

# Endangered Species Act And the Sonoran Desert Conservation Plan

## **ESA Section 9 Prohibitions:**

Take is prohibited under section 9 of the ESA.

Take is defined by ESA (section 3(19)) to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

“Harass” and “harm” have been further defined by FWS regulations at 50 CFR 17.3 as follows:

- Harass means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.
- Harm means an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.

On June 29, 1995, The Supreme Court upheld the FWS’ definition of harm to include adverse modification of habitat in the Sweet Home case (Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, et al. No. 94-859 [U.S. Supreme County 1995]).

Section 9 of the ESA provides limited protection of listed plants. Section 9 prohibits the removal and reduction to possession of federally listed endangered plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of endangered plants on non-Federal areas in violation of State law or regulation or in the course of any violation of a State criminal trespass law.

Incidental take: take that is not the intended purpose of the action.

## **ESA Section 7 Consultations for Federal Activities:**

Incidental take can be permitted under section 7 of the ESA for projects with a Federal nexus. Section 7 consultations can provide an incidental take statement that exempts action agencies and their permittees from the Act’s section 9 prohibitions if they comply with the reasonable and prudent measures and the implementing terms and conditions of incidental take statements provided in a biological opinion.

### **ESA Section 10 Permits:**

Section 10(A)(1)(a) of the ESA provides for the issuance of permits for research and recovery.

Regulations governing permits for endangered species are at 50 CFR 17.22.

ESA amended in 1982 to provide for incidental take associated with non-Federal activities (e.g., private, State, Tribal).

Section 10(A)(1)(B) of the ESA provides for the issuance of incidental take permits for non-Federal activities.

Section 10(B)(2)(A) requires that a [habitat] conservation plan (HCP) be submitted with a permit application. The HCP must specify:

- 1) the impact which will likely result from such taking;
- 2) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- 3) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- 4) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

Section 10(B)(2)(B) provides the following permit issuance criteria:

- 1) the taking will be incidental;
- 2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- 3) the Applicant will ensure that adequate funding for the permit will be provided;
- 4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild [jeopardy standard]; and
- 5) the measures, if any, required by the Secretary will be met.

On March 9, 1999, we published in the Federal Register a notice of our 5-point policy, which provides additional guidance on:

- 1) biological goals and objectives
- 2) adaptive management
- 3) monitoring
- 4) permit duration
- 5) public participation.

The issuance of a permit for incidental take is a Federal action requiring compliance with the

National Environmental Policy Act and several other Federal laws (National Historic Preservation Act, Environmental Justice, Clean Air Act, etc.). Compliance with NEPA can be in the form of a categorical exclusion for low-effect HCPs, an environmental assessment for medium effect HCPs, and an Environmental Impact Statement for HCPs with a significant effect on the environment.

FWS analysis of a permit application includes:

- Analysis under NEPA and other relevant environmental laws
- Analysis under section 7 of the ESA to determine if taking will jeopardize species
- Analysis under section 10 (findings on permit issuance criteria)

Both the ESA and NEPA require that we request and consider public review and comment on the section 10 permit application and the NEPA document, respectively, through publication of a Federal Register notice. Our policy is to provide a 60-day public comment period for most HCPs and a 90-day public comment period for large, regional or complex HCPs. Review and comment on the NEPA documentation is concurrent with that of the ESA.

Benefits of Regional HCPs:

- 1) Promote a regional view of conservation versus a project-by-project approach
- 2) Allow the development of a reserve system that crosses jurisdictional boundaries (a blue-print for conservation).
- 3) Encourage collaboration of various interests
- 4) Provide certainty to developers on where to purchase land and the costs of development
- 5) Provide certainty of where conservation will occur
- 6) Provide for large-scale land management and monitoring.
- 7) Streamline ESA compliance for projects

Negative aspects of Regional HCPs:

- 1) Take multiple years to develop
- 2) Are costly to develop
- 3) We never know enough about rare species to have certainty on effects and conservation needs

### **Sonoran Desert Conservation Plan (SDCP):**

Includes 6 elements:

- 1) Ranch Conservation
- 2) Cultural resources element;
- 3) Mountain Parks Element;
- 4) Riparian Protection Management and Restoration Element;
- 5) Habitat Protection Element; and
- 6) Corridors Protection Element

### **Pima County Comprehensive Plan:**

The Pima County Comprehensive Plan Update (December 2001) incorporates the conservation map and guidelines prepared by the Science Conservation Advisory Team in the Environmental Element.

### **Pima County Multi-Species Conservation Plan:**

The Pima County Multi-Species Conservation Plan is Pima County's habitat conservation plan that will accompany their section 10 permit application. It focuses on 55 listed and other vulnerable species in eastern Pima County. It relies on the biological goals and objectives developed by the Science Technical Advisory Team and is a subset of the SDCP.

The purpose of and need for the proposed Pima County MSCP are: (1) to ensure the long-term survival of the full spectrum of plants and animals that are indigenous to Pima County, through maintaining or improving the habitat conditions and ecosystems necessary for their survival; and (2) to provide the framework for a combination of actions to protect and enhance the natural environment through comprehensive, long-range planning. This will ensure that the County's natural and urban environments can not only coexist, but can also develop an interdependent relationship with one another. This relationship will guide already approved public bond investments and conservation and preservation actions, define Federal program and funding priorities, and establish a regional preference for the expenditure of State funds to preserve and protect State Trust lands threatened by urbanization.

### **Permit Duration:**

We anticipate that Pima County will request permit coverage for a period of 20 to 50 years.

Proposed Covered Activities:

Maintenance of county operations, implementation of capital improvement projects, and issuance of land-use related permits, including those for residential and commercial development.

Proposed Covered Species:

Pima County is expected to apply for incidental take permits for up to 55 vulnerable species that would be protected within their Conservation Lands System map. The 55 species include the following federally listed species: the lesser long-nosed bat (*Leptonycteris curasoae yerbabuena*), cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), southwestern willow flycatcher (*Empidonax traillii extimus*), Chiricahua leopard frog (*Rana Chiricahuensis*), desert pupfish (*Cyprinodon macularius*), Gila topminnow (*Poeciliopsis occidentalis occidentalis*), Huachuca water umbel (*Lilaeopsis schaffneriana* var. *recurva*), Nichol Turk's head cactus (*Echinocactus horizonthalonius* var. *nicholli*), and Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*). In addition, Pima County will seek to address and cover the Gila chub (*Gila intermedia*), a species proposed for listing, and the Acuna cactus (*Echinomastus erectocentrus* var. *acunensis*) and yellow-billed cuckoo (*Coccyzus americanus* spp. *Occidentalis*), both of which are candidates for listing. Pima County is also seeking to address and cover at least 43 other rare and/or sensitive species that occur in the County. Unlisted species that are addressed as if they were listed, and that are found to be adequately conserved by the Pima County MSCP, will be automatically permitted for incidental take should they be listed as federally threatened or endangered species in the future. Numerous other listed and sensitive species for which Pima County is not seeking permit coverage will also benefit from the conservation measures provided in the Pima County MSCP through protection of similar or overlapping habitat conditions and ecosystem functions.

Stakeholder Groups:

- 1) Landowners
- 2) Developers
- 3) Builders
- 4) Realtors
- 5) Conservation organizations
- 6) Ranching Community
- 7) Tohono O'odham Nation and Pascua Yaqui Tribe
- 8) Home owners
- 9) Recreationists
- 10) Local jurisdictions (Oro Valley, Tucson, Marana, Sahuarita)
- 11) Private property rights groups
- 12) Mining interests
- 13) Neighborhood associations
- 14) Others

Reports of particular interest:

Pima County Multi-Species Conservation Plan (January 15, 2004)

Conservation Bond Program Proposal (October 2003)

Notice of Intent to Prepare an Environmental Impact Statement and Notice of a Public Scoping Meeting related to the Pima County Multi-Species Conservation Plan (68 FR 53748; September 12, 2003)

Sonoran Desert Conservation Plan Steering Committee (June 13, 2003)

Pima County Economic Analysis, Section 10 Permit (May 2003)

Pima County Comprehensive Plan Update (December 2001)

Priority Vulnerable Species: Data Compilation and Synthesis (June 2000)

Notice of Availability of a draft addendum to the final handbook for habitat conservation planning and incidental take permitting process (64 FR 11485; March 9, 1999)

Habitat Conservation Planning Handbook, FWS and NMFS, November 1996

Websites:

Fish and Wildlife Service's web site for Arizona: <http://www.fws.gov/arizonaes/>

Pima County's web site for the SDCP: <http://www.co.pima.az.us/cmo/sdcp/>