



City of Galveston

MINUTES OF THE PLANNING COMMISSION OF THE CITY OF GALVESTON REGULAR MEETING – August 4, 2020

CALL MEETING TO ORDER

The meeting was called to order at 3:37 p.m.

ATTENDANCE

Members Present via Videoconference: Cate Black, Bob Brown, Jeffrey Hill, Carol Hollaway, CM John Paul Listowski

Members Absent: Jeff Antonelli, Eugene Cook

Staff Present: Catherine Gorman, AICP, Assistant Director/HPO

Staff Present via Telephone: Tim Tietjens, Executive Director of Development Services; Dustin Henry, AICP, Coastal Resource Manager; Virginia Greb, Assistant Coastal Resource Manager; Daniel Lunsford, Planner; Karen White, Planning Technician; Donna Fairweather, Assistant City Attorney

CONFLICT OF INTEREST

None

APPROVAL OF MINUTES

The July 21, 2020 minutes were approved as presented.

MEETING FORMAT

Staff explained the adjusted meeting format to the Commission and the public.

PUBLIC COMMENT

Public comment (Attachment A) was provided to the Planning Commission via email.

NEW BUSINESS AND ASSOCIATED PUBLIC HEARINGS

REPLAT

20P-023 (21631 Zachary, 21703 Zachary, 21630 San Luis Pass Road/FM 3005, 21702 San Luis Pass Road/FM 3005) Request for a replat in order to decrease the number of lots from five into four. Properties are legally described as: Hall & Jones Survey Abandoned Mason Drive Right-of-way Adjacent to Lots 118, 119, 142 & 143, (143-1); Lot 118; Lot 119; Lot 142; and Lot 143; Sea Isle Section 1; in the City and County of Galveston, Texas.

Applicants and Property Owners: Angele Investments, LLC; Angele Holdings, LLC; Joe Allen Cooper; and Bennie F. Simmons and Patricia Ann Simmons

Staff presented the staff report and noted that of thirty (30) notices of public hearing sent, seven (7) had been returned in favor, two (2) had been returned in opposition, and one (1) had been returned without comment.

Chairperson Cate Black opened the public hearing on case 20P-023. Applicants Ben Simmons, Rhonda Angele, Mrs. Joe Cooper, and Russell Plackemeyer presented to the Commission. The public hearing was closed and the Chairperson called for questions or comments from the Commission.

Chairperson Cate Black made a motion to approve case 20P-023 with staff's recommendations. Carol Hollaway seconded, and the following votes were cast:

In favor: Black, Brown, Hill, Hollaway
Opposed: None
Absent: Antonelli, Cook
Non-voting participant: CM Listowski (Ex-Officio)

The motion passed.

BEACHFRONT

20BF-051 (Kahala Beach Estates) Request for a Beachfront Construction Certificate/Dune Protection Permit in order to perform annual beach maintenance. The property is legally described as Sur Tr (0-1), Beach Area, Kahala Beach Estates, a subdivision in the City and County of Galveston, Texas.

Applicant: Sunrise Beach Cleaning, Santiago Mejia

Property Owner: City of Galveston

Staff presented the staff report.

Chairperson Cate Black opened the public hearing on case 20BF-051. The public hearing was closed and the Chairperson called for questions or comments from the Commission.

Carol Hollaway made a motion to approve case 20BF-051 with staff's recommendations, requesting that staff make the U.S. Department of the Interior's decision tree regarding incidental take permits (Attachment B) available to the applicant. Chairperson Cate Black seconded, and the following votes were cast:

In favor: Black, Brown, Hill, Hollaway
Opposed: None
Absent: Antonelli, Cook
Non-voting participant: CM Listowski (Ex-Officio)

The motion passed.

20P-016 (Stewart Beach – 201 Avenue K) Request for a Beachfront Construction Certificate/Dune Protection Permit in order to construct improvements to the park including drainage, resurfacing park roadways, filling parking areas, and constructing pedestrian and emergency vehicle crossovers. Property is legally described as Abst 628 Page 141 & 142 M Menard Sur TR 59 7.909 Acrs; Abst 628 M B Menard Sur (241-0-0) Blk 241 Galveston; Abst 628 M B Menard Sur (242-0-0) Blks 242 & Pt of 243 Galveston; Abst 628 M B Menard Sur (242-0-0) Blks 242 & Pt of 243 Galveston; Abst 628 M B Menard Sur (183-0-0) Blk 183 Galveston; Abst 628 M B Menard Sur (182-0-0) Blk 182 Galveston; Abst 628 M B Menard Sur (181-0-0) Blk 181 Galveston; Abst 628 M B Menard Sur (121-0-0) Blk 121 Galveston; Abst 628 M B Menard Sur (122-0-0) Blk 122 Galveston; Abst 628 M B Menard Sur (123-0-0) Blk 123 Galveston, a subdivision in the City and County of Galveston, Texas.

Applicant: Galveston Park Board of Trustees, Sheryl Rozier

Property Owner: City of Galveston

Staff presented the staff report and read the public comment (Attachment A) into the record.

Chairperson Cate Black opened the public hearing on case 20P-016. Applicant Sheryl Rozier of the Galveston Park Board of Trustees presented to the Commission. The public hearing was closed and the Chairperson called for questions or comments from the Commission.

Vice-Chairperson Jeffrey Hill made a motion to approve case 20P-016 with staff's recommendations. Chairperson Cate Black seconded, and the following votes were cast:

In favor: Black, Brown, Hill, Hollaway
Opposed: None
Absent: Antonelli, Cook

Non-voting participant: CM Listowski (Ex-Officio)

The motion passed.

DISCUSSION AND ACTION ITEMS

- Planning Commission Awards (Staff)

Carol Hollaway nominated:

- The Lost Bird Project by the Galveston Island Nature Tourism Council
- Turtles About Town
- Student athlete housing at Galveston College
- Tipsy Turtle and the Galveston Park Board of Trustees

Chairperson Cate Black nominated:

- Vision Galveston
- Cedars at Carver Park and Villas on the Strand
- Galveston Arts Center
- Seeding Galveston

Bob Brown nominated:

- Project SIT by Artist Boat

Vice-Chairperson Jeffrey Hill nominated:

- All eligible projects from last year's list and staff's list

THE MEETING ADJOURNED AT 5:24 PM

Attachment A

Planning Commission
August 4, 2020

Public Comment				
Case #	In favor	Opposed	Other	Comments
20P-016			X	<p>Lisa Carrell: As homeowners in The Preserve at Grand Beach bordering Stewart Beach we request the project be amended to include:</p> <ol style="list-style-type: none"> 1) Existing bollards to the East of Stewart Beach be repositioned to the actual property lines of lots 10-12 and "Reserve G" as platted 2) The City permit a sand fence along our seaward boundary to recover from the scraping of loose sand by the city and improperly routed traffic 3) Limiting General vehicle access to the east as we have provided additional parking spaces at AP1C
			X	Michael Lutz: Same as above.
			X	<p>Lisa Carrell: As homeowners in The Preserve at Grand Beach we suggest the proposal be amended to:</p> <ol style="list-style-type: none"> A) The proposed Catchment Swale B and Drainage ditches for the East Parking Area be extended northward to the North Easterly corner of the Stewart beach parcel to connect into the Seawall Boulevard/East Beach Drive drainage system. Recent dredging of the East Beach Drive ditches has greatly improved the drainage into the Appfel Park lagoon system. This would minimize seaward releases and erosion events.
			X	Michael Lutz: Same as above.
			X	<p>Lloyd Martin: No ad-jointing property owners were notified. Page 13 addresses two "existing concentrated water flows" When actually there are three and the one by us on East end of Stewart Beach is not addressed. The bollards need to be moved onto property line. What Park board has created wash out of beach in front of my house as excavating loose sand from vehicular travel. Past access on private property never been filled in. Beach access should be on Stewart Beach's side of the property boundary.</p>
			X	<p>Lloyd Martin: The proposed drainage ditch, East end North and South is 5 feet wide at the bottom and 1.1 feet elevation at the bottom. Thus will always have water and will present mosquito heaven. What is the plan for mosquito control and maintenance? We have swarms of mosquitos now and this will greatly add to our situation. Why not do a test trench and you will see it will not work as we are dealing with the same situation in our subdivision. Water needs to drain to the East Lagoon.</p>
			X	<p>Lloyd Martin: All their satellite and calculations up to 2012 and one place 2016 According to the U.T. Bureau of Economic Geology, this is a stable beach area. Between the 1950s and 2012, this beach area experienced an average shoreline change rate ranging from -1.5 to +0.9 feet per year.</p>

				<p>When we know about 8 feet per year per survey 2019 some 50 feet since 2013 the elevation of the bottom of the drainage ditch next to us is 1.1 and 2 feet deep 5 feet wide at bottom</p> <p>So will always have water Mosquito heaven</p>
			X	<p>Lloyd Martin: Since no public input only online and only 500 characters and no pictures, sending emails. Also, no adjacent property owners being notified. Page 13 addresses two “existing concentrated water flows” When actually there are three and the one by us on East end of Stewart Beach is not addressed. Pictures showing water flowing from parking lot and washing out beach. Access not aligned with property lines. Wash out and water flowing from parking lot caused by excavating beach access. We need the bollards realigned with the property line and sand fence to replace sand excavated.</p> <p>Page 10</p> <p>Showing what little vegetation berm.</p> <p>The bollards need to be realigned with the property line and a sand fence put up along property line to reestablish the vegetation dune that the Park Board was going to remove off Reserve G until I stopped them on a Saturday morning at 5 am. They had already removed the bollards that were in the dune well within Reserve G. Now if we did this, we would be required to put all back original as per city and state codes. Sand fence needs to be put up to restore back.</p> <p>Note from staff: Photos provided by Mr. Martin are attached.</p>
			X	<p>Herb Walpole: As owners in The Preserve at 47 Grand Beach, we request project be amended to include:</p> <ol style="list-style-type: none"> 1) Existing bollards at beach on east side Stewart be relocated to actual property line along Preserve Blk 2 lots 10&11 on into Reserve G as platted. Originally suggested by engineer at GLO, Mr. Rajiv. 2) City issue permit to sand fence along Preserve seaward boundary. City improperly excavated sand from lots 10&11& Reserve G for traffic 3) Limit vehicular traffic thru same conduit to “Emergency only”.
			X	<p>Herb Walpole: As Preserve homeowners, we suggest existing plan be amended to include: Extend Catchment Swale B and drainage for East parking area northward, to the northeasterly corner of Stewart Beach parcel. Connect into Seawall Blvd/East Beach Dr. drainage. Recent cleanout of East Beach Dr ditches improved drainage into Apffel Park lagoon during nominal rainfall. Will minimize seaward releases and erosion. And limit stagnant water for mosquitos in same swale along west side of Preserve/East Stewart Pkng.</p>

20P-023			X	Charles M. & Joe Allen: Questions for Planning Commission @ 3:30 p.m. Tuesday August 4, 2020. 1) How can my property be managed with sewer and electric lines on the corner of easement? 2) Will taxes on my property decrease, increase or stay the same with the addition of easement access?
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City of Galveston

Public Comment Form

First Name *

Lisa

Last Name *

Carrell

Email *

[REDACTED]

Phone *

8324536362

Street Address *

38 Grand Beach Boulevard

City *

Galveston

State *

TX

ZIP *

77550

Subject *

Stewart Beach Beachfront Construction/ / Dune Protection Permit

Comments * (?)

500 character maximum

As homeowners in The Preserve at Grand Beach bordering Stewart Beach we request the project be amended to include:

- 1) Existing bollards to the East of Stewart Beach be repositioned to the actual property lines of lots 10-12 and "Reserve G" as platted
- 2) The City permit a sand fence along our seaward boundary to recover from the scraping of loose sand by the city and improperly routed traffic
- 3) Limiting General vehicle access to the east as we have provided additional parking spaces at AP1C



City of Galveston

Public Comment Form

First Name *

Michael

Last Name *

Lutz

Email *

[REDACTED]

Phone *

7135167999

Street Address *

38 Grand Beach Boulevard

City *

Galveston

State *

TX

ZIP *

77550

Subject *

Planning Commission agenda - Stewart Beach 20P-016

Comments * (?)

500 character maximum

As homeowners in The Preserve at Grand Beach bordering Stewart Beach we request the project be amended to include:

- 1) Existing bollards to the East of Stewart Beach be repositioned to the actual property lines of lots 10-12 and "Reserve G" as platted
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- 3) Limiting General vehicle access to the east as we have provided additional parking spaces at AP1C



City of Galveston

Public Comment Form

First Name *

Lisa

Last Name *

Carrell

Email *

[REDACTED]

Phone *

832 452 6362

Street Address *

38 Grand Beach Boulevard

City *

Galveston

State *

TX

ZIP *

77550

Subject *

Stewart Beach Drainage Improvement 20P-016

Comments * (?)

500 character maximum

As homeowners in The Preserve at Grand Beach we suggest the proposal be amended to:

A) The proposed Catchment Swale B and Drainage ditches for the East Parking Area be extended northward to the North Easterly corner of the Stewart beach parcel to connect into the Seawall Boulevard / East Beach Drive drainage system. Recent dredging of the East Beach Drive ditches has greatly improved the drainage into the Appfel Park lagoon system. This would minimize seaward releases and erosion events.



City of Galveston

Public Comment Form

First Name *

Michael

Last Name *

Lutz

Email *

[REDACTED]

Phone *

713 516 7999

Street Address *

38 Grand Beach Boulevard

City *

Galveston

State *

TX

ZIP *

77550

Subject *

Stewart Beach Drainage Improvement Plan 20P-016

Comments * (?)

500 character maximum

As homeowners in The Preserve at Grand Beach we suggest the proposal be amended to:

A) The proposed Catchment Swale B and Drainage ditches for the East Parking Area be extended northward to the North Easterly corner of the Stewart beach parcel to connect into the Seawall Boulevard / East Beach Drive drainage system. Recent dredging of the East Beach Drive ditches has greatly improved the drainage into the Apffel Park lagoon system. This would minimize seaward releases and erosion events.



City of Galveston

Public Comment Form

First Name *

Lloyd

Last Name *

Martin

Email *

[REDACTED]

Phone *

512-636-3406

Street Address *

41 Grand Beach Blvd

City *

Galveston

State *

TX

ZIP *

77550

Subject *

20P-016 Stewart Beach Construction

Comments * (?)

500 character maximum

No ad-jointing property owners were notified.

Page 13 addresses two "existing concentrated water flows" When actually there are three and the one by us on East end of Stewart Beach is not addressed.

The bollards need to be moved onto property line. What Park board has created wash out of beach in front of my house as excavating loose sand from vehicular travel. Past access on private property never been filled in. Beach access should be on Stewart Beach's side of property boundary.



City of Galveston

Public Comment Form

First Name *

Lloyd

Last Name *

Martin

Email *

[REDACTED]

Phone *

512-636-3406

Street Address *

41 Grand Beach Blvd

City *

Galveston

State *

TX

ZIP *

77550

Subject *

20P-016 Stewart Beach Construction

Comments * (?)

500 character maximum

The proposed drainage ditch, East end North and South is 5 feet wide at the bottom and 1.1 feet elevation at the bottom. Thus will always have water and will present mosquito heaven. What is the plan for mosquito control and maintenance? We have swarms of mosquitoes now and this will greatly add to our situation. Why not do a test trench and you will see it will not work as we are dealing with the same situation in our subdivision. Water needs to drain to the East Lagoon.



City of Galveston

Public Comment Form

First Name *

Lloyd

Last Name *

Martin

Email *

[REDACTED]

Phone *

512-636-3406

Street Address *

41 Grand Beach Blvd

City *

Galveston

State *

TX

ZIP *

77550

Subject *

20P-016 Stewart Beach Construction

Comments * (?)

500 character maximum

All their satellite and calculations up to 2012 and one place 2016
According to the U.T. Bureau of Economic Geology, this is a stable beach area. Between the 1950s and 2012,
this beach area experienced an average shoreline change rate ranging from -1.5 to +0.9 feet per year.
When we know about 8 feet per year per survey 2019 some 50 feet since 2013
he elevation of the bottom of the drainage ditch next to us is 1.1 and 2 feet deep 5 feet wide at bottom
So will always have water Mosquito heaven

Karen White

From: Lloyd Martin <[REDACTED]>
Sent: Monday, August 3, 2020 4:57 PM
To: Tim Tietjens; Catherine Gorman; Planning Counter; Dustin Henry; Craig Brown; David Collins
Cc: [REDACTED]; 'Michael Jenkins'
Subject: Planning Commission / 20P-016 Stewart Beach Construction
Attachments: image.jpg; image.jpg; image.jpg; image.jpg; image.jpg; image.jpg; 10021.pdf; Bollard Survey and Relocation.pdf

Since no public input only online and only 500 characters and no pictures, sending emails. Also, no adjacent property owners being notified.

Page 13 addresses two "existing concentrated water flows" When actually there are three and the one by us on East end of Stewart Beach is not addressed.

Pictures showing water flowing from parking lot and washing out beach. Access not aligned with property lines.

Wash out and water flowing from parking lot caused by excavating beach access.

We need the bollards realigned with the property line and sand fence to replace sand excavated.

Page 10

Showing what little vegetation berm.

The bollards need to be realigned with the property line and a sand fence put up along property line to reestablish the vegetation dune that the Park Board was going to remove off Reserve G until I stopped them on a Saturday morning at 5 am. They had already removed the bollards that were in the dune well within Reserve G.

Now if we did this, we would be required to put all back original as per city and state codes.

Sand fence needs to be put up to restore back.

Lloyd Martin
41 Grand Beach Blvd
512-636-3406













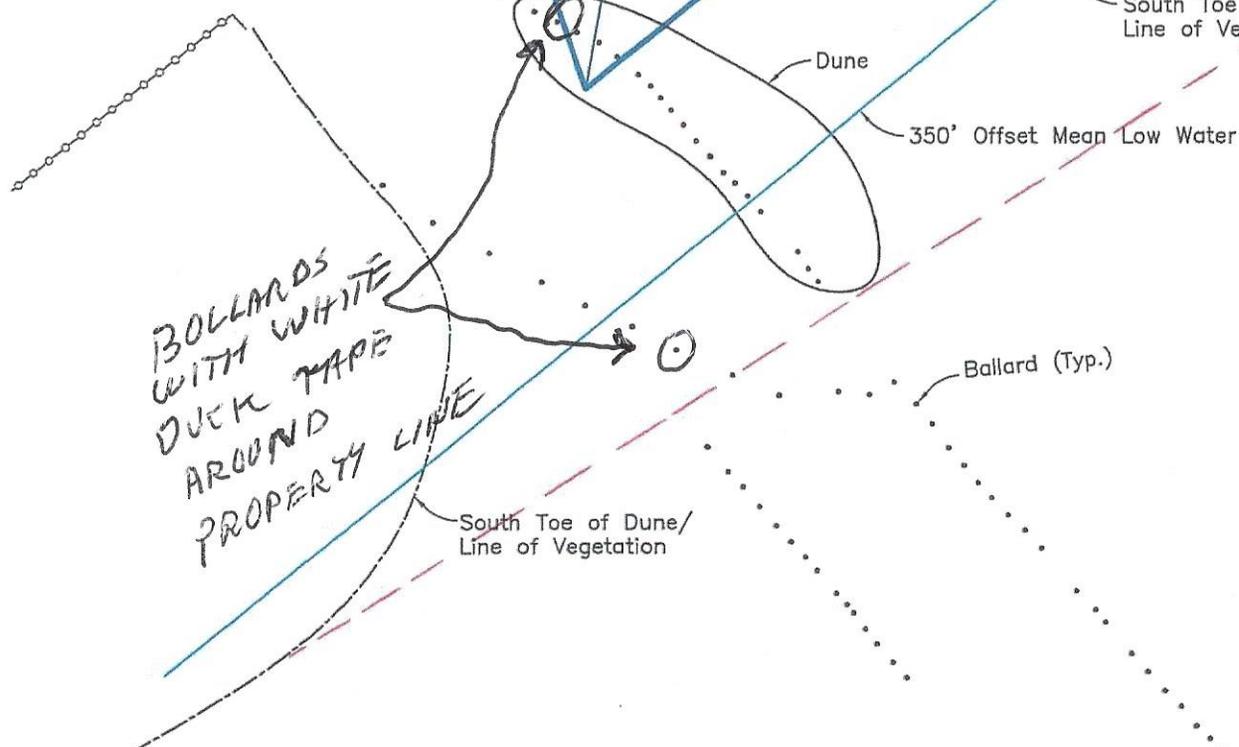
PRESERVE AT GRAND BEACH



SCALE: 1" = 50'

Lot 17

Lot 10



South Toe of Dune/
Line of Vegetation

Dune

350' Offset Mean Low Water

BOLLARDS
WITH WHITE
DUCK TAPE
AROUND
PROPERTY LINE

Ballard (Typ.)

South Toe of Dune/
Line of Vegetation



GALVESTON OFFICE

Registration Number: 10193855

(409) 740-1517 www.hightidelandsurveying.com

8017 HARBORSIDE DRIVE | GALVESTON, TX 77554

Mailing | P.O. BOX 16142 | GALVESTON, TX 77552



PRESERVE AT GRAND BEACH

SCALE: 1" = 50'

DRIVE WAY ACCESS
ALL ON STEWARD
BEACH SIDE

Lot 11

Lot 10

#1 SURVEY STAKE

#2 SURVEY STAKE

ACCESS

ROAD

South Toe of Dune/
Line of Vegetation

Dune

350' Offset Mean Low Water

PULL THESE BOLLARDS
TO RELOCATE
ON PROPERTY LINE

RELOCATION OF BOLLARDS

PARK BOARD PULLED
THESE BOLLARDS
STORED IN PAVILION

South Toe of Dune/
Line of Vegetation

VEGETATION
DUNE

Ballard (Typ.)

REMOVE AND
USE ON
RELOCATED
BOLLARDS

BOLLARDS

#3 SURVEY STAKE
SEAWARD OF
"DUNE"



GALVESTON OFFICE

Registration Number: 10193855

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8017 HARBORSIDE DRIVE | GALVESTON, TX 77554

Mailing | P.O. BOX 16142 | GALVESTON, TX 77552



City of Galveston

Public Comment Form

First Name *

Herb

Last Name *

Walpole

Email *

herb@centurymillwork.com

Phone *

7136142043

Street Address *

18927 Aldine Westfield Rd

City *

Houston

State *

Texas

ZIP *

77073

Subject *

Stewart Beach Proposed Renovations/Excavation

Comments * (?)

500 character maximum

As owners in The Preserve at 47 Grand Beach, we request project be amended to include: 1) Existing bollards at beach on east side Stewart be relocated to actual property line along Preserve Blk 2 lots 10&11 on into Reserve G as platted. Originally suggested by engineer at GLO, Mr. Rajiv. 2) City issue permit to sand fence along Preserve seaward boundary. City improperly excavated sand from lots 10&11& Reserve G for traffic 3) Limit vehicular traffic thru same conduit to "Emergency only".



City of Galveston

Public Comment Form

First Name *

Herb

Last Name *

Walpole

Email *

herb@centurymillwork.com

Phone *

7136142043

Street Address *

18927 Aldine Westfield Rd

City *

Houston

State *

Texas

ZIP *

77073

Subject *

Stewart Beach Proposed Parking Renovations

Comments * (?)

500 character maximum

As Preserve homeowners, we suggest existing plan be amended to include: Extend Catchment Swale B and drainage for East parking area northward, to the northeasterly corner of Stewart Beach parcel. Connect into Seawall Blvd/East Beach Dr. drainage. Recent cleanout of East Beach Dr ditches improved drainage into Apffel Park lagoon during nominal rainfall. Will minimize seaward releases and erosion. And limit stagnant water for mosquitoes in same swale along west side of Preserve/East Stewart Pkng.



City of Galveston

Public Comment Form

First Name *

Charles M. & Joe Allen

Last Name *

Cooper

Email *

[REDACTED]

Phone *

2814381876 7138296875

Street Address *

3714 East Creek Club

City *

Missouri City

State *

Texas

ZIP *

77459

Subject *

Public hearing for replat on 21702 San Luis Pass Road/FM 3005, Galveston Texas

Comments * (?)

500 character maximum

Questions for Planning Commission @ 3:30 p.m. Tuesday August 4, 2020.

- 1) How can my property be managed with sewer and electric lines on the corner of easement?
- 2) Will taxes on my property decrease, increase or stay the same with the addition of easement access?

Contact me @ 281-438-1876 if you have any questions.

Thank You,

Charles Melba Cooper



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/067974

APR 26 2018

Memorandum

To: Regional Directors 1-8

From: Principal Deputy Director 

Subject: Guidance on trigger for an incidental take permit under section 10 (a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified.

The U.S. Fish and Wildlife Service (Service) Field and Regional personnel often provide critical technical assistance to private parties who may take actions affecting listed species, and who may decide to invest significant resources to prepare an incidental take permit application pursuant to ESA Section 10(a)(1)(B). It is vital that Service staff apply correct and consistent interpretations of ESA statutory and regulatory provisions.

It is also vital that Service staff recognize that whether to apply for a section 10(a)(1)(B) permit is a decision of the applicant. Service staff can and should advise non-federal parties on the law, our regulations and guidance, and the potential for take of listed species incidental to their activities, but it is not appropriate to use mandatory language (e.g., a permit is "required") in the course of that communication. The HCP process is applicant driven, and that includes the threshold determination of whether to develop an HCP and apply for a permit. That threshold determination ultimately rests with the project proponent. Project proponents can take Service input into account and proceed in a number of ways, based upon their own risk assessment. They may proceed (at their own risk) as planned without a permit, modify their project and proceed without a permit, or prepare and submit a permit application. The biological, legal, and economic risk assessment regarding whether to seek a permit belongs with the private party determining how to proceed¹.

After consultation with the Solicitor's Office, I am providing guidance on how one determines whether a project is likely to result in "take" of a listed species as it relates to habitat modification. Further, I am requiring that : 1) the Assistant Director – Ecological Services post this memorandum and the attached questionnaire on the Headquarters Endangered Species web page; and 2) that Service regional and field staff include direction to that web site

¹ However, once a project proponent has decided to apply for a permit, the structure and scope of the HCP and associated permit are subject to negotiation between the permittee and the Service.

www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf) when project proponents seek information about whether their action needs an incidental take permit under section 10 (a)(1)(B). By operating in a consistent manner, with clear standards, we can reduce conflict, minimize public frustration and increase government efficiency.

Simply put, as set out below, a section 10 (a)(1)(B) incidental take permit is only needed in situations where a non-federal project is likely to result in “take” of a listed species of fish or wildlife. That is, the requirement for an incidental take permit, as set forth in section 10 (a)(1)(B) of the ESA and its accompanying regulations, is only activated when non-Federal activities are likely to result in the take of listed wildlife.² As discussed in more detail below, habitat modification, in and of itself, does not necessarily constitute take. Chapter 3 of the Fish and Wildlife Service’s Habitat Conservation Plan Handbook (Handbook) sets out the pre-application process and plainly states that if take is not anticipated then an incidental take permit is not needed. Further, it explains that an incidental take permit is only needed if a non-federal party’s activity is “in an area where ESA-listed species are known to occur and where their activity or activities are reasonably certain to result in incidental take.” The Handbook clarifies that the standard for determining if activities are likely to result in incidental take is whether that take is “reasonably certain to occur.” In addition, the Handbook directs that the Service should avoid “processing applications submitted purely ‘as insurance’ when take of ESA –listed species is not anticipated.” (*See Handbook, Chapter 3 “Phase 1:Pre-Application”*)

An essential component of analysis needed to determine whether an incidental take permit (ITP) is needed is an understanding of what constitutes take under the ESA. The ESA defines “take” as: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. 16 U.S. C. 1542(b). The ESA’s take definition has been supplemented by the Service with regulatory definitions of the terms “harm” and “harass”.

The terms “harm” and “harass” have been redefined several times. In July 1975, the Service proposed “harass” to be defined as an act that “either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding, or sheltering. Significant environment modification or degradation which has such effects is included in the meaning of harass.” 40 F.R. 28712 (July 8, 1975). After notice and comment on the proposed definition, the Service reworked the definition of harass (as well as the definition of harm) and redefined the Service’s regulatory definition of “harass” as follows: “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding feeding or sheltering.” 50 C.F.R. §17.3.

² Listed plants are not included in the ESA’s prohibition on take of listed species.

The preamble to the final rule explicitly stated that the Service moved the concept of environmental modification or degradation from “harass” to the term “harm.” 40 F.R. 44412 (Sept. 26, 1975). Specifically, the preamble explained that the “concept of environmental damage being considered a ‘taking’ has been retained, but it now found in a new definition of ‘harm.’” In addition, the Service chose to modify the definition of “harass” by “restricting its application to acts or omissions which are done ‘intentionally or negligently.’” The preamble explained that this change – to have “harass” only apply to intentional or negligent actions – was made as otherwise under the proposed language, harass would have “applied to any action, regardless of intent or negligence.” Harass, therefore, is not a form of take permitted under section 10(a)(1)(B), which applies to taking “incidental to, but not the purpose of, the carrying out of an otherwise lawful activity.”

Take in the form of “harm” is particularly significant and relevant to section 10 ITPs because it can be manifested in the form of habitat modification, a common component of non-Federal activities. As discussed above, the term “harm” has also been redefined several times, always with the intention to clarify that “harm” relates to activities that are likely to result in the actual death or injury of listed species. In 1975, the Secretary issued a regulation that defined “harm” to mean an act that “actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include but are not limited to, breeding, feeding or sheltering,” and which include “significant environmental modification or degradation which has such effects.” This regulation’s preamble noted that “harm” was “expressly limited to those actions causing actual death or injury to a protected species of fish and/or wildlife. The actual consequences of such an action upon a listed species is paramount.” See, 40 F.R. 44,413 (Sept. 26, 1975).

In 1981, the Secretary established the current regulatory definition of “harm” because of concerns that the prior regulatory definition was being interpreted to bar habitat modification even when there was no resulting injury to species. The regulatory definition of “harm” was modified to read: “Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.” 50 C.F.R. §17.3. Some commenters on the rule asserted that habitat modification alone could be a “take” under section 9; the Service’s response in the preamble was that “in the opinion of the Service Congress expressed no such intent.” Further, the preamble explained that the use of the word “actually” clarifies that a “standard of actual adverse effects applies to section 9 taking” and that it was clear that “habitat modification or degradation, standing alone, is not a taking pursuant to section 9.” It went on to emphasize that “modification must be *significant*, must *significantly impair essential* behavior patterns, and must result in *actual injury*” (emphasis in original). Finally, the preamble discussed the specific choice to use the word “impair” rather than “disrupt” in the phrase “significantly impair essential behavior patterns” to “limit harm to situations where a behavioral pattern was adversely affected

and not simply disturbed on a temporary basis with no consequent injury to the protected species.” See, 46 FR 54,748 (Nov. 4, 1981).

The validity of the regulatory definition of “harm” as applied to habitat modification faced a facial challenge, which eventually reached the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities For a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407 (1995). The Supreme Court upheld the regulatory definition of “harm” and emphasized that while “harm” could result from habitat modification “every term in the regulation’s definition of ‘harm’ is subservient to the phrase ‘an act which actually kills or injures.’”

After the Supreme Court’s decision, the 9th Circuit also analyzed the definition of “harm” and agreed that harming a species may be indirectly caused by habitat modification but concluded that habitat modification in and of itself does not constitute harm unless it “actually kills or injures wildlife.” *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999). The *Bernal* court highlighted the Supreme Court’s emphasis that every term in the definition of harm is “subservient to the phrase ‘an act which actually kills or injures wildlife.’” In a later case, the 9th Circuit again tackled the definition of “harm” and held that, while the harm could be prospective, the “mere potential for harm, however, is insufficient.”³ *Arizona Cattle Growers’ Association v. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir.2001). The *Arizona Cattle Growers’* Court opined that without evidence that a take would likely occur, a finding of take based on habitat modification alone would impose conditions on otherwise lawful use of land and such an action by the Service would be arbitrary and capricious.

The law is clear, then, that in order to find that habitat modification constitutes a taking of listed species under the definition of “harm”, all aspects of the harm definition must be triggered. The questions that should be asked before a determination is made that an action involving habitat modification is likely to result in take are:

1. Is the modification of habitat significant?
2. If so, does that modification also significantly impair an essential behavior pattern of a listed species?
3. And, is the significant modification of the habitat, with a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife?

All three components of the definition are necessary to meet the regulatory definition of “harm” as a form of take through habitat modification under section 9, with the “actual killing or injury of wildlife” as the most significant component of the definition.

In summary, potential applicants should be advised that an ITP is only needed when an activity (or the results of the activity) is likely to result in the take of listed wildlife and that it is the

³ The impact on a species may be prospective but it still must hit all the components of the definition of “harm” and must be reasonably certain to occur.

potential applicant's decision whether to apply for an ITP. If an applicant seeks technical assistance from the Service, a careful examination of what constitutes take (using guidance from this document, the attached questionnaire, and the HCP Handbook) should be central to the discussion as to whether an ITP is needed. Further, it should be noted that habitat modification, in and of itself, does not constitute take unless all three components of the definition of "harm" are met.

Please ensure that each non-Federal party who seeks information about a section 10(a)(1)(B) permit is directed to this memorandum and questionnaire as posted on the Service's Endangered Species webpage (www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf).

**QUESTIONNAIRE FOR POTENTIAL APPLICANTS FOR INCIDENTAL
TAKE AUTHORIZATION UNDER SECTION 10(a)(1)(B) of the
ENDANGERED SPECIES ACT**

Respond to these questions to help decide if you need an Endangered Species Act (ESA) permit:

1. Keeping in mind that the ESA does not apply to take of plants incidental to otherwise lawful activities, are there ESA listed species present in the area where your activity will occur or will they be present at some point in the duration of your activity?

Yes? Then proceed to question 2.

No? Then you do not need a permit.

2. Is it likely that any of these listed species will be exposed to your activities (or the results of your activity) during any of the various phases of your activity (construction, operation, maintenance, etc.)?

Yes? Then proceed to question 3.

No? Then you do not need a permit.

Review questions 3, 4, 5, and 6 to determine if the exposure from your activity to the listed species constitutes prohibited “take” under the ESA. A permit under section 10 (a)(1)(B) of the ESA does not cover purposeful take. As you review the questions below remember that only take that is “incidental” to an otherwise lawful action can be covered under an incidental take permit.

3. If your activity overlaps with the listed species at some point of its duration, will that exposure likely result in any of the following actions to the listed species: pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct? Keep in mind that some of these definitions most likely only apply to purposeful take (e.g. hunting, shooting).

Yes to incidental take? Then you likely need a permit.

No? Then proceed to question 4.

4. Is your activity likely to harass a listed species? To answer this question ask whether your activity, through an intentional or negligent act or omission, is likely to annoy the listed 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.)?

Yes? This take is not permitted as it is not “incidental.”

No? Then proceed to question 5.

5. Is your activity likely to result in an act that actually injures or kills a listed species?

Yes? Then you likely need a permit.

No? Then proceed to question 6.

6. Is your activity likely to harm a listed species through habitat modification? To answer this question, ask:
- Is my activity likely to result in **significant** habitat modification or degradation?
 - Will that modification or degradation **significantly impair** essential behavior patterns, including breeding, feeding, or sheltering?
 - As a result of a. and b. above, is it likely there will be **an actual injury or death** to a listed species?

Yes to all three questions? Then you can anticipate take through habitat modification and likely will need a permit.

No? Then you have not satisfied the definition of “harm” through habitat modification.

Ultimately you, as a potential applicant, must decide whether it is reasonable to conclude that the proposed action is likely to result in the take of a listed species. If such an outcome is unlikely, you do not need to seek a section 10 permit.

Guidance on Determining Need to ITP under ESA Section 10(a)(1)(B)

