

ESA Overview Module 6 – Section 10, Exceptions

Exceptions – 10(a)(1)(B) Permits (slides 15 - 23)

10(a)(1)(B) Permits

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There's a second permit you may encounter in your Endangered Species Act responsibilities. It's known as the 10(a)(1)(B) permit. That's how the Services grant incidental take to non-Federal entities like private landowners, provided a habitat conservation plan has been developed and approved.

The Services may permit prohibited forms of take under the Endangered Species Act if such taking is incidental to – not the purpose of – carrying out of an otherwise lawful activity.

If an activity isn't scientific research or enhancement of propagation or survival, and the species will be adversely affected, an incidental take permit is required. A 10(a)(1)(B) permit is issued to non-Federal entities that submit an approved habitat conservation plan to the Services.

A habitat conservation plan is a planning document that accommodates economic or other development, to the extent possible, by allowing the limited and unintentional take of listed species when it occurs incidental to otherwise lawful activities.

Habitat Conservation Plans or HCPs are detailed plans, designed to conserve areas upon which listed species depend, while still allowing development to occur. Once an applicant submits an approved plan, a 10(a)(1)(B) permit is issued that authorizes incidental take. The plan explains how impacts to species or habitat will be minimized or mitigated.

If the applicant includes conservation measures for unlisted species in an approved plan as well, the applicant receives an extra layer of "insurance." That protection assures the applicant of no more requirements if the unlisted species later become listed; again, the "no surprises" policy. Such added conservation measures, up front, provide obvious benefit to more species.

Examples of situations when an incidental take permit might be issued for a listed species include construction and development projects like flood control, road maintenance, and recreational development.

A habitat conservation plan is quite detailed. It may take considerable time to prepare and finish. It generally starts when a landowner works with the Services to describe what activities will occur in the area to be covered by an HCP. It specifies what species will be affected and the impacts to the species from the project and activities. It addresses how impacts will be monitored, minimized, or mitigated; how the species will benefit from mitigation; goals and objectives for both species and habitat; and short- and long-term funding for the plan.

Next, a habitat conservation plan addresses alternatives to the selected action that could reduce incidental take, and the rationale for why such alternatives weren't selected.

Procedures to deal with changes and unforeseen circumstances is a regulatory process not discussed in the Endangered Species Act. It's included to make sure any unforeseen changes to an approved HCP won't jeopardize a listed species. If jeopardy occurs, an agency could revoke the permit. An adaptive management provision allows for changes in management should they be necessary.

Finally, "other measures" seem open-ended and not likely to reassure a potential applicant. But this is included because it's expected that the Services and applicants will engage in active discussions before and during the submission of an HCP application. There's no "one size fits all" approach in HCP planning, due to the habitat requirements of different species and the varying needs of landowners.

The HCP process is open to the public for review, comment, and potential modification of the original plan. It's an involved process, not entered into lightly. But it adds flexibility to the endangered species conservation process, which we'll talk about next.

Benefits from habitat conservation plans are similar to benefits from "safe harbor" agreements and candidate conservation agreements, with assurances.

HCPs under Section 10(a)(1)(B) authorize non-Federal projects to take federally listing wildlife, while ensuring their long-term survival and enhancement or preservation of their habitat. From your previous discussion of incidental take in Module 4, you'll recall the Act doesn't include a take provision for listed plants. However, listed plants can generally benefit from these 10(a)(1)(B) permits, since – outside of Federal lands and absent any sort of state protection law – they can be destroyed without violation of Section 9 of the Act.

These permits promote the long-term conservation of federally-listed species through protection and management. Since HCPs take time to develop, their full implementation can run years. In addition, proposed, candidate, and other at-risk species stand to benefit from protection of habitat; for the latter two, the need to list under the Act may even be unnecessary if impacts and threats are minimized.

Incidental take permits reduce conflict between endangered wildlife and economic activities. They allow development to occur, while allowing listed species to persist without appreciably diminishing the overall population. Landowner assurances guarantee "no surprises" once a habitat conservation plan is in place.

Much of the information needed for an incidental take permit under a habitat conservation plan is the same as what's required for the HCP itself.

Take must be incidental to lawful activities. The applicant will minimize and mitigate, to the maximum extent possible. Adequate funds are needed. Take cannot reduce survival and recovery, or destroy critical habitat. Other measures to conduct activities authorized by the permit are agreed to.

An applicant's permit will include binding terms and conditions, much like a biological opinion.

There will likely be monitoring requirements for compliance, effectiveness, and effects. Reporting of the results or success of an HCP also is required.

Because the Services and the applicant engaged in discussions during the application process before a permit is issued, the terms and conditions should not be a surprise. If a part of the plan isn't working, the permit can be amended through additional discussions with the applicant. A permit may be amended, suspended, denied, or revoked because of failure to meet the terms and conditions, or because a limit on incidental take is reached. The applicant has the right of appeal. Revocation is identified in the Act, but is generally a last resort.

You'll want to visit the Fish and Wildlife Service Habitat Conservation Plan website for more information about HCPs.