United States Department of the Interior

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Memorandum

To: Service Directorate

From: Deputy Director Kenneth Stansell

Subject: Guidance on Using Existing Tools to Expand Cooperative Conservation for Candidate Species on Mixed Federal and Non-Federal Lands

This memorandum transmits the final guidance for the combined use of existing conservation tools to facilitate actions that may make listing certain species under the Endangered Species Act (Act) unnecessary. The guidance addresses situations in which species that are candidates for listing or likely to become candidates in the near future (collectively referred to as "species-at-risk") occur on a mix of Federal and non-Federal lands. It is based on existing provisions of sections 7 and 10 of the Act, and related regulations and policies, as cited in the guidance. I encourage you to work with our partners to expand opportunities for cooperative conservation through the approach described in this guidance.

I appreciate the helpful comments and edits submitted by the Regions on the draft guidance. Many of your suggestions have been incorporated in the final version. The final guidance has been uploaded into the Document Tracking System at DCN 038098 and will be posted on the Service's Endangered Species website. Please contact Bryan Arroyo, Assistant Director for Endangered Species (202-208-4646, or bryan_arroyo@fws.gov) if you have questions regarding the guidance.

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Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and Non-Federal Lands

Introduction

One of the Service's goals is to facilitate cooperative conservation of species that are candidates or likely to become candidates for listing in the near future under the Endangered Species Act (ESA), so that listing is unnecessary. Many of these species-at-risk use habitat on intermingled Federal and non-Federal lands. In some of these situations, property owners rely on using a mix of land ownerships where the species occur, e.g., a ranching operation may depend on using both non-Federal and Federal lands to graze livestock. There has been concern about how to integrate conservation efforts across these intermingled land ownerships to better ensure that listing will be unnecessary, and to provide greater predictability about potential changes that may be needed in land use activities if listing does occur in the future. This guidance describes how existing conservation tools can be combined to address such situations. The approach is applicable to intermingled surface lands, as well as "mixed estate" lands where the surface is in non-Federal ownership but the subsurface is Federal (e.g., managed for energy/ mineral leasing), or *vice versa*.

Background

For many years the Service has worked with partners to help them develop Candidate Conservation Agreements (CCAs). CCAs primarily have been developed by Federal agencies to cover Federal lands, and several have resulted in conservation efforts that made listing unnecessary.

To provide an incentive for voluntary conservation of species-at-risk on non-Federal lands, the Service adopted a policy and regulations in 1999 for Candidate Conservation Agreements with Assurances (CCAAs) under the authority of section 10 of the ESA.[1] Under a CCAA, a property owner voluntarily commits to implement specific conservation measures on non-Federal lands for species covered by the agreement. In exchange, they receive a permit from the Service which provides assurances that additional conservation measures will not be required and additional land, water, or resource use restrictions under the ESA will not be imposed on them if the species becomes listed in the future, provided the CCAA is being properly implemented. These assurances provide considerable certainty to the property owner regarding their activities on non-Federal lands covered by the CCAA.

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[1] For ease of reference, this guidance cites regulations under 50 CFR 17.22(d) for enhancement of survival permits that go into effect if a species covered by a CCAA becomes listed as endangered. Nearly identical regulations at 50 CFR 17.32(d) address enhancement of survival permits that go into effect if a covered species is listed as threatened.

Federal agencies have special obligations for the conservation of listed species, as specified in section 7 of the ESA. Consequently the assurances available under a CCAA may be provided only to non-Federal property owners for their actions on non-Federal lands (50 CFR 17.22(d)(5), 64 FR 32727). A concern for some property owners is that even if they implement the CCAA conservation measures across all land ownerships where they operate, their activities on Federal lands could be subject to substantial changes should the species become listed in the future. Providing greater certainty to these property owners about potential changes in their activities on Federal lands would provide a strong incentive for implementing conservation efforts that help make listing unnecessary. The approach described below addresses this situation by integrating the use of existing conservation tools, including an overarching conservation plan or agreement for the species, and mechanisms available under sections 7 and 10 of the ESA. Integration of these tools can: (1) help conserve species so that listing may be unnecessary; and (2) provide greater predictability for property owners about what to expect in relation to the ESA if listing does occur.

Approach

The Conservation Plan/Agreement. The foundation of the approach is a comprehensive plan or agreement for conservation of the species, including measures to address threats to the species on both Federal and non-Federal lands. Because the conservation plan/agreement would be designed to provide for effective conservation of the covered species, full implementation of the measures in the CCA would likely make the protections of the ESA unnecessary. Conserving species so that listing is unnecessary provides the greatest certainty to property owners that they will not face additional conservation measures or requirements beyond those they voluntarily commit to implement under the agreement. The plan would have a primary goal and a secondary goal:

- The primary goal of the plan would be to guide the implementation of specific conservation efforts for covered species-at-risk, so that listing them under the ESA will not be necessary;
- Recognizing that it is not always possible to preclude the need to list a species, the secondary goal would be to integrate processes available under sections 7 and 10 of the ESA so as to reduce uncertainty about potential changes in land/resources uses that might be necessary if the covered species must be listed in the future.

The over-arching conservation plan for the species could be written as a Candidate Conservation Agreement (or similar document) if no equivalent plan already exists. The Service can provide technical expertise to help Federal agencies, the State(s), Tribes, non-governmental organizations, industry groups, private property owners, or a combination of parties, prepare the CCA. Because species that are not listed or proposed for listing are under the jurisdiction of the States (migratory birds and marine mammals are special cases), State involvement is highly desirable even if they do not take the lead for preparing the CCA. In

some cases the State may already have an appropriate plan developed that can be used or updated to serve the purposes identified in this guidance.

Recommended components of the CCA (or similar document) are as follows:

1 A description of the scope and goals/objectives of the CCA, and its duration.
2. A description of the lands covered, e.g. where are they, what land ownerships are involved, and how many acres are involved.
3. Appropriate biological information about the species, including its taxonomy, current distribution and abundance, habitat requirements, life history characteristics, and other relevant information. (Much or all of this information may already be available in a species assessment prepared by the Service for individual candidate species, or in existing documents prepared by State wildlife agencies or others.)
4. A description of known and anticipated threats to the species, particularly in the area covered by the CCA if it is less than the entire range of the species. (Threats should be described in relation to the five factors used to evaluate a species for listing under section 4(a)(1) of the ESA, which is the approach used in the Service's assessments of individual candidate species.)
5. A description of the specific conservation measures and efforts to be implemented under the CCA to address the identified threats, who will implement them, and an implementation schedule.
6. A description of anticipated effects, both adverse and beneficial, on the covered species and any listed or proposed species that may be affected by actions under the CCA. This includes the actions to be covered and the likely effects of those actions on all species that would be considered in the conference and the permitting process under sections 7 and 10 of the ESA (see below). This includes all actions that may affect the species, not just those expected to be beneficial.
7. A monitoring plan describing procedures that will be used to monitor and report progress in the implementation and the effectiveness of the specific conservation efforts called for in the CCA.
8. An explanation of how adaptive management will be used to adjust activities based on new information, unanticipated changes in conditions, or the results of monitoring.
9. Any other information needed to ensure that the aspects of the plan applicable to non-Federal lands will qualify as a CCAA (see below).

Actions of Property Owners on Non-Federal lands. The CCA should be written so that a subset of it covering the activities of non-Federal property owners on non-Federal lands can satisfy the standard for a CCAA. Specifically, the duration of a CCAA must be sufficient to enable the Service to determine that "...the benefits of the conservation measures in the Agreement [CCAA], when combined with those benefits that would be achieved if it is assumed that the conservation measures would also be implemented on other necessary properties, would preclude or remove any need to list the species covered by the agreement" (50 CFR 17.22(d)(8)).

Under the provisions of section 10 of the ESA and related regulations for CCAAs, the Service may issue an enhancement of survival permit to property owners who commit to a CCAA; permit issuance criteria and conditions are provided at 50 CFR 17.22(d)(2) and (3), respectively. This permit includes assurances that no additional resource use restrictions or conservation measures on non-Federal lands will be required by the Service beyond those in the CCAA without their consent (see 50 CFR 17.22(d)(5) for the specific text of assurances). The permit also authorizes a prescribed amount of incidental take of the covered species that may result from the participant's actions covered by the CCAA. The permit becomes effective if the species is listed under the ESA in the future.

In essence, the CCAA guides activities on non-Federal lands that can help make listing unnecessary, which is the primary goal of the approach. The assurances provided through the CCAA permit address the secondary goal of providing the property owner with a high level of certainty that their activities on non-Federal land will not need to change due to ESA requirements in the event the species does become listed, provided the CCAA is being properly implemented.

Actions of Property Owners on Federal lands. As described above, the primary goal of the CCA would be to guide conservation measures and efforts that will make listing unnecessary for the covered species. Federal agencies and property owners with activities occurring under the jurisdiction of those agencies would need to work collaboratively so that the property owners could adopt the same practices on the Federal lands as they adopt on the non-Federal lands (as specified under the CCAA component of the plan). This landscape-scale, integrated approach to conservation across the mix of land ownerships provides the greatest likelihood that listing will not be necessary, and thus the greatest certainty that additional conservation measures beyond those in the CCA will not be necessary.

Property owners may be concerned that listing will be needed despite the best intentions and efforts of all parties involved. They would like greater predictability about potential changes in their use of Federal lands if listing occurs. The activities of non-Federal property owners on Federal lands are subject to requirements of the Federal agency responsible for authorizing actions on those lands. The planned actions of non-Federal landowners that are authorized or funded by a Federal agency are subject to the conference requirement of section 7(a)(4) of the ESA when species proposed for listing or proposed critical habitat are involved. The conference process is designed to assist the Federal agency and any party who needs approval or authorization from a Federal agency, in identifying and resolving potential ESA conflicts at an early stage in the planning process (50 CFR 401.10). For these types of CCAs, the Federal agency may also engage in a conference process with the Service to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize candidate and other species-at-risk.

The result of formal conference is a Conference Opinion issued by the Service to the requesting Federal agency. The Conference Opinion would describe whether or not the action is likely to jeopardize the continued existence of the species under consideration. The Conference Opinion also would describe the amount of incidental take that is anticipated to result from actions implemented under the CCA including: (1) Federal actions (this includes actions of non-Federal property owners authorized or funded by the Federal agency), and (2) those non-Federal actions of property owners on non-Federal land to be covered by the section 10 CCAA enhancement of survival permit. (Because the issuance of a section 10 enhancement of survival permit by the Service is an action subject to the ESA consultation requirement, the actions covered by that permit can be considered as a component of the conference process.)

The CCA must include a description of all actions to be carried out under the CCA and to be considered in the conference process. The conference process that considers these actions should be conducted following the same standards as a traditional consultation for a listed species (described in 50 CFR 402, and as provided for in 50 CFR 402.10(d)). Consequently, the analysis must address all potential effects of the action (as defined in 50 CFR 402.02), including direct and indirect effects as described in the CCA, as well as interrelated and interdependent actions that may affect the species within the action area.

Should listing occur, the Conference Opinion and associated incidental take statement may be adopted as a Biological Opinion if no significant new information is developed or no significant changes were/are made to the CCA that would alter the content or determinations of the Conference Opinion. Changes in activities or circumstances on the Federal lands could trigger changes in the Conference Opinion, including changes in restrictions necessary to address incidental take. Having a robust CCA is the key to having a high degree of certainty that changes in activities or circumstances on Federal lands would only be necessary if unanticipated and unusual circumstances develop that are not adequately addressed by the CCA.

Benefits of the Approach

- The CCA (or equivalent document) can identify and guide specific actions to help ensure conservation of the species across land ownerships, and thus could make listing unnecessary for the covered species.

- Property owners enrolled in the CCAA subset of the CCA receive regulatory assurances through the section 10 permit that no additional resource restrictions would be imposed and no additional conservation measures would be required on their non-Federal lands in the event that listing does occur, provided they are properly implementing the CCAA.

- The section 7 conference process can result in incidental take authorization (should the species become listed) to Federal agencies for the actions they

authorize or fund; this can cover the activities of non-Federal property owners on Federal lands. Thus there is a high level of certainty for non-Federal participants that their management activities on the covered Federal lands are unlikely to be disrupted if listing occurs, provided the agreed-upon actions are being properly implemented and no significant new information or changes in conditions have occurred that would alter the content of the Conference Opinion.

- No changes in existing laws, regulations, or policies are needed to implement this approach.

Summary

The approach described above can be used in a variety of situations where a combination of interested parties, both Federal and non-Federal, are committed to implementing specific conservation actions that could make listing unnecessary. Although the Service cannot guarantee listing will never be necessary, this collaborative approach to conserving species-at-risk occurring on mixed land ownerships can greatly reduce that possibility.

Even if the species covered by a CCA and associated CCAA must be listed in the future, the robustness of the CCA in providing for the conservation of the covered species provides considerable certainty because: (1) the ESA section 10 permit associated with the CCAA component would provide assurances and incidental take authorization for the involved non-Federal property owners for their actions on non-Federal lands; and (2) the Conference Opinion with the associated Incidental Take Statement (covering relevant Federal agency actions associated with implementation of the CCA, including activities by non-Federal property owners on Federal lands) could be adopted as a Biological Opinion, provided the agreed-upon actions are being properly implemented and no significant new information or changes in conditions have occurred that would alter the content of the Conference Opinion.

This guidance involves combining existing tools under sections 7 and 10 of the ESA. No changes in existing laws, regulations, or policies are needed to implement this approach. The key to its success is the willingness of the relevant parties to collaboratively develop and implement robust conservation measures for species-at-risk.