

Eligibility Determination for the American Burying Beetle Industry Conservation Plan

May 2014

The following steps will help you determine if your project, or projects, may be eligible for an Endangered Species Act (ESA) section 10(a)(1)(B) permit under the Industry Conservation Plan for the American Burying Beetle (ICP). The ICP and its associated documents can be found here: www.fws.gov/southwest/es/oklahoma/ABBICP.htm. The ICP is designed to cover oil and gas related activities that overlap with American burying beetles (ABBs) and their habitat within portions of Oklahoma. If you determine that your proposed project, or projects, is not eligible for coverage under the ICP, recommendations are provided in the steps below to assist you with compliance with the ESA. If you determine that your project, or projects, may be eligible for coverage, you will need to complete this form and submit an application for a section 10(a)(1)(B) permit, along with additional information described below.

1. Does your project(s) have the potential to result in take¹ of the American burying beetle, including through habitat loss? At the permit application stage, you may assume potential take or you may utilize the Service's "American Burying Beetle Impact Assessment for Project Reviews". A more detailed analysis of impacts will be required after your permit is approved and before project initiation.
 - a. If yes, proceed to step 2.
 - b. If no, maintain documentation for your records that your project(s) will not result in take of the ABB. Permits issued through the ICP only address potential take of the ABB. Contact the Service if any other species may be affected.

2. Is the proposed project a "Covered Activity" under the ICP? For a description of Covered Activities, see ICP Section 2.0.
 - a. If yes, check the boxes below for the activity you are requesting coverage for and proceed to step 3.
 - Upstream Production (as described in section 2.1 of the ICP)
 - Midstream Development (as described in section 2.2 of the ICP)
 - Operation and Maintenance (as described in 2.1 and/or 2.2 of the ICP)
 - b. If no, your project cannot address ESA compliance needs through the ICP. Please contact the Service to determine next steps to address any potential project impacts to listed species or their habitats.

3. Will take of ABB be incidental to the proposed project? Section 10(a)(1)(B) authorizes the issuance of permits for take resulting from non-federal activities that may occur incidentally to otherwise lawful measures with the provision of an HCP. The term incidental take is defined as take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”
 - a. If yes, proceed to step 4.
 - b. If no, project cannot address ESA compliance needs through the ICP. Please contact the Service to determine next steps to address any potential project impacts to listed species or their habitats.

4. Is the proposed project an otherwise lawful activity? The ESA statute and the associated implementing regulations and policies of the U.S. Fish and Wildlife Service (Service) require that the proposed action must be otherwise lawful. This standard requires that the proposed action must comply with all applicable local, state and Federal laws, regulations, and ordinances.
 - a. If yes, proceed to step 5.
 - b. If no, the Service cannot issue a Federal Fish and Wildlife Permit for actions that do not meet this requirement. Contact the Service to determine if there are other pathways to comply with the statute.

5. Will the proposed project be wholly located within the ICP Planning area? For a description of ICP Planning area, see Section 1.2 of the ICP.
 - a. If yes, proceed to step 6.
 - b. If no, project may not address ESA compliance needs through the ICP. Please contact the Service to determine next steps to address any potential project impacts to listed species.

6. Can you avoid impacts² to species not covered under the ICP? Guidance for avoiding impacts to "Non-Covered Species" is provided on the ICP website: www.fws.southwest/es/oklahoma/ABBICP.htm.
 - a. If yes, we recommend you document and maintain for your records how impacts for each species and its habitat will be avoided and proceed to step 7.
 - b. If no, project cannot address ESA compliance needs through the ICP. Please contact the Service to determine next steps to address any potential project impacts to listed species or their habitats.

7. Do you agree to conduct an historical/cultural review of your project site and work with the State Historic Preservation Office and Tribal Historic Preservation Officers to overcome any significant impacts; accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and avoid adversely affecting the physical integrity of such sacred sites?
 - a. If yes, proceed to step 8.
 - b. If not, the project may not be in compliance with the Service's Environmental Assessment of the ICP for which a finding of no significant impact was determined.
8. If your project will be on or will impact any park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (Executive Order 11990); floodplains (Executive Order 11988); national monuments; migratory birds (Executive Order 13186); and other ecologically significant or critical areas under Federal ownership or jurisdiction, do you agree to work with managing entities and meet their requirements?
 - a. If yes, proceed to step 9. Note, that if your project impacts land under federal ownership or jurisdiction, consultation with the appropriate Federal agency may be necessary. If consultation under section 7(a)(2) of the ESA is conducted with that agency, a section 10(a)(1)(B) permit may not be necessary.
 - b. If not, the project may not be in compliance with the Service's Environmental Assessment of the ICP for which a finding of no significant impact was determined.
9. Has your company 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, where such assessment or conviction evidences a lack of responsibility?
 - a. If yes, please contact the Service to determine if such penalty may preclude you from being eligible for this ICP.
 - b. If no, proceed to step 10.
10. Do you agree to implement minimization and mitigation measures, funding assurances for mitigation and changed circumstances, and reporting requirements as described in the ICP?
 - a. If yes, proceed to step 11.
 - b. If no, your project cannot address ESA compliance needs through this ICP. The applicant should, to the maximum extent practicable minimize their impacts to federally-listed species and provide assurances of funding for mitigation and changed circumstances. Contact the Service to determine next steps to address any potential project impacts to listed species or their habitats.

- 11. Do you acknowledge that issuance of the permit is only the first step of the ICP approval process and before any project may proceed under the permit, an Individual Project Package (IPP) must be submitted to the Service and approved? See section 7.2 of the ICP for additional information on the IPP submittal process.
 - a. If yes, proceed to step 12
 - b. If no, your Permit application cannot be approved. Although approval of this permit is necessary first step to obtain take authorization for the American burying beetle, take cannot be authorized until your IPP has been approved by the Service.

- 12. Your project may be eligible for coverage under the ICP. Your next step is to submit this document (completed and signed), a section 10(a)(1)(B) permit application, and the other documents identified in the checklist on the following page. For more information on the permit application process, see Section 7.0 of the ICP. If your project has a federal nexus, we recommend that you contact the Service before putting together your permit application.

Certification: I hereby certify the information submitted in this Eligibility Determination for the American burying beetle Industry Conservation Plan is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to the criminal penalties of 18 U.S.C. 1001 (50 CFR 13.12(a)(5)).

Signature of applicant/person responsible for permit

Date of signature (mm/dd/yyyy)

Name: _____ Company Name: _____

Company Address: _____

Phone Number: _____ Email: _____

ICP Permit Application Checklist:

Completed and signed Eligibility Determination (this document)

Completed Section 10(a)(1)(B) application and processing fee (currently \$100.00). The application and step-by-step application guidance can be found here:

www.fws.gov/southwest/oklahoma/es/ABBICP.htm

General map and list of counties to be included for the Area of Permit Coverage (may be the entire Planning Area).

All information above should be submitted electronically to: permitsR2ES@fws.gov, with a subject line of “ABB_ICP Company Name”. Additionally, the original signed permit application should be submitted to the following address:

U.S. Fish and Wildlife Service
 Endangered Species Permit Office
 P.O. Box 1306 (mailing address)
 Albuquerque, New Mexico 87103-1306

For additional discussion on the permit application and implementation process, see Section 7.0 of the ICP.

¹ Section 9 of the ESA prohibits “take” of threatened and endangered species. The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (16 USC §1532(3)(19)). The term “harm” is defined to include any 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 CFR § 17.3). The term “harass” is defined as “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 CFR § 17.3).

² Non-covered species include federally-listed and proposed species and birds protected under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act. Any action that results in take (as defined above) of federally-listed and proposed species is considered an impact. For the purposes of this ICP, the definition of take also applies to proposed species when considering eligibility under this ICP. Although federal proposed species are not afforded the same protections as federally-listed species under the Endangered Species Act, a clear definition of impacts is provided here to ensure consistent analysis of potential impacts. Impacts to birds protected under the Migratory Bird Treaty Act and Bald and Golden Eagle include any violation of the following prohibitions: take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird or eagle, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations. Migratory bird species protected by the Act are listed in 50 CFR 10.13. Further, activities that would disturb an eagle are prohibited under the BGEPA and would be considered an impact. “Disturb” means to agitate or bother an eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.