

Appendix C

Endangered Species Act Guidance Review Procedure

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 stormwater discharges and discharge-related activities on federally listed endangered and threatened species (“listed species”) and designated critical habitat (“critical habitat”) to ensure that those goals are met. Prior to obtaining general permit coverage, applicants must meet the ESA eligibility provisions of this permit. 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, the applicant 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 federal agency, either the United States Fish and Wildlife Service (USFWS)² office or the National Marine Fisheries Service (NMFS), (jointly, “the Services”).

ESA Eligibility Process

Before submitting a notice of intent (NOI) for coverage by this permit, applicants must determine whether they meet the ESA eligibility criteria by following the steps in “Steps to

¹ Section 9 of the ESA prohibits any person from “taking” a listed species (e.g., harassing or harming it) unless: (1) the taking is authorized through an “incidental take statement” as part of completion of formal consultation according to ESA section 7; (2) where an incidental take permit is obtained under ESA section 10 (which requires the development of a habitat conversion plan; or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

² Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

EPA Region 2 Small MS4 General Permit

Determine if the ESA Eligibility Criteria Can Be Met” of this Appendix. Applicants that cannot meet any of the eligibility criteria must apply for an individual permit.

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. Upon notification, EPA may direct an applicant to pursue eligibility under Criterion B.

Criterion A: No endangered or threatened species or critical habitat are in proximity to the stormwater discharges or discharge related activities.

Criterion B: In the course of a separate federal action involving the municipality, formal or informal consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service under Section 7 of the ESA has been concluded and that consultation (1) addressed the effects of the stormwater discharges and discharge-related activities on the listed species and critical habitat; and (2) the consultation resulted in either a no jeopardy opinion or a written concurrence by USFWS and/or NMFS on a finding that the stormwater discharges and discharge related activities are not likely to adversely affect listed species or critical habitat.

Criterion C: The activities are authorized under Section 10 of the ESA and that authorization addresses the effects of the stormwater 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 stormwater 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 C.F.R. § 17.22(b)(1) for USFWS and 50 C.F.R. § 222.22 for NMFS). Application instructions for Section 10 permits can be obtained by assessing the appropriate websites (www.fws.gov and www.fisheries.noaa.gov) or by contacting the appropriate regional office.

Criterion D: The stormwater discharges and discharge-related activities were already addressed in another operator’s certification of eligibility which includes the municipality’s stormwater activities.

Criterion E: Using the best scientific and commercial data available, the effect of the stormwater discharge and discharge-related activities on listed species and critical habitat have been evaluated. Based on those evaluations a determination is made by the permittee and affirmed by EPA that the stormwater discharges and

EPA Region 2 Small MS4 General Permit

discharge-related activities are not likely to adversely affect any federally threatened or endangered listed species or designated critical habitat.

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 stormwater discharges and discharge related activities on listed species or critical habitat, PRIOR to completing and submitting a Notice of Intent. You must follow the steps outlined below and document the results of your eligibility determination.

Step 1 – Determine if you can meet Criterion “A”

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 Municipality?
- Are there any Critical Habitats in your Municipality?
- Are there any Endangered Species or Critical Habitat in proximity to your stormwater discharges?

Use the guidance below to answer these questions, and to “*Check for Listed Endangered Species in Your Municipality*,” “*Check for Critical Habitat in Your Municipality*,” and “*Check for Proximity to Your Stormwater discharge locations or discharge related activities*.”

If you answered “No” to the questions above, you have met ESA eligibility Criterion A. Skip to Step # 5.

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

NOTE: You may use the information from the USFWS Information for Planning and Consultation (IPaC) (<https://ecos.fws.gov/ipac/location/index>), and NOAA Species Directory (<https://www.fisheries.noaa.gov/species-directory/threatened-endangered>) when determining the presence of ESA listed species and critical habitat. Attaching aerial image(s) of the site to this NOI is helpful to EPA, USFWS, and NMFS in confirming eligibility under this criterion. Please note that NMFS’ jurisdiction includes ESA-listed marine and estuarine species that spawn in inland rivers.

Guidance Eligibility Under Criterion A

Check for Listed Endangered Species in Your Municipality

Look at the latest Municipality species list to see if any listed species are found in your municipality. If you are located in proximity to the border of a municipality or your municipality

EPA Region 2 Small MS4 General Permit

or activity is in one municipality 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 Municipality

Some (but not all) listed species have designated critical habitat. Exact locations of such habitat are provided in the endangered species regulations at 50 C.F.R. §§ 17 and 226. To determine if the discharge locations or activities are within designated critical habitat, you should either:

- Review those regulations (50 C.F.R. §§ 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 USFWS office and NMFS office. A list of USFWS offices and NMFS offices for this permit coverage is found near the end of this Appendix; or
- Contact the Puerto Rico Department of Natural and Environmental Resources' Natural Heritage Program. 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 Heritage program is provided below, in Appendix D.

Check for Proximity to your Discharge locations or municipal activities

You must determine whether listed species or critical habitat are in proximity to your stormwater 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 stormwater 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 stormwater 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.

EPA Region 2 Small MS4 General Permit

- Contacting the nearest Puerto Rico Department of Natural and Environmental Resources, NMFS 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 below). These groups inventory species, and their locations maintain lists of sightings and habitats.
- Conducting a formal biological survey.

Step 2 – Determine if You Can Meet Eligibility Criteria “B”, “C”, “D”, or “E”

Criterion B: 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 municipality?³
- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat, and address your stormwater discharges and discharge-related activities?
- Did the ESA Section 7 consultation result in either a “no jeopardy” opinion by the Services (for formal consultation) or concurrence by the Services since your activities would be “unlikely 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 D, or Go to Step 3.

Criterion C: 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 MS4?⁴
- Does your ESA Section 10 permit consider all currently listed species and critical habitat, and address your stormwater discharges and discharge-related activities for your system?

³ 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 stormwater discharges and discharge-related activities on listed species and critical habitat. (See 50 C.F.R. § 402.13).

⁴ You have a permit under section 10 of the ESA and that authorization addresses the effects of your stormwater 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 C.F.R. § 17.22(b)(1)).

EPA Region 2 Small MS4 General Permit

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 D or go to Step 3.

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:

- Did another operator previously certify ESA eligibility for your system?⁵
- Did the other operator’s certification of eligibility consider all currently listed species and critical habitat, and address your stormwater 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 D. Skip to Step 5.

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

Step 3 – Determine if You Can Meet Eligibility Criterion “E”

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

- Have you determined that your stormwater discharges and discharge-related activities are “not likely to adversely affect” listed species or critical habitat, and/or have you received concurrence from the appropriate Services with a not likely to adversely affect determination?
- 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.

⁵ 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 stormwater discharges and discharge-related activities on listed species and critical habitat.

EPA Region 2 Small MS4 General Permit

If you answered “Yes” to both questions above, you have met ESA eligibility Criterion E. 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 stormwater discharges. (See 40 C.F.R. § 122.21).

Guidance for Adverse Effects Determination

If you are unable to certify eligibility under Criterion A, B, C, D, or E you must assess whether your stormwater 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 stormwater pollutant discharges; and measures to provide treatment for stormwater discharges including the siting, construction and operational procedures to control, reduce or prevent water pollution. Please be aware that no protection from incidental 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 Natural Heritage Program for assistance. In order to complete the determination of effects, it will be necessary to follow the consultation procedures in Section 7 of the ESA (See Criterion B information above, and Section 7 consultation weblink, below).

Upon completion of your assessment, document the results of your effects determination. If adverse effects are not likely, you are eligible under Criterion E – proceed to Step 5 of this Attachment. Your determination may be based on measures that you implement to avoid, eliminate, or minimize adverse effects.

If the determination is “May adversely 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 Services or one of the Services reach agreement on measures to avoid adverse effects, you are eligible under criterion “E”. 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 SWMP (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 other criteria, then you are not eligible for coverage under this permit. You must seek coverage under an individual permit.

EPA Region 2 Small MS4 General Permit

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

- *Hydrological*: Stormwater discharges may cause siltation, sedimentation, or induce other changes in receiving waters such as temperature, salinity or pH. These effects will vary with the amount of stormwater discharged and the volume and condition of the receiving water. Where a discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- *Habitat*: Excavation, site development, grading and other surface disturbance activities, including the installation or placement of treatment equipment, may adversely affect listed species or their habitat. Stormwater from the small MS4 may inundate a listed species habitat.
- *Toxicity*: In some cases, pollutants in the stormwater may have toxic effects on listed species.

Step 4 – Submit NOI and Document Results of the Eligibility Determination

Once the ESA eligibility requirements have been met, and you have determined NHPA eligibility (see Appendix D), 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 SWMP required by the permit. Documentation for the various ESA eligibility criteria are as follows:

- Criterion A: A copy of the most current county species list pages for the counties where your stormwater discharges and storm sewer system are located. You must also include a statement on how you determined that no listed species or critical habitats are in proximity to your stormwater 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 documents originally used by the other operator of your system to satisfy the documentation requirements of Criteria A, B, C, or E.
- Criterion E: A copy of the appropriate Services’ concurrence with the operator’s determination that the stormwater discharges and discharge-related activities were not likely to adversely affect listed species.

EPA Region 2 Small MS4 General Permit

Duty to Implement Terms and Conditions upon Which Eligibility was Determined

You must comply with any terms and conditions imposed under the ESA eligibility requirements to ensure that your stormwater discharges and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. You must incorporate such terms and conditions into your SWMP, 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.

United States Fish and Wildlife Service Office

National websites for Endangered Species Information:

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

ESA Section 7 Consultations: <https://www.fws.gov/southeast/pdf/letter/consultation-under-section-7-of-the-endangered-species-act-with-the-caribbean-ecological%20Services-field-office-template-letter.pdf>.

U.S. FWS – Region 4 (Southeast Region)

Supervisor

Ecological Services Field Office

U.S. Fish and Wildlife Services

Carr. 301, Km 5.1, Barrio Corozo

Boquerón, Puerto Rico 00622-0510

Telephone: (787) 851-7297

National Marine Fisheries Service Office

Website: <https://www.fisheries.noaa.gov/species-directory/threatened-endangered>.

Caribbean Branch Office

National Marine Fisheries Service

Endangered Species Branch, Protected Resource Division

Attn: Endangered Species Coordinator

263 13th Avenue South

St. Petersburg, FL, 33701

Telephone: (727) 824-5312

Puerto Rico Natural Heritage Office

The Puerto Rico Department of Natural and Environmental Resources (DNER) is in charge of the implementation and formulation of environmental public policy, and the protection and conservation of natural resources, the environment and energy. It was created in 1972 and reorganized in 1993. The DNER is part of the Governor's Constitutional Cabinet.

The agency has a wide range of public servants from various disciplines and skills committed to the protection and conservation of the environment. Among the staff, there are experts in various disciplines, including, but not limited to, as educators, biologists, geologists, ecologists, planners, computer professionals, architects, translators, lawyers, engineers, agronomists, surveyors, and pilots. They all bring their skills, knowledge and experience to achieve DNER's mission.

DNER's organizational structure is designed to integrate components of management, education, legal representation, scientific research, project management, social interest, adjudicative processes, permits and endorsements, boating safety, monitoring and management of the agency for the effective implementation of their responsibilities and ministerial functions.

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.

Through their website you can browse the various offices of the DNER, where you can discover and access the services provided by both their Central Office and the other 68 units distributed across the Commonwealth of Puerto Rico. DNER is accessible on-line at: <http://www.drna.gobierno.pr>, which provides links and other access to a large number of specific Commonwealth of Puerto Rico programs and documents.