

ACOE Regulatory Process to Address Effects to Federally Listed Bats in New York State

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April 2016



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US Army Corps of Engineers
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U.S. Army
 Corps of Engineers

U.S. Army Corps of Engineers
 Regulatory Districts
 in New York State

Regulatory Program Goals

- To provide strong protection of the Nation's aquatic environment, including streams.
- To enhance the efficiency of the Corps administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.



How do I know when/if I need to apply for a Corps permit?

- Determine whether Federal waters or wetlands exist on site;
- Determine whether and what type of work will occur in waters or wetlands;
- Determine what type of Corps permit required, if necessary.



Department of the Army Permit under Section 10 RHA is required....:

- Construction and/or placement of any structure in, over or under any navigable water of the US;
 - INCLUDES: aerial crossings and borings (HDD)
- Excavating from (dredging) or depositing of material in such waters; or
- Any other work affecting the course, location, condition, or capacity of such waters.



Section 404 of the Clean Water Act of 1977

- Goal - to preserve the physical, chemical and biological integrity of the nation's waters
- Applies to all 'waters of the United States' (33 CFR 328.3)
- 'Discharge of dredged or fill material' is regulated (33 CFR 323.2)



Department of the Army Permits Include:

Individual Permits

- Letter of Permission (LOP)
- Standard Individual Permit (IP)

General Permits

- Regional General Permits (RGP)
- Nationwide Permits (NWP)



Nationwide Permits (NWP)

- A type of general permit used to authorize specific types of activities
- Minimal impact to aquatic environment (w/Mitigation)
- Expedite permit review process (45 – 60 days)
- 50 different NWPs
- 31 general conditions
- Regional conditions developed by District/State agencies
- Compensatory Mitigation may be required (> 1/10 acre loss of wetlands, some stream projects)
- Valid for 5 years (until March 18, 2017)



NWP General Condition No. 31: Pre-Construction Notification

- Where required... applicants **MUST** notify the Corps by submitting a PCN;
 - Required by NWP, GCs, or Regional Conditions.
- Corps must determine complete or request additional information within 30 days;
- Corps must verify NWP or notify applicant an IP is required within 45 days or project may proceed as proposed
 - Unless waiver, ESA or SHPO consultation required.



PCN Requirements in NYS

- Outlined General Condition No. 31, and Regional Condition G-D, and additional items in certain NWP's;
- Joint Application Form (Feb. 2013), or ENG-4345;
- See form instructions for basic supporting information for all applications (including non-reporting NWP's)



PCN Requirements in NYS for Threatened and Endangered (T&E) Species

NWP General Condition No. 18, which applies to ALL reporting and non-reporting NWPs, states that, "Non-federal permittees must submit a PCN... if any listed (T&E) species or designated critical habitat *might be affected* or is *in the vicinity of* the project,..., 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."



PCN Requirements in NYS for T&E Species

PCNs must include a written statement indicating if any federally listed species **MAY BE AFFECTED** or is **IN THE VICINITY** of the project, or if the project is located in designated critical habitat...

- Note, any time an applicant proposes an activity under a reporting or non-reporting NWP that involves clearing 'suitable habitat', AT ANY TIME OF THE YEAR, it 'may affect' Ibat and/or NLEB and requires submission of a PCN under NWP GC No. 18.



PCN Requirements in NYS for T&E Species

- ***IN THE VICINITY*** of the project, **OR**
- ***MAY BE AFFECTED***
- ***WRITTEN STATEMENT***... for any federally listed species **OR** if the project is located in designated critical habitat



PCN Requirements in NYS for T&E Species

“IN THE VICINITY”

1) Does Indiana bat or NLEB come up in IPaC species list?

Yes – Continue;

No - Done (not in the vicinity).

2) Does the project affect a bridge?

Yes - PCN / project “in the vicinity”;

No - Continue...

3) Project within 5 miles of a hibernaculum?

Yes - PCN / project “in the vicinity”;

No - Continue...



PCN Requirements in NYS for T&E Species

“IN THE VICINITY”

4) Suitable Indiana bat or NLEB summer habitat present within the entire project area?

Yes – Continue;

No - Done (not in the vicinity).

5) Project within 1.5 miles of documented roosts, or within 3 miles of netting captures or probable acoustic detections (i.e., either species identified by NYNHP)?

Yes - PCN / project “in the vicinity”;

No - Continue...



PCN Requirements in NYS for T&E Species

“IN THE VICINITY”

6) Prior negative Indiana bat and NLEB P/A surveys (within last 5 years) at the project site?

Yes - Done (not in the vicinity).

No - Continue...

7) Does the project entail removing trees exceeding 3 inches dbh anywhere in the project area?

Yes - PCN / project “in the vicinity”;

No - Done (not in the vicinity).



PCN Requirements in NYS for T&E Species

MAY BE AFFECTED ...

- Note, any time an applicant proposes an activity under a reporting or non-reporting NWP that involves clearing 'suitable habitat', **AT ANY TIME OF THE YEAR**, it 'may affect' Indiana bat and/or NLEB and requires submission of a PCN under NWP GC No. 18.



T&E Species – Process and Documentation

- 1) **DETERMINE PRIMARY FEDERAL ACTION AGENCY**
- 2) **DETERMINE THE ACTION AREA**
- 3) **DETERMINE WHETHER SPECIES MAY BE PRESENT**
- 4) **OBTAIN PROJECT-SPECIFIC INFORMATION ON SPECIES AND POTENTIAL EFFECTS**
- 5) **DETERMINE EFFECTS ON SPECIES**
- 6) **CONDUCT SECTION 7 CONSULTATION**

<http://www.fws.gov/northeast/nyfo/es/section7.htm>

(Click on “Project Reviews” for a step-by-step process.)



T&E Species – Process and Documentation

1) DETERMINE PRIMARY (LEAD) FEDERAL ACTION AGENCY

- ▶ Must be a Federal agency, or a designated representative;

2) DETERMINE THE ACTION AREA

- ▶ Varies depending on the extent of jurisdictional activities associated with a project;
- ▶ Varies on the level of Corps “control” over a project (Section 10 vs Section 404);
- ▶ Typically includes all the areas directly or indirectly affected by the construction of a project



T&E Species – Process and Documentation

3) DETERMINE WHETHER SPECIES MAY BE PRESENT

- Information for Planning and Conservation (IPaC);
<https://ecos.fws.gov/ipac/>
 - ▶ Enter Project Location (AKA Action Area);
 - ▶ Print out IPaC Species List;
 - ▶ Enter species into Species Conclusion Table;
- Same for **Designated Critical Habitat** (piping plover);
- NOTE: In tidal and/or coastal areas there may T&E species under the jurisdiction of the National Marine Fisheries Service.



T&E Species – Process and Documentation

4) **OBTAIN PROJECT-SPECIFIC INFORMATION ON SPECIES AND POTENTIAL EFFECTS**

- ▶ Check for any known locations of federally listed species by contacting the New York Natural Heritage Program (NYNHP)
 - <http://www.dec.ny.gov/animals/31181.html>
 - Allow 2-4 weeks for response
- ▶ Conduct Presence/Absence (P/A) surveys;
- ▶ Survey site for Suitable Habitat;
- ▶ Survey bridges for signs of bats.



T&E Species – Process and Documentation

5) DETERMINE EFFECTS ON SPECIES

- ▶ Refer to Species Profiles, FWS Fact Sheets, and designated Websites;
- ▶ **Request Technical Assistance from FWS**;
- ▶ Consult with your local Corps office;
- ▶ Propose Conservation Measures;
- ▶ Complete Species Conclusion Table;
- ▶ **NOTE: A final ‘Determination of Effect’ for each species is by a Federal Action Agency or Designated Representative.**



T&E Species – Process and Documentation

5) DETERMINE EFFECTS ON SPECIES (cont.)

- ▶ **For Indiana bat and NLEB:** Generally, the following activities “may effect” listed bats and require consultation...
 - **Bridge projects;**
 - **Projects in close proximity to a known hibernaculum, maternity roost, or individual location recently documented using accepted P/A survey techniques;**
 - **Clearing suitable summer habitat;**



T&E Species – Process and Documentation

5) DETERMINE EFFECTS ON SPECIES (cont.)

- ▶ **For Indiana bat and NLEB:** Generally, the following activities “may ADVERSELY effect” listed bats and require consultation...
 - **Clearing suitable habitat from April - October;**
 - ▷ OR for Indiana bat areas w/in 10 miles of Priority 3 or 4 hibernaculum, or w/in 20 miles Priority 1 or 2
 - **Disturbing a known hibernaculum or roost;**
 - **Actions that may cause TAKE** (see FWS guidance).



T&E Species – Process and Documentation

6) CONDUCT SECTION 7 CONSULTATION

- ▶ **ONLY a Federal Action Agency or Designated Representative** can determine an undertaking has “no effect” on a listed species, and therefore eliminate the need to consult with FWS under Section 7 of the ESA;
- ▶ **ONLY a Federal Action Agency or Designated Representative** can consult with FWS under Section 7 of the ESA.



T&E Species – Process and Documentation

PCN ‘Written Statement’: Purpose

To provide the Corps with sufficient information to:

- Determine the extent of potential effects on T&E species and/or designated critical habitat; AND...
- Conduct any necessary Section 7 consultation;
- OR Document whether and how consultation was completed by LEAD Federal agency



T&E Species – Process and Documentation

A complete PCN should include (paper and electronic):

- A copy of an IPaC Species List of T&E species;
 - ▶ Indiana bat found within approx. 40 miles from active hibernacula (except some urban areas);
 - ▶ NLEB in ALL counties in NYS;
 - ▶ Data updated by FWS regularly.
- A copy of response email/letter from NYNHP;
- Results of P/A or bridge surveys, if any.



T&E Species – Process and Documentation

A complete PCN should include (cont.):

- Completed Phase 1 Summer Habitat Assessment form;
 - ▶ Examples of unsuitable habitat:
 - Individual trees that are greater than 1000 feet from forested/wooded areas;
 - Urban street trees (trees found in highly-developed urban areas);
 - A pure stand of 5-inch dbh (Indiana bat) or 3-inch dbh (NLEB) trees (or less) that are not mixed with larger trees;
 - Apple orchards;
 - Buckthorn patches; and
 - Christmas tree stands that are actively managed.

<http://www.fws.gov/midwest/endangered/mammals/inba/inbasummersurveyguidance.html>



T&E Species – Process and Documentation

A complete PCN should include (cont.):

- A discussion of suitable bat habitat within the project site, potential effects and conservation measures to minimize impacts;
 - ▶ Examples of conservation measures:
 - Avoidance of 'good' habitat;
 - Seasonal restriction for tree clearing activities.
- A completed Species Conclusion Table;
- A drawing showing the extent of tree clearing areas;
- Representative photographs of habitat to be cleared.



T&E Species – NLEB and the 4(d) Rule

Key for Corps permit actions

- Rule applies ONLY to NLEB (threatened), NOT Indiana bat (endangered);
- Rule exempts incidental take, NOT consultation;
- Effects addressed by conditions of Programmatic BO;

See Also:

<http://www.fws.gov/midwest/endangered/mammals/nleb/>



T&E Species – NLEB and the 4(d) Rule

Key for Corps permit actions (cont.)

- Action agencies **MUST** wait up to 30 days for review by FWS prior to finalizing action;
 - ▶ NOTE: Informal consultation for NLTAA determinations (e.g. winter tree clearing) requires action agency to wait for a response, however FWS review typically takes less than 10 days for a NWP action;
 - ▶ FWS can advise agency that proposed action is not covered under BO, and requires additional consultation.



T&E Species – NLEB and the 4(d) Rule

Documentation for Corps review

- PCN information for NLEB
 - ▶ IPaC List, NYNHP response, Habitat Assessment form, description of effects, proposed conservation measures, clearing drawing, photographs,
 - ▶ AND why winter clearing not practicable;
- Streamlined Consultation Form (follows Key and BO);
 - ▶ How much (acres) clearing in April - October?
 - ▶ How much (acres) clearing in June and July?



T&E Species – NLEB and the 4(d) Rule

Documentation for Corps review (cont.)

- Streamlined Consultation Form (Yes/No);
 - ▶ Will project alter the entrance or inside environment of a known NLEB hibernaculum?
 - ▶ Will project clear trees within 0.25 miles of known NLEB hibernaculum?
 - ▶ Will project destroy known NLEB maternity roost in June or July (pup season)?
 - ▶ Will project clear trees within 150 feet of a known NLEB maternity roost in June or July (pup season)?



Questions?

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Questions?



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