

ESA Regulatory Reform: Proposed Rule Governing Incidental Take Statements Questions and Answers

What action are you taking?

The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (the Services), the two federal agencies responsible for administering the Endangered Species Act (ESA), are proposing to amend regulations governing Incidental Take Statements (ITSs) for endangered and threatened species under Section 7 of the ESA.

The proposed changes address two issues:

1. The use of "surrogates" to express the amount or extent of anticipated take in an ITS.
2. ITSs for "programmatic" federal actions.

Why are the Services proposing these changes?

These changes are meant to clarify and codify the current policy of the Services regarding the use of surrogates, and to address recent court decisions related to ITSs for programmatic federal actions. These changes will also allow for flexibility in how the Services prepare ITSs in situations where assessing and monitoring take of endangered and threatened species may be extremely difficult, time-consuming, and expensive.

What are Incidental Take Statements?

Under Section 7 of the ESA, when federal agencies conduct actions (e.g., issue a permit, provide funding, undertake construction projects, etc.) that may or are likely to adversely impact threatened or endangered species, they must first formally consult with the Services. The outcome of those formal consultations is transmitted to the federal agency by the Services in the form of a biological opinion.

A biological opinion includes an incidental take statement that expresses the amount or extent of anticipated take of listed animal species caused by the proposed action, along with reasonable and prudent measures to minimize the impact of take and terms and conditions for which there must be compliance. The ITS provides an exemption from the ESA Section 9 prohibitions on take of listed species, provided the federal agency and any applicant comply with Reasonable and Prudent Measures and Terms and Conditions provided in the ITS.

If the federal action proceeds and the take of threatened or endangered species exceeds the level or extent exempted under the ITS, or if the scope of the project changes, the federal agency must reinitiate its consultation with the Services.

How are surrogates used in the development of an Incidental Take Statement?

The Services have found that in many cases, the biology of a listed species or the nature of the proposed action makes it difficult to detect or monitor take of individual animals. Additionally, the impact of proposed actions to some species may not be in the form of direct or immediate mortality to affected individuals, but rather a reduction in their biological fitness. For example, a

decrease in fitness may occur if habitat loss or degradation likely to be caused by the proposed federal action results in less food available to individuals of the listed species. In those cases, impacts to a “surrogate” such as habitat may be the most reasonable and meaningful measure of assessing and monitoring anticipated take of listed species.

Surrogates can be expressed in terms of a listed species’ habitat, ecological conditions within that habitat, or a different species that may be similarly impacted by the federal action but that are easier to monitor.

What is a practical example of using surrogates?

Timber harvest within habitat of the threatened northern spotted owl can cause take by modifying habitat conditions that significantly disrupt the owls’ nesting, roosting, or foraging behavior. Although the number of spotted owls likely to be taken as a result of a project can be estimated, detection and monitoring of the affected owls to determine when take has occurred or when the take limit has been reached is not practical because 1) spotted owl ranges average about 3,000 acres, and injured or dead owls are frequently quickly removed by predators and scavengers, making them very difficult to count; and 2) the impact to the spotted owl is primarily in the form of reduced fitness of adult owls, leading to reduced survival and reproductive potential. Documenting this reduction is very difficult, and doing so may take months or years at considerable expense. Using habitat as a surrogate to express the extent of anticipated take and to monitor the impacts of take on the species is a practical alternative because effects to habitat are observable and can be readily monitored.

What is the proposed regulatory change addressing the use of surrogates?

The Services are proposing to change the section 402.14 of the regulations that implement Section 7 of the ESA to codify the use of surrogates to express the likely amount or extent of take in an ITS. Under this change, the Services will be able to use surrogates in ITSs, provided the following conditions are met:

1. The ITS describes the link between the effects on the surrogate and the take of the listed species;
2. The ITS describes why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and
3. The ITS sets a clear standard for determining when the extent of take of the listed species has been exceeded.

What if there is sufficient information to quantify the precise number of affected individuals anticipated to be taken?

Quantifying the anticipated amount or extent of take is only one side of the equation. It must also be possible and practical to detect and monitor the take of individuals to ensure that the exempted take level is not exceeded. If the anticipated take of listed species is quantifiable in terms of affected individuals, but the monitoring of that take is not practical, it would be most appropriate and reasonable to express the amount or extent of anticipated take using a surrogate for which the impacts of take can be readily detected and monitored.

What are “programmatic actions” and how are they being addressed?

Under the proposed regulatory changes, a “programmatic action” is defined as an action that provides a framework for the development of future, site-specific actions that are authorized, funded, or implemented at a later time and subject to Section 7 consultation requirements, as appropriate, and for which site-specific information regarding where, when, and how listed species will be affected will become available at the time of a subsequent Section 7 consultation. A good example of such a programmatic action is a land management plan.

Even when it is determined that a proposed programmatic federal action is likely to result in take of a listed species, quantifying that take may not be feasible until a site-specific project is proposed that provides details about where, when and how take will occur. To address this situation, the Services are proposing a change in the regulations to specifically distinguish and define “Programmatic Incidental Take Statements.”

Under the proposed changes, a Programmatic Incidental Take Statement can be issued provided:

1. The Services conclude in a biological opinion that the proposed programmatic action is not likely to jeopardize the continued existence of any endangered or threatened species or to result in the destruction or adverse modification of critical habitat in accordance with the requirements of Section 7 (a)(2) of the ESA
2. Incidental take of listed species is anticipated, but the amount or extent of anticipated take cannot be quantified because site-specific information regarding where, when and how listed species will be taken is not yet available

The addition of this approach in the regulations for take relating to programmatic actions respects the purpose of the ESA relative to providing ITSs in biological opinions, by exempting an unquantified amount or extent of take and providing meaningful triggers for reinitiation of formal consultation.

How will reinitiation of formal consultation be triggered if an Incidental Take Statement for a programmatic action does not quantify the amount or extent of anticipated take?

Programmatic ITSs will specify “reasonable and prudent measures” that would minimize the impacts of take caused by the programmatic action, and would also serve as a trigger to reinitiate formal consultation on the programmatic action.

If we have adequate information regarding where, when and how a listed species will be taken, and we can quantify the amount or extent of anticipated take, the action would not be considered a “programmatic action” under the proposed changes. In those cases, the preparation of the ITS would then proceed as otherwise described in the regulations.

What process will be used to formalize these changes?

The Services have drafted a proposed rule to revise the regulations to address the above needs. The Services are soliciting public review and comment on the proposed changes for a period of 60 days following publication in the Federal Register. Following the close of the public comment period, the Services will review and consider public responses in preparing a final rule on this action. The final rule will include a section that identifies and responds to substantive comments received from the public.

Could these proposed changes to the regulations cause less protection for listed species?

No. These proposed changes do not alter the obligation of federal agencies to ensure their actions do not jeopardize listed species or destroy or adversely modify critical habitat in accordance with the requirements of Section 7(a)(2) of the ESA. These changes also do not alter the authority of the Services to require implementation of Reasonable and Prudent Measures and Terms and Conditions in ITSs to minimize and monitor the impacts of anticipated take on the listed species in accordance with Section 7(b)(4) of the ESA and the implementing regulations for Section 7.

What are the benefits of these changes?

They will provide more clarity, flexibility, and efficiency around the development and implementation of ITSs. These changes are expected to reduce delays, litigation and conflict associated with implementation of the ESA.

How will these proposed changes affect Incidental Take Statements in completed biological opinions?

Should these proposed regulations become final, they will apply to ITSs in biological opinions that are issued after the effective date of the final rule. Ongoing federal actions that are subject to biological opinions and ITSs issued prior to the effective date of the final rule, but where reinitiation of formal consultation is warranted, will also fall under the purview of these regulation changes.

How do I comment on this Proposed Rule?

The Services will be accepting public comments electronically or by postal mail for 60 days immediately following publication of the proposed rule in the Federal Register. Guidance on how to provide comment is provided in the Addresses section of the proposed rule. Please visit www.regulations.gov to view all Federal Register notices, and to submit an electronic comment.