

*Comment:* Incidental take permits imply acceptance of the killing of threatened and endangered species. Granting exceptions to the ESA undermines the intent of the Act. Protective regulations for threatened species impacted by non-Federal entities should be issued under section 4(d) of the Act instead of through section 10 permits. If section 10 permits are allowed, then they should not be used as a means to avoid the required use of turtle excluder devices in shrimp fisheries.

*Response:* Section 10(a)(1)(B) of the ESA explicitly provides that the Secretary may permit any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. The intent of this provision of the ESA is to allow non-Federal entities to carry out an activity that may incidentally take endangered species without jeopardizing the species, thereby extending the same allowance for Federal actions to non-Federal actions. Section 4(d) of the ESA allows NMFS to apply this provision and the takings prohibition of section 9, to threatened as well as endangered species.

As a Federal action that may affect listed species, the proposed issuance of a section 10 incidental take permit must be accompanied by a section 7 consultation. Through the consultation process, NMFS must ensure that the activity conducted under the permit, including the conservation plan, is not likely to jeopardize the listed species. This is the same substantive requirement applicable to regulations.

*Comment:* The section 10 incidental take permit program should require adequate Federal oversight of permits and conditions. NMFS must deny general permits to states unless there are adequate assurances that state applicants have the requisite legal authority, resources, and commitment to administer a statewide general permit under the required conservation plan. A conservation plan should provide for the registration of all vessels covered by the permit, observers on a substantial portion of the vessels, onshore and aerial observations, and procedures to halt the activity if conditions are being violated. In addition, applicants must demonstrate that they have sufficient resources and interest to provide adequate monitoring and enforcement of permit conditions, including an effective turtle stranding network to monitor mortalities.

*Response:* Both section 10 of the ESA and NMFS regulations (50 CFR 222.22(b)(5)) require permit applicants

to include a detailed conservation plan that specifies (among other things) the steps that will be taken to monitor, minimize, and mitigate the activity's impacts on listed species. The conservation plan must also detail the funding available to implement these measures. In addition, one of the criteria used to determine issuance is the availability of effective monitoring techniques. Conservation plans for incidental take permits for commercial fisheries that incidentally take sea turtles may include requirements such as observer coverage, aerial surveys, and a monitoring network to document turtle strandings as necessary, depending on the activity involved.

If the permit holder fails to comply with the conditions of the permit or with any applicable laws or regulations governing the conduct of the permitted activity, then NMFS may suspend or revoke the permit pursuant to 50 CFR 227.27. In a state that has an authorized general section 10 permit, those vessels that wish to conduct an activity covered by the permit must apply to NMFS for a certificate of inclusion. Certificates of inclusion may also be suspended or revoked if the certificate holder fails to comply with the applicable terms of the permit.

*Comment:* Adequate procedural safeguards should be added to ensure that interested parties receive timely notice and meaningful opportunity to comment on applications for incidental take permits.

*Response:* Under existing NMFS regulations (50 CFR 222.24) and guidelines, a notice of receipt of a completed permit application is published in the **Federal Register** with a 30-day comment period. The permit application is then distributed to interested parties for review and comment. All comments received are reviewed and considered prior to final agency action on the permit application. In addition, any commenter may request a hearing. Specific questions raised by reviewers are directed anonymously to the applicant for reply. If the issuance of the permit may significantly affect the human environment, then an environmental assessment is prepared, as required by the National Environmental Policy Act. Because issuance of an incidental take permit is a Federal action that may affect the listed species, consultation pursuant to section 7 is required. The permit application may be altered, denied or issued based on the public comments and environmental compliance reviews. NMFS will make every effort to ensure that comments are adequately responded to in the applicable section 7

consultations and environmental assessments.

*Comment:* NMFS recently issued a joint policy with the U.S. Fish and Wildlife Service (USFWS) regarding Habitat Conservation Plans (HCPs) under section 10 of the ESA. This policy should not apply to section 10 permits for sea turtles because the conservation plans do not involve private ownership, but address the taking of public resources from public trust waters.

*Response:* NMFS agrees. The "No Surprises" policy states that the purpose of the policy is to provide assurances to non-Federal landowners participating in Habitat Conservation Planning that "no additional land restrictions or financial compensation will be required from an HCP permittee for species adequately covered by a properly functioning HCP in light of unforeseen or extraordinary circumstances."

*Comment:* Permits should be issued for periods not to exceed 1 year because conditions may change altering the necessity for exemptions and modifications to existing ESA rules governing turtles.

*Response:* NMFS agrees that circumstances may change that alter the conditions of the activity or the status of the species, thereby requiring alterations to the terms of the permit. However, NMFS regulations set neither a minimum nor maximum time limit to incidental take permits. Regulations at 50 CFR 222.22(e) state that the duration of the permit is related to the duration of the proposed activities, as well as the possible positive and negative effects associated with issuing a permit of the proposed duration. Rather than requiring annual renewals of all section 10 permits, NMFS may require either periodic renewals or reviews and, if needed, require applicable modifications. The timing of that review will depend on the nature of the permitted activity, and will be set as a condition of the permit. Additionally, permit holders will be required to submit reports on the implementation of and activities conducted under the conservation plan.

#### **Final Regulations and Changes From the Proposed Rule**

The purpose of this final rule is to amend the existing regulations to allow NMFS to authorize incidental take permits for threatened, as well as endangered, species of sea turtles. The final regulations are identical to those published in the proposed rule. NMFS has determined that no changes to the text of the regulations are necessary.

The general permit procedures in 50 CFR part 220, as well as the endangered