Illinois Department of Transportation
2300 South Dirksen Parkway / Springfield, Illinois / 62764

BDE PROCEDURE MEMORANDUM

NUMBER: 31-03

SUBJECT: Incidental Taking Authorization Procedures

DATE: March 19, 2003

This memorandum supersedes BDE Procedures Memorandum 31-02, dated September 23, 2002, and supplements the information in Section 26-9.06 of the BDE Manual. This memorandum includes changes to clarify the point in the project development and implementation process at which an incidental taking authorization must be in place on undertakings that will involve an incidental taking. The procedures described in this memorandum will be incorporated in the BDE Manual in a future update.

Background

Section 11 of the Illinois Endangered Species Protection Act (520 ILCS 10/11) states that where a State or local agency evaluates its actions through the Endangered Species Act consultation process with the Illinois Department of Natural Resources (IDNR), the agency shall be deemed to have complied with its obligations under the Act, provided the agency action shall not result in the killing or injuring of any Illinois-listed animal species or provided that authorization for taking a listed species has been issued in accordance with Sections 4, 5, or 5.5 of the Act. Based on this language, the endangered species consultation process can be used to establish compliance with the Act for all impacts of agency actions on Illinois-listed plant species. The consultation process also can establish compliance for effects of agency actions on Illinois-listed animal species, provided the action will not result in killing or injuring of any of the species. However, if the agency action will result in killing or injuring of a listed animal species, the only way compliance with the Act can be established for that aspect of the action is by obtaining an authorization for "taking". (Section 2 of the Act defines "take" to mean, in reference to animals, "...to harm, hunt, shoot, pursue, lure, wound, kill, destroy, harass, gig, spear, ensnare, trap, capture, collect, or to attempt to engage in such conduct." This definition covers killing or injuring of listed animal species.)

Section 5.5 of the Act sets forth "incidental taking" provisions whereby IDNR may authorize a "taking" that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. IDNR has promulgated detailed procedures for the incidental taking authorization process in Administrative Rules. (Refer to BDE Information Memorandum 01-35 for information regarding Section 5.5 of the Act and the Administrative Rules for the incidental taking

authorization process, published in the Illinois Register August 3, 2001.) Where an IDOT project will result in killing or injuring of an Illinois-listed animal species, the incidental taking authorization process will be the means of establishing compliance with the Act for that impact to the species.

Applicability

The procedures in this memorandum are applicable to all State highway projects.

Procedures

As discussed in the "Background" section, the requirements for obtaining an incidental taking authorization will apply to any project that will result in killing or injuring of Illinois-listed animal species. The need for requesting an incidental taking authorization will be based on a thorough evaluation of the likelihood that the project will result in the killing or injuring of any Illinois-listed animal species. This evaluation will consider available data and/or the results of field studies regarding the actual occurrence of Illinois-listed animal species (not just the existence of suitable habitat) within the specific area that will be affected by the project. It will also consider the potential for the undertaking to actually impact the species such that they may be killed or injured. IDNR staff responsible for administering the incidental taking authorization requirements has advised that they will recommend obtaining an incidental taking authorization only if there is a high likelihood, or near certainty that listed animal species will be killed or injured by an agency action. (They have clarified that they have no authority to require an agency to request an incidental taking authorization and can only make recommendations. However, they also pointed out that if an agency's action results in killing or injuring of an Illinois-listed animal species and does not have an incidental taking authorization, the agency could be subject to the penalty provisions in Section 9 of the Endangered Species Protection Act.)

Recommendations for obtaining an incidental taking authorization may be included in IDNR's coordination responses (e.g., for a Biological Resource Review, Agency Action Report, or Detailed Action Report). Another possibility is that the district and/or BDE may determine that an incidental taking authorization is needed, based on the results of field studies or other available information. If an incidental taking authorization is determined to be necessary, the application process should be initiated as soon as possible after the need for the authorization is confirmed. The Endangered Species Protection Act and the implementing rules on incidental taking provide that the authorization for incidental taking must be in place before a taking occurs. To ensure appropriate compliance with this requirement on highway projects, the incidental taking authorization must be in place prior to awarding the contract for the work that will cause the incidental taking, unless the potential incidental taking issue is not identified until after such contract has been awarded. If the

potential incidental taking is identified after award, the authorization still must be in place before proceeding with the work that would result in a taking. It is recommended that coordination with IDNR for a potential incidental taking be initiated as early as practical to afford maximum flexibility for considering and accommodating alternatives to avoid, minimize, and mitigate the taking. The avoidance alternatives and minimization/mitigation measures will ultimately be reflected in the conservation plan, which will provide the information IDNR will use in making its decision on approval or denial of the authorization request. Although there currently is no requirement for having the incidental taking authorization prior to design approval, coordination with IDNR on the incidental taking issues should occur prior to that point to ensure that project plans reflect decisions (e.g., regarding minimization and mitigation measures for the proposed incidental taking) that are acceptable to IDNR for purposes of approving the incidental taking authorization. Failure to do so may result in potentially costly project/plan changes and delays later in project development or implementation (e.g., if IDNR does not accept the minimization and mitigation measures as planned or stipulates additional measures as a condition for approving the incidental taking authorization).

When the need for an incidental taking authorization is identified during Phase I, the public notice procedures required for the incidental taking authorization should be coordinated to coincide with other public involvement activities for the project to the extent practical.

If the district receives a recommendation from IDNR or BDE to obtain an incidental taking authorization and subsequently determines that the incidental taking authorization will not be pursued (e.g., because changes in the project have eliminated the need), the district shall provide written notification to the BDE. The notification shall be provided as soon as possible after the determination is made and shall include an explanation of the reason(s) for not seeking the incidental taking authorization.

When authorization for incidental taking is determined necessary, the following procedures will apply, unless the IDNR has approved special "programmatic" procedures for the category of action and species involved. In such case, the approved alternate procedures will govern.

1. The district will be responsible for preparing the required Conservation Plan* and newspaper notice for compliance with the incidental taking

* *The State implementing rules for the incidental taking requirements provide that a Habitat Conservation Plan approved by the U.S. Fish and Wildlife Service pursuant to Section 10 of the Endangered Species Act of 1973 may be submitted in lieu of a Conservation Plan as otherwise required under the State rules. The rules also provide that an authorization to take an endangered or threatened species under the terms of a biological opinion issued by the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Protection Act of 1973 may be submitted in lieu of a Conservation Plan.*

authorization rules (17 Ill. Adm. Code 1080, distributed via BDE Information Memorandum 01-35). BDE will provide information and technical assistance, as needed, to help the district in preparing the plan and notice. (This may include, for example, biological data on the affected species, recommendations for mitigation measures, data and information regarding the effect of the proposed taking on the likelihood of the survival of the listed species, and information identifying participants that will be involved in implementing portions of the Conservation Plan).

Conservation Plan – The Conservation Plan must contain the following, at a minimum:

a. A description of the impact likely to result from the proposed taking of the listed animal species that would be covered by the authorization, including, but not limited to:
   (1) Legal description, if available, or detailed description including street address and map of the area to be affected by the proposed action and information indicating the ownership or control of the affected property;
   (2) Biological data on the affected species;
   (3) Description of the activities that will result in taking (killing or injuring) of the endangered or threatened animal species; and
   (4) Explanation of the anticipated adverse effects on the listed species.
b. Measures that will be taken to minimize and mitigate the impact on the listed animal species and the funding that will be available to undertake those measures, including, but not limited to:
   (1) Plans to minimize the area affected by the proposed action, the estimated number of individuals of the endangered or threatened species that will be taken, and the amount of habitat affected;
   (2) Plans for management of the area affected by the proposed action that will enable continued use of the area by endangered or threatened species;
   (3) Description of all measures to be implemented to minimize or mitigate the effects of the proposed action on the endangered or threatened species;
   (4) Plans for monitoring the effects of measures implemented to minimize or mitigate the effects of the proposed action on the endangered or threatened species;
   (5) Adaptive management practices that will be used to deal with changed or unforeseen circumstances that affect the effectiveness of measures instituted to minimize or mitigate the effects of the proposed action on the endangered or threatened species; and
   (6) Verification that adequate funding exists to support and implement all mitigation activities described in the Conservation Plan.

c. A description of alternative actions considered that would not result in take of an Illinois-listed animal species and the reasons that each of those alternatives was not selected. A "no action" alternative shall be included in this description of alternatives.
d. Data and information to indicate that the proposed taking will not reduce the likelihood of the survival of the endangered or threatened animal species in the wild within the State of Illinois, the biotic community of which the species is a part, or the habitat essential to the species' existence in Illinois.
e. An implementing agreement, which shall include, but not be limited to:
   (1) The names and signatures of all participants in the execution of the Conservation Plan;
   (2) The obligations and responsibilities of each of the identified participants with schedules and deadlines for completion of activities included in the Conservation Plan and a schedule for preparation of progress reports to be provided to the IDNR;
   (3) Certification that each participant in the execution of the Conservation Plan has the legal authority to carry out their respective obligations and responsibilities under the Conservation Plan;
   (4) Assurance of compliance with all other federal, State and local regulations pertinent to the proposed action and to execution of the Conservation Plan; and
   (5) Copies of any final federal authorizations already issued for the proposed taking, if any.

<u>Newspaper Notice</u> – The notice for publication in the newspaper as described later in these procedures, must include the following, at a minimum:

a. The name of the district contact person and the district office mailing address;
b. A map or description that clearly shows or describes the precise location and boundaries of both the area to be affected by the proposed project and any areas to be affected by provisions of the Conservation Plan and is sufficient to enable local residents to readily identify the subject areas. It must include towns, bodies of water, local landmarks, or any other information that would identify the subject areas. If a map is used, it shall indicate the north direction;
c. A summary of the incidental taking for which authorization is being requested;
d. A summary of the measures that will be instituted to minimize and mitigate the effects of the proposed incidental taking;
e. The location where a copy of the Conservation Plan is available for inspection;
f. The street and e-mail address of the IDNR office to which comments on the Conservation Plan may be submitted; and

g. The closing date for receipt of written comments on the Conservation Plan. (The closing date must allow at least 30 days from the last date the notice will be published in the newspaper as discussed in 5, below.)

2. After the district, in consultation with BDE, as necessary, has prepared the Conservation Plan and proposed newspaper notice, it shall submit two (2) copies of each to BDE.

3. BDE will complete a final review of the Conservation Plan and notice. After resolving any comments with the district, BDE will forward the Conservation Plan and notice to IDNR.

4. Within 30 days of receipt of the Conservation Plan and notice, IDNR will either respond that the Conservation Plan is complete and the newspaper notice is satisfactory or will provide an indication of any deficiencies identified in the Conservation Plan or notice.

5. If IDNR identifies deficiencies in the Conservation Plan or notice, BDE will coordinate with the district and IDNR as necessary to resolve the deficiencies. When IDNR advises that the Conservation Plan is complete and the notice is satisfactory, the district shall proceed with publication of the notice. It shall be placed in a newspaper of general circulation in the locality of the proposed action at least once a week for three (3) consecutive weeks. At least fourteen (14) days must elapse between the first and last publication of the notice. Concurrent with the first publication in a local newspaper, the notice also shall be published one time in the official State newspaper. Prior to, or concurrent with, publication of the first newspaper notice, the district shall make one or more copies of the complete Conservation Plan available for review at the nearest public library in the county or counties in which the proposed action will occur. The district also shall provide a copy of the complete Conservation Plan to the Executive Director of the Illinois Endangered Species Protection Board at IDNR headquarters.

6. The Incidental Taking rules in 17 Ill. Adm. Code 1080.30 provide that comments on the Conservation Plan may be submitted to IDNR for up to thirty (30) days following the last publication of the newspaper notice. The rules also indicate that "...IDNR shall, upon receipt of written comments, transmit a copy of the comments to the applicant." As comments submitted on the Conservation Plan are received from IDNR, BDE will forward them to the district. The district, in consultation with BDE, will prepare a written summary in accordance with the requirements in the Incidental Taking rules. The summary will include a list of all persons or organizations making comments, a list of the criticisms, suggestions, and issues raised, and an analysis of each comment, including a description of any revisions to the Conservation Plan made in response to public comment. The written summary of comments should be completed as quickly as possible in order that it

can be submitted to the IDNR Office of Resource Conservation within ten (10) days after the close of the public comment period, as required by Section 1080.30 of the Incidental Taking rules.

7. The IDNR Office of Resource Conservation must complete its review of the Conservation Plan and issue its decision on the incidental taking authorization request within 120 days after the date of the first publication of the notice in the newspaper. IDNR may authorize the incidental taking if it finds that the taking will meet all requirements as stipulated in 17 Ill. Adm. Code 1080.40(a). If IDNR finds that the Conservation Plan does not meet all of the stipulated requirements, it may require additional terms and conditions to assure that the requirements will be met. BDE will coordinate with the district and IDNR as necessary to resolve any identified deficiencies in the Conservation Plan and to respond to any additional terms and conditions proposed by IDNR. Upon receipt of the written notice from IDNR concerning its decision on the incidental taking application, BDE will forward the notice to the district. Work that would cause the killing or injuring of an Illinois-listed animal species shall not be commenced until IDNR has issued an incidental taking authorization for the work.

BDE will be available to provide technical assistance to the district, as necessary, in implementing the approved Conservation Plan and any additional terms and conditions required.

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