



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington DC, 20004



In Reply Refer To:
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Memorandum

To: Regional Directors, Regions 1 – 8

From: Acting Assistant Director – Ecological Services

Subject: NHPA Compliance for ESA Section 10 Permits

The U.S. Fish and Wildlife Service (Service) has reviewed current National Historic Preservation Act (NHPA) compliance practices for Endangered Species Act (ESA) section 10 permits to find efficiencies, ensure consistency, and improve ESA implementation. The purpose of this memorandum is to provide guidance for compliance with the NHPA when processing section 10 enhancement of survival and incidental take permit applications.

The NHPA aims to preserve historic properties in the United States. Section 106 of the NHPA requires federal agencies to consider the effects of their undertakings on historic properties. An “undertaking” is defined as a project, activity, or program funded or carried out by a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval (36 CFR 800.16(y)). NHPA is a procedural statute that requires analysis of potential effects but does not mandate a specific outcome. If adverse effects of a federal “undertaking” are identified, the federal agency must consider ways to avoid, minimize, or mitigate them. For “undertakings” that have the potential to cause effects to historic properties, NHPA requires consultation with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), and other consulting parties, including Tribes, to develop and evaluate alternatives that reduce adverse effects. Concurrence by the SHPO and THPO on the resolution of adverse effects is typically necessary to conclude the section 106 process.

Since the early 2000s, the Service has taken the position that issuing ESA section 10 permits is an “undertaking” subject to section 106 compliance (36 CFR 800.3(a)). Since then, the Service’s issuance of section 10 permits has often been interpreted by various SHPOs to include not only the issuance of the permit for “take” associated with the covered activity but broadened to include the entirety of the applicant’s project despite being outside of the Service’s authority. Broadening the “undertaking” beyond the Service’s authority is inappropriate and problematic because the Service does not have the ability to approve, disapprove or modify the actions that could affect historic properties.

Through this memorandum the Service is clarifying our responsibilities for NHPA compliance when issuing ESA section 10 permits. While the issuance of these permits is an “undertaking,” we have determined that the permit issuance will not cause effects to historic properties because the permit only authorizes the “take” of listed species; it does not authorize the covered activities causing the “take.” Therefore, the federal “undertaking,” issuance of a section 10 permit, will not affect historic properties. Implementation guidance will be provided within 90 days of the date of this memorandum.

If you have any questions, please contact Andy DeVolder, Chief, Branch of Recovery and Conservation Planning at andy_devolder@fws.gov.

cc: Ecological Services ARDs