



United States Department of the Interior

FISH AND WILDLIFE SERVICE
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2001
RECEIVED

October 12, 2001

Cons. # 2-22-01-I-700

James P. Bearzi, Bureau Chief
Hazardous Waste Bureau (Attn. S. Pullen)
New Mexico Environment Department
2905 Rodeo Park Drive, East, Building 1
Santa Fe, New Mexico 87505-6303

Dear Mr. Bearzi:

This responds to a telephone conversation from your staff on August 24, 2001, requesting information on federally-listed threatened or endangered species and important wildlife habitats that could be affected by proposed development of the Triassic Park Hazardous Waste Disposal Facility (Facility). The Facility will be located in Sections 17 and 18 of Township 11 South, Range 31 East, New Mexico Prime Meridian, approximately 43 miles east of Roswell, New Mexico, and 36 miles west of Tatum, New Mexico, in Chaves County.

The New Mexico Environment Department (Department) is considering its decision to permit the Facility. The Facility would be the first hazardous waste landfill of its kind in New Mexico. Gandy Marley Incorporated (GMI) is expected to construct and operate the Facility. The Facility would store, treat, and dispose of certain hazardous wastes that are known to exhibit the characteristics of ignitability, reactivity, corrosivity, or toxicity as defined by the Resource Conservation and Recovery Act (RCRA). Wastes that could be disposed at the Facility are likely to include chemicals, solvents, certain wastewater treatment sludges, gas pipeline residues, and petroleum refining wastes. In addition, the Facility will likely store, treat, and dispose of soils, remediation waste, and non-ignitable liquids contaminated with polychlorinated biphenyl (PCB) concentrations less than 50 parts per million.

The Department is authorized by the United States Environmental Protection Agency (USEPA), under RCRA, to issue and enforce RCRA hazardous waste facility permits. Subtitle C of RCRA provides for "cradle to grave" environmental regulation for the management, treatment, storage, and disposal of hazardous waste at a hazardous waste disposal facility. These requirements will be applicable from the moment waste is received at the Facility until it is closed, and through a post-closure period.

We reviewed a copy of the draft permit along with a fact sheet outlining the pertinent aspects of the permit and the Public Notice. From these materials, we understand the proposed site in Chaves County was selected because it is geologically favorable as by more than 600 feet of Triassic Era mud stone underlies the site. This geological formation appears to provide a barrier to contaminant migration from the Facility landfill to underlying groundwater. In addition to meeting siting criteria, the Department has required that GMI commit to numerous environmental safeguards including double lining of all disposal cells with an impermeable synthetic membrane to minimize the potential for waste releases, construction of redundant monitoring systems to ensure early detection of any liner failure, and development of rigorous and specific contingency plans to address any detected contaminant releases.

The Department's permit contains conditions and requirements for treatment by evaporation of hazardous waste in a surface impoundment (Part 5 of the proposed permit). Standards for construction, operation, and maintenance are also specified. Conditions are included in the permit to ensure proper pond operation and maintenance and for response actions to be taken in case of pond failure. The permit also includes conditions specifying the maximum volumes and kinds of waste that can be treated in the surface impoundment. The surface impoundment will include a two-layered liner with leak detection and removal system and netting to preclude wildlife access.

The primary concern of the United States Fish and Wildlife Service (Service) is the protection of the Nation's fish and wildlife resources including threatened and endangered species, migratory birds, and their habitats. Under its responsibilities in the Migratory Bird Treaty Act, the Service would be concerned if the open, hazardous waste impoundment attracted migratory birds or other wildlife to their detriment. During flight, migratory birds (but also bats) would not necessarily distinguish between this impoundment and a natural waterbody and could be attracted to drink, rest, and perhaps feed on the insects that are invariably associated with impounded waters. The facility lighting could attract migratory birds as well. Therefore, the Service supports the requirement that the impoundment (and any other open hazardous waste lagoon, pond, or container) be constructed with an appropriate exclusion technology (*e.g.*, netting, fences, enclosed tanks, *etc.*) to prevent migratory bird access and they are regularly maintained. To minimize the likelihood of adverse impacts to nesting migratory birds from Facility construction, we recommend that construction activities occur outside the general migratory bird nesting season of March through August, or that areas proposed for construction during the nesting season be surveyed, and if necessary, avoided until nesting is complete.

The Service is also responsible for administering the Endangered Species Act of 1973 as amended (Act). Section 7 of the Act requires Federal agencies to consult with the Service if their actions may affect a federally-listed threatened or endangered species. If the Department's issuance of a permit for the construction and operation of the Facility is determined to be a federal action by the USEPA under its RCRA authority and

responsibilities, then it would be the responsibility of the USEPA (or its designated representative) to determine if a proposed action "may affect" any threatened, endangered, or proposed species, or critical habitats, and if necessary, to consult with us further.

We have enclosed a current list of federally-endangered, threatened, candidate species, and species of concern that may be found in Chaves County, New Mexico. Candidate species and species of concern were included on this list but have no legal protection under the Act. Additional information about these species is available on the internet at <<http://ifw2es.fws.gov/endangeredspecies>>, <<http://nmnhp.unm.edu/bisonm/bisonm.cfm>>, and <<http://nmrareplants.unm.edu>>. If the action area has suitable habitats for any species that is federally-listed or proposed to be listed as threatened or endangered, we recommend that species-specific surveys be done during the appropriate breeding season to evaluate any possible project-related impacts. We encourage you, your staff, or GMI, to review the enclosed list of species and contact us further if you have any questions.

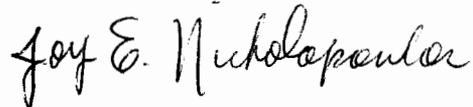
For example, the Facility will be situated in the Southern High Plains Ecosystem that contains an expansive shortgrass prairie. The Facility may be suitable for nesting by the proposed threatened mountain plover (*Charadrius montanus*). This member of the shorebird family is not actually found nesting near shorelines or on mountains, but instead prefers the semi-arid prairie of the Great Plains. Historically, mountain plovers were associated with bison and prairie dogs towns (and therefore the presence of any prairie dog towns should be identified) in prairie ecosystems. We recommend that surveys for nesting mountain plovers be conducted from May 1 through June 15 by a qualified biologist in order to evaluate any possible project-related impacts.

If the Department's action is not determined to be a Federal action of the USEPA, then only section 9 of the Act would apply to the Department's permitting of the Facility. Section 9 of the Act prohibits the deliberate or incidental "take" (*i.e.*, to harm, harass, pursue, injure, or kill) of any federally-listed species by any person or corporation. "Harm" is further defined to include habitat modification or degradation where it kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. If appropriate, authorization from the Service for "take" of any listed species should be obtained prior to initiating projects to avoid potential violations of the Act. Take can be authorized pursuant to the provisions in section 7 and permitted under section 10 (a)(1)(B) of the Act. Habitat Conservation Plans (HCPs) have been frequently used to assist non-Federal applicants, where adverse actions to federally-listed species cannot be avoided. HCPs are one of several conservation tools available to private landowners that allow for incidental take of federally-listed species, while integrating the needs of the species into the development of the project. We have included some information on HCPs and Candidate Conservation Agreements with this letter (Enclosures).

Please keep in mind that the scope of federally-listed species compliance may also include any interrelated or interdependent project activities (*e.g.*, transportation of hazardous waste across state borders, spills during transport, utility relocations, *etc.*) as well as any indirect effect and cumulative impacts. We suggest you contact the New Mexico Department of Game and Fish, and the New Mexico Energy, Minerals, and Natural Resources Department, Forestry Division for information regarding fish, wildlife, and plants of State concern.

Thank you for your concern for migratory birds, endangered species, and New Mexico's wildlife habitats. If you would like additional information on HCPs or Candidate Conservation Agreements or have questions about consultation with the Service, please contact Joel D. Lusk or Lyle Lewis at the letterhead address or at (505) 346-2525, ext. 109 or 114, respectively.

Sincerely,



Joy E. Nicholopoulos
Field Supervisor

Enclosures

cc: (w/enc)

Section Chief, RCRA Permits, New Mexico and Federal Facilities, Dallas, Texas
(Attn. D. Neleigh, 6PD-N)

cc: (w/o enc)

Director, New Mexico Department of Game and Fish, Santa Fe, New Mexico
Director, New Mexico Energy, Minerals, and Natural Resources Department, Forestry
Division, Santa Fe, New Mexico

Threatened, Endangered, and Candidate Species,
and Species of Concern
Chaves County
October 12, 2001

Black-footed ferret, Mustela nigripes, E**
Black-tailed prairie dog, Cynomys ludovicianus, C
Cave myotis, Myotis velifer, SC
Desert pocket gopher, Geomys bursarius arenarius, SC
Fringed myotis, Myotis thysanodes, SC
Long-eared myotis, Myotis evotis, SC
Occult little brown bat, Myotis lucifugus occultus, SC
Townsend's big-eared bat, Corynorhinus townsendii, SC
Western red bat, Lasiurus blossevillii, SC
Pecos River muskrat, Ondatra zibethicus ripensis, SC
Swift fox, Vulpes velox, SC
American peregrine falcon, Falco peregrinus anatum, SC
Arctic peregrine falcon, Falco peregrinus tundrius, SC
Baird's sparrow, Ammodramus bairdii, SC
Bald eagle, Haliaeetus leucocephalus, T
Black tern, Chlidonias niger, SC
Ferruginous hawk, Buteo regalis, SC
Interior least tern, Sterna antillarum, E
Loggerhead shrike, Lanius ludovicianus, SC
Mountain plover, Charadrius montanus, PT
Northern aplomado falcon, Falco femoralis septentrionalis, E
Northern goshawk, Accipiter gentilis, SC
Western burrowing owl, Athene cunicularia hypugaea, SC
White-faced ibis, Plegadis chihi, SC
Lesser prairie chicken, Tympanuchus pallidicinctus, C
Yellow-billed cuckoo, Coccyzus americanus, SC
Headwater catfish, Ictalurus lupus, SC
Pecos bluntnose shiner, Notropis simus pecosensis, T w/CH
Pecos gambusia, Gambusia nobilis, E
Pecos pupfish, Cyprinodon pecosensis, SC
Plains minnow, Hybognathus placitus*, SC
Rio Grande shiner, Notropis jemezianus, SC
Sand dune lizard, Sceloporus arenicolus, SC
Texas horned lizard, Phrynosoma cornutum, SC
Mescalero Sands tiger beetle, Cicindela formosa rutilovirescens, SC
Mescalero Sands june beetle, Polyphylla mescalerensis, SC
Koster's tryonia (springsnail), Tryonia kosteri, C
Noel's amphipod, Gammarus desperatus, SC
Pecos assiminea snail, Assiminea pecos, C
Roswell springsnail, Pyrgulopsis roswellensis, C
Kuenzler hedgehog cactus, Echinocereus fendleri var. kuenzleri, E
Pecos sunflower, Helianthus paradoxus, T
Wright's marsh thistle, Cirsium wrightii, SC

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- E = Endangered (in danger of extinction throughout all or a significant portion of its range).
- PE = Proposed Endangered
- T = Threatened (likely to become endangered within the foreseeable future throughout all or a significant portion of its range).
- PT = Proposed Threatened
- CH = Critical Habitat
- PCH = Proposed Critical Habitat
- C = Candidate Species (taxa for which the Service has sufficient information to propose that they be added to list of endangered and threatened species, but the listing action has been precluded by other higher priority listing activities).
- SC = Species of concern (taxa for which further biological research and field study are needed to resolve their conservation status OR are considered sensitive, rare, or declining on lists maintained by Natural Heritage Programs, State wildlife agencies, other Federal agencies, or professional/academic scientific societies). Species of concern are included for planning purposes only.
- S/A = Similarity of Appearance
- * = Introduced population
- † = May occur in this county from re-introductions in Colorado.
- XN = Nonessential Experimental Population
- ** = Survey should be conducted if project involves impacts to prairie dog towns or complexes of 200-acres or more for the Gunnison's prairie dog (*Cynomys gunnisoni*) and/or 80-acres or more for any subspecies of Black-tailed prairie dog (*Cynomys ludovicianus*). A complex consists of two or more neighboring prairie dog towns within 4.3 miles (7 kilometers) of each other.
- *** = Extirpated in this county

Candidate Species and Candidate Conservation Agreements With Assurances For Non-Federal Property Owners

What is a candidate species?

Candidate species are plants and animals for which the Fish and Wildlife Service (Service) has sufficient information on their biological status and threats to propose them as endangered or threatened under the Endangered Species Act, but for which development of a proposed listing regulation is precluded by other higher priority listing activities. The National Marine Fisheries Service (NMFS), which has jurisdiction over most marine species, defines candidate species more broadly to include species whose status is of concern but more information is needed before they can be proposed for listing.

How does the public know what species are candidates for listing?

The Service annually publishes a Notice of Review in the *Federal Register* that provides an updated list of plants and animals native to the United States that are regarded as candidates for possible listing. While there is no requirement under the ESA to publish such a list, the Service believes that it is important to advise other Federal agencies, State and Tribal governments, local governments, industry, and the public of those species that are at risk and may warrant ESA protection. Advance notice of potential ESA listings can assist environmental planning efforts allowing resource managers to alleviate threats and thereby possibly remove the need to list these taxa. In publishing the candidate species list, the Service also solicits any new information that may be available on the biology, status, and distribution of and threats to these species or other potential candidates. NMFS periodically publishes in the *Federal Register* a list of the species it regards as candidates.

What protection does the ESA provide to candidate species?

Candidate species receive no statutory protection under the ESA. However, the Service encourages the formation of partnerships to conserve these species since they are by definition species that may warrant future protection under the ESA.

How do species become candidates?

Identification of potential candidates is a cooperative effort. The Service's Endangered Species specialists work closely with staff from other Service resource programs, such as fisheries, refuges, and migratory birds, as well as representatives of other Federal and State natural resource agencies, local and Tribal governments, business and industry, academia, and other private interests to identify potential candidate species. The Nature Conservancy's Natural Heritage Central Databases system, which ranks species' status at State, national, and global levels based on their relative imperilment, also is an important tool for identifying potential candidate species. This database will soon be available via a public internet delivery tool (NatureServe®), and will provide information on more than 50,000 plants, animals, and ecological communities of the U. S. and Canada.

When sufficient information is developed to make well documented, biologically sound determinations about a species' status, the Service's Field Offices consider whether it meets the criteria for listing under the ESA. The Service's Regional Offices then provide recommendations for additions to the candidate list to the Service's Director, whose concurrence is necessary before a species becomes an official candidate species. Species are assigned a listing priority from 1 to 12 based on the magnitude of threats they

face, the immediacy of the threats, and taxonomic uniqueness (for example, full species have higher priority than subspecies). The species' listing priority dictates the relative order in which proposed listing rules are prepared, with the species at greatest risk (listing priority 1 through 3) being proposed first. We review the listing priority number for each species yearly.

How many species are currently candidates for listing?

As of February, 2001, 236 species were candidates for listing and 60 species were proposed for listing.

What is the advantage of conserving species that are already candidates or proposed for listing?

An effective program for the conservation of endangered species requires a means of addressing species that have not yet been listed but that face immediate, identifiable risks. Early conservation preserves management options, minimizes the cost of recovery, and reduces the potential for restrictions on land use in the future. Addressing the needs of species before the regulatory restrictions associated with listed species come into play often allows greater management flexibility to stabilize or restore these species and their habitats. In addition, as threats are reduced and populations are increased or stabilized, priority for listing can be shifted to those species in greatest need of the ESA's protective measures. Ideally, sufficient threats can be removed to eliminate the need for listing.

What are Candidate Conservation Agreements?

Candidate Conservation Agreements are formal agreements between the Service and one or more parties to address the conservation needs of

voluntarily committed to in the Agreement. At the time the parties enter into the Agreement, the Service would issue an enhancement of survival permit under section 10(a)(1)(A) of the ESA authorizing the property owner to take individuals or modify habitat to return the property to the conditions agreed upon and specified in the Agreement, provided that the take is at a level consistent with the overall goal of precluding the need to list. The effective date on the permit would be tied to the date any covered species becomes listed.

What must the Candidate Conservation Agreement with Assurances include?

The Candidate Conservation Agreement must include:

- a description of the population levels (if available or determinable) of the covered species existing at the time the parties negotiate the Agreement; the existing habitat characteristics that sustain any current, permanent, or seasonal use by the covered species on lands or waters owned by the property owner; and/or the existing characteristics of the property owner's lands or waters included in the Agreement that support populations of covered species on lands or waters not on the participating owner's property;
- a description of the conservation measures that the property owner is willing to undertake to conserve the species covered by the Agreement;
- an estimate of the expected conservation benefits as a result of conservation measures (e.g., increase in population numbers, enhancement, restoration, or preservation of suitable habitat; removal of threats) and the conditions that the property owner agrees to maintain;
- assurances that the Service will not require additional conservation measures or impose additional take restrictions beyond those agreed to if a covered species is listed in the future;
- a monitoring provision that may include measuring and reporting progress in implementation of the conservation measures described above and changes in habitat conditions and the species' status resulting from the measures; and
- a notification requirement, to provide the Service or appropriate State

agencies with a reasonable opportunity to rescue individuals of the covered species before any authorized take occurs.

Who can participate in a Candidate Conservation Agreement with Assurances?

A Candidate Conservation Agreement with Assurances will involve the Service, one or more non-Federal property owners, and possibly other cooperators. State fish and wildlife agencies, which have primary jurisdiction over species that are not federally listed, may be a cooperator in any Candidate Conservation Agreement. Other potential cooperators include neighboring property owners, State or local agencies, Tribal governments, or Federal property owners. Only non-Federal property owners may receive regulatory assurances under the Agreement.

Will there be any public notification of Candidate Conservation Agreements With Assurances?

As with other section 10 permits, the Service will publish a notice in the *Federal Register* when it receives the permit application. The Service will announce receipt and availability of the application and Agreement and will accept and consider comments from the public before making a final decision on issuance of the permit.

What if I already have listed species on my lands?

If a private property owner already has listed species occurring permanently or seasonally on his lands and he wishes to voluntarily undertake management activities on his lands or waters that enhance, restore, or maintain habitat benefiting such species, the Service and the property owner may enter into a "Safe Harbor Agreement" for the listed species. A Safe Harbor Agreement and associated permit authorizes take of listed species provided the property owner carries out the activities and maintains the conditions agreed upon in the Agreement. If both listed and candidate species occur on the property owner's property, both a Safe Harbor Agreement and a Candidate Conservation Agreement with Assurances might be appropriate.

In other situations, if a property owner has listed species occurring on his lands and proposes an activity that would

result in take of the listed species, he can apply for an incidental take permit. Incidental take permits are issued under section 10(a)(1)(B) of the ESA, and their purpose is to authorize take that is incidental to, and not the purpose of, an otherwise lawful activity. To obtain an incidental take permit, the landowner must develop a Habitat Conservation Plan that describes how the take will be avoided, minimized, and mitigated. If the landowner also has candidate species on his property, conservation measures to minimize and mitigate take of those candidates could be included under the Habitat Conservation Plan, and if listed, those species would be covered by the associated incidental take permit.

What if I sell my land? Is the CCAA transferable?

If a property owner who is party to a Candidate Conservation Agreement with Assurances transfers ownership of the lands included in the Agreement, the Service will regard the new owner as having the same rights with respect to the subject lands as the original property owner if the new property owner agrees to become part of the original Agreement.

Whom should I contact to initiate a Candidate Conservation Agreement?

Interested parties should contact the nearest Fish and Wildlife Service Field Office in their State to discuss potential cooperative opportunities. For information on the final policy and regulations, contact our Headquarters Office at the address below. More information and office addresses can also be found by visiting the Fish & Wildlife Service website (<http://www.fws.gov>).

**U. S. Fish and Wildlife Service
Division of Endangered Species
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
703/358 2105
<http://endangered.fws.gov>
February 2001**





U.S. Fish & Wildlife Service

Habitat Conservation Plans and the Incidental Take Permitting Process

What is a Habitat Conservation Plan and Incidental Take Permit?

Incidental take permits are required when non-Federal activities will result in "take" of threatened or endangered species. A habitat conservation plan or "HCP" must accompany an application for an incidental take permit. The purpose of the habitat conservation planning process associated with the permit is to ensure there is adequate minimizing and mitigating of the effects of the authorized incidental take. The purpose of the incidental take permit is to authorize the incidental take of a listed species, not to authorize the activities that result in take.

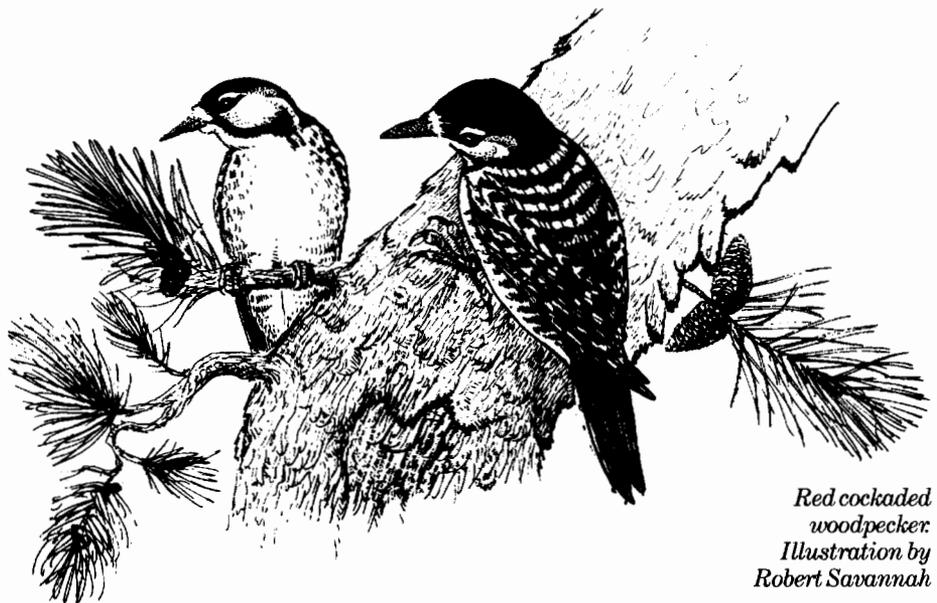
What is take?

"Take" is defined in the Endangered Species Act (Act) as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species. Harm may include significant habitat modification where it actually kills or injures a listed species through impairment of essential behavior (e.g., nesting or reproduction).

How many HCPs have been developed and what size areas do they cover?

As of September 2001, over 360 HCPs have been approved. These HCPs address more than 200 species across more than 30 million acres.

Both the number of HCPs and the size and complexity of the areas they cover have increased. Most of the earlier HCPs approved were for planning areas of less than 1,000 acres. However, of the HCPs that have been approved as of September 2001, seventeen range from 10,000 to 100,000 acres; eleven range from 100,000 to 500,000; six exceed 500,000 acres; and five cover more than one million acres. In some cases, there are more than one incidental take permit associated with a HCP. For example, the Central Coastal Orange County HCP was developed as an overall plan under which each individual participating entity received their own



*Red cockaded woodpecker.
Illustration by
Robert Savannah*

incidental take permit. This suggests that HCPs are evolving from a process adopted primarily to address single projects to broad-based, landscape-level planning, utilized to achieve long-term biological and regulatory goals.

Who needs an Incidental Take Permit?

Anyone who believes that their otherwise-lawful activities will result in the "incidental take" of a listed species needs a permit. The Service can help you determine whether your proposed project or action is likely to result in "take" and whether a HCP is an option to consider. Service personnel can also provide technical assistance to help you design your project so as to avoid take. For example, the project could be designed with seasonal restrictions on construction to minimize disturbance during nesting.

What is the benefit of an Incidental Take Permit and Habitat Conservation Plan to a private landowner?

The permit allows a landowner to legally proceed with an activity that would otherwise result in the illegal take of a

listed species. The Services also developed a regulation to address the problem of maintaining regulatory assurances and providing certainty to landowners through the HCP process, the "No Surprises" regulation.

What are No Surprises assurances?

No Surprises assurances are provided by the government through the section 10(a)(1)(B) process to non-Federal landowners. Essentially, private landowners are assured that if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee. The government will honor these assurances as long as a permittee is implementing the terms and conditions of the HCP permit, and other associated documents in good faith. In effect, this regulation states that the government will honor its commitment as long as the HCP permittees honor theirs.

Are Incidental Take Permits needed for listed plants?

There are no Federal prohibitions under the Act for the take of listed plants on non-Federal lands, unless taking of those plants is in violation of State law. However, before the Service issues a permit, the effects of the permit on listed plants must be analyzed because section 7 of the Act requires that issuance of a HCP permit must not jeopardize any listed species, including plants.

What is the process for getting an Incidental Take Permit?

The applicant is in charge of deciding whether to pursue an incidental take permit. While Service personnel provide detailed guidance and technical assistance throughout the process, the development of a HCP is driven by the applicant. The applicant is responsible for submitting a completed permit application. The necessary components of a completed permit application are: a standard application form, a HCP, an Implementation Agreement (if required), and, if appropriate, a draft National Environmental Policy Act analysis.

While processing the permit application, the Service will prepare an intra-Service biological opinion under section 7 of the ESA and the incidental take permit, and finalize the NEPA analysis documents. Consequently, incidental take permits have a number of associated documents besides the HCP.

How long will it take to process our application?

The length of time to complete the permitting process depends on the complexity of issues involved (e.g., the number of species) and the completeness of the documents submitted by the applicant. The Service will work to complete all steps such as the public comment process as expeditiously as possible. The most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under NEPA, in other words, whether an Environmental Impact Statement, Environmental Assessment, or a categorical exclusion is required. Other factors such as public controversy can also affect permit processing times.

“Low Effect” HCPs are those involving (1) minor effects on federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) minor effects on other environmental values or resources. These HCPs do not require a NEPA document, and the target permit processing time is 3 months.

HCPs which do not fall into the “Low Effect” category require either an EA or an EIS, depending on their complexity. For those requiring an EA as part of the permit application, the target permit processing time is 3 to 5 months. An EIS will probably be required only on rare occasions. For those requiring an EIS, the target permit processing time is less than 10 months.

How do we know if we have listed species on our project site?

Check with the appropriate State fish and wildlife agency, the nearest Service field office, or the National Marine Fisheries Service (for anadromous fish). You can arrange for a biologist from one of these agencies to visit your property to determine whether a listed species may be on your project site.

What needs to be in a HCP?

The contents of a HCP are defined in section 10 of the Act and its implementing regulations. They include:

- An assessment of impacts likely to result from the proposed taking of one or more federally listed species.

- Measures the permit applicant will undertake to monitor, minimize, and mitigate for such impacts; the funding that will be made available to implement such measures; and the procedures to deal with unforeseen or extraordinary circumstances.

- Alternative actions to the taking that the applicant analyzed, and the reasons why the applicant did not adopt such alternatives.

- Additional measures that the Service may require as necessary or appropriate.

What kind of actions are considered mitigation?

Mitigation measures are actions that reduce or address potential adverse effects of a proposed activity upon species covered by a HCP. They should address specific needs of the species involved and be manageable and enforceable. Mitigation measures may take many forms, such as: preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; creation of new habitats; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access.

What is the legal commitment of a HCP?

The elements of a HCP are made binding through the incidental take permit. While

incidental take permits contain an expiration date, the mitigation identified in the HCP can be in perpetuity in certain cases. Violation of the terms of an incidental take permit would result in illegal take under section 9 of the Act. If the violation is deemed technical or inadvertent in nature, the Service may send the permittee a notice of noncompliance by certified mail or may recommend alternative actions to the permittee so that they may regain compliance with the terms of the permit.

Who approves a HCP?

The Regional Director of the Service's Region decides whether to issue a HCP permit based on findings that:

- the taking will be incidental to an otherwise lawful activity;

- the impacts will be minimized, and mitigated to the maximum extent practicable;

- adequate funding will be provided;

- the taking will not appreciably reduce the likelihood of the survival and recovery of the species; and

- any other necessary measures are met.

If the HCP addresses all of these requirements and those of other applicable laws, the permit is issued.

What other laws besides the Endangered Species Act are involved?

In issuing an incidental take permit, the Service must comply with the NEPA and all other statutory and regulatory requirements, including any State or local environmental/planning laws. HCPs may be categorically excluded from NEPA or may require either an EA or, rarely, an EIS.

Who is responsible for NEPA compliance during the HCP process?

The Service is responsible for ensuring NEPA compliance during the HCP process. However, if the Service does not have sufficient staff resources to prepare the appropriate NEPA analysis in a timely fashion, an applicant may, within certain limitations, prepare draft Environmental Assessment analyses. This can benefit the applicant and the government by expediting the application process and issuance of the permit. When this is done, the Service will: (1) provide the preparer with appropriate guidance concerning document preparation; and (2) review the document within 30 days and take responsibility ultimately for its scope, adequacy, and content.

Does the public get to comment on our HCP? How do public comments affect our HCP?

The Act requires a 30-day period for public comment on the application for an incidental take permit. Additionally, NEPA requires public comment on certain NEPA documents, and the Service runs these two comment periods concurrently. Therefore, public comments must be considered in the permit decision.

What kind of monitoring is required for a HCP and who performs it?

The Service or any party designated as responsible by the Service (e.g., State wildlife agency, local government) in the HCP will monitor the project for compliance with the terms of the incidental take permit or HCP. If another party is responsible for monitoring compliance with the permit, the Service will require periodic reporting from such party in order to maintain overall oversight responsibility for the implementation of the HCP's terms and conditions. For regional and other large-scale or long-term HCPs, monitoring programs must provide long-term assurances that the HCP will be implemented correctly, that actions will be monitored, and that such actions will work as expected. This should include periodic accountings of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements (e.g., habitat acres acquired). Monitoring plans for HCPs should establish target milestones, to the extent practicable, or reporting requirements throughout the life of the HCP and should address actions to be taken in case of unforeseen or extraordinary circumstances.

In addition, the Service must monitor the applicant's implementation of the HCPs and the permits terms and conditions; the biological conditions associated with the HCP to determine if species' needs are being met, and must determine if the biological goals that are expected as part of the HCP mitigation and minimization strategy are being realized the Service's ability to determine if the mitigation and minimization strategy is functioning as intended and the anticipated benefits to the species are being realized.

Are efforts made to accommodate the needs of HCP participants who are not professionally involved in the issues?

Because development of a HCP is done by the applicant, it is considered a private action and, therefore, not subject to public participation or review until the Service receives an official application. The Service

is committed to working with HCP applicants and providing technical assistance as required throughout the HCP development process to accommodate their needs. The Service believes that HCPs under development are restricted by privacy regulations unless waived by the applicant. However, the Service does encourage the applicant to involve all appropriate parties. This is especially true for complex and controversial projects, and applicants for most large-scale, regional HCP efforts choose to provide extensive opportunities for public involvement during the planning process. The issuance of a permit is, however, a Federal action that is subject to public review and comment. There is time for public review during the period when the Service reviews the information and decides to grant or deny a permit based on the completed HCP. A 30-day public comment period is required for all completed HCP applications. During this period, any member of the public may review and comment on the HCP and the accompanying NEPA document (if applicable). Additionally, the Service solicits public involvement and review, as well as requests for additional information during the scoping process for an Environmental Impact Statement.

Are the views of independent scientists used or sought, before and during development of a HCP?

The views of independent scientists are important in the development of mitigation and minimization measures in nearly all HCPs. In many cases, these individuals are contacted by the applicant and are directly involved in discussions on the adequacy of possible mitigation and minimization measures. In other cases, the views of independent scientists are incorporated indirectly through their participation in other documents, such as listing documents, recovery plans, and conservation agreements, that are referenced by applicants as they develop their HCP.

How does the Service ensure that species are adequately covered in HCPs?

The Service has strengthened the HCP process by incorporating adaptive management into the plans when there are species covered for which additional scientific information may be useful during the implementation of the HCP. These provisions allow FWS and NMFS to work with the landowner to reach mutual agreement upon changes in the mitigation strategies within the HCP area, if new information about the species indicates this is needed. Any changes in

strategy that may occur are discussed up front with the landowner during the development of the HCP. In this manner, the permittees are fully aware of any future uncertainty in the management strategies, and have concurred with the adaptive approaches outlined in the HCP.

What will the Service do in the event of unforeseen circumstances that may jeopardize the species?

The Service will use its authority to manage any unforeseen circumstances that may arise to ensure that species are not jeopardized as a result of approved HCPs. The Service will work with all other Federal and State agencies to help ensure the continued survival and recovery of the species in the wild.

How can I obtain information on numbers and types of HCPs?

Our National HCP database displaying basic statistics on HCPs is available online from our Habitat Conservation Planning page at <http://endangered.fws.gov/hcp>. The contact information regarding an individual HCP that is available for public comment is listed in the notice of availability for that HCP, published in the *Federal Register* by the appropriate Regional office. Regional office contact information can be found at <http://www.fws.gov>.

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