

Final ESA Section 10(a) Regulation Revision Overview

Town Hall
USFWS Headquarters, Falls Church VA



Goals of Section 10(a) Revisions

- Create efficiencies and flexibility
- Improve permitting processes
- Clarify concepts
- Respond to feedback
- Encourage participation in voluntary conservation programs
- Increase conservation for listed and at-risk species



Conservation Benefit Agreement / EOS Permit

- New agreement type
- Incorporates aspects of CCAA/SHA policies into regulations
- Clarifies authorized take can include both incidental and purposeful take for conservation actions
- Provides option to return to baseline conditions



Habitat Conservation Plan / ITP

- Allows incidental take permits to be issued for non-listed species without a listed species on permit
- Incorporates aspects of 5-Point Policy (2000) and 2016 HCP Handbook guidance into regulation



For both permit types

- Incorporates aspects of long-practiced policies and guidance under both programs
- Standardizes language, defines or updates terms, and revises definitions

Clarifies:

- Requirements for complete application
- Service determines application completeness
- Renewals and amendments must meet current regulations, policy, and guidance
- Scope of Federal action is limited to authorizing take, not activity



10(a) structure

Section	10(a)	
Sub-section	10(a)(1)(A)	10(a)(1)(B)
Permit	Enhancement of Survival (EOS) permit	Incidental Take Permit (ITP)
Take	Take associated with activities to enhance propagation and survival	Take incidental to otherwise lawful activity
Standard	Net conservation benefit	Minimize & mitigate to maximum extent practicable
Agreement/ Plan	Conservation Benefit Agreement (CBA)	Habitat Conservation Plan (HCP)



Public Comments

- Proposed Rule published in February 2023
- Received 71 comments
 - 12 states and 1 territory
 - 21 Industry and 12 Non-governmental Organizations
- Primary concerns
 - issuance of ITPs for non-listed species only
 - method for determining appropriate authority to permit take
 - requirements for complete applications
- Incorporated changes in response to comments, but did not fundamentally change proposed revisions
- Other suggestions for improvement may be considered in updates to policy or guidance



Proposed to Final - Changes

- Further clarified within preamble and response to comments under which permit to authorize take
- Clarified assurances apply to all enhancement of survival permittees and participating property owners, as well as neighboring property owners
- Clarified for incidental take permits that scope of monitoring should be commensurate with scope of project impacts
- Added references for incidental take permits to clarify Service has authority to include additional permit conditions
- Refined or revised definitions and terms for consistency
- Corrected the appearance of an omission regarding “no surprises assurances”



Permits for Non-Listed Species Only

- Ensures take is authorized under appropriate authority, either 10(a)(1)(A) or (B)
- Provides additional flexibility for project proponents and landowners
- Upfront species conservation may preclude listing
- Take authorization goes into effect only if covered species is listed



Choosing the Type: CBAs

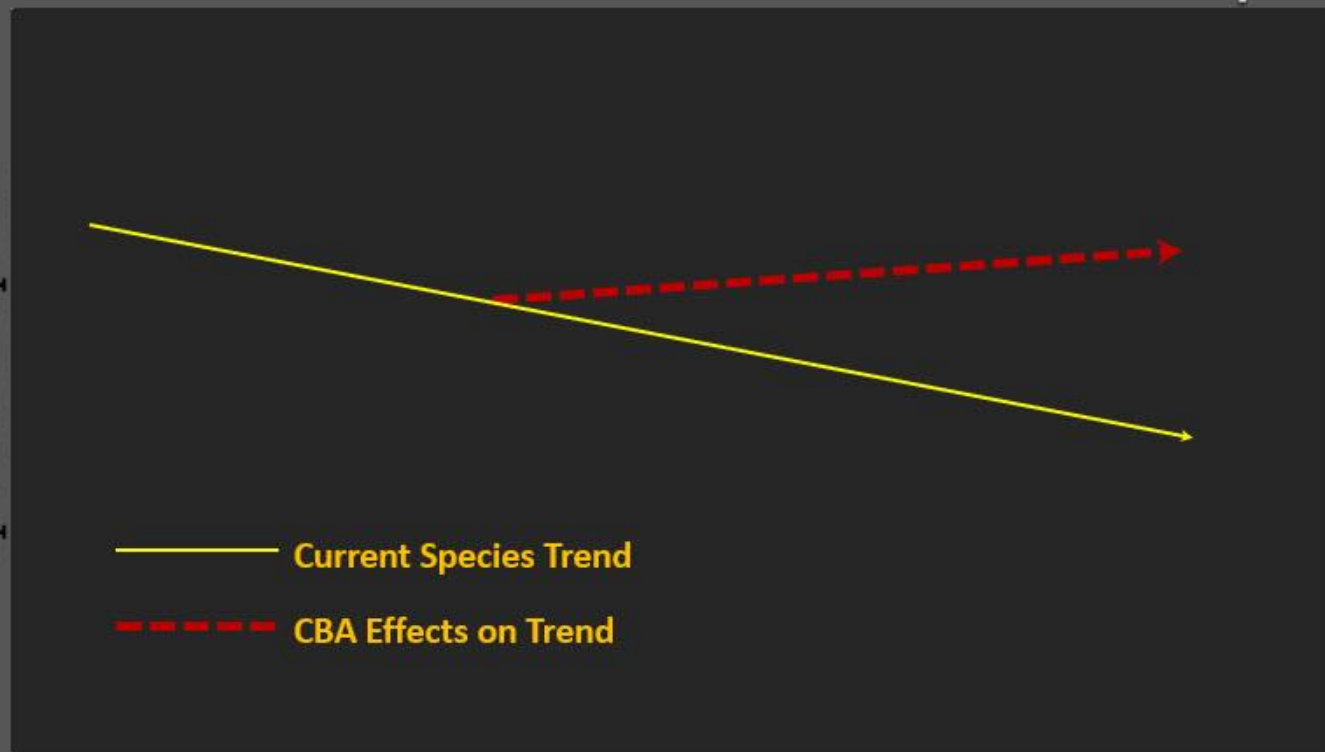
- Conservation actions in associated agreement are of nature of improving condition of species
- Covered activities enhance propagation or survival of covered species
- Baseline condition is sustained or improved
- Current land use remains substantially unchanged in type and intensity
- Take is small relative to benefits of implementing conservation
- Achieve net conservation benefit





Conservation Benefit Agreement Concept

Species Response



Time

Choosing the Type: HCPs

- Conservation actions in associated plan minimize and mitigate the impacts of the taking
- Purpose of the covered activity is to carry out an otherwise lawful activity
- The anticipated outcome is that take resulting from covered activities will be fully offset through minimization and mitigation
- Covered activities are typically associated with economic development
- Current land use will change in type or intensity.
- Take is incidental to, but not purpose of, carrying out covered activities





Habitat Conservation Plan Concept

Species Response

Minimum ESA requirement



- Current Species Trend
- - - Project Effects on Trend
- Minimization and Mitigation

Time



Examples

Forestry

- Owner proposes to alter normal timber operations to improve native meadows to benefit listed butterfly
- Butterfly habitat is meadow-like grasslands that occur at certain elevations and successional forest stages
- Many meadow sites overtaken by woody vegetation
- Propose timber harvest will mimic dwindling native meadows and implement restoration and management measures
- Conservation actions drive and maintain harvested sites toward early successional grasslands to benefit butterfly



Result: CBA

- Conservation actions are intended to expand the covered species population or habitat
- Baseline conditions can be determined and described in Conservation Benefit Agreement
- Conservation “lift” in species numbers or acres/quality of habitat can be quantified
- Project implementation will provide net conservation benefit for affected species



Wind Energy

- Proposed 50-turbine wind farm in area occupied by ESA-listed bat species
- Take not anticipated to occur during construction
- Take of listed bats in form of injury and death likely during operation of wind facility
- Requesting take coverage to be compliant with ESA



Result: HCP

- Covered activity is wind turbine operation to generate electricity, an otherwise lawful activity
- Take of bats, in form of harm, is incidental to on-going facility operation and maintenance
- Impact of taking is offset through minimization and mitigation and fulfilling incidental take permit issuance criteria



Next Steps

- Effective Date: May 13, 2024
- External Town Hall webinars
- Internal FWS section 10 Practitioner webinars
- Office Hours (to be scheduled)
- Website and SharePoint site with interim guidance
- Draft Conservation Benefit Agreement Handbook in review
- Habitat Conservation Handbook update in progress





Questions and Discussion

