

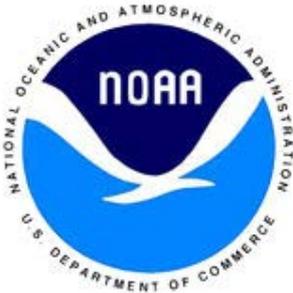
NOAA
FISHERIES

Greater Atlantic Regional
Fisheries Office

NMFS/FHWA ESA s7 and EFH Programmatic Consultations

Wednesday, June 20, 2018, 10am - 12pm

Thursday, June 21, 2018, 1pm - 3pm



U.S. Department of Transportation
**Federal Highway
Administration**

GARFO team:

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NMFS/FHWA Interagency Agreement

NMFS GARFO and FHWA HQ collaborated to develop a 3-part package of documents intended to increase the efficiency of both ESA Section 7 and EFH consultations

1. Consultation Process Guide (Task 1)
2. Best Management Practices (BMP) Manual (Task 2)
3. **ESA Section 7 and EFH Programmatic Consultations (Task 3)**

Goals and Objectives of Agreement

- ID proactive conservation measures most suitable for particular transportation projects
- ID up front BMPs including times and areas for avoidance and minimization measures
- Increase predictability and reduce uncertainty of consultation process and standardize effects analyses
- ID criteria and circumstances for making appropriate consultation determinations
- Develop a standardized process to address consultation requirements to ensure necessary information is available at correct time

Overview of NMFS/FHWA Programmatic Consultations

- Programmatic informal consultation pursuant to section 7 of the Endangered Species Act (ESA)
- Programmatic consultation for essential fish habitat (EFH) pursuant to section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) -- also includes diadromous species/shellfish under Fish and Wildlife Coordination Act (FWCA)
- Cover projects within wetlands and navigable waters of our region (ME, NH, MA, RI, CT, NY, NJ, DE, MD, VA, and District of Columbia)

NMFS/FHWA Programmatic Consultations

Designed to:

- streamline ESA section 7 and EFH consultation to maximize efficiency and lessen timelines for review
- identify and comprehensively assess activities with known, predictable, and similar effects
- allow for abbreviated project-specific analysis because effects are analyzed up front in the programmatic consultation

Expected Benefits of NMFS/FHWA Programmatic Consultations

- Reduce need for in-person meetings
- Reduce need for site visits
- Reduce need for multiple emails and letter exchanges
- Allow for a simple email or form-letter confirming that a project is eligible under the ESA or EFH programmatic consultation
- Result in shorter consultation timelines

NMFS/FHWA Programmatic Consultations

- Broken down by **Projects and Activities** (common to several projects)
- Applicable to routine transportation actions with similar/predictable effects
- All actions conforming to the programmatic must include all applicable and relevant **Project Design Criteria (PDC)** and **Conservation Recommendations (CRs)** or provide appropriate justification for non-inclusion

Elements of Programmatic Consultations

- PDC (ESA section 7)/CRs (EFH) to avoid and minimize adverse effects
- Descriptions of expected effects to species and habitats
- Process for evaluating projects and their effects; tracking of individual and aggregate effects
- Procedures for streamlined project-specific consultations
- Procedures for monitoring, reporting, and validating effects predictions
- Comprehensive annual review
- FHWA/DOT Standard Operating Procedures (SOPs) for eligible projects
- Verification Form (VF) to certify activities are consistent with those activities analyzed

Included Documents for Task 3

ESA section 7

- Program Criteria
- Programmatic consultation
- Standard Operating Procedures (SOPs)
- Verification Form (VF)

www.greateratlantic.fisheries.noaa.gov/protected/section7/reporting.html

EFH

- EFH memo
- Programmatic consultation
- Standard Operating Procedures (SOPs)
- Verification Form (VF)

www.greateratlantic.fisheries.noaa.gov/habitat/efh/24_highway_activities.html

Projects Covered Under ESA/EFH Consultations

1. Bridge Repair, Demolition, and Replacement
2. Culvert Repair and Replacement
3. Docks, Piers, and Waterway Access Projects
4. Slope Stabilization



Sub-Activities of Transportation Projects

1. Cofferdams/Dewatering
2. Demolition
3. Pile Driving/Removal
4. Dredging/Excavation
5. Fill/Stabilization
6. Vessel Activities
7. Habitat Restoration, Establishment, and Enhancement
8. Scientific Measurement Devices/Survey Activities
9. Staging Area Establishment

NMFS/FHWA Programmatic Consultations

Allow for:

- stressor-based analysis (not activity based) for effects – allowing a variety of activity types to be considered
- use of time/area and stressor thresholds for applicable projects – incorporated into PDC/CRs to determine which activities are eligible

NMFS/FHWA Programmatic Consultations

Stressors:

- Underwater Noise
- Impingement/Entrainment and Entanglement
- Water Quality/Turbidity
- Habitat Alteration
- Vessel Traffic

Programmatic Endangered Species Act (ESA) Section 7 Consultation



Areas where ESA section 7 consultation is required

- Areas within the proposed transportation project footprint (i.e., adjacent uplands), where pathways exist for exposure of NMFS ESA-listed species and critical habitats to stressors from project activities
- ESA-listed species and critical habitats in the action area are identified in the Program Criteria document as well as in our online species maps and tables at <https://www.greateratlantic.fisheries.noaa.gov/protected/section7/listing/index.html>

ESA Section 7 Consultation Process

Frequently used terms/concepts

- No Effect (NE) – no consultation necessary
 - ESA-listed species or critical habitat (CH) are not present in the action area (no species present)
 - ESA-listed species or CH will not be affected, directly or indirectly, including by any activities that are inter-related or interdependent to the proposed action
 - ESA-listed species or CH will not be exposed to any potentially harmful/beneficial elements of the action (no plausible routes of effects)
- May affect, but is not likely to adversely affect (NLAA) – informal consultation
 - All effects are insignificant (so small they cannot be meaningfully measured, detected or evaluated), discountable (extremely unlikely to occur), or wholly beneficial
- May affect, likely to adversely affect (LAA) – formal consultation
 - Effects are NOT insignificant, discountable, or wholly beneficial but rather would result in incidental take (e.g., harassment, injury, mortality)

For ESA Programmatic Consultation:

- Scenarios/projects/activities that could result in NLAA
- All project effects are insignificant, discountable, or wholly beneficial

ESA Programmatic Project Exclusions

** No project will individually or in aggregate have an adverse effect on ESA-listed species or designated CH

- Time of year restrictions on projects in spawning grounds, overwintering grounds, and rivers/streams where sturgeon species and Atlantic salmon may be present
- Projects that affect specific PBFs of Atlantic sturgeon and Atlantic salmon critical habitat
- Projects that affect hard bottom substrate
- Any impacts on SAV or oyster reefs
- Any blasting or use of explosives
- Projects that restrict movement or passage

Project Design Criteria

Stressor	Types of Project Design Criteria
General	Restrictions on work in spawning/overwintering grounds and CH; no changes to water temperature, volume, salinity, or DO; turbidity control measures; ensure free passage through action area; restrictions on blasting and use of explosives
Underwater Noise	20 minute pile driving “soft start”; restrictions on steel and large diameter pile use; restrictions on number of piles being driven
Impingement/Entrainment/Entanglement	Restrictions on dredges; use of mesh screenings over intakes; no new permanent surface water withdrawal, intakes, or diversions; restrictions on in-water equipment
Water Quality/Turbidity	Restrictions on offshore disposal, temporary discharges, and TSS; no new permanent discharge pipes
Habitat Alteration	Restrictions on culvert replacements and rehabilitations; other restrictions on filling and new waterward encroachment
Vessel Traffic	Restrictions on vessel speed, buffers around project vessels, limits on numbers of project and new commercial vessels

Project Design Criteria

- PDC are expected to avoid and minimize the effects of stressors produced by transportation activities
 - Effects will be reduced to levels that are insignificant or discountable (NLAA the ESA-listed species or CH)
- Projects that do not follow all applicable PDC are not eligible for the programmatic unless sufficient justification for non-inclusion is provided in the VF and GARFO PRD concurs with the exceptions
 - Currently no limit to how many justifications can be provided, so long as effects of the project on listed species and CH are still insignificant and/or discountable

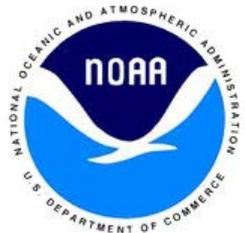
ESA Programmatic Consultation Process

- Screen the transportation project for the presence of ESA-listed species and CH in the project's action area using the Program Criteria document or GARFO PRD species tables and maps
- If ESA-listed species and/or CH may be present, determine whether the project fits within the activity description of the programmatic
- If while accounting for all relevant stressors, FHWA/DOT determines that the proposed project is not likely to adversely affect listed species or CH, the programmatic consultation may be used:
 - **FYI:** NLAA projects may not fit under the programmatic if applicable PDCs are not incorporated or their non-use is not sufficiently justified; those projects that are not eligible for the programmatic can still be determined as NLAA through individual consultation

FHWA/DOT Effects Determinations

- No effect projects: FHWA/DOT should document the “no effect” determination in project files – GARFO does not review, concur with, or otherwise approve no effect determinations
- NLAA projects under programmatic: FHWA/DOT submits a completed Verification Form and GARFO PRD must concur with the project’s eligibility for the NLAA program for the proposed action to proceed
- NLAA projects outside of programmatic: Initiate project-specific informal consultation with GARFO PRD – refer to GARFO PRD website for process
- LAA projects: Initiate formal consultation with GARFO PRD

Programmatic Essential Fish Habitat (EFH) Consultation



Areas where EFH consultation is required



- All tidal waters and non-tidal waters that support diadromous fish, in the jurisdiction of GARFO Habitat Conservation Division
- EFH habitat includes submerged aquatic vegetation (SAV), salt marsh and tidal wetlands, intertidal mudflats, hard bottom habitat, areas containing shellfish, shallow water habitat, and prey species/diadromous fish
- <http://www.habitat.noaa.gov/protection/efh/habitatmappper.html>

EFH Programmatic Consultation Process

- FHWA/DOT provides all required project-specific information to GARFO HCD via Verification Form
- GARFO HCD confirms that project is eligible for programmatic and requests additional information if necessary
 - Project must incorporate all of the applicable CRs to qualify for the programmatic consultation, except where justification is provided and GARFO HCD concurs via the Verification Form
- Individual consultation required for proposed activities that do not follow all applicable CRs or one of excluded activities
- Tracking: FHWA must track and analyze EFH activities on an annual basis

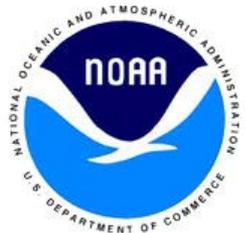
EFH Programmatic Project Exclusions

- Construction of new bridges and culverts (where one did not previously exist)
- Independent pedestrian trails or bridges
- New or improvement dredging
- Any blasting or use of explosives
- Any temporary structures/activities in place for more than 2 years
- Impacts to submerged aquatic vegetation (SAV)
- Impacts $\geq 1,000$ sf to saltmarsh, shellfish beds, intertidal areas
- Impacts ≥ 100 sf to natural rocky habitat (e.g., bedrock, boulders, cobble, and/or gravel- does not include engineered stone)
- Stream channelization or relocation
- Work on dams, tidegates, or breakwaters
- Others, see Appendix A

Conservation Recommendations

Stressor	Conservation Recommendation
Underwater Noise	Pile driving soft start; 20 minute start-up; TOY restrictions on noise-generating work; restrictions on use of cofferdams to maintain fish passage
Impingement/Entrainment and Entanglement	Turbidity control measures; guidelines on size of fish screens around pumps used in temporary dewatering or stream diversion, no new permanent surface water withdrawal/diversions
Water Quality/Turbidity	Soil erosion, sediment, and turbidity controls; TOY restrictions on stream work; limitations on construction debris, dredged materials, and creosote piles; removal of abandoned piles; no contact of raw concrete with water; wood treatments
Habitat Alteration	Restrictions and guidelines for: temporary structures and fills; monitoring devices; pipelines/cables; ambient light transmission; height of docks and piers; pre/post-dredge surveys in benthic habitat; dredging location; SAV surveys; compensatory mitigation; construction in wetlands/mudflats, fish passage
Vessel Traffic	Operate in adequate water depths; no mooring in SAV

Verification Forms, SOPs, Monitoring



Verification Forms for ESA/EFH Programmatic Consultations

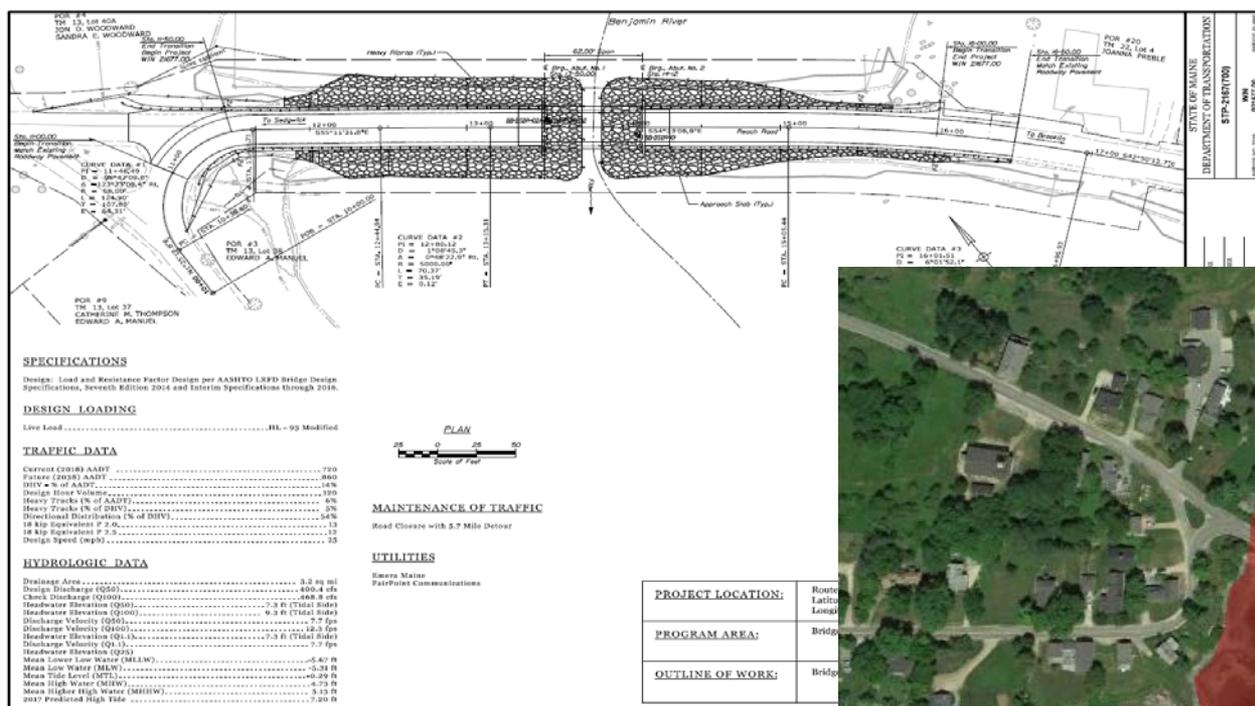
Key points:

- the VF is essentially a shortened consultation—the same thought and effects determination language needs to be used when completing one
- the forms should be coming from FHWA or a state DOT—not from applicants or contractors
- all fields must be filled out: activity type, general project info, species/CH present, potential stressors, FHWA determination of effects, PDC checklist (ESA), justification for non-inclusion of PDC/CRs

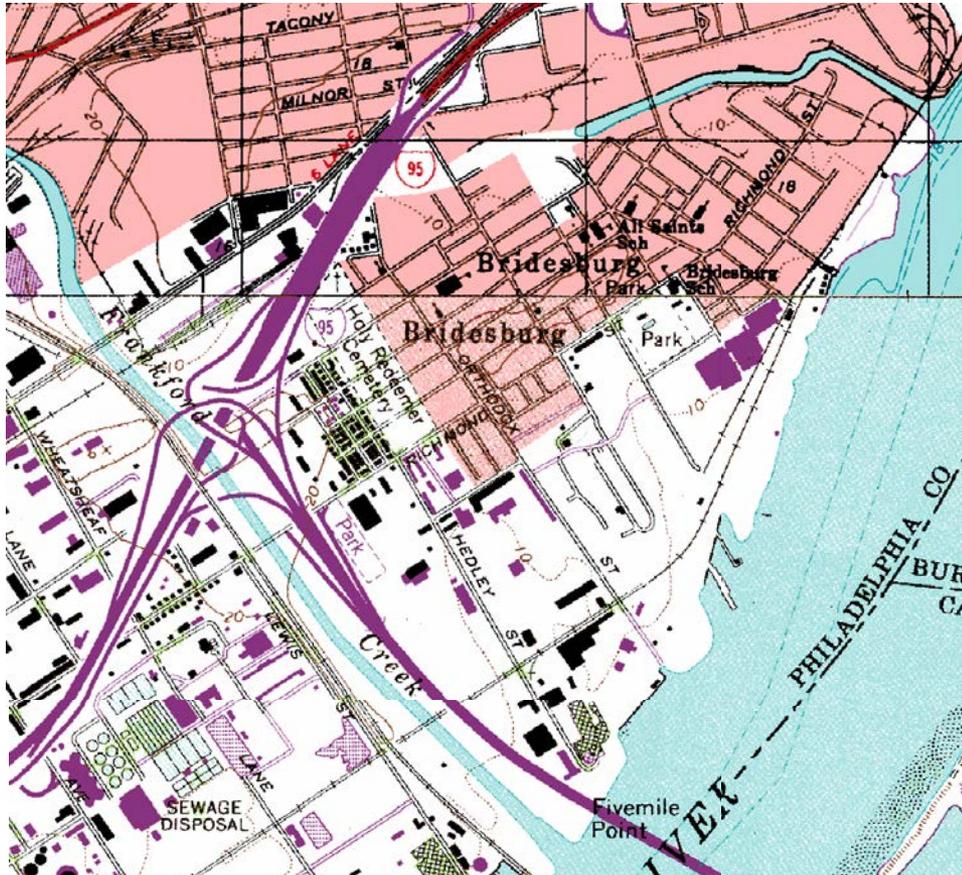
https://www.greateratlantic.fisheries.noaa.gov/protected/section7/FHWA%20documents/appendix_a_verification_form_for_web.pdf

https://www.greateratlantic.fisheries.noaa.gov/habitat/efh/fillable_verification_form_appendix_b.pdf

ESA Programmatic VF example: ME DOT Benjamin River Bridge Replacement



ESA Programmatic VF example: Penn DOT I-95 Section BRI



Programmatics So Far...

Status report

- Both ESA and EFH consultations signed April 30, 2018
- As of June 2018
 - 3 ESA VFs submitted and completed
 - All 3 signed off by NMFS same day as adequate version received
 - 0 EFH VFs submitted
- Completed projects have covered bridge repair/replacement, slope stabilization

NMFS/FHWA Programmatic Consultations

Key points:

- VFs
 - although they can be stand alone submissions, we suggest that additional materials and project info (e.g., schematics, acoustic tool calculations) be included to help justify that all effects will be insignificant and discountable (ESA) or not substantial (EFH), even when certain PDC/CRs are not utilized
 - when submitting the VFs, please do not lock the documents - NMFS cannot sign them otherwise (DOT signature page can be reinserted into the PDF)
- SOPs
 - meant to be used in conjunction with the VFs — they guide the process
- The VFs and SOPs are “living documents” and will occasionally be updated to reflect new processes, increase utility, answer questions

NMFS/FHWA Programmatic Consultations

Monitoring

- annual monitoring report from FHWA must be delivered to NMFS
- project tracking by fields on the Verification Form will make a good guide for important data to include in report

Questions?

