United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington DC, 20004

In Response Reply To:
FWS/AES/080681

Memorandum

To: Regional Directors

From: Director

Digitally signed by MARTHA WILLIAMS
Date: 2024.04.22 16:51:54 -04'00'

Subject: Rescission of the 2018 Principal Deputy Director Memorandum, FWS/AES/067974

On April 26, 2018, the Principal Deputy Director of the U.S. Fish and Wildlife Service (Service) issued a memorandum entitled *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*. Among other things, the memorandum provided an interpretation of the terms "harm"[1] and "harass"[2] that are contained within the Endangered Species Act's (ESA) definition of the term "take." Although the memorandum accurately describes the Service's interpretation of the regulatory definition of "harm," the memorandum's interpretation that the regulatory definition of the term "harass" applies only to actions that *intentionally* create the likelihood of injury is erroneous. Therefore, for the reasons outlined in this memorandum, I am rescinding the Principal Deputy Director's April 26, 2018, memorandum.

The April 26, 2018, memorandum argues that harassment is not a form of take that can be permitted under ESA section 10(a)(l)(B), which only applies to a taking that is "incidental to, but not the purpose of, the carrying out of an otherwise lawful activity." The April 26, 2018, memorandum's interpretation is wrong. The regulations at 50 C.F.R. § 17.3 are unambiguous; in the context of "harass," intent applies to the act or omission—not creating the likelihood of injury to wildlife. It therefore follows that harassment is a form of take that may be permitted under ESA section 10(a)(l)(B).

The April 26, 2018, memorandum's interpretation of "harass" contradicts long-standing Service interpretation. For example, the Service's 1998 section 7 consultation handbook describes the following scenario, which anticipates "harass" as incidental take. It states: "A 1981 FWS

[1] Harm "means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." (50 C.F.R. § 17.3)

[2] Harass "means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." (50 C.F.R. § 17.3)

Solicitor's opinion (Appendix D, #SO-1) expands on these concepts, holding that an act that harasses wildlife must demonstrate the likelihood of injury to the species and some degree of fault, whether intentional or negligent. Thus, a private landowner who wishes to develop land that serves as habitat for listed wildlife is not harassing that wildlife if reasonable measures are taken to avoid their injury." (Handbook, p. 4-47). Likewise, the Service's December 21, 2016, Habitat Conservation Plan Handbook contemplated that harassment could be a form of incidental take (e.g., *"An incidental take permit may not be* required if a proposed project can be designed to avoid taking listed species. Projects that may result in harassment, such as interference to a species' nighttime activity caused by artificial lighting, often can be adjusted to incorporate best management practices or other measures that would avoid any incidental take entirely." *See* Handbook, p. 3-5).

A recent court decision supports rescission of the 2018 memorandum. In *Sovereign Iñupiat for a Living Arctic v. BLM*, 2023 U.S. Dist. LEXIS 201981 (D. Alaska, Nov. 9, 2023), the court disagreed with the premise that the ESA and its implementing regulations require an intent to harass. In its biological opinion, the Service concluded that any incidental disturbances to polar bears did not constitute harassment under the ESA because they would be conducted with the intent of developing and producing oil and gas, and not with the intent to annoy, disturb, or harass polar bears. In rejecting this interpretation, the court relied on the ESA's legislative history and implementing regulations at 50 C.F.R. § 17.3. The decision states:

> Plaintiffs argue that FWS improperly defined "harassment" "to require specific intent directed toward the listed animal, rather than general intent to commit acts that create a likelihood for injury," in contravention of FWS regulations.
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> . . . .
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> Plaintiffs are correct that the definition of "harass" that FWS applied to non-denning polar bears is inconsistent with the regulation. The regulation's text is unambiguous. "Harass" means an "intentional or negligent act or omission which creates [a] likelihood of injury," [50 C.F.R. § 17.3,] not an intentional or negligent act or omission which intentionally or negligently creates a likelihood of injury. "Intentional or negligent" modifies "act," not "likelihood of injury." [*See id.*] This interpretation is bolstered by the legislative history of the ESA.
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> > The House Report [on the ESA] underscored the breadth of the "take" definition by noting that it included "harassment, *whether intentional or not*." The Report explained that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." These comments . . . support the Secretary's interpretation that the term "take" in § 9 reached far more than the deliberate actions of hunters and trappers. [*Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704-05 (1995) (emphasis in original) (quoting H.R. Rep. No. 93-412, at 11 (1973)).]

Slip op. at 72-75.

The April 26, 2018, memorandum specifically addressed "harass" in the context of section 10(a)(1)(B) incidental take permits issued pursuant to 50 C.F.R. § 17.22 (endangered species) and § 17.32 (threatened species). However, as noted above, harassment is also considered in section 7 consultations and, under the interpretation in the 2018 memorandum, incidental take statements issued along with biological opinions issued under section 7(a)(2) do not cover take in the form of harassment. This further supports rescinding the April 26, 2018, memorandum's erroneous interpretation of "harass."

In light of the above, this memorandum rescinds the Principal Deputy Director's April 26, 2018, memorandum. Service staff should continue to encourage the public to consult the Habitat Conservation Planning Handbook when applying for an incidental take permit.

If you have any questions regarding this memorandum, please contact Gina Shultz, Acting Assistant Director for Ecological Services.