

US EPA ARCHIVE DOCUMENT



XI. Endangered Species Act (ESA) Requirements for Construction Activities

Before beginning any construction project, you should consider the impact of your construction activities on species listed or proposed under the Endangered Species Act (ESA) as threatened or endangered (“listed species”), and the habitat of listed species. You should assess the impacts on listed species as early as possible in the construction process to avoid delays in your project.

Definitions

Critical Habitat—The specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations, and specific areas outside the geographical area occupied by a species at the time it is listed upon determination by the Secretary that such areas are essential for the conservation of the species (defined at Section 3(5) of the federal ESA).

Harass—Actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include but may not be limited to breeding, feeding, or sheltering.

Harm—An act that actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.

Operator—The party (ies) that has: (1) operational control of construction project plans and has the ability to make modifications to those plans, or (2) day-to-day operational control of stormwater compliance activities.

Take—To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (Section 3(18) of the federal ESA).

The ESA was passed in 1973 to protect threatened or endangered species from further harm. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Services (NMFS) enforce the ESA. Under the ESA, FWS and NMFS identify the listed species and habitats, and work through consultations and permit actions to protect those species and their critical habitat. Although ESA is not an EPA requirement, it is included as part of the EPA stormwater Construction General Permit (CGP) requirements and therefore is important to the construction industry.

The ESA has different requirements for federal activities and non-federal activities. The ESA typically applies to construction activities under three general scenarios: A) construction activities under EPA's CGP, B) activities funded or permitted by federal agencies (other than the CGP) for a construction project, or C) construction activities that impact a listed species and/or critical habitat. The requirements under these scenarios are discussed below.

A. Coverage Under the Construction General Permit

To be eligible for coverage under the CGP, discussed in Section III of Part I of this document, you must assess the potential effects of your activities on federally listed endangered and threatened species and any designated critical habitat that exists on or near your site. In making this determination, you need to consider areas beyond the immediate footprint of the construction activity and beyond the property line, including those that could be affected directly or indirectly by stormwater discharges. For coverage under the CGP, you need to complete the steps described below. Be sure to document your findings at each step of the process. For more information on these requirements, review the relevant portions of the CGP, particularly Part 1.3.C and Appendix C.

Step 1: Determine if Listed Species are Present On or Near Your Project Area

To determine whether listed species are located on or near your project area, you should:

- Determine if listed species are in your county or township. The local offices of the FWS, NMFS, and State or Tribal Heritage Centers often maintain lists of federally listed endangered or threatened species on their internet sites. Visit <http://cfpub1.epa.gov/npdes/stormwater/cgp.cfm> to find the appropriate site for your state or check with your local office. In most cases, these lists allow you to determine if there are listed species in your county or township.

Acronyms

ESA—Endangered Species Act

NMFS—National Marine Fisheries Service

NOAA—National Oceanic and Atmospheric Administration

NPDES—National Pollutant Discharge Elimination System

USFWS—U.S. Fish and Wildlife Service

- If there are listed species in your county or township, contact your local FWS, NMFS, or State or Tribal Heritage Center to determine if the listed species could be found on or near your project area and if any critical habitat areas have been designated that overlap or are near your project area. Critical habitat areas may be designated independently from the listed species for your county, so even if there are no listed species in your county or township, you must still contact one of the agencies mentioned above to determine if there are any critical habitat areas on or near your project area.
- If there are no listed species in your county or township, no critical habitat areas on or near your project area, or if your local FWS, NMFS, or State or Tribal Heritage Center indicates that listed species are not a concern in your part of the county or township, you may check Box A on the Notice of Intent (NOI) form (see Section III in Part I of this guide for a discussion of this form).
- If there are listed species or critical habitat, and if your local FWS, NMFS, or State or Tribal Heritage Center indicates that these could exist on or near your project area, you will need to do one or more of the following:
 - Conduct visual inspections to identify any listed species or critical habitat. This method may be particularly suitable for construction sites that are smaller in size or located in non-natural settings such as highly urbanized areas or industrial parks where there is little or no natural habitat, or for construction activities that discharge directly into municipal stormwater collection systems.
 - Conduct a formal biological survey. In some cases, particularly for larger construction sites with extensive stormwater discharges, biological surveys may be an appropriate way to assess whether species are located on or near the project area and whether there are likely to be adverse effects to such species. Biological surveys are frequently performed by environmental consulting firms. A biological survey may be useful in conjunction with Steps 2, 3, or 4 below.
 - Conduct an environmental assessment under the National Environmental Policy Act (NEPA). Such an assessment may indicate if listed species are in proximity to the project area. Note that coverage under the CGP does not trigger a requirement for a NEPA assessment. See Section XII in Part I of this guide for more information on NEPA.

If listed species or critical habitat are present in the project area, you must look at the impacts to the species and/or habitat when following Steps 2 through 4. Note that many, but not all, measures imposed to protect listed species under these steps will also protect critical habitat. Thus, meeting the eligibility requirements of the CGP may require separate measures to protect critical habitat from those to protect listed species.

Step 2: Determine if Your Construction Activities Are Likely to Adversely Affect Listed Species or Critical Habitat

To receive CGP coverage, you must assess whether your construction activities are likely to adversely affect listed species or designated critical habitat that are present on or near your project area. Potential adverse effects from stormwater discharges and stormwater discharge-related activities include:

- *Hydrological.* Stormwater discharges may cause siltation or 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 stormwater discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely. Construction activities may also alter drainage patterns on a site where construction occurs. This can also impact listed species or critical habitat.
- *Habitat.* Excavation, site development, grading, and other surface-disturbing construction activities may adversely affect listed species or their habitat. Stormwater may drain into or inundate listed species' habitat.
- *Toxicity.* In some cases, pollutants in stormwater may have toxic effects on listed species.

The scope of effects to consider will vary with each site. If you are having difficulty determining whether your project is likely to adversely affect listed species or critical habitat, or one of the Services has already raised concerns to you, you should contact the appropriate office of the FWS, NMFS or Natural Heritage Center for assistance. If adverse effects are not likely, then you may check Box E on the NOI form and apply for coverage under the CGP. If the discharge may adversely effect listed species or critical habitat, you must follow Step 3.

Step 3: Determine if Measures Can Be Implemented to Avoid Adverse Effects

If you determine that your activities will affect listed species or critical habitat, you can still receive coverage under the CGP if you take measures to avoid or eliminate the likelihood of adverse effects prior to applying for CGP coverage. These measures may involve relatively simple changes to construction activities such as rerouting a stormwater discharge to bypass an area where species are located, relocating BMPs, or changing the "footprint" of the construction activity. Contact the FWS and/or NMFS to see what measures might be appropriate to avoid or eliminate the likelihood of adverse impacts to listed species and/or critical habitat. This can entail the initiation of informal consultation with the FWS and/or NMFS (described in more detail in Step 4).

If you adopt measures to avoid or eliminate adverse affects, you must continue to abide by those measures for the duration of the construction project and coverage under the CGP. These measures must be described in the Stormwater Pollution Prevention Plan (SWPPP) (see Section III of Part I of this guide) and are enforceable CGP conditions. If appropriate measures to avoid the likelihood of adverse effects are not available, you must follow Step 4.

Step 4: Determine if the Requirements of the CGP Can Be Met

Where adverse effects are likely, you must contact the FWS and/or NMFS. You may still be eligible for CGP coverage if any likely adverse effects can be addressed through meeting one of the following criteria as identified in Subpart 1.3.C of the CGP. Confer with FWS and/or NMFS to determine which criteria is appropriate for your project.

1. *An ESA Section 7 Consultation Is Performed for Your Activity.*

Contact FWS and/or NMFS to initiate a formal or informal ESA Section 7 consultation. The purpose of a consultation is to address the effects of your activities on listed species and critical habitat. To be eligible for coverage under the CGP, consultation must result in a “no jeopardy opinion” or a written concurrence by the Service(s) on a finding that your stormwater discharge(s) and stormwater-discharge-related activities are not likely to adversely affect listed species or critical habitat. If you receive a “jeopardy opinion,” you may continue to work with the FWS and/or NMFS and your permitting authority to modify your project so that it will not jeopardize listed species or designated critical habitat.

Most consultations are “informal.” By the terms of the CGP, EPA has designated operators as non-federal representatives for the purpose of conducting informal consultations. When conducting informal ESA Section 7 consultation as a non-federal representative, you must follow the procedures found in 50 CFR Part 402 of the ESA regulations. You must notify FWS and/or NMFS of your intention and agreement to conduct consultation as a non-federal representative. Consultation may also occur in the context of another federal action at the construction site (e.g., where ESA Section 7 consultation is performed for issuance of a wetlands dredge and fill permit for the project or where a NEPA review is performed for the project that incorporates a Section 7 consultation). Any terms and conditions developed through consultations to protect listed species and critical habitat must be incorporated into the SWPPP.

Whether ESA Section 7 consultation must be performed with either the FWS, NMFS or both Services depends on the listed species that may be affected by the operator’s activity. In general, NMFS has jurisdiction over marine, estuaries, and anadromous species. Operators should also be aware that while formal Section 7 consultation provides protection from incidental takings liability, informal consultation does not.

2. *An Incidental Taking Permit Under Section 10 of the ESA is Issued for the Operator’s Activity.*

Your construction activities can be authorized through the issuance of a permit under Section 10 of the ESA that addresses the effects of your stormwater discharge(s) and stormwater discharge-related activities on federally listed species and designated critical habitat. You must follow FWS and/or NMFS procedures when applying for an ESA Section 10 permit. Application instructions for Section 10 permits for FWS and NMFS can be obtained by accessing the FWS and NMFS web sites (<http://www.fws.gov> and <http://www.nmfs.noaa.gov>) or by contacting the appropriate FWS and NMFS regional office. More information on Section 10 requirements is provided in Section XI-C of Part I of this guide.

3. You are Covered Under the Eligibility Certification of Another Operator for the Project Area.

Your stormwater discharges and stormwater-discharge-related activities may already be addressed in another operator's certification of eligibility, which also included your project area. For example, a general contractor or developer may have completed and filed an NOI for the entire project area with the necessary ESA certifications. Subcontractors may then rely on that certification and must comply with any conditions resulting from that process. By certifying eligibility, you agree to comply with any measures or controls upon which the other operator's certification was based.

You must comply with any terms and conditions imposed under the eligibility requirements of the CGP to ensure that your stormwater discharges and stormwater-discharge-related activities protect listed species and/or critical habitat. Such terms and conditions must be incorporated in the project's SWPPP. If the eligibility requirements cannot be met, then you are not eligible for coverage under the CGP. In these instances, you may consider applying to EPA for an individual permit.

B. Federal Funding or Federal Permitting For a Construction Project

If a federal agency is funding (either fully or partially) a construction project, or if a federal permit (other than the CGP) is required for a construction project, the federal agency taking the action (i.e., funding or permitting) must fulfill the requirements of the ESA. Some examples that would trigger this requirement include federal highway construction projects, Section 404 permits issued by EPA, or state construction programs that receive federal funding. The federal agency may designate a state agency or contractor to fulfill the requirements of the ESA. The federal agency (or designee) needs to follow the same steps as described under Section XI-A of Part I of this guide, with the exception of requirements associated with the CGP Notice of Intent and SWPPPs. The federal agency or designee should document their findings at each step discussed under Section XI-A of Part I of this guide.

In situations where a contractor is not designated to fulfill the requirements of the ESA, the contractor should still ensure early in the process that the federal agency has fulfilled the requirements. In addition, if the agency determined that the project would impact listed species and/or critical habitat, and has developed plans to mitigate these impacts, it likely will be the obligation of the contractor to implement these plans. Failure to implement the plans can result in violation of the ESA. Therefore, you should understand the requirements of these plans up front to facilitate compliance with the ESA.

C. Construction Activities That Impact a Listed Species and/or Critical Habitat

Section 9 of the ESA generally prohibits the unauthorized “take” of a listed species and/or critical habitat. “Take” is defined in the ESA as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species. Harm may include significant habitat modification which actually kills or injures a listed species through impairment of essential behavior (e.g., nesting or reproduction). This “take” prohibition applies not only to federal agencies but to non-federal entities and citizens as well. If your construction activity is not covered by the CGP (e.g., if your stormwater permit is issued by your state), and if no federal funding or other federal permits are associated with your construction activity, you should still evaluate if your project will incidentally cause a take of a listed species and/or critical habitat. If your project will result in a take, you need to obtain an Incidental Take Permit from USFWS or NOAA-Fisheries to get authorization for the take. Such a permit, which covers non-federal activities, is issued under Section 10 of the ESA, and includes conditions that focus on efforts to minimize and mitigate the anticipated take.

To obtain an Incidental Take Permit, you need to submit a habitat conservation plan (HCP) along with your application. The HCP outlines your plans to minimize and mitigate effects of the authorized incidental take. To determine if your project will result in a take, and to obtain an Incidental Take Permit, you should complete the following steps.

Step 1: Determine if Listed Species are Present On or Near Your Project Area

You will first need to determine if listed species are present on or near your project area. Follow the steps described under Section XI-A in Step 1 (Coverage Under the Construction General Permit) above. If you find that there are not listed species present on or near your project area, document your findings and proceed with your project (you do not need an Incidental Take Permit). If listed species are present, proceed to Step 2.

Step 2: Determine if your Construction Activity Is Likely to Adversely Affect Listed Species or Critical Habitat

Follow the procedures described in Step 2 under Section XI-A to determine if your construction activity is likely to adversely affect listed species or critical habitat. Note that you need to consider all the impacts of your construction activity, not just stormwater-related impacts. If you determine that your construction activity will not adversely affect listed species or critical habitat, document your findings and proceed with your project (you do not need an Incidental Take Permit). If your construction activity will adversely affect listed species or critical habitat, proceed to Step 3.

Step 3: Obtain an Incidental Take Permit

If your construction activity will adversely affect listed species or critical habitat, you need to obtain an Incidental Take Permit. The necessary components of a permit application are: a standard application form, an HCP, an implementation agreement (if required), and, if appropriate, a draft NEPA analysis (the Service is responsible for ensuring NEPA compliance during the permitting process). General information on ESA permits can be found at <http://endangered.fws.gov/permits/index.html>, while the specific permit application can be found at <http://forms.fws.gov/3-200-56.pdf>.

You should coordinate with the FWS or NOAA-Fisheries as soon as possible for guidance in assembling a complete application package. They will inform you if you need to develop an implementation agreement or prepare a draft NEPA analysis, and will provide you the necessary guidance on how to prepare these. Before you submit an application, you may be required to conduct biological surveys to determine which species and/or habitat would be impacted by the activities covered under the permit. The surveys also provide information that can be used to develop the HCP. The HCP should include:

- An assessment of the impacts likely to result from the proposed taking of one or more federally listed species;
- Measures you will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to implement such measures; and the procedures to deal with unforeseen or extraordinary circumstances;
- Alternative actions to the take that you analyzed, and the reasons why you did not adopt such alternatives; and
- Additional measures that FWS or NOAA-Fisheries may require as necessary or appropriate.

You can find additional information on HCPs at <http://endangered.fws.gov/hcp/>; the Habitat Conservation Planning Handbook can be found at <http://endangered.fws.gov/hcp/hcpbook.html>.

D. What Are the Penalties?

The USFWS and the NMFS may impose administrative, civil, and criminal sanctions for failure to comply with the ESA. Civil penalties – imposed in a judicial proceeding – can reach \$27,500 per day per violation. Stiffer penalties are authorized for criminal violations of the Act – for negligent or knowing violations – of as much as \$50,000 per day, 3 years' imprisonment, or both. A fine of as much as \$250,000, 15 years in prison, or both, is authorized for “knowing endangerment” violations that knowingly place another species in imminent danger of death or serious bodily injury.

Noncompliance with the requirements of the CGP is a violation of the Clean Water Act (CWA). EPA may impose administrative, civil, and criminal sanctions on a property owner and/or a contractor for failure to comply with the CWA. Administrative penalties can reach \$157,500 and civil penalties – imposed in a judicial proceeding – can reach \$32,500 per violation per day. Under certain circumstances, the CWA also authorizes criminal penalties. In addition, the CWA allows private citizens to bring civil actions against any person for any alleged violation of "an effluent standard or limitation." In a citizen suit, a court may issue an injunction and/or impose civil penalties, litigation costs, and attorney's fees.

In addition to fines, you may need to pay legal fees and face project delays. If legal action is taken against your construction site, you also may be subject to increased scrutiny at all of your other construction sites by regulatory agencies and the public.

E. What Questions Do You Need to Answer Before Starting Your Construction Project?

You can use the questions in Section II of Part I of this guide to start a discussion among all parties involved in the construction project and to assign tasks to ensure all environmental requirements are met. Each question has a space next to it to designate who will take the lead on each task. Note that designating a responsible party does not absolve you of meeting environmental requirements or liability for failing to meet these requirements.

F. Where Can You Get Additional Information?

Many tools are available to assist you with the ESA requirements, including the following:

- The U.S. Fish & Wildlife Service web site is the most complete source of information on ESA-listed species. This site contains valuable tools for landowners: <http://endangered.fws.gov>.
- The NOAA Fisheries - Office of Protected Resources provides the full text of the ESA. It also provides information on marine and anadromous species as well as recovery plans for their listed species: http://www.nmfs.noaa.gov/prot_res/overview/es.html.
- The USFWS Threatened and Endangered Species System identifies federally listed threatened and endangered species at: http://ecos.fws.gov/tess_public/TESSWebpage.
- The USFWS Threatened and Endangered Species System State and Territory Listings identifies state and territory listed threatened and endangered species at: http://ecos.fws.gov/tess_public/TESSWebpageStateLists.
- EPA's "Where you live" page contains links to state environmental agencies: <http://www.epa.gov/epahome/wherelive.htm>.
- NatureServe is a conservation organization that provides the scientific information and tools needed to help guide effective conservation action. NatureServe and its network of natural heritage programs are the leading source for information about rare and endangered species and threatened ecosystems: <http://www.natureserve.org>.

- The Construction Industry Compliance Assistance Center (<http://www.cicacenter.org/espermits.html>) provides resources specific to ESA-listed species, including state requirements and contacts.
- The National Environmental Compliance Assistance Clearinghouse contains a search engine to help you find compliance assistance tools, contacts, and EPA-sponsored programs: <http://www.epa.gov/clearinghouse/>.
- National and regional USFWS Endangered Species Contacts:
 - Washington D.C. Office Endangered Species, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203, <http://endangered.fws.gov>, Phone: (703) 358-2390,
 - Pacific Region, Eastside Federal Complex 911 N.E. 11th Avenue, Portland, OR, <http://pacific.fws.gov>, Phone: (503) 231-6158,
 - Southwest Region, P.O. Box 1306, Rm 4012, Albuquerque, NM 87102, <http://southwest.fws.gov>, Phone: (505) 248-6657,
 - Great Lakes, Big Rivers Region, Bishop Henry Federal Building One Federal Drive, Ft. Snelling, MN 55111-4056, <http://midwest.fws.gov>, Phone: (612) 713-5334,
 - Southeast Region, 1875 Century Boulevard Suite 200, Atlanta, GA 30345, <http://southeast.fws.gov>, Phone: (404) 679-7100,
 - Northeast Region, 300 Westgate Center Drive, Hadley, MA 01035-9589, <http://northeast.fws.gov>, Phone: (413) 253-8615,
 - Mountain Prairie Region, 134 Union Boulevard, Lakewood, CO 80228, <http://mountain-prairie.fws.gov>, Phone: (303) 236-7400, and
 - Alaska, 1011 E. Tudor Road, Anchorage, AK 99503-6199, <http://alaska.fws.gov>, Phone: (907) 786-3868.