

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

This model document works from the proposed Energy Independence and Security Act of 2022 (“2022 Draft Permitting Law”) ([available here](#)), making references to that document where appropriate to show how to address this subject within the context of a larger piece of legislation addressing the permitting of renewable energy infrastructure generally.

1. Additional Definitions

Action Agency – The term “Action Agency” means a federal agency proposing to authorize, fund or carry out a project.

ESA – The term “ESA” means the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

ESA Implementing Regulations – The term “ESA Implementing Regulations” means the regulations in part 402 of subchapter A of chapter IV of title 50, Code of Federal Regulations, as amended.

Incidental Take Permit – The term “Incidental Take Permit” means a permit issued by a Service under section 10 of the ESA.

Programmatic Consultation – The term “Programmatic Consultation” means a consultation under section 7 of the ESA addressing the impacts of multiple similar, routine or repeatedly-occurring projects affecting a particular geographic area of local, landscape or regional scale.

Programmatic Habitat Conservation Plan – The term “Programmatic Habitat Conservation Plan” means a habitat conservation plan prepared under section 10 of the ESA addressing the impacts of multiple similar, routine or repeatedly-occurring projects affecting a particular geographic area of local, landscape or regional scale. A Programmatic Habitat Conservation Plan may be prepared by the Service, or another governmental entity or a non-governmental entity provided such plan is approved by the Service.

Programmatic Incidental Take Statement – The term “Programmatic Incidental Take Statement” means an incidental take statement issued by a Service in connection with a Programmatic Consultation under section 7 of the ESA.

Programmatic Permit – The term “Programmatic Permit” means an Incidental Take Permit issued by a Service to a State or local governmental entity, which by its terms allows persons other than the permittee to carry out an authorized activity, where such persons are under the direct control of the permittee by reason of being subject to the permittee’s jurisdiction or pursuant to a written agreement between the State or local government entity and such permittee.

Service – The term “Service” means the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service.

2. Add two new subsections:

(q) COORDINATION OF NEPA REVIEW WITH CONSULTATION UNDER SECTION 7 OF THE ESA.

(1) The lead agency for a project, or a class, series or program of projects under NEPA shall take the lead in consulting with the Service with respect to such project(s) in accordance with section 7 of the ESA, and any NEPA coordinating agency or participating agency may join in such consultation as an Action Agency as it deems appropriate. The lead agency, other Action Agencies and the Service shall fulfill their consultation responsibilities under section 7 of the ESA in conjunction with the environmental review of the project(s) under NEPA, and shall complete such responsibilities as expeditiously as practicable and consistent with Federal law. Among other things:

- (A) The lead agency shall include in the coordination plan prepared under subsection __: (i) the activities required to complete the Section 7 process, including preparing the biological assessment, convening informal and any formal consultation, and preparing any biological opinion and incidental take statement; (ii) the Federal agencies, Service and non-Federal entities responsible for undertaking and completing those activities; and (iii) the timetable for accomplishing them. Such timetable shall adhere to the timeframes established by the ESA Implementing Regulations and shall be designed to achieve completion of the ESA consultation process prior to issuance of the Record of Decision under NEPA. Nothing herein shall prevent the parties from reinitiating the consultation process after issuance of the Record of Decision under circumstances where such renewed consultation is required under the ESA and ESA Implementing Regulations.
- (B) Where the lead agency under NEPA determines to prepare a programmatic environmental impact statement or programmatic environmental assessment for a project, or a class, series or program of projects, the lead agency, Service, other Federal Agencies and non-Federal entities shall undertake Programmatic Consultation with respect to such project(s).
- (C) Where the parties undertake Programmatic Consultation: (i) the Service may issue a Programmatic Incidental Take Statement at the conclusion thereof; and (ii) the parties may streamline subsequent individual conferences and consultations by establishing standardized protocols for assessing localized impacts, generally applicable individual project design criteria, standardized mitigation programs and other measures deemed advisable and consistent with Federal law.

(r) PERMITTING OF PROJECTS SUBJECT TO SECTION 10 OF THE ESA

(1) Where a project is subject to the incidental take permitting requirements under section 10 of the ESA, the Service considering the issuance of such permit shall serve either as lead agency or a coordinating agency in the NEPA review of such project, and such permit shall be an “authorization” subject to the time limit set forth in section ____.

(2) A Service may in its discretion facilitate the incidental take permitting process for a project, or class, series or program of projects by such means as:

- (A) Creating or authorizing the creation of generally accessible species/habitat impact databases for particular geographic areas for use by individual Incidental Take Permit applicants for projects proposed to be located in such areas;
- (B) Developing or allowing the use of standardized protocols for assessing impacts for use by individual Incidental Take Permit applicants for projects located in particular geographic areas;
- (C) Creating or authorizing the creation of generally applicable individual project design criteria for projects located in particular geographic areas;
- (D) Developing or allowing the use of standardized mitigation programs for inclusion in habitat conservation plans for projects to be located in particular geographic areas;
- (E) Issuing Programmatic Incidental Take Permits to state or local governments on the basis of Programmatic Habitat Conservation Plans;
- (F) Allowing applicants for individual Incidental Take Permits in particular geographic areas to rely on Programmatic Habitat Conservation Plans prepared for such areas by the Service, the applicant or other interested party;
- (G) Where the Service is acting as lead agency under NEPA for a class, series or program of projects affecting a particular geographic area, undertaking a programmatic environmental review of such project(s) and tiering the subsequent environmental review of individual permit applications from the environmental documents prepared in connection with such programmatic review; and
- (H) Implementing such other measures it deems to be advisable and consistent with Federal law to expedite the incidental take permitting process.