

ISSUANCE CRITERIA FOR INCIDENTAL TAKE PERMITS

Upon receiving a permit application and conservation plan completed in accordance with the requirements of section 10(a)(2)(A) of the ESA, FWS and NMFS must consider the issuance criteria described at section 10(a)(2)(B) of the ESA in determining whether to issue the permit. All applicable criteria must be satisfied before a permit may be issued. If the application fails to meet any of the criteria, the permit must be denied. In addition, the FWS must ensure that general permit issuance criteria described at 50 CFR 13.21 and criteria specific to section 10(a)(1)(B) permits described at 50 CFR 17.22(b)(2) and 50 CFR 17.32(b)(2) are satisfied. However, issuance criteria under at 50 CFR Part 17 are essentially identical to those under the ESA. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222, and denials of permits must be made pursuant to Subpart D of 15 CFR part 904.

A. General Permit Issuance Criteria

The FWS cannot issue a permit if any of the following apply:

- (1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility;
- (2) The applicant has failed to disclose material information, or has made false statements as to any material fact in connection with the application;
- (3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;
- (4) The authorization requested threatens the continued existence of a wildlife or plant population.
- (5) The FWS finds through further inquiry or investigation, or otherwise, that the applicant is not qualified to conduct the proposed activities.

In addition to the above, FWS regulations cite four factors relating to felony violations of national wildlife laws and violation of conditions within other permits that could disqualify an applicant from receiving a section 10 permit. These factors are described at 50 CFR 13.21(c). NMFS regulations describe similar conditions under which a permit could not be issued (see 50 CFR 220.21).

B. Endangered and Threatened Species Permit Issuance Criteria

Section 10(a)(2)(B) of the ESA requires the following criteria to be met before the FWS or NMFS may issue an incidental take permit. If these criteria are met and the HCP and supporting information are statutorily complete, the permit must be issued.

1. The taking will be incidental.

Under the ESA, all taking of federally listed fish and wildlife species as detailed in the HCP must be incidental to otherwise lawful activities and not the purpose of such activities. For example, deliberate shooting or wounding a listed species ordinarily would not be considered incidental take and would not qualify for an incidental take permit. Conversely, the destruction of an endangered species or its habitat by heavy equipment during home construction or other land use activities generally would be construed as incidental and could be authorized by an incidental take permit.

a. Authorizing Take Associated With Mitigation Activities.

Mitigation and monitoring programs sometimes require actions that, strictly speaking, may be construed as a deliberate take. A good example is trapping endangered or threatened animals at a project site to re-locate or protect them in some fashion or to monitor their presence or activities. Generally, actions that result in deliberate take can be conducted under an incidental take permit, if:

(1) the take results from mitigation measures (e.g., capture/relocation) specifically intended to minimize more serious forms of take (e.g., killing or injury) or are part of a monitoring program specifically described in the HCP; and

(2) such activities are directly associated in time or place with activities authorized under the permit. Examples include capture of endangered animals from a project site and removal to adjacent or nearby habitat, capture and release of animals accidentally entrapped at the site (e.g., in a pipeline trench), capture/release studies for monitoring purposes, even permanent capture for purposes of donation to a captive breeding or research facility. However, where such activities require special qualifications, the HCP should require written FWS or NMFS authorization before any individual is permitted to conduct the work.

b. Authorizing Take For Scientific Purposes.

Other types of activities cannot be authorized by an incidental take permit because they include actions that are not generally needed to implement an HCP or include long-term components that are not "incidental" to the activity described in the HCP. Examples of these types of activities include holding endangered or threatened animals in captivity for propagation purposes or scientific research; euthanizing them for research purposes; and taking tissue samples for laboratory testing. However, such activities qualify as take for "scientific purposes" or purposes of "enhancement of propagation or survival" and can be

authorized under section 10(a)(1)(A) of the ESA.

If an HCP calls for activities of this type, the applicant should specify that the project will result in incidental take and take for scientific purposes or for purposes of enhancement of propagation or survival. Application requirements for scientific permits must then be addressed. These are described at 50 CFR 17.22(a)(1)(i-ix) for endangered species and 50 CFR 17.32(a)(1)(i-ix) for threatened species (FWS) and 50 CFR 217, 220, and 222 (NMFS). In addition, FWS must address issuance criteria under 50 CFR 17.22(a)(2) for endangered species and 50 CFR 17.32 (a)(2) for threatened species to issue permits for these purposes. Generally, if proposed activities are well-described in the HCP, including those requiring a scientific permit, and if all incidental take permit application requirements have been met, the only additional information needed for a scientific permit is resumes of individuals who would be conducting permitted activities. The permit issued can be a joint section 10(a)(1)(A) section 10(a)(1)(B) permit--i.e., only one permit need be issued.

2. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.

The applicant decides during the HCP development phase what measures to include in the HCP (though, obviously, the applicant does so in light of discussions with and recommendations from FWS or NMFS). However, the Services ultimately decide, at the conclusion of the permit application processing phase, whether the mitigation program proposed by the applicant has satisfied this statutory issuance criterion. This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. Analysis of the alternatives that would require additional mitigation in the HCP and NEPA analysis, including the costs to the applicant is often essential in helping the Services make the required finding.

3. The applicant will ensure that adequate funding for the HCP and procedures to deal with unforeseen circumstances will be provided.

These issuance criteria are identical to HCP requirements discussed in Chapter 3. The Services must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. Without such findings, the section 10 permit cannot be issued. Examples of funding mechanisms and methods of ensuring funding are

discussed in Chapter 3, Section B.6. The "Unforeseen or Extraordinary Circumstances " discussion in the HCP must be consistent with the joint Department of Interior/Department of Commerce "No Surprises" policy and should impose no higher standard on the permit applicant with respect to unforeseen circumstances than that described under this policy (see Chapter 3, Section B.5(a)).

4. The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.

This is a critically important criterion for incidental take permits because it establishes a fundamental "threshold" standard for any listed species affected by an HCP. Furthermore, the wording of this criterion is identical to the "jeopardy" definition under the section 7 regulations (50 CFR Part 402.02), which defines the term "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Congress was explicit about this link, stating in the Conference Report on the 1982 ESA amendments that the Services will determine whether or not to grant a permit, "in part, by using the same standard as found in section 7(a)(2) of the ESA, as defined by the [Services'] regulations." Congress also directed the Services to "consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." (H.R. Report No. 97-835, 97th Congress, Second Session). Thus, since the issuance of a section 10 permit is a Federal action subject to section 7 of the ESA (see Chapter 3, Section B.2(e)), the law prohibits any non-Federal activity under an HCP from "jeopardizing" a species under two standards: (1) the section 7 jeopardy standard; and (2) the incidental take permit issuance criteria. There is one difference between these two standards--the section 10 issuance criteria apply only to listed fish and wildlife species (because listed plants typically are not protected against take on non-Federal lands), while the jeopardy standard under section 7(a)(2) applies to plants as well as animals. However, the practical effect is the same--the ESA requires a "no-jeopardy" finding for all affected federally listed species as a precondition for issuance of an incidental take permit. The basis for this finding is the Service's biological opinion.

5. The applicant will ensure that other measures that the Services may require as being necessary or appropriate will be provided.

This criterion is equivalent to the requirement that HCPs include other measures as necessary or appropriate for purposes of the plan. Because the HCP process deals with numerous kinds of proposals and species, this criterion authorizes the Services to impose additional measures to protect listed species where deemed necessary. Although these types of measures should have been discussed during the HCP development phase and incorporated into the HCP, FWS or NMFS must ensure that the applicant has included all those measures the Services consider necessary "for purposes of the plan" before issuing the permit. The principal additional measure that the Services may require at this time is the Implementing Agreement. Other measures the Services might recommend during

HCP negotiations could include those necessary to guarantee funding for the mitigation program and monitoring and reporting requirements to ensure permit compliance. Also, any incidental take permit issued will be subject to the general permit conditions described at 50 CFR Part 13, Subpart D (FWS) or 50 CFR Part 220 (NMFS) regarding the display of permits, maintenance of records, filing of reports, etc.

6. The Services have received such other assurances as may be required that the HCP will be implemented.

The applicant must ensure that the HCP will be carried out as specified. Since compliance with the HCP is a condition of the permit. The authority of the permit is a primary instrument for ensuring that the HCP will be implemented. When developed, Implementing Agreements also provide assurances that the HCP will be properly implemented. Where a local government agency is the applicant, the Agreement should detail the manner in which local agencies will exercise their existing authorities to effect land or water use as set forth in the HCP. Under an HCP, government entities continue to exercise their duly constituted planning, zoning, and permitting powers. However, actions that modify the agreements upon which the permit is based (e.g., rezoning an area contrary to land uses specified in the HCP) could invalidate the permit. In addition, failure to abide by the terms of the HCP and Implementing Agreement (if required) is likely to result in suspension or revocation of the permit. Some HCPs may involve interests other than the applicant or permittee. In these cases, the applicant must have specific authority over the other parties affected by the HCP and be willing to exercise that authority, or must secure commitments from them that the terms of the HCP will be upheld. In the latter case, agreements between the FWS or NMFS and the other groups, or legally binding contracts between the applicant and such individuals or interests, may be necessary to bind all parties to the terms of the HCP. Any Implementing Agreement submitted in support of an HCP should be consistent with the discussion in Chapter 3, Section B.8, and, where applicable, with the Implementing Agreement "template" in Appendix 4.