

Endangered Species Act (ESA) Applicability to North Kona Sewer Pump Station (SPS)

Congress enacted the Endangered Species Act to “provide a program for the consideration of ... endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. Sec.1531(b).

In the North Kona Sewer Pump Station Draft Environmental Assessment (DEA) the Department of Environmental Management (DEM) stated that the data indicate numerous federally listed species may occur or transit through the vicinity of the proposed project area. Therefore, before the construction and operation of this North Kona SPS, DEM must *determine* if it is likely to jeopardize these listed protected Hawaiian species or destroy or adversely modify their critical habitat, the action may not proceed as proposed. *See* 16 U.S.C. 1536 (a)(2). However, the U.S. Fish and Wildlife Service (FWS) may determine a “reasonable and prudent alternative” that would avoid the jeopardy to the species and destruction or adverse modification of critical habitat. *Id* Sec.1536 (b)(3)(A).

Throughout the North Kona SPS DEA, the DEM has designated that a “Section 7 consultation” for this *determination* would be done by the State of Hawaii Department of Health (DOH). The Preliminary Design Report Section 6-2 Project Schedule shows “Section 7 consultation” and the project timeline shows “Task 12 Section 7 through DOH.” Page 6 of the task timeline Tasks 294 through 299 break down the Section 7 consultation as: Task 295) Prepare consultation package for DOH; Task 296) DOH submits consultation package to USFWS; Task 297) Consultation period; Task 298) USFWS issues letter; Task 299) Section 7 consultation complete. (For another example of this DEM attempt to designate DOH instead of a Federal agency for Section 7 consultation, *see Naalehu Wastewater System Contract c007672 Exhibit A Scope of Work Section 2.3.3*

Subtask 3.2. C. Endangered Species Act (EA), Section 7: “1) Coordinate DOH’s consultation with the U.S. Department of the Interior Fish and Wildlife Service (USFSW) pursuant to the EA as it pertains to threatened or endangered species.”).

Section 7 of the Endangered Species Act of 1973 (ESA), called “Interagency Cooperation,” is the mechanism by which **Federal agencies** ensure the actions they take, including those they fund or authorize, do not jeopardize the continued existence of any listed species. In fact, the North Kona SPS DEA states: “Section 7 of the Act, Interagency Cooperation (16 U.S.C. Sec. 1536), states **each federal agency** shall, in consultation with and the assistance of the Secretary of the Interior, ensure that any action authorized, funded, or carried out by such agency (an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined, after consultation as appropriate with affected states, to be critical, unless such agency has been granted an exemption for such action.” (emphasis mine) North Kona SPS DEA, Page 5-9.

When an action is *likely to adversely affect* a listed species, the **Federal agency** submits to FWS a request for formal consultation. During formal consultation, FWS and the **Federal agency** share information about the proposed project, after which FWS will prepare a “biological opinion” or concurrence letter (called “letter” in the DEA Tasks). When the project is reasonably certain to result in the incidental take of an endangered species, the FWS provides the **Federal agency** with an incidental take statement with the biological opinion. The anticipated incidental take is not subject to the take prohibitions of the ESA as long as the **Federal agency** or applicant implements the terms and conditions provided in the incidental take statements.

But the State of Hawaii DOH is not a Federal agency.

I. Endangered Species Act, Section 9: Violations

To avoid violation of the ESA Section 9 for incidental take on otherwise legal projects on U.S. lands, every “person” (other than a Federal agency who is covered by following ESA Section 7 incidental take consultation procedures) must apply for a Federal Incidental Take Permit (ITP) which requires preparation of a Habitat Conservation Plan (HCP). The ESA is a comprehensive federal statute applicable to every “person” including DEM, declaring that endangered and threatened species are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. 1531 (a)(3).

The ESA has a suite of substantive legal protections that apply to “species,” *id.* 1532(16) (defining “species”), once they are listed as endangered, ESA Section 9 prohibits, among other actions, “any person” from “taking” protected animals without a lawful authorization from the U.S. Fish and Wildlife Service. *Id.* 1538(a)(1)(B) and 1539. Other provisions require the Secretary to designate “critical habitat” for listed species, *id.* 1533(a)(3)(A) and enforce regulations for civil and criminal penalties for take under ESA Section 9. *Id.* 1540(e)(1).

II. “Person”

Section 9 of the ESA makes it unlawful for any person to take individuals of an endangered species. 16 U.S.C. 1538(a). “Person” is broadly defined to include everyone, from private citizens to public entities such as the Department of Environmental Management. 16 U.S.C. 1532(13).

III. “Take” and ESA Section 10 Incidental Take Permits

Once listed, Section 9 of the ESA makes it unlawful for any person, including private and public entities, to “take” individuals of an endangered species. 16 U.S.C. 1538(a). “Take” means “to harass, harm, pursue, hunt, shoot,

wound, kill, trap, capture or collect, or attempt to engage in any such conduct.” 16 U.S.C. 1532(19). However, among the limited exemptions to these strict Section 9 prohibitions, one allows the FWS to issue permits to take listed species incidental to otherwise lawful activities upon submission of a habitat conservation plan (“HCP”). 16 U.S.C. 1539(a)(1)(B).

An HCP must detail the anticipated impact of the activity on listed species and their designated critical habitat. 50 C.F.R. 17.32(b)(1)(iii); 222.307(b). To approve an HCP, the FWS must find, among other things, that the applicant will monitor, minimize and mitigate the impacts of any incidental taking to the maximum extent practicable, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. 50 C.F.R. 17.32(b)(2); 222.307(c). In addition to exempting any incidental take of listed species from the prohibition of Section 9, HCPs come with an additional benefit called “No Surprises.” *See* 63 Fed. Reg. 8859(Feb.23, 1998). Once an HCP has been issued, and so long as the permitted activity is not jeopardizing listed species, the FWS may not require the commitment of additional funding or resources from the HCP holder. 50 C.F.R. 17.32(b)(5)(iii)(B); 222.307(g)(2).

Unlawful “take” of endangered species means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct.” 16 U.S.C. 1532(19). “Harm” is further defined to include significant habitat modification or degradation which “actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. 17.3.

IV. Endangered Species Act, Section 11: Penalties and Enforcement

The ESA is administered by the United States Department of the Interior, Fish and Wildlife Service for terrestrial species. Section 4 of the ESA authorizes

FWS to “list” species as endangered or threatened, depending on the risk of extinction to that species, after conducting a status review and considering the best scientific and commercial data available. 16 U.S.C. 1533(a), (b).¹

There are two types of penalties assessed for violation of any part of the Endangered Species Act and any regulation authorized under the ESA. Civil violations are enforced administratively, usually within the Department of Interior Office of the Secretary.² The ESA assesses civil penalties when a violation was an accident, mistake, or oversight.³ Criminal violations are enforced judicially in U.S. District Court.⁴ The ESA allows rewards to be paid for information leading to an arrest, criminal conviction and civil assessment penalties from violating the Act.⁵

V. CONCLUSION

The Endangered Species Act makes it a crime for any “person” “knowingly” to “take” any member of a listed endangered species. Without the HCP for the North Kona SPS, the Department of Environmental Management takes the risk that ITP unpermitted construction and sewage pump operation is likely to annoy listed endangered species to such an extent as to cause an injury to the species by significantly disrupting normal behavior patterns (e.g. breeding, feeding or sheltering, etc.).

Instead of allowing violation of ESA Section 9, risking Section 11 civil and criminal penalties, DEM should voluntarily develop the Habitat Conservation Plan to receive FWS’ permission for incidental take (receiving the Incidental Take

¹ Cherise Gaffney, *A Primer on the Endangered Species Act: The Species List, Take Prohibition, Permits, and Federal Consultation Requirements*, Stoel Rives LLP, Seattle WA, website, (undated).

² *ESA Overview Module & Section 11, Penalties and Enforcement*, ntc.blm.gov/krc/upload/656/m7_Types_of_penalties_final_ly.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Permit) and an Incidental Take License from the State of Hawaii Board of Land and Natural Resources (BLNR) for this otherwise lawful construction and operation of an industrial sewage pump station.

DEM has no Federal agency named for Section 7 consult, so following Section 10 procedures is the only way for DEM to avoid civil and criminal penalties for harming Hawaii's federally listed endangered birds and bats.