



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
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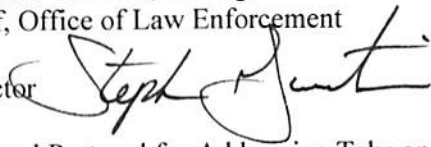


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Memorandum

To: Regional Directors 1-8  
Assistant Director, Ecological Services  
Chief, Office of Law Enforcement

From: **Deputy** Director 

Subject: National Protocol for Addressing Take and Potential 'Take'  
of Endangered Species through Habitat Modification

Intra-agency communication regarding violations of the Endangered Species Act (ESA) is critically important and enables the U.S. Fish and Wildlife Service (Service) to properly administer the ESA and fulfill the law's intent.

To address and resolve matters involving unauthorized take of protected species by habitat modification or other actions whether direct, indirect, intentional, unintentional, or incidental to otherwise legal activity, Service employees working in field stations must communicate effectively across programs. It is the responsibility of all field station employees to report to the Office of Law Enforcement (OLE) any ESA violations that they observe or become aware of occurring on lands not under the Service's jurisdiction.

Among the most complex of tasks when administering the ESA involves addressing the unauthorized 'take' of threatened or endangered species as a result of habitat modification. To successfully address the inherent complexities presented by take of endangered species through habitat modification and to achieve positive and just outcomes, it is imperative that Ecological Services (ES) and OLE employees work together.

Many ES employees have the biological knowledge necessary to manage and regulate endangered species through listing, recovery, permitting, and other activities. They are among the world's foremost experts on endangered species management. OLE special agents are authorized and charged to enforce the provisions of the ESA, and they have the training, experience, and skills to investigate the most complex violations of the Act. When executing their duties together, ES and OLE employees can ensure that the ESA functions as intended by Congress and as expected by the public.

Attached to this memorandum is a national protocol outlining the respective roles and responsibilities and appropriate lines of communication and cooperation that ES and OLE employees must follow when addressing take off Service lands of ESA-listed species due to habitat modification. This national protocol supersedes any prior guidance.

Attachment

## **National Protocol for Addressing Take and Potential ‘Take’ of Endangered Species Through Habitat Modification**

The following protocol informs U.S. Fish and Wildlife Service (Service) employees working at field stations of their roles and responsibilities when they become aware of a take or a potential unauthorized or non-permitted ‘take’ of endangered or threatened species through habitat modification. Additionally, because interaction between Ecological Services (ES) and the Office of Law Enforcement (OLE) is crucial when addressing these issues, it also provides specific guidance for their respective roles and responsibilities.

### **Guidance for All Field Employees about Notification**

When any field station employee becomes aware of a potential Endangered Species Act (ESA) violation on lands not under the jurisdiction of the Service, such as ESA habitat destruction and instances of direct take of protected species, they must immediately report such information to appropriate managers in ES and OLE.

**Note:** This protocol does not affect nor restrict the responsibility of all Service employees to report to OLE if they become aware of a potential violation of any Federal fish and wildlife law.

### **Specific Guidance for ES and OLE Employees**

It is important for ES and OLE employees to become familiar with the following steps and their order (some may be concurrent, but OLE takes the lead), and how they will interact during potential ESA habitat destruction violations.

1. When an ES staff member is notified or becomes aware of a potential ESA violation on lands not under the jurisdiction of the Service, he/she must immediately report such information to OLE and notify his/her (ES) field supervisor. The field supervisor (through the chain of command) must notify the ES Assistant Regional Director (ARD) of the need to consult with the respective Resident Agent-in-Charge (RAC) about the potential violation, including the relative roles for preservation of records and collection of evidence. It is the responsibility of the ARD to apprise the Deputy Regional Director (DRD) or, in the absence of the DRD, the Regional Director (RD). The field supervisor must be the official liaison with the OLE RAC.
2. If OLE is first to be notified or becomes aware of a potential ESA habitat destruction violation and is in need of ES assistance, the RAC must contact the respective ES field supervisor, who will notify their Regional office. OLE will make a prompt decision whether to investigate, in consultation with ES, and as necessary, may request ES assistance from the field supervisor or the ARD. If OLE decides to investigate the matter and ES assistance is approved (at the RD level unless otherwise delegated), ES will prepare a take assessment statement, as needed and if requested (see below).

3. If a decision has been made to continue investigative activity, the local special agent will work with the local ES field biologist to notify potential responsible parties in a timely manner in a written notice of the Service's opinion that the habitat modification has or is likely to result in "take" of the respective species. Whenever possible, the written notice should be co-signed by OLE (RAC) and ES (field supervisor). However, if and to the extent that such written notice would impede the ongoing investigation, OLE may delay it until the relevant investigative actions have been completed.
4. ES may request assistance from the special agent, or vice versa, to survey/conduct reconnaissance of the affected land parcels as needed to document use by listed species and the extent of habitat modification. Concurrence from the ARD (and DRD/RD if required in that Region) is needed for a field biologist to accompany OLE onto private lands.
  - Case law in most U.S. court districts has instructed that only law enforcement officers may enter onto private lands without permission. If a field biologist is to accompany OLE onto private lands, landowner consent to enter the property must be granted (unless the case prosecutor advises us that entry without landowner consent is allowed in the judicial district).
  - Special agents have training and experience specific to 4th amendment rights and responsibilities regarding access onto private property, especially under circumstances where explicit consent has not been granted. If field biologists accompany OLE onto private lands, it is imperative for their physical safety and to minimize personal legal liability to do so only under the strict guidance of OLE.
5. If OLE determines that a criminal investigation is appropriate, OLE will conduct the investigation and from then on will be the lead Service representative in communication with the landowner/developer (or their representative), including attorneys representing the landowner, on any matter potentially concerning the investigation.
  - If it is necessary for ES to communicate with a potential target or subject of the investigation to either halt ongoing taking(s) or avoid anticipated future take, OLE must lead the arrangement of any such communications. ES employees must not discuss mitigation or settlement with the defendants (landowner or developer); however, ES employees may assist OLE or the case prosecutor in such negotiations upon request.
  - As the lead, OLE also has a role and responsibility to provide guidance to ES field staff on retention and organization of records (e.g., for discovery) and guidance regarding content of internal communications, as well as those between the Service and the defendant.
6. Once an ESA case has been referred to the Department of Justice (DOJ) or the Office of the Solicitor (SOL) for possible criminal prosecution or civil enforcement, the DOJ or SOL must direct and coordinate all investigative actions and contacts with potential subjects or targets by either ES or OLE.

7. It is the responsibility of the ARD or the Special Agent-in-Charge (SAC), or both, to keep the DRD (or RD) fully apprised of the investigation and the involvement of ES staff.

### **“Take Assessment Statements”**

1. A take assessment statement is a biological assessment or other review, normally issued by a Service biologist, that states take of an endangered or threatened species has occurred.
  - It is important that the investigating special agent consult with the appropriate prosecuting/civil enforcement attorney **before** obtaining a take assessment statement. Some DOJ attorneys prefer to not have a written take assessment statement, or they may want to be involved in the identification of the potential expert(s) to prepare the take assessment statement because the expert may potentially have to testify.
  - If OLE opens an investigation and requests a take assessment statement, the local special agent or case attorney will review the take assessment statement with the field biologist before sending it up the chain of command for review. This helps to ensure that the take assessment statement addresses the required elements relevant to criminal prosecution or civil enforcement action and that all relevant information is known to investigators.
  - ES biologists may obtain sample take assessment statement(s) from their Regional OLE office for guidance.
2. The take assessment statement must be reviewed in the following order:
  - a) the field biologist and special agent,
  - b) the field supervisor and the RAC, and
  - c) the ARD for ES and the SAC.
3. Following final review, the take assessment statement or supporting documentation must be sent from the field supervisor to the RAC by formal memorandum.

### **Prosecution/Civil Enforcement/Settlement**

1. In coordination with the DOJ and SOL, OLE will pursue the appropriate remedy as warranted by facts in the case. Possible remedies include (in order of consideration as warranted by the facts):
  - a) criminal prosecution,
  - b) civil enforcement, or
  - c) other settlement remedies.
2. Upon request by OLE or by the case attorney, ES will provide OLE with biologically sound recommendations that best serve the conservation need of the affected listed

species. These recommended actions will be used for negotiations by either the DOJ or SOL (as appropriate) for obtaining resolution of the violations.