



November 4, 2013

Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

**RE: Docket No. FWS–R9–ES–2011–0080**

The National Hydropower Association<sup>1</sup> (“NHA”) is pleased to submit these comments on the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service’s (“FWS”) (collectively, the “Services”) proposal to amend the regulations governing the Services’ issuance of incidental take statements (“ITSs”) under Section 7 of the Endangered Species Act (“ESA”). *See* 78 Fed. Reg. 54,437 (Sept. 4, 2013). As set forth below, NHA generally supports the proposed regulations, but also recommends that the Services modify the proposed regulations in certain respects to provide more clarity. Thank you for your consideration of these comments.

The proposed regulations address two specific aspects of ITSs. First, the proposed regulations authorize the Services to use surrogate measures of incidental take when it is impractical to specify the amount or extent of anticipated take.

**A. Surrogate Measures of Incidental Take**

The proposed regulations expressly state that “a surrogate (e.g., habitat or ecological conditions or similarly affected species) may be used to express the amount or extent of anticipated take” so long as certain conditions are satisfied and the surrogate is monitored to “ensure that the action does not exceed the anticipated amount or extent of take.” In general, the proposed regulation is a step in the right direction because it formally establishes some necessary flexibility in the Services’ administration of ESA Section 7. With respect to surrogates, the proposed regulations would codify a mechanism that allows for the identification of incidental take when it is not possible to estimate or monitor the actual number of animals that will be taken. However, despite our general agreement that the use of surrogates may be appropriate under some circumstances, we want to emphasize that surrogates should be used when quantifying the amount of take of the protected species is impractical. We believe this is a fundamental premise of the regulation, but is worth underscoring.

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<sup>1</sup> NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA’s membership consists of more than 180 organizations including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

We would agree that *when used correctly* a surrogate such as habitat and/or *other closely related* non-listed species may serve as an appropriate substitute for listed species where the potential for incidental take exists. For example:

- when listed species that are cryptic, rare, or for populations that have few individuals or low densities.
- the use of habitat or habitat components is an appropriate substitute for assessing the level of take when surveys fail to detect listed species or where surveys are inadequate to derive numerical estimates for the Services to make informed decisions.
- when unrealistic “take” authorization numbers (i.e., numbers of individual organisms) are based on limited data and/or questionable methods of development.
- when “take” numbers may be impractical to measure due to monitoring limitations.

Consistent with the Section 7 regulations and handbook, NHA believes it is important that the Service work closely with the Action agencies, and as appropriate the applicants, when determining the need for a surrogate and the identification of an appropriate surrogate. Because the Action Agency has the most technical expertise regarding the nature of the proposed action, its involvement in selecting a surrogate that can be accurately measured and monitored will increase the likelihood that this approach is successful.

Although the proposed regulations regarding the use of surrogates are generally helpful, some minor modifications can and should be made to the proposed regulatory language. Specifically, the reference to “habitat or ecological conditions or similarly affected species” as examples of acceptable surrogates could be interpreted as a limit on the types of acceptable surrogates. Given the uncertainty inherent in the problem that the proposed regulations are intended to address (i.e., the inability to measure incidental take), it will be more helpful to the regulated community if the Services have ample discretion to consider and use a wide variety of surrogates such that the Services are not limited when addressing the complicated incidental take issues that are bound to arise. Accordingly, either the reference to “habitat or ecological conditions or similarly affected species” should be removed or a phrase should be added to make clear that the examples are not intended to constrain the Services’ ability to identify and use other types of surrogates.

## **B. Requirements for Programmatic ITSs**

The proposed regulations also attempt to clarify the requirements applicable to ITSs by (i) establishing a definition for “programmatic action,” (ii) establishing a definition for “programmatic ITS,” and (iii) providing that a programmatic ITS is required for a programmatic action that is “anticipated to cause incidental take.” Although NHA has no objection to these proposed requirements in concept, the proposed regulations will establish a definition for “programmatic action,” which does not exist in the current ESA regulations. There are some aspects of the proposed regulations that can be improved as a general matter to provide clarity.

- These proposed regulations define a “programmatic ITS” as being required when incidental take of listed species is “reasonably certain to occur.” However, a separate provision of the proposed regulations states that a programmatic ITS is required for a programmatic action that is “anticipated to cause incidental take.” These two standards are not the same, and the second provision should be modified to clearly state that a programmatic ITS is required when

incidental take is reasonably certain to occur, which is the established standard in the Ninth Circuit.

- In addition, the proposed regulations should clearly state that a description of the amount or extent of incidental take (whether directly or by surrogate) in a programmatic ITS is not required. The proposed regulations are vague on this point, but could arguably be interpreted to require a programmatic ITS to include a description of the expected amount or extent of incidental take. We do not believe that such a description is necessary, appropriate, or feasible in a programmatic ITS.
- Finally, the proposed regulations require a programmatic ITS to include “specific provisions as reasonable and prudent measures . . . to minimize the impacts of take caused by the programmatic action and to serve as a trigger to reinitiate formal consultation on the programmatic action.” This broadly worded provision creates some concern because the Services are not allowed to use reasonable and prudent measures to limit the scope of a proposed action. The proposed regulatory language should be revised to clearly state that any reasonable and prudent measures included in a programmatic ITS “cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes,” as provided in 50 C.F.R. § 402.14(i)(2).

NHA supports the proposed changes, as modified above, since they will result in improvements that provide necessary flexibility for the Services’ administration of ESA Section 7.

Sincerely,

A handwritten signature in cursive script that reads "Linda Church Ciocci". The signature is written in black ink on a light-colored background.

Linda Church Ciocci  
Executive Director