

CHAPTER 4.1

ENDANGERED AND THREATENED SPECIES

PROJECT ENVIRONMENTAL GUIDELINES

January 1995

4.1 ENDANGERED AND THREATENED SPECIES

TABLE OF CONTENTS

- I. SUMMARY
- II. DEFINITIONS
- III. APPLICABILITY
- IV. PROCEDURES
- V. FLOW CHARTS (not currently available on-line, see paper EPM Chap. 4.1)
- VI. CITATIONS
- VII. ADDITIONAL INFORMATION
- VIII. ATTACHMENTS

I. SUMMARY

Federal and state laws protect certain species of plants, fish and wildlife included on federal and state lists of endangered and threatened species. To ensure compliance with federal and state laws and to secure project approval, NYS Department of Transportation (NYSDOT) must determine whether a project will adversely affect a federal or state endangered or threatened species.

This determination may involve: determining whether the project requires process review; reviewing the Natural Heritage Program "red flag" maps as an initial screening for applicable projects; determining the type and significance of the Natural Heritage record; contacting and consulting with the state and federal agencies to determine the likelihood of occurrence of an endangered or threatened species in the project area; conducting a site screening of the project area to determine the potential affect of the project on a listed or proposed species; developing an endangered and threatened species survey; conducting a field survey and documenting the results to ascertain the presence or absence and affects of the project on a listed or proposed species; and evaluating avoidance, minimization and mitigation measures.

If a federal or state endangered or threatened species is present, NYSDOT must assess potential impacts and consider efforts to avoid, minimize and mitigate the impacts. NYSDOT must modify the project to the satisfaction of the state and federal agencies.

To avoid misinterpretation and inconsistencies, it is advisable to designate a single contact person, preferably the Regional Environmental Contact or designee, for contact and correspondence with the regulatory agencies.

II. DEFINITIONS

Endangered Species: as defined by 6 NYCRR § 182.2(g) and 193.3(b), any species of fish, shellfish, crustacea, wildlife or plant designated by NYSDEC that are native species in imminent danger of extirpation or extinction in New York; or are listed as endangered by the USFWS in 50 C.F.R. §§ 17.11-17.12.

Endangered Species Act: the Endangered Species Act of 1973, a federal statute.

Listed Species: as defined in 50 C.F.R. § 402.02, any species of fish, shellfish, crustacea, wildlife or plant that has been determined to be endangered or threatened and are listed in 50 C.F.R. §§ 17.11-17.12.

Native Species: as defined by 6 NYCRR § 182.2(d), any species which spends some portion of its life cycle within New York State, has occurred in New York State on a regular basis for many years, and was not intentionally or accidentally released in New York or formerly met the conditions of this definition.

Proposed Species: as defined in 50 C.F.R. § 402.02, any species of fish, wildlife or plant that is proposed in the Federal Register to be listed in 50 C.F.R. §§ 17.11-17.12.

Protected Plants: as defined by 6 NYCRR § 193.3, any plant species listed by NYSDEC as endangered, threatened, rare or exploitably vulnerable, including all plant species listed as endangered or threatened by USFWS in 50 C.F.R. § 17.12.

Threatened Species: as defined by 6 NYCRR § 182.2(h) and 193.3(c), any fish, shellfish, crustacea, wildlife or plant species that are native species likely to become an endangered species within the foreseeable future in NY; or are listed as threatened by the USFWS in 50 C.F.R. Part 17.11-17.12.

III. APPLICABILITY

To ensure compliance with federal and state laws and to secure project approval, NYS Department of Transportation (NYSDOT) must determine whether a project will adversely affect a federal or state endangered or threatened species.

For all NYSDOT projects that are not considered exempt (i.e., limited purpose projects as listed in Step 1 of the PEG), NYSDEC needs to be contacted if a review of the New York Natural Heritage Program red flag maps indicates that there is a natural heritage record within one-half mile of the project limits. NYSDEC must be consulted throughout the process to evaluate whether a state or federal endangered or threatened species may be potentially affected by the project. NYSDEC should be the sole contact if the project involves no federal action.

For federal actions (i.e., projects receiving federal aid and/or requiring a federal permit),

USFWS/NMFS may need to be contacted in addition to NYSDEC. Contact with USFWS/NMFS is required for all projects requiring a federal individual permit or permit requiring notification, for federal actions with a record of a federal species, or for federal-aid projects requiring a NEPA EIS or EA.

IV. PROCEDURES

STEP 1. Determine if the Project is Exempt from the Endangered and Threatened Species Review Process.

Projects that NYSDOT considers exempt from endangered and threatened species review are limited purpose projects that typically involve sign, guiderail, traffic signal, fencing or lighting installation or replacement; pavement markings; limited intersection improvements in urban areas; crack joint sealing; bridge painting; and resurfacing. The exemptions only apply if there is no grading of unpaved areas or work in, over or within 100 feet of surface waterbodies, including wetlands.

1a) If the project is determined to be exempt from the state and federal endangered and threatened species review process, document the rationale in the design approval document. No further steps are required for this PEG.

1b) If the project is not exempt from review, go to Step 2.

STEP 2. Review Natural Heritage Program "Red Flag" Maps.

During Preliminary Design, review the New York Natural Heritage Program (NYNHP) "red flag" maps (maintained by the Regional Environmental Contact (REC)) to determine the likelihood of occurrence of endangered or threatened species in the vicinity of the project.

There are sixteen Natural Heritage Program "red flag" maps (scale = 1:250,000) covering New York state. These maps depict current records showing general locations of federal and state endangered, threatened and rare wildlife and plant species, rare and exemplary natural communities, and other areas of natural heritage importance. All data are depicted with the same symbol, with no distinction between those with legal protective status and those without.

NYNHP will periodically provide NYSDOT Environmental Analysis Bureau (EAB) with updated copies of the entire set of red flag maps. EAB will immediately distribute the updated maps to the Regional Environmental Contacts (REC). The REC will destroy the superseded maps upon receipt of the updated version.

Any added (new) natural heritage records will be depicted in a distinctly different symbol on the updated maps such that the REC can easily discern the added record. For on-going

projects, the REC will examine the updated maps to determine if new records were added that may be affected by on-going projects. If the REC determines that there is a new record within one-half mile of an on-going project, the REC shall follow procedures in the PEG.

2a) If there are no natural heritage records within one-half mile of the project limits, state the following in the design approval document: "Based on a review of the New York Natural Heritage red flag maps, dated (date), there are no NYS Natural Heritage Program records of state or federal endangered or threatened species within one-half mile of the project limits." Go to Step 4 to determine if federal agencies need to be contacted.

2b) If there is a natural heritage record located within one-half mile of the proposed project limits, go to Step 3.

STEP 3. Determine Type and Significance of Natural Heritage Record.

If there is a natural heritage record within one-half mile of the project, write to the NYSDEC regional staff person responsible for the Natural Heritage Program maps (see Attachment 4.1.A) to determine the type and significance of the natural heritage record (e.g., federal endangered wildlife species, state rare plant species).

NYSDOT correspondence to NYSDEC should contain the project PIN/BIN number(s), a brief description of the proposed project, and the appropriate section of USGS or NYSDOT quadrangle map(s) clearly delineating the project area (encompassing the area for all alternatives). It is not necessary to submit a Design Report or plans and specifications for this determination.

NYSDEC will send a written determination within 30 days of receipt of the information request. In the determination, NYSDEC will inform NYSDOT whether or not there is a record of a natural heritage element that may be potentially affected by the project. NYSDEC will indicate the type of natural heritage record (e.g., significant fish habitat, federal endangered plant species). If there is a record of a potentially affected endangered, threatened or rare species or natural community, NYSDEC will indicate whether the species is listed on or is proposed for inclusion on the state and/or federal list(s). Include the written determination from NYSDEC in the design approval document appendices.

If there is a natural heritage record other than an endangered or threatened species, the NYSDOT Region should assess the potential project impacts on the natural heritage element. Consultation with NYSDEC regarding the element is recommended. The NYSDOT Region should consider appropriate avoidance, minimization and mitigation efforts even if the natural heritage elements have no legal protective status.

3a) If the NYSDEC regional office determines that there are no records of state or federal endangered or threatened species that have the potential to be affected by the project, state the

following in the design approval document: "The NYSDEC has determined that there are no records of state or federal endangered or threatened species that have the potential to be affected by the project." Include the written determination from NYSDEC in the design approval document appendices. Go to Step 4 to determine if federal agencies need to be contacted.

3b) If there is a record of a potentially affected state or federal endangered or threatened species, contact the NYSDEC regional specialist (see Attachment 4.1.B) to obtain more specific information on the species (the state lists include all federally-listed species). Contact the regional forester for plant records, the regional wildlife manager for wildlife records, and the regional fisheries manager for fish records. Go to Step 4 to determine if federal agencies need to be contacted.

STEP 4. Determine if the Federal Resource Management Agencies Should be Contacted.

Federal resource management agencies must be contacted for all projects requiring a federal individual permit or permit requiring notification, for federal actions that may affect a federal endangered or threatened species, or for federal-aid projects requiring a NEPA Environmental Impact Statement (EIS) or Environmental Assessment (EA). The U.S. Fish and Wildlife Service (USFWS) is the federal agency implementing the federal Endangered Species Act. The National Marine Fisheries Service (NMFS) has jurisdiction over marine species (i.e., marine mammal, sea turtle or shortnose sturgeon).

Federal actions are projects that receive federal aid and/or require a federal permit. Federal permits may include U.S. Coast Guard Section 9 Permit, U.S. Army Corps of Engineers (COE) Section 10 and 404 Individual Permits or COE permits requiring Pre-discharge Notification (PDN). Section 401 Water Quality Certification is not considered a federal permit.

4a) If the project does not involve a federal action and the NYSDEC regional office determines that there are no records of state or federal endangered or threatened species that have the potential to be affected by the project (determined in Step 2a or Step 3a), no further steps are required for this PEG.

4b) If the project does not involve a federal action but there is a record of a potentially affected state or federal endangered or threatened species (determined in Step 3b), no coordination with the USFWS/NMFS is required. Go to Step 5 regarding consultation with NYSDEC.

NYSDEC should be the sole contact if the project involves no federal action.

4c) If the project requires a federal individual permit or permit requiring notification or involves a federal action and there is a record of a potentially affected federal endangered or threatened species or the project is a federal-aid project requiring a NEPA EIS or EA, initiate informal consultation by writing to USFWS, and NMFS as appropriate for marine species (i.e., marine mammal, sea turtle or shortnose sturgeon). See Attachment 4.1.C for addresses. Go to Step 5.

NYSDOT correspondence to USFWS/NMFS should contain the project PIN/BIN number(s),

a brief description of the proposed project, and a USGS or NYSDOT quadrangle map clearly delineating the project area (encompassing the area for all alternatives). It is not necessary to submit a Design Report or plans and specifications for this determination. When possible, the NYSDOT Regions should batch requests for federal determination by type of project, project location, or other suitable groupings.

USFWS/NMFS will send written determination(s) generally within 30 days of receipt of the information request. In the determination, USFWS/NMFS will inform NYSDOT whether or not there is a record of a listed or proposed federal endangered or threatened species that may be potentially affected by the project.

STEP 5. Consult with State and Federal Agencies.

In consultation with the NYSDEC regional specialist, and, if appropriate, USFWS/NMFS, determine the likelihood of occurrence of the state and/or federal endangered or threatened species within the project boundaries. This determination shall be based, in part, on the date of the last species sighting in the area, date of the most recent search for the species in the area, availability of suitable habitat, and current evidence of human or natural disturbance of the site.

5a) If NYSDEC and USFWS/NMFS, if appropriate, determine that there is no probability of occurrence of the listed or proposed state or federal endangered or threatened species occupying habitat in the project area, state the following in the design approval document: "Based on available data and consultation with NYSDEC (and USFWS/NMFS, if appropriate), it is determined that there is no probability of occurrence of (state which species), a (state/federal) (endangered/threatened) species within the project boundaries." Provide rationale for determination, as appropriate. Include the agency written determination(s) in the design approval document appendices. No further steps are required for this PEG.

5b) If the appropriate agency determines that there is a likelihood of occurrence of a state or federal endangered or threatened species occupying habitat in the project area, or if there is not sufficient data for NYSDEC, USFWS and/or NMFS to reasonably draw a conclusion regarding the likelihood of occurrence of the species within the project limits, follow Step 6 to conduct a site screening.

STEP 6. Conduct a Site Screening.

The REC or designee shall make a request to the NYSDEC regional specialist and USFWS/NMFS, if appropriate, that a representative make a site visit with the REC or designee to evaluate: (a) whether the habitat in the project area is suitable to support the listed or proposed state or federal endangered or threatened species, (b) whether the species currently occupies this habitat within the project boundaries, and (c) whether the project is likely to adversely affect the species. If agency representatives are unavailable for a site visit, the REC or designee shall conduct a site screening or secure a consultant to conduct the site screening. NYSDEC should be consulted to advise on protocol regarding the site screening.

6a) If the site screening indicates that the federal or state endangered or threatened species does not occupy the habitat within the project boundaries or it is unlikely that the project will have an adverse

affect on the species, document this determination in the design approval document. Provide rationale for determination, as appropriate. Send documentation to the appropriate state and federal agencies. No further actions are required for this PEG.

6b) If it is determined that there may be an adverse affect on an endangered or threatened species, or if it cannot be determined whether the listed or proposed species currently occupies the habitat within the project boundaries, develop and conduct an endangered/threatened species survey following procedures in Steps 7 through 9.

STEP 7. Develop an Endangered/Threatened Species Survey.

Coordinate with the involved agencies to develop an endangered/threatened species survey. This survey may be developed in-house or by a qualified consultant and approved by the involved regulatory agencies. Permits, such as scientific collection permits or endangered species permits, may be necessary to conduct the survey.

The endangered/threatened species survey shall discuss the methodology and findings of the field survey, views of recognized experts on the listed or proposed species, review of literature and other information regarding the listed or proposed species, analysis of the effects of the proposed project activities on the listed or proposed species, and analysis of alternative actions.

Considerations in the design of the survey shall include species' habitat needs, availability of suitable habitat within and adjacent to the project boundaries, and appropriate season(s) to conduct the field survey for the endangered or threatened species.

If the project is a NEPA-defined major construction activity, the endangered/threatened species survey will be designed to meet the requirements for a "Biological Assessment" under Section 7 of the Endangered Species Act.

STEP 8. Conduct and Document the Endangered/Threatened Species Survey.

A qualified consultant or the REC or designee, as approved by the involved agencies, shall conduct the endangered/threatened species survey for the listed or proposed species consistent with the study design developed with the involved agencies in Step 7.

The survey will consist of a thorough field search for the listed or proposed species in potentially suitable habitat during appropriate seasons or time periods within the project boundaries and/or evaluation of potentially suitable habitat to determine the project area's capability to support the listed or proposed species. The consultant shall assist NYSDOT in determining the potential impacts of the project on the species, if present.

8a) If the results of the endangered/threatened species survey indicate that no listed or proposed endangered or threatened species currently occupy habitat within the project boundaries or that the project is not likely to jeopardize the continued existence of any listed or proposed species, document

the findings in the design approval document. Provide rationale for this determination (e.g., habitat suitability, past disturbance, thorough species search(es), project activities). This documentation satisfies the federal Endangered Species Act and the state endangered and threatened species laws. No further action is required upon receiving written concurrence from the involved regulatory agencies.

8b) If the results of the endangered/threatened species survey indicate that a listed or proposed endangered or threatened species currently occupies habitat within the project boundaries and, the involve regulatory agencies determine that the project is likely to jeopardize the continued existence of any listed or proposed species, document the findings and follow Step 9.

The involved federal agency (e.g., FHWA, COE) will initiate formal consultation under Section 7 of the Endangered Species Act. The federal agency will initiate conference procedures for species or critical habitats proposed for listing on the federal list. (Refer to Attachment 4.1.D for a detailed flow chart explaining the federal consultation process.)

After the formal consultation or conference procedures are initiated regarding a listed or proposed endangered or threatened species, the federal agency and the applicant are "prohibited from making any irretrievable commitment of resources that has the effect of foreclosing any options for reasonable and prudent alternative measures".

STEP 9. Evaluate Avoidance, Minimization, and Mitigation Measures.

Evaluate potential modifications to the NYSDOT project that will avoid, minimize, or mitigate adverse impacts to state or federal endangered or threatened species to the satisfaction of the involved state and federal agencies. Modify the project, as appropriate, to meet the concerns of the state and/or federal agencies.

If there is a federal action involved, the United States Army Corps of Engineers (COE), the Federal Highway Administration (FHWA) and other federal agencies will not approve projects that will likely jeopardize the continued existence of any federal endangered or threatened species or will likely result in the destruction or adverse modification of any designated critical habitat of such species.

Document in the design approval document: the results of the endangered/threatened species survey, NYSDEC/USFWS/NMFS determination as to whether or not the action is likely to jeopardize the continued existence of listed species and/or destroy or adversely modify critical habitat, efforts to avoid, minimize and mitigate potential impacts, and state and federal approval of the proposed design alternative. Include agency correspondence in appendices of the design approval document.

V. FLOW CHARTS

(not currently available on-line, see paper EPM Chapter 4.1)

VI. CITATIONS

The following state and federal laws and regulations are used as a source for this guidance.

STATE STATUTES

Env. Cons. Law § 11-0535 - prohibits the taking, possession or transporting of endangered or threatened species of fish, shellfish, crustacea or wildlife.

Env. Cons. Law § 9-1503 - prohibits the removal of protected species of plants.

STATE REGULATIONS

6 NYCRR Part 182 - for fish and wildlife; gives prohibited actions and lists endangered species, threatened species and species of special concern.

6 NYCRR Part 193 - for plants; gives prohibited actions and lists protected plants.

FEDERAL STATUTE

The Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 - 1544; Section 7 at 16 U.S.C. § 1536 prohibits federal agencies from taking actions that would be likely to jeopardize the continued existence of endangered or threatened species or their critical habitat and requires a consultation process with the Secretary of the Interior (for USFWS) or Secretary of Commerce (for marine species under the jurisdiction of the NMFS).

FEDERAL REGULATIONS

50 C.F.R. § 17.11 - identifies endangered and threatened wildlife.

50 C.F.R. § 17.12 - identifies endangered and threatened plants.

50 C.F.R. § 402 - describes the federal consultation and biological assessment process.

50 C.F.R. § 222.23(a) - lists endangered wildlife under jurisdiction of National Marine Fisheries Service (NMFS).

50 C.F.R. § 227.4 - lists threatened wildlife under jurisdiction of NMFS.

50 C.F.R. § 226; 50 C.F.R. § 17.95; 50 C.F.R. § 17.96 - gives designated critical habitat areas (there are no designated critical habitat areas in NY).

40 C.F.R. § 1508.27(9) - Council on Environmental Quality NEPA regulations require consideration of the degree to which the federal action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act.

23 C.F.R. § 771.133 - FHWA regulations require a Final Environmental Impact Statement (EIS) or Finding Of No Significant Impact (FONSI) to document compliance with all other applicable environmental laws. If full compliance is not possible by the time of the final EIS or FONSI, the document should reflect consultation with appropriate agencies and provide reasonable assurance that the requirements will be met. See also, FHWA Technical Advisory No. T 6640.8A, Oct. 30, 1987 at 31-33.

33 C.F.R. §330.4(f) - U.S. Army Corps of Engineers regulations require notice if a project that would use a Nationwide Permit has listed or proposed species in the vicinity of the project or that might be affected by the project.

VII. ADDITIONAL INFORMATION

Each Regional Environmental Contact (REC) has copies of the following:

- Natural Heritage Program "red flag" maps.
- copies of the applicable laws and regulations.

For further information or assistance, contact the Water/Ecology Section, Environmental Analysis Bureau, Building 5-303, 1220 Washington Avenue, Albany, New York 12232 or by telephone at (518) 457-5672.

VIII. ATTACHMENTS

- 4.1.A. NYSDEC OFFICES, NATURAL HERITAGE DATABASE CONTACTS
- 4.1.B. NYSDEC REGIONAL SPECIALISTS
- 4.1.C. FEDERAL AGENCY ADDRESSES
- 4.1.D. FEDERAL CONSULTATION PROCESS
- 4.1.E. SPECIES FIELD REPORTING FORM (NY NATURAL HERITAGE PROGRAM)
- 4.1.F. LIST OF FEDERAL CANDIDATE ANIMALS FOR ENDANGERED/THREATENED STATUS NATIVE TO NEW YORK STATE
- 4.1.G. ANIMAL STATUS LIST (NY NATURAL HERITAGE PROGRAM BIOLOGICAL AND CONSERVATION DATA SYSTEM, MAY 27, 1994)
- 4.1.H. NEW YORK STATE RARE PLANT STATUS LIST, AUGUST 1992
- 4.1.I. COMMUNITY STATUS LIST (NY NATURAL HERITAGE PROGRAM BIOLOGICAL AND CONSERVATION DATA SYSTEM, MAY 27, 1994)
- 4.1.J. FEDERAL ENDANGERED SPECIES ACT AND RELATED RULES, REGULATIONS AND POLICY