United States Department of the Interior

FISH AND WILDLIFE SERVICE
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Memorandum

To: Regional Directors 1-8

From: Principal Deputy Director

Subject: Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified.

The U.S. Fish and Wildlife Service (Service) Field and Regional personnel often provide critical technical assistance to private parties who may take actions affecting listed species, and who may decide to invest significant resources to prepare an incidental take permit application pursuant to ESA Section 10(a)(1)(B). It is vital that Service staff apply correct and consistent interpretations of ESA statutory and regulatory provisions.

It is also vital that Service staff recognize that whether to apply for a section 10(a)(1)(B) permit is a decision of the applicant. Service staff can and should advise non-federal parties on the law, our regulations and guidance, and the potential for take of listed species incidental to their activities, but it is not appropriate to use mandatory language (e.g., a permit is "required") in the course of that communication. The HCP process is applicant driven, and that includes the threshold determination of whether to develop an HCP and apply for a permit. That threshold determination ultimately rests with the project proponent. Project proponents can take Service input into account and proceed in a number of ways, based upon their own risk assessment. They may proceed (at their own risk) as planned without a permit, modify their project and proceed without a permit, or prepare and submit a permit application. The biological, legal, and economic risk assessment regarding whether to seek a permit belongs with the private party determining how to proceed[1].

After consultation with the Solicitor's Office, I am providing guidance on how one determines whether a project is likely to result in "take" of a listed species as it relates to habitat modification. Further, I am requiring that : 1) the Assistant Director – Ecological Services post this memorandum and the attached questionnaire on the Headquarters Endangered Species web page; and 2) that Service regional and field staff include direction to that web site

[1] However, once a project proponent has decided to apply for a permit, the structure and scope of the HCP and associated permit are subject to negotiation between the permittee and the Service.

(www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf) when project proponents seek information about whether their action needs an incidental take permit under section 10 (a)(1)(B). By operating in a consistent manner, with clear standards, we can reduce conflict, minimize public frustration and increase government efficiency.

Simply put, as set out below, a section 10 (a)(1)(B) incidental take permit is only needed in situations where a non-federal project is likely to result in "take" of a listed species of fish or wildlife. That is, the requirement for an incidental take permit, as set forth in section 10 (a)(1)(B) of the ESA and its accompanying regulations, is only activated when non-Federal activities are likely to result in the take of listed wildlife.[2] As discussed in more detail below, habitat modification, in and of itself, does not necessarily constitute take. Chapter 3 of the Fish and Wildlife Service's Habitat Conservation Plan Handbook (Handbook) sets out the pre-application process and plainly states that if take is not anticipated then an incidental take permit is not needed. Further, it explains that an incidental take permit is only needed if a non-federal party's activity is "in an area where ESA-listed species are known to occur and where their activity or activities are reasonably certain to result in incidental take." The Handbook clarifies that the standard for determining if activities are likely to result in incidental take is whether that take is "reasonably certain to occur." In addition, the Handbook directs that the Service should avoid "processing applications submitted purely 'as insurance' when take of ESA –listed species is not anticipated." (*See Handbook, Chapter 3 "Phase 1:Pre-Application")*

An essential component of analysis needed to determine whether an incidental take permit (ITP) is needed is an understanding of what constitutes take under the ESA. 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). The ESA's take definition has been supplemented by the Service with regulatory definitions of the terms "harm" and "harass".

The terms "harm" and "harass" have been redefined several times. In July 1975, the Service proposed "harass" to be defined as an act that "either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding, or sheltering. Significant environment modification or degradation which has such effects is included in the meaning of harass." 40 F.R. 28712 (July 8, 1975). After notice and comment on the proposed definition, the Service reworked the definition of harass (as well as the definition of harm) and redefined the Service's regulatory definition of "harass" as follows: "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." 50 C.F.R. §17.3.

[2] Listed plants are not included in the ESA's prohibition on take of listed species.

The preamble to the final rule explicitly stated that the Service moved the concept of environmental modification or degradation from "harass" to the term "harm." 40 F.R. 44412 (Sept. 26, 1975). Specifically, the preamble explained that the "concept of environmental damage being considered a 'taking' has been retained, but it now found in a new definition of 'harm.'" In addition, the Service chose to modify the definition of "harass" by "restricting its application to acts or omissions which are done 'intentionally or negligently.'" The preamble explained that this change – to have "harass" only apply to intentional or negligent actions – was made as otherwise under the proposed language, harass would have "applied to any action, regardless of intent or negligence." Harass, therefore, is not a form of take permitted under section 10(a)(1)(B), which applies to taking "incidental to, but not the purpose of, the carrying out of an otherwise lawful activity."

Take in the form of "harm" is particularly significant and relevant to section 10 ITPs because it can be manifested in the form of habitat modification, a common component of non-Federal activities. As discussed above, the term "harm" has also been redefined several times, always with the intention to clarify that "harm" relates to activities that are likely to result in the actual death or injury of listed species. In 1975, the Secretary issued a regulation that defined "harm" to mean an act that "actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include but are not limited to, breeding, feeding or sheltering," and which include "significant environmental modification or degradation which has such effects." This regulation's preamble noted that "harm" was "expressly limited to those actions causing actual death or injury to a protected species of fish and/or wildlife. The actual consequences of such an action upon a listed species is paramount." *See*, 40 F.R. 44,413 (Sept. 26, 1975).

In 1981, the Secretary established the current regulatory definition of "harm" because of concerns that the prior regulatory definition was being interpreted to bar habitat modification even when there was no resulting injury to species. The regulatory definition of "harm" was modified to read: "Harm in the definition of 'take' in the Act means 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. Some commenters on the rule asserted that habitat modification alone could be a "take" under section 9; the Service's response in the preamble was that "in the opinion of the Service Congress expressed no such intent." Further, the preamble explained that the use of the word "actually" clarifies that a "standard of actual adverse effects applies to section 9 taking" and that it was clear that "habitat modification or degradation, standing alone, is not a taking pursuant to section 9." It went on to emphasize that "modification must be *significant*, must *significantly impair essential* behavior patterns, and must result in *actual* injury" (emphasis in original). Finally, the preamble discussed the specific choice to use the word "impair" rather than "disrupt" in the phrase "significantly impair essential behavior patterns" to "limit harm to situations where a behavioral pattern was adversely affected

and not simply disturbed on a temporary basis with no consequent injury to the protected species." *See*, 46 FR 54,748 (Nov. 4, 1981).

The validity of the regulatory definition of "harm" as applied to habitat modification faced a facial challenge, which eventually reached the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407 (1995). The Supreme Court upheld the regulatory definition of "harm" and emphasized that while "harm" could result from habitat modification "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures.'"

After the Supreme Court's decision, the 9th Circuit also analyzed the definition of "harm" and agreed that harming a species may be indirectly caused by habitat modification but concluded that habitat modification in and of itself does not constitute harm unless it "actually kills or injures wildlife." *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999). The *Bernal* court highlighted the Supreme Court's emphasis that every term in the definition of harm is "subservient to the phrase 'an act which actually kills or injures wildlife.'" In a later case, the 9th Circuit again tackled the definition of "harm" and held that, while the harm could be prospective, the "mere potential for harm, however, is insufficient."[3] *Arizona Cattle Growers' Association v. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir.2001). The *Arizona Cattle Growers'* Court opined that without evidence that a take would likely occur, a finding of take based on habitat modification alone would impose conditions on otherwise lawful use of land and such an action by the Service would be arbitrary and capricious.

The law is clear, then, that in order to find that habitat modification constitutes a taking of listed species under the definition of "harm", all aspects of the harm definition must be triggered. The questions that should be asked before a determination is made that an action involving habitat modification is likely to result in take are:

1. Is the modification of habitat significant?
2. If so, does that modification also significantly impair an essential behavior pattern of a listed species?
3. 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?

All three components of the definition are necessary to meet the regulatory definition of "harm" as a form of take through habitat modification under section 9, with the "actual killing or injury of wildlife" as the most significant component of the definition.

In summary, potential applicants should be advised that an ITP is only needed when an activity (or the results of the activity) is likely to result in the take of listed wildlife and that it is the

[3] The impact on a species may be prospective but it still must hit all the components of the definition of "harm" and must be reasonably certain to occur.

potential applicant's decision whether to apply for an ITP. If an applicant seeks technical assistance from the Service, a careful examination of what constitutes take (using guidance from this document, the attached questionnaire, and the HCP Handbook) should be central to the discussion as to whether an ITP is needed. Further, it should be noted that habitat modification, in and of itself, does not constitute take unless all three components of the definition of "harm" are met.

Please ensure that each non-Federal party who seeks information about a section 10(a)(1)(B) permit is directed to this memorandum and questionnaire as posted on the Service's Endangered Species webpage (www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf).