



East
FOUNDATION

Management BULLETIN / NO. 11

We promote the advancement of land stewardship through ranching, science, and education.

Photo: Fin and Fur Films

Permitting Approaches for Establishing Endangered Species Act Assurances on Private Lands

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Note for readers: This Management Bulletin is part two of a series of six bulletins intended to share East Foundation's research and its experiences as a private landowner interacting with the challenges and opportunities of managing threatened, endangered, and other at-risk species on private working lands. This series is meant to provide information relevant to decision making by land stewards. Each bulletin in the series will be released in sequence and is available through East Foundation's website at www.eastfoundation.net/media.

As part of our mission to promote the advancement of land stewardship, the East Foundation plans to reintroduce ocelots to our San Antonio Viejo Ranch – a private working cattle ranch in South Texas that currently has no ocelots but is within the historic range of the endangered cat. Ocelot conservation and the operation of a working ranch have already proven compatible on East Foundation's El Sauz Ranch, which is home to some of the last remaining ocelots in the United States (Lombardi et al., 2022).

East Foundation developed a [Programmatic Safe Harbor Agreement](#) for ocelot reintroduction with the U.S. Fish and Wildlife Service (USFWS) to avoid exposing the San Antonio Viejo Ranch – or any nearby private properties – to new Endangered Species Act (ESA) prohibitions or regulations on land use following ocelot reintroduction. This Agreement and an associated “enhancement of survival” permit assure East Foundation and our neighbors of the continued freedom to operate our working lands without ESA regulatory surprises for reintroduced ocelots.

Here, we provide more information about Safe Harbor Agreements and other permitting programs that provide regulatory certainty by authorizing incidental take of covered species and assuring permittees that they will have no additional conservation requirements nor land use restrictions for the species. Some background on the need for these types of agreements and how landowners are affected by the ESA can be found in a companion Bulletin [here](#).



East Foundation developed a programmatic Safe Harbor Agreement to reintroduce endangered ocelots to its San Antonio Viejo ranch in South Texas while protecting ourselves and nearby landowners from any regulatory surprises regarding the reintroduced cats.

IMPROVING SPECIES STATUS WITH CONSERVATION BENEFIT AGREEMENTS

Conservation Benefit Agreements (U.S. Fish and Wildlife Service 2024) between landowners and the USFWS are a

streamlined agreement that combines and replaces Safe Harbor Agreements (SHAs) and Candidate Conservation Agreements with Assurances (CCAA). In Conservation Benefit Agreements, private landowners earn regulatory assurances when they voluntarily agree to implement actions to increase the abundance of a covered species or its habitat relative to baseline conditions present on their land at the agreement's initiation. Habitat management practices are typically the basis of Conservation Benefit Agreements, but reintroductions, research that supports conservation planning, or other agreed upon actions are also options for landowners.



Photo courtesy of Texas Parks and Wildlife Department.

In 2007, a Boy Scouts group created a Safe Harbor Agreement to manage habitat for endangered Houston toads on the group's private camp property in east central Texas and to obtain regulatory assurances regarding Endangered Species Act liabilities for the amphibian.

In exchange for performing the conservation activities included in these agreements, private landowners receive an "enhancement of survival" permit for the covered species from USFWS. **The permit authorizes incidental take of the species on participating lands and assures the landowner that USFWS will not impose on them additional conservation requirements nor land use restrictions for the covered species.** The key standard for the USFWS to enter into a conservation benefit agreement with a landowner is that the benefits of the proposed conservation activities must outweigh the negative impacts of potential incidental take, meaning the agreement results in a 'net conservation benefit' to the covered species. Landowners and USFWS must decide whether the proposed conservation actions and assurances are acceptable to both. The development of these agreements, therefore, can be a process of negotiation between both parties.

Historically, the distinction between Safe Harbor Agreements (U.S. Fish and Wildlife Service 2017b) and Candidate Conservation Agreements with Assurances (U.S. Fish and Wildlife Service 2017a) was that SHAs supported the recovery of species already listed under

the ESA, while CCAAs were for species at-risk but not yet listed, with the objective of avoiding listing at all (Schuler et al. 2020). At-risk but unlisted species could include those that are protected at the state level but not yet the federal level, have been petitioned for ESA listing, or have been designated by USFWS as "candidates" for listing under the ESA. Due to the similarity of the SHA and CCAA programs, USFWS in spring 2024 wrapped both programs into the so-called "[Conservation Benefit Agreement](#)" program in which private landowners implement conservation actions to benefit listed or unlisted species on their lands in exchange for regulatory assurances for those species. While Conservation Benefit Agreements often cover only one species, they can also include conservation activities and regulatory assurances for multiple species.

CONSERVATION BENEFIT AGREEMENT DETAILS

A single landowner can develop a Conservation Benefit Agreement for only their lands, or an agreement can be made "programmatically" with a larger geography that can include multiple landowners. Programmatic agreements have an administrator that facilitates their development. Administrators of programmatic agreements invite multiple landowners to implement the conservation actions identified in the agreement (with support of the administrator as needed) and issue them "Certificates of Inclusion" to the agreement and associated permit. The participating landowners receive regulatory assurances and enhancement of survival permit coverage in exchange for their participation. While participants must coordinate with the program administrator, their participation can be kept anonymous from both the federal government and public. Finally, in Conservation Benefit Agreements, even landowners who do not participate in the agreement but are adjacent to or near to a participating property can be covered by the agreement because their lands may become occupied by a covered species due to conservation activities on nearby lands.

For the recently developed programmatic Safe Harbor Agreement for ocelot reintroduction in South Texas, East Foundation, a private landowner, authored the agreement, holds the enhancement of survival permit, and serves as the administrator of the Safe Harbor. We negotiated with USFWS to develop the terms, requirements, and assurances in the agreement. Because we are landowners and ranch operators, we developed the agreement to protect our risks and those of other similar ranch owners.

Though our participation as the administrator is not confidential, we are able to provide assurances of confidentiality to additional participating landowners who desire it. These participating landowners will allow

the reintroduced ocelot population to be present on their land and allow some ocelot monitoring by East Foundation, but landowners are not required to change their normal activities. East Foundation also negotiated with USFWS to protect non-participating landowners from new liabilities or restrictions if they are located within the area that the reintroduced ocelot population may occupy.

Conservation Benefit Agreements and enhancement of survival permits are not permanent. Landowners and USFWS agree on a defined length of time, and landowners can withdraw early or let the agreement and permit expire without extending. When an agreement is ending or is terminated early, the landowner can cease conducting the conservation activities and allow the number of listed animals or amount of habitat to return to baseline quantities defined in the agreement (even if zero) without any regulatory concern; there is no requirement to maintain anything but the baseline conditions (Kreye et al. 2015). Before their enhancement of survival permit expires, a landowner can also request that USFWS remove animals from their property in order to immediately return to the baseline conditions and liabilities present before the agreement.



Photo courtesy of Texas Parks and Wildlife Department

To support conservation on private farmlands while providing landowners with regulatory certainty, the Texas Parks and Wildlife Department made a Programmatic Candidate Conservation Agreement with Assurances for the rare Texas kangaroo rat in 2022. When the species ultimately became listed as federally endangered in 2023, landowners participating in the program were protected from Endangered Species Act liabilities for the small mammal.

Each Conservation Benefit Agreement is unique; there are not standard terms, and the length and conditions can vary based on landowner objectives and species needs. East Foundation negotiated the ocelot reintroduction SHA to have an initial term of 30 years, with the opportunity to extend. The baseline condition was set at zero ocelots because no ocelots currently occupy the reintroduction area.

MAKING LAND USE AND SPECIES CONSERVATION COMPATIBLE WITH HABITAT CONSERVATION PLANS

Under a Habitat Conservation Plan (HCP), a private landowner whose lands are occupied by threatened, endangered, or other at-risk but unlisted species address their ESA regulatory risks by proactively identifying ways to minimize incidental take of covered species due to their activities. For example, a landowner may agree to conduct certain land use activities at a distance from dens or nests of species covered in the HCP. An HCP also establishes mitigation measures, such as restoring or protecting other habitat, that a landowner will implement or otherwise support (e.g., financially) in the case of unavoidable negative impacts to the covered species on participating lands (U.S. Fish and Wildlife Service 2021).

In exchange for implementing an HCP over a period agreed upon with USFWS, landowners receive an “incidental take” permit from USFWS, similar to the enhancement of survival permit issued under Conservation Benefit Agreements. This permit allows the landowner to incidentally take the covered species as a consequence of their activities, so long as they are properly implementing the HCP. The permit also assures the landowner that they will not be subject to additional conservation requirements nor land use restrictions for the covered species beyond those agreed upon.

The ultimate goal of HCPs is for landowners to contribute to long-term sustainability of endangered species and their habitat. In exchange, the landowner obtains regulatory assurances for their land use activities that might impact the species. This contrasts with a Conservation Benefit Agreement, where landowners implement actions to increase the abundance of covered species on their lands and are then assured that they have no additional obligations for the covered species.

As with Conservation Benefit Agreements, HCPs can be developed for single landowners or can be programmatic. Though HCPs are perhaps best known for being used by developers seeking incidental take permits for projects in listed species habitat, HCPs can also be used by working landowners who harbor listed species – or unlisted, but at-risk species – and wish to address their ESA liability. Finally, HCPs are not limited to a single species; they are often comprehensive, covering multiple species.

NAVIGATING THE PERMITTING PROCESS

These permitting assurance programs are valuable tools allowing private landowners to establish certainty on their liabilities under the ESA. However, the process of negotiating the agreement and obtaining a permit for one’s property is a barrier to participation.

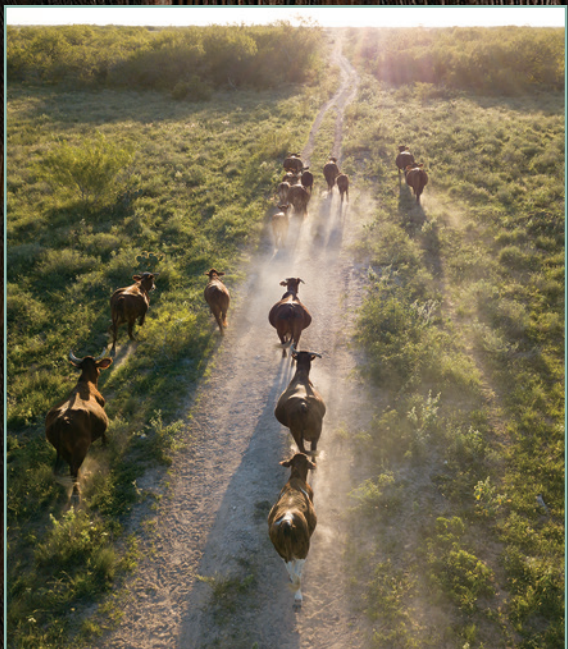
PERMIT-BASED LANDOWNER ASSURANCE TOOLS

| Program Name | Permit Type | Goal | Implementing Federal Agency | Agreement Sections | Examples |
|---|-------------------------|---|--------------------------------|---|---|
| Conservation Benefit Agreement (formerly called Safe Harbor Agreement or SHA) | Enhancement of Survival | Increase abundance of listed species and/or their habitat by introducing new practices | U.S. Fish and Wildlife Service | <ul style="list-style-type: none"> Conservation measures Covered species Goals/objectives Baseline conditions Net conservation benefit Monitoring Neighboring property owners Return to baseline Additional actions | <ul style="list-style-type: none"> Houston toad SHA by Boy Scouts of America Ocelot programmatic SHA by the East Foundation |
| Conservation Benefit Agreement (formerly called Candidate Conservation Agreement with Assurances or CCAA) | Enhancement of Survival | Increase abundance of unlisted but at-risk species and/or their habitat by introducing new practices | U.S. Fish and Wildlife Service | <ul style="list-style-type: none"> Conservation measures Covered species Goals/objectives Baseline conditions Net conservation benefit Monitoring Neighboring property owners Return to baseline Additional actions | <ul style="list-style-type: none"> Texas Kangaroo rat programmatic CCAA by Texas Parks and Wildlife Department for private agricultural lands Monarch butterfly nationwide programmatic CCAA by University of Illinois at Chicago for energy and transportation lands |
| Habitat Conservation Plan (HCP) | Incidental take | Sustain abundance of listed or unlisted but at-risk species and/or their habitat by making land use compatible with species and mitigating for impacts to species | U.S. Fish and Wildlife Service | <ul style="list-style-type: none"> Project/land use description Covered species Goals/objectives Anticipated take Conservation program Conservation timing Permit duration Monitoring Funding needs and sources Alternative actions Additional actions | <ul style="list-style-type: none"> Multi-species HCP in Arizona by San Rafael Cattle Ranch Multi-species programmatic HCP for Malpai Borderlands in Arizona and New Mexico |





Conservation activities and related monitoring for threatened, endangered, or other at-risk species can earn landowners permits that protect their operations from Endangered Species Act regulations protecting those species.



First, the Conservation Benefit Agreement or Habitat Conservation Plan proposed language must be developed by the landowner (or a program administrator for a programmatic agreement), with the aid of USFWS or another conservation partner as needed. The proposal must provide information about the covered species and its baseline condition on the proposed land plus the goals, objectives, and methods for conservation actions and monitoring, and more. Engaging USFWS during the writing process will help in meeting agency standards for permit issuance. The Service can also aid in identifying other species to include in the proposal so that the landowner can manage for and have ESA assurances for multiple species, further reducing their regulatory risk.

Once the proposal is finalized, the landowner or programmatic administrator submits it to USFWS and concurrently applies online for either an [enhancement of survival permit](#) (Conservation Benefit Agreement) or an [incidental take permit](#) (Habitat Conservation Plan) from USFWS. Notice of submitted applications are posted in the Federal Register along with the applicant's name – whether a single landowner or a program administrator. This posting also opens a public comment period of 30 to 90 days (depending on the scale of the proposal).

Following public comment, USFWS reviews the agreement proposal and permit application plus any input received during public comment. It also conducts impact analyses under the National Environmental Policy Act and Section 7 of the ESA. Following these reviews, the applicant's proposal can be edited as necessary to meet permit issuance standards. The standard for Conservation Benefit Agreements is that the conservation activities minus the authorized incidental take will result in a net conservation benefit to the species. For a Habitat Conservation Plan, incidental take must be minimized and mitigated. For proposals that meet these standards, the appropriate permit must be issued.

Once the relevant permit is issued, landowners move forward under the terms of the agreement with the accompaniment of ESA assurances for the covered species. Programmatic agreement administrators holding permits can extend assurances to other landowners by issuing them Certificates of Inclusion to the permit. As conservation actions proceed, the permit holder is required to complete regular monitoring and reporting to USFWS. Because participation in one of these programs does not come with any financial incentives or assistance from USFWS, landowners or programmatic administrators must provide or obtain funding for conservation activities. An upcoming bulletin in this series will provide information on sources of funding for conservation on private lands.

CHALLENGES WITH PERMITTING APPROACHES

As first-time writers of a Safe Harbor Agreement, we spent several months collaborating with partner organizations and USFWS to develop a programmatic SHA for ocelot reintroduction. (Since then, Conservation Benefit Agreements have replaced SHAs to provide a streamlined format aimed at making agreement writing more straightforward). Then, procedural steps necessary for approval – including permit application, public comment, and agency analyses and documentation – extended the process by additional months.

Certainly, individual landowners can develop and propose their own Conservation Benefit Agreements or Habitat Conservation Plans for their lands and then navigate the procedural requirements. Alternately, landowner coalitions, agencies, academic institutions, industry representatives, or conservation organizations can develop programmatic Conservation Benefit Agreements or Habitat Conservation Plans with USFWS on behalf of partnered landowners, navigate the application and approval processes, and then enroll multiple landowners into finalized and approved programs via Certificates of Inclusion. This is likely the most efficient – and impactful – route for utilizing these programs for the benefit of both species and landowners.

As an alternative to the permitting programs described here, private landowners can also utilize non-permitting assurance programs that have fewer procedural requirements. We will discuss these approaches in the next Management Bulletin.

OTHER MANAGEMENT BULLETINS IN THIS SERIES:

- Endangered Species Act Information for Private Landowners – An Introduction
- Non-permitting Approaches for Landowners to Obtain Endangered Species Act Assurances
- Economic Incentives for Conservation of At-risk Species on Private Lands
- Confidentiality Matters for At-risk Species on Private Lands
- Endangered Plant Regulations and Opportunities for Private Landowners

KEY POINTS

Private landowners can earn Endangered Species Act regulatory assurances by acquiring certain permits from the U.S. Fish and Wildlife Service. These permits authorize incidental take of covered species and establish that permittees will have no additional conservation requirements or land use restrictions for the covered species.

Landowners can obtain an enhancement of survival permit by initiating a Conservation Benefit Agreement with the U.S. Fish and Wildlife Service and implementing practices to benefit the conservation of a threatened, endangered, or other unlisted but at-risk species on their lands.

Landowners can obtain an incidental take permit by creating a Habitat Conservation Plan that details how to sustain a listed or unlisted but at-risk species' abundance or habitat through minimization and mitigation of incidental take.

Agencies, universities, organizations, industry representatives, or other partners can develop programmatic (multi-landowner) Conservation Benefit Agreements or Habitat Conservation Plans and enroll landowners in permit coverage via Certificates of Inclusion.



Photo: Fin and Fur Films

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Ranching



Science



Education