

## Summary of U.S. Fish and Wildlife Service (FWS) Final Rule on Section 10 Permits

### Overview of Final Rule

- Clarifies distinction between enhancement of survival permits (ESP) and incidental take permits (ITP).
- Creates a new “conservation benefit agreement” (CBA) for ESPs that replaces safe harbor agreements (SHA) and candidate conservation agreements with assurances (CCAA).
- Affirms that non-listed species can be covered in Section 10 agreements (CBAs and habitat conservation plans (HCPs)) without including listed species.
- Goes into effect on **May 13, 2024**.

### Determination of Appropriate Permit Type

- Distinguishes permit type based on the nature and purpose of the activities, the anticipated conservation outcome, and the proposed covered activities for which “take” authorization is requested.
- *ESP with a CBA*. Authorizes take of covered species, above baseline conditions, when the conservation actions in the associated conservation agreement are of the nature of improving the condition of the species or the amount or quality of its habitat to provide a net conservation benefit to the covered species (e.g., beneficial actions that address threats to the covered species, establish new wild populations, or otherwise benefit the covered species).
- *ITP with an HCP*. Authorizes take that is incidental to otherwise lawful activities (e.g., resource extraction, commercial and residential development, and energy development), and the conservation actions in the associated conservation plan are of the nature of minimizing and mitigating the impacts of the anticipated incidental take for the covered species.

### CBAs for ESPs (replaces SHAs and CCAAs).

- Requires achieving a “net conservation benefit.”
  - Defined as “the cumulative benefit provided through implementation of a conservation benefit agreement that is designed to improve the existing baseline condition of a covered species by reducing or eliminating threats, or otherwise improving the status of covered species, minus the adverse impacts to covered species from ongoing land or water use activities and conservation measures, so that the condition of the covered species or the amount or quality of its habitat is reasonably expected to be greater with implementation of the agreement period than without it. If FWS determines that the species and habitat are already adequately managed to the benefit of the species, a net conservation benefit will be achieved if the property owner commits to continuing to species’ management for a specified period of time, including addressing any likely future threats that are under the property owner’s control, with the anticipation that the population will increase, habitat quality will improve, or both.”
  - Takes into account all the beneficial actions that the property owner is taking on their property, whether they are continuing actions or implementing new measures.
  - Revised from proposed rule to acknowledge that it includes maintaining and managing habitat that is already suitable for the covered species.
- Applicants have the option to return the property to baseline conditions (like a SHA).
  - “Baseline conditions” is defined as “the population estimates and distribution or habitat characteristics across the enrolled property that currently sustains seasonal or permanent

use by the covered species at the time a conservation benefit agreement is executed by FWS and the property owner, or by a programmatic permit holder and the property owner, under §§ 17.22(c) and 17.32(c) of this part, as applicable.”

- ESPs can authorize both incidental and purposeful take that may occur as a result of implementing beneficial actions under the CBA (e.g., reintroducing a species, capturing/relocated a species that has dispersed to an adjacent, not-covered property).

#### HCPs for ITPs

- Expanded criteria regarding application requirements for ITP.
- Applicant must describe the measures that will be taken to minimize and mitigate the impacts of the taking commensurate with the taking.
  - “Commensurate” means “in proportion to.”
  - Mitigation may include research that is directly linked to reducing threats or that provides a quantifiable benefit to the species.
- Clarifies that monitoring program must be commensurate with the scope and duration of the conservation program and the project impacts.

#### “No Surprises” Assurances

- Retains “no surprises” assurances for ITPs (had been omitted from proposed rule).
- Assurances for ESPs do not address “changed circumstances” or “unforeseen circumstances,” but provide that “the Director may not require additional or different conservation measures to be undertaken by a permittee without the consent of the permittee.”
  - Allows for take coverage for owners of neighboring properties.

#### Permit Renewal and Amendment

- Permit renewals and amendments are subject to the current laws and regulations.
  - Application will be evaluated under the current policies and guidance in place at the time of the decision on the renewal or amendment.
- Scope of the federal decision extends only to the requested amendment, not the previously approved permit or unchanged portions of the ESP/CBA or ITP/HCP.

#### Coverage of Non-listed Species

- ESPs and ITPs can be issued for non-listed species with or without listed species.
  - Permittee immediately implements conservation commitments for non-listed species; take authorization only becomes effective when listed.

#### Clarification of Authority

- FWS authority only extends to authorizing take that would otherwise be prohibited.
- Issuance of the ESA Section 10 permit does not authorize covered activities that may result in take or the proposed conservation activities.

#### Handbooks

- FWS intends to update the HCP handbook, and to develop a CBA handbook that will be published in the Federal Register for public comment.