

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>

Memorandum to Accompany Model Language to Enhance ESA Consultation and Permitting Procedures*

Permitting for large-scale renewable energy facilities is an arduous process, calling for compliance with a wide range of substantive and procedural requirements under numerous Federal, State and sometimes local laws and regulations. Two of the most prominent of these statutes are the National Environmental Policy Act (“NEPA”)¹, which requires federal agencies to consider a broad range of environmental impacts resulting from major federal actions, and the Endangered Species Act (“ESA”)², which requires the Fish and Wildlife Service and the National Marine Fisheries Service (the “Services”) to address the impacts of federal and non-federal projects on endangered or threatened species and their critical habitat. Regulations adopted by the Council on Environmental Quality and various federal agencies aim to facilitate the environmental review process for projects involving multiple agencies by enabling one of them to assume the role of the “lead agency” responsible for shepherding the project through the process, with other agencies consulting as either “coordinating” or “participating” agencies.

Moreover, the ESA requires the assessment and mitigation of risks posed to endangered or threatened species and their habitats through inter-agency consultation under Section 7 (where a federal agency is authorizing, funding or carrying out a project), or through permitting under Section 10 (where a non-federal project poses a risk of an “incidental take” of an endangered or threatened species or harm to its habitat.)

For complex projects, highly detailed environmental impact statements are prepared under NEPA, which identify the wide range of impacts the projects would cause, and consider reasonably available alternatives and practicable mitigation that may avoid or lessen those impacts. In a parallel process under the ESA, comprehensive “habitat conservation plans” are devised to assess and mitigate impacts on endangered or threatened species and their critical habitat. Compliance with NEPA and ESA may take several years of effort for sponsors of large-scale energy projects.

Federal agencies have devised a number of techniques to enhance the efficiency of the NEPA and ESA procedures. For example, the NEPA regulations allow agencies reviewing programs involving several like-kind projects affecting large areas to prepare “programmatic” environmental

* This memorandum and the accompanying model law were drafted by J. Kevin Healy and Robert Tuchman of the Bryan Cave law firm.

¹ 42 U.S.C. secs. 4321 et seq.

² 16 U.S.C. secs. 1531 et seq.

documents to examine the regional impacts of the entire program, with follow-up assessments “tiering” from that initial document to focus on the site-specific impacts that individual projects may cause. Similarly, the ESA procedures allow for “programmatic” consultations and several variations of programmatic permitting mechanisms to achieve the same sorts of efficiencies in assessing and mitigating area-wide incidental take impacts. In large measure these techniques are creatures of guidance, and have not been explicitly authorized by statute.

In general, the proposed statutory language is intended to: (i) assure that to the maximum extent practicable and consistent with Federal law, the ESA requirements for a project or series of projects are satisfied in conjunction with the NEPA review; and (ii) endorse and encourage the Services to take a programmatic, region-wide approach to consultations under Section 7 and incidental take permitting under Section 10, to the extent they deem it appropriate to do so. The terms used in the proposed statutory language generally are keyed to those found in the NEPA and ESA regulations and guidance, although we have attempted to pare down the wide variety of terms appearing in agency guidance for programmatic planning under the ESA.

The 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.

The model is divided into three basic provisions. The first provision sets forth several definitions (to be added to those in the 2022 Draft Permitting Law), including the terms “Programmatic Consultation,” “Programmatic Permit” and “Programmatic Habitat Conservation Plan.”

The second basic provision addresses the Section 7 ESA consultation process among the Services and the “Action Agencies,” i.e., those Federal agencies proposing to fund, authorize or carry out a project. It includes language that:

- Designates the NEPA lead agency as the lead action agency for purposes of the consultation with the Services;
- Directs the Services and lead agency to fulfill the consultation requirements under Section 7 in conjunction with NEPA, and to complete such requirements as expeditiously as practicable and consistent with Federal law;
- Requires the lead agency to include in the coordination plan called for under the 2022 Draft Permitting Law, the steps needed to complete the consultation, the parties required to take such steps and the timetable for completing them, and requires that the consultation be completed before the Record of Decision (“ROD”) is issued under NEPA;

- Requires a programmatic consultation under the ESA where a programmatic EIS or programmatic environmental assessment is prepared under NEPA;
- Explicitly authorizes the Service to issue a Programmatic Incidental Take Statement at the conclusion of a programmatic consultation; and
- Explicitly authorizes the parties to a programmatic consultation to facilitate subsequent consultations for individual projects 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.

The third provision addresses incidental take permitting for projects subject to Section 10 of the ESA (i.e., those projects that are not funded, authorized or carried out by a Federal agency.) The proposed language would:

- Require the Service considering the permit to act as either the lead agency or a coordinating agency under NEPA;
- Provide that such permit is an “authorization” under the 2022 Draft Permitting Law, making it subject to the requirement that it be issued no later than 180 days after the NEPA ROD or Finding of No Significant Impact;
- Explicitly authorize the Services to use various approaches to streamline the permitting process for a class, series or program of projects, including:
 - Creating generally available impact databases for particular geographic areas;
 - Allowing the use of standardized protocols for assessing impacts for projects located in particular geographic areas;
 - Creating generally-applicable individual project design criteria for projects located in particular geographic areas;
 - Creating standardized mitigation programs for projects located in particular geographic areas;
 - Issuing Programmatic Incidental Take Permits to State and local governmental entities, on the basis of Programmatic Habitat Conservation Plans, which by their terms allow 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.
 - Preparing and/or allowing individual permit applicants to prepare or use previously prepared Programmatic Habitat Conservation Plans;
 - Undertaking programmatic NEPA reviews for projects affecting particular geographic areas; and
 - Taking other advisable measures to expedite the permitting process.

Thus, the proposed language would provide clear and unambiguous Congressional authorization for techniques that are now embodied in agency guidance.