

ALERT

Voluntary Prelisting Conservation Action Policy Adds to the ESA Mitigation Toolbox

July 22, 2014

The U.S. Fish and Wildlife Service (FWS) announced today a draft Voluntary Prelisting Conservation Action policy that provides a new opportunity for heading off disruptive Endangered Species Act (ESA) disputes.

The new policy, published at 79 Fed. Reg. 42,525 (Jul. 22, 2014), would allow landowners, government agencies, and others to receive credit for voluntary conservation efforts benefiting species that are not yet listed as threatened or endangered under the ESA, 16 U.S.C. § 1531 *et seq.* Those credits could then be applied to offset detrimental effects to those species from other actions taken after they are listed.

The new policy could spur the implementation of broader-based conservation efforts affecting both listed and nonlisted species alike. But uncertainties as to how the credits will be measured in the future when—and if—they ever need to be used may make it less attractive than its sponsors believe.

FWS hopes that the policy will encourage and incentivize conservation efforts that, in turn, may avoid some new listings. The policy complements other voluntary “pre-listing” conservation programs operated by the FWS. For example, the Candidate Conservation Program utilizes so-called Candidate Conservation Agreements with Assurances to allow landowners to implement prelisting conservation efforts, in exchange for an assurance that they will not be subject to additional conservation requirements once a species becomes listed.

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The new policy is intended to quantify the benefits of current, prelisting conservation efforts and apply them in the future toward any additional conservation that may still be needed. But given the evolving science of measuring ecological “credits” and “benefits,” the policy may not provide a “sure thing” or an absolute safe harbor to those taking advantage of it.

FWS proposes to treat credits as either actions to minimize or mitigate impacts of incidental takings allowed by permit under Section 10(a)(1)(B) of the ESA, or as compensatory measures for a proposed federal agency action under Section 7 consultation requirements. See 16 U.S.C. §§ 1536(a)(2), 1539(a)(1)(B); see *also* 50 C.F.R. § 402.14(g)(8). With respect to Section 7 consultations, FWS will consider applying the beneficial effects of a voluntary prelisting conservation action to the environmental baseline against which the federal agency action is measured. If a proposed voluntary prelisting action results in a net beneficial effect to existing environmental conditions, that benefit will be taken into consideration when determining whether the proposed federal agency action is “not likely to jeopardize” listed species or critical habitat. 16 U.S.C. § 1536(a)(2). The policy would also allow credits to be transferred to third parties, if used for the same species and within the same State where the credit was earned.

The policy defines the subject “voluntary prelisting conservation actions” as “any conservation measure undertaken to benefit a nonlisted species of plant or wildlife.” 79 Fed. Reg. at 42,528. Examples include land conservation banking, species or habitat management commitments, and the introduction of a species into a portion of its historical range. In order for a voluntary prelisting action to be credited toward detrimental actions occurring after listing, the action must provide a benefit greater than the detriment caused by the post-listing action. Calculation of the net benefit of the action can include beneficial actions taken both before and after listing, as long as the initial conservation action occurred before listing.

However, the policy would impose a number of additional requirements before credits may be generated by a voluntary prelisting conservation action. First, the conservation action must be taken prior to the final listing of the species, but it may be taken after listing is proposed. Second, it must be truly voluntary and not required by any law or regulation. Third, the action must be taken as part of state-administered programs to conserve nonlisted species, such as the State Wildlife Action Plans that are developed by the states and approved by FWS. See, e.g., California State Wildlife Action Plan, *available at* <http://www.dfg.ca.gov/SWAP/>. Importantly, credits used to offset post-listing activities regulated by the State will not be available under the federal policy.

FWS states that it “will evaluate the beneficial impacts of such action according to the same criteria, standards and metrics that it uses to evaluate the beneficial impacts of other mitigating or compensatory measures and the detrimental impacts of activities that give rise to mitigating or compensatory actions.” 79 Fed. Reg. at 42,529. This is important, because it will enable stakeholders to more easily calculate and forecast the environmental effect of their voluntary actions using a consistent and well-established set of compensatory conservation metrics developed under Sections 7 and 10 of the ESA. While the FWS reserves the right to modify the metrics, the policy could have a significant impact on allowable compensatory conservation measures by enabling landowners, government agencies, and others to take a broader approach to species conservation. Those entities could supplement listed species-specific actions with efforts

that provide wider ecological benefit, implement conservation actions earlier than they would otherwise, or “bank” credits for actions taken in the future that may negatively affect listed species. But whether initial credit calculations made at the time of the voluntary prelisting conservation action carry through to when they are “cashed in” remains to be seen.

Comments on the proposed policy will be accepted until September 22, 2014. Comments can be submitted electronically on the federal eRulemaking portal at <http://www.regulations.gov>, Docket number FWS-R9-ES-2011-0099, or by mail at the address listed in the Federal Register notice.