

ESA Section 10(a) Final Regulations

Frequently Asked Questions

What is the difference between an Enhancement of Survival (EOS) permit and an Incidental Take Permit issued under ESA section 10(a)(1)(A) and 10(a)(1)(B), respectively?

The differences between the two sections are explicit within the ESA. Under section 10(a)(1)(A), we may authorize take associated with acts otherwise prohibited under section 9 for scientific purposes or to enhance the survival and recovery of the affected species. An EOS permit supported by a conservation benefit agreement (CBA) authorizes take, both purposeful and incidental, associated with conservation actions that 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). The anticipated conservation outcome of implementing a conservation agreement will result in a net conservation benefit that persists through the permit term. Property owners typically choose to seek an EOS permit because they wish to conduct activities on their land that may attract or expand existing populations of listed species or species that may become listed in the future and want legal ESA coverage for take.

Conversely, under section 10(a)(1)(B), the purpose of the ITP supported by a habitat conservation plan (HCP) is to authorize take that is incidental to carrying out otherwise lawful activities (e.g., resource extraction, commercial and residential development, and energy development) and the conservation actions in the associated conservation plan minimize and mitigate the impacts of the anticipated incidental take for the covered species. The anticipated conservation outcome of implementing the HCP is fully offsetting the impacts of the taking. Often, applicants seek an ITP because they intend to conduct economic activities in areas occupied by listed species and wish to avoid ESA section 9 conflicts, third-party lawsuits, or to be consistent with state laws.

What are CBAs and HCPs?

A conservation benefit agreement is prepared jointly by the property owner and the Service and is required to support the EOS permit application. The agreement describes the beneficial activities to be conducted and impacts to species, establishes the baseline, and identifies the net conservation benefit. Through the CBA, the property owner demonstrates how they intend to meet the permit issuance criteria (i.e., net conservation benefit to the species).

Similarly, section 10(a)(2)(A) requires applicants to prepare a conservation plan that describes the project, impacts of the incidental taking, steps to minimization and mitigate the impacts, funding to implement those steps, and alternatives to the taking. The HCP supports the applicant's ITP application. Through the HCP, the applicant demonstrates how they intend to meet the permit issuance criteria described in section 10(a)(2)(B) (i.e., minimize and mitigation to the maximum extent practicable).

Is the permitting process different for EOS permits and ITPs?

The issuance criteria are different under each permit type, however the permitting process is exactly the same for both enhancement of survival and incidental take permits. Under both authorities, because the Service is an action agency issuing a permit, we must comply with NEPA, conduct consultations under the National Historic Preservation Act (NHPA) and ESA section 7, and consult with Tribes in addition to processing the permit application.

How will the revised regulations reduce the amount of time and resource investment it takes to develop the necessary documents to support section 10(a) applications?

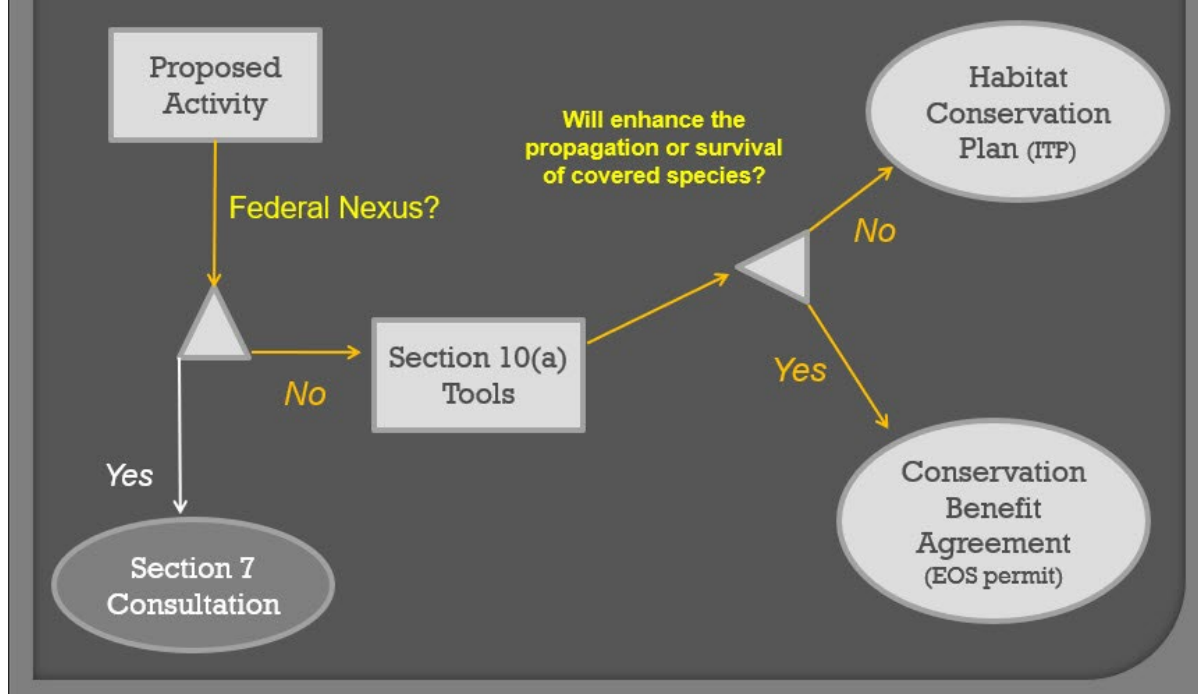
To provide clarity, reduce confusion, and save time, both for applicants and the Service, the final rule clarifies the current regulations and revises the requirements for permit applications in § 17.22(b)(1) and (c)(1) and § 17.32(b)(1) and (c)(1) by codifying portions of the 2016 Habitat Conservation Planning Handbook, five-point policy, SHA policy, and CCAA policy. These clarifications address the requirements that an applicant must meet for the Service to: (1) determine that an application is complete, (2) publish the receipt of a complete application, (3) begin processing the application, and (4) make a permit decision consistent with section 10 of the ESA. The final rule also refines the incidental take permit issuance criteria under § 17.22(b)(2) and § 17.32(b)(2) for plans permitted under ESA section 10(a)(1)(B) to align with the statute, existing policy, and practice. These revisions, along with the revised requirements for a complete application, will lead to more efficient permit application processing and decision-making and provide a better record supporting our permit decision. As a result, we expect HCP negotiations to improve, leading to less contention and confusion during the permitting process and reducing delays previously associated with HCP applications.

Determining Under which section 10(a) Authority to Permit Take

While both ESA section 10(a)(1)(A) enhancement of survival (EOS) permits and 10(a)(1)(B) incidental take permits (ITP) provide conservation for covered species, their purpose and the intent of their authorities are inherently different. Providing clear guidance on how to determine under which authority is appropriate to authorize take will improve timely application evaluation, thereby ultimately reducing time in planning and processing an application while ensuring proper implementation of the permit programs.

The EOS permit covers potential take of the covered species associated with activities where implementing the project will enhance the survival and propagation of the species and provide beneficial conservation. The anticipated conservation outcome is a net conservation benefit. Conversely, section 10(a)(1)(B) authorizes incidental take associated with an applicant's otherwise lawful activities where the purpose of the project is other than beneficial conservation. In most cases, the anticipated conservation outcome is to fully offset the take through minimization and mitigation.

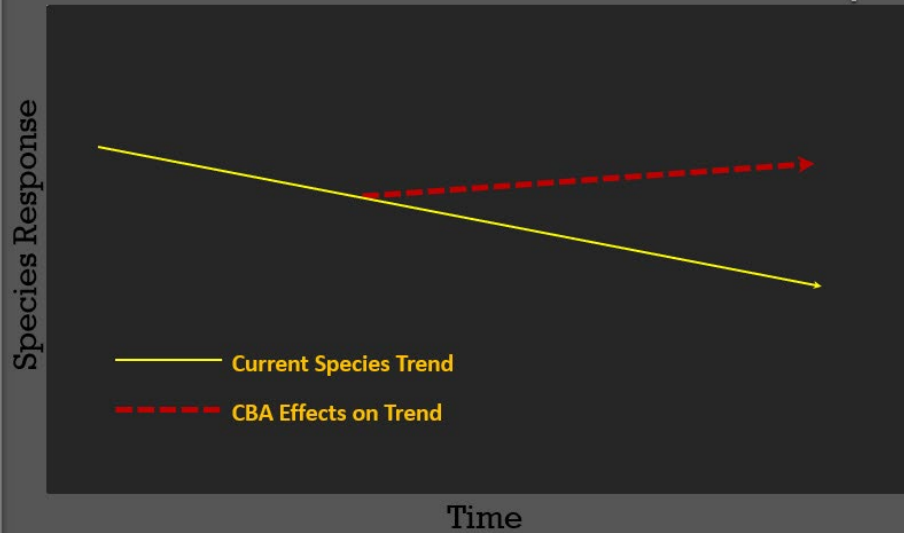
Which Section 10(a) Tool?



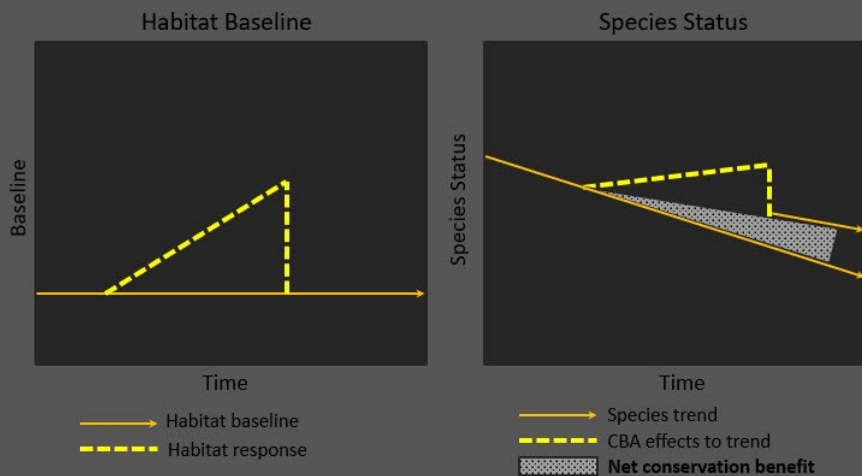
EOS permit supported by a conservation benefit agreement (CBA) is appropriate when:

- The conservation actions in the 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.
- The covered activities will enhance the propagation or survival of the covered species.
- The existing baseline condition for the covered properties is sustained or improved for the conservation of the covered species.
- The current land use will remain substantially unchanged in type and intensity.
- The take authorized is a result of ongoing and/or implementing new conservation activities and ongoing land management (the covered activities).
- The take resulting from the covered activities is small relative to benefits of implementing the conservation and achieve a net conservation benefit.

Conservation Benefit Agreement Concept

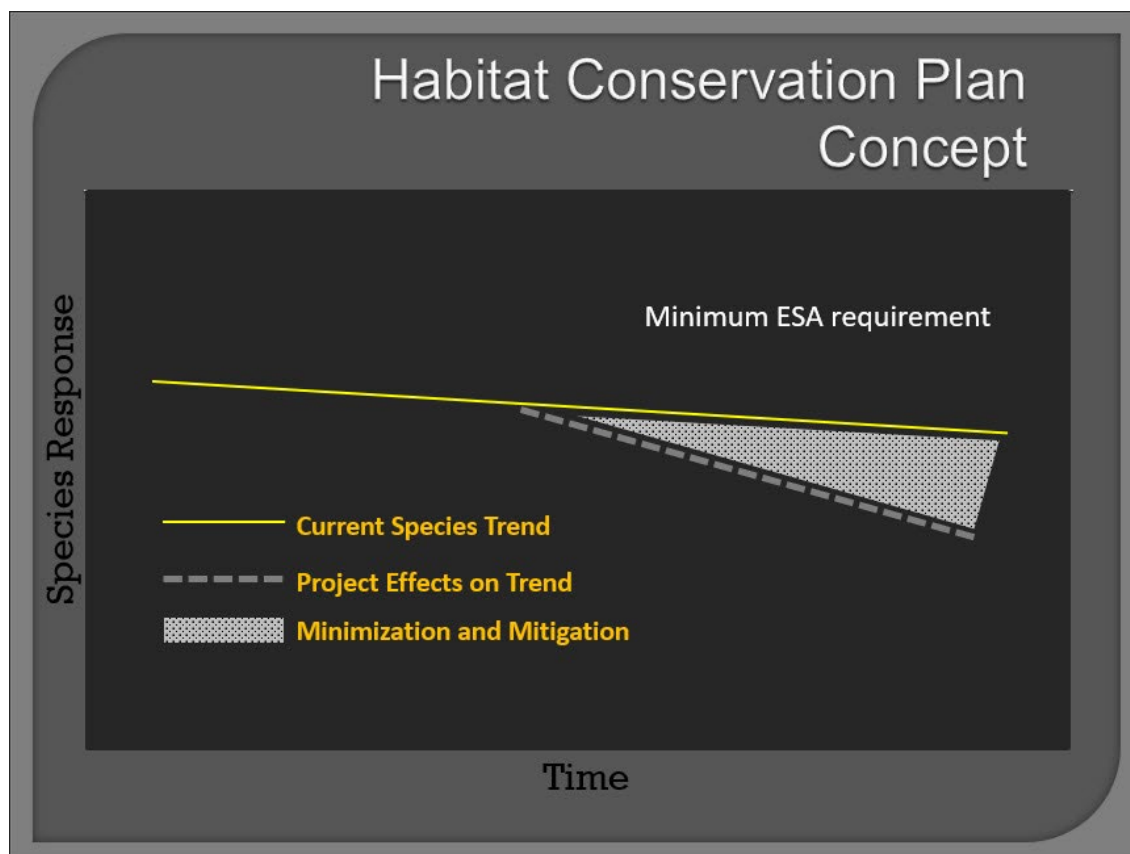


Return to Baseline Concept



ITP permit supported by a habitat conservation plan (HCP) is appropriate when:

- The conservation actions in the associated habitat conservation plan are of the nature of minimizing and mitigating the impacts of the anticipated incidental take for the covered species.
- The purpose and anticipated outcome of the covered activity is to carry out otherwise lawful activities that are likely to result in incidental take that is harmful to the species and requires mitigation (e.g., activities that convert habitat to other uses).
- In most cases, the take resulting from the covered activities will be fully offset through minimization and mitigation actions.
- The covered activities are otherwise lawful activities typically associated with economic development.
- The current land use will change in type or intensity.
- The take requested is incidental to, but not the purpose of, carrying out the covered activities.



CBA and HCP Examples

Wind Energy - HCP

A wind energy company recently proposed to construct a 50-turbine wind farm within an area occupied by bat species listed under the ESA. While take is not anticipated to occur during construction, take of listed bats in the form of injury and death is likely during operation of the wind facility. The company is requesting take coverage to be compliant with the ESA.

In this case, the covered activity is wind turbine operation to generate electricity and the take of bats is incidental to the lawful operation of the facility. Therefore, an incidental take permit under 10(a)(1)(B) is appropriate because the purpose and anticipated outcome of the covered activity is to carry out otherwise lawful activities that are likely to result in incidental take that is harmful to the species. The expected conservation outcome is that the impact of the taking would be fully offset through minimization and mitigation.

To date, all requested take authorization associated with wind energy facility operation has been permitted through section 10(a)(1)(B). We do not anticipate that this will change under the revised regulations.

While we recognize the benefits of renewable energy and the vital role it plays to address climate change, under section 10(a) we must evaluate under which authority to authorize take based on the purpose and anticipated conservation outcome of the activities. Wind turbine operations do not qualify for an EOS permit because the project's purpose is to generate electricity and its intended conservation outcome is to minimize and mitigate the impacts of the incidental take on the species. Regardless of how much greenhouse gas reduction or other environmental benefits can be attributed to wind turbine operation, the purpose of the project and its intended conservation outcome is inconsistent with an EOS permit.

Shorebird - HCP

A state has issued an incidental take permit to address take of nesting shorebirds associated with the state's permitting of beach driving, beach access, and other recreational activities within the occupied nesting habitat. The conservation strategy associated with the HCP included avoidance, minimization and mitigation measures to increase nesting success. While the permittee was only required to minimize and mitigate the impact of the taking to the maximum extent practicable, implementation of the HCP's conservation strategy resulted in an increase in the shorebird's population over several seasons such that it has met the state recovery goals.

While the conservation outcome of the HCP's could be argued to exceed mitigation requirements (i.e., more than minimized and mitigated the impact of the taking), the project would not qualify for a CBA because covered activities are otherwise lawful activities, and the conservation actions were implemented to minimize and mitigate the impacts of the taking.

Forestry - CBA

A private forest owner, or timber company, chooses to enhance propagation and survival of a listed old-growth forest dwelling bird species and listed salmonids that occur in streams within the forest. To manage the site and improve habitat and populations for each species, commercial

thinning of marketable timber improves the trajectory of mature habitat toward late successional stage. The land use is not changing nor is the intensity increasing. Conservation actions include managing old growth habitat sites and improving habitat and populations for each species. As well as commercial thinning of marketable timber that improves trajectory of mature habitat toward late successional stage. The removal of old roads and culverts and placing large woody debris, which is a byproduct of commercial thinning, into streams generate a temporary short-term pulse of sediment that negatively impacts salmonids, but in the long run improves habitat conditions and reduces long-term chronic sedimentation.

In this case, the project implementation will enhance propagation and survival of both covered species and the anticipated conservation outcome is a net benefit to the covered species. The initial baselines for the species can be established and increases in habitat quantity, quality, and species populations can be quantified to demonstrate a net conservation benefit. This qualifies as a CBA.

Forestry - CBA

A private forestry owner is proposing to alter their normal timber harvest operations to improve naturally occurring native meadows to benefit a listed butterfly species. The butterfly's habitat is found in naturally occurring meadow-like grasslands that occur at elevation among second and third-growth evergreen forest. Due to natural successional practices and/or changing weather patterns, many of those sites are being overtaken by woody vegetation. By choosing to commercially harvest timber in patches that mimic the naturally occurring but dwindling native meadows and implement restoration and management measures, the conservation actions will drive and maintain the harvested sites toward early successional grasslands that include the key vegetation needed by the butterfly.

In this case, the project and conservation actions are intended to expand the target species population or their habitat. The baseline conditions can be established and described in a CBA. The conservation "lift" in species numbers or acres/quality of habitat can be quantified. Project implementation, while generating commercial timber harvest, will provide a net conservation benefit for the affected species. This qualifies as a CBA.