NMFS that the discharge was not likely to adversely impact listed species or critical habitat or NMFS concluded in a biological opinion that the discharge or discharges were not likely to jeopardize listed species or destroy or adversely modify critical habitat, either as part of your activities as planned or as modified with a reasonable and prudent alternative (check box B corresponding to Criterion B and submit the supporting documentation with the NOI). For example, most federal agencies that apply pesticides have already consulted with NMFS, as required under 50 C.F.R. § 402.01(a), and can therefore certify under this criterion.
- The effects of your activities have been addressed through approval of a Habitat Conservation Plan under Section 10 of the ESA (check box C corresponding to Criterion C and submit the supporting documentation with the NOI). Your pesticide discharges may be authorized by this PGP if some activity is authorized through the issuance of a permit under Section 10 of the ESA and that authorization addressed the effects of your pesticide discharges on federally-listed species and designated critical habitat. You must follow NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR 222.22). Application instructions for Section 10 permits for NMFS can be obtained by accessing the NMFS website (www.nmfs.noaa.gov) or by contacting the appropriate NMFS regional office.

If you believe an existing ESA-related action may have already been completed for your planned pesticide application activities but you are uncertain of the details, you should contact your regional NMFS office (contact information available at <https://www.epa.gov/npdes/pesticide-permitting-ESA-procedures>).

Step 2: Determine if a Previous ESA-Related Action has Already been Completed for your Activities

- I have confirmed in Step 1 there are NMFS Listed Resources of Concern in my Pest Management Area. I do not have a previously completed ESA Section 7 consultation or a previously issued ESA Section 10 permit for my activities. **Proceed to Step 3.**
- I have confirmed in Step 1 there are NMFS Listed Resources of Concern in my Pest Management Area. I do have a previously completed ESA Section 7 consultation or a previously issued ESA Section 10 permit. **Select either Criterion B or C on your NOI. You are done with this worksheet.**
 - Criterion B, previously completed ESA Section 7 consultation
 - Criterion C, previously issued Section 10 permit

STEP 3: DETERMINE IF THE PESTICIDE APPLICATION IS IN RESPONSE TO A DECLARED PEST EMERGENCY SITUATION

Determine if all the discharges to waters of the United States containing NMFS Listed Resources of Concern and that are to be included in the NOI are being performed in response to a Declared Pest Emergency Situation as defined in Appendix A of the PGP (check box D corresponding to Criterion D). In such a case, an NOI must be filed no later than 15 days after beginning to discharge with that NOI identifying:

1. The location of the pest management area in detail or include a map of the location;
2. Pest(s) to be controlled;
3. Pesticide product(s) to be discharged and method of application;
4. Planned quantity and rate of discharge(s) for each method of application;
5. Number of planned discharges;
6. Approximate date(s) of planned discharge(s); and
7. The rationale supporting the determination whether the discharge is likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern, including the description of appropriate measures to be undertaken to avoid or eliminate the likelihood of any short or long term adverse effects.

Information provided for items 1 through 6 above must also include any discharges that have already occurred in the days (up to 15) prior to NOI submission. The discharge or discharges to address these Declared Pest Emergency Situations are authorized under the general permit for at least 60 days after beginning to discharge. You may continue to discharge after 60 days unless EPA advises the Operator that additional conditions or an individual permit are necessary. NMFS will, within 30 days of submission of the NOI, advise EPA whether the past and planned future discharges meet the eligibility criterion of not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern; whether the eligibility criterion could be met with additional conditions; or whether the eligibility criterion is not met. EPA will advise the

Decision-maker within 15 days after receiving notification from NMFS whether the discharge or discharges qualify for coverage beyond the 60-day authorization provided under the permit. If EPA identifies additional conditions to qualify discharges as eligible for coverage beyond 60 days under the permit, those conditions remain in effect for the life of the permit. EPA expects to rely on NMFS' determination in identifying eligibility for continuing authorization, either with or without additional conditions. If you do not hear from EPA within 45 days of submitting your NOI, you may assume that your authorization to discharge continues unless and until notified otherwise by EPA.

Step 3: Determine if the Pesticide Application is in Response to a Declared Pest Emergency Situation

- I have confirmed in Step 1 there are NMFS Listed Resources of Concern in my Pest Management Area. My pesticide application is not in response to a Declared Pest Emergency Situation. **Proceed to Step 4.**
- I have confirmed in Step 1 there are NMFS Listed Resources of Concern in my Pest Management Area. My pesticide application is in response to a Declared Pest Emergency Situation. **Select Criterion D on your NOI. You are done with this worksheet.**

STEP 4: DETERMINE IF THE PESTICIDE APPLICATION IS NOT LIKELY TO RESULT IN ANY SHORT OR LONG TERM ADVERSE EFFECTS TO NMFS LISTED RESOURCES OF CONCERN

The PGP provides two options for Decision-makers to demonstrate that discharges from pesticide applications to waters of the United States containing NMFS Listed Resources of Concern are not likely to result in any short or long term adverse effects to those resources for the activities for which the Decision-maker is seeking permit coverage. These options include: (1) obtaining confirmation from a NMFS Regional Office prior to NOI submission that discharges are not likely to adversely affect NMFS Listed Resources of Concern, or (2) self-certifying in the NOI that based on your analysis, you have concluded that discharges are not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern. Descriptions of procedures that are to be followed for these two options are described below.

- Option 1 (Criterion E): For each pest management area that will include discharges to waters of the United States containing NMFS Listed Resources of Concern, you may contact your Regional NMFS Office and request input regarding your planned discharges. If NMFS determines that your planned discharges are found to meet eligibility criteria for use (*i.e.*, not result in any short or long term adverse effects to NMFS Listed Resources of Concern), you have satisfied your eligibility obligations under Criterion E and you may submit your NOI for coverage under the PGP (check box E corresponding to Criterion E and submit the supporting documentation with the NOI). As part of certifying your compliance with Criterion E, you must submit information received from NMFS acknowledging the discharges that they have determined are not

likely to adversely affect NMFS Listed Resources of Concern and establishing any additional requirements for your permit eligibility. To maintain eligibility under the permit for those discharges, you must abide by those additional requirements for the duration of your coverage under the PGP.

- Option 2 (Criterion F): You must self-certify in your NOI that your discharge is not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern. To do so, you will have to take appropriate measures to avoid or eliminate the likelihood of any short or long term adverse effects prior to applying for PGP coverage. These measures may be relatively simple, such as applying pesticides to waters at concentrations below those found to cause adverse effects, or during seasons when species of concern are not present. Provided you are able to implement appropriate measures, you may proceed with submitting your NOI for coverage under the PGP (check box F corresponding to Criterion F). As part of certifying your compliance with Criterion F, you must submit information to support your findings, including:
 1. The location of the pest management area in detail or include a map of the location;
 2. Pest(s) to be controlled;
 3. Pesticide product(s) to be discharged and method of application;
 4. Planned quantity and rate of discharge(s) for each method of application;
 5. Number of planned discharges;
 6. Approximate date(s) of planned discharge(s); and
 7. The rationale supporting the determination that the criterion for which the NOI is submitted is being met, including the description of appropriate measures to be undertaken to avoid or eliminate the likelihood of any short or long term adverse effects to NMFS Listed Resources of Concern.

This information will be posted online and also will be sent to NMFS for their review.

NMFS will, within 30 days of submission of the NOI, advise EPA whether it believes the planned discharges meet the eligibility criteria of not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern, whether the eligibility criterion could be met with additional conditions; or whether the eligibility criterion is not met. EPA will advise the Decision-maker as to whether the intended discharges qualify to proceed under the General Permit or whether an individual permit will be required. EPA expects to rely on NMFS' determination in identifying eligibility for authorization, either with or without additional conditions. If you do not hear from EPA within 30 days, you may assume that your discharge is authorized without further conditions.

You must comply with any terms and conditions imposed under the eligibility requirements to ensure that your pesticide discharges and discharge-related activities are protective of listed species and/or critical habitat. If the eligibility requirements cannot be met and maintained, then you are not eligible for coverage under this PGP. In these instances, you may consider applying to EPA for an individual permit or revising your pesticide application activities so as to comply with these eligibility conditions and resubmitting an NOI to EPA that documents this revised eligibility.

Step 4: Determine if the Pesticide Application is not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern

I have confirmed in Step 1 there are NMFS Listed Resources of Concern in my Pest Management Area. I have read above and can select either Criterion E or F for my Pest Management Area.

Criterion E, I have obtained confirmation from a NMFS Regional Office that discharges are not likely to adversely affect NMFS Listed Resources of Concern. **Select Criterion E on your NOI. You are done with this worksheet.**

Criterion F, I can self-certify in the NOI that based on my analysis, I have concluded that discharges are not likely to result in any short or long term adverse effects to NMFS Listed Resources of Concern. **Select Criterion F on your NOI. You are done with this worksheet.**