

From: [CEQAResponses](#)
To: [Werner, Steve](#); [Ford, John](#); [Shortridge, Tricia](#); [Humboldt Wind](#); [Elizabeth Burks](#)
Subject: FW: Humboldt Wind Project comments
Date: Friday, June 14, 2019 4:28:35 PM
Attachments: image001.png

Thanks,



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From: Marbled Murrelet <marbledmurreletfriends@gmail.com>
Sent: Friday, June 14, 2019 3:59 PM
To: CEQAResponses <CEQAResponses@co.humboldt.ca.us>
Subject: Humboldt Wind Project comments

The primary purpose of this letter is to inform the Humboldt County Officials of their potential liability under the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq. Specifically, that the County’s actions in approving the proposed wind energy development project, implementing the General Plan, zoning changes, issuing development permits, cannabis cultivation permits, forest land conversion permits, and other discretionary actions, must be sufficiently protective of ESA-listed species so as to avoid “take” as defined by the ESA. Under the ESA, it is unlawful to “take” endangered or threatened wildlife unless a statutory exception applies. 16 U.S.C. § 1538(a)(1)(B) (the “take” prohibition); see 50 C.F.R. § 17.31(a)(the "take" prohibition applies to threatened as well as endangered wildlife). Defined broadly, “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect[.]” 16 U.S.C. § 1532(19); see *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 115 S.Ct. 2407, 2416, 132 L.Ed.2d 597 (1995) (“Congress intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.”). It is equally unlawful “to attempt to commit, solicit another to commit, or cause to be committed” a “take.” 16 U.S.C. § 1538(g).

“Harass” and “harm,” within the meaning of “take,” are defined through regulation. The Secretaries of the Interior and Commerce, through the U.S. Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”), have further defined “harass” 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 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife.

O10-1

Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Id.

O10-1
(Cont.)

Because Humboldt County does not possess an incidental take permit, the County’s actions in regulating private activity that causes “take” of ESA-listed species makes the County liable for such actions. A number of federal courts have now held that the “take” prohibition extends not only to acts of parties that end up directly killing or harming a listed species or its habitat, **“but also applies to and prohibits those acts of a third party that bring about”** the taking. Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) cert. den. 525 U.S. 830 (1998) (Mass. officials liable under ESA for licensing commercial fisherman who used methods that harmed listed whales). See also, Coalition for a Sustainable Delta v. McCamman, 725 F. Supp. 2d 1162, 1167–68 (E.D. Cal. 2010) (recognizing that state regulating agencies may be held liable for take under the ESA, but holding there were disputes of material fact regarding whether the striped bass sport fishing regulations at issue caused take of listed salmonids); Oregon Natural Desert Ass’n v. Tidwell, 716 F. Supp. 2d 982, 1005 n.8 (D. Or. 2010) (holding that Forest Service may be held liable for authorizing grazing that results in unlawful take); Animal Welfare Institute v. Martin, 588 F. Supp. 2d 110, 113 (D. Me. 2008) (holding that a state’s licensing scheme violates the ESA take prohibition if it can be shown that the scheme results in illegal taking); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008) (holding the Minnesota DNR violated ESA take prohibition by authorizing lynx trapping); Nat’l Wildlife Fed’n v. Hodel, No. S-85-0837 EJG, 1985 U.S. Dist. LEXIS 16490, at *12,15 (E.D. Cal. Aug. 26, 1985) (FWS’ authorization of lead shot for hunting constituted a taking under section 9 by causing the deaths of listed eagles); Seattle Audubon Soc’y v. Sutherland, No. C06-1608MJP, 2007 U.S. Dist. LEXIS 39044 at *8 (W.D. Wash. May 30, 2007) (holding that Washington DNR officials implementing the state Forest Practices Act could potentially be liable for take of spotted owls because the ESA “prohibits a party, including state officials, from bringing about the acts of another party that exact a taking”); Pacific Rivers Council v. Oregon Forest Indus. Council, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL [32356431](#) at *11 (D. Or Dec. 23, 2002) (finding that state forester’s authorization of logging operations that are likely to result in a take is itself a cause of a take); Loggerhead Turtle v. County Council of Volusia, 148 F.3d 1231, 1249 (11th Cir. 1998) cert. den. 526 U.S. 1081 (1998) (plaintiffs had standing to sue County Council for take created by inadequately protective lighting ordinances); US v. Town of Plymouth, 6 F. Supp 2d 81, 90–91 (D. Mass 1998) (holding town liable for take of piping plovers caused by off road vehicle use that town allowed on its local beach); Greater Ecosystem Alliance v. Lydig, No. C94-1536C (W.D. Wash. Mar. 5, 1996) (unpublished Opin. & Order p.13) (holding that the Washington Fish and Wildlife Commission’s black bear hunting regulations, which authorized hunting with hounds and bait in certain forests, amounted to a taking of the endangered grizzly bear); Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (holding USFS caused illegal take of listed woodpeckers by approving timber management plan that allowed timber companies to clear cut certain lands); and Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding EPA caused illegal take by registering certain pesticides for specific uses that would likely harm listed species).

O10-2

Based on this clear and convincing line of cases, local governments are liable for actions of third parties that result in “take” when those governments authorize activities that directly or indirectly result in “take.” In addition, when local governments fail to sufficiently regulate an activity within their jurisdiction, and the County knows, or should know that the actions authorized may result in “take” to ESA-listed species, this prohibited taking is imputed to the local government.

O10-2
(Cont.)

In the present matters before Humboldt County officials, 1) the discretionary approval of a wind energy project that is likely to result in “take”; 2) the discretionary approval of zoning changes county-wide has far reaching implications that have great potential to result in “take” to ESA-listed species, including Northern Spotted Owl, Marbled Murrelet, Coho Salmon, Chinook Salmon, Steelhead, Eulachon, as well as other species, and those now being considered for listing; 3) the discretionary approval of multiple commercial cannabis cultivation permits with potential to result in “take” of ESA-listed species. In addition, the wind energy project, zoning changes, commercial cannabis cultivation, and other discretionary permits have cumulatively significant impacts to ESA-listed species because the result of these actions will facilitate development in sensitive wildlife habitat, including the known impacts from industrial sites in floodplains and riparian areas impacting listed salmonids, fragmentation and degradation of forest habitat for commercial and residential development in wild areas impacting Northern Spotted Owl, Marbled Murrelet, Pacific Fisher, Humboldt Marten and other species.

O10-3

As previously disclosed in the County’s second attempt at a commercial cannabis ordinance, the final EIR admits significant potential for harming ESA-listed species. Therefore, the final EIR for Humboldt County’s Commercial Cannabis Ordinance 2.0 is hereby incorporated by reference.

O10-4

Therefore, it is imperative that the County, in considering the present matters, including a large wind energy project, changing zoning county-wide and on individual discretionary actions, must ensure that absolutely no “take” occurs. This is true for both activity that complies with County regulations, and for activity that does not comply with regulations, but for which the County has not provided sufficient resources for enforcement.

O10-5

Therefore, we request that the county ensure that all discretionary approvals meets a no “take” standard and includes sufficient resources for enforcement to ensure compliance with the ESA. The County should work closely with expert agencies that implement the ESA, namely the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to achieve this legal requirement.