



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



APR 30 2013

In Reply Refer To:
FWS/AES/054210

Memorandum

To: Regional Directors, Region 1-8

From: Deputy Director

SUBJECT: Final Guidance for Endangered Species Act Incidental Take Permits
Covering Multiple Projects or Project Owners

Largely as a result of recent efforts to develop Habitat Conservation Plans (HCP) for large-scale wind power projects in the Southwest, Mountain-Prairie, and Midwest Regions, issues have been identified that would benefit from clarifying national direction. Described here in broad terms, these issues are:

- 1) the extent to which any additional National Environmental Policy Act and intra-Service section 7 analyses are required when “umbrella HCP” (aka “template HCP”) or “General Conservation Plan” approaches are used to permit incidental take;
- 2) how to apply the “direct control” requirement when a “master permit” is approved;
- 3) how and when the “No Surprises Assurances” apply to incidental take permits issued under the “master permit” approach and under the “umbrella HCP” approach;
- 4) the use of the permit transfer procedures to extend incidental take coverage to parties that were not part of the original HCP; and
- 5) the use of co-permittees.

This memorandum conveys final guidance regarding these issues based on suggestions provided by the Regions to proposed guidance that was transmitted on July 20, 2012. The principles outlined in this guidance also apply to Endangered Species Act permits issued in association with Safe Harbor Agreements and Candidate Conservation Agreements with Assurances; however, the guidance is primarily directed towards the development of HCPs.

Any questions or comments regarding this memorandum should be directed to Mr. Rick Sayers, Chief, Division of Environmental Review, at (703) 358-2442.

Attachment

Guidance for Incidental Take Permits Covering Multiple Projects or Project Owners

Background

This guidance was developed in an effort to improve conservation of threatened and endangered species by promoting conservation planning at larger, landscape scales, ensuring consistency and fairness among similarly situated applicants, and improving the development and implementation of Habitat Conservation Plans (HCP). Historically, the Fish and Wildlife Service (Service) has used a variety of approaches to convey incidental take authorizations for multiple parties whose activities affect listed wildlife species in similar ways or across large geographic scales. Among the most commonly used approaches are “master permits” and “umbrella HCPs.” While terms such as “master permit,” “programmatic permit,” “template HCP,” and “umbrella HCP” may have varying common uses, for purposes of this guidance they are to be understood as described herein.

Under the “master permit” (aka “programmatic permit”) approach, a single entity (frequently a local unit of government such as a county or municipality) works with the Service to develop a HCP and receives an incidental take permit (ITP) based on that HCP. Individual participants who are under the “direct control” of the master permit holder are covered by the take authorization in the master permit, as provided for in the Service’s general permitting regulations at 50 CFR 13.25(d). When a permit is issued to a state or local government, the Service interprets “direct control” as provided in 50 CFR 13.25(e). Individual participants usually come under the direct control of the permit holder through issuance by the permit holder of a certificate of inclusion or letter of participation. It should be noted that under the master permit approach, non-compliance with the provisions of the permit and HCP by individual participants or the master permit holder could result in the master permit being suspended or revoked or limitations on enrollment of new participants.

The most common alternative to the “master permit” approach is an “umbrella HCP” (aka “template HCP”) where an interested party develops a generic HCP that can be adopted by subsequent users who then apply to the Service for their ITP that adopts the “umbrella HCP.” In some circumstances the Service develops this umbrella HCP, which then is typically called a “General Conservation Plan” (see October 5, 2007 memorandum; DCN 032359). The key difference between the “master permit” and “umbrella HCP” approaches is that under the “master permit” approach, the Service issues a single ITP and parties under the “direct control” of the master permit holder receive coverage, while under the “umbrella permit” approach, the Service issues individual ITPs to each qualified party who agrees to implement the HCP.

NEPA and Intra-Service Section 7 Consultation Considerations

Regardless of which permitting approach is used, the Service is required to complete a National Environmental Policy Act (NEPA) analysis on the issuance of an ITP and to conduct an intra-Service section 7 consultation regarding the effects of the Service's proposed permit action on listed species and critical habitat. For either approach, the Service's NEPA analysis needs to evaluate the full range of effects of the proposed permit action and alternative actions on the human environment that are reasonably foreseeable, and provide a clear explanation of the amount or extent of incidental take of listed species and any other covered species that is reasonably certain to occur under each alternative that is considered. In addition, the intra-Service section 7 analysis should evaluate the full range of effects of the Service's proposed permit action on the covered species and designated and proposed critical habitats that may be affected by the permit action. Under the "master permit" approach, the permittee's subsequent issuance of a letter of participation or a certificate of inclusion will not require additional NEPA or intra-Service section 7 analysis on the part of the Service provided the activities are within the scope of the initial NEPA and intra-Service section 7 analysis for the approved HCP.

Under the "umbrella HCP" approach, the Service must confirm that the activities to be covered by the applicant's request for a permit are consistent with the NEPA and intra-Service section 7 analyses for the approved umbrella HCP. NEPA compliance for any project proposed under an umbrella HCP that falls within the scope of the previous NEPA and intra-Service section 7 analyses would be fulfilled by preparing a memorandum to the project file confirming that the individual HCP permit application fits within the scope of the NEPA and intra-Service section 7 analyses for the approved umbrella HCP.

Notifications as Required by Section 10(c)

The Service is required to provide notice in the Federal Register of all ITP applications that are received. Decisions by master permittees to enroll participants do not trigger a notification requirement, but decisions by the Service to issue permits associated with an umbrella HCP would trigger the notification requirement. To reduce workload and to streamline the public notice process for umbrella HCPs where many applicants are anticipated, the Service may batch applications into regularly scheduled submissions to the Federal Register.

Considerations Regarding "Direct Control"

Our permit regulations specify that any person who is under the "direct control" of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit (see 50 CFR 13.25(d)). Where the permit is issued to a state or local governmental entity, our permit regulations provide that parties who are under the regulatory jurisdiction of the

governmental entity or who receive a permit from the governmental entity are considered to be under the direct control of the governmental entity. Therefore, they are covered by the incidental take authorization, as are those who have executed a written instrument with the governmental entity (see 50 CFR 13.25). Such an executed written agreement would most commonly take the form of a certificate of inclusion or letter of participation.

In some situations, the Service has been asked to consider issuing “master permits” to nongovernmental entities, with the understanding that parties who subsequently enter into binding contracts with the permit holders to implement the HCPs will be covered by the “master permit” incidental take authorizations. Examples of such nongovernmental entities might include industry associations and non-governmental conservation organizations. In these situations, the contractual obligations to implement the terms of the HCPs would be the basis of establishing direct control per 50 CFR 13.25(d). This is a novel approach and its use could be challenged through litigation brought by outside parties. Because the provisions of contract law can vary considerably between the states, the parties choosing to adopt this approach must exercise due diligence to ensure that the terms of the contractual agreements are consistent with the contractual requirements of the state(s) in which such a contract would be executed and implemented.

An HCP relying on contracts to establish direct control would need to describe how the master permit holder and contracted parties share responsibility or liability should one or more of the contracted parties fail to properly implement the HCP or if the authorized amount of incidental take is exceeded. Ultimately, if a permittee or a contracted party fails to fulfill the contractual obligations pursuant to the master HCP, the Service may pursue permit suspension or revocation in accordance with the provisions of the HCP and 50 CFR 13.27 and 13.28.

In addition to including terms that are necessary and appropriate for establishing and ensuring the permit holder’s direct control over any parties seeking ITP authorization, contracts that are intended to establish direct control shall address the following issues: 1) what actions the master permit holder will take if a contractor does not comply with the terms and conditions of the permit or is otherwise in breach of contract; 2) terms to resolve any non-compliance concerns, including terms to avoid prolonging adverse effects or lack of mitigation during any period of non-compliance ; 3) what mechanisms (such as performance bonds or non-wasting funds) are appropriate for ensuring any necessary minimization and mitigation measures for those additional impacts; 4) how contractors will monitor and report their activities to the holder of the master permit; and 5) a process for dispute resolution to avoid the need to litigate potential breach of contract.

Ultimately, the master permit holder is responsible for the compliance of all enrolled parties. The permit holder should certify that it has the capacity to enter into the contracts and that the proposed certificates of inclusion or letters of participation are valid contracts under the laws of the state(s) where they will be executed and implemented. If these conditions are met, the Service should generally accept a nongovernmental entity as a permit holder.

To ensure the conservation commitments of the HCP and ITP are met, a master permit holder will be responsible for developing and implementing a program for compliance and biological monitoring of all activities covered by the HCP and reporting to the Service on the activities of all sub-permittees. For large and complex ITPs, master permit holders may choose to fund or partially fund a Service liaison to coordinate compliance and biological monitoring efforts.

Applicability and timing of “No Surprises Assurances”

The “No Surprises Assurances” concept was initially developed as a policy and subsequently codified into regulation (see 63 FR 8859; February 23, 1998) in an effort to provide those who are issued ITPs with strong assurance that the Service will not ask for additional conservation measures from a permittee who is properly implementing their HCP and in compliance with their ITP. The Service interprets the regulations to mean that the “No Surprises Assurances” convey to all who receive incidental take authorizations under any approved HCP, regardless of whether the authorization comes via an individual permit in association with an “umbrella HCP” or a certificate of inclusion in association with a “master permit.” We consider the “No Surprises Assurances” to be in effect at the time we approve the “umbrella HCP” and its associated NEPA and intra-Service consultation documents. Permit applicants under the “umbrella HCP” approach would be entitled to the “No Surprises Assurances” unless there are changes to the project that were not previously analyzed, the project will cause adverse effects to species not covered by the HCP, or the permit has been revoked.

Once an umbrella HCP has been approved by the Service for use by eligible ITP applicants, the umbrella HCP’s text and terms will not be altered (except as may be provided in the umbrella HCP) without first being re-noticed and re-evaluated via the same processes as any formal ITP amendment. Such amendments will have no effect to previously issued permits.

Alternatives to Master Permit and Umbrella HCPs

In appropriate circumstances, the Service may also use its ITP transfer regulations at 50 CFR 13.25(b) to expedite permitting of numerous projects that are expected to have similar effects on groups of listed species. This approach would involve issuing an ITP to an applicant who would then execute partial permit transfers to individual project developers that would be covered by the HCP. The recipient of the transferred permit would have to meet the general qualifications for holding an ITP (50 CFR 13.25(b)(1)), and would have to provide adequate written assurances that they will provide sufficient funding to fulfill the conservation commitment outlined in the HCP and will implement the terms and conditions of the permit, including any applicable minimization and mitigation requirements (50 CFR 13.25(b)(2)). The participating parties would need to create appropriate legal instruments to allocate the rights and responsibilities of each transfer recipient, and those documents would need to be reviewed by the Service for acceptability. As with the “master permit” and “umbrella HCP” approaches, the Service

would need to affirm the continued applicability of the NEPA analysis and intra-Service section 7 consultation at the time of approving any transfer, but would not otherwise revisit the NEPA or intra-Service section 7 analyses. ITP transfer recipients would be entitled to the “No Surprises Assurances” that conveyed with the original ITP.

The Service also has the authority to issue an ITP to a group of “co-permittees.” The participating parties would need to create appropriate legal instruments to allocate the rights and responsibilities of each “co-permittee” and those documents would need to be reviewed by the Service for acceptability and incorporation into the final permit(s). The participating parties need to describe how co-permittees shall share responsibility or liability should one or more of the co-permittees fail to properly implement the HCP or if the amount of permitted incidental take is exceeded. If a co-permittee fails to fulfill its obligations under the HCP, the Service may pursue permit suspension or revocation in accordance with the provisions of the ITP, as well as 50 CFR 13.27 and 13.28. All co-permittees would be entitled to the “No Surprises Assurances” unless there are changes to the project that were not previously analyzed, the project will cause adverse effects to species not covered by the HCP, or the ITP has been suspended or revoked.