

ESA Overview Module 4 – Section 7, Interagency Consultation Text

Incidental Take (slides 48 - 54)

Incidental Take

If the Service finds that an action may result in take of a species, but not jeopardize its continued existence, the Service prepares an Incidental Take Statement for the project.

Section 7(b)(4) reconciles impacts to species that are prohibited under section 9 which pronounces that “take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant” can be exempted where those impacts, that is, the incidental take are considered in the consultation and biological opinion.

Rich, is Incidental Take the same as “Take”? Well, remember when we discussed the definition of take earlier in the module, take means to harass, harm pursue, hunt, shoot, wound, kill, trap capture or collect, or to attempt to engage in any such conduct. So, incidental take is just a form of take.

We will cover Section 9, the section on Prohibited Acts, in the next module.

A Biological Opinion must include an Incidental Take Statement, even if no take is being exempted (in which case the Incidental Take Statement should indicate that no take is being anticipated). A Biological Opinion will not include Incidental Take when the action only involves listed plants.

An Incidental Take Statement is provided as part of the consultation package to articulate the amount or extent of take expected from the proposed action and to minimize the effects of the action under consultation, that is, through those Reasonable & Prudent Measures we mentioned earlier. The Reasonable and Prudent Measures and Terms and Conditions “cannot alter the basic design, location, scope, duration or timing of the action” and may only make minor changes to an action

An Incidental Take Statement is never used to remove the threat of an action jeopardizing listed species. Rather it is only issued for what take has been already determined in a Biological Opinion to not be at a level that would jeopardize the listed species.

I have a question. Rich, why doesn't Incidental Take involve plants? Well, because it is not a prohibited action under section 9. Section 9 only applies only to fish and wildlife.

And Rich, I have another question. Can there be incidental take of critical habitat? Well no, incidental take only applies to fish and wildlife, as well. Impacts to critical habitat are usually referenced in whether or not there is adverse modification to that critical habitat.

Take must be quantifiable. Everyone involved needs to clearly understand when and how the expected take will occur, how it will be measured and monitored, and what to do if the take level is exceeded or may be exceeded. There should be clear triggers to reinitiate consultation– in other words, to renew the analysis of effects– if the level of take is not what was expected in the consultation.

Incidental take may be expressed in a variety of ways such as the number of individual animals that would be taken. If this cannot be estimated, then the percentage of an affected population may be used. If the percentage of the population estimate is impractical, explain why that method is impractical, and use an ecological surrogate or habitat marker to represent the extent of take.

A situation quantifying take might be: a road needs to be widened that is within a 200 acre Utah prairie dog town. To quantify take, the road widening might result in the destruction of 50 burrows or the loss of 2% of the prairie dog population due to prairie dog-vehicle collisions.

Not all listed species are treated equally with regards to take. The Endangered Species Act does not generally prohibit the incidental take of listed plants and therefore a biological opinion for these species does not contain an Incidental Take Statement, Reasonable and Prudent Measures, or Terms and Conditions. Therefore, if a Biological Opinion determines that the action is not likely to jeopardize a listed plant, there are no further requirements under the section 7 process.

However, listed plants do have limited protection from removal or destruction in areas under Federal jurisdiction as well as non-Federal lands if the listed plant is protected under State law. So an example of when a listed plant would be protected, well, if Slickspot Peppergrass were found on a National Wildlife Refuge it would be unlawful for the plant to be collected on Refuge lands – these are Federally designated lands. It is prohibited to reduce the plants to possession which will be discussed more in the module on section 9, Prohibited Acts.

Reinitiation of consultation is a requirement in a completed biological opinion that includes a statement defining under what conditions a consultation must be reinitiated.

Items that might trigger a reinitiation include:

If the amount of expected incidental take is exceeded.

If new information reveals effects of the action that were not previously considered.

If the original action that was consulted upon is modified in a way that alters the anticipated effects, such as changing the timeframe of an action or terms and conditions not being met.

If a new species or critical habitat is listed that may be affected by the original action

Reinitiation can only occur where the Federal agency maintains discretion or control over the action –

So Rich, who decides when reinitiation of consultation should be done?

The regulations at 50 CFR 402.16 state that reinitiation may be requested by the action agency, or the Service may ask but it's up to the action agency to reinitiate.

So, next we're going to be talking about Special Cases . . . Debra!