



U.S. Department of Justice  
Office of the Solicitor General

---

Washington, D.C. 20530

January 3, 2018

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543

Re: People for the Ethical Treatment of Property Owners v. United States Fish and Wildlife Service, No. 17-465

Dear Mr. Harris:

This petition for a writ of certiorari involves a challenge to the constitutionality of a federal regulation that implements the Endangered Species Act by restricting the “take” of the Utah prairie dog. Petitioner is an association of Utah property owners who assert that the regulation’s take restrictions interfere with the development or use of their properties. The government filed a brief in opposition on December 6, 2017. That brief stated (at 5 n.1) that the United States Fish and Wildlife Service (FWS) intends “to work with the State [of Utah] and the affected county governments to develop greater regulatory and management flexibility” for property owners and others affected by the regulation.

This Office has now been informed that, consistent with that intention, the FWS has made available for comment a draft General Conservation Plan (GCP) for the Utah prairie dog. See 82 Fed. Reg. 60,211 (Dec. 19, 2017). “The draft GCP is designed to streamline incidental take permit authorization for many types of development activities while conserving the species.” *Ibid.* For example, three Utah counties “are applying for master incidental take permits under the GCP for development activities.” *Ibid.* Those master permits would allow the counties to authorize incidental take by property owners. *Ibid.* The draft GCP also “incorporates elements of the Utah Division of Resources’ Utah Prairie Dog Management Plan.” *Ibid.*

I would appreciate it if you would distribute this letter and the attached Federal Register notice to the Members of the Court. Thank you for your assistance.

Sincerely,

Noel J. Francisco  
Solicitor General

cc: See Attached Service List

Dated: December 13, 2017.

**Melanie J. Pantoja,**  
*Program Analyst, Office of Federal Advisory  
 Committee Policy.*

[FR Doc. 2017-27225 Filed 12-18-17; 8:45 am]

BILLING CODE 4140-01-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[Docket No. FWS-R6-ES-2017-0073;  
 FF06E23000-178-FXES11140600000]**

#### **Endangered and Threatened Wildlife and Plants; Incidental Take Permit Application; Draft Range-Wide General Conservation Plan for Utah Prairie Dogs and Environmental Assessment**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the availability of the following documents for review and comment by the public and Federal, Tribal, State, and local governments:

- Draft Range-wide General Conservation Plan for Utah Prairie Dogs (GCP);
- Draft Implementing Agreement for the GCP; and
- Draft Environment Assessment of the GCP (EA).

We prepared the draft GCP to fulfill the requirements of the Endangered Species Act (ESA) for issuing permits to authorize take of Utah prairie dogs incidental to development activities within the range of the species in Utah. The draft GCP is designed to streamline incidental take permit authorization for many types of development activities while conserving the species. As required by the National Environmental Policy Act (NEPA), we also prepared a draft EA that analyzes the potential effects to the natural and human environment from issuing permits to Iron, Beaver, and Garfield Counties and from overall implementation of the GCP, including potential issuance of master or individual permits over the 10-year term of the proposed GCP.

**DATES:** *Comment submission:* To ensure consideration in our analyses, comments must be submitted or postmarked by January 18, 2018.

**ADDRESSES:** *Document availability:* The draft GCP, EA, and Implementing Agreement are available via the internet at the Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov)) in Docket No. FWS-R6-ES-2017-0073. Information

regarding these documents is available in alternative formats upon request (see **FOR FURTHER INFORMATION CONTACT**). Documents will also be available for public inspection by appointment (call 801-975-3330) during normal business hours at the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 W. Orton Circle, #50, West Valley City, UT 84119.

**Submitting comments:** To send written comments, please use one of the following methods, and note that your information requests or comments are in reference to the draft GCP. Please specify which of the documents your comment addresses.

- *Internet:* Submit comments at <http://www.regulations.gov> to Docket Number FWS-R6-ES-2017-0073.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS-R6-ES-2017-0073; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041-3803.

**FOR FURTHER INFORMATION CONTACT:** Laura Romin, 801-975-3330, extension 142 (phone), or [laura\\_romin@fws.gov](mailto:laura_romin@fws.gov) (email). If you use a telecommunications device for the deaf, hard-of-hearing, or speech disabled, please call the Federal Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the following documents for review and comment by the public and Federal, Tribal, State, and local governments:

- Draft Range-wide General Conservation Plan for Utah Prairie Dogs (GCP);
- Draft Implementing Agreement for the GCP; and
- Draft Environment Assessment of the GCP (EA).

We prepared the draft GCP to fulfill the requirements of the Endangered Species Act (16 U.S.C. 1531 *et seq.*; ESA) for issuing permits to authorize take of Utah prairie dogs incidental to development activities within the range of the species in Utah. The draft GCP is designed to streamline take authorization for many types of development activities while conserving the species. Iron, Beaver, and Garfield Counties, in Utah, are applying for master incidental take permits under the GCP for development activities in those counties. Under their master permits, each county would provide take authorization through certificates of inclusion to project proponents who agree to adhere to the conditions of the GCP and the relevant county's master permit. Project proponents in other counties within the GCP's plan area

would apply directly to the Service for their own incidental take permits. Other counties and municipalities may apply to the Service for a master permit for their area of jurisdiction.

The Utah prairie dog (*Cynomys parvidens*) is listed as threatened under the ESA and is the sole species covered by the GCP. The draft GCP incorporates elements of the Utah Division of Resources' Utah Prairie Dog Management Plan for Non-Federal Lands, as well as other conservation measures to meet ESA requirements for issuing incidental take permits.

As required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*; NEPA), we prepared a draft EA that analyzes the potential effects to the natural and human environment from issuing permits to Iron, Beaver, and Garfield Counties and overall implementation of the GCP, including potential issuance of other master or individual permits over the 10-year term of the proposed GCP. For future decisions to issue permits under the GCP, we would use the analysis in this EA, as appropriate, in accordance with NEPA and relevant case law. As required by the ESA, we would make any future master or individual permit applications under the GCP available for public comment. In the draft EA, we also analyze the potential impacts to the natural and human environment from issuing permits in the future for projects outside Iron, Beaver, and Garfield Counties, and from implementing two alternatives to the proposed action. The draft EA also identifies alternatives that we considered but eliminated from further analysis.

#### Background

Section 9 of the ESA prohibits take of fish and wildlife species listed as endangered (16 U.S.C. 1538). Under section 3 of the ESA, the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" (16 U.S.C. 1532(19)). The term "harm" is defined in title 50 of the Code of Federal Regulations as "an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering" (50 CFR 17.3). The term "harass" is defined in the regulations as to carry out "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but

are not limited to, breeding, feeding, or sheltering" (50 CFR 17.3).

Under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed fish and wildlife species. "Incidental take" is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing incidental take permits to non-Federal entities for the incidental take of endangered and threatened species, provided the following criteria are met:

- The taking will be incidental.
- The applicant will minimize and mitigate, to the maximum extent practicable, the impact of such taking.
- The applicant will develop an HCP and ensure that adequate funding for the plan will be provided.
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.
- The applicant will carry out any other measures that the Secretary of the Interior may require as being necessary or appropriate for the purposes of the HCP.

Regulations governing permits for threatened species are at 50 CFR 17.32.

The National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) requires that Federal agencies conduct an environmental analysis of their proposed actions to determine whether the actions may significantly affect the human environment. Under NEPA and its implementing regulations (40 CFR 1500 *et seq.*; 43 CFR 46), Federal agencies must also compare effects of a reasonable range of alternatives to the proposed action. In these analyses, the Federal agency will identify potentially significant direct, indirect, and cumulative effects, as well as possible mitigation for any significant effects, on biological resources, land uses, and other human and environmental resources that could occur with the implementation of the proposed action and alternatives. In accordance with NEPA, we prepared a draft EA to analyze the impacts to the natural and human environment that may occur if the Service were to issue master permits to Iron, Beaver, and Garfield Counties and individual permits to project proponents outside these counties and from implementation of the GCP across the range of the Utah prairie dog.

#### Proposed Action

We propose to make the GCP available to non-Federal parties within the range of the Utah prairie dog for use when they are applying for incidental take permits for development activities.

We also propose, at this time, to issue 10-year master permits for incidental take of the Utah prairie dog to Iron, Beaver, and Garfield Counties, if applications from these counties demonstrate commitments to implement the requirements of the GCP to meet all the ESA section 10(a)(1)(B) permit issuance criteria. The master permits would authorize take of the Utah prairie dog incidental to activities associated with residential and commercial development and infrastructure construction, operations, and maintenance. Each county would convey take authorization under its permit to individual project proponents who apply for certificates of inclusion under the GCP. We also propose to issue individual permits to project proponents and master permits to other counties and municipalities as they submit applications over the 10-year term of the GCP.

The GCP's plan area encompasses the entire current range of the Utah prairie dog, which includes all or parts of Iron, Garfield, Wayne, Beaver, Piute, Sevier, and Kane Counties. Individual permits we issue under the GCP would cover the area within which take is expected to occur from each project. The master permits for Iron, Beaver, and Garfield Counties would include any areas where take may occur from covered activities within those counties.

The GCP identifies two zones where take would be authorized for development activities: (1) Major development areas—Non-Federal lands that are already built out or adjacent to built-out areas, and (2) Minor Development Areas—Non-Federal lands that are less likely than the major development areas to have large-scale human development growth over the term of the GCP.

The GCP's measures to minimize and mitigate the impacts of the take include prairie dog translocations, habitat and plague management at translocation sites, and the protection of occupied Utah prairie dog habitats, all of which are consistent with our recovery objectives for this species. The overall conservation goals include: (1) Establishing and augmenting prairie dog colonies on Federal and other protected lands through translocations, and (2) Establishing conservation easements or acquiring lands from willing sellers to protect existing prairie dog colonies on private other non-Federal lands to support connectivity and metapopulation viability. Implementation of the conservation measures would rely on a combination of efforts by the Utah Division of Wildlife, Bureau of Land Management,

U.S. Forest Service, and U.S. Fish and Wildlife Service. State funds and fees paid by developers obtaining a permit or certificate of inclusion would pay for implementation of the conservation measures.

#### Alternatives Analyzed in the Draft Environmental Assessment

In the draft EA, we evaluate the effects on the natural and human environment from two alternatives to the proposed action: (1) No action (*i.e.*, no GCP), and (2) Issuing a master permit to each county that prepares an HCP with a permit application.

The draft EA considers the direct, indirect, and cumulative effects of the two action alternatives, including measures intended to avoid, minimize, and mitigate such impacts.

#### Public Comments

We request information, views, and opinions from the public specifically on our proposed Federal action, including but not limited to any other aspects of the human environment not already identified in the draft EA. We also solicit information regarding the adequacy of the GCP in meeting the requirements of 50 CFR parts 13 and 17.

Written comments received become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public disclosure in their entirety.

**Authority:** We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for incidental take permits (50 CFR 17.22) and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6; 43 CFR part 46).

Dated: October 2, 2017.

**Michael G. Thabault,**

*Assistant Regional Director—Ecological Services, Mountain-Prairie Region, U.S. Fish and Wildlife Service, Lakewood, Colorado.*

[FR Doc. 2017-27250 Filed 12-18-17; 8:45 am]

BILLING CODE 4333-15-P

17-0465

PEOPLE FOR THE ETHICAL TREATMENT OF  
PROPERTY OWNERS  
U.S. FISH & WILDLIFE SERVICE, ET AL.

JEFFREY B. AUGELLO  
NATIONAL ASSOCIATION OF HOME  
BUILDERS  
1201 15TH STREET, NW  
WASHINGTON, DC 20005-2800  
202-266-8490  
JAUGELLO@NAHB.ORG

PAUL J. BEARD, II  
ALSTON & BIRD  
1115 11ST STREET  
SACRAMENTO, CA 95814  
916-498-3354  
PAUL.BEARD@ALSTON.COM

KAREN BUDD-FALEN  
BUDD-FALEN LAW OFFICES, LLC  
300 EAST 18TH STREET  
PO BOX 346  
CHEYENNE, WY 82003-0346  
307-632-5105  
KAREN@BUDDFALEN.COM

WILLIAM S. CONSOVOY  
CONSOVOY MCCARTHY PARK PLLC  
3033 WILSON BLVD.  
SUITE 700  
ARLINGTON, VA 22201  
703-243-9423  
WILL@CONSOVOYMCCARTHY.COM

JOHN C. EASTMAN  
CENTER FOR CONSTITUTIONAL  
JURISPRUDENCE  
C/O CHAPMAN UNIVERSITY UNIVERSITY  
DALE E. FOWLER SCHOOL OF LAW  
ONE UNIVERSITY DRIVE  
ORANGE, CA 92866  
877-855-3330  
JEASTMAN@CHAPMAN

TYLER R. GREEN  
UTAH SOLICITOR GENERAL  
350 N. STATE STREET  
SALT LAKE CITY, UT 84114  
801-538-1191  
TYLERGREEN@UTAH.GOV

MICHAEL RAY HARRIS  
FRIENDS OF ANIMALS WILDLIFE LAW  
PROGRAM  
7500 E. ARAPAHOE ROAD  
SUITE 385  
CENTENNIAL , CO 80112  
720-949-7791  
MICHAELHARRIS@FRIENDSOFANIMALS.ORG

M. REED HOPPER  
PACIFIC LEGAL FOUNDATION  
930 G STREET  
SACRAMENTO, CA 95814  
916-419-7111

CONNER NICKLAS  
BUDD-FALLEN LAW OFFICES  
300 EAST 18TH STREET  
PO BOX 346  
CHEYENNE, WY 82003-0346  
307-632-5105  
CONNER@BUDDFALEN.COM

JOHN J. PARK  
PROPERTY AND ENVIRONMENT RESEARCH  
CENTER  
MIDTOWN PROSCENIUM  
SUITE 2200  
1170 PEACHTREE STREET NE  
ATLANTA , GA 30309-7200  
678-347-2200  
JJP@SBLLAW.NET

ILYA SHAPIRO  
CATO INSTITUTE  
1000 MASSACHUSETTS AVENUE, NW  
WASHINGTON, DC 20001  
202-842-0200  
ISHAPIRO@CATO.ORG

THOMAS J. WARD  
NATIONAL ASSOCIATION OF HOME  
BUILDERS  
1201 15TH STREET, N.W.  
WASHINGTON, DC 20005  
202-266-8161  
TWARD@NAHB.ORG

JONATHAN WOOD  
PACIFIC LEGAL FOUNDATION  
3033 WILSON BLVD.  
SUITE 700  
ARLINGTON, VA 22201  
202-888-6881  
JWOOD@PACIFICLEGAL.ORG