



November 6, 2018

Dear:

We respectfully request that you support legislative language that better facilitates federal interagency consultation process required under section 7 of the Endangered Species Act (“ESA”).¹

Background:

Section 9 of the ESA prohibits all persons—whether federal or non-federal—from “take” of species listed as endangered.² The ESA and its implementing regulations broadly define “take” to include both direct actions—such as killing or shooting endangered species—and indirect actions—such as modifying species habitat in such a way that the species’ essential behavioral patterns are significantly altered. Section 7 and its implementing regulations allow the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries Service (“NMFS”)³ to issue an incidental take statement to federal agencies whose activities will result in take of listed species. In 1982, Congress amended section 10 of the ESA to provide a mechanism, known as an “incidental take permit,” by which a non-federal entity may obtain authorization to take listed species, so long as that take occurs incidentally to otherwise lawful activities, including land and infrastructure development. Section 10 of the ESA sets forth the specific process and requirements with which a non-federal entity must comply in order to obtain an incidental take permit. Among the requirements set forth in ESA section 10 is the provision of compensatory mitigation for impacts to the species covered by the permit and the preparation of a habitat conservation plan.

For many years, various state and local agencies within the State of California have obtained large-scale, programmatic incidental take permits under section 10 of the ESA to streamline ESA compliance, protect and preserve listed species and critical habitat, and ensure that critical infrastructure and economic development may occur in an efficient manner.

Once USFWS has approved a programmatic or “regional” habitat conservation plan and issued an incidental take permit to a state or local governmental agency (“local agency”), that local agency may proceed immediately with its projects and must, pursuant to the incidental take permit and regional habitat conservation plan, implement specified minimization and mitigation (and in some cases, recovery) measures benefitting affected species. Where a project receives incidental take authorization through a regional habitat conservation plan, the project proponent is not then required to seek further approvals from

¹ 16 U.S.C. § 1536.

² *Id.* at 1538. While section 9 of the ESA applies only to species listed as endangered, U.S. Fish and Wildlife Service regulations extent the “take” prohibition to most species listed as threatened. 50 C.F.R. § 17.31.

³ Although both USFWS and NMFS administer the ESA, the focus of this letter is on USFWS administration thereof.

USFWS in connection with that project. As a result, projects receiving coverage through a regional habitat conservation plan typically are not faced with the kinds of delays and uncertainty associated with projects that are not covered by such plans.

While federal projects are subject to the consultation requirements of ESA section 7, USFWS offices in California have significantly streamlined their review of federal projects that comply with the minimization and mitigation measures of the relevant regional habitat conservation plan. This streamlining has saved both the taxpayers of California and USFWS itself significant time and resources and is a common sense solution to ESA compliance, particularly since the USFWS's approval of a regional habitat conservation plan and issuance of an incidental take permit must go through an intra-USFWS ESA section 7 consultation (meaning that the take authorized under the incidental take permit has already been determined by USFWS to neither jeopardize the continued existence of listed species nor result in the destruction or adverse modification of designated critical habitat).

While every USFWS local and regional office has the discretion to implement the process followed in California, some USFWS offices in the country have not allowed streamlining of federal projects even where those projects commit to the same minimization and mitigation measures set forth in existing regional habitat conservation plans. Instead, in those regions, state and local agencies whose projects have a federal nexus often must go through multiple, duplicative steps in order to comply with the ESA, which is costly, time consuming, and taxes the resources of both the state or local agency and USFWS. In some cases, these duplicative processes result in less conservation for listed species because compensatory mitigation is not required under an ESA section 7 consultation.

In those instances where a project qualifies for and receives incidental take authorization through a regional habitat conservation plan, the project proponent should not then be required to seek further approval(s) from USFWS in connection with that project. Instead, there should be an expedited consistency review process wherein USFWS determines whether the underlying activity is within the geographic boundaries served by the regional habitat conservation plan, whether the take sought to be authorized is within the limits of the incidental take permit approved by USFWS, and whether the activity is of a type covered by the regional habitat conservation plan. Such determinations should take no more than 30 days and should be accompanied by a brief letter or memorandum setting forth the conclusion of USFWS. When the determination is made that a federal project is, in fact, consistent with the relevant regional habitat conservation plan, as evidenced by a letter or memorandum from USFWS, further ESA compliance review should not be necessary.

Proposed Legislative Language:

We ask that you support the following legislative language.

**SEC. _____. DUPLICATION OF ENDANGERED SPECIES
CONSIDERATIONS NOT REQUIRED.**

Chapter 35 of title 16, United States Code, is amended—

(1) in section 1536 by inserting after subsection (p) the following:

“(q) Notwithstanding any provision in this title to the contrary, a Federal agency may, at its discretion, seek and receive authorization for take otherwise prohibited under section 1538(a)(1)(B) pursuant to

a permit issued to a state or local governmental entity under section 1538(a)(1)(B). Where a Federal agency thereby receives authorization for take pursuant to section 1539(a)(1)(B), the provisions of subsections (a)-(d) shall not apply.”

(2) in section 1539(a)(1)(B) by inserting “, and is reasonably certain to occur” before the period.

Interpretation of the Proposed Legislative Language:

The proposed legislative language would amend the Endangered Species Act in two ways:

- (1) it would specifically authorize federal projects to seek and receive authorization for incidental take through a USFWS-approved, programmatic or regional incidental take permit, and, where that happens, consultation requirements would not apply; and
- (2) it would add to ESA section 10 incidental take permit provisions the caveat that an incidental take permit is for circumstances where take of listed species is “reasonably certain to occur.”

The effect of the proposed language would be to provide less discretion to local USFWS offices to deny federal projects the ESA streamlining benefits of regional habitat conservation plans crafted specifically by state and local agencies to provide localized solutions to species conservation and infrastructure development. Additionally, the proposed language would ensure that all USFWS offices administer the ESA uniformly across the country and that unnecessary duplication of ESA process would be eliminated. Indeed, some federal agencies, such as the U.S. Army Corps of Engineers, already significantly streamline ESA compliance in the manner described herein (such as pursuant to General Condition 18 of the 2017 Clean Water Act section 404 Nationwide Permits).

By making this common-sense change, we can ensure that endangered species are protected while simultaneously allowing a state and local agencies, through their regional habitat conservation plans, to proceed with their local projects with greater efficiency.

Please call us if you have any questions. Your office is always helpful to us, and we appreciate you very much.

Sincerely,



Dan A. Gattis
County Judge
Williamson County