

ILLINOIS ENDANGERED SPECIES PROTECTION BOARD

MINUTES OF A SPECIAL MEETING

MAIN CONFERENCE ROOM OF THE FOREST PRESERVE DISTRICT OF WILL COUNTY,
SUGAR CREEK ADMINISTRATION OFFICE
17540 W. LARAWAY ROAD, JOLIET, IL 60433

OCTOBER 11, 2013 – 9:30 AM
(Approved at the February 20, 2014 Special Meeting)

BOARD MEMBERS PRESENT: Chair Dan Gooch, Vice-chair Glen Kruse, Dr. Jim Herkert, Dr. Joyce Hofmann, Ms. Susanne Masi, Mr. Jim Robinett, Ms. Laurel Ross Dr. John Taft, Dr. Jeff Walk.

BOARD MEMBERS ABSENT: Secretary John Clemetsen

BOARD MEMBER VACANCIES: One.

OTHERS PRESENT: Ms. Bridget Henning and Ms. Tara Kieninger (Illinois Department of Natural Resources, Office of Resource Conservation), Ms. Karen Miller, Mr. Todd Rettig and Mr. Keith Shank (Illinois Department of Natural Resources, Office of Realty and Environmental Planning), Ms. Jeannie Barnes (Illinois Natural History Survey), and Ms. Anne Mankowski (Endangered Species Protection Board).

1 Call to Order Welcome and Introduction of Guests

Chair Gooch called the meeting to order at 9:30 A.M. and asked Board members to introduce themselves and noted that there was a quorum. He then asked audience members to introduce themselves

2 Adoption of Agenda

Chair Gooch noted that the agenda consisted of several items all relating to the same topic and asked if there were any changes to the agenda. None were noted and Dr. Walk **moved** to adopt the agenda, Dr. Hofmann seconded the motion, and it was **approved** unanimously.

3 Overview of Title 17 Ill. Admin. Code Part 1075 Consultation Procedures for Assessing Impacts of Agency Action on Endangered and Threatened Species and Natural Areas and nexus and crosswalk to 520 ILCS 10/ Illinois Endangered Species Protection Act, Title 17 Ill. Admin. Code Part 1070 Possession of Specimens or Products of Endangered or Threatened Species, and Title 17 Ill. Admin. Code Part 1080 Incidental Taking of Endangered or Threatened Species

Ms. Mankowski presented her overview of the Act and each supporting regulation including a timeline of amendments and the crosswalk between provisions (Attachment A). She reviewed how a project might be initiated in the consultation program and then move to the incidental take program, noting that consultation results in non-binding recommendations and an incidental take authorization is a legally binding contract. She explained that the consultation provision was added to the Act many years prior to the incidental take authorization provision and that language between and across the Act and the respective administrative rules does not appear to have been fully updated or crosswalked when incidental take authorization was introduced, resulting in unclear division of levels of review and authorities regarding “jeopardy”, “adverse impacts”, “take”, and “cumulative impacts”. Under the Act, the consultation provision reviews for “adverse impacts” and “jeopardy”, but the Department does not have the authority to allow “take” under the consultation program, so minimization or mitigation recommendations from that program should not be for instances involving take and those instances should

be addressed by the Department under the incidental take authorization program. Additionally, because “take” is a lower threshold than “jeopardy”, it seems that the consultation program should in fact be reviewing for “take” and a determination regarding “jeopardy” should probably be a function of the incidental take authorization program. The Board reviewed that there appears to be no official or memorialized process or protocol for how a project is reviewed for the likelihood of take or how it is crosswalked from the consultation program to the incidental take authorization program. The Board also discussed variable requirements or standards for and scaling of mitigation under incidental take authorization.

4 Board Overview of IDNR Office of Realty and Environmental Planning’s (OREP) Proposed Amendments to Title 17 Ill. Admin. Code Part 1075, Consultation Procedures for Assessing Impacts of Agency Action on Endangered and Threatened Species and Natural Areas

Ms. Mankowski presented to the Board her comments and recommendations in a side-by-side review of the existing 1075 Administrative Rule and OREP’s proposed amendments and also noted areas where additional changes could enhance or improve consistency with the Act and across the consultation and incidental take authorization regulations (Attachment B). Among other elements, she reviewed that the proposed amendments do not clarify a process or criteria for evaluating for “jeopardy”, “adverse impacts”, “take”, and “cumulative impacts” nor for crosswalking a project from the consultation program to the incidental take authorization program. She also reviewed that the proposed amendments appear to eliminate requirements for the “agency action report”, “biological opinion”, and “detailed action report” and added that it seems the Department should be required to produce some record of decision that summarizes information reviewed and the Department’s determination regarding a likelihood for “jeopardy”, “adverse impacts”, “cumulative impacts”, and “take”. The Board noted that many proposed changes appeared to be in the interest of simplifying the process and reviewed and discussed each element of the current administrative rule and proposed amendments.

Dr. Walk made a **motion** to recess, Ms. Ross seconded the motion, and it was **approved** unanimously. The Board recessed from 11:45 A.M. to 12:30 P.M..

5 Presentation - IDNR OREP Proposed Amendments to Title 17 Ill. Admin. Code Part 1075, Consultation Procedures for Assessing Impacts of Agency Action on Endangered and Threatened Species and Natural Areas

Mr. Rettig, Ms. Miller, and Mr. Shank from the Illinois Department of Natural Resources, Office of Realty and Environmental Planning explained aspects of their program and reviewed their proposed amendments to the respective Administrative Rule. Mr. Rettig answered questions from Board members, further explaining the steps by which a project is submitted and may go through review. He explained that about 5,000 projects are submitted annually to the EcoCAT (Ecological Compliance Assessment Tool) web-based application and usually about 90% are closed because the project does not fall in the vicinity of resources subject to consultation or following basic avoidance recommendations by his staff. The remaining 10% of projects require varying levels of review and consultation between his staff and the applicant and a small portion, between 10 and 20 projects, are recommended for incidental take authorization.

Ms. Miller explained that their program reviews for multiple resources in addition to endangered and threatened species. There was more discussion about evaluating for “take”, “jeopardy”, and “cumulative impacts”, with Mr. Shank noting that their program does not technically have the authority to review for “take”, but they do. There was general agreement that some uncertainty is inherent in evaluating species and habitat presence and abundance and that all Department and Board functions are also challenged by the temporal and detail limits of available data and information. The Board reviewed that “essential habitat” is a broad definition and how it is and might be considered in reviews.

Mr. Rettig explained that in the proposed amendments the elements of an “agency action report”, “biological opinion”, and “detailed action report” would still exist, they just wouldn’t be compiled into one document or determination and that the proposed changes are to increase program and staff efficiencies. He added that the Department’s determination would basically still be explained in the letter that is sent to an applicant explaining either that a consultation is closed, the department’s recommendations to avoid, minimize, or mitigate, or the department’s recommendation for the applicant to seek an incidental take authorization. Dr. Walk commented that the need for increasing efficiencies is appreciated, but it seems that the proposed amendments greatly minimize transparency and may too significantly marginalize the intent or spirit of the original requirements. Mr. Rettig reiterated that the elements of those items would still exist and explained that he felt the proposed amendments adequately met those requirements while still allowing for improved efficiencies.

6 Board Discussion of and Recommendations Regarding IDNR OREP Proposed Amendments to Title 17 Ill. Admin. Code Part 1075, Consultation Procedures for Assessing Impacts of Agency Action on Endangered and Threatened Species and Natural Areas

The Board completed its review of the proposed amendments and discussion. Vice-chair Kruse **moved** that Ms. Mankowski should revise her side-by-side review with comments from the discussion, confirm the final version with Chair Gooch, and then send the final version (Attachment B) to Mr. Rettig within the next few weeks. Mr. Robinett seconded the motion and it was **approved** unanimously.

7 Next Meeting Information

The Board’s next regularly scheduled meeting will be November 15, 2013 at 9:30 A.M. at Midewin National Tallgrass Prairie.

8 Public Comment Period (3 minutes per person)

There were no public comments.

9 Other Business (Board members complete travel forms and time reporting sheets)

Board members completed travel forms and time reporting sheets.

10 Adjournment

Ms. Ross **moved** to adjourn, Dr. Hofmann seconded the motion, and it was **approved** unanimously. The meeting was adjourned at 2:48 P.M.

ESPB Overview of Title 17 Ill. Admin. Code Part 1075 Consultation Procedures for Assessing Impacts of Agency Action on Endangered and Threatened Species and Natural Areas and nexus and crosswalk to 520 ILCS 10/ Illinois Endangered Species Protection Act, Title 17 Ill. Admin. Code Part 1070 Possession of Specimens or Products of Endangered or Threatened Species, and Title 17 Ill. Admin. Code Part 1080 Incidental Taking of Endangered or Threatened Species (Mankowski 10/2013)

Act and Rules Timeline

- 1972/73** **Illinois Endangered Species Protection Act (520 ILCS 10/)** passed by the Illinois General Assembly in 1972 and became effective in 1973. Included provisions for permitting the possession/taking of specimens or products of Illinois listed species for specific purposes (520 ILCS 10/4 and 520 ILCS 10/5) and for Board duties, including making the IL List (520 ILCS 10/6 and 520 ILCS 10/7).
- 1977** **ESPA amendments** - Added a “Threatened” category and included plants, although there were no prohibitions regarding threatened animals and plants were protected in no way.
- 1977** **List of E&T Animals regulation established - Title 17 ILL. ADM. CODE, CH. I, SEC. 1010, Illinois List of Endangered and Threatened Fauna;** amended in 1984, 1989, 1994, 1997, 1999, 2004, 2009, 2010, 2011.
- 1980** **List of E&T Plants regulation established - Title 17 ILL. ADM. CODE, CH. I, SEC 1050, Illinois List of Endangered and Threatened Flora;** amended 1989, 1990, 1991, 1994, 1998, 2004, 2009.
- 1986** **ESPA amendments** - Clarified protections for species and their habitats, providing equal protections for both endangered and threatened animal species and some protection was added for plants.
 - Added the requirement for state and local governments to engage in consultation (520 ILCS 10/11(b)).
 - Added the requirement that the List be reviewed/revised at least every 5 years.
 - Identified the establishment of the IDNR Endangered Species Conservation Program.
- 1989** **Permit regulation established - Title 17 ILL. ADM. CODE, CH. I, SEC. 1070, Possession of Specimens or Products of Endangered or Threatened Species;** amended in 1990, 1991, 1993, 1994, and 2003.
- 1990** **Consultation regulation established - Title 17 ILL. ADM. CODE, CH. I, SEC. 1075, Consultation Procedures for Assessing Impacts of Agency Actions on Endangered and Threatened Species and Natural Areas;** amended in 1995 and 2013.
- 1996** **Interagency wetlands policy regulation established - Title 17 ILL. ADM. CODE, CH. 1, SEC. 1090, Implementation Procedures for the Interagency Wetlands Policy Act;** has never been amended.
- 2000** **ESPA amendments** - Addition of provisions allowing the IDNR to authorize incidental take, under prescribed terms and conditions (520 ILCS 10/5.5).
- 2001** **Incidental take regulation established - Title 17 ILL. ADM. CODE, CH. I, SEC. 1080, Incidental Taking of Endangered and Threatened Species;** has never been amended.

Possession Permits

“Upon receipt of proper application and approval of the same, the Department may issue to any qualified person a permit which allows the taking, possession, transport, purchase, or disposal of specimens or products of an endangered or threatened species of animal or federal endangered plant after the effective date of this Act for justified purposes, that will enhance the survival of the affected species by zoological, botanical or educational or for scientific purposes only.” (520 ILCS 10/4). Section 520 ILC 10/5 addresses “limited permits” to cover specimens or products in possession prior to the introduction of the law and/or those obtained legally out-of-state.

Program administered by IDNR, Office of Resource Conservation.

Board nexus:

(520 ILCS 10/4) Rules for the issuance and maintenance of permits shall be promulgated by the Department after consultation with and written approval of the Board.

(520 ILCS 10/6) The Board shall also advise the Department on methods of assistance, protection, conservation and management of endangered and threatened species and their habitats, and on related matters.

(520 ILCS 10/11) Conservation program; public policy; rules. (a) The Department, with the advice of the Board, shall actively plan and implement a program for the conservation of endangered and threatened species, by means which should include published data search, research, management, cooperative agreements with other agencies, identification, protection and acquisition of essential habitat, support of beneficial legislation, issuance of grants from appropriated funds, and education of the public.

Enforcement/violation penalty:

The Department shall, upon notice and hearing, revoke the permit of any holder thereof upon finding that the person is not complying with the terms of the permit, the person is knowingly providing incorrect or inadequate information, the activity covered by the permit is placing the species in undue jeopardy, or for other cause (520 ILCS 10/4 and 10/5).

Any person who violates any provision of the Act shall be guilty of a Class A misdemeanor – up to \$2,500 and one year jail time (520 ILCS 10/9, 730 ILCS 5/5-4.5-5.5).

May authorize take “...for justified purposes, that will enhance the survival of the affected species by zoological, botanical or educational or for scientific purposes only.”

Not intended as an alternative for authorization that should take place under ITA.

Consultation

“It is the public policy of all agencies of State and local governments to utilize their authorities in furtherance of the purposes of this Act by evaluating through a consultation process with the Department whether actions authorized, funded, or carried out by them are likely to jeopardize the continued existence of Illinois listed endangered and threatened species or are likely to result in the destruction or adverse modification of the designated essential habitat of such species...” (520 ILCS 10/11).

Program administered by IDNR, Office of Realty and Environmental Planning.

Board nexus:

(520 ILCS 10/6) The Board shall also advise the Department on methods of assistance, protection, conservation and management of endangered and threatened species and their habitats, and on related matters.

(520 ILCS 10/11) Conservation program; public policy; rules. (a) The Department, with the advice of the Board, shall actively plan and implement a program for the conservation of endangered and threatened species, by means which should include published data search, research, management, cooperative agreements with other agencies, identification, protection and acquisition of essential habitat, support of beneficial legislation, issuance of grants from appropriated funds, and education of the public.

Enforcement/violation penalty:

Enforceable only by a writ of mandamus.

Federal agencies are not subject to requirement to consult, however this does not exempt them or their agents from prohibitions against take.

Consultation program does not have the authority to authorize take – under any tool (MOUs, letters of agreement for taking plants, or recommending possession permits, etc.).

Non-binding; recommendations only.

Makes recommendations for avoiding, minimizing, and mitigating... “To promote the conservation of threatened and endangered species and Natural Areas by establishing the following policy: the avoidance of adverse impacts is a priority of action; when avoidance is not practicable, adverse impacts should be minimized; and when practicable alternatives do not exist and an adverse impact is likely to occur, compensation shall be requested.”

The process currently requires an “Agency Action Report”, “Biological Opinion”, and “Detailed Action Report” and by way of these the project evaluation process should generate some record of decision by the IDNR relative to the status of the subject Element Occurrence/population/habitat, likelihood of take (including impacts to habitat), degree of impacts, and how jeopardy is evaluated.

It is currently unclear how a project is cross-walked to the ITA program.

Incidental Take Authorization

“The Department may authorize, under prescribed terms and conditions, any taking otherwise prohibited by Section 3 if that taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. No taking under this Section shall be authorized by the Department unless the applicant submits to the Department a conservation plan.” (520 ILCS 10/5.5)

Program administered by IDNR, Office of Resource Conservation.

Board nexus:

(520 ILCS 10/6) The Board shall also advise the Department on methods of assistance, protection, conservation and management of endangered and threatened species and their habitats, and on related matters.

(520 ILCS 10/11) Conservation program; public policy; rules. (a) The Department, with the advice of the Board, shall actively plan and implement a program for the conservation of endangered and threatened species, by means which should include published data search, research, management, cooperative agreements with other agencies, identification, protection and acquisition of essential habitat, support of beneficial legislation, issuance of grants from appropriated funds, and education of the public.

(Title 17, Section 1080.20 (c)(2)) The applicant shall: provide copies of the conservation plan to the Executive Director of the Illinois Endangered Species Protection Board (Board).

(Title 17, Section 1080.40 (a)(7)) The Department’s Office of Resource Conservation shall coordinate and perform the review of the conservation plan and issue the incidental take authorization pursuant to this Part. The Department shall complete its review of the conservation plan within 120 days after the first publication of the notice required in Section 1080.20(b). After reviewing the conservation plan, the Department may authorize the incidental taking if the Department finds that the taking will meet all of the following requirements: (7) the Department has sought the advice of the Board and provided written response to any Board comments regarding the issuance of authorization for incidental taking and on the terms of any authorization to be issued.

Enforcement/violation penalty:

ITAs includes standard contract clause allowing for revocation by the IDNR of the ITA if any terms and conditions are violated and/or for any taking other than that authorized.

Any person who violates any provision of the Act shall be guilty of a Class A misdemeanor – up to \$2,500 and one year jail time (520 ILCS 10/9, 730 ILCS 5/5-4.5-5.5).

Among other required elements, the conservation plan is supposed to include an estimate of the number of individuals that will be taken and amount of habitat impacted from project and is supposed to provide an evaluation that the proposed impacts will “...not reduce the likelihood of the survival or recovery of the endangered or threatened 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.”

The IDNR is supposed to in the ITA also provide an evaluation that the proposed impacts will “...not reduce the likelihood of the survival or recovery of the endangered or threatened 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.”

Plants are not exempt from ITA (reference, email string ending 01/09/2012).

Authorization is a legally binding contract.

Not intended to be a “relocation program” (reference, IDNR memo of 1999). Habitat conservation and mitigation is a very important component.

| | | Attachment B |
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| Existing Regulation Language | Draft 08/15/13 OREP Proposed Amendments | ESPB 10/11/13 comments on Draft 08/15/13 OREP Proposed Amendments |
| | | General: The Board recommends a joint overall review and development of potential changes to the ESPA and all supporting Ad Rules to address inconsistencies and conflicts within and between. |
| | | General: The Board recommends that since the 2000 addition of an incidental take authorization provision, it may be appropriate for consultation to review for both take and for jeopardy. Comments below are relative to consultation reviewing for both. |
| Red text = text tied to an ESPB comment in the third column. | Red text = text tied to an ESPB comment in the third column. | Red text = recommended edits. |
| Section 1075.10 Purpose | Section 1075.10 Purpose | Section 1075.10 Purpose |
| <p>The purpose of this Part is:</p> <p>a) To establish a consultation process between the Department and agencies of State and local governments of Illinois concerning impacts on State endangered and threatened species and Natural Areas by actions authorized, funded, or carried out by those agencies which are authorized by Section 11(b) of the Illinois Endangered Species Protection Act [520 ILCS 10/11] and Section 17 of the Illinois Natural Areas Preservation Act [525 ILCS 30/17].</p> | <p>The purpose of this Part is:</p> <p>a) To establish the consultation process authorized by Section 11(b) of the Illinois Endangered Species Protection Act [520 ILCS 10/11] and Section 17 of the Illinois Natural Areas Preservation Act.</p> | |
| <p>b) To provide a consultation procedure designed to assist agencies of State and local governments in the evaluation of proposed actions for the purpose of addressing the adverse impacts to endangered or threatened flora or fauna as listed by the Illinois Endangered Species Protection Board, or to the essential habitat of such species or to Natural Areas.</p> | <p>b) To establish procedures that will assist State agencies and units of local government evaluate whether actions authorized, funded or carried out by them are likely to jeopardize the continued existence of Illinois listed endangered and threatened species or result in the destruction or adverse modification of essential habitat of such species.</p> | <p>Problem of reviewing/evaluating for jeopardy - jeopardy is a much higher threshold than take. Shouldn't this section include evaluation for take also? How do you get to jeopardy without taking? How does the IDNR evaluate for jeopardy? OREP stated that they do not believe they have authority to evaluate for take, but 1) because evaluating for take is part of evaluating for jeopardy, shouldn't it be considered captured under the current authority; and/or, 2) even not considered that way, since the Ad Rule can be more restrictive, but not more permissive, than the Act, shouldn't it be acceptable to include and specify evaluating for take in the Ad Rule. Recommended edit</p> <p>b) To establish procedures that will help assist State agencies and units of local government evaluate whether actions authorized, funded or carried out by them are likely to have the potential for take, jeopardize the continued existence of Illinois listed endangered and threatened species, or result in the destruction or adverse modification of Essential Habitat of such species.</p> |

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| | c) To establish procedures that will assist State agencies and units of local government evaluate whether actions authorized, funded or carried out by them are likely to result in the destruction or adverse modification of any natural area that is registered or dedicated with the approval of the Illinois Nature Preserves Commission and the owner, or that is identified by the Department in the Illinois Natural Areas Inventory. | |
| c) To promote the conservation of threatened and endangered species and Natural Areas by establishing the following policy: the avoidance of adverse impacts is a priority of action; when avoidance is not practicable, adverse impacts should be minimized; and when practicable alternatives do not exist and an adverse impact is likely to occur, compensation shall be requested. | d) To promote the conservation of threatened and endangered species and natural areas by recommending measures to avoid, minimize or mitigate potential adverse effects from actions submitted for consultation. | Avoidance is the only recommendation that excludes the potential of take. Once recommendations are being made to minimize or mitigate effects to listed species/individuals or habitat, doesn't that mean that the actions represent take? The IDNR consultation program does not have the authority to authorize take. Shouldn't the project then be referred to the IDNR Incidental Take Authorization Process? For the same reason, it seems appropriate that the reference to compensation is removed. Proposed edit: d) To promote the conservation of threatened and endangered species and natural areas by recommending measures to avoid minimize or mitigate potential adverse modifications from actions submitted for consultation that may result in take. If take cannot be avoided, the action is referred to the IDNR Incidental Take Authorization process. e) To promote the conservation of natural areas by recommending measures to avoid, minimize, mitigate, or compensate for potential adverse effects from actions submitted for consultation. |
| d) This Part provides details for the following: 1) actions requiring review and those exempted; 2) filing of the Agency Action Report; 3) filing of the Detailed Action Report; 4) preparation of the biological opinion; 5) emergencies; 6) public involvement opportunities; and 7) alternative action guidelines. | | |
| Section 1075.20 Definitions | Section 1075.20 Definitions | |
| The following terms will be used throughout this Part: | The following terms will be used throughout this Part: | |
| "Act" - the Illinois Endangered Species Protection Act [520 ILCS 10]. | "Act" - the Illinois Endangered Species Protection Act [520 ILCS 10]. | |
| "Action" - construction, land management, or other activities that are authorized, funded, or performed in whole or in part by agencies of State and local governments and that will result in a change to the existing environmental conditions or may affect listed endangered or threatened species or their essential habitat or Natural Areas. | "Action" - any activity authorized, funded, or carried out in whole or in part by an Agency that may change existing physical, chemical or biological conditions of air, land or water. | |

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| <p>"Adverse Impact" - a direct or indirect alteration of the physical or biological features of the air, land or water which may affect the survival, reproduction or recovery of a listed species or that may diminish the viability of a Natural Area.</p> | <p>"Adverse Modification" - a direct or indirect alteration of the physical, chemical or biological conditions of the air, land or water which may affect the survival, reproduction or recovery of a Listed Species or that may diminish the integrity or biological diversity of a Natural Area.</p> | <p>Proposed edit to definition: "Adverse Modification" - a direct or indirect alteration of the physical, chemical or biological conditions of the air, land or water which may affect the survival, reproduction or recovery of a Listed Species or that may diminish the integrity or biological diversity of Essential Habitat or of a Natural Area.</p> |
| <p>"Agency" - includes all agencies, boards and commissions which are under the jurisdiction of State or local governments.</p> | <p>"Agency" - all state agencies and units of local government and their political subdivisions, agencies, boards, committees and commissions.</p> | |
| <p>"Agency Action Report" - a report submitted to the Department by agencies proposing an action(s) requiring consultation. The information required to be submitted shall be sufficient to determine the presence or absence of a threatened or endangered species or Natural Area in the vicinity of the proposed action.</p> | | <p>While the proposed amendments describe that the same elements of an AAR will still be required of the applicant via an EcoCAT submittal or otherwise, it is recommended that the IDNR require some single standardized format document/report/file of the applicant and that the IDNR maintain it as part of a Record of Decision (ROD) for its evaluation. See additional comments under 1075.40</p> |
| <p>"Applicant" - the Agency or third party consulting with the Department. A third-party Applicant is a non-governmental party consulting with the Department on behalf of an Agency because the third-party is seeking financial support, funding, authorization or other approval from the agency.</p> | <p>"Applicant" - the Agency or third party consulting with the Department. A third-party Applicant is a non-governmental party consulting with the Department on behalf of an Agency because the third-party is seeking financial support, funding, authorization or other approval from the agency.</p> | |
| <p>"Authorized or Authorization" - any permitting, licensing, zoning or other administrative approval provided by an Agency.</p> | <p>"Authorized or Authorization" - any permitting, licensing, zoning or other administrative approval provided by an Agency</p> | |
| <p>"Biological Opinion" - the component of the Detailed Action Report prepared by the Department, when a valid record of an occurrence for a threatened or endangered species or Natural Area exists within the vicinity of a proposed action. This opinion will conclude whether the action will jeopardize the listed species present, destroy or adversely modify their essential habitat or adversely modify a Natural Area.</p> | | <p>Eliminating this requirement, without an alternate or replacement requirement, seems to fall short of the IDNR's requirement to maintain some administrative record or a Record of Decision (ROD) for its evaluation. As Board staff has recommended previously, the Biological opinion or a ROD should accompany a project review from consultation to the ITA process - it should be used to inform the development of both the conservation plan by the applicant and the ITA by the IDNR. It is recommended that this requirement not be eliminated.</p> |
| <p>"Carried Out" - conducted by, or on behalf of, an Agency or its agents through contract, agreement, or other legal arrangement.</p> | <p>"Carried Out" - conducted by, or on behalf of, an Agency or its agents through contract, agreement, or other legal arrangement.</p> | |
| <p>"Conservation" - utilization of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the protection provided by the Illinois Endangered Species Protection Act [520 ILCS 10/1] are no longer necessary. These methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, habitat acquisition, habitat management restoration, and maintenance and propagation.</p> | | <p>Is this not used in the Rule? Why is it proposed for deletion?</p> |
| <p>"Consultation" - the process of review of actions of governmental and third party actions pursuant to Section 11(b) of the Act and Section 17 of the Natural Areas Act.</p> | <p>"Consultation" - the process of review of actions of governmental and third party actions pursuant to Section 11(b) of the Act and Section 17 of the Natural Areas Act.</p> | |

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| "Cumulative Effects" - direct and indirect effects of a proposed action(s) together with the identifiable effects of actions that are interrelated or interdependent with the action. Indirect effects are those that are caused by the action but are later in time or farther in distance. Interrelated actions are those that are a part of a larger action. Interdependent actions are those that have independent utility apart from the action. | | Since this term does not have a dictionary definition, it is recommended that this definition not be eliminated. |
| "Department" - means the Department of Natural Resources. | "Department" - the Department of Natural Resources. | |
| "Detailed Action Report" - a written report that is prepared by an agency when a threatened or endangered species or Natural Area has been identified within the vicinity of a proposed action. This report shall contain sufficient information to make a judgement regarding the potential adverse impacts to a listed species or its essential habitat or a Natural Area. | | See comments above for Agency Action Report and Biological Opinion. |
| "EcoCAT" - the Department's on-line consultation application process. | "EcoCAT" - the Department's on-line consultation application process. | It would be helpful to explain what the acronym stands for. |
| "Essential Habitat" - is the physical and biological environment that is required to maintain viable populations of a listed species in order to ensure the survival and recovery of that species. | "Essential Habitat" - the specific ecological conditions required by an endangered or threatened species for its survival and propagation, or physical examples of these conditions. | It is appreciated that OREP corrected this definition when it amended the Rule to address fees earlier in 2013. |
| "Funded" - receipt of any grant, loan, loan guarantee, bond or other public financing provided by an agency. | "Funded" - receipt of any grant, loan, loan guarantee, bond or other public financing provided by an agency. | Would it add clarification to add "contract" to the list? |
| | | Add definition of "Incidental Take Committee" - a committee of IDNR staff that evaluates projects for the likelihood of take in order to make a recommendation to the applicant advising of the prohibitions against take and for the opportunity to apply for an Incidental Take Authorization. |
| "Jeopardize" - to engage in an action which would reduce the likelihood of the survival or recovery of a listed species or would result in the destruction or adverse modification of the essential habitat of such a species or which would result in the destruction or adverse modification of a Natural Area. | "Jeopardize" - to engage in an action which would reduce the likelihood of the survival or recovery of a Listed Species. | |
| "Listed Species" - is any species of plant or animal which has been listed as endangered or threatened by the Illinois Endangered Species Protection Board or the U.S. Fish and Wildlife Service. | "Listed Species" - any species of plant or animal which has been listed as endangered or threatened by the Illinois Endangered Species Protection Board. | |
| | | Recommend addition of definition for "Mitigation". |
| "Natural Area" - is any area of land in public or private ownership which is registered under the Illinois Natural Areas Preservation Act [525 ILCS 30] or is identified in the Illinois Natural Areas Inventory. | "Natural Area" - any area of land in public or private ownership that is registered under the Natural Areas Act or is identified in the Illinois Natural Areas Inventory. | |
| "Natural Areas Act" - Illinois Natural Areas Preservation Act [525 ILCS 30]. | "Natural Areas Act" - Illinois Natural Areas Preservation Act [525 ILCS 30]. | |
| | "State Agency" - defined as provided in Section 1-20 of the Illinois Administrative Procedure Act. | |

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| | | Add definition of take: "Take" means, in reference to animals and animal products, to harm, hunt, shoot, pursue, lure, wound, kill, destroy, harass, gig, spear, ensnare, trap, capture, collect, or to attempt to engage in such conduct. "Take" means, in reference to plants and plant products, to collect, pick, cut, dig up, kill, destroy, bury, crush, or harm in any manner. |
| | "Unit of Local Government" - all those units of local government as defined in Article 7, Section 1 of the Constitution of the State of Illinois, 1970 as well as any boards or commissions and subdivisions of said units of local government, also included shall be school and community college districts. | |
| "Vicinity" - the area surrounding the action, as determined by the life history requirements of the species of concern or proximity to a Natural Area. | "Vicinity" - the area surrounding the action, as determined by the life history requirements of the Listed Species or proximity to a Natural Area, including Class III Special Resource Groundwater. | |
| Section 1075.30 Actions Reviewed and Exempted | Proposed Section 1075.30 Actions Requiring Consultation | |
| a) Actions Requiring Review for Consultation - Any construction, land management or other activity authorized, funded or performed by a State agency or local unit of government that will result in a change to the existing environmental conditions and/or may have a cumulative, direct or indirect adverse impact on a listed species or its essential habitat or that otherwise jeopardizes the survival of that species and/or may have a cumulative, direct or indirect adverse impact on a Natural Area shall be evaluated through the consultation process. This includes but is not limited to the following: 1) the alteration, removal, excavation or plowing of non-farmed, non-cultivated areas, or dredging of soil, sand, gravel, minerals, organic matter, vegetation, or naturally occurring materials of any kind; 2) the changing of existing drainage characteristics or sedimentation patterns; 3) the grading or removal of materials that would alter existing topography; 4) the creation of new, or the increase in existing permanent barriers to the movement of wildlife, such as dam construction; 5) a discharge of pollutants into the air, water, or on the land; 6) the application of chemicals to the air, water, or on the land; 7) preliminary plats, plans and permits; and 8) an application for rezoning from a nonurban classification to an urban classification (e.g. from agricultural to residential) or a change from one urban classification to another on land not used in its entirety for the original classification. <p style="text-align: center;">end</p> | a) Any Action as defined by this Part that is not exempted by subsection (b) of this Section must be evaluated through the Consultation process described in Section 1075.40 of this Part. | See comment above under definitions: Because 1075.30 a), the description and list of actions requiring review for consultation, is proposed for deletion, it is recommended that this section include "preliminary plats, plans, and permits" to promote the early planning intention of consultation - to best inform for opportunities to avoid. Recommended edit: a) Any Action as defined by this Part, and including preliminary plats, plans and permits for such action , that is not exempted by subsection (b) of this Section must be evaluated through the Consultation process described in Section 1075.40 of this Part. |

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| <p>b) Actions Not Requiring Review - Actions authorized, funded or performed by State agencies or local units of government not resulting in a land-disturbing activity or not directly or indirectly affecting an endangered or threatened species or a Natural Area are not required to be evaluated by the consultation process. Such actions shall involve activities not listed in Section 1075.30(a) (e.g. acquisition of equipment or rehabilitation of an existing structure).</p> | <p>b) The following Actions are exempt from Consultation because they are not likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area.</p> <ol style="list-style-type: none"> 1) Routine mowing and spraying intended to maintain an existing public right-of-way so long as the effects are limited to the right-of-way. 2) Routine resurfacing and application of oil and gravel to existing roads and highways that do not require widening the road or shoulder. 3) Maintenance, repair, or rehabilitation of existing buildings. 4) Actions in areas that have an Illinois Nature Preserves Commission-approved management plan, where the proposed Actions are consistent with the plan and are undertaken to maintain or improve natural ecosystem conditions or to reestablish pre-settlement vegetation conditions. 5) Maintenance, repair or replacement of existing utilities or other similar infrastructure in areas zoned, developed, and currently used in their entirety for commercial, industrial or residential purposes. 6) Maintenance of existing lawns, yards and ornamental plantings. 7) Annual, routine cultivation of existing agricultural lands. 8) Change of zoning requests for land currently zoned, developed, and used in its entirety for commercial, industrial or residential purposes. 9) Application of microbial larvicides to catch basins and storm sewers. 10) Application of aquatic pesticides to artificial impoundments under 10 acres. 11) Land disturbance of one-half acre or less in areas currently zoned, developed and used in their entirety for commercial, industrial or residential purposes. | <p>How is the IDNR evaluating jeopardy? Should the Ad Rule include what criteria is used to evaluate jeopardy? How do you get to jeopardy without taking? Should this also include a requirement that the proposed exemptions do not have the potential for take? Proposed edit to b): b) The following Actions are exempt from Consultation because they do not have potential to result in take and are not likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area. Relative to proposed edit, exemptions in red text are questioned because it is unclear that the possibility of take has been eliminated.</p> <p>9) Application of microbial larvicides to catch basins and storm sewers. #9 is questioned relative to ESPB staff 02/01/2011 memo to IDNR re: proposed MOU with IEPA (copy appended). How can the IDNR provide blanket exemption of any larvicide and ensure that it will not result in any take? 10)</p> <p>Application of aquatic pesticides to artificial impoundments under 10 acres. #10 is questioned relative to ESPB staff 11/23/2012 email to IDNR and IDNR response 12/05/2013. The subject site was a naturally occurring wetland that was "enhanced" into an impoundment/lake and then management activities for the lake were enacted. The occurrence of wetland E&T preceded the "enhancement". If this exemption is kept in, it is recommended that it specify "artificial impoundments that have been constructed in areas confirmed without hydric soils (as confirmed by soils maps) and without any E&T or essential habitat present prior to construction"</p> |
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c) Actions Exempted - The following actions are exempt from the consultation process unless it is evident that there will be an adverse impact to a listed species or its essential habitat or to a Natural Area:

- 1) mowing within maintained highway rights-of-way;
- 2) routine resurfacing and application of oil and gravel to existing roads and highways that do not require widening of the road or shoulder;
- 3) construction activities required for the maintenance or repair of existing structures;
- 4) actions in those areas with a Department approved management plan, where the proposed actions are consistent with the Plan and are undertaken to maintain or improve natural ecosystem conditions or to re-establish pre-settlement vegetation conditions. This includes such actions as prescribed burns, spot application of herbicides, brush clearing and other appropriate natural resource management activities. Where a listed species is known to be present, management for its survival and recovery shall be a priority;
- 5) actions within highway rights-of-way, unless specifically notified by the Department, that adjoin land used for agricultural or urban purposes, except those portions of the right-of-way adjacent to borrow pits, railroads, streams, wetlands, lakes, or other natural areas and open space;
- 6) maintenance of existing lawns, yards and ornamental plantings;
- 7) annual, routine cultivation of existing agricultural lands; and
- 8) change of zoning requests for land currently zoned, developed, and used in its entirety for commercial, industrial or residential purposes.

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| <p>d) Memorandums of Understanding - the Department may enter into an agreement with an agency, referred to as a Memorandum of Understanding (MOU) which allows the development of an expedited review process, the review of comprehensive plans and natural resource ordinances, or exempts from the consultation process those actions commonly performed by that agency and that have no adverse impact to a listed species or its essential habitat or a Natural Area.</p> <p>1) The Memorandum of Understanding shall expire in 1 to 3 years, based on the type of activity or the frequency with which it is performed. At the time of renewal, the agency shall submit a report evaluating the following:</p> <p>A) whether the actions exempted avoided, minimized or created an adverse impact to a listed species and its essential habitat or a Natural Area; and</p> <p>B) if the technology of the exempted action has changed to such an extent that the action should no longer be exempted.</p> <p>2) The Memorandum of Understanding shall be available for review from the Department upon request.</p> | <p>c) The Department may enter into an agreement with an Agency, referred to as a Memorandum of Understanding, which allows the development of an expedited review process, the review of comprehensive plans and natural resource ordinances, or exempts from Consultation those Actions commonly Carried Out by that Agency provided sufficient procedural safeguards exist to protect Listed Species and Natural Areas. The Memorandum of Understanding shall expire in three years.</p> <p>1) The Agency shall submit an annual report, the contents of which will be determined by the specific Memorandum of Understanding.</p> <p>2) The Memorandum of Understanding shall be available for review from the Department upon request.</p> | <p>What does "provided sufficient procedural safeguards exist to protect Listed Species and Natural Areas" mean - what are "sufficient procedural safeguards" and what is the definition of "protect"?</p> <p>See also comment under 1075.30 b) This is questioned relative to ESPB staff 02/01/2011 memo to IDNR re: proposed MOU with IEPA (copy appended). It is unclear how DNR confirmed no adverse impacts to any listed species or their essential habitat in that instance - especially since that subject and current (?) MOU is cited as an example of why the proposed exemption should be allowed.</p> <p>Recommended edit: c) The Department may enter into an agreement with an Agency, referred to as a Memorandum of Understanding, which allows the development of an expedited review process, the review of comprehensive plans and natural resource ordinances, or exempts from Consultation those Actions commonly Carried Out by that Agency provided sufficient procedural safeguards exist to eliminate the potential for take and for adverse modification that may jeopardize a Listed Species or for adverse modification to Essential Habitat or Natural Areas. The Memorandum of Understanding shall expire in three years.</p> <p>1) The Agency shall submit an annual report, the contents of which will be determined by the specific Memorandum of Understanding, but must include whether the actions exempted eliminated the potential for take, whether adverse modification took place, and what was the outcome for the Essential Habitat or Natural Area from the adverse modification.</p> |
| <p>e) If more than two years elapses between the review and approval of the proposed action and implementation, the Department shall have an opportunity to review the Agency Action Report again to determine whether a listed species or Natural Area is present.</p> | <p>d) An Action must be resubmitted for Consultation if it is substantially modified or has not been implemented within three years after the Department closes the Consultation.</p> | |
| | <p>e) The Applicant shall not begin the proposed Action until the Department closes the Consultation.</p> | |
| <p>f) Compliance with this Part does not relieve the agency from applicable state or federal laws or regulations.</p> | <p>f) Compliance with this Part does not relieve the Applicant from complying with applicable local, state, or federal laws or regulations, including other provisions of the Illinois Endangered Species Protection Act and the Illinois Natural Areas Preservation Act.</p> | |
| <p>Section 1075.40 Consultation Process</p> | <p>Section 1075.40 Consultation Process</p> | |

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| <p>As authorized by Section 11(a) of the Illinois Endangered Species Protection Act [520 ILCS 10/11] and by Section 17 of the Illinois Natural Areas Preservation Act [525 ILCS 30/17], state and local units of government shall evaluate, through a consultation process with the Department, whether actions authorized, funded, or carried out by them, as defined in Section 1075.30, are likely to jeopardize the continued existence or recovery of Illinois listed endangered or threatened species or are likely to result in the destruction or adverse modification of the essential habitat of such species or are likely to result in the adverse modification of a Natural Area. The proposed action shall not commence until the completion of the consultation process. This consultation process shall consist of the following:</p> | <p>The Consultation process authorized by Section 11(b) of the Illinois Endangered Species Protection Act [520 ILCS 10/11(b)] and by Section 17 of the Illinois Natural Areas Preservation Act [525 ILCS 30/17] shall be as follows:</p> | |
| <p>a) After identifying a specific action included in Section 1075.30, an agency shall complete and submit the Agency Action Report to the Department. This shall be submitted as early in the planning process as may be practicable and prior to approval of preliminary plat, design, permit, plan, or project approval. The purpose of this report is to identify the specific location of the project in order to determine if a listed species or Natural Area is located within the vicinity of the proposed action. The Agency Action Report shall include but not be limited to the following:</p> <ol style="list-style-type: none"> 1) name and address of agency proposing the action; 2) the responsible person within that agency; 3) the precise location of the proposed action in sufficient detail to determine the presence or absence of a listed species or Natural Area; 4) a brief description of the proposed action; and 5) the starting and ending dates of the proposed action. | <p>a) To initiate Consultation the Applicant must submit the proposed Action to the Department through EcoCAT or other means. The Consultation request should be submitted early in the planning process and prior to authorizing, funding or carrying out the Action. The information submitted must include:</p> <ol style="list-style-type: none"> 1) government unit and type of Action requiring Consultation; 2) government contact name, address, phone and fax number; 3) whether the project will receive any funding or other financial support from a state agency; 4) Applicant name, contact person, address, e-mail, phone and fax numbers; 5) project title and description of the project; and 6) project location including street address, city, county, the township, range, and section, and a site-specific map. | <p>If the AAR, DAR, and Biological Opinion are eliminated, it seems that these newly proposed elements need to be very detailed in order for the IDNR to maintain a responsible Record of Decision for its evaluation. Recommended edits:</p> <ol style="list-style-type: none"> 6) project location including street address, city, county, the township, range, and section, and a site-specific map that shows the footprint of the action area, and includes all areas for staging, access, and any permanent or temporary disturbances. 7) the estimated starting and ending dates of the proposed action. |
| <p>b) The Department shall review the Agency Action Report and determine whether a valid record of occurrence for a listed species or a Natural Area exists within the vicinity of the proposed action. The agency shall receive one of two responses from the Department within 30 calendar days of receipt of the Agency Action Report:</p> <ol style="list-style-type: none"> 1) If no listed species or their essential habitat or Natural Areas have been identified in the vicinity of the proposed action, a letter will be sent indicating that further consultation is not necessary. 2) If a listed species or a Natural Area is identified within the vicinity of the project, the agency will be sent a letter explaining the continuation of the consultation process and a Detailed Action Report. | <p>b) If a Listed Species or a Natural Area is not located within the vicinity of the Action, the Department will close the consultation.</p> | |

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| <p>c) The agency shall complete the Detailed Action Report, and submit it to the Department. Sufficient information must be provided about the proposed action to determine the potential indirect, direct and cumulative adverse impacts to the listed species present or its essential habitat or to the Natural Area. The Detailed Action Report shall include, but is not limited to the following components:</p> <ol style="list-style-type: none"> 1) name and address of agency proposing the action; 2) responsible person within the agency; 3) a detailed map indicating the precise location of the proposed action; 4) a detailed description of the proposed action, including any direct or indirect alteration or destruction of the vegetation, changes anticipated to air or water quality, alteration of the topography, or any other detail that might jeopardize the listed species or its essential habitat or cause adverse modification of the Natural Area; 5) starting and ending dates of the proposed project; and 6) discussion of alternatives which were considered. | <p>c) The Department may request additional information to evaluate whether the proposed Action is likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area.</p> <ol style="list-style-type: none"> 1) The request may include information on any anticipated direct, indirect or cumulative effect including, but not limited to, changes to air quality, changes to hydrology, changes to water quality or quantity, alteration of the topography or vegetation, or any other alteration that might Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area. 2) If the Applicant does not respond to the request within 60 days after the date the request is issued by the Department, the Consultation will be considered withdrawn. | <p>If the AAR, DAR, and Biological Opinion are eliminated, it seems that these newly proposed elements need to be very detailed in order for the IDNR to maintain some Record of Decision for its evaluation. How does the IDNR evaluate for jeopardy - should criteria be included in the Ad Rule? It seems this step should also include evaluation for take. With regard to evaluating jeopardy, it seems that IDNR would have to request the information identified in #1. Recommended edits: c)</p> <p>The Department may request additional information to evaluate whether the proposed Action is likely to result in take or Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area. 1) The request shall may include information on any anticipated direct, indirect or cumulative effect including, but not limited to, changes to air quality, changes to hydrology, changes to water quality or quantity, alteration of the topography or vegetation, or any other alteration that might result in take or Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area and discussion of alternatives which were considered.</p> |
| <p>d) Upon completing the portion of the Detailed Action Report involving the proposed project, the agency shall provide background information on the listed species or Natural Area present. The direct and indirect effects of the proposed action on the listed species and its essential habitat or on the Natural Area including cumulative effects shall be analyzed by the agency. The Department shall assist units of local government, upon request, if the unit of local government does not have the expertise to provide the required data and does not have the resources to procure outside experts.</p> | | |

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| <p>e) Upon completion, the agency shall submit the Detailed Action Report to the Department for the formulation of a biological opinion as to whether the proposed action, taken with its cumulative effects, will jeopardize the listed species present or have an adverse impact on its essential habitat or cause adverse modification of the Natural Area. The biological opinion shall be completed within 60 calendar days of receipt of a completed Detailed Action Report. The biological opinion shall result in one of the following conclusions:</p> <p>1) the action may promote the conservation of a listed species or its essential habitat or enhance the protection of the Natural Area, in which case the consultation process is terminated;</p> <p>2) the action is not likely to jeopardize a listed species or its essential habitat or cause adverse modification of the Natural Area, in which case the consultation process is terminated; or</p> <p>3) the proposed action is likely to jeopardize a listed species or its essential habitat or cause adverse modification of the Natural Area, in which case the consultation process shall continue.</p> | | <p>It is recommended that the requirement for the IDNR to produce a Biological Opinion should not be eliminated. If Biological Opinion is eliminated, it seems that there needs to be a replacement by some document that establishes some Record of Decision for the IDNR's evaluation of the project and determinations with regard to take and jeopardy of Listed Species, impacts to essential habitat, and impacts to Natural Areas.</p> <p>Should there also be mention and explanation of the IDNR's use of the "Incidental Take Committee" - how and when they meet and what and how they evaluate for take and that their evaluation and determinations become part of the ROD?</p> |
| <p>f) If the biological opinion concludes that the proposed action is likely to have an adverse impact, recommendations to avoid these impacts shall be provided to the agency by the Department.</p> | | |
| <p>g) A meeting shall be scheduled with representatives of the agency and the Department to discuss practicable alternatives to the proposed action that would avoid, minimize, or compensate for the impacts.</p> | | |
| <p>h) After the consultation meetings have taken place to discuss practicable alternatives, the agency shall notify the Department in writing, stating its decision to proceed, modify, or forgo the action, and which, if any, of the alternatives included in the Detailed Action Report it is adopting.</p> | | |
| <p>i) If the Department disagrees with the agency's decision, it shall notify the agency in writing within 10 days.</p> | | |
| <p>j) It is desirable that disagreements which arise over an agency's response or procedural questions be resolved quickly and at the lowest possible level of agency involvement. For most actions, areas of disagreement should be resolved by middle and upper level management of the Department and agency involved. However, where there is failure to reach agreement, it may be necessary to refer the matter to the agency head for resolution.</p> | | |
| | <p>d) If the Department concludes the Action is not likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area, the Department will close the Consultation.</p> | <p>Recommend deleting this and breaking the "decision tree" into separate steps below:</p> |
| | <p>e) If the Department concludes the Action is likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat or a Natural Area, the Department will recommend measures to avoid, reduce, or mitigate the jeopardy or Adverse Modification and will close the Consultation.</p> | <p>This documentation should be part of some Record of Decision. Recommended edit: e - d?)f the Department concludes that listed species and their essential habitat can be avoided, the Department will make recommendation to avoid and will close the Consultation.</p> |

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| | | Recommended new entry, relative to edit immediately above, e?) If the Department concludes the Action is likely to result in the Adverse Modification of a Natural Area, the Department will recommend measures to avoid, reduce, mitigate, or compensate for the Adverse Modification and will close the Consultation. |
| | f) If the Department concludes the Action has the potential to take a Listed Species it will notify the Applicant of the prohibition against taking a Listed Species pursuant to Section 3 of the Illinois Endangered Species Protection Act and of the opportunity to apply for an Incidental Take Authorization pursuant to Section 5.5 of the Illinois Endangered Species Protection Act. | Recommended edit: f) If the Department concludes the Action has the potential to take a Listed Species or is likely to Jeopardize a Listed Species or result in the Adverse Modification of Essential Habitat the Department will notify the Applicant of the prohibition against taking a Listed Species pursuant to Section 3 of the Illinois Endangered Species Protection Act and of the opportunity to apply for an Incidental Take Authorization pursuant to Section 5.5 of the Illinois Endangered Species Protection Act. The Applicant will be advised to include the Record of Decision as an appendix to their conservation plan that is required as part of the Incidental Take Authorization process. A copy of the letter and ROD will be sent to the ITA program. |
| | g) An Agency authorizing, funding or carrying out an Action for which the Department provides recommendations pursuant to subsection (e) of this Section must notify the Department whether the project will be modified in accordance with the recommended measures. | |
| Section 1075.50 Special Circumstances | Section 1075.50 Special Circumstances | |
| a) When a particular action involves more than one agency, these agencies may, upon notification to the Department, fulfill their consultation requirements through a single lead agency. Factors relevant in determining appropriate lead agency include the time sequence in which agencies would become involved in the action, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. | a) When an Action or substantially similar Actions result in simultaneous or sequential Consultation requests from more than one agency, any or all of the following may occur. 1) The Agencies may, upon notification to the Department, fulfill their Consultation requirements through a single lead Agency. Factors relevant in determining appropriate lead Agency include the sequence in which agencies would become involved in the Action, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the Action. 2) The Department, at its initiative, may consolidate Consultation requests. 3) The Department may use information derived from one Consultation for other Consultations. | |
| | b) A closed Consultation on an Action not yet completed may be reopened by the Department if: 1) the Department receives new information that indicates the Action may Jeopardize a Listed Species or adversely modify Essential Habitat or a Natural Area in a manner not previously considered; or 2) additional Listed Species, Essential Habitat, or Natural Areas are identified within the Vicinity of the Action. | Recommended edit: 1) the Department receives new information that indicates the Action has the potential for take or may Jeopardize a Listed Species or adversely modify Essential Habitat or a Natural Area in a manner not previously considered; or |

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| <p>b) In the case of complex actions, where the Department and the agency determine that additional information is needed concerning the listed species or Natural Area and/or the action, the period for the agency to prepare the Detailed Action Report, and the Department to formulate the biological opinion, may be extended by mutual agreement. During this extension, an agency shall make no irreversible or irretrievable commitments of resources that would foreclose implementation of any reasonable and prudent alternative prior to issuance of a biological opinion.</p> | | |
| <p>c) The consultation process shall be modified for the review of rezoning applications (See Section 1075.30(a)(8)):</p> <ol style="list-style-type: none"> 1) The Agency Action Report shall be submitted for review as required in Section 1075.40(a). 2) If no listed species or Natural Area is known to be present, a letter of notification of the termination of the consultation process shall be sent within thirty days. 3) If a listed species or Natural Area is identified, the information shall be provided for consideration in the decision to grant the request for rezoning. This information shall be made a matter of public record. 4) The consultation process shall not proceed until development of that parcel is under consideration. At that time, the agency shall submit to the Department a Detailed Action Report and continue the consultation process as defined in Section 1075.40(c) through (j). | | |
| <p>d) The consultation process shall be initiated or a terminated consultation process shall be reopened by the Department or the agency if:</p> <ol style="list-style-type: none"> 1) New information reveals effects of the identified action that may adversely affect a listed species or its essential habitat or a Natural Area in a manner not previously considered; or 2) The proposed action is subsequently modified such that it may adversely affect a listed species or its essential habitat or a Natural Area in a manner which was not considered in the consultation process; or 3) Additional listed species or their essential habitat or Natural Areas are identified within the vicinity of the action. | | |
| <p>Section 1075.60 Emergencies</p> | <p>Section 1075.60 Emergencies</p> | |
| <p>Two types of emergency conditions may exist that require special treatment:</p> | <p>Where emergency circumstances pose an immediate threat to human life, or severe loss of property is imminent, and Action must be taken immediately, the Agency can proceed without notifying the Department prior to taking Action. The Consultation process shall be initiated as soon as practicable after the emergency is under control, but not to exceed 30 calendar days.</p> | |

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| <p>a) Where emergency circumstances pose an immediate threat to human life, or severe loss of property is imminent from situations involving acts of God, disasters, casualties, or national defense or security emergencies, and action must be taken immediately, the agency can proceed without notifying the Department prior to taking action. The consultation process shall be initiated as soon as practicable after the emergency is under control, but not to exceed 30 calendar days. The agency shall submit a Detailed Action Report, which shall include information on the nature of the emergency actions, the justification for requiring immediate action, and any adverse impacts to a listed species or its essential habitat or a Natural Area that may have resulted. The Department shall evaluate such information and issue a biological opinion, including the information and recommendations given during the emergency consultation.</p> | | |
| <p>b) Where emergency circumstances pose a threat to human life or loss of property and the action must commence within 30 days, the agency may request permission to commence the action without undergoing the consultation process prior to the action. The agency shall contact the Department prior to commencing the action and explain the nature of the problem. The Department shall determine whether a listed species or Natural Area is present within the vicinity of the action and notify the agency in writing. One of two courses of action shall then be taken:</p> <p>1) if no listed species or their essential habitats or Natural Areas are present, the action may commence and the consultation process is terminated; or</p> <p>2) if a listed species or its essential habitat or a Natural Area is present within the vicinity of the project, alternatives shall be discussed to avoid or minimize the adverse impacts prior to commencement of the action.</p> | | |
| <p>Section 1075.70 Public Involvement</p> | <p>Section 1075.70 Public Involvement</p> | |
| <p>Provisions shall be made to inform the public of the actions of the Department under this Part and to consider public comment. This may include, but is not limited to maintaining a list, as funds permit, by the Department for those persons wishing to receive notification of those projects involved in the consultation process under Section 1075.40(b)(2).</p> | <p>No change proposed.</p> | |
| <p>Section 1075.80 Alternative Action Guidelines</p> | <p>Section 1075.80 Alternative Action Guidelines</p> | |

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| <p>Alternative Action Guidelines - In order to assist state and local agencies in evaluating and selecting alternatives to proposed actions that adversely affect listed species or their habitat or Natural Areas, the Department may prepare Alternative Action Guidelines for alternatives to a range of actions common to these agencies. These Guidelines shall propose practicable alternatives to actions affecting a listed species or Natural Area, while at the same time maintaining the project purpose to the greatest extent possible. These Guidelines shall serve to encourage the consideration of alternatives prior to initiation of the consultation process. They shall be made available upon request to all units of government as they are prepared.</p> | <p>No change proposed.</p> | |
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Comments from the Endangered Species Protection Board to the IDNR on a proposed MOU between IDNR and IEPA to allow exemption from IDNR consultation for applications of identified microbial larvicides to catch basins and storm sewers.

Prepared by: Anne Mankowski, Illinois Endangered Species Protection Board

Submitted to: Karen Miller, Illinois Department of Natural Resources

Date: February 1, 2011

Issue

Based on email communication dated January 20, 2011 provided by Karen Miller, the proposed MOU seeks to exempt consultation for application per product label instructions of *Bacillus sphaericus* (Bs), *Bacillus thuringiensis* (Bti), and methoprene to catch basins and storm sewers “unless it is evident that there will be an adverse impact to a listed species or its essential habitat or to a Natural Area”. In that and subsequent emails, Ms. Miller requested review and comment by February 3, 2011 from Joe Kath, IDNR Endangered Species Project Manager, and Anne Mankowski, ESPB Director.

A review of the literature illustrates that these constituents are deemed safe to humans and most wildlife. However species-specific data is not available for Illinois endangered and threatened species (or acceptable surrogates) to thoroughly evaluate potential risks to individuals or populations that may be proximate, and/or downstream, of application sites. Given this starting place, a brief review of information found in the literature, comments/concerns, and recommendations follow.

Bacillus thuringiensis (Bt)

Bacillus thuringiensis (Bt) is a spore forming bacterium that produces crystal proteins which are toxic to many species of insects, it has a short half-life in the environment, it may be effective for up to 48 hours in water and then it gradually settles out or adheres to suspended organic matter, it is moderately persistent in soil (its half-life in suitable conditions is about four months), and it is classified as immobile because it does not move, or leach, with groundwater (USGS No Date B).

This current document does not spend much time reviewing Bt. As noted in USGS (No Date B), shrimp and mussels may be affected adversely by Bt, and multiple authors demonstrated cumulative effects on taxa and communities with significant reductions of insect densities and biomass at two and three years after treatment with methoprene and Bt in a six-year study in Minnesota (Hanowski et al 1997; Hershey et al 1998; Niemi et al 1999; references in Butler et al 2010).

Methoprene

Methoprene is an insect growth regulator, it has potential to volatilize from water and soil, it is relatively lipophilic and readily adsorbs to suspended solids and sediment, it is slightly mobile with little potential for leaching or groundwater exposure, and a very high potential for bioconcentration in aquatic organisms (Rexrode et al 2008).

Concentrations Resulting in Adverse Impacts

There is considerable literature reviewing this subject for a great many species and this current document does not attempt to provide a comprehensive review or analysis. There is a great deal of evidence that concentrations far exceeding application rates are necessary to illicit acute or chronic effects in multiple

species. Indeed, Rexrode et al (2008) summarized toxicity information for multiple species from several taxonomic groups with most requiring concentrations at several orders of magnitude greater than application rates (multiple ppm vs. ppb).

However, in the absence of species-specific data, several adverse effects thresholds from the literature are also noteworthy here as possible surrogate species of some Illinois listed invertebrate taxa. Opossum shrimp (*Mysidopsis bahia*) showed reduced numbers of young produced per female at 2.0 ppb (in Butler 2010), lobster (*Homarus americanus*) larvae mortality rates were at 14% at 0.1 and 0.5 ppb, at 30% at 1.0 ppb, and at 86% at 10 ppb (in Butler 2010), fathead minnow (*Pimephales promelas*) showed affected growth above 48.0 ppm (Rexrode et al 2008). Additionally, the potential cumulative effects on taxa and communities from application of methoprene and Bt is illustrated in a six-year study in Minnesota that showed significant reductions of insect densities and biomass at two and three years after treatment (Hanowski et al 1997; Hershey et al 1998; Niemi et al 1999; references in Butler et al 2010). No information for effects of methoprene on mussels was found in the literature review for this current document.

Application Rates, Detection Rates, and Estimated Environmental Concentrations

A review of literature indicates that applications rates of at least 1 part per billion (ppb) active ingredient (a.i.) is necessary to control mosquitoes (Stark 2001). However, depending on the formulation, individual products may result in greater estimated environmental concentrations (EECs) of active ingredient even when applied as per label instructions. Examples of these difference are illustrated in Rexrode et al (2008) where extrapolated water column concentrations for storm drain applications after 60 days may be as high as 2.0 ppb for briquets and as high as 5.04 ppb for extended release briquets (XR), and field data for storm drain applications indicated peak EECs of 4.24 ppb for briquets and 3.37 ppb for briquets XR. Similarly, USEPA (2001) reports a maximal rate of release of ≤ 4 ppb with data generated under laboratory and field conditions for methoprene mosquito product formulations, including slow release briquet formulations.

Additionally, because methoprene has an affinity for organic matter, measured concentrations can vary greatly depending on the sampling protocol. As demonstrated by Butler et al (2010), very low (0.5 ppb) concentrations of methoprene were measured in water samples one week after application within and at 30 m downstream of the outflow of catch basins, but the authors indicate that when particulate matter was included in the extraction samples, concentrations increased to 5.7 – 15.4 ppb. Butler et al (2010) discuss another example (Hershey et al 1995) of the great range of detected concentrations possible depending on environmental circumstances where using 150-day slow release briquets resulted in an average of 0.5 ppb, but with a range of from non-detect to 45 ppb.

Based on these examples, it appears that exposure rates and concentrations present in the environment and available for transport to downstream locations may exceed, in some case significantly, the concentrations levels identified as causing adverse effects in some species. With regard to the potential for transport downstream, although methoprene has a fairly short persistence in soil (half life 10-14 days) (Glare and O'Callaghan 1999), the environmental benefit from volatilization may be mitigated when the chemical is being delivered in an extended release formulation where it can continually bind to organic particles and be transported downstream and deposited in potentially increasing concentrations in bottom sediments (Rexrode et al 2008), which may pose greater risk to benthic species such as mussels, crayfish, and snails.

Comments/Concerns

The current review and comment period does not allow enough time to thoroughly review the environmental fate and transport of each constituent and potential adverse impacts upon individual listed species or taxonomic groups of species.

While the subject application sites (catch basins and storm sewers) may not in themselves support much in the way of endangered and threatened species habitat, of concern are possible impacts to downstream/downgradient habitat and species. In this respect, of particular concern are storm sewers because they drain directly to waterways.

Many of Illinois' 483 endangered and threatened species are aquatic species and certain groups, such as freshwater mussels, are among the most imperiled species in the state. Some of Illinois' endangered and threatened animal species that may be considered most vulnerable to water quality issues include 21 species of fish, 16 species of amphibians and reptiles, and at least 33 species of invertebrates (including 25 mussels).

Recommendations

Whether or not the IDNR determines to allow exemption from consultation for the application per product label instructions of *Bacillus sphaericus* (Bs), *Bacillus thuringiensis* (Bti), and methoprene to catch basins and storm sewers "unless it is evident that there will be an adverse impact to a listed species or its essential habitat or to a Natural Area", it is recommended that:

- Additional review of the subject constituents and effects on the environment be conducted to better inform the decision of whether to exempt certain activities from environmental review.
- Such review should include research to determine toxicological thresholds for listed species, (especially mussel species) or appropriate surrogates, and associated environmental fate and transport studies.

References

Antunes-Kenyon, S. and G. Kennedy. 2001. Methoprene: A review of the impacts of the insect growth regulator methoprene on non-target aquatic organisms in fish bearing waters (Ver. 2.0). For the Massachusetts Pesticide Board Subcommittee. Massachusetts Pesticide Bureau, Department of Food and Agriculture. 40 pp.

Butler, M., H.S. Ginsberg, R.A. LeBrun, and A. Gettman. 2010. Evaluation of nontarget effects of methoprene applied to catch basins for mosquito control. Vol. 35, no. 2 Journal of Vector Ecology. 372-384.

Glare, T.R. and M. O'Callaghan. 1999. Environmental and health impacts of the insect juvenile hormone analogue, S-methoprene. Report for New Zealand Ministry of Health, Wellington. 106 pp.

Hanowski, J.M., G.J. Niemi, A.R. Lima, and R.R. Regal. 1997. Do mosquito control treatments of wetlands affect red-winged blackbird (*Agelaius phoeniceus*) growth, reproduction, or behavior? Environmental Toxicology and Chemistry, Vol. 16, No. 5, pp. 1014–1019.

Niemi, G.J., A.E. Hershey, L. Shannon, J.M. Hanowski, A.Lima., R.P.Axler, and R.R. Regal. 1999. Ecological effects of mosquito control on zooplankton, insects, and birds. Environmental Toxicology and Chemistry, Vol. 18, No. 3, pp. 549–559.

Pinkney, A.E., P.C. McGowan, D.R. Murphy, T.P. Lowe, D.W. Sparling, and L.C. Ferrington. 2000. Effects of the mosquito larvicides temephos and methoprene on insect populations in experimental ponds. Environmental Toxicology and Chemistry, Vol. 19, No. 3, pp. 678–684.

Raimondo, S. and C.L. McKenney, Jr. 2006. From organisms to populations: modeling aquatic toxicity data across two levels of biological organization. *Environmental Toxicology and Chemistry*, Vol. 25, No. 2, pp. 589–596.

Schoff, P.K. and G.T. Ankley. 2004. Effects of methoprene, its metabolites, and breakdown products on retinoid-activated pathways in transfected cell lines. *Environmental Toxicology and Chemistry*, Vol. 23, No. 5, pp. 1305–1310.

Stark, J.D. 2005. A Review and Update of the Report “Environmental and health impacts of the insect juvenile hormone analogue, S-methoprene” 1999 by Travis R. Glare and Maureen O’Callaghan”. Report for New Zealand Ministry of Health, Wellington. 32 pp.

Rexrode, M., I. Abdel-Saheb, and J.L. Andersen. 2008. Potential Risks of Labeled S-Methoprene Uses to the Federally Listed California Red Legged Frog (*Rana aurora draytonii*): Pesticide Effects Determination. U.S. Environmental Protection Agency, Biopesticide & Pollution Prevention Division Office of Pesticide Programs, Washington, D.C. 80 pp.

United States Environmental Protection Agency. 2001. Update of the March 1991 Methoprene R.E.D. Fact Sheet. Pesticide Fact Sheet. U.S. Environmental Protection Agency.

United States Geological Survey (USGS). No Date A. *Bacillus sphaericus* Formulated Larvicide (Insecticide). Web accessible reference at http://usgs.wildlifeinformation.org/List_Vols/westnile/Chemicals/bac_sphaericus.htm. Accessed January 2011.

USGS. No Date B. Chemical Summary Page - *Bacillus thuringiensis* Formulated Larvicide (Insecticide). Web accessible reference at http://usgs.wildlifeinformation.org/List_Vols/westnile/Chemicals/bac.htm. Accessed January 2011.