

Appendix B Complying with the Endangered Species Act

Assessing the Effects of The Permittee's Discharge and Discharge-Related Activities

Coverage under the DWGP is available only if the Permittee's wastewater discharge and related activities are determined to have "no effect" or to "may affect, but not likely to adversely affect" federally listed endangered or threatened species ("listed species") or habitat that is federally designated as "critical" under the ESA. This appendix outlines the process to assess the potential effects of wastewater discharges and related activities on listed species and their critical habitat, and to determine which of the eligibility criteria for coverage, if any, the Permittee qualifies under. The Permittee shall select the appropriate criterion on the NOI prior to NOI submission. In accordance with section 5.7 of the DWGP, the Permittee must keep documentation of records to support the Permittee's determination of eligibility under section 1.3.6 of the DWGP, including the process employed and results of the endangered species investigation.

If the Permittee is seeking coverage under the DWGP, the Permittee must complete this analysis using any data collected when the Permittee's site was fully active, even if the Permittee is not discharging. If no such data exist for the Permittee's facility, the Permittee should utilize the best available information from any facility expected to discharge substantially similar effluents. The Permittee should contact the EPA if the Permittee needs assistance in obtaining data from a facility with a substantially similar effluent.

When evaluating the potential effects of the Permittee's activities, the Permittee must consider effects to listed species or critical habitats within the "action area." Action area is defined as all areas affected directly or indirectly by the wastewater activities, and not merely the immediate area involved in these discharges and activities. This includes areas beyond the footprint of the facility that are likely to be affected by planned or unplanned lagoon discharges, and discharge-related activities.

Eligibility Criteria

As required by section 1.3.3, the Facility must meet one or more of the following six criteria (A-F) to be eligible for coverage under the DWGP for the Permittee's wastewater discharge and discharge-related activities. **The FWS IPaC site (<https://ecos.fws.gov/ipac/>) must be used to determine the likely presence of federally-listed species or designated critical habitat.**

Criterion A. No federally-listed threatened or endangered species or their designated critical habitat are likely to occur in the "action area". In order to be eligible for coverage under Criterion A, the applicant must confirm there are no federally-listed species nor designated critical habitat in the facility's action area. An explanation of the basis for selecting this criterion and supporting documentation identifying the FWS information sources (including the FWS IPaC site) must be submitted with the NOI and retained with the Permittee's records.

Criterion B. Consultation between a Federal agency and the FWS under section 7(a)(2) of the ESA has been concluded. The consultation may be either formal or informal and would have occurred only as a result of a separate federal action (e.g., during application for an individual wastewater discharge permit or the issuance of a wetlands dredge and fill permit). Consultation must have addressed the potential effects of the facility's wastewater discharge and related activities on all federally-listed threatened or endangered species or all federally designated critical habitat in the facility action area. The result of this consultation must be either:

- i) An FWS biological opinion that concludes that the action in question (taking into account the effects of the Facility's discharges and related activities) is not likely to jeopardize the continued existence of federally-listed species, nor the destruction or adverse modification of designated critical habitat.

- ii) Written concurrence from the FWS with the federal agency's finding that its action (including the facility's wastewater discharge and related activities) is not likely to adversely affect federally-listed species or designated critical habitat.

The Permittee must verify that the consultation remains valid, in accordance with 50 CFR § 402.15. If re-initiation of consultation is required, the Permittee must conclude the reinitiated consultation and the result must be consistent with (i) or (ii) above.

Documents retained to support this criterion shall include identification of the federal agency(ies) and its action, the FWS office involved in the consultation, any identifiers or tracking information for the process, the date consultation was completed and federal agency's biological evaluation or assessment and the FWS biological opinion or concurrence letter.

Criterion C. The Permittee's activities are authorized through the issuance of a permit under section 10 of the ESA, and authorization addresses the effects of the wastewater discharge on federally-listed species and federally-designated critical habitat. The Permittee must keep documentation with the DWGP, including a copy of the FWS issued permit.

In order to be eligible for coverage under Criterion C, the applicant must confirm that the following is true:

- A permit has been issued under section 10 of the ESA. The permit authorization specifically addresses the effects of the facility's wastewater discharges and related activities on all federally-listed species or designated critical habitat in the facility's action area.

Documentation retained to support this criterion shall include information on the FWS office that provided the permit, any tracking numbers or identifiers (e.g., IPaC number, ECO number) and a copy of the permit from the FWS.

Criterion D. Federally-listed species or their designated critical habitat(s) are likely to occur in or near the facility's "action area". Wastewater discharges and related activities **are not** likely to adversely affect listed species or their designated critical habitat.

To be eligible for DWGP coverage under Criterion D, the applicant must demonstrate that the facility's wastewater discharge and wastewater management related activities are not likely to adversely affect federally-listed species and designated critical habitat that may occur in the facility's action area. To arrive at this conclusion, the applicant must maintain documentation to conclude that at least one of the following is true:

- Listed species or critical habitat are not likely to be exposed to the effects of the facility's activities; or
- If they may be exposed, the facility's activities are not likely to adversely affect the listed species or result in the destruction or adverse modification of designated critical habitat.

The permittee must follow the assessment procedures in this Appendix: Summary of Steps to Assist in the Determination of ESA Eligibility. The permittee must provide the following information to the EPA with the completed NOI form:

- i. If the facility is an **EXISTING DICHARGER**, the following must be submitted:
- An updated list of the federally-listed species and any designated critical habitat that are likely to occur in the “action area” based on the most current FWS IPaC and other informational resources;
 - A list of the pollutant parameters for which the facility has ever exceeded any applicable permitted effluent limitations, or for which the facility has ever been found to have caused or contributed to an exceedance of any applicable water quality standard or to have violated a Tribal water quality requirement; AND
 - If the facility was eligible under this criterion for the previous EPA Region 8 DWGP, documentation as noted in either option 1 or 2 (below) shall be submitted based on the facility’s circumstance at the time of the NOI submission:
 - If there is **NO CHANGE** to the:
 - action area;
 - federally-listed species/ designated critical habitat; and
 - potential effects from the discharge and related activities to such species or critical habitat; then

The applicant must submit all of the following:

- A rationale supporting the facility’s determination that it qualifies under Criterion D;
 - documentation confirming that there has been no change in the facility’s action area and, based on the current FWS IPaC or other informational resources, there are no additional FWS-listed species, designated critical habitat listed by FWS or other new information relevant to potential effects on such species or critical habitat;
 - A map, or other description, showing the approximate distance (in miles) between the facility’s discharge(s) and federally-listed species or designated critical habitat; and
 - a description of measure(s) the facility will implement, or continue to implement, to ensure no likely adverse effects on federally-listed species or critical habitat. (e.g. appropriate practices/measures to avoid or eliminate the likelihood of adverse effects).
2. If there **HAVE BEEN CHANGES** in:
- Action area;
 - Federally-listed species;
 - Designated critical habitat; and/or

- Effects from the discharge and related activities to Federally-listed species or critical habitat; then

The Permittee must submit:

- a. a rationale supporting the facility's determination that it qualifies under Criterion E;
 - b. a description of the changes in the facility's action area, FWS designated critical habitat, or additional federally-listed species (as applicable);
 - c. A map, or other description, showing the approximate distance (in miles) between the facility's discharge(s) and federally-listed species or designated critical habitat.
 - d. A description of measure(s) the facility will implement, or continue to implement, to ensure that likely adverse effects on federally-listed species or critical habitat. (e.g. appropriate practices/measures to avoid or eliminate the likelihood of adverse effects).
- ii. If the facility is a **NEW DISCHARGER**, the following shall be submitted:
- a. a list of the federally-listed threatened or endangered species or their designated critical habitat that are likely to occur in the "action area" based on the most current FWS IPaC and other informational resources;
 - b. a list of the potential pollutants in the facility's discharge; AND
 - c. if any ESA-listed species or designated critical habitat are likely to occur in the action area, but the facility's discharges are not likely to adversely affect them, the applicant shall also submit:
 - The rationale supporting the determination that the facility qualifies under Criterion E;
 - A map, or other description, showing the approximate distance (in miles) between the facility's discharge(s) and federally-listed species or designated critical habitat; and
 - A description of measure(s) the facility will implement, or continue to implement, to ensure no likely adverse effects on federally-listed species or critical habitat. (e.g. appropriate practices/measures to avoid or eliminate the likelihood of adverse effects).

After evaluation of the determination, EPA may require additional controls that the Permittee must implement to avoid or eliminate potential adverse effects on federally-listed species or designated critical habitat from wastewater discharges and related activities.

The Permittee must retain relevant documentation with the DWGP, in accordance with section 5.7 Retention of Records of the DWGP, supporting the claim for Criterion E.

If analysis reveals that the wastewater discharge and its related activities **are** likely to adversely affect federally-listed species and/or designated critical habitat; **and/or the facility cannot devise measures to implement to avoid** the likelihood of adverse effects, **the Permittee cannot submit an NOI for coverage under the DWGP and must apply for an individual permit.**

Criterion E. The Facility's wastewater discharges and related activities were already addressed in another operator's valid certification of eligibility for the Facility's "action area" under one of the other criteria described in this Appendix (i.e. criteria A, B, C or D) and the permittee has confirmed using IPAC that no additional federally-listed species or designated critical habitat may be present or located in the "action area".

In order to be eligible for coverage under Criterion E, the applicant must confirm the following are true:

- There has been no lapse of NPDES permit coverage in the other operator's certification.
- The other operator's certificate of eligibility accounted for the facility's action area, discharges and related activities, and that the eligibility determination was valid.
 - If the certification is based on another operator's certification under Criterion E, that certification is valid only if the applicant has documentation showing that the other operator had certified under Criterion E, and the applicant provides EPA with the relevant supporting information required of dischargers in Criterion E in the NOI form.

If certifying under Criterion E, the facility must:

- Document what certification was relied upon and comply with any measures or controls upon which the other operator's certification was based to ensure that wastewater discharges and discharge-related activities are protective of federally-listed species or designated critical habitat;
- Comply with all terms and conditions imposed under the other operator's valid certification of eligibility, and those terms and conditions are listed in the NOI and maintained with the DWGP file; and
- Retain relevant documentation with the Permit that supported the other operator's eligibility determination, as well as any terms and conditions imposed under the eligibility requirements that applied under the prior certification, and documentation confirming that there are no additional federally-listed species or designated critical habitat since the prior certification.

If the applicant has complied with all of the above listed requirements, the applicant may select Criterion E on the NOI.

Summary of Steps to Assist in the Determination of ESA Eligibility:

The following section provides a summary of step-by-step instructions to determine eligibility under the criteria described above.

Step One: *Determine if the Eligibility Requirements of Criterion B, C, or E can be met.*

The applicant should first determine whether the facility is eligible under Criterion B, C, or E because of a previously completed ESA section 7(a)(2) consultation, a previously issued ESA section 10 permit, or because the facility's activities were already addressed in another discharger's certification of eligibility. If the facility is not likely to be eligible under Criterion B, C, or E, proceed directly to Step 2.

Step Two: *Determine if Listed Threatened or Endangered Species or Critical Habitat are Present in the Action Area.*

Next, the applicant should determine whether federally-listed species or designated critical habitat are likely to occur in the facility's action area. The applicant can do this by obtaining a list of federally-listed species that are likely to occur in facility's general area, including the appropriate receiving water for the facility's discharges.

The FWS IPaC site (<https://ecos.fws.gov/ipac/>) must be used when determining the likely presence of federally-listed species or designated critical habitat. EPA encourages applicants to contact the FWS directly for assistance. If there are federally-listed species in the facility's county or township, the applicant must determine, as best they are able, whether any of the species are likely to occur in the facility's action area (using the appropriate FWS offices or Tribal Heritage Centers, as necessary). General species information can be found at: www.fws.gov/endangered/.

The applicant must also check to see if critical habitat has been designated and whether such areas overlap the facility's action area. Critical habitat should be listed on the species list for the facility's county or township, available from the appropriate FWS office. The applicant can also find critical habitat designations at 50 CFR §§ 17 and 226 and at <http://ecos.fws.gov/crithab/>.

Based on the assessment above utilizing the website tools and any coordination with the FWS:

- if the applicant confirms that there are **no federally-listed species nor designated critical habitat** in the facility's action area, the applicant **may select Criterion A** on the NOI; or
- if the applicant determines that federally-listed species or designated critical habitat **may be present** in the action area, the applicant will need to evaluate whether the facility's discharges have the potential to affect such species or critical habitat. **Proceed to Step Three.**

Step Three: *Determine if Activities Are Not Likely to Adversely Affect Listed Threatened or Endangered Species or Designated Critical Habitat*

To apply for DWGP coverage, the applicant must analyze the effects of facility's activities, which may include not only the facility's wastewater discharge, but also any construction, operation, maintenance, and other activities related to wastewater management. The applicant must assess whether the wastewater discharge and associated activities are likely to adversely affect federally-listed species and/or designated critical habitat.

Construction, operation, and maintenance related to the facility's wastewater discharge can potentially result in adverse hydrological, habitat and toxicity effects. The scope of effects to consider will vary with each site. If the applicant has difficulty determining whether the facility is likely to adversely affect listed species or

designated critical habitat, or the FWS has already raised concerns to the facility, the applicant must contact the appropriate office of the FWS for assistance. Some potential effects include, but are not limited to:

- Wastewater discharges that may adversely affect receiving waters from parameters such as temperature, salinity, pH, or other pollutant parameters. These effects will vary with the amount of wastewater discharged and the volume and condition of the receiving water. Where a wastewater discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- Outdoor activities, such as storage of materials, maintenance and land disturbances associated with construction or wastewater management-related activities, may adversely affect receiving waters, federally-listed species or designated critical habitat.
- Pollutants in wastewater discharges and lagoon systems (e.g. waste stabilization ponds) may have adverse or toxic effects on federally-listed species or adversely affect critical habitat. Exceedances of effluent limitations, or Tribal water quality requirements may be indicative of potential adverse effects on federally-listed species or critical habitat.

Step Four: *Determine if the Eligibility Requirements of Criterion E can be met.*

Based on the assessment performed in Step Three:

- if adverse effects to federally-listed species or designated critical habitat are **not likely**, then the applicant **may select eligibility Criterion E** on the NOI form; or
- if the applicant **cannot** yet conclude the facility's wastewater discharge is **not likely** to adversely affect federally-listed species or designated critical habitat, or if the applicant concludes that the facility's **wastewater discharge could potentially** adversely affect listed species or critical habitat, **proceed to Step Five.**

Step Five: *Determine if Measures Can Be Implemented to Avoid Adverse Effects or if Further Analysis Supports the Conclusion that Adverse Effects Are Not Likely.*

If the facility could not make a preliminary determination in Steps Three and Four that adverse effects to listed species and/or critical habitat are not likely to occur, the facility can still receive coverage under Criterion E if appropriate measures are undertaken to avoid or eliminate the likelihood of adverse effects prior to applying for DWGP coverage (e.g., re-routing a wastewater discharge to avoid an area where federally-listed species and/or designated critical habitat are located, etc.).

- If the facility **is able** to install and implement appropriate measures to avoid the likelihood of adverse effects, the **applicant may submit the facility's NOI for coverage under the DWGP and the measures the facility adopts to avoid or eliminate adverse effects must be implemented.**
- If the facility **cannot** devise measures to implement to avoid the likelihood of adverse effects, the permittee **may not** submit an NOI for coverage under the DWGP and **should submit an individual NPDES permit application to EPA.**