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U.S. Fish and Wildlife Service Issues Guidance on Endangered Species Act Incidental Take Permits

The U.S. Fish and Wildlife Service issued a guidance memorandum addressing when an incidental take permit may be needed under Section 10(a)(1)(B) of the Endangered Species Act for projects that modify habitat of federally listed species. The guidance memorandum seeks to ensure that the Service operates "in a consistent manner, with clear standards," when assessing what types of habitat modification may trigger the need for a Section 10 Permit.

Legal Background

The ESA prohibits the "take" of listed species, which can occur through direct harm to one or more members of the species or indirectly through modification of the species' habitat as a result of development. The ESA defines "take" as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." 16 U.S.C. § 1542(b). In turn, regulations under the ESA define "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." The regulations further define "harm" as 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 behavior patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

In 1982, Congress amended the ESA to authorize the Service to issue permits for "incidental" takes—which can occur, for example, when the otherwise lawful construction of a development project results in the death or injury of members of a listed species. To receive an incidental take permit under Section 10(a)(1)(B) of the ESA (commonly referred to as a Section 10 Permit), an applicant must design, implement and secure funding for a binding Habitat Conservation Plan (or HCP) that minimizes and mitigates harm to the impacted species during the proposed project. Historically, preparation of an HCP and obtaining a Section 10 Permit has often been an onerous, complex and very time-consuming task.

April Guidance Memorandum

Recognizing the importance of applying correct and consistent interpretations of the ESA statutory and regulatory provisions, the guidance memorandum attempts to ensure that all non-federal project proponents receive clear, uniform information about whether their actions may trigger the need for a Section 10 Permit. The guidance memorandum and an accompanying questionnaire are required to be posted on the Service headquarters website, and all Service regional and field staff must include direction to that web page when project proponents inquire about Section 10 permitting.

The guidance memorandum emphasizes that it is "vital" for Service staff to recognize that whether to apply for a Section 10 Permit "is a decision of the applicant" and admonishes that "it is not appropriate to use mandatory language (e.g., a permit is 'required')" in the course of staff communications with non-federal parties. Thus, while there may be significant legal risks for proceeding with a project without a Section 10 Permit if a prohibited "take" occurs, including potential civil and criminal penalties, the guidance memorandum makes clear that the risks, detriments and benefits of pursuing or foregoing a permit are ultimately up to the project applicant to determine, rather than any compulsory directive from the Service.

Further, the guidance memorandum states that the Service should avoid processing applications purely "as insurance" for potential "takes" that in fact may never occur, and sets clear boundaries for when a permit may (or

may not) be appropriate. Specifically, the guidance memorandum instructs staff to advise potential applicants that a Section 10 Permit is appropriate only where a "take" is reasonably certain to occur. The guidance memorandum explains that habitat modification, standing alone, does not necessarily call for a Section 10 Permit, and instead constitutes a "take" only when it meets all the elements of the regulatory definition of "harm."

The guidance memorandum thus poses the following three questions for assessing whether a habitat modification may trigger the need for a Section 10 Permit:

- Is the modification of habitat significant?
- If so, does that modification also significantly impair an essential behavior pattern of a listed species?
- And, is the significant modification of the habitat, with a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife?

The guidance memorandum concludes that "[a]ll three components of the definition are necessary to meet the regulatory definition of 'harm' as a form of take through habitat modification ... with the 'actual killing or injury of wildlife' as the most significant component" The guidance memorandum therefore appears designed to safeguard against potential regulatory overreach by Service staff in requiring and issuing Section 10 Permits.

In documenting the rationale for this approach, the guidance memorandum examines past and current regulatory definitions of "harm" and "harass," and explains how various revisions to each of these terms inform the Service's position. For example, because the Service ultimately "restricted" the term "harass" to include only those "acts or omissions which are done intentionally or negligently," the guidance memorandum reasons that "harass" is not a form of take that may be permitted under Section 10, which authorizes only takes that are "incidental to, but not the purpose of, the carrying out of an otherwise lawful activity." The regulatory definition of "harm," by contrast, expressly includes habitat modification and, according to the Guidance Memorandum, makes the actual death or injury of a listed species the paramount concern. The guidance memorandum notes, for example, that while the term "harm" has been redefined several times, it was "always with the intention to clarify that 'harm' relates to activities that are likely to result in the actual death or injury to species." Moreover, U.S. Supreme Court and U.S. Court of Appeals for the Ninth Circuit caselaw that have upheld the regulatory definition of "harm" as applied to habitat modification, have consistently concluded that every term in the definition of harm is "subservient to the phrase 'an act which actually kills or injures wildlife.'" From this, the guidance memorandum concludes that the "law is clear"—"in order to find that habitat modification constitutes a taking of listed species ... all aspects of the harm definition must be triggered," with an actual injury to listed species of principal importance.

Conclusion

While not its stated goal, the guidance memorandum accords with other Trump administration efforts to [expedite environmental review and permitting](#) for new projects and to ensure that regulatory agencies appropriately support those efforts.

At bottom, the guidance memorandum is a clear attempt to ensure that different Service offices provide consistent treatment to prospective applicants for a Section 10 Permit. It provides the governing standard (and supporting rationale) to determine whether actions that include habitat alteration may result in the "take" of listed species, and attempts to ensure that—across all Service Regions—only those projects that meet this standard are considered for inclusion in the Section 10 Permit process. And, by reiterating that the permit process is applicant-driven, and emphasizing that habitat modification must meet a clear and relatively high standard before it may constitute a prohibited "take," the guidance memorandum appears to show the administration's desire to prevent the Section 10 Permit process from being used as a cudgel or threat against project proponents or being artificially expanded to include projects that do not meet the applicable regulatory requirements and

definitions.

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