

SPECIAL PUBLIC NOTICE**GALVESTON DISTRICT REGULATORY UPDATE:
Information to assist non-federal applicants understand compliance with
Nationwide Permit General Condition 18, Endangered Species**

The purpose of this document is to provide information for non-federal applicants using the Nationwide Permits (NWP) 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 2021 NWPs, ESA Section 7 compliance is required by NWP General Condition (GC) 18. Paragraph (c) of GC 18 requires non-federal permittees to submit a PCN to the appropriate Corps District office **“if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation.”**

All PCNs submitted to the Galveston District are reviewed and evaluated for potential effects to listed and proposed species and critical habitat. Paragraph (c) of GC 18 requires that **“the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity.”**

The Galveston District contains species and critical habitat under the jurisdiction of US Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS). Information on the potential location of threatened and endangered species and their critical habitat can be obtained directly from FWS’s Information for Planning and Consultation website at <https://ipac.ecosphere.fws.gov> and from the NMFS Southeast Regional Office (SERO) website at <https://www.fisheries.noaa.gov/southeast/endangered-species-conservation/esa-section-7-interagency-consultation-southeast-united-states> or SERO’s ESA Section 7 Mapper at <https://noaa.maps.arcgis.com/apps/webappviewer/index.html?id=b184635835e34f4d904c6fb741cfb00d>.

Paragraph (c) of GC 18 states that the Corps 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.”** It also states that the **“applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat or critical**

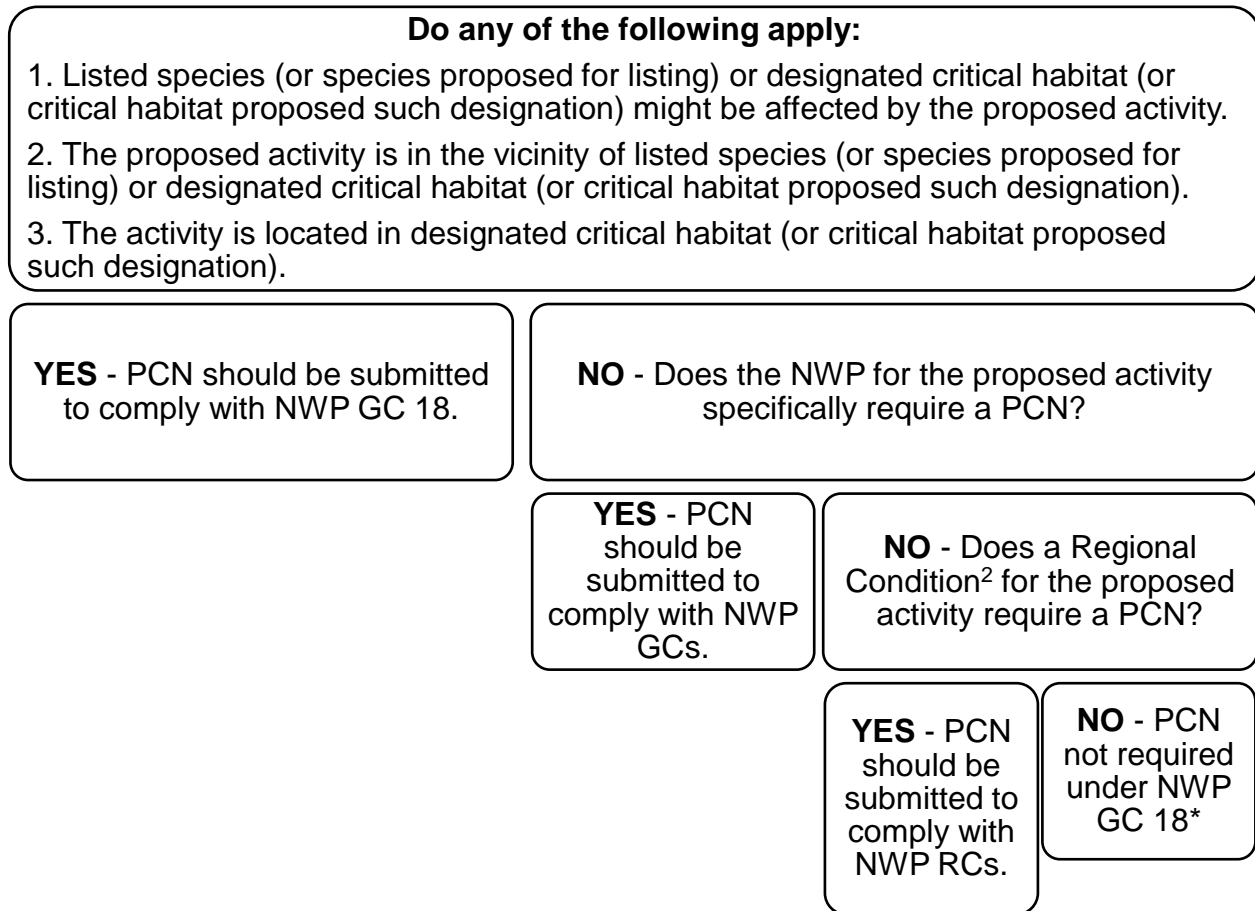
habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.”

The complete text of NWP GC 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 or proposed species or critical habitat.

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. If you are uncertain about whether a PCN should be submitted for a particular NWP activity to comply with NWP General Condition 18, please submit a pre-application request through the Regulatory Request System at <https://rrs.usace.army.mil/rrs>.

Questions concerning whether your proposed NWP activity is in the vicinity of a listed species (or species proposed for listing) or in designated critical habitat (or critical habitat proposed such designation) should also be directed to the Galveston District, because the determination of “vicinity” is dependent on the characteristics of the project site, the species/critical habitat, and the NWP activity. If you have general questions regarding this document, please email us at CESWGRegulatoryInbox@usace.army.mil.

Pre-Construction Notification Determination Flow Chart



*NOTE: A PCN could be required to comply with other NWP General Conditions.

¹Many of the NWPs specifically require PCNs for all activities authorized by the specific NWP. Please review the NWP relevant to your proposed activity to determine whether that specific NWP requires notification. If you have questions regarding NWP specific notification requirements, please submit a pre-application request through the Regulatory Request System at <https://rrs.usace.army.mil/rrs>.

² In the Galveston District, Regional Conditions have been added to some of the NWPs to require pre-construction notification for additional activities and locations. For activities occurring within Texas, please review the Galveston District RCs, which are available at:

https://www.swg.usace.army.mil/Portals/26/docs/regulatory/2021NWP/2021%20NWP_TX_RGC%20Combined%20Feb2022.pdf?ver=rxTFkDGcZQIl8-1MFmgRtw%3d%3d

For activities occurring within Louisiana, please review the Galveston District RCs, which are available at:

https://www.swg.usace.army.mil/Portals/26/docs/regulatory/2021NWP/2021_Final_Louisiana%20RCs_December_2021.pdf?ver=yJwG4puA_gdp6_ccHEppkw%3d%3d

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 designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. 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. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or

until ESA section 7 consultation or conference 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 or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWP.

(e) Authorization of an activity by an 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 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) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

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

Appendix B – ESA 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.

Destruction or adverse modification - means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. [50 CFR 402.02]

Effects of the action - are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. [50 CFR 402.02]

May affect - the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat. [Endangered Species Consultation Handbook – Procedures for Conducting Consultation and Conference Activities under Section 7 of the ESA (1998), page xvi]

No effect - the appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat. [Endangered Species Consultation Handbook – Procedures for Conducting Consultation and Conference Activities under Section 7 of the ESA (1998), page xvi]

Explanatory note – When a Corps district receives a PCN for a proposed NWP activity, it 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.