

## **Standard Operating Procedures (SOPs) for the FHWA GARFO 2018 NLAA Program**

The FHWA NLAA Program Criteria together with the programmatic ESA section 7 consultation letter, are jointly referred to as the FHWA GARFO 2018 NLAA Program, or “Program.” The Program represents an interagency effort to streamline ESA consultation for routine, non-controversial projects that are not likely to adversely affect (NLAA) ESA-listed species or critical habitat. The Program does not address whether certain activity categories or stressor levels will have no effect on listed species or critical habitat (this remains under the discretion of FHWA/state DOT). Those activities that are ineligible for the Program require individual section 7 consultation (informal or formal, depending on whether the proposed work will likely adversely affect listed species or habitat).

### **1) Eligibility under the FHWA GARFO 2018 NLAA Program**

- a) FHWA/state DOT will screen transportation projects for the potential presence of NMFS 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 (check both the maps and species tables):

[www.greateratlantic.fisheries.noaa.gov/protected/section7/listing/index.html](http://www.greateratlantic.fisheries.noaa.gov/protected/section7/listing/index.html)

[ESA-listed species and habitat GIS layers](http://www.greateratlantic.fisheries.noaa.gov/educational_resources/gis/data/index.html#e1112936) are available here:

[www.greateratlantic.fisheries.noaa.gov/educational\\_resources/gis/data/index.html#e1112936](http://www.greateratlantic.fisheries.noaa.gov/educational_resources/gis/data/index.html#e1112936). If FHWA/state DOT is in doubt about whether ESA-listed species or critical habitat overlap with the action area, they will contact a GARFO Section 7 biologist and request technical assistance. For section 7 biologist contacts for your state see:

[www.greateratlantic.fisheries.noaa.gov/protected/section7/contactus/index.html](http://www.greateratlantic.fisheries.noaa.gov/protected/section7/contactus/index.html).

- b) Once there is complete information on the project design in relation to effects on ESA-listed species and/or critical habitat, as applicable, FHWA/state DOT will make a determination on the project effects. FHWA/state DOT must account for all stressors that are relevant to the action area, listed species, and critical habitats under consideration.
- i. If FHWA/state DOT determines that a project will have **no effect** on ESA-listed species or critical habitat, no ESA consultation is needed, and no documentation should be sent to GARFO. A “no effect” determination may be made if there is no direct or indirect effect of the proposed action on ESA-listed species or critical habitat temporally or spatially. For FHWA/state DOT to determine if activities will have no effect on ESA-listed species and critical habitat in the action area, the determination must be made for ALL ESA-listed species and critical habitat in the action area under NMFS’ jurisdiction. FHWA/state DOT will document the “no effect” determination in their project file to explain why ESA section 7 consultation with GARFO PRD is not necessary.
- ii. If the activity has a direct or indirect effect on ESA-listed species or critical habitat temporally or spatially, and FHWA/state DOT determines that the project may affect,

but is not likely to adversely affect ESA-listed species or critical habitat (i.e., the project's effects are **insignificant, discountable, or wholly beneficial**), the project will need informal ESA section 7 consultation with GARFO PRD.

The project may be eligible for review under the Program. To determine project eligibility, FHWA/state DOT must determine whether the project fits within the activity descriptions and meets all of the **project design criteria (PDC)** and conditions outlined in the FHWA NLAA Program Criteria. The action must not be associated in any way with known existing litigation against NMFS, FHWA, or the applicant.

There are 32 PDC in the Program; 11 of these are general PDC that apply to all projects, and the rest are "stressor-specific" PDC that apply to projects that have the potential to introduce those stressors into the action area. If the project meets all of the applicable PDC and conditions, it is eligible for review under the Program.

(1) For projects that fit within the activity description and incorporate all applicable PDC of the Program, FHWA/state DOT will consult with GARFO PRD using the Verification Form. If the project does not incorporate all PDC, FHWA/state DOT may provide additional justification in the Verification Form justifying how the project is still consistent with the Program. Project modifications must not result in different effects not already considered in the consultation. GARFO PRD will respond after receiving the Verification Form and identify whether they concur with FHWA/state DOT's effect determination and that the project meets the terms of the Program. FHWA/state DOT must receive a completed and signed Verification Form back from GARFO PRD with concurrence that the proposed project is consistent with the Program for the proposed action to proceed.

(a) **IMPORTANT:** If the project does not meet all of the applicable PDC, but FHWA/state DOT still believes the project is eligible for review using the form (e.g., the project does not introduce any stressors outside of those considered in the Program, but it occurs during a time of year restriction), FHWA/state DOT should indicate which PDC are not met, and then provide a justification for each PDC not met. Examples of acceptable justifications include (but are not limited to) additional measures, such as observer coverage, turbidity curtains, working in the dry, etc. 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.

(2) Projects that are not eligible for the Program will undergo individual consultation with GARFO PRD. Using the guidance at [www.greateratlantic.fisheries.noaa.gov/protected/section7/guidance/consultation/index.html](http://www.greateratlantic.fisheries.noaa.gov/protected/section7/guidance/consultation/index.html), FHWA/state DOT will submit a request to GARFO PRD for individual (informal or formal) ESA section 7 consultation for projects that:

(a) do not incorporate all PDC;

- (b) do not fit within the activity description;
- (c) introduce a stressor not considered under the Program; and/or
- (d) do not have proper justification for why the project violates the PDC but should still be reviewed under the Program.

## 2) Consultation with GARFO PRD under the FHWA GARFO 2018 NLAA Program

- a) FHWA/state DOT will use the Verification Form to notify GARFO PRD of all actions to be reviewed and processed under the Program. FHWA/state DOT will appropriately fill out and submit the Verification Form and ensure that any activity using the Program incorporates all applicable project design criteria (PDC). If the project does not incorporate all PDC, FHWA/state DOT may provide additional justification in the Verification Form indicating that the project is consistent with the Program. Project modifications must not result in different effects not already considered.
  - i. FHWA/state DOT will email the completed Verification Form to: [NMFS.GAR.ESA.Section7@noaa.gov](mailto:NMFS.GAR.ESA.Section7@noaa.gov) with “FHWA GARFO 2018 NLAA Program” in the subject line.
  - ii. FHWA/state DOT should submit their consultation requests to GARFO PRD only when sufficient information is available to fill out the Verification Form in its entirety. FHWA/state DOT should send the form two weeks to one month prior to the date FHWA/state DOT plans to make their final decision so GARFO PRD can review the Verification Form (and ensure it is complete and accurate) and sign off on it.
  - iii. Upon receipt of the Verification Form, GARFO PRD will check that the project is consistent with the Program parameters and may request additional information to verify consistency. If GARFO PRD has any ESA-listed species or critical habitat concerns, including whether the proposed project is eligible for the Program, GARFO PRD will notify FHWA/state DOT after receiving the Verification Form. FHWA/state DOT must receive a response from GARFO PRD for a project to proceed under the Program. GARFO PRD will respond within two calendar weeks with either (1) a completed Verification Form or (2) notification that additional information or project details are needed to determine whether the project is eligible for the Program.
  - iv. For projects that do not incorporate all applicable PDC, where an individual section 7 consultation is not required, the unincorporated PDC must be documented in the Verification Form with additional justification on why the PDC were not incorporated and any additional measures that will be used to meet the intent of the PDC not incorporated. Any project modifications must not result in different effects not already considered.
- b) FHWA/state DOT will determine if reinitiation of ESA section 7 consultation is necessary, if the activity plans change that cause an effect that was not originally considered and after the Verification Form is submitted to GARFO PRD. It may be

necessary to submit a new Verification Form or initiate individual ESA section 7 consultation.

### 3) Monitoring

As outlined in the Program, FHWA will provide an annual monitoring report to GARFO by April 1 of each year. FHWA will compile all completed Verification Forms, with GARFO PRD's responses, for tracking and reporting purposes, for all transportation projects using the Program. FHWA will use this information to create the Annual Report.

### 4) Glossary

**Action Area:** "All areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action" (50CFR§402.02). This includes the project's footprint as well as the area beyond it that may experience direct or indirect effects that would not occur but for the action. For more information on how to determine the scope of the action area, please consult the definition of "effects of the action" (50 CFR§402.02).

**Discountable:** To determine that effects of a particular project will be "discountable," you must be able to demonstrate that the effects are extremely unlikely to occur (i.e., discountable effects relate to the likelihood of the impact).

**Insignificant:** To determine that effects of a particular project will be "insignificant," you must be able to demonstrate that the effects cannot be meaningfully detected, measured, or evaluated, and will never reach the scale where "take" will occur (i.e., insignificant effects relate to the magnitude of the impact).

**NLAA:** Informal consultation: the action agency determines that an action may affect, but is not likely to adversely affect listed species or critical habitat. A "May Affect, but Not Likely to Adversely Affect" (NLAA) determination is based on a determination that effects are insignificant, discountable, or wholly beneficial as those terms are defined in the U.S. FWS-NMFS Joint Section 7 Consultation Handbook.

**No Effect:** There will be no direct or indirect effects to listed species or critical habitat from the proposed action. FHWA/state DOT does not need to contact GARFO for consultation.

**PBF:** Physical or Biological Features. Critical habitat designations are based on the physical or biological features essential to the conservation of the listed entity (e.g., species, subspecies, or DPS) and which may require special management or protection.

**PDC:** Project Design Criteria. PDC determine whether a project is eligible for consultation under the Program using a Verification Form. There are General PDC that apply to all projects, and stressor specific PDC that depend on the activity and associated in-water work.

**TOY:** Time of Year. Some of the General PDC require that in-water work occur outside of certain TOYs when sensitive life stages and behaviors are present (e.g., spawning, overwintering).

**Wholly Beneficial:** To determine that effects of a particular project will be “insignificant,” you must be able to demonstrate that the effects are wholly positive, without any adverse effects, on an ESA-listed species or designated critical habitat.