

Standard Operating Procedures (SOPs)

Not Likely to Adversely Affect (NLAA) Programmatic for NPDES Permits in U.S. EPA Region 1

The NLAA Programmatic for NPDES Permits in U.S. EPA Region 1 (EPA NLAA Programmatic) represents an interagency effort to streamline Endangered Species Act (ESA) section 7 consultation for routine activities that are not likely to adversely affect (NLAA) ESA-listed species or critical habitat. The EPA NLAA Programmatic does not address whether or not certain activity categories or stressors will have no effect on ESA-listed species or critical habitat (this remains under the discretion of EPA).

The purpose of this Standard Operating Procedures (SOPs) document is to help EPA determine which activity categories and associated stressors are eligible for processing under the EPA NLAA Programmatic streamlined verification form. Those which are ineligible require individual section 7 consultation (informal or formal, depending on whether the proposed work will likely adversely affect listed species or critical habitat).

I. Is my project eligible for review under the EPA NLAA Programmatic?

An EPA biologist/permit writer will review an activity for the potential presence of NOAA Fisheries ESA-listed species and critical habitat in the project's action area. The best available information on the distribution (geographic and temporal), life stages, and behaviors of ESA-listed species, as well as the physical or biological features (PBFs) of critical habitat are found here:

<https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-species-critical-habitat-information-maps-greater>

If the EPA biologist/permit writer determines that a project will have no effect on ESA-listed species or critical habitat, no ESA consultation with NOAA Fisheries is needed, and no documentation should be sent to GARFO. The EPA biologist/permit writer should document the "no effect" determination for their files in order to explain why they are not consulting with NOAA Fisheries under ESA section 7. Be sure to indicate which stressors are relevant to the action under consideration. It is not necessary to notify NOAA Fisheries or seek their concurrence with your no effect determination, as we are not obligated to review it, concur with it, or otherwise provide comments on it. For more information, please see our website:

<https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-no-effect-determinations-greater-atlantic-region>

If the EPA biologist/permit writer determines that a project may affect, but is not likely to adversely affect (NLAA) ESA-listed species or critical habitat (*i.e.*, the project's effects are insignificant, discountable, or wholly beneficial), it may be eligible for review under the EPA NLAA Programmatic. To determine project eligibility, the EPA biologist/permit writer must check to see whether or not the application meets (or could meet with the appropriate permit conditions) all of the Project Design Criteria (PDC) outlined in the EPA NLAA Programmatic.

There are general PDC (Section 3 in the verification form) and “stressor specific” PDC (Section 4 through Section 6 in the verification form), that apply to projects that have the potential to introduce those stressors into the action area. The EPA NLAA Programmatic verification form lists all of the PDC. If the project meets all of the applicable PDC, it is eligible for review under the EPA NLAA Programmatic.

If the project does not meet all of the applicable PDC, but the EPA biologist/permit writer still believes the project should be eligible for review using the verification form (*e.g.*, the project does not introduce any stressors that are likely to adversely affect (LAA) ESA-listed species or critical habitat), the EPA biologist/permit writer should leave both boxes unchecked for the PDC, then provide a justification for each PDC that is not met (Section 7 in the verification form). Examples of acceptable justifications include, but are not limited to, additional permit conditions, high dilution factor, intermittent frequency (*e.g.*, stormwater), or existing waterbody conditions (*e.g.*, receiving water characteristics including high flow, tidal flushing, location not in critical habitat or spawning area). Each justification should explain how the project’s effects are insignificant (*i.e.*, too small to be meaningfully measured, detected, or evaluated) or discountable (*i.e.*, extremely unlikely to occur), despite not meeting the PDC.

If the project does not meet all of the PDC and the EPA biologist/permit writer cannot provide proper justification for why the project is NLAA ESA-listed species or critical habitat, the EPA biologist/permit writer must submit a request for individual informal (or formal, if necessary) consultation.

Any questions related to eligibility for coverage under the EPA NLAA Programmatic can be sent to nmfs.gar.esa.section7@noaa.gov.

II. EPA NLAA Programmatic PDC

A. Guidance on General PDC

On the verification form, General PDC are found in Section 3. Review all 6 PDC (guidance below). If the PDC is met, check YES. If the PDC is not applicable to your project because the stressor category is not part of your project activity (*i.e.*, no impingement/entrapment is expected because no CWIS is part of the activity (*e.g.*, PDC 7 and PDC 8)) or, your project does not occur within the time of year (*e.g.*, PDC 14) or location (*e.g.*, PDC 2, PDC 3, PDC 6) indicated in the PDC, select N/A. If the PDC is applicable, but is not met, leave both boxes blank and provide a justification for that PDC in Section 7.

1. No portion of the proposed action will individually or cumulatively have an adverse effect on ESA-listed species or designated critical habitat.

- **Yes** – project is eligible for processing under the EPA NLAA Programmatic through the verification form.
- **N/A** – If the EPA biologist/permit writer determines that PDC 1 is N/A, this is an indication that there may be no pathways for effects to ESA-listed species and ESA section 7 consultation may not be necessary. See guidance above for “no effect” determinations.

- If the PDC is not met because adverse effects may occur, the project will require individual consultation.

2. No project will occur in Atlantic or shortnose sturgeon spawning grounds in the Merrimack River, Piscataqua River, Connecticut River, and/or any additional river where spawning grounds are identified unless:

a. effluent is compliant with state water quality standards at the end-of-pipe discharge point, and

b. an adequate dilution factor in the receiving water body is achieved.

- **Yes** – project is eligible. If the project is in the Merrimack River, Piscataqua River, Connecticut River, and/or any additional river where spawning may occur, this PDC is applicable. Therefore, the EPA biologist/permit writer should check Yes if the action occurs in one of these rivers, but spawning grounds are not identified in the action area.
- **N/A** – PDC is not applicable for any project located outside of spawning rivers identified in the PDC. If the project occurs in coastal/marine waters (i.e., outside of a river where spawning will occur), this PDC does not apply. If after reviewing the ESA Section 7 Mapper, Atlantic sturgeon or shortnose sturgeon spawning is not expected to occur in the action area, check N/A.
- If PDC is applicable but not met, leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

3. Any project within designated Atlantic sturgeon critical habitat will have no effect on hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0-0.5 parts per thousand) (PBF 1).

- **Yes** – project is eligible. If the project is located in Atlantic sturgeon critical habitat, this PDC is applicable. To determine if your project has the potential to affect Atlantic sturgeon critical habitat, first look to see if your project is located in Atlantic sturgeon critical habitat (GARFO maps/species tables). Next, review PBF 1 details and compare those to the project site (low salinity waters and hard bottom substrate).
- **N/A** – PDC is not applicable if a project's action area is not within Atlantic sturgeon critical habitat. If the project is in coastal/marine waters (i.e., outside of a river/estuary), this PDC does not apply.
- If PDC is applicable but not met, leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

4. The project will not change temperature, water flow, salinity, or dissolved oxygen levels in the receiving waters to a level that may adversely affect ESA-listed species or critical habitat.

- **Yes** – project is eligible. If changes in the receiving water change temperature, water flow, salinity, or dissolved oxygen levels will occur as a result of the project, this PDC is applicable. If these changes in receiving water are not expected to adversely affect ESA-listed species, check Yes.

- **N/A** – PDC is not applicable for the project.
- If PDC is applicable but not met, leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

5. If ESA-listed species are likely to pass through the action area at the time of year when the activity occurs, a zone of passage (~50% of water body) with appropriate habitat for ESA-listed species (e.g., depth, water velocity, etc.) must be maintained (i.e., biological stressors such as turbidity or effluent plume must not create barrier to passage nor extend from bank to bank or surface to bottom in a river).

- **Yes** – project is eligible. If the effluent plume will not exceed 50% of the width of the river, check Yes.
- **N/A** – PDC is not applicable for the project.
- If PDC is applicable but not met (e.g., the effluent plume will extend more than 50% of the waterway and a sufficient zone of passage will not be maintained), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

6. Any project in designated North Atlantic right whale critical habitat must have no effect on the physical and biological features.

- **Yes** – project is eligible. If the project is located in North Atlantic right whale critical habitat, this PDC is applicable. To determine if your project has the potential to affect North Atlantic right whale critical habitat, first look to see if your project is located in North Atlantic right whale critical habitat (GARFO maps/species tables). Next, review North Atlantic right whale PBF details and compare those to the project site.
- **N/A** – PDC is not applicable if a project’s action area is not within North Atlantic right whale critical habitat. If the project is in a river/estuary, this PDC does not apply.
- If PDC is applicable but not met (e.g., the project occurs in North Atlantic right whale critical habitat and may impact water quality), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

B. Guidance on Impingement/Entrainment/Capture PDC

7. No intake of water at cooling water intake structures (CWIS) where early life stages (ELS) are expected to be present:

-In the Connecticut River Atlantic and/or shortnose sturgeon ELS are expected to be present from April 15 to October 31.

-In the Merrimack River up to Haverhill, shortnose sturgeon ELS are expected to be present from April 1 to July 15.

-In areas of a river where PBF 1 (i.e., hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0 to 0.5 parts per thousand range) needed for the

settlement of fertilized eggs, refuge, growth, and development of early life stages), and PBF 2 (i.e., aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (e.g., sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development) are present.

- **Yes** – project is eligible. If the project has CWIS and is located in an area where ELS may be present (as listed in the PDC), this PDC is applicable. To determine if your project has the potential to overlap with ELS presence, look to see if your project is located in an area near where spawning could occur (GARFO maps/species tables).
- **N/A** – PDC is not applicable if a project does not have CWIS. If the project is in coastal/marine waters (*i.e.*, outside of a river/estuary), this PDC does not apply.
- If PDC is applicable but not met, leave both boxes blank. Any facility with a CWIS where ELS are present is excluded from the EPA NLAA Programmatic and will require individual consultation.

8. CWIS must not have greater than 1 ft/s intake velocities in any waters to prevent impingement or entrainment of any juvenile-adult stage ESA-listed sturgeon species. CWIS are also required to have appropriate sized mesh screens to block access of aquatic life to CWIS when operationally feasible and ESA-listed species may be present.

- **Yes** – project is eligible. If the project has CWIS and is located in an area where sturgeon may be present, this PDC is applicable. To determine if your project has the potential to overlap with sturgeon presence, look at the GARFO maps/species tables.
- **N/A** – PDC is not applicable if a project does not have CWIS.
- If PDC is applicable but not met (*e.g.*, the approach intake velocity exceeds 1 ft/s or mesh size is determined to be slightly less protective based on the best available science), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

C. Guidance on Water Quality PDC

9. Any discharges must meet state water quality standards (e.g., no discharges of substances in concentrations that may cause acute or chronic adverse reactions, as defined by EPA water quality standards criteria); no discharges of unauthorized or toxic substances without justification supporting a NLAA determination for ESA-listed species.

- **Yes** – project is eligible. If changes in the receiving water will occur as a result of the project, this PDC is applicable. If a discharge meets state water quality standards and does not contain toxic substances, check Yes.
- **N/A** – PDC is not applicable for the project.
- If PDC is applicable but not met (*e.g.*, toxic substances may be present in the effluent), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

10. Effluent bacteria levels should meet water quality standards at the point of discharge and must not reduce dissolved oxygen levels in a way that negatively affects ESA-listed species.

- **Yes** – project is eligible. If effluent will reduce dissolved oxygen levels in the receiving water as a result of the project, this PDC is applicable. If changes in dissolved oxygen levels are not expected to negatively impact ESA-listed species, check Yes.
- **N/A** – PDC is not applicable for the project if bacteria is not expected to be present in the effluent.
- If PDC is applicable but not met (*e.g.*, there may be substantial reduction in dissolved oxygen due as a result of the effluent), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

11. Nutrients must not reduce dissolved oxygen levels (particularly in summer months) in a way that negatively affects ESA-listed species.

- **Yes** – project is eligible. If effluent will reduce dissolved oxygen levels in the receiving water as a result of the project, this PDC is applicable. If changes in dissolved oxygen levels are not expected to negatively impact ESA-listed species, check Yes.
- **N/A** – PDC is not applicable for the project if nutrients are not expected to be present in the effluent.
- If PDC is applicable but not met (*e.g.*, there may be substantial reduction in dissolved oxygen due as a result of the effluent), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

12. Increased total suspended solids (TSS) should meet water quality standards and must not negatively affect sturgeon early life stages (ELS) or spawning.

- **Yes** – project is eligible. If effluent will increase TSS levels in the receiving water as a result of the project and spawning/ELS are present in the action area, this PDC is applicable. If changes in TSS levels are extremely minimal, check Yes.
- **N/A** – PDC is not applicable for the project if increased TSS are not expected to be present in the effluent or if ELS or spawning does not occur in the action area.
- If PDC is applicable but not met (*e.g.*, increased TSS will occur where spawning may occur or ELS may be present), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

13. Effluent temperature must meet water quality standards and an adequate dilution factor for any thermal plume in the receiving water body must be achieved.

- **Yes** – project is eligible. If effluent will change temperature in the receiving water as a result of the project, this PDC is applicable. If adequate dilution and substantial mixing of the effluent is expected to occur, check Yes.
- **N/A** – PDC is not applicable for the project if increased temperature in the receiving water is not expected as a result of the effluent.
- If PDC is applicable but not met (*e.g.*, substantial increase in temperature in the receiving waters may occur), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

D. Guidance on Habitat Modification PDC

14. No portion of the proposed action that may affect sturgeon will occur in areas identified as overwintering grounds, where dense aggregations are known to occur as follows:

- In the Connecticut River from November 15 to April 15
- In the Merrimack River from November 1 to March 31

- **Yes** – project is eligible. If the project is or may be located in sturgeon overwintering areas, this PDC is applicable. To determine if your project has the potential to affect sturgeon overwintering, look to see if your project is located in areas where overwintering may occur (GARFO maps/species tables).
- **N/A** – PDC is not applicable if a project’s action area is not within an area that may support sturgeon overwintering. If the project is in coastal/marine waters (*i.e.*, outside of a river/estuary), this PDC does not apply.
- If PDC is applicable but not met (*e.g.*, the project occurs in areas where sturgeon overwintering may occur), leave both boxes blank. Provide justification for NLAA determination for the PDC in Section 7 or the project will require individual consultation.

E. Guidance on Justifications

If the project does not meet all of the applicable PDC, but EPA still believes the project is eligible for review using the verification form (*e.g.*, the project introduces stressors outside of those considered in the NLAA programmatic framework, but are determined to be NLAA ESA-listed species), a justification can be provided in Section 7. Each justification should explain how the project’s effects are insignificant (*i.e.*, too small to be meaningfully measured, detected, or evaluated) or discountable (*i.e.*, extremely unlikely to occur), despite not meeting the PDC.

III. Guidance on Analysis of Pollutants

Fill out the first table in Section 8 of the verification form with all permit-specific effluent limitations. Check the box next to each “standard” pollutant that will be present in the effluent and EPA’s proposed limit for each. For the purposes of the EPA NLAA Programmatic, “standard” effluent may include oil and grease, pH, TSS/turbidity, nutrients, dissolved oxygen/biochemical oxygen demand, bacteria, and temperature.

Next, fill out the second table in Section 8, if applicable, with any permit-specific effluent limitations for “non-standard” pollutants. For the purposes of the EPA NLAA Programmatic, these may include, but are not limited to, metals, chlorine, and industrial pollutants. For any “non-standard” pollutants that may be present in the effluent, the EPA biologist/permit writer must explain why the effects from these “non-standard” pollutants on ESA-listed species or critical habitat are insignificant (i.e., too small to be meaningfully measured or detected) or discountable (i.e., extremely unlikely to occur) in the justification section.

IV. Sign and submit your EPA NLAA Program Verification Form

Once you’ve completed Sections 1- 8, move to Section 9 and be sure to check the appropriate box for the determination that your project is NLAA ESA-listed species or critical habitat. Check the first box if your project meets all of the PDC and does not require any justifications in Section 7 and Section 8. Check the second box if your project did not meet one or more PDC and you provided justification(s) in Section 7 or Section 8. Enter a digital signature of the EPA representative with a CAC in the signature box, and save.

Once the form is signed, submit the PDF along with any associated project plans, maps, public notices, supporting documentation (*e.g.*, details for each individual facility to be included in a general permit), etc. to nmfs.gar.esa.section7@noaa.gov with **EPA NLAA Programmatic: [Permit Number]** in the subject line of the email. Please do not print, sign, and scan the form, as the original fillable PDF format allows us to import the data you enter to a spreadsheet, and we cannot do that from a scanned version.

By providing your determination and signature, you are certifying that to the best of your knowledge the answers you have provided in the form are accurate and based upon the best available scientific information. The form must be filled out and signed by EPA representative, and not a third party, unless that party is an officially designated non-federal representative.