



**Billing Code 4333–15**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**[FWS–R1–ES–2015–N181]; [FXES1112010000–156–FF01E00000]**

**Draft Habitat Conservation Plan for Oregon Department of Transportation Routine Maintenance Activities**

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

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

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have received an application from the Oregon Department of Transportation (ODOT) for an incidental take permit (permit) under the Endangered Species Act (ESA) of 1973, as amended. The ODOT’s application requests a 25-year permit that would authorize “take” of the endangered Fender’s blue butterfly and the threatened Oregon silverspot butterfly incidental to otherwise lawful activities associated with road right-of-way (ROW)

maintenance and management activities. The application includes ODOT's draft habitat conservation plan (HCP), which describes the actions ODOT will implement to minimize and mitigate the impacts of incidental take caused by covered activities. We invite comment on the application, draft HCP, and the Service's draft environmental action statement (EAS) and preliminary determination that the draft HCP qualifies for a categorical exclusion under the National Environmental Policy Act (NEPA).

**DATES:** Written comments on the draft HCP and the NEPA categorical exclusion determination must be received from interested parties no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** To request further information or submit written comments, please use one of the following methods, and note that your information request or comments are in reference to the ODOT HCP.

- *Internet:* Documents may be viewed on the Internet at <http://www.fws.gov/oregonfwo/ToolsForLandowners/HabitatConservationPlans/>.
- *Email:* [ODOTHCPcomments@fws.gov](mailto:ODOTHCPcomments@fws.gov). Include "ODOT HCP" in the subject line of the message or comments.
- *U.S. Mail:* State Supervisor, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266.
- *Fax:* 503-231-6195, Attn: ODOT HCP.
- *In-Person Viewing or Pickup:* Comments and materials received will be available for public inspection, by appointment, during normal business hours at the

Oregon Fish and Wildlife Office , U.S. Fish and Wildlife Service, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266.

**FOR FURTHER INFORMATION CONTACT:** Richard Szlemp, U.S. Fish and Wildlife Service (see **ADDRESSES**), telephone: 503-231-6179, facsimile: 503-231-6195. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 9 of the ESA (16 U.S.C. 1531 *et seq.*) prohibits the take of fish and wildlife species listed as endangered or threatened under section 4 of the ESA. Under the ESA, the term “take” means 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. 1532(19)). The term “harm,” as defined in our regulations, includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term “harass” is defined in our regulations as 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 specified circumstances, the Service may issue permits that authorize take of federally listed species, provided the take is incidental to, but not the purpose of, an

otherwise lawful activity. Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 17.32, respectively. Section 10(a)(1)(B) of the ESA contains provisions for issuing such incidental take permits to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

(1) The taking will be incidental;

(2) The applicant will prepare a conservation plan that, to the maximum extent practicable, identifies the steps the applicant will take to minimize and mitigate the impact of such taking;

(3) The applicant will ensure that adequate funding for the plan will be provided;

(4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(5) The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the plan.

### **Proposed Action**

The Service proposes to approve the HCP and to issue a permit, both with a term of 25 years, to ODOT for incidental take of the endangered Fender's blue butterfly (*Icaricia icarioides fenderi*) and the threatened Oregon silverspot butterfly (*Speyeria zerene hippolyta*) caused by covered activities, if permit issuance criteria are met.

The HCP addresses routine maintenance activities on ODOT-managed roads and their associated right-of-ways (ROWs) throughout Oregon. The ROW is defined as property along the State highway system owned by ODOT, including paved surface, shoulders, and drainage ditches. Medians and interchanges associated with the highway

system are part of the ROW. The ROW width varies considerably and is often based on property purchased when the highway was constructed. Typically, the ROW boundary is just beyond the top of slopes cut into hills or the bottom of low areas filled for construction of the highway. Populations of Federal and State listed plants known to occur within ODOT ROW were field located through targeted surveys, verified, and posted.

The “Operational Roadway” is that portion of the ROW that has been identified as critical for maintaining the integrity of the highway and the safety of the travelling public. Under the HCP, ODOT will not specifically protect or manage listed plants or butterfly habitat in the Operational Roadway because of the importance of this area for road safety and functionality. This does not preclude the continued presence of listed species and is one reason an incidental take permit is being sought.

ODOT has identified known populations of listed species outside the Operational Roadway that they propose to avoid impacting. ODOT established a Special Management Area (SMA) Program designed to protect and manage threatened and endangered species, primarily plants, occurring adjacent to the highway. The specific boundary between the Operational Roadway and protected areas is determined on a case-by-case basis, depending on topography, highway features and facilities, and proximity to protected resources. When a roadside ditch is present, the Operational Roadway typically ends 4 feet beyond the bottom center of the ditch. When no ditch is apparent, the Operational Roadway boundary is usually 10 feet beyond the edge of pavement. Under the HCP, the SMAs incorporate the known populations of rare plants on ODOT ROW that ODOT has agreed to avoid impacting. In most cases, only periodic maintenance is

necessary in SMAs and site-specific restrictions have been developed to protect listed species in each SMA. However, most of the highway facilities that require routine maintenance are located in the Operational Roadway.

All federally listed plants in Oregon are also protected by State law under the Oregon Endangered Species Act, and their protection and conservation are administered by the Oregon Department of Agriculture (ODA). The Oregon ESA protects many other plant species beyond those protected under the Federal ESA. All State agencies, including ODOT, must consult with ODA when a proposed action on land owned or leased by the State, or for which the State holds a recorded easement, has the potential to appreciably reduce the likelihood of the survival or recovery of any listed plant species. ODA will accept the HCP as the foundation for consultation with ODOT regarding possible routine roadside maintenance impacts to State listed plants. Because of the Oregon ESA, conservation measures for many plant species are included in the HCP, but they will not be included under the incidental take permit since the Federal ESA has very limited take prohibitions with respect to federally listed plants.

The anticipated extent of impacts for which incidental take permit coverage is sought includes 0.066 acre of Fender's blue butterfly larval host plants and 1.11 acres of adult nectar plants. These impacts will be mitigated at a ratio of 3:1. Impacts to the Oregon silverspot butterfly along the ROW would amount to about 0.27 acre of its habitat. These impacts would occur as a result of ODOT mowing less than a mile of ROW containing herbaceous flowering plants alongside U.S. Highway 101 in the central coast area to discourage use by Oregon silverspot butterflies so as to reduce their likelihood of being hit by highway traffic. Additional measures may involve increasing

listed butterfly nectar and larval food plants in meadows that are distant from the road, and adding hedgerow or forest fringe shelter to meadows on both sides of the highway so listed butterflies will not have to cross the road to access nectar and larval plant resources.

### **National Environmental Policy Act Compliance**

The development of the draft HCP and the proposed issuance of an incidental take permit is a Federal action that triggers the need for compliance with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) (NEPA). We have made a preliminary determination that the proposed HCP and permit issuance are eligible for categorical exclusion under the NEPA. The basis for our preliminary determination is contained in an EAS, which is available for public review (see **ADDRESSES**).

### **Public Comments**

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on our proposed Federal action. We particularly seek comments on the following: (1) Biological data or other information regarding the Fender's blue butterfly and Oregon silverspot butterfly; (2) additional information concerning the range, distribution, population size, and population trends of these butterflies; (3) current or planned activities in the HCP area and their possible

impacts on these species; (4) the presence of archeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns in the HCP area, which are required to be considered in Federal project planning by the National Historic Preservation Act; (5) identification of any other environmental issues that should be considered with regard to the permit action; and (6) information regarding the adequacy of the HCP pursuant to the requirements for permits at 50 CFR parts 13 and 17.

### **Public Availability of Comments**

All comments and materials we receive 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 comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation will be available for public inspection by appointment, during normal business hours, at our Oregon Fish and Wildlife Office (see **ADDRESSES**).

### **Next Steps**

We will evaluate the HCP, as well as any comments we receive, to determine whether implementation of the HCP would meet the criteria for issuance of a permit under section 10(a)(1)(B) of the ESA. We will also evaluate whether the proposed

permit action would comply with section 7 of the ESA by conducting an intra-Service section 7 consultation. We will consider the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue a permit to the ODOT. We will not make the final NEPA and permit decisions until after the end of the 30-day public comment period on this notice, and we will fully consider all comments we receive during the public comment period. If we determine that the permit issuance requirements are met, the Service will issue a permit to the ODOT.

**Authority**

We provide this notice in accordance with the requirements of section 10 of the ESA (16 U.S.C. 1531 *et seq.*), and NEPA (42 U.S.C. 4321 *et seq.*) and their implementing regulations (50 CFR 17.22 and 40 CFR 1506.6, respectively).

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**Paul Henson,  
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[FR Doc. 2015-25216 Filed: 10/2/2015 08:45 am; Publication Date: 10/5/2015]