



Federal Wildlife Agencies Issue Final Rule Codifying Practice of Using Surrogates in Incidental Take Statements

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On May 1, 2015, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the wildlife agencies) issued a final rule amending the regulations governing consultation under section 7 of the Endangered Species Act (ESA) in order to codify the practice of using surrogates to express the amount of extent of anticipated take in an incidental take statement issued concomitant with a biological opinion. The final rule also provides that consultations on programmatic actions that would not result in incidental take without specific future actions will not be accompanied by incidental take statements. The rule establishes basic standards that the agencies must follow to use surrogates, but it affords the wildlife agencies a substantial degree of latitude when doing so. As a consequence, the agencies may be expected to use proxies, such as impacts to habitat, in lieu of limits tied to take of individuals or a portion of the population.

Section 7(b)(4) of the ESA provides, where a federal agency action and anticipated incidental take will not violate section 7(a)(2), the pertinent wildlife agency will issue an incidental take statement that, among other things, "specifies the impact of such incidental taking on the species." In the preambles to both the proposed and final rules, the wildlife agencies acknowledge that Congress expressed a preference for numerical limits with respect to individuals of the listed species. At the same time, the wildlife agencies conclude that in some circumstance use of surrogates, or indicators, may be acceptable as an alternative to numerical estimates of individuals. Consistent with the proposed rule, the preamble to the final rule states "evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species."

The text of the final rule goes on to indicate that surrogates may be used, provided the biological opinion or incidental take statement: (1) describes the causal link between the surrogate and take of the listed species;

(2) describes why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and (3) sets a clear standard for determining when the extent of taking has been exceeded. In response to comments, the wildlife agencies expounded on these requirements, stating "use of a surrogate in an incidental take statement is predicated on a finding that measuring take impacts to a listed species is not practical and on establishing a link, based on best available scientific information, between effects of the action to a surrogate and take of the listed species." Further, the wildlife agencies indicated their intent to prepare implementation guidance for the use of surrogates though they did not provide a timeframe for such action. Despite the issuance of the rule, it is likely that there will continue to be litigation over the use of surrogates by the wildlife agencies, particularly in high-stakes cases where the agencies have not documented that the surrogate and target species will respond similarly to salient environmental phenomena.