

FWS/AES-TE

Memorandum

To: Regional Director

Through: Assistant Regional Director, Ecological Services  
Program Manager, Endangered Species/Habitat Conservation

From: Regional HCP Coordinator

Subject: Set of Findings: Long Point Homeowner's Association, Kelleys Island, Erie County, Ohio (TE 072436)

On March 11, 2003, the U.S. Fish and Wildlife Service (Service) received an application for an incidental take permit under the Endangered Species Act of 1973, as amended (Act) from Long Point Homeowner's Association, LLC (LPHA). In accordance with the regulations, a Habitat Conservation Plan (HCP) accompanied the permit application. The Service prepared the Environmental Assessment (EA) for this incidental take permit (ITP) application request. A *Federal Register* Notice announcing receipt of the permit application, and soliciting comments on the application, was published on March 17, 2003. The comments received during the public review and responses to those comments were incorporated into the final EA. This memorandum constitutes a Set of Findings for processing the application and describes the Service's rationale for making a recommendation to issue an incidental take permit to the applicant.

**I. DESCRIPTION OF PROPOSAL**

LPHA applied to the Service for a permit to incidentally take Lake Erie water snake (*Nerodia sipedon insularum*) under the authority of section 10(a)(1)(B) of the Act. The permit duration is 15 years to develop a 15-acre property with seven private residences intended primarily for seasonal occupation. The Long Point property (Property) extends along 0.549 km of Lake Erie shoreline on the Long Point peninsula, Kelleys Island, Erie County, Ohio. All owners of units on the Property will be members of LPHA, an organization set up to manage, administer, and maintain the Property. Each individual lot on the Property contains a deed restriction that provides the mechanism for funding and implementing the conservation measures listed in HCP. The LPHA will consist of the 7 homeowners for the 7 lots specified in this document.

The HCP identifies conservation measures LPHA intends to implement for the purposes of minimizing and mitigating incidental take that may occur in the future. The primary goal of the HCP is to address human activities so that human alteration of this habitat is avoided and free use of the Property by the Lake Erie water snake is allowed to occur.

## **II. SECTION 10(a)(2)(A) HCP CRITERIA - ANALYSIS AND FINDINGS**

### **1. The impact that will likely result from such taking**

The HCP, EA, and Implementing Agreement adequately describe the proposed activities and the anticipated impacts to the Lake Erie water snake and the associated habitat within the project area. Given the Lake Erie water snake has been documented on the Property, the Service determined incidental take of the species and its habitat will occur as a result of construction activities and subsequent human use of the Property. It is estimated 5.25 acres of Lake Erie water snake habitat will be permanently lost due to construction of residences, driveways, mowed grass, and associated developments. Additionally, 15 adult snakes and additional immature snakes may be taken during the duration of the 15-year ITP resulting from habitat loss, driving on roads, and mowing lawns. Harassment of snakes, in the form of changes in daily behavior patterns, and changes in daily use areas are expected for a small number of snakes. The applicant has prepared an HCP to address the potential effects of these impacts. The HCP provided sufficient information for the Service to evaluate the impacts of the proposed activities. The Service's analysis of the project impact is described in the Biological Opinion.

### **2. The steps that will be taken to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances.**

LPHA is responsible for ensuring implementation and compliance with the conservation measures in the ITP and the HCP. Specifically, the LPHA will (1) implement the conservation measures identified in the HCP through bylaws and deed restrictions, (2) monitor lot owner compliance with the conservation measures, and (3) implement prompt corrective action to remedy any non-compliance observed. The LPHA will ensure implementation and compliance with the terms of the ITP. The applicants' HCP describes measures LPHA will implement to avoid or minimize harm to individuals, mitigation measures to compensate for potential losses, and a monitoring program to avoid potential disturbances to Indiana bats within the project area. The LPHA will pay a one-time fee of \$750 for the installation of signs relating to the Lake Erie water snake and HCP on the property. Funds exist within the LPHA that have been obligated for this expense. In addition, \$1,250 will be provided by the LPHA for each annual monitoring event specified in the HCP (not to exceed \$18,750). LPHA has funding obligated for this task and has the mechanism to collect through deed restrictions on the Property.

The following measures will be implemented to avoid, minimize, and mitigate adverse effects on Lake Erie water snakes:

- The LPHA will implement the Service's Interim Lake Erie water snake guidelines.
- Proposed residences, garages, outbuildings, roads, driveways, access roads, and septic mound construction will not occur within the area between the shoreline and 125 feet inland (Zones A and B).
- No lawn will be established within Zones A and B. Herbicides, pesticides, and fertilizers will not be utilized within these zones, with the exception of spot-treatment of approved chemicals for poison ivy, to avoid disturbance of important shoreline vegetation habitat.
- Constructed trails to access the shoreline are limited to a boardwalk no wider than 6 feet, and terminating in a platform no larger than 600 ft<sup>2</sup>.
- Ten-foot access routes for the Lake Erie water snake from the shoreline to inland areas will be provided along property lines and will be composed of natural vegetation to promote safe Lake Erie water snake travel between the shoreline and hibernation sites.
- Mowing in Zones A, B, and C will be subject to seasonal, height-specific, and temperature-specific restrictions.
- Maximum area of land to be cleared per lot for construction of residences and associated building will be limited to 1.0 acre, with a maximum of 0.75 acres remaining in a developed or landscaped area once construction has been completed.
- Two artificial hibernacula per lot will be constructed to replace hibernacula disturbed during construction of residences and associated buildings.
- LPHA will protect the existing stone building foundation in Lot 3, which currently provides hibernation habitat.
- During forest clearing activities, stumps greater than 6 inches at ground level and all stumps with base cavities will not be removed to protect potential hibernacula.
- LPHA will abandon all roadway easements, including the former shoreline access road, for a total area of 5.36 acres of easements on Long Point. This area will be allowed to revert back to a natural state, providing additional habitat for LEWS.
- Signs will be posted on the new access road promoting low speeds and awareness of the snake.
- Driveways will be constructed with light-colored gravel, to dissuade snakes from basking, and driveways to residential areas will be limited to a maximum width of 12 feet.
- LPHA will control pets at all times.
- Fire pits will be limited to one per lot in zone B or C, and will not be filled with materials until the time of burning.
- Water features such as fountains and hot tubs will be constructed above ground to discourage access by snakes. These structures will be de-chlorinated before draining, and hot tubs will be covered when not in use to discourage access by snakes.
- Lot owners agree to notify visitors and guests of the requirements of the HCP.

The treatment of unforeseen circumstances in the HCP (section 8.7) is consistent with the Service's Habitat Conservation Plan Assurances ("No Surprises") Rule, dated February 23, 1998.

### **3. Alternative actions to the taking the applicant considered and the reasons such alternatives are not proposed to be utilized**

Alternatives to the proposed project are fully described in the EA. There was interest in evaluating the feasibility of establishing a sanitary waste management system on the Property utilizing a single wastewater “package plant,” rather than the septic. The Ohio Environmental Protection Agency conducted an on-site inspection of the Property in 1999, and reviewed preliminary plans for seven privately owned lots with one residence each. After evaluating this information carefully, they recommended against installation of a package plant, and indicated they would decline to issue a permit for this type of system based on technical concerns. This alternative was found not practicable and was not considered in detail. The EA is limited to analysis of a range of reasonable alternatives selected to reflect several development scenarios, with or without an ITP and HCP. Four alternatives were evaluated in full in the EA, all resulting in take of the Lake Erie water snake. Under the No Action alternative, the Service would not issue an ITP and the HCP would not be implemented. This alternative does not forbid sale of the land or construction and development of the property. The property owners could reasonably be expected to sell their lots, or proceed with construction in a manner similar to that currently occurring in numerous places on Kelleys Island and on other islands inhabited by the LEWS. If development on the 15-acre tract occurred without an HCP and ITP, it is likely few if any of the measures designed to avoid and minimize take proposed would be implemented. It is likely that the shoreline access road would be reopened to vehicular traffic. The proposed action is the issuance of an ITP under section 10(a)(1)(B) of the Act to authorize the incidental take of threatened Lake Erie water snakes expected to occur from the construction and occupancy of the Property. The other alternatives evaluated more development under an HCP and the same development under a shorter ITP duration. Both alternatives are believed to provide fewer protective measures to the Lake Erie water snake than the proposed action.

### **4. Other measures that the Director may require as being necessary or appropriate for the purposes of the plan**

The applicant developed the HCP in consultation with the Service, and further modified the HCP as a result of public comments. These included minimization and mitigation measures the Service determined to be necessary and practicable to minimize and mitigate take.

## **III. ENVIRONMENTAL ASSESSMENT AND PUBLIC COMMENT - ANALYSIS AND FINDINGS**

The Service prepared the EA for this ITP application request. A Notice of Availability was published in the *Federal Register* on March 17, 2003, notifying the public of the availability of the EA and HCP for public comment accepted through May 16, 2003. During the comment period, the Service received 10 comment letters. The Service addressed comments and as a result, appropriate changes were made to the HCP and EA.

#### **IV. SECTION 10(a)(2)(B) PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

##### **1. The taking will be incidental.**

The Service finds the take will be incidental to the otherwise lawful activities occurring as a result of the proposed construction and related development by LPHA.

##### **2. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.**

The Service finds the applicant has developed an HCP pursuant to the requirements provided in the Act and its implementing regulations and has provided for mitigation and minimization of take to the full extent requested. The "maximum extent practicable" concept consists of considering the economic objectives with the applicant (reflected by the scope of the project and its design), a measurement of the subsequent impact imposed on the protected species, and to what degree the extent of mitigation and minimization measures offered in the HCP compensate for impact to the species. Minimization efforts do not take precedence over mitigation efforts or vice-versa. Minimization and mitigation can take many forms and any combination to address direct, indirect, and cumulative adverse effects on listed species. In this particular case, the level of incidental take is expected to be low once measures of the HCP and permit are in place, and the applicant has provided mitigation and minimization to offset the expected impacts to the Lake Erie water snake. The Service's Biological Opinion described the incidental take considered to be reasonable occurring under this ITP.

##### **3. The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.**

Through execution of the Implementing Agreement, the applicant ensures funding is available to meet their obligations under this Agreement, the Permit, and the HCP throughout the term of the HCP. The Service's HCP Assurances ("No Surprises") rule is discussed in the HCP and measures to address changed and unforeseen circumstances have been identified in Section 8.7 of the HCP. Unforeseen circumstances would necessitate coordination between the Service and the applicants. The applicants have committed to a coordination process to address such circumstances. The Service has therefore determined the financial commitment, along with the willingness to address changed and unforeseen circumstances in a cooperative fashion, is sufficient to meet this criterion.

##### **4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.**

The Service has reviewed issuance of an ITP to the applicant in accord with section 7 of the Act to cover activities associated with the proposed activities and HCP/Permit maintenance. As concluded in the Biological Opinion, the ITP will not appreciably reduce the likelihood of survival and recovery of Lake Erie water snake in the wild or adversely modify its habitat.

##### **5. Additional measures as required by the Director of the Service will be implemented.**

The EA and HCP have incorporated all elements necessary for issuance of a section 10(a)(1)(B) permit. No measures other than those in the HCP or in the terms and conditions of the ITP are required to implement the intent and purpose of the HCP.

**6. The Director of the Service has received the necessary assurances that the plan will be implemented.**

The permit will be valid only if the minimization and mitigation measures have been carried out in accordance with the HCP and the terms and conditions of the permit. Failure to perform the obligation outlined by the conditions of the section 10(a)(1)(B) permit may be grounds for suspension, revocation of the permit, and enforcement actions under authority of the Endangered Species Act.

**V. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS**

The Service has no evidence the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR § 13.21(b)-(c).

**VI. RECOMMENDATIONS ON ISSUANCE OF PERMIT**

Based on the findings of the Regional Office and the Reynoldsburg, Ohio Field Office staff, and with respect to the ITP application, HCP, EA, Implementing Agreement, and biological opinion, we concur the issuance of the section 10(a)(1)(B) ITP to LPHA proposing the *Habitat Conservation Plan for take of the Lake Erie water snake* is recommended.

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