

Information To Assist In Compliance With Nationwide Permit General Condition 18, Endangered Species

This document implements one of the protective measures identified in the November 24, 2014 programmatic biological opinion on the 2012 Nationwide Permits issued by NOAA Fisheries. It only addressed endangered and threatened species and their designated critical habitat under NOAA Fisheries jurisdiction. Nationwide Permit General Condition 18 also applies to endangered and threatened species and designated critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service. Information on listed species and critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service is available at:

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

The purpose of this document is to provide information for prospective users of the Nationwide Permits (NWP) that are not federal agencies to help them determine whether a proposed NWP activity requires a pre-construction notification (PCN) to ensure compliance with the Endangered Species Act (ESA). For the 2012 NWPs, ESA Section 7 compliance is covered by NWP General Condition 18. Paragraph (c) of NWP General Condition 18 requires a non-federal user of an NWP to submit a PCN to the appropriate Corps District office if “any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat.”

Federal permittees are expected to follow their own procedures for complying with the ESA. If the proposed NWP activity requires a PCN the Federal permittee should submit a copy of its documentation demonstrating compliance with ESA Section 7 with its PCN (see paragraph (b)(6) of NWP General Condition 31).

All PCNs are reviewed by Corps staff and evaluated for potential effects to listed species and critical habitat. Paragraph (c) of NWP General Condition 18 also states that the project proponent cannot begin the NWP activity until he or she has been notified by the Corps that the proposed activity “will have ‘no effect’ on listed species or critical habitat, or until [Endangered Species Act] Section 7 consultation has been completed” if the Corps makes a “may affect” determination for the proposed NWP activity. The complete text of NWP General Condition 18 is provided in Appendix A.

In Appendix B of this document, there are definitions that can assist non-federal permittees in determining whether their proposed NWP activities might affect listed species or designated critical habitat. Any potential effect to listed species or critical habitat, no matter how small, requires submission of a PCN to the Corps district office, so that the district can evaluate the proposed activity and determine whether ESA Section 7 consultation is required.

Listed species under the jurisdiction of NOAA Fisheries that may occur in the geographic area of responsibility of the New York District are:

- **Humpback Whale** (*Megaptera novaeangliae*)
- **Fin Whale** (*Balaenoptera physalus*)
- **North Atlantic right whale** (*Eubalaena glacialis*)
- **Sperm Whale** (*Physeter macrocephalus*)
- **Green Turtle** (*Chelonia mydas*)
- **Hawksbill Turtle** (*Eretmochelys imbricata*)
- **Kemp's Ridley Turtle** (*Lepidochelys kempii*)
- **Leatherback Turtle** (*Dermochelys coriacea*)
- **Loggerhead Turtle** (*Caretta caretta*)
- **Scalloped Hammerhead Shark** (*Sphyrna lewini*)
- **Atlantic Sturgeon** (*Acipenser oxyrinchus oxyrinchus*)
- **Shortnose Sturgeon** (*Acipenser brevirostrum*)

Information on these species is available at: <http://www.nmfs.noaa.gov/pr/species/esa/>

Additional information on these species is also available at the NOAA Greater Atlantic Regional Fisheries Office (GARFO) on their web site at: <http://www.greateratlantic.fisheries.noaa.gov/protected/>

Within the New York District, critical habitat has **not** been designated by NOAA Fisheries for those species described above.

Information on the critical habitat designations for listed species can be found at: <http://www.nmfs.noaa.gov/pr/species/esa/>

Determining whether pre-construction notification is required

There are three situations that require PCNs: (a) when required specifically by the terms and conditions of the NWP; (b) when required by regional conditions for the NWPs; or (c) when a project is in or within the vicinity of occupied habitat or designated critical habitat of any of the species listed above as determined from the NOAA Fisheries websites referenced above.

Many of the NWPs require PCNs for all activities authorized by those NWPs. Some NWPs require PCNs only for certain types of activities and locations. Please read the text of the NWP(s) you plan to use for your proposed activity. In the State of New York, regional conditions have been added to the NWPs to require pre-construction notification for additional activities and locations. Please review those regional conditions, which are available at:

http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/NWP_PN_30MAY12.pdf

In the State of New Jersey, regional conditions have been added to the NWPs to require pre-construction notification for additional activities and locations. Please review those regional conditions, which are available at:

http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/PN_NWPRegCondNJDE_16mar12.pdf

If your project is located in any of the areas inhabited by the species listed above, within designated critical habitat for those species or in the vicinity of these areas, a PCN is required, regardless of the lack of any specific requirements in the individual NWPs or in the regional conditions for the NWPs. The information required for a PCN is listed in paragraph (b) of NWP General Condition 31. Additional information required for PCNs within the State of New York is specified in the regional conditions listed above at:

http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/NWP_PN_30MAY12.pdf

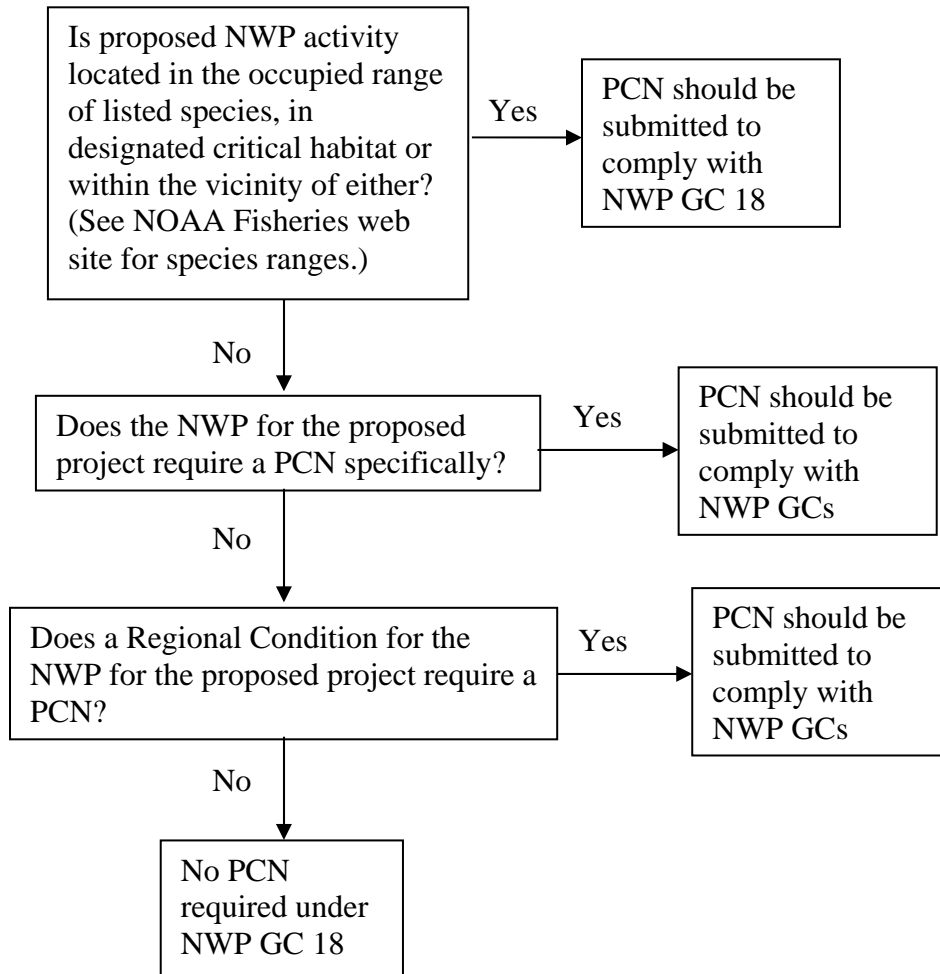
Additional information required for PCNs within the State of New Jersey is specified in the regional conditions listed above at:

http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/PN_NWPRegCondNJDE_16mar12.pdf

The New York District will notify you within 45 days of receipt of your PCN whether formal or informal ESA Section 7 consultation needs to be conducted for the proposed NWP activity. You cannot conduct the NWP activity until notified by the New York District that the proposed NWP activity will have “no effect” on listed species or critical habitat or the ESA Section 7 consultation has been completed. Please see the text of NWP General Condition 18, which is in Appendix A of this document, for more detail.

The flow chart provided below gives some guidance on determining when a PCN should be submitted for a proposed NWP activity to comply with NWP General Condition 18 and other general and regional conditions. If you are uncertain about whether a PCN should be submitted for a particular NWP activity to comply with NWP General Condition 18, or if you have any questions regarding the information in this document, you should contact the New York District at 917-790-8511 for additional guidance. Questions concerning whether your proposed NWP activity is in the vicinity of the occupied range of listed species or in the vicinity of designated critical habitat should also be directed to the New York District, because the determination of “vicinity” is dependent on the characteristics of the project site, the listed species, and the NWP activity.

Pre-Construction Notification Determination Flow Chart



Appendix A – Text of Nationwide Permit General Condition 18

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the U.S. FWS or the NMFS, The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which 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 behavioral patterns, including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.noaa.gov/fisheries.html> respectively.

Appendix B – Definitions

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR 402.02]

Explanatory note – For the purposes of the NWP Program, the action is generally the activity that is authorized by one or more NWPs (item (c)). Those activities are: discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and structures or work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR 402.02]

Explanatory note – When a Corps district receives a PCN for a proposed NWP activity, it will identify the action area if it determines the proposed NWP activity may affect listed species or designated critical habitat and therefore requires ESA Section 7 consultation.

Effects of the action refers to the direct and indirect effects of a proposed action on listed species or critical habitat. [50 CFR 402.02]

Direct effect means the direct or immediate effects of the proposed action on a listed species or its habitat. [Services' 1998 Section 7 Consultation Handbook, page 4-25.]

Indirect effect means effects that are caused by the proposed action and are later in time, but still are reasonably certain to occur. [50 CFR 402.02]

Explanatory note – For the purposes of determining whether a PCN is required because a proposed NWP activity might affect listed species or critical habitat, non-federal applicants should submit a PCN when the proposed activity is located within or in the vicinity of any of the areas inhabited by the species listed above or in designated critical habitat for those species, regardless of the lack of any specific requirements in the individual NWPs or in the regional conditions for the NWPs. As described in NWP General Condition 18, paragraph (c), proposed activities in occupied habitats, within designated critical habitat, or in the vicinity of these areas “might affect” listed species. The Corps district will evaluate that PCN and make an effect determination to decide whether ESA Section 7 consultation is required. The Corps district will notify the applicant of its determination, and if ESA Section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR 402.02]

Explanatory note – Under NWP General Condition 18, pre-construction notification is required for any NWP activity that: (a) might affect designated critical habitat, (b) is in the vicinity of designated critical habitat, or (c) is located in critical habitat. The Corps district will evaluate the PCN to determine if the proposed NWP may affect designated critical habitat, and will conduct ESA Section 7 consultation if it makes a “may affect” determination. The Corps district will notify the applicant of its determination, and if ESA section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

No effect means the proposed action will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat.

Explanatory note – There has to be no potential for an NWP activity to affect listed species or critical habitat to be considered no effect. For example, an NWP activity and all of its components would have to be located outside of the range and designated critical habitat of listed species, beyond the distance where an indirect effect might occur to listed species or designated critical habitat.