

U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Plan (No Surprises) Assurances Final Rule

Q. What is a Habitat Conservation Plan and Incidental Take Permit?

A. In the 1982 amendments to the Endangered Species Act, Congress established a mechanism under section 10(a)(1)(B) that authorizes the Services to issue to non-Federal entities a permit for the "incidental take" of endangered and threatened wildlife species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the "incidental" taking of a listed species. The ESA defines incidental take as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

A habitat conservation plan, or HCP must accompany an application for an incidental take permit. The purpose of the HCP is to ensure that the effects of the permitted action on listed species are adequately minimized and mitigated. The permit authorizes the incidental take, not the activity that results in take. The activity itself must comply with other applicable laws and regulations.

Q. What is the benefit of an Incidental Take Permit and Habitat Conservation Plan to a private landowner?

A. Prior to 1982, non-Federal landowners undertaking otherwise lawful activities that were likely to take listed species risked violating section 9 of the ESA, which prohibits the "taking" of an endangered species. The incidental take permit allows a non-Federal landowner to legally proceed with an activity that would otherwise result in the illegal take of a listed species.

Q. What are No Surprises assurances?

A. No Surprises assurances are provided by the government through the section 10(a)(1)(B) process to non-Federal landowners. Essentially, private landowners are assured that if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee. The government will honor these assurances as long as a permittee is implementing the terms and conditions of the HCP, permit, and other associated documents in good faith. In affect, this regulation states that the government will honor its commitment as long as the HCP permittees honor theirs.

Q. Why are assurances provided to non-Federal landowners?

A. The Services believe that assurances should be provided to the private sector when economic development projects that provide long-term conservation benefits to species through implementation of HCPs. In order to provide sufficient incentives for the private sector to participate in the development of long-term conservation plans, adequate assurances must be made to the financial and development communities, that may be investing hundreds of thousands, if not millions, of dollars in a project, that a section 10(a)(1)(B) permit can be made for the life of the project.

Q. How are the views of independent scientists used or sought, before and during development of an HCP? Please cite examples.

A. The views of independent scientists are important in the development of operating conservation program in nearly all HCPs. In many cases, these individuals are contacted by the applicant and are directly involved in discussions on the adequacy of possible mitigation and minimization measures. In other cases, the views of independent scientists are incorporated indirectly through their participation in other documents, such as listing documents, recovery plans, and conservation agreements, that are referenced by applicants as they develop their HCP. Additionally, input from independent scientists can occur during the HCP's public comment period.

Q. Aren't HCPs protecting landowners, not species?

A. HCPs benefit threatened and endangered species because they provide an incentive for landowners to integrate conservation measures into the day-to-day management of their lands. In short, to proceed with their proposed activity under an incidental take permit, a landowner must provide a long-term commitment to species conservation through the development of an HCP.

As a result of the No Surprises rule and other improvements made by the Clinton Administration, HCPs are evolving into a broad-based, landscape-level planning tool. In addition to conserving listed species, HCPs often include conservation measures for proposed and candidate species, as well as other rare or vulnerable species that live in the plan area. By adequately covering such unlisted species, developers and landowners can also help prevent their decline. Thus, landowners have an incentive to conserve both listed and unlisted species . . . an incentive that in most cases does not exist outside of the HCP process.

Q. How are HCPs enforced to ensure that required mitigation is implemented?

A. There are a number of processes through which the Services ensure that terms of an HCP are being complied with. Among these are monitoring, development of annual reports by the permittee, and field inspections. On occasion, the Services may find that a permittee has violated conditions of the permit. Implementing Agreements sometimes contain provisions concerning the failure of signatory parties to perform their assigned responsibilities under an HCP. There is a process established that the Services follow in the event of a known or suspected permit violation. If the violation is deemed technical or inadvertent in nature, the Services may send a notice of noncompliance by certified mail or may recommend alternative action to regain compliance with the terms of the permit.

The Services may suspend or revoke all or part of the privileges authorized by a permit, if the permittee

does not: comply with conditions of the permit or with applicable laws and regulations governing the permitted activity; or pay any fees, penalties, or costs owed to the government. If the permit is suspended or revoked, incidental take must cease and wildlife held under authority of the permit must be disposed of in accordance with the Services' instructions.

Q. Aren't HCPs in direct conflict with the actual purpose of the ESA, which is to conserve species and the habitat they depend upon?

A. Section 10(a) of the ESA allows the Services to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided that those activities were conducted according to an approved HCPs, and the issuance of the HCP permit would not jeopardize the continued existence of the species. Accordingly, these proposed HCPs must satisfy specific issuance criteria enumerated in section 10(a)(2)(B) of the ESA. In deciding whether these criteria have been satisfied and whether the permit should be issued for a given species, the Services consider, among other things, the extent to which the habitat of the affected species or its long-term survivability may be improved or enhanced.

Q. How do you monitor the HCPs that are in existence now?

A. Monitoring is a mandatory element of HCPs under the ESA and Federal regulation, and a crucial factor related to the success of HCPs. The section 10 permit must include reporting requirements necessary to track take levels occurring under the permit and to ensure the conservation program is being properly implemented. The HCP itself will often specify reporting requirements. Both the permittee and the Services are responsible for monitoring the success of the HCP, and the Services have the added responsibility of monitoring the permittee's implementation of the HCP in order to determine if the permittee is complying with its regulatory requirements. In addition to verifying the success of individual HCPs and the program, monitoring will allow the scientific data attained relative to the success of operating conservation program to be used for the development of future strategies that will help conserve listed species.

The Services have drafted additional monitoring guidance for HCPs, which will be published in the near future for public review. The Services are also developing a nationwide database for issuance and tracking of permits, including incidental take permits associated with HCPs. This new system will greatly improve the Services' ability to monitor HCP compliance. The Services are also strengthening the monitoring component of the HCP program to ensure the permittees' compliance with the terms of the HCP.

Q. Isn't science always a surprise, especially with species that are rare. Isn't it dangerous to lock into a long-term plan with a non-Federal landowner on a species you might know little to nothing about?

A. If there are significant biological data gaps associated with a species covered by an HCP's operating conservation program, adaptive management becomes an integral component of the HCP. Incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-

term interest of affected species when HCPs cover species with biological data gaps. In the HCP program, adaptive management is used to examine alternative strategies for meeting measurable biological goals and objectives through research and/or monitoring, and then, if necessary, to adjust future conservation management actions according to what is learned. Through adaptive management, the biological objectives of an operating conservation program are defined using techniques such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what conservation and mitigation measures are needed to achieve a biological objective, then an adaptive management approach will be used in the HCP. The primary reason for using adaptive management in HCPs is to allow for changes in the operating conservation program, which may be necessary to reach the biological objectives of the HCP.

Q. What will the Services do in the event of unforeseen circumstances that may jeopardize the species?

A. The Services believe that it will be rare for unforeseen circumstances to result in a jeopardy situation. However, in such cases, the Services will use all of their authorities and resources, will work with other Federal agencies to rectify the situation, and work with the permittee to redirect conservation and mitigation measures that remove the jeopardizing effects. The Services have significant resources and authorities that can be utilized to provide additional protection for threatened or endangered species that are the subject of a given HCP including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. For example, lands managed by the Department of the Interior could be used to ensure listed species protection.

Q. How has the proposed rule changed?

A. The following information summarizes some of the revisions to the proposed rule as a result of the consideration of the public comments received during this rulemaking process.

- Definitions used in this rulemaking process will now be codified as definitions in 50 CFR. These definitions were concepts identified in the "Background" section of the proposed rule.
- The rule was revised so the Services can only provide assurances for species listed on a permit that are adequately covered in the conservation plan and specifically identified on the permit.
- The Services clarified that the duration of the assurances is the same as the length of the permit.
- The Services revised the rule so that there is only one level of assurances provided to permittees, instead of one level of assurances for standard HCPs and another level for HCPs that were developed to provide a "net benefit" for the covered species.
- The Services clarified the rule so that it is apparent that No Surprises assurances do not apply to Federal agencies who have a continuing obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.
- The Services eliminated the permit-shield provisions from the final rule.

result in listed species occupying adjacent properties.

The Services will use the maximum flexibility allowed under the Act in addressing neighboring properties under Safe Harbor Agreements and associated take authorizations, including, but not limited to, granting of incidental take authority to the owners of neighboring lands, where occupation of neighboring lands is expected as a result of the Agreement. Neighboring landowners would only be required to agree to such conditions as would be necessary to ensure that the Agreement does not circumvent those obligations or requirements, if any, under section 9 of the Act that were applicable at the time the Agreement was signed. Implications to neighboring landowners with non-enrolled lands will be determined on a case-by-case-basis, and the Services will make every effort to include them as a signatory party to the Agreement and enhancement of survival permit when the occupation of their lands by covered species is expected. For neighbors to receive the Safe Harbor Assurances, they would sign an Agreement with the following requirements: (1) Allow an assessment/establishment of the baseline on their properties with concurrence by all parties, (2) notify the Services prior to significantly modifying the habitat, and (3) allow the Services access to capture and translocate individuals of the covered species on their property that would be expected to be adversely affected by those habitat modifications. To facilitate neighboring landowner's participation, the Services will encourage them to become signatory parties to these Agreements, where appropriate.

Part 15. Will There Be Public Review?

The Services will encourage property owners to involve the public in the development of an Agreement. However, public participation must be agreed to by the property owner. The Services will make every Safe Harbor Agreement available for public review and comment as part of the evaluation process for issuance of the associated enhancement of survival permit. This comment period will generally be 30 days; with the comment period for large or programmatic Agreements 60 days.

Part 16. What Is the Scope of the Policy?

This policy applies to all Federally-listed species of fish and wildlife administered by the Services, as provided in the Act and its implementing regulations.

Dated: March 22, 1999.

Jamie Rappaport Clark,
Director, U.S. Fish and Wildlife Service.

Dated June 10, 1999.

Penelope D. Dalton,
Assistant Administrator of Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

Announcement of Final Policy for Candidate Conservation Agreements with Assurances

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Announcement of final policy.

SUMMARY: The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (jointly the Services) announce a joint final Policy for Candidate Conservation Agreements (Agreements) with Assurances under the Endangered Species Act of 1973, as amended (Act). This policy offers assurances as an incentive for non-Federal property owners to implement conservation measures for species that are proposed for listing under the Act as threatened or endangered, species that are candidates for listing, and species that are likely to become candidates or proposed in the near future. Published concurrently in this **Federal Register** are the FWS's regulations necessary to implement this policy.

DATES: This policy is effective July 19, 1999.

ADDRESSES: Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Washington, D.C. 20240 (Telephone 703/358-2171, Facsimile 703/358-1735); or Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910 (Telephone 301/713-1401, Facsimile 301/713-0376).

FOR FURTHER INFORMATION CONTACT: Richard Hannan, Acting Chief, Division of Endangered Species, U.S. Fish and Wildlife Service (Telephone 703/358-2171) or Marta Nammack, Endangered Species Division, National Marine

Fisheries Service (Telephone 301/713-1401).

SUPPLEMENTARY INFORMATION:

Background

On June 12, 1997, the Services issued a draft policy (62 FR 32183), and the FWS issued proposed regulations to implement the policy (62 FR 32189). This policy is intended to facilitate the conservation of proposed and candidate species, and species likely to become candidates in the near future by giving citizens, States, local governments, Tribes, businesses, organizations, and other non-Federal property owners incentives to implement conservation measures for declining species by providing certainty with regard to land, water, or resource use restrictions that might be imposed should the species later become listed as threatened or endangered under the Act. Under the policy, non-Federal property owners, who enter into a Candidate Conservation Agreement with assurances that commit them to implement voluntary conservation measures for proposed or candidate species, or species likely to become candidates or proposed in the near future, will receive assurances from the Services that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed in the future.

Much of the land containing the nation's existing and potential fish and wildlife habitat is owned by private citizens, States, local governments, Native American Tribal governments, businesses, organizations, and other non-Federal entities. The future of many declining species is dependent, wholly or in part, on conservation efforts on these non-Federal lands. Such conservation efforts are most effective and efficient when initiated early. Early conservation efforts for proposed and candidate species, and species likely to become candidates or proposed in the near future can, in some cases, preclude or remove any need to list these species as threatened or endangered under the Act.

By precluding or removing any need to list a species through early conservation efforts, property owners can maintain land use and development flexibility. In addition, initiating or expanding conservation efforts before a species and its habitat are critically imperiled increases the likelihood that simpler, more cost-effective conservation options will still be available and that conservation will ultimately be successful.

Early conservation efforts for declining species can be greatly expanded through a collaborative stewardship approach. A collaborative approach fosters cooperation and facilitates the exchange of ideas among private citizens, Federal agencies, States, local governments, Tribes, businesses, and organizations in by involving all stakeholders in the conservation planning process.

Candidate Conservation Agreements without assurances have been effective mechanisms for conserving declining species, particularly candidate species, and have, in some instances, precluded or removed any need to list some species. Development of Agreements without assurances will continue to be a high priority. However, most of these Agreements have been between the Services and other Federal agencies since non-Federal property owners have had little incentive to enter such Agreements. Many non-Federal property owners are willing to manage their lands to benefit fish, wildlife, and plants, especially those species that are declining. However, some of these property owners are reluctant to implement conservation measures for declining species because of possible future land, water, or resource use restrictions that may result from the Act's section 9 "take" prohibitions if their conservation efforts cause a species to colonize their lands or increase in numbers and the species is subsequently listed as threatened or endangered. This policy is designed to provide these property owners with the necessary assurances to remove these concerns and encourage them to implement conservation measures for these species.

Non-Federal property owners, who through a Candidate Conservation Agreement with assurances commit to implement conservation measures for a proposed or candidate species or a species likely to become a candidate or proposed in the near future, will receive assurances from the Services that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed in the future. These assurances will be provided in the property owner's Agreement and in an associated enhancement of survival permit issued under section 10(a)(1)(A) of the Act.

The Services must determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if

it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. "Other necessary properties" are other properties on which conservation measures would have to be implemented in order to preclude or remove any need to list the covered species.

The kinds of conservation measures specified in an Agreement with assurances will depend on the types, amounts, and conditions of, and need for, the habitats existing on the property and on other biological factors. Different kinds of conservation measures may benefit different life stages or serve to fulfill different life history requirements of the covered species. The amount of benefit provided by an Agreement with assurances will depend on many factors, particularly the size of the area on which conservation measures are implemented and the degree of conservation benefit possible (e.g., through habitat restoration or reduction of take). For example, an Agreement with assurances for a property with a small area of severely degraded habitat could be designed to achieve greater benefits than one for a property with a large amount of slightly degraded habitat.

Because Candidate Conservation Agreements with assurances will be designed with the goal of precluding or removing any need to list the covered species, these Agreements can have significance in the Services' listing decisions. However, the determination of whether these Agreements do in fact preclude or remove any need to list the covered species will be made on a case-by-case basis in accordance with the listing criteria and procedures under section 4 of the Act.

Collaborative stewardship with State and Tribal fish and wildlife agencies is particularly important in the development of Candidate Conservation Agreements, given the statutory role of these entities under the Act and their traditional conservation responsibilities and authorities for resident species. The Services recognize that, under some circumstances, a State, Tribal, or local agency or other entity may be able to work more promptly, effectively, and efficiently with individual property owners toward conservation of declining species. Under this policy, the Services can enter into an "umbrella" or programmatic Agreement with an appropriate State, Tribal, or local agency or other entity. Such an Agreement and its associated enhancement of survival permit would specify the assurances and take allowances that could be

distributed by the participating State, Tribal, or local agency or other entity to individual property owners who choose to participate under the umbrella Agreement. Appropriate agencies for such programmatic Agreements include State or Tribal fish and wildlife agencies and State, Tribal, or local land management agencies. The State, Tribal, or local agency or other entity would be the permittee and would issue Certificates of Inclusion (also called Participation Certificates) to private property owners who satisfy the terms and conditions of the State, Tribal, or local agency's or other entity's programmatic Agreement and its associated "enhancement of survival" permit.

The Services have a long history of developing Candidate Conservation Agreements with Federal agencies, and these efforts will continue to be a high priority. However, because subsections 7(a)(1) and (a)(2) of the Act obligate Federal agencies to affirmatively conserve listed species, an obligation not imposed upon non-Federal property owners, the Services will not provide assurances to other Federal agencies through these Agreements.

In 1994, the FWS prepared Draft Candidate Species Guidance, which underwent public review and comment (59 FR 65780, December 21, 1994). However, it did not address the development of Candidate Conservation Agreements with assurances for non-Federal property owners. This final policy will be incorporated into the FWS's final guidance on candidate species conservation.

A final rule of the FWS's regulations necessary to implement this policy is published concurrently in this issue of the **Federal Register**. That final rule also includes the FWS's regulations necessary to implement the Safe Harbor policy (also published concurrently in this issue of the **Federal Register**). The NMFS will publish proposed regulations to implement these policies at a later time.

Summary of Comments Received

The Services received more than 280 letters of comment on the draft policy from Federal and State agencies, businesses and corporations, conservation groups, religious organizations, trade associations, private organizations, and individuals. The Services considered all of the information and recommendations received from all interested parties and made changes to the draft policy where appropriate. A few commenters raised issues related to the FWS's draft implementing regulations, and the FWS

has addressed these issues where appropriate in its final implementing regulations also published in today's **Federal Register**. The following is a summary of the comments on the draft policy and the Services' responses.

Issue 1. Many commenters stated that the policy is inconsistent with provisions of section 7(a)(1) of the Act that requires all Federal agencies to use their authorities to conserve endangered and threatened species.

Response 1. The Services believe that the policy is consistent with provisions of section 7(a)(1) of the Act and enables the Services to further satisfy the intent of this section of the Act. Entering into an Agreement with assurances is completely voluntary for the Services, as it is for property owners. The Services will enter into an Agreement with assurances only if we have determined that the conservation needs for covered species on the participating property owner's property are adequately addressed in the Agreement.

By entering into a Candidate Conservation Agreement with assurances, a property owner can obtain certainty that no additional conservation measures will be required and no additional land, water, and resource use restrictions will be imposed if the species is listed in the future. If they cannot obtain such certainty, some property owners might choose to eliminate or reduce the species' habitat before listing occurs. An Agreement with assurances thus can further the conservation of the covered species because it can prevent such losses of existing habitat.

Issue 2. Many commenters believed that the policy is inconsistent with provisions of section 7(a)(2) of the Act because it precludes reinitiation of section 7 consultation on issuance of an enhancement of survival permit. Also, many commenters believed that the Services cannot guarantee that funding will be available to pay for additional conservation measures needed to address unanticipated changes in circumstances.

Response 2. The Services believe that the policy is consistent with section 7(a)(2) of the Act. As applied to implementation of this policy, section 7(a)(2) requires the Services to conduct a formal intra-Service consultation on the issuance of an enhancement of survival permit. The purpose of any consultation is to ensure that any action authorized, funded, or carried out by a Federal agency, including the issuance of an enhancement of survival permit by the Services, is not likely to jeopardize the continued existence of any listed or proposed species or result in the

destruction or adverse modification of designated or proposed critical habitat of such species. Since the standard for Candidate Conservation Agreements with assurances is the preclusion or removal of the need to list, the Services believe that it is highly unlikely that the conservation measures prescribed in an Agreement or any incidental take authorized by the associated enhancement of survival permit would later be discovered to adversely affect the covered species or any listed species causing a need to reinitiate intra-Service consultation.

If unanticipated changes in circumstances occur that might warrant modifications to the agreed upon conservation measures, the Services would work with the property owner to seek mutually agreed upon adjustments to those conservation measures that enhance their effectiveness for the covered species. Thus, the Services and property owners could agree to substitute the original agreed upon conservation measures for new ones that would be no more costly but more effective in addressing the changed circumstances. In this fashion, the conservation goal for that property owner's property could still be maintained.

The Services will not enter into an Agreement unless (1) the threats to and the requirements of the covered species are adequately understood so that the Services can determine that the agreed upon conservation measures will be beneficial to the covered species; and the effects of the agreed upon conservation measures are adequately understood so that the Services can determine that they will not adversely affect listed species or adversely modify critical habitat or (2) any information gaps relating to the requirements of the covered species or the effects of the conservation measures on the covered species or listed species can be adequately addressed by incorporating adaptive management principles into the Agreement. The Services believe that, in many Agreements, the conservation measures prescribed for the covered species will also benefit other species, including listed ones.

Moreover, the Services have significant resources and conservation authorities that can be used to address the needs of species covered by Agreements with assurances when unanticipated changes in circumstances cause a need for additional conservation measures. Some funding for additional conservation measures may come from existing appropriations for either candidate conservation or recovery, depending on whether the species is

listed. When necessary, the Services will work with other Federal, State, and local agencies, Tribal governments, conservation groups, and private entities to implement additional conservation measures for the species.

Finally, the Services are prepared as a last resort to revoke a permit implementing a Candidate Conservation Agreement with assurances where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a situation.

Issue 3. Many commenters believed that the policy precludes adaptive management.

Response 3. The Services encourage the inclusion of the principles of adaptive management into Candidate Conservation Agreements with assurances and associated enhancement of survival permits when necessary, especially when new management techniques are being tested. Adaptive management is a process of monitoring the implementation of conservation measures, then adjusting future conservation measures according to what was learned. Adaptive management can also include testing of alternative conservation measures, monitoring the results, and then choosing the most effective and efficient measures for long-term implementation. Inclusion of adaptive management in Agreements allows for up-front, mutually agreed upon changes to conservation measures in response to changing conditions or new information.

By incorporating adaptive management into Agreements with assurances and associated enhancement of survival permits, the Services believe that these Agreements will have sufficient flexibility to enable the Services and property owners to address reasonably foreseeable changes in circumstances or new information.

Issue 4. Many commenters stated that Candidate Conservation Agreements with assurances will undermine recovery of the covered species once it is listed.

Response 4. The Services believe that this comment reflects confusion regarding the standard required by the policy in all Agreements with assurances. The policy requires the Services to determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if

it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. Since this is essentially a recovery standard, each property owner with an Agreement with assurances would contribute to precluding or removing any need to list the covered species. Therefore, if the covered species became listed, these property owners would already be implementing conservation measures that address the covered species' conservation needs on their properties.

Issue 5. Many commenters believed that the draft policy limited public participation. Some stated that the draft policy was unclear as to when the Services will solicit comments on Candidate Conservation Agreements with assurances, and some commenters felt that the public should be allowed to participate in the development of all Agreements. In addition, many commenters said that Agreements should be subject to citizen enforcement.

Response 5. The Services have changed the policy to clarify when the public will have the opportunity to review and comment on Agreements with assurances. The Services will make every Agreement with assurances available for public review and comment as part of the evaluation process for issuance of the enhancement of survival permit associated with these Agreements. This comment period will generally be 30 days; the comment period for large-scale or programmatic Agreements that may affect other natural resources will be at least 60 days.

The development of an Agreement with assurances consists primarily of the preparation of a proposal by a non-Federal property owner to modify voluntarily their current land management practices so as to restore, enhance, or preserve habitat or to implement voluntarily other conservation measures for declining species. Because development of such a proposal is purely voluntary and involves private land use decisions, public participation in the development of an Agreement with assurances will only be provided when agreed to by the property owner.

However, the Services will encourage property owners to allow for public participation during the development of an Agreement with assurances, particularly if non-Federal public agencies (e.g., State fish and wildlife agencies) are involved. The Services also will encourage State or local agencies or other entities developing

"umbrella" or programmatic Agreements, which would specify the assurances and take allowances that could be further delegated by the State or local agency or other entity to individual participating non-Federal property owners, to provide extensive opportunities for public involvement during the development process.

The public will also be given other opportunities to comment on Agreements in cases that are related to a listing determination. When one or more additional Agreements are completed after the covered species is proposed for listing, and the Services determine, based upon a preliminary evaluation, that all completed Agreements could potentially justify withdrawal of the proposed listing, the comment period for the proposed listing will be extended or reopened to allow for public comments on the Agreements' adequacy in removing threats to the species. The Services believe a preliminary evaluation of the likelihood that the completed Agreements remove the need to list is necessary in order to justify constricting the available time to reach a final determination by extending or reopening the comment period on a proposed rule.

The provisions of the Act providing for citizen suits will be neither enhanced nor diminished in any way by the issuance of this policy because it will be implemented through the enhancement of survival permitting process recognized under the Act. To the extent that the current Act allows for citizen lawsuits to challenge the issuance of a given section 10(a) permit, nothing in this policy would modify or alter that opportunity for possible judicial review.

Issue 6. Many commenters stated that all Candidate Conservation Agreements with assurances should undergo independent scientific review.

Response 6. In determining the need for independent scientific review, the Services will consider the complexity of the Agreement, the size of the geographic area covered, the number of species covered, the presence of data gaps or scientific uncertainties, and other factors. Scientific experts will often be asked to assist with development of conservation measures and/or to review a draft Agreement. When scientific experts are not specifically solicited to provide comments, such individuals can submit comments during the general public review and comment periods (see Response 5 above). In developing Agreements with assurances, the Services may use existing State conservation plans or strategies that

have undergone scientific review, or the Services may use other scientific information published in peer reviewed journals.

Issue 7. Many commenters questioned the authority for and the availability of adequate funding for the implementation of this policy.

Response 7. The Services believe that sections 2, 7, and 10 of the Act allow the implementation of this policy. For example, section 2 states that "encouraging the States and other interested parties through Federal financial assistance and a system of incentives, to develop and maintain conservation programs * * * is a key * * * to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants." The Services believe that establishing a program for the development of Candidate Conservation Agreements with assurances provides an excellent incentive to encourage conservation of the Nation's fish and wildlife. Section 7 requires the Services to review programs they administer and to "utilize such programs in furtherance of the purposes of this Act." The Services believe that, in establishing this policy, they are utilizing their Candidate Conservation Programs to further the conservation of the Nation's fish and wildlife. Of particular relevance is section 10(a)(1) which authorizes the issuance of permits to "enhance the survival" of a listed species. From the perspective of the Services, a well designed voluntary Candidate Conservation Agreement is the epitome of conservation efforts designed to "enhance the survival" of the covered species.

Funding is available to implement this policy through annual appropriations. The Services are currently working on Candidate Conservation Agreements without assurances, and with finalization of this policy the Services will use available resources to develop Agreements with assurances as well. The FWS is currently implementing over 40 conservation agreements (without assurances) and actions benefitting over 200 species. Several of these conservation agreements and actions have successfully precluded or removed threats so that listing by the Services was avoided.

The Services will prioritize the development of Agreements with assurances because resources to develop Agreements are limited. Prioritization will help the Services focus on those Agreements that are expected to provide the greatest conservation benefits.

Issue 8. Many commenters stated that the policy should require that all

Candidate Conservation Agreements with assurances include monitoring provisions.

Response 8. The Services agree that monitoring is necessary to ensure that the conservation measures specified in an Agreement with assurances are being implemented and to learn about the effectiveness of the agreed upon conservation measures. In particular, when adaptive management principles are included in an Agreement, monitoring is especially helpful for obtaining the information needed to measure the effectiveness of the conservation program and detect changes in conditions. For these reasons, monitoring will be a component of most Agreements with assurances. For many of these Agreements, monitoring can be conducted by the Services or the State and, in many cases, may involve only a brief site inspection and appropriate documentation.

Issue 9. Many commenters believed that Candidate Conservation Agreements with assurances will wrongly be used to replace recovery plans or warranted listing determinations or to delay the listing process.

Response 9. The Services do not intend for Agreements with assurances to replace recovery plans. In fact, in order to facilitate the development of Agreements with individual property owners, the Services may develop a conservation outline, strategy, or plan to determine the measures needed to address the conservation needs of the covered species. If the covered species is later listed, the conservation strategy or plan may form the basis for part or all of a recovery plan.

The Services also do not intend to use Agreements with assurances to justify a determination not to list the covered species when listing is in fact warranted. As described in Response 5, when an Agreement with assurances is completed after the covered species is proposed for listing, and when the Services determine, based upon a preliminary evaluation, that the Agreement could potentially justify withdrawal of the proposed rule, the comment period for the proposed rule will be extended or reopened to allow for public comments on the Agreement's adequacy in removing threats to the species.

However, the Act requires the Services to issue a final determination within 1 year of issuing a proposed rule to list. The FWS is working diligently to remove the backlog of listing actions that accrued following the listing moratorium in 1995 and 1996, and the

FWS expects to soon be able to again make final listing determinations within the 1-year time frame. The Services will not extend this time frame in order to allow for the completion and/or consideration of an Agreement with assurances. The Services believe a preliminary evaluation of an Agreement is necessary in order to justify constricting the available time to reach a final determination by extending or reopening the comment period on a proposed rule.

Issue 10. Several commenters stated that the policy should require incorporation of avoidance and minimization of take in all Candidate Conservation Agreements with assurances.

Response 10. The Services believe that avoidance and minimization of take is an inherent consideration in the development of any Agreement with assurances. Property owners whose current land, water, or resource use results in take of proposed or candidate species, or species likely to become candidates or proposed in the near future, are a primary focus of this policy. For some Agreements, avoidance and/or minimization of take may be the primary objective. A property owner entering into an Agreement with assurances can be assured that, if the covered species is listed in the future, no additional land, water, or resource use restrictions will be imposed above and beyond the conservation measures set forth in the Agreement. After take is eliminated or reduced, land, water, or resource uses can often provide significant benefits to the covered species. For example, a property owner could eliminate or reduce take of a declining grassland bird species that nests on his property by agreeing to delay mowing until after the nesting season. The species would benefit from successful reproduction, and the property owner would benefit from being able to maintain his current land use even if the species is later listed.

If a property owner exceeds the conservation goal established for his property as specified in an Agreement with assurances, the property owner may choose to reduce the level of conservation benefits he/she has provided to the covered species to a lower level, but one that is still at or above the conservation goal specified in the Agreement. The property owner's enhancement of survival permit would authorize incidental take associated with this reduction of conservation benefits back to the agreed upon level. Prior to issuing the enhancement of survival permit, the Services must determine that the conservation goal for

the property can be maintained with the level of take authorized by the permit. The policy also requires that the Agreement include a notification requirement, if appropriate, to provide the Services or State agencies with a reasonable opportunity to rescue and translocate individuals of a covered species before any authorized take occurs. The Services believe that these provisions will ensure that any authorized take will not prevent a property owner from achieving the conservation goal established for his property and will minimize the amount of authorized take that occurs.

Issue 11. Several commenters believed that the policy should list the minimum conditions that must be satisfied before any Candidate Conservation Agreements with assurances are pursued.

Response 11. The Services agree with this comment, and the final policy lists the general requirements that all Agreements with assurances and associated enhancement of survival permits should satisfy. In addition, FWS's implementing regulations, which are published in today's **Federal Register**, also list the requirements that must be met before the Services will issue an enhancement of survival permit.

In addition, the FWS's draft Candidate Conservation Handbook includes a list of conditions under which Candidate Conservation Agreements would most likely be successful in eliminating threats and precluding or removing any need to list the covered species. This list would also apply to Agreements with assurances. The Services believe that such a list is more appropriately included in implementation guidance such as the FWS's Candidate Conservation Handbook.

Issue 12. Several commenters stated that the policy should not apply to candidate and proposed species because determinations have already been made that these species should be listed, and efforts to develop Candidate Conservation Agreements with assurances would only delay or forego the necessary protection that could be afforded by listing.

Response 12. The Services do not believe that Agreements with assurances will delay or forego any actions necessary to achieve conservation of the covered species. In fact, these Agreements will help to garner the necessary support from non-Federal property owners in achieving conservation through voluntary implementation of conservation measures. Additionally, the Services

believe that, for some candidate and proposed species, it is possible to complete the Agreements with assurances necessary to remove the need to list before a final listing determination could be made. These candidate and proposed species may include (1) species for which relatively few, non-complex Agreements are necessary, (2) species for which development of Agreements begins prior to the species becoming a candidate or proposed species, and (3) candidate species that have a low listing priority. Therefore, the Services believe that including candidate and proposed species in this policy is appropriate. However, for the Services to justify withdrawal of a proposed rule to list, the parties to all Agreements with assurances for the covered species must have the authority, funding, and commitment to implement the Agreements.

As of April 30, 1999, there were 154 FWS candidate species awaiting preparation of proposed rules and 69 FWS proposed species awaiting preparation of final rules. Final listing of many of these species, as well as many of the species that will be added as candidates or proposed species in the future, will require considerable time. The FWS believes that initiating early conservation efforts, including the development of Agreements with assurances, for some of these species will significantly increase the likelihood that conservation will be successful.

Issue 13. Several commenters asked how the conservation goal for each property owner's property can be determined without preparing a recovery plan.

Response 13. The Services believe it may be appropriate in some cases to prepare a conservation outline, strategy, or plan for a species before an Agreement with assurances is developed. In some cases, a conservation strategy or plan may already have been developed by the Services, another Federal agency, and/or a State agency. These strategies or plans may already have identified measures that should be implemented to conserve the covered species. In these cases, development of Agreements with assurances can be initiated right away.

Issue 14. Some commenters argued that a property owner could destroy habitat for candidate or proposed species, and then request a Candidate Conservation Agreement with assurances based on a lower starting baseline. Also, some commenters suggested that property owners may threaten to destroy habitat unless Agreements are written their way.

Response 14. The Services will not enter into any Agreement with assurances that does not meet the minimum standards established by this policy and its implementing regulations. Entering into an Agreement with assurances is voluntary for the Services and property owners; the Services will refuse to enter into an Agreement that does not meet the minimum established standards. Also, because the conservation goal for a property owner's property is not based solely on the amount of currently suitable habitat present, destroying habitat will likely only make it more difficult for the property owner to achieve the conservation goal for his property. Removing threats and taking actions consistent with the goal of precluding or removing any need to list would only be made more arduous by an initial destruction of habitat. Finally, the Services do not believe that it is credible to suggest that a property owner who is otherwise interested enough in declining species conservation to consider entering into an Agreement is likely to go in and first destroy portions of the species' habitat before entering into an Agreement.

Issue 15. Some commenters stated that the standard for Candidate Conservation Agreements with assurances should be to increase the likelihood that the species will survive rather than to preclude or remove any need to list.

Response 15. The Services believe that the overall goal for Agreements with assurances developed under this policy should be to remove threats to the covered species so as to preclude or remove any need to list the species. The Services believe that the policy must incorporate this standard in order to justify the expenditure of resources to develop and evaluate Agreements with assurances, process associated enhancement of survival permits, and allow the Services to provide assurances to the property owner.

Issue 16. Some commenters stated that the Services must conduct National Environmental Policy Act (NEPA) analyses for all Candidate Conservation Agreements with assurances and enhancement of survival permits.

Response 16. The Services believe that implementation of this policy must comply with NEPA. The Services have determined that most of these Agreements will be categorically excluded under the Department of Interior Departmental Manual (DM) NEPA procedures in 516 DM 2, Appendix 1.10 and under NOAA Administrative Series 216-6, Sections 602b.3 and 602c.3. The Services expect

that most Agreements with assurances and associated enhancement of survival permits will result in minor or negligible effects on the environment including federally listed species and their habitats. Complex, large-scale, or programmatic Agreements and their associated permits will require individual NEPA analysis.

Issue 17. Many commenters were confused by the term "umbrella agreements" in the draft policy.

Response 17. The Services may enter into an "umbrella" or programmatic Agreement with an appropriate State or local agency or other entity, and through such an Agreement and associated enhancement of survival permit, specify the assurances and take allowances that could be further delegated by the State or local agency or other entity to individual participating non-Federal property owners. In such a case, the State or local agency or other entity would be the permittee and would issue Certificates of Inclusion (also sometimes called Participation Certificates) to non-Federal property owners who satisfy the terms and conditions of the State or local agency's or other entity's "umbrella" or programmatic Agreement and associated permit. To avoid confusion in this final policy, the term "Agreements with non-Federal property owners" is used to refer to Agreements between the Services and individual property owners as well as "umbrella" or programmatic Agreements with State or local agencies or other entities through which assurances are further delegated to individual participating non-Federal property owners.

Issue 18. The statement "These assurances will only be provided to the participating property owners or State or local land management agencies but not to State regulatory agencies" confused many commenters who recognized that many State or local land management agencies also have regulatory responsibilities.

Response 18. The Services agree that this statement was confusing and have clarified it in the final policy. In making the statement, the Services overlooked the dual role of many State and local land management agencies. The Services intended to emphasize that only non-Federal property owners, whether they are State or local agencies, private individuals, Tribes, or other non-Federal entities, can receive assurances. However, as discussed previously, the Services can enter into an "umbrella" or programmatic Agreement with a State or local agency, including a State or local regulatory agency if appropriate, or other entity, and through such an Agreement and its

associated enhancement of survival permit, specify the assurances and take allowances that can be delegated by the State or local agency or other entity to individual participating non-Federal property owners through Certificates of Inclusion, Participation Certificates, or other similar vehicles.

Issue 19. Many commenters questioned the meaning of, or were confused by, the phrase "similarly situated property owners," which was used in describing the standard to which every Candidate Conservation Agreement with assurances will be held. Some commenters asked what the standard would be if there are no other similarly situated property owners within the range of the species. Some commenters asked what non-similarly situated property owners would be required to do. In addition, some commenters asked what property owners outside the current range of the species would be required to do if expansion of the current range of the species is necessary to preclude or remove any need to list.

Response 19. The Services agree that the draft policy did not clearly explain the standard that all Agreements with assurances must meet and have revised the description of the standard in the final policy as follows:

"The Services must determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. Other necessary properties are other properties on which conservation measures would have to be implemented in order to preclude or remove any need to list the covered species. The kinds of conservation measures specified in an Agreement with assurances will depend on the types, amounts, and conditions of, and need for, the habitats existing on the property and on other biological factors.

Different kinds of conservation measures may benefit different life stages or serve to fulfill different life history requirements of the covered species. The amount of benefit provided by an Agreement with assurances will depend on many factors, particularly the size of the area on which conservation measures are implemented and the degree of conservation benefit possible (e.g., through habitat restoration or reduction of take). For example, an Agreement with assurances

for a property with a small area of severely degraded habitat could be designed to achieve greater benefits than one for a property with a large amount of slightly degraded habitat."

The Services believe this description of the standard more clearly explains the contribution an individual property owner entering into an Agreement with assurances would need to make toward precluding or removing any need to list the covered species. This description addresses the fact that properties differ and that, consequently, different conservation measures could be specified for different properties. In addition, this description takes into account the fact that the Services may need to expand the species' current range in order to preclude or remove any need to list.

Issue 20. Several commenters asked for clarification of the phrase "species which will likely become candidates in the near future."

Response 20. The objective of this policy is to provide incentives to encourage non-Federal property owners to implement early conservation for declining species with the goal of precluding or removing any need to list. The Services did not want to exclude those species that are declining and/or are becoming subject to increasing threats and may soon be considered for candidate status. Including these species is particularly important considering that the rates of decline can sometimes increase abruptly, that the development of a Candidate Conservation Agreement with assurances might take longer than expected, and that conservation options may be more numerous the earlier a species is addressed. Because the circumstances surrounding each species are unique, the Services have chosen not to adopt a strict regulatory definition of the term "species that will likely become candidates in the near future." Instead, the Services will review species that are not candidates or proposed species on a case-by-case basis when determining whether they may be covered by an Agreement with assurances.

Issue 21. Several commenters were confused by the phrase "above those levels agreed upon and specified in the Agreement," which was used in describing the assurances provided through Candidate Conservation Agreements with assurances and associated enhancement of survival permits.

Response 21. The Services agree that this phrase is confusing and have clarified the meaning in the final policy. The draft policy stated that "* * * take

authorization would be provided to allow the property owner or State or local land management agency to implement management activities that may result in take of individuals or modification of habitat above those levels agreed upon and described in the Agreement." The Services did not intend this statement to mean that the amount of take authorized by an enhancement of survival permit could exceed the amount specified in the associated Agreement or could allow for more habitat modification than specified in the Agreement. Rather, the statement was an attempt to explain that the enhancement of survival permit accompanying an Agreement with assurances would authorize a property owner who exceeds the conservation goal specified in the Agreement (e.g., through additional habitat improvement or the implementation of conservation measures that are more effective or beneficial than anticipated and described in the Agreement) to take the additional or enhanced number of individuals of the species that is consistent with the conservation goal specified in the Agreement. That is, a property owner can still avoid the imposition of additional restrictions above those agreed to in the Agreement where the property owner surpassed the conservation goals established under the Agreement.

Issue 22. Some commenters were confused by Part 3A of the draft policy that stated that a Candidate Conservation Agreement with assurances will identify habitat characteristics that support use by the covered species on lands or waters under the property owner's control or that support populations of the covered species in waters that may not be under the property owner's control. These commenters questioned the meaning of the phrase "waters that may not be under the property owner's control."

Response 22. In using this phrase, the Services intended to address the fact that, in some cases, characteristics of a particular property owner's property may sustain (or land, water, or resource uses on that property may affect) individuals of a species located on other lands or waters adjacent to or some distance away from the property owner's property. For example, riparian habitat enhancement measures upstream may benefit candidate species that are downstream from the participating property owner's property. An Agreement with assurances can describe this relationship and can include conservation measures to improve the characteristics of the property that help sustain (or to reduce

the impacts of the land, water, or resource uses that may affect) the individuals of the species found off the property owner's property.

Issue 23. Several commenters asked if there was any difference between the meanings of the terms "conservation actions," "management actions," "conservation activities," "management activities," and "conservation management activities."

Response 23. The Services did not intend for these terms to have different meanings and, in the final policy, have used a single term, "conservation measures," in place of the terms listed above. The term "conservation measures" clearly describes the range of practices which could be included in a Candidate Conservation Agreement with assurances. Not all conservation measures involve "management" that is continued into the future; conservation measures may include removal of a hazard to the species, construction of a habitat feature (such as placement of boulders in a stream to create fish resting habitat), or other practices.

Issue 24. Several commenters were confused by the sentence in the "Definitions" section of the draft policy under "Covered species" that read "Those species covered in the Agreement must be treated as if they were listed."

Response 24. The Services agree that this sentence may have caused some confusion and the sentence has been deleted from the final policy. The Services have also clarified the definition in the final policy.

Issue 25. Some commenters questioned why the Services used the term "incidental take" to describe take authorized by an enhancement of survival permit under section 10(a)(1)(A) of the Act when "incidental take" normally applies to take authorized by an Incidental Take permit under section 10(a)(1)(B).

Response 25. The Services have decided to use the term "incidental take" to refer to the take authorized by an enhancement of survival permit associated with a Candidate Conservation Agreement with assurances because this "take" is incidental to enhancing the survival of the species through compliance with the Agreement. Similarly, take resulting from research authorized by an enhancement of survival permit under section 10(a)(1)(A) is "incidental take" in that it is typically a consequence of and not the purpose of the research. The Services believe using the term "incidental take" in this policy will be less confusing than coining a new term to differentiate take authorized under

section 10(a)(1)(A) from that authorized under section 10(a)(1)(B).

Issue 26. Some commenters questioned the use of the term "net benefit" in the draft policy.

Response 26. The term "net benefit" was erroneously included in the draft policy and has been eliminated in the final policy. "Net benefit" is a concept more appropriately used in "Safe Harbor" Agreements for listed species conservation.

Revisions to the Proposed Policy

The following represents a summary of the revisions made to the proposed Candidate Conservation Agreements with Assurances policy following consideration of public comments.

(1) The final policy describes the mechanism for property owners to terminate their voluntary Candidate Conservation Agreements with assurances before the expiration date.

(2) Specific public review periods for proposed Candidate Conservation Agreements with assurances and their associated proposed enhancement of survival permits have been established in the final policy and implementing regulations.

(3) The final policy includes general guidelines for the development of monitoring provisions of Candidate Conservation Agreements with assurances.

(4) Several definitions and terms have been clarified in the final policy.

Final Candidate Conservation Agreements With Assurances Policy

Part 1. What Is the Purpose of the Policy?

This policy, is intended to facilitate the conservation of proposed and candidate species, and species likely to become candidates or proposed in the near future, by giving non-Federal citizens, States, local governments, Tribes, businesses, organizations, and other non-Federal property owners incentives to implement conservation measures for declining species by providing regulatory certainty with regard to land, water, or resource use restrictions that might otherwise apply should the species later become listed as threatened or endangered under the Act. Under the policy, non-Federal property owners who commit in a Candidate Conservation Agreement with assurances to implement mutually agreed upon conservation measures for a proposed or candidate species, or a species likely to become a candidate or proposed in the near future, will receive assurances from the Services that additional conservation measures above

and beyond those contained in the Agreement will not be required, and that additional land, water, or resource use restrictions will not be imposed upon them should the species become listed in the future.

In determining whether to enter into a Candidate Conservation Agreement with assurances, the Services will consider the extent to which the Agreement reduces threats to proposed and candidate species and species likely to become candidates or proposed in the near future so as to preclude or remove any need to list these species as threatened or endangered under the Act. While the Services realize that the actions of a single property owner usually will not preclude or remove any need to list a species, they also realize the collective effect of the actions of many property owners may be to preclude or remove any need to list. Accordingly, the Services will enter into an Agreement with assurances when they determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species.

While some property owners are willing to manage their lands to benefit proposed and candidate species, or species likely to become candidates or proposed in the near future, most desire some degree of regulatory certainty and assurances with regard to possible future land, water, or resource use restrictions that may be imposed if the species is listed in the future. The Services will provide regulatory certainty to a non-Federal property owner who enters into a Candidate Conservation Agreement with assurances by authorizing, through issuance of an enhancement of survival permit under section 10(a)(1)(A) of the Act, a specified level of incidental take of the species covered in the Agreement. Incidental take authorization benefits non-Federal property owners in two ways. First, incidental take authorization provides assurances to property owners that any extra, either intentional or unintentional, benefits they achieve for the species beyond those agreed upon will not result in additional land, water, or resource use restrictions that would otherwise be imposed should the species become listed in the future. Second, in the event the species is listed in the future, incidental take authorization enables

property owners to continue current land uses that have traditionally caused take, provided take is at or reduced to a level consistent with the overall goal of precluding or removing any need to list the species.

Candidate Conservation Agreements with assurances will be developed in close coordination and cooperation with the appropriate State fish and wildlife agencies and other affected State agencies and Tribes, as appropriate. Close coordination with State fish and wildlife agencies is particularly important given their primary responsibilities and authorities for the management of unlisted resident species. Agreements with assurances are to be consistent with applicable State laws and regulations governing the management of these species.

The Services must determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if it assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. Pursuant to section 7 of the Act, the Services must also ensure that the conservation measures included in any Agreement with assurances do not jeopardize any listed or proposed species and do not destroy or adversely modify any proposed or designated critical habitats that may occur in the area.

Some non-Federal property owners may not have the necessary resources or expertise to develop Candidate Conservation Agreements with assurances. Therefore, the Services are committed to providing, to the maximum extent practicable given available resources, the necessary technical assistance to develop Agreements with assurances and prepare enhancement of survival permit applications. Furthermore, the Services may assist or train property owners to implement conservation measures.

Development of a biologically sound Agreement and enhancement of survival permit application are intricately linked. The Services will process the participating non-Federal property owner's enhancement of survival permit application following the procedures described in 50 CFR Parts 17.22(d)(1) and 17.32(d)(1) or 50 CFR Part 222. All terms and conditions of the enhancement of survival permit must be consistent with the conservation measures included in the associated Agreement with assurances.

Part 2. What Definitions Apply to this Policy?

The following definitions apply for the purposes of this policy.

"Candidate Conservation Agreement" means an Agreement signed by either Service, or both Services jointly, and other Federal or State agencies, local governments, Tribes, businesses, organizations, or non-Federal citizens, that identifies specific conservation measures that the participants will voluntarily undertake to conserve the covered species.

"Candidate Conservation Agreements with assurances" means a Candidate Conservation Agreement with a non-Federal property owner that meets the standards described in this policy and provides the non-Federal property owner with the assurances described in this policy.

"Candidate Conservation Assurances" are assurances provided to a non-Federal property owner in a Candidate Conservation Agreement with assurances that conservation measures and land, water, or resource use restrictions in addition to the measures and restrictions described in the Agreement will not be imposed should the covered species become listed in the future. Candidate Conservation Assurances will be authorized by an enhancement of survival permit. Such assurances may apply to a whole parcel of land, or a portion, as identified in the Agreement.

"Candidate species" are defined differently by the Services. FWS defines candidate species as species for which FWS has sufficient information on file relative to status and threats to support issuance of proposed listing rules. NMFS defines candidate species as species for which NMFS has information indicating that listing may be warranted but for which sufficient information to support actual proposed listing rules may be lacking. The term "candidate species" used in this policy refers to those species designated as candidates by either of the Services.

"Conservation measures" are actions that a non-Federal property owner voluntarily agrees to undertake when entering into a Candidate Conservation Agreement with assurances.

"Covered species" means those species that are the subject of a Candidate Conservation Agreement with assurances and associated enhancement of survival permit. Covered species are limited to species that are candidates or proposed for listing and species that are likely to become candidates or proposed in the near future.

"Enhancement of survival permit" means a permit issued under section

10(a)(1)(A) of the Act that, as related to this policy, authorizes the permittee to incidentally take species covered in a Candidate Conservation Agreement with assurances.

"Non-Federal property owner" includes, but is not limited to, States, local governments, Tribes, businesses, organizations, and private individuals, and includes owners of land as well as owners of water or other natural resources.

"Other necessary properties" are properties in addition to the property that is the subject of a Candidate Conservation Agreement with assurances on which conservation measures would have to be implemented in order to preclude or remove any need to list the covered species.

"Proposed species" is a species for which the Services have published a proposed rule to list as threatened or endangered under section 4 of the Act.

Part 3. What Are Candidate Conservation Agreements With Assurances?

Candidate Conservation Agreements with assurances will identify or include:

A. The population levels (if available or determinable) of the covered species existing at the time the parties negotiate the Agreement; the existing habitat characteristics that sustain any current, permanent, or seasonal use by the covered species on lands or waters owned by the participating non-Federal property owner; and/or the existing characteristics of the property owner's lands or waters included in the Agreement that support populations of covered species on lands or waters not on the participating property owner's property;

B. The conservation measures the participating non-Federal property owner is willing to undertake to conserve the species included in the Agreement;

C. The benefits expected to result from the conservation measures described in B above (e.g., increase in population numbers; enhancement, restoration, or preservation of habitat; removal of threat) and the conditions that the participating non-Federal property owner agrees to maintain. The Services must determine that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would

preclude or remove any need to list the covered species;

D. Assurances provided by the Services that no additional conservation measures will be required and no additional land, water, or resource use restrictions will be imposed beyond those described in B above should the covered species be listed in the future. Assurances related to take of the covered species will be authorized by the Services through a section 10(a)(1)(A) enhancement of survival permit (see Part 5);

E. A monitoring provision that may include measuring and reporting progress in implementation of the conservation measures described in B above and changes in habitat conditions and the species' status resulting from these measures; and,

F. A notification requirement to provide the Services or appropriate State agencies with a reasonable opportunity to rescue individuals of the covered species before any authorized incidental take occurs.

Part 4. What Are the Benefits to the Species?

Before entering into a Candidate Conservation Agreement with assurances, the Services must make a written finding that the benefits of the conservation measures implemented by a property owner under a Candidate Conservation Agreement with assurances, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. If the Services and the participating property owner cannot agree to an adequate set of conservation measures that satisfy this requirement, the Services will not enter into the Agreement. Expected benefits of the conservation measures could include, but are not limited to: restoration, enhancement, or preservation of habitat; maintenance or increase of population numbers; and reduction or elimination of incidental take.

Part 5. What Are Assurances to Property Owners?

In a Candidate Conservation Agreement with assurances, the Services will provide that if any species covered by the Agreement is listed, and the Agreement has been implemented in good faith by the participating non-Federal property owner, the Services will not require additional conservation measures nor impose additional land, water, or resource use restrictions beyond those the property owner

voluntarily committed to under the terms of the original Agreement. Assurances involving incidental take will be authorized through issuance of a section 10(a)(1)(A) enhancement of survival permit, which will allow the property owner to take individuals of the covered species so long as the level of take is consistent with those levels agreed upon and identified in the Agreement.

The Services will issue an enhancement of survival permit at the time of entering into the Agreement with assurances. This permit will have a delayed effective date tied to the date of any future listing of the covered species. The Services believe that an enhancement of survival permit is particularly well suited for Candidate Conservation Agreements with assurances because the main purpose of such Agreements is to enhance the survival of declining species.

The Services are prepared as a last resort to revoke a permit implementing a Candidate Conservation Agreement with assurances where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a situation.

Part 6. How Do the Services Comply With National Environmental Policy Act?

The National Environmental Policy Act of 1969 (NEPA), as amended, and the regulations of the Council on Environmental Quality (CEQ) require all Federal agencies to examine the environmental impact of their actions, to analyze a full range of alternatives, and to use public participation in the planning and implementation of their actions. The purpose of the NEPA process is to help Federal agencies make better decisions and to ensure that those decisions are based on an understanding of environmental consequences. Federal agencies can satisfy NEPA requirements either by preparing an Environmental Assessment (EA) or Environmental Impact Statement (EIS) or by showing that the proposed action is categorically excluded from individual NEPA analysis.

The Services will review each Candidate Conservation Agreement with assurances and associated enhancement of survival permit application for other significant environmental, economic, social, historical or cultural impact, or for significant controversy (516 DM 2, Appendix 2 for FWS and NOAA's Environmental Review Procedures and NOAA Administrative Order Series

216-6). If the Services determine that the Agreement and permit will likely result in any of the above effects, preparation of an EA or EIS will be required. General guidance on when the Services exclude an action categorically and when and how to prepare an EA or EIS is found in the FWS's Administrative Manual (30 AM 3) and NOAA Administrative Order Series 216-6.

The Services expect that most Candidate Conservation Agreements with assurances and associated enhancement of survival permits will result in minor or negligible effects on the environment and will be categorically excluded from individual NEPA analysis. When the impacts to the environment are expected to be more than minor, individual NEPA analysis will be required. Complex, large-scale, or programmatic Agreements and their associated permits will typically be subject to individual NEPA analysis.

Part 7. Will There Be Public Review?

Public participation in the development of a proposed Candidate Conservation Agreement with assurances will only be provided when agreed to by the participating property owner. However, the Services will make every proposed Agreement available for public review and comment as part of the public evaluation process that is statutorily required for issuance of the enhancement of survival permit associated with the Agreement. This comment period will generally be 30 days but may be longer for very large or programmatic Agreements. The public will also be given other opportunities to review Agreements in certain cases. For example, when the Services receive an Agreement covering a proposed species, and when the Services determine, based upon a preliminary evaluation, that the Agreement could potentially justify withdrawal of the proposed rule, the comment period for the proposed rule will be extended or reopened to allow for public comments on the Agreement's adequacy in removing or reducing threats to the species. However, the Act requires the Services to issue a final determination within 1 year of issuing a proposed rule to list; the Services will not extend this time frame in order to allow for the completion and/or consideration of an Agreement with assurances. Therefore, the Services may not be able to consider in their final determination Agreements that are not received within a reasonable period of time after issuance of the proposed rule.

Part 8. Do Property Owners Retain Their Discretion?

Nothing in this policy prevents a participating property owner from implementing conservation measures not described in the Agreement, provided such measures are consistent with the conservation measures and conservation goal described in the Agreement. The Services will provide technical advice, to the maximum extent practicable, to the property owner when requested. Additionally, a participating property owner, with good cause, can terminate the Agreement prior to its expiration date, even if the terms and conditions of the Agreement have not been realized. However, the enhancement of survival permit would also be terminated at the same time.

Part 9. What Is the Discretion of All Parties?

Nothing in this policy compels any party to enter a Candidate Conservation Agreement with assurances at any time. Entering an Agreement is voluntary for non-Federal property owners and the Services. Unless specifically noted, an Agreement does not otherwise create or waive any legal rights of any party to the Agreement.

Part 10. Can Agreements Be Transferred?

If a property owner who is a party to a Candidate Conservation Agreement with assurances transfers ownership of the enrolled property, the Services will regard the new property owner as having the same rights and obligations as the original property owner if the new property owner agrees to become a party to the original Agreement. Actions taken by the new participating property owner that result in the incidental take of species covered by the Agreement would be authorized if the new property

owner maintains the terms and conditions of the original Agreement. If the new property owner does not become a party to the Agreement, the new owner would neither incur responsibilities under the Agreement nor receive any assurances relative to section 9 restrictions resulting from listing of the covered species.

An Agreement must commit the participating property owner to notify the Services of any transfer of ownership at the time of the transfer of any property subject to the Agreement. This will allow the Services the opportunity to contact the new property owner to explain the prior Agreement and to determine whether the new property owner would like to continue the original Agreement or enter a new Agreement. When a new property owner continues an existing Agreement, the Services will honor the terms and conditions of the original Agreement.

Part 11. Is Monitoring Required?

The Services will ensure that necessary monitoring provisions are included in Candidate Conservation Agreements with assurances and associated enhancement of survival permits. Monitoring is necessary to ensure that the conservation measures specified in an Agreement and permit are being implemented and to learn about the effectiveness of the agreed upon conservation measures. In particular, when adaptive management principles are included in an Agreement, monitoring is especially helpful for obtaining the information needed to measure the effectiveness of the conservation program and detect changes in conditions. However, the level of effort and expense required for monitoring can vary substantially among Agreements depending on the circumstances. For many Agreements,

monitoring can be conducted by the Services or a State agency and may involve only a brief site inspection and appropriate documentation.

Large-scale or complex Candidate Conservation Agreements with assurances may require more in-depth and comprehensive monitoring. Monitoring programs must be agreed upon and included in the Agreement prior to public review and comment on the Agreement. The Services are committed to providing as much technical assistance as possible in the development of acceptable monitoring programs. Additionally, these monitoring programs will provide valuable information that the Services can use to evaluate program implementation and success.

Part 12. How Are Cooperation and Coordination With the States and Tribes Described in the Policy?

Coordination between the Services, the appropriate State fish and wildlife agencies, affected Tribal governments, and property owners is important to the successful development and implementation of Candidate Conservation Agreements. The Services will closely coordinate and consult with the affected State fish and wildlife agency and any affected Tribal government that has a treaty right to any fish or wildlife resources covered by an Agreement.

Dated: March 22, 1999.

Jamie Rappaport Clark,
Director, U.S. Fish and Wildlife Service.

Dated: June 10, 1999.

Penelope D. Dalton,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

[FR Doc. 99-15257 Filed 6-11-99; 5:08 pm]

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Federal Register

Thursday
June 17, 1999

Part IV

Department of The Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric
Administration

National Marine Fisheries Service

50 CFR 13 and 17

Safe Harbor Agreements and Candidate
Conservation Agreements With
Assurances; Announcement of Final Safe
Harbor Policy; Announcement of Final
Policy for Candidate Conservation
Agreements With Assurances; Final Rule
and Notices

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR 13 and 17**

RIN 1018-AD95

Safe Harbor Agreements and Candidate Conservation Agreements With Assurances

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule contains the U.S. Fish and Wildlife Service's (Service) final regulatory changes to Part 17 of Title 50 of the Code of Federal Regulations (CFR) necessary to implement two final policies developed by the Service and the National Marine Fisheries Service (NMFS) under the Endangered Species Act (Act)—the Safe Harbor and the Candidate Conservation Agreement with Assurances policies published in today's *Federal Register*. NMFS will develop separate regulatory changes to implement these policies.

This rule also contains several amendments to parts 13 and 17 of title 50 of the CFR that alter the applicability of the Service's general permitting regulations in 50 CFR part 13 to permits issued under section 10 of the Act for Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreements with Assurances.

DATES: This rule is effective July 19, 1999.

ADDRESSES: To obtain copies of the final rule or for further information, contact Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 452 ARLSQ, Washington, D.C., 20240 (Telephone 703/358-2171, Facsimile 703/358-1735).

FOR FURTHER INFORMATION CONTACT: Richard Hannan, Acting Chief, Division of Endangered Species (Telephone (703/358-2171), Facsimile (703/358-1735)).

SUPPLEMENTARY INFORMATION: These final regulations and the background information regarding the final rule apply to the U.S. Fish and Wildlife Service only. Therefore, the use of the terms Service and "we" in this notice refers exclusively to the U.S. Fish and Wildlife Service. The proposed rule on Safe Harbor Agreements and Candidate Conservation Agreements with Assurances was issued on June 12, 1997 (62 FR 32189). We revised the proposed rule based on public comments we received, because of further consideration of the proposed rule, and to reflect the revisions to the Safe

Harbor and Candidate Conservation Agreements with Assurances policies the rule is intended to implement (see Final Safe Harbor and Candidate Conservation Agreements with Assurances policies published in today's *Federal Register*). This rule does not finalize the proposed changes to part 13 that were published on September 5, 1995 (60 FR 46087), which are still pending.

Background

The Service administers a variety of conservation laws that authorize the issuance of certain permits for otherwise prohibited activities. In 1974, we published 50 CFR part 13 to consolidate the administration of its various permitting programs. Part 13 established a uniform framework of general administrative conditions and procedures that would govern the application, processing, and issuance of all Service permits. We intended the general part 13 permitting provisions to be in addition to, and not in lieu of, other more specific permitting requirements of Federal wildlife laws.

Subsequent to the 1974 publication of part 13, we added many wildlife regulatory programs to Title 50 of the CFR. For example, we added part 18 in 1974 to implement the Marine Mammal Protection Act, modified and expanded part 17 in 1975 to implement the Act, and added part 23 in 1977 to implement the Convention on International Trade in Endangered Species of Fauna and Flora (CITES). These parts contained their own specific permitting requirements in addition to the general permitting provisions of part 13.

In most instances, the combination of part 13's general permitting provisions and part 17's specific Act permitting provisions have worked well since 1975. However, in three areas of emerging permitting policy under the Act, the "one size fits all" approach of part 13 is inappropriately constraining and narrow. These three areas involve Habitat Conservation Planning, Safe Harbor Agreements, and Candidate Conservation Agreements with Assurances.

Congress amended section 10(a)(1) of the Act in 1982 to authorize incidental take permits associated with Habitat Conservation Plans (HCP). Many HCP permits involve long-term conservation commitments that run with the affected land for the life of the permit or longer. We negotiate such long-term permits recognizing that a succession of owners may purchase or resell the affected property during the term of the permit. The Service does not view this as a problem, where the requirements of

such permits run with the land and successive owners agree to the terms of the HCP. Property owners similarly do not view this as a problem so long as we can easily transfer incidental take authorization from one purchaser to another.

In other HCP situations, the HCP permittee may be a State or local agency that intends to sub-permit or blanket the incidental take authorization to hundreds if not thousands of its citizens. We do not view this as a problem so long as the original agency permittee abides by, and ensures compliance with, the terms of the HCP.

The above HCP scenarios are not easily reconcilable with certain sections of part 13. For example, 50 CFR sections 13.24 and 13.25 impose significant restrictions on permit right of succession or transferability. While these restrictions are well justified for most wildlife permitting situations, they impose inappropriate and unnecessary limitations for HCP permits where the term of the permit may be lengthy and the parties to the HCP foresee the desirability of simplifying sub-permitting and permit transference from one property owner to the next, or from a State or local agency to citizens under their jurisdiction.

Similar problems also could arise in attempting to apply the general part 13 permitting requirements to permits issued under part 17 to implement Safe Harbor or Candidate Conservation Agreements with Assurances. A major incentive for property owner participation in the Safe Harbor or Candidate Conservation programs is the long-term certainty the programs provide, including the certainty that the incidental take authorization will run with the land if it changes hands and the new owner agrees to be bound by the terms of the original Agreement. Property owners could view the present limitations in several sections (e.g., sections 13.24 and 13.25) as impediments to the development of these Agreements.

The proposed rule would have addressed these potential problems by revising section 13.3, the Scope of Regulations provision in part 13, to provide that the specific provisions in a particular HCP, Safe Harbor, or Candidate Conservation Agreement permit and associated documents would control whenever they were in conflict with the general provisions of the part 13 regulations. After further consideration, we have determined that it is more appropriate to address these potential conflicts by promulgating revisions to parts 13 and 17 that identify the specific instances in which the

permit procedures for HCP, Safe Harbor, and Candidate Conservation Agreement permits will differ from the general part 13 permit procedures. For a fuller discussion of these revisions to parts 13 and 17, see "Description of the Final Rule," below.

It is important to note that we proposed other amendments to section 13.3 on September 5, 1995 (60 FR 46087). Those changes would, among other things, provide an explanation of the term "permit" needed to refer correctly to CITES requirements, state the scope of part 13's requirements clearly, and ensure that the up-to-date titles of several parts of 50 CFR are used. However, the September 5, 1995, proposal did not deal with the potential conflicts between the general provisions included in part 13 and the specific provisions for incidental take and enhancement of survival permits under part 17. This final rule does not amend the language included in the September 5, 1995, proposal which is still pending.

Finally, we also proposed to add four new sub-sections to part 17 that would govern the issuance of endangered or threatened species "enhancement of survival" permits under section 10(a)(1)(A) of the Act for activities conducted under Safe Harbor or Candidate Conservation Agreements with Assurances.

Overview of Safe Harbor Agreement and Candidate Conservation Agreement With Assurances Programs

The information below briefly describes these two programs. For more details on these two programs, see the two final policies also published in today's **Federal Register**.

Much of the nation's current and potential habitat for listed, proposed, and candidate species exists on property owned by private citizens, States, municipalities, Tribal governments, and other non-Federal entities. Conservation efforts on non-Federal lands are critical to the long-term conservation of many declining species. More importantly, a collaborative stewardship approach is critical for the success of such an initiative. Many property owners would be willing to manage their lands voluntarily to benefit fish, wildlife, and plants, especially those that are declining, provided that they are not subjected to additional regulatory restrictions as a result of their conservation efforts. Beneficial management could include actions to maintain habitat or improve habitat (e.g., restoring fire by prescribed burning, restoring properly functioning hydrological conditions). Property owners are particularly concerned about

land-use restrictions that might result if listed species colonize their lands or increase in numbers or distribution because of the property owners' conservation efforts, or if species subsequently become listed as a threatened or endangered species. The potential for future restrictions has led many property owners to avoid or limit land or water management practices that could enhance or maintain habitat and benefit or attract fish and wildlife that are listed or may be listed in the future.

The purpose of the Safe Harbor Policy is to ensure consistency in the development of Safe Harbor Agreements. Under a Safe Harbor Agreement, participating property owners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting federally listed species. Safe Harbor Agreements encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners they will not be subjected to increased property-use restrictions if their efforts attract listed species to their properties or increase the numbers or distribution of listed species already present on their properties. We will closely coordinate development of Safe Harbor Agreements with the appropriate State fish and wildlife or other agencies and any affected Native American Tribal governments. Collaborative stewardship with State fish and wildlife agencies is particularly important given the critical partnership between the Service and the States in recovering listed species.

The ultimate goal of Candidate Conservation Agreements with Assurances is, to remove enough threats to the covered species to preclude any need to list them as threatened or endangered under the Act. Proposed and candidate species may be the subject of a Candidate Conservation Agreement. Certain other unlisted species that are likely to become a candidate or proposed species in the near future may also be the subject of a Candidate Conservation Agreement. These Agreements are different from Safe Harbor Agreements (which involve the presence of at least one listed species) in that they provide conservation benefits exclusively to candidate and proposed species of fish, wildlife, and plants. The substantive requirements of activities carried out under Candidate Conservation Agreements with Assurances, if undertaken on a broad enough scale by other property owners similarly situated, should be expected to preclude any need to list species covered by the

Agreement as threatened or endangered under the Act.

Summary of Proposed Rule

As discussed above, the proposed rule issued on June 12, 1997 (62 FR 32189), would have revised section 13.3, the Scope of Regulations provision in part 13, to provide that the specific provisions in a particular HCP, Safe Harbor, or Candidate Conservation Agreement permit and associated documents would control whenever they were in conflict with the general provisions of the part 13 regulations. The proposed rule also would have added four new subsections to 50 CFR part 17. These subsections would govern the issuance of "enhancement of survival" permits under section 10(a)(1)(A) of the Act for activities conducted under Safe Harbor Agreements or Candidate Conservation Agreements with Assurances for endangered species (50 CFR 17.22(c) and (d), respectively), and threatened species (50 CFR 17.32(c) and (d), respectively). These sub-sections were designed to ensure consistent application of the Safe Harbor Agreements and Candidate Conservation Agreements with Assurances programs, and are the legal mechanism for us to provide the necessary assurances to non-Federal landowners participating in these programs. Permits issued to provide assurances for activities to be conducted under a Candidate Conservation Agreement with Assurances only become effective upon the effective date of a final rule listing any of the covered species as threatened or endangered.

Summary of Received Comments

We received only two specific comments related to the proposed regulations, although more than 300 letters were received regarding the policies these regulatory changes are intended to implement. This final rule reflects changes needed to implement the final policies, which were revised to address comments received on the proposed policies. We address here only the two comments directly related to these regulations. For detailed discussions of the issues raised by commenters relative to the policies and the Service's responses, please refer to the final policies also published in today's **Federal Register**.

Issue 1. A commenter raised concerns regarding the opportunity for public review of permits issued under 50 CFR part 17. 22(c)(1) [Safe Harbor permits] and 17.22(d)(1) [Candidate Conservation Agreement with Assurances permits] for species listed as endangered.

Response 1. The proposed rule did not reduce the opportunity for public involvement in the issuance of these permits. The commenter apparently was unaware that all applications for permits issued under 50 CFR 17.22 (permits for species listed as endangered) are already required to undergo public review and comment. "Each notice shall invite the submission from interested parties, within 30 days after the date of the notice, of written data, views, or arguments with respect to the application" (50 CFR 17.22). Therefore, it is clear that the current regulations governing these permits already require public review and comment on permit applications filed, and to add a specific review requirement for these permits would be redundant. The commenter was probably confused by the inclusion of specific public review requirements for threatened species permits issued under 50 CFR part 17.32 (c)(1) [Safe Harbor permits] and 17.32 (d)(1) [Candidate Conservation Agreement permits]. In contrast to 50 CFR 17.22, 50 CFR 17.32 generally does not require public review and comment on permits, although the specific provisions for threatened species incidental take permits do require such notice and comment (see 50 CFR 17.32 (b)(1)(ii)). To ensure an open and public process for the evaluation and issuance of permits to provide assurances to non-Federal landowners participating under the Safe Harbor and Candidate Species Conservation Agreements with Assurances policies, we have included similar public review requirements for these permits. The inclusion of these new provisions under 50 CFR 17.32 (c)(2) and 50 CFR 17.32 (d)(2) will ensure ample and meaningful public participation in this process.

Issue 2. Several commenters expressed concerns regarding the inability of landowners to terminate both Safe Harbor Agreements and Candidate Conservation Agreements with Assurances/Permits before their expiration dates, especially since these are voluntary Agreements.

Response 2. We agree that it is reasonable to include "early-out" provisions in these Agreements and in this final rule. We acknowledge that in some circumstances, such as family illnesses, financial hardships, and economically profitable ventures, landowners may need to terminate Agreements prior to their expiration dates. The final rule has been revised to provide for such opportunities, while ensuring that the agreed upon baseline conditions are not eroded and that we

have an opportunity to translocate affected individuals of covered species.

Revisions to the Proposed Rule

The regulations have been revised to accommodate needs identified during the public review and comment period. This accommodation will facilitate our implementation of these programs and participation by interested non-Federal landowners. The proposed rule provided that the specific provisions in a particular HCP, Safe Harbor, or Candidate Conservation Agreement permit and associated documents would control whenever they were in conflict with the provisions of the general part 13 permit regulations. The final rule instead includes specific revisions to parts 13 and 17 that identify the particular instances in which the permit procedures for HCP, Safe Harbor, and Candidate Conservation Agreement permits will differ from the general part 13 permit procedures. For a fuller discussion of these revisions to parts 13 and 17, see "Description of the Final Rule," below. The final rule also includes a provision to allow for the termination of an Agreement and permit prior to their expiration dates. Because of the voluntary nature of the Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, it is appropriate to provide these "early-out" options to program participants. Based on our past experience with voluntary habitat management programs (e.g., Partners for Fish and Wildlife), we expect that only a minor fraction of all participating landowners will invoke this option. We require "early-out" participants to provide us with prior notification. This will facilitate our ability to translocate any potentially affected individuals of a covered species. In addition, the final rule reflects revisions needed to implement revisions in the final Safe Harbor and Candidate Conservation Agreements with Assurances policies. For a full description of these revisions, see the final Safe Harbor and Candidate Conservation Agreements with Assurances policies published in today's *Federal Register*.

Description/Overview of the Final Rule

The final rule codifies minimum permit requirements and conditions that must be met in order for participating non-Federal landowners to receive the assurances under a Safe Harbor or a Candidate Species Conservation Agreement with Assurances. These permits, issued under 50 CFR part 17, are for activities to be voluntarily conducted under a Safe Harbor Agreement and/or a Candidate

Conservation Agreement with Assurances.

As discussed above, the final rule does not adopt the proposal to amend section 13.3 to clarify that the specific provisions of an HCP, Safe Harbor Agreement, or Candidate Conservation Agreement would control wherever they conflict with the general permit provisions of part 13. We did not receive any public comments on this proposal, including any comments objecting to the proposal. However, we decided instead to include in the final rule specific amendments to parts 13 and 17 that will dictate when the permitting requirements for HCP, Safe Harbor, and Candidate Conservation Agreement permits will vary from the general part 13 requirements. We believe these amendments will achieve the proposal's purpose of avoiding potential conflicts between these permits and the general part 13 requirements, while more clearly informing potential applicants and the interested public of the ways in which the requirements for HCP, Safe Harbor, and Candidate Conservation Agreement permits differ from the general permit requirements. The specific changes are as follows:

1. Section 13.21(b)(4) generally prevents the Service from issuing a permit for an activity that "potentially threatens a wildlife or plant population." This is unnecessary and might even be confusing for HCPs, Safe Harbor Agreements, and Candidate Conservation Agreements with Assurances, since the HCP and Candidate Conservation Agreement with Assurances permit issuance criteria already incorporate a requirement that the permitted activity cannot be likely to jeopardize the continued existence of a species and since Safe Harbor Agreement permits must meet a net benefit test. The final rule therefore revises the HCP permit issuance criteria in sections 17.22(b)(2) and 17.32(b)(2) to except HCP permits from section 13.21(b)(4) and includes in the final Safe Harbor Agreement and Candidate Conservation Agreement with Assurances permit regulations a similar exception from section 13.21(b)(4).

2. Section 13.23(b)(4) generally reserves to the Service the right to amend permits "for just cause at any time." The final rule revises this provision to clarify that the Service's reserved right to amend HCP, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances permits must be exercised consistently with the assurances provided to HCP, Safe Harbor Agreement, and Candidate Conservation

Agreement with Assurances permit holders in their permits and in the HCP, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances permit regulations.

3. Section 13.24 is revised in the final rule to provide a more streamlined approach to rights of succession for HCP, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances permits and section 13.25 is revised to provide for greater transferability of these permits. As explained in the proposed rule, the restrictions sections 13.24 and 13.25 impose on permit succession and transferability are justified for most wildlife permitting situations, but they are inappropriate and unnecessary for HCP, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances permits. These permits may involve substantial long-term conservation commitments, and the Service negotiates such long-term permits recognizing that there may be succession or transfer in ownership during the term of the permit. Revised sections 13.24 and 13.25 allow this as long as the successor or transferor owners meet the general qualifications for holding the permit and agree to the terms of the HCP, Safe Harbor Agreement, or Candidate Conservation Agreement with Assurances. Under revised section 13.25(d), any person under the direct control of a State or local governmental entity that has been issued a permit may carry out the activity authorized by the permit if (1) they are under the jurisdiction of the governmental entity and the permit provides that they may carry out the authorized activity, or (2) they have been issued a permit by the governmental entity or executed a written instrument with the governmental entity pursuant to the terms of an implementing agreement.

4. The final rule adds a new subparagraph (7) to sections 17.22(b) and 17.32(b) to make clear that HCP permittees remain responsible for mitigation required under the terms of their permits even after surrendering their permits. We have required this approach in many HCPs. The general provision in section 13.26 is silent on this issue and could have been interpreted as not requiring any further actions after surrender of an incidental take permit, even if mitigation were owed under the terms of the permit for take that had already occurred.

5. The final rule modifies the permit revocation criteria in section 13.28(a) to provide that the section 13.28(a)(5) criterion shall not apply to HCP, Safe Harbor Agreement, and Candidate

Conservation Agreement with Assurances permits. The Service determined that it would be more appropriate to refer instead to the statutory issuance criterion in 16 U.S.C. 1539(a)(2)(B)(iv) that prohibits the issuance of an incidental take permit unless the Service finds the permit is not likely to jeopardize the continued existence of the species. The final rule therefore includes in the specific regulations for HCP permits a provision (sections 17.22(b)(8) and 17.32(b)(8)) that allows a permit to be revoked if continuing the permitted activity would be inconsistent with 16 U.S.C. 1539(a)(2)(B)(iv). The final rule also includes similar provisions in the Safe Harbor Agreement and Candidate Conservation Agreement with Assurances regulations.

In keeping with the "No Surprises" rule (sections 17.22(b)(5)-(6) and 17.32(b)(5)-(6)) these provisions would allow the Service to revoke an HCP permit as a last resort in the narrow and unlikely situation in which an unforeseen circumstance results in likely jeopardy to a species covered by the permit and the Service has not been successful in remedying the situation through other means. The Service is firmly committed, as required by the No Surprises rule, to utilizing its resources to address any such unforeseen circumstances. These principles would also apply to Safe Harbor Agreement and Candidate Conservation Agreement with Assurances permits.

6. The final rule revises section 13.50 to allow more flexibility where the permittee is a State or local governmental entity, and has thus taken a leadership role and assists in implementation of the permit program.

The four new sub-sections under 50 CFR part 17 are designed to ensure consistent application of the Safe Harbor Agreements and Candidate Conservation Agreements with Assurances programs. These regulatory changes are the legal mechanism for the Service to provide the necessary assurances to non-Federal landowners participating in these programs.

Required Determinations

Regulatory Planning and Review, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act

The final rule was subject to Office of Management and Budget (OMB) review under Executive Order 12866.

a. The final rule will not have an annual economic effect of \$100 million or adversely affect an economic sector,

productivity, jobs, the environment, or other units of government.

b. The final rule will not create inconsistencies with other agencies' actions. The final rule establishes completely voluntary programs for non-Federal property owners. These programs are not available to Federal agencies. Because Safe Harbor Agreements and Candidate Conservation Agreements with Assurances are entered into voluntarily, the final rule does not create inconsistencies with the actions of non-Federal agencies.

c. The final rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. The final rule follows the policy direction set forth in the March 1995 Administration's 10-point plan for an effective and efficient implementation of the Act. In that plan the Administration set the precedent and the policy direction for the implementation of the Act. Specifically, various proposals have been published which provides incentives for non-Federal property owners to conserve species. More importantly, these proposals call for removing the disincentives that implementation of some provisions of the Act may have inadvertently imposed on non-Federal property owners.

The Department of the Interior certifies that the final rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). E.O. 12866, 5 U.S.C. 601 *et seq.* and 5 U.S.C. 801 *et seq.* require that an agency assess the economic effects of a rule. One way to address this is to determine whether a credible upper bound for the effects of the rule is less than \$100 million.

We take that approach below by first determining the maximum number of Candidate Conservation Agreements with Assurances that the Service's budget allows it to process in a year, and then seeing whether this number of agreements could reasonably be expected to generate \$100 million of effects annually.

The Service's Candidate Conservation Program budget for FY 1999 is approximately \$6.7 million. This funding covers candidate assessment activities, development of traditional Candidate Conservation Agreements (without assurances), development and implementation of other candidate conservation actions, and development of Candidate Conservation Agreements with Assurances. The 1999 funding level for the Candidate Conservation

Program represents an increase of \$1 million over the 1998 level. Some of the additional monies were anticipated to be used to increase capabilities for existing functions. However, for purposes of this analysis we will assume that the entire \$1 million is available for development of Candidate Conservation Agreements with Assurances.

The average time required for a Service biologist to develop a Candidate Conservation Agreement with Assurances and process a Section 10(a)(1)(A) permit application is estimated to be about one month. Using an average cost index of \$10,000 per employee month and adding an additional \$5,000 to cover travel, management review, publication in the **Federal Register**, and other associated costs brings the total cost for development of an average Candidate Conservation Agreement with Assurances to \$15,000. Therefore, the Service could fund the development of approximately 67 Candidate Conservation Agreements with Assurances per year at the FY 1999 funding level.

For there to be \$100 million of effects from the 67 Candidate Conservation Agreements with Assurances, on average a Candidate Conservation Agreement with Assurances would have to generate approximately \$1.5 million in benefits. Since we expect the participants in the program to be relatively small entities, this is not a credible number for the effect of the average Candidate Conservation Agreement with Assurances.

The Service's budget for FY 1999 included \$5 million for a new activity, the Private Landowner Incentive Program. This funding covers the development of Safe Harbor Agreements. About half of the money will be used to fund Service personnel to work with landowners to develop Safe Harbor Agreements; the remaining funds will serve as financial assistance incentives to participating landowners.

The average time required for a Service biologist to develop a Safe Harbor Agreement and process a Section 10(a)(1)(A) permit application is estimated to be about one month. Using an average cost index of \$10,000 per employee month and adding an additional \$5,000 to cover travel, management review, publication in the **Federal Register**, and other associated costs brings the total cost for development of an average Safe Harbor Agreement to \$15,000. Therefore, the Service could fund the development of approximately 67 Safe Harbor

Agreements per year at the FY 1999 funding level.

For there to be \$100 million of effects from the 67 Safe Harbor Agreements, on average a Safe Harbor Agreement to generate approximately \$1.5 million in benefits. Since we expect the participants in the program to be relatively small entities, this is not a credible number for the effect of the average Safe Harbor Agreement.

The final rule is not a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

a. The final rule will not produce an annual economic effect of \$100 million.

b. The final rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Because property owners will voluntarily enter into Safe Harbor Agreements and Candidate Conservation Agreements with Assurances only when the effects are positive, the final rule will not increase costs or prices.

c. The final rule will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Because property owners will voluntarily enter into Safe Harbor Agreements and Candidate Conservation Agreements with Assurances only when the effects are positive, the final rule will not result in adverse effects.

All non-Federal entities—individuals, small businesses, large corporations, State and local agencies, and private organizations—are eligible to participate in Safe Harbor Agreements and Candidate Conservation Agreements with Assurances. Although there may be some corporate property owners interested in developing Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, based on prior experience we expect most participating properties will be family-owned farms and ranches. We do not expect that all Candidate Conservation Agreements with Assurances or Safe Harbor Agreements would be geographically concentrated to the degree that small entities in one particular area would be most affected. The impact on small ownerships is expected to be economically insignificant because most of these costs are on a per acre basis. There will also not be enough Safe Harbor Agreements or Candidate Conservation Agreements with Assurances in any given year or in any given area to lead to a substantial

impact on a significant number of small entities.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

a. The final rule will not impose a cost of \$100 million or more in any given year on State, local or Tribal governments or private entities. No additional information will be required from a non-Federal entity solely as a result of the final rule. Since the final rule establishes a completely voluntary program, there are no incremental costs being imposed on non-Federal landowners.

b. The final rule will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings Implication Assessment

The Service has determined that this rule has no potential takings of private property implications as defined by Executive Order 12630. The primary reason for this determination is that this rule provides two voluntary programs that do not require individuals to participate unless they volunteer to do so.

Federalism Assessment

This final rule will not have substantial direct effects on the States, in their relationship between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, in accordance with Executive Order 12612, the Service has determined that this rule does not have sufficient federalism implications to warrant a Federalism Assessment.

Civil Justice Reform

The Department of the Interior has determined that this final rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The Service has examined this final rule under the Paperwork Reduction Act of 1995 and found it to contain no requests for additional information or increase in the collection requirements associated with incidental take permits other than those already approved for incidental take permits with OMB approval #1018-0094, which has an expiration date of February 28, 2001.

National Environmental Policy Act

The Department of the Interior has determined that the issuance of the rule

is categorically excluded under the Department's NEPA procedures in 516 DM 2, Appendix 1.10.

Section 7 Consultation

The Service does not need to complete a section 7 consultation on this final rule. An intra-Service consultation is completed prior to issuing enhancement of survival permits under 10(a)(1)(A) of the Endangered Species Act associated with individual Safe Harbor Agreements and Candidate Conservation Agreements with Assurances.

List of Subjects

50 CFR Part 13

Administrative practice and procedure, Exports, Fish, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 17

Endangered and threatened species, Export, Import, Reporting and recordkeeping requirements, Transportation.

For the reasons set out in the preamble, we amend Title 50, Chapter I, subchapter B of the Code of Federal Regulations, as set forth below:

PART 13—[AMENDED]

The authority citation for part 13 continues to read as follows:

Authority: 16 U.S.C. 668a; 704, 712; 742j-1; 1382; 1538(d); 1539, 1540(f); 3374; 4901-4916; 18 U.S.C. 42; 19 U.S.C. 1202; E.O. 11911, 41 FR 15683; 31 U.S.C. 9701.

2. Section 13.23(b) is revised to read as follows:

§ 13.23 Amendment of permits.

* * * * *

(b) The Service reserves the right to amend any permit for just cause at any time during its term, upon written finding of necessity, provided that any such amendment of a permit issued under § 17.22(b) through (d) or § 17.32(b) through (d) of this subchapter shall be consistent with the requirements of § 17.22(b)(5), (c)(5) and (d)(5) or § 17.32(b)(5), (c)(5) and (d)(5) of this subchapter, respectively.

* * * * *

3. Section 13.24 is revised to read as follows:

§ 13.24 Right of succession by certain persons.

(a) Certain persons other than the permittee are authorized to carry on a permitted activity for the remainder of the term of a current permit, provided they comply with the provisions of

paragraph (b) of this section. Such persons are the following:

(1) The surviving spouse, child, executor, administrator, or other legal representative of a deceased permittee; or

(2) A receiver or trustee in bankruptcy or a court designated assignee for the benefit of creditors.

(b) In order to qualify for the authorization provided in this section, the person or persons desiring to continue the activity shall furnish the permit to the issuing officer for endorsement within 90 days from the date the successor begins to carry on the activity.

(c) In the case of permits issued under § 17.22(b) through (d) or § 17.32(b) through (d) of this subchapter B, the successor's authorization under the permit is also subject to a determination by the Service that:

(1) The successor meets all of the qualifications under this part for holding a permit;

(2) The successor has provided adequate written assurances that it will provide sufficient funding for the conservation plan or Agreement and will implement the relevant terms and conditions of the permit, including any outstanding minimization and mitigation requirements; and

(3) The successor has provided such other information as the Service determines is relevant to the processing of the request.

4. Section 13.25 is revised to read as follows:

§ 13.25 Transfer of permits and scope of permit authorization.

(a) Except as otherwise provided for in this section, permits issued under this part are not transferable or assignable.

(b) Permits issued under § 17.22(b) through (d) or § 17.32(b) through (d) of this subchapter B may be transferred in whole or in part through a joint submission by the permittee and the proposed transferee, or in the case of a deceased permittee, the deceased permittee's legal representative and the proposed transferee, provided the Service determines that:

(1) The proposed transferee meets all of the qualifications under this part for holding a permit;

(2) The proposed transferee has provided adequate written assurances that it will provide sufficient funding for the conservation plan or Agreement and will implement the relevant terms and conditions of the permit, including any outstanding minimization and mitigation requirements; and

(3) The proposed transferee has provided such other information as the

Service determines is relevant to the processing of the submission.

(c) Except as otherwise stated on the face of the permit, any person who is under the direct control of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit.

(d) In the case of permits issued under § 17.22(b) through (d) or § 17.32(b) through (d) of this subchapter to a State or local governmental entity, any person who is under the direct control of the permittee may carry out the activity authorized by the permit where:

(1) The person is under the jurisdiction of the permittee and the permit provides that such person(s) may carry out the authorized activity; or

(2) The person has been issued a permit by the governmental entity or has executed a written instrument with the governmental entity, pursuant to the terms of the implementing agreement.

5. Section 13.28(a)(5) is revised to read as follows:

§ 13.28 Permit revocation.

(a) * * *

(5) Except for permits issued under § 17.22(b) through (d) or § 17.32(b) through (d) of this subchapter, the population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.

* * * * *

6. Section 13.50 is revised to read as follows:

§ 13.50 Acceptance of Liability.

Except as otherwise limited in the case of permits described in § 13.25(d), any person holding a permit under this subchapter B assumes all liability and responsibility for the conduct of any activity conducted under the authority of such permit.

PART 17—[AMENDED]

7. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

8. Section 17.22 is amended by revising paragraph (b)(2), adding new paragraphs (b)(7) and (b)(8), redesignating paragraph (c) as paragraph (e), and adding new paragraphs (c) and (d) as follows:

§ 17.22 Permits for scientific purposes, enhancements of propagation or survival, or for incidental taking.

* * * * *

(b) * * *

(2) *Issuance criteria.* (i) Upon receiving an application completed in accordance with paragraph (b)(1) of this section, the Director will decide whether or not a permit should be issued. The Director shall consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and shall issue the permit if he or she finds that:

(A) The taking will be incidental;

(B) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings;

(C) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided;

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

(E) The measures, if any, required under paragraph (b)(1)(iii)(D) of this section will be met; and

(F) He or she has received such other assurances as he or she may require that the plan will be implemented.

(ii) In making his or her decision, the Director shall also consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected.

* * * * *

(7) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, habitat conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter. The permit shall be deemed canceled only upon a determination by the Service that such minimization and mitigation measures have been implemented. Upon surrender of the permit, no further take shall be authorized under the terms of the surrendered permit.

(8) *Criteria for Revocation.* A permit issued under this paragraph (b) may not be revoked for any reason except those

set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied in a timely fashion.

(c)(1) *Application requirements for permits for the enhancement of survival through Safe Harbor Agreements.* The applicant must submit an application for a permit under this paragraph (c) to the appropriate Regional Director, U.S. Fish and Wildlife Service, for the Region where the applicant resides or where the proposed activity is to occur (for appropriate addresses, see 50 CFR 10.22), if the applicant wishes to engage in any activity prohibited by § 17.21.

The applicant must submit an official Service application form (3-200.54) that includes the following information:

(i) The common and scientific names of the listed species for which the applicant requests incidental take authorization;

(ii) A description of the land use or water management activity for which the applicant requests incidental take authorization; and

(iii) A Safe Harbor Agreement that complies with the requirements of the Safe Harbor policy available from the Service.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (c)(1) of this section, the Director will decide whether or not to issue a permit. The Director shall consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if he or she finds:

(i) The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Safe Harbor Agreement;

(ii) The implementation of the terms of the Safe Harbor Agreement will provide a net conservation benefit to the affected listed species by contributing to the recovery of listed species included in the permit and the Safe Harbor Agreement otherwise complies with the Safe Harbor policy available from the Service;

(iii) The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species;

(iv) Implementation of the terms of the Safe Harbor Agreement is consistent with applicable Federal, State, and Tribal laws and regulations;

(v) Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation

or recovery programs for listed species covered by the permit; and

(vi) The applicant has shown capability for and commitment to implementing all of the terms of the Safe Harbor Agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (c) is subject to the following special conditions:

(i) A requirement for the participating property owner to notify the Service of any transfer of lands subject to a Safe Harbor Agreement;

(ii) A requirement for the property owner to notify the Service at least 30 days in advance, but preferably as far in advance as possible, of when he or she expects to incidentally take any listed species covered under the permit. Such notification will provide the Service with an opportunity to translocate affected individuals of the species, if possible and appropriate; and

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the Safe Harbor Agreement.

(4) *Permit effective date.* Permits issued under this paragraph (c) become effective the day of issuance for species covered by the Safe Harbor Agreement.

(5) *Assurances provided to permittee.* (i) The assurances in paragraph (c)(5) (ii) of this section (c)(5) apply only to Safe Harbor permits issued in accordance with paragraph (c)(2) of this section where the Safe Harbor Agreement is being properly implemented, and apply only with respect to species covered by the Agreement and permit. These assurances cannot be provided to Federal agencies. The assurances provided in this section apply only to Safe Harbor permits issued after July 19, 1999.

(ii) If additional conservation and mitigation measures are deemed necessary, the Director may require additional measures of the permittee, but only if such measures are limited to modifications within conserved habitat areas, if any, for the affected species and maintain the original terms of the Safe Harbor Agreement to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Safe Harbor Agreement without the consent of the permittee.

(6) *Additional actions.* Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a Safe Harbor Agreement.

(7) *Criteria for revocation.* A permit issued under this paragraph (c) may not be revoked for any reason except those set forth in § 13.28(a) (1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in § 17.22(c)(2)(iii) and the inconsistency has not been remedied in a timely fashion.

(8) *Duration of permits.* The duration of permits issued under this paragraph (c) must be sufficient to provide a net conservation benefit to species covered in the enhancement of survival permit. In determining the duration of a permit, the Director will consider the duration of the planned activities, as well as the positive and negative effects associated with permits of the proposed duration on covered species, including the extent to which the conservation activities included in the Safe Harbor Agreement will enhance the survival and contribute to the recovery of listed species included in the permit.

(d)(1) *Application requirements for permits for the enhancement of survival through Candidate Conservation Agreements with Assurances.* The applicant must submit an application for a permit under this paragraph (d) to the appropriate Regional Director, U.S. Fish and Wildlife Service, for the Region where the applicant resides or where the proposed activity is to occur (for appropriate addresses, see 50 CFR 10.22). When a species covered by a Candidate Conservation Agreement with Assurances is listed as endangered and the applicant wishes to engage in activities identified in the Agreement and otherwise prohibited by § 17.31, the applicant must apply for an enhancement of survival permit for species covered by the Agreement. The permit will become valid if and when covered proposed, candidate or other unlisted species is listed as an endangered species. The applicant must submit an official Service application form (3-200.54) that includes the following information:

(i) The common and scientific names of the species for which the applicant requests incidental take authorization;

(ii) A description of the land use or water management activity for which the applicant requests incidental take authorization; and

(iii) A Candidate Conservation Agreement that complies with the requirements of the Candidate Conservation Agreement with Assurances policy available from the Service.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (d)(1) of this section, the Director will decide whether or not to issue a permit. The Director shall consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if he or she finds:

(i) The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement;

(ii) The Candidate Conservation Agreement complies with the requirements of the Candidate Conservation Agreement with Assurances policy available from the Service;

(iii) The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any species;

(iv) Implementation of the terms of the Candidate Conservation Agreement is consistent with applicable Federal, State, and Tribal laws and regulations;

(v) Implementation of the terms of the Candidate Conservation Agreement will be in conflict with any ongoing conservation programs for species covered by the permit; and

(vi) The applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (d) is subject to the following special conditions:

(i) A requirement for the property owner to notify the Service of any transfer of lands subject to a Candidate Conservation Agreement;

(ii) A requirement for the property owner to notify the Service at least 30 days in advance, but preferably as far in advance as possible, of when he or she expects to incidentally take any species covered under the permit. Such notification will provide the Service with an opportunity to translocate affected individuals of the species, if possible and appropriate; and

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the Candidate Conservation Agreement.

(4) *Permit effective date.* Permits issued under this paragraph (d) become effective for a species covered by a Candidate Conservation Agreement on the effective date of a final rule that lists a covered species as endangered.

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (d)(5) apply only to permits issued in accordance with paragraph (d)(2) where the Candidate Conservation Agreement with Assurances is being properly implemented, and apply only with respect to species adequately covered by the Candidate Conservation Agreement with Assurances. These assurances cannot be provided to Federal agencies.

(i) *Changed circumstances provided for in the Agreement.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the Agreement's operating conservation program, the permittee will implement the measures specified in the Agreement.

(ii) *Changed circumstances not provided for in the Agreement.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the Agreement's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the Agreement without the consent of the permittee, provided the Agreement is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the Agreement without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the Agreement is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the Agreement's operating conservation program for the affected species, and maintain the original terms of the Agreement to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional

restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Agreement without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

- (1) Size of the current range of the affected species;
- (2) Percentage of range adversely affected by the Agreement;
- (3) Percentage of range conserved by the Agreement;
- (4) Ecological significance of that portion of the range affected by the Agreement;
- (5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the Agreement; and
- (6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) *Additional actions.* Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a Candidate Conservation with Assurances Agreement.

(7) *Criteria for revocation.* A permit issued under this paragraph (d) may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in paragraph (d)(2)(iii) of this section and the inconsistency has not been remedied in a timely fashion.

(8) *Duration of the Candidate Conservation Agreement.* The duration of a Candidate Conservation Agreement covered by a permit issued under this paragraph (d) must be sufficient to enable the Director to determine that the benefits of the conservation measures in the Agreement, when combined with those benefits that would be achieved if it is assumed that the conservation measures would also be implemented on other necessary properties, would preclude or remove any need to list the species covered by the Agreement.

* * * * *

9. Section 17.32 is amended by revising (b)(2) by adding (b)(7) and (b)(8), and adding new paragraphs (c) and (d) as follows:

§ 17.32 Permits—general.

* * * * *

(b) * * *
(2) *Issuance criteria.* (i) Upon receiving an application completed in accordance with paragraph (b)(1) of this section, the Director will decide whether or not a permit should be issued. The Director shall consider the general issuance criteria in 13.21(b) of this subchapter, except for 13.21(b)(4), and shall issue the permit if he or she finds that:

- (A) The taking will be incidental;
- (B) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings;
- (C) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided;
- (D) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
- (E) The measures, if any, required under paragraph (b)(1)(iii)(D) of this section will be met; and
- (F) He or she has received such other assurances as he or she may require that the plan will be implemented.

(ii) In making his or her decision, the Director shall also consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected.

* * * * *

(7) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, habitat conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter. The permit shall be deemed canceled only upon a determination by the Service that such minimization and mitigation measures have been implemented. Upon surrender of the permit, no further take shall be authorized under the terms of the surrendered permit.

(8) *Criteria for revocation.* A permit issued under this paragraph (b) may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied in a timely fashion.

(c)(1) *Application requirements for permits for the enhancement of survival through Safe Harbor Agreements.* The applicant must submit an application for a permit under this paragraph (c) to the appropriate Regional Director, U.S. Fish and Wildlife Service, for the Region where the applicant resides or where the proposed action is to occur (for appropriate addresses, see 50 CFR 10.22), if the applicant wishes to engage in any activity prohibited by § 17.31. The applicant must submit an official Service application form (3-200.54) that includes the following information:

- (i) The common and scientific names of the listed species for which the applicant requests incidental take authorization;
- (ii) A description of the land use or water management activity for which the applicant requests incidental take authorization;
- (iii) A Safe Harbor Agreement that complies with the requirements of the Safe Harbor policy available from the Service; and
- (iv) The Director must publish notice in the **Federal Register** of each application for a permit that is made under this paragraph (c). Each notice must invite the submission from interested parties within 30 days after the date of the notice of written data, views, or arguments with respect to the application. The procedures included in § 17.22(e) for permit objection apply to any notice published by the Director under this paragraph (c).

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (c)(1) of this section, the Director will decide whether or not to issue a permit. The Director shall consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if he or she finds:

- (i) The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Safe Harbor Agreement;
- (ii) The implementation of the terms of the Safe Harbor Agreement will provide a net conservation benefit to the affected listed species by contributing to the recovery of listed species included in the permit and the Safe Harbor Agreement otherwise complies with the

Safe Harbor policy available from the Service;

(iii) The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species;

(iv) Implementation of the terms of the Safe Harbor Agreement is consistent with applicable Federal, State, and Tribal laws and regulations;

(v) Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit; and

(vi) The applicant has shown capability for and commitment to implementing all of the terms of the Safe Harbor Agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (c) is subject to the following special conditions:

(i) A requirement for the participating property owner to notify the Service of any transfer of lands subject to a Safe Harbor Agreement;

(ii) A requirement for the property owner to notify the Service at least 30 days in advance, but preferably as far in advance as possible, of when he or she expects to incidentally take any listed species covered under the permit. Such notification will provide the Service with an opportunity to translocate affected individuals of the species, if possible and appropriate; and

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the Safe Harbor Agreement.

(4) *Permit effective date.* Permits issued under this paragraph (c) become effective the day of issuance for species covered by the Safe Harbor Agreement.

(5) *Assurances provided to permittee.*

(i) The assurances in subparagraph (ii) of this paragraph (c)(5) apply only to Safe Harbor permits issued in accordance with paragraph (c)(2) of this section where the Safe Harbor Agreement is being properly implemented, and apply only with respect to species covered by the Agreement and permit. These assurances cannot be provided to Federal agencies. The assurances provided in this section apply only to Safe Harbor permits issued after July 19, 1999.

(ii) If additional conservation and mitigation measures are deemed necessary, the Director may require additional measures of the permittee, but only if such measures are limited to

modifications within conserved habitat areas, if any, for the affected species and maintain the original terms of the Safe Harbor Agreement to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Safe Harbor Agreement without the consent of the permittee.

(6) *Additional actions.* Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a Safe Harbor Agreement.

(7) *Criteria for revocation.* A permit issued under this paragraph (c) may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 17.22(c)(2)(iii) and the inconsistency has not been remedied in a timely fashion.

(8) *Duration of permits.* The duration of permits issued under this paragraph (c) must be sufficient to provide a net conservation benefit to species covered in the enhancement of survival permit. In determining the duration of a permit, the Director will consider the duration of the planned activities, as well as the positive and negative effects associated with permits of the proposed duration on covered species, including the extent to which the conservation activities included in the Safe Harbor Agreement will enhance the survival and contribute to the recovery of listed species included in the permit.

(d)(1) *Application requirements for permits for the enhancement of survival through Candidate Conservation Agreements with Assurances.* The applicant must submit an application for a permit under this paragraph (d) to the appropriate Regional Director, U.S. Fish and Wildlife Service, for the Region where the applicant resides or where the proposed activity is to occur (for appropriate addresses, see 50 CFR 10.22). When a species covered by a Candidate Conservation Agreement with Assurances is listed as threatened and the applicant wishes to engage in activities identified in the Agreement and otherwise prohibited by § 17.31, the applicant must apply for an enhancement of survival permit for species covered by the Agreement. The permit will become valid if and when

covered proposed, candidate or other unlisted species is listed as a threatened species. The applicant must submit an official Service application form (3-200.54) that includes the following information:

(i) The common and scientific names of the species for which the applicant requests incidental take authorization;

(ii) A description of the land use or water management activity for which the applicant requests incidental take authorization; and

(iii) A Candidate Conservation Agreement that complies with the requirements of the Candidate Conservation Agreement with Assurances policy available from the Service.

(iv) The Director must publish notice in the **Federal Register** of each application for a permit that is made under this paragraph (d). Each notice must invite the submission from interested parties within 30 days after the date of the notice of written data, views, or arguments with respect to the application. The procedures included in § 17.22(e) for permit objection apply to any notice published by the Director under this paragraph (d).

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (d)(1) of this section, the Director will decide whether or not to issue a permit. The Director shall consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if he or she finds:

(i) The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Candidate Conservation Agreement;

(ii) The Candidate Conservation Agreement complies with the requirements of the Candidate Conservation Agreement with Assurances policy available from the Service;

(iii) The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any species;

(iv) Implementation of the terms of the Candidate Conservation Agreement is consistent with applicable Federal, State, and Tribal laws and regulations;

(v) Implementation of the terms of the Candidate Conservation Agreement will be in conflict with any ongoing conservation programs for species covered by the permit; and

(vi) The applicant has shown capability for and commitment to implementing all of the terms of the Candidate Conservation Agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (d) is subject to the following special conditions:

(i) A requirement for the property owner to notify the Service of any transfer of lands subject to a Candidate Conservation Agreement;

(ii) A requirement for the property owner to notify the Service at least 30 days in advance, but preferably as far in advance as possible, of when he or she expects to incidentally take any species covered under the permit. Such notification will provide the Service with an opportunity to translocate affected individuals of the species, if possible and appropriate; and

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the Candidate Conservation Agreement.

(4) *Permit effective date.* Permits issued under this paragraph (d) become effective for a species covered by a Candidate Conservation Agreement on the effective date of a final rule that lists a covered species as threatened.

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (d)(5) apply only to permits issued in accordance with paragraph (d)(2) where the Candidate Conservation with Assurances Agreement is being properly implemented, and apply only with respect to species adequately covered by the Candidate Conservation with Assurances Agreement. These assurances cannot be provided to Federal agencies.

(i) *Changed circumstances provided for in the Agreement.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the Agreement's operating conservation program, the permittee will implement the measures specified in the Agreement.

(ii) *Changed circumstances not provided for in the Agreement.* If additional conservation and mitigation

measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the Agreement's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the Agreement without the consent of the permittee, provided the Agreement is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the Agreement without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the Agreement is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the Agreement's operating conservation program for the affected species, and maintain the original terms of the Agreement to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Agreement without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

(1) Size of the current range of the affected species;

(2) Percentage of range adversely affected by the Agreement;

(3) Percentage of range conserved by the Agreement;

(4) Ecological significance of that portion of the range affected by the Agreement;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the Agreement; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) *Additional actions.* Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a Candidate Conservation with Assurances Agreement.

(7) *Criteria for revocation.* A permit issued under this paragraph (d) may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in paragraph (d)(2)(iii) of this section and the inconsistency has not been remedied in a timely fashion.

(8) *Duration of the Candidate Conservation Agreement.* The duration of a Candidate Conservation Agreement covered by a permit issued under this paragraph (d) must be sufficient to enable the Director to determine that the benefits of the conservation measures in the Agreement, when combined with those benefits that would be achieved if it is assumed that the conservation measures would also be implemented on other necessary properties, would preclude or remove any need to list the species covered by the Agreement.

Dated: May 11, 1999.

Donald J. Barry,

*Assistant Secretary, Fish, Wildlife, and Parks,
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product adhesive operations at Solar Corporation's Libertyville, Illinois facility from 3.5 pounds VOM per gallon to 5.75 pounds VOM per gallon.

(i) *Incorporation by reference.* July 20, 1995, Opinion and Order of the Illinois Pollution Control Board, AS 94-2, effective July 20, 1995.

3. Section 52.720 is amended by adding paragraph (c)(136) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *
(136) On January 9, 1997, Illinois submitted a site-specific revision to the State Implementation Plan which grants a temporary variance from certain automotive plastic parts coating volatile organic material requirements at Solar Corporation's Libertyville, Illinois facility.

(i) *Incorporation by reference.* September 5, 1996, Opinion and Order of the Illinois Pollution Control Board, PCB 96-239, effective September 13, 1996. Certificate of Acceptance signed September 13, 1996.

[FR Doc. 98-4378 Filed 2-20-98; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

50 CFR Part 222

[Docket No. 980212035-8035-01]

RIN 1018-AE24

Habitat Conservation Plan Assurances ("No Surprises") Rule

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Final rule.

DATES: This rule is effective March 25, 1998.

SUMMARY: This final rule codifies the Habitat Conservation Plan assurances provided through section 10(a)(1)(B) permits issued under the Endangered Species Act (ESA) of 1973, as amended. Such assurances were first provided through the "No Surprises" policy issued in 1994 by the Fish and Wildlife Service (FWS) and the National Marine

Fisheries Service (NMFS), (jointly referred to as the "Services,") and included in the joint FWS and NMFS Endangered Species Habitat Conservation Planning Handbook issued on December 2, 1996 (61 FR 63854). The No Surprises policy announced in 1994 provides regulatory assurances to the holder of a Habitat Conservation Plan (HCP) incidental take permit issued under section 10(a) of the ESA that no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit. The Services issued a proposed rule on May 29, 1997 (62 FR 29091) and the comments received on that proposal have been evaluated and considered in the development of this final rule. This final rule contains revisions to parts 17 (FWS) and 222 (NMFS) of Title 50 of the Code of Federal Regulations necessary to implement the Habitat Conservation Plan assurances.

ADDRESSES: To obtain copies of the final rule or for further information, contact Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C., 20240; or Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD, 20910.
FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, (Telephone 703/358-2171, or Facsimile 703/358-1735), or Nancy Chu, Chief, Endangered Species Division, National Marine Fisheries Service (Telephone (301/713-1401, or 301/713-0376).

SUPPLEMENTARY INFORMATION: These final regulations and the background information regarding the final rule apply to both Services. The proposed rule has been revised based on the comments received. The final rule is presented in two parts because the Services have separate regulations for implementing the section 10 permit process. The first part is for the final changes in the FWS's regulations found at 50 CFR 17.22 and 17.32, and the second part is for the final changes in NMFS's regulations found at 50 CFR 222.22.

Background

Section 9 of the ESA generally prohibits the "take" of species listed under the ESA as endangered. Pursuant to the broad grant of regulatory

authority over threatened species in section 4(d) of the ESA, the Services' regulations generally prohibit take of species listed as threatened. See, e.g., 50 CFR 17.31 and 17.21 (FWS). Section 3(18) of the ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." FWS regulations (50 CFR 17.3) define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

Section 10 of the ESA, as originally enacted in 1973, contained provisions allowing the issuance of permits authorizing the taking of listed species under very limited circumstances for non-Federal entities. In the following years, both the Federal government and non-Federal landowners became concerned that these permitting provisions were not sufficiently flexible to address situations in which a property owner's otherwise lawful activities might result in limited incidental take of a listed species, even if the landowner were willing to plan activities carefully to be consistent with the conservation of the species. As a result, Congress included in the ESA Amendments of 1982 provisions under section 10(a) to allow the Services to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided that those activities were conducted according to an approved conservation plan (habitat conservation plan or HCP) and the issuance of the HCP permit would not jeopardize the continued existence of the species. In doing so, Congress indicated it was acting to " * * * address the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking * * * " H.R. Rep. No. 835, 97th Cong., 2d Sess. 29 (1982) (hereafter "Conf. Report").

Congress modeled the 1982 section 10 amendments after the conservation plan developed by private landowners and local governments to protect the habitat of two listed butterflies on San Bruno Mountain in San Mateo County, California while allowing development activities to proceed. Congress recognized in enacting the section 10 HCP amendments that:

" * * * significant development projects often take many years to complete and permit applicants may need long-term permits. In this situation, and in order to provide sufficient incentives for the private sector to

participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project. Thus, the Secretary should have the discretion to issue section 10(a) permits that run for periods significantly longer than are commonly provided [for other types of permits]." (Conf. Report at 31).

Congress also recognized that long-term HCP permits would present unique issues that would have to be addressed if the permits were to function to protect the interests of both the species involved and the non-Federal community. For instance, Congress realized that " * * * circumstances and information may change over time and that the original [habitat conservation] plan might need to be revised. To address this situation, the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." (Conf. Report at 31). Congress also recognized that non-Federal property owners seeking HCP permits would need to have economic and regulatory certainty regarding the overall cost of species mitigation over the life of the permit. As stated in the Conference Report on the 1982 ESA amendments:

"The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (Conf. Report at 30 and 50 FR 39681-39691, Sept. 30, 1985).

Congress thus envisioned and allowed the Federal government to provide regulatory assurances to non-Federal property owners through the section 10 incidental take permit process. Congress recognized that conservation plans could provide early protection for many unlisted species and, ideally, prevent subsequent declines and, in some cases, the need to list covered species.

The Services decided that a clearer policy regarding the assurances provided to landowners entering into an HCP was needed. This need prompted the development of the No Surprises policy, which was based on the 1982

Congressional Report language and a decade of working with private landowners during the development and implementation of HCPs. The Services believed that non-Federal property owners should be provided economic and regulatory certainty regarding the overall cost of species conservation and mitigation, provided that the affected species were adequately covered by a properly functioning HCP, and the permittee was properly implementing the HCP and complying with the terms and conditions of the HCP permit in good faith. A driving concern during the development of the policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities.

The Services issued the ESA No Surprises policy in August of 1994. This policy was then included in the joint Endangered Species Habitat Conservation Planning Handbook, which was published in draft form for public review and comment on December 21, 1994 (59 FR 65782), and, after consideration of the comments, was issued as final in December 1996 (61 FR 63854). In addition to that opportunity for public comment on the No Surprises policy in general, the application of the policy and its assurances have been and continue to be subject to an opportunity for public comment on each proposed HCP permit under section 10(c) of the ESA on a case-by-case basis. The Services were subsequently sued in *Spirit of the Sage Council v. Babbitt*, No. 1:96CV02503 (SS) (D. D.C.), which challenged the procedures under which the No Surprises policy was adopted and under which subsequent HCP permits were issued. In settling this lawsuit, the Services agreed to submit the No Surprises Policy to further public comment and to consider public comment in deciding whether to adopt the No Surprises policy as a final regulation. The Services agreed to this approach because they recognized the benefits of permanently codifying the No Surprises policy as a rule in 50 CFR, as well as the value of soliciting additional comments on the policy itself.

Summary of the Proposed Rule

The proposed rule stated that the Services, when negotiating unforeseen circumstances provisions for HCPs, would not require the commitment of additional land, property interests, or financial compensation beyond the level of mitigation that was otherwise

adequately provided for a species under the terms of a properly functioning conservation plan. Moreover, the Services would not seek any other form of additional mitigation from a permittee except under unforeseen circumstances. However, if additional mitigation measures were subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning conservation plan, the obligation for such measures would not rest with the permittee.

Under the proposed rule, if unforeseen circumstances warrant additional mitigation from a permittee who is in compliance with the conservation plan's obligations, such mitigation would, to the maximum extent possible, be consistent with the original terms of the conservation plan. Further, any such changes will be limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species. Additional mitigation requirements would not involve the payment of additional compensation or apply to parcels of land or the natural resources available for development under the original terms of the conservation plan without the consent of the permittee.

Criteria were also developed by the Services that must be used for determining whether and when unforeseen circumstances arise.

Under the proposed rule, the Services also would not seek any form of additional mitigation for a species from a permittee where the terms of a properly functioning conservation plan were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the conservation plans which have been or are being met. Nothing in the proposed rule would limit or constrain the Services, or any other governmental agency, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

The Services also proposed a permit-shield provision in the proposed rule that stated that compliance with the terms of an incidental take permit constitutes compliance with the requirements of sections 9 and 10 of the ESA with respect to the species covered by the permit regardless of changes in circumstances, policy, and regulation, unless a change in statute or court order specifically requires that assurances given in the original permit be modified or withdrawn.

The Services also clarified in the proposed rule that the regulatory and economic assurances provided to HCP permittees are limited to section 10(a)(1)(B) permits. In addition, the assurances are not provided to Federal agencies.

Summary of Comments Received

The Services received more than 800 comments on the proposed rule from a large variety of entities, including Federal, State, County, and Tribal agencies, industry, conservation groups, religious groups, coalitions, and private individuals. The Services considered all of the information and recommendations received from all interested parties on the proposed regulation during the public comment period and appreciated the comments received on the proposed rule. In addition to comments that specifically addressed the proposed No Surprises policy in the proposed rule, the Services received numerous additional comments on the HCP process itself, comments which were beyond the narrow scope of this particular rulemaking on the No Surprises policy. The Services will utilize these more generic comments on HCPs, as appropriate, as we continue to improve the implementation of our HCP programs. However, at this time, the Services will only address comments received that are specific to the proposed No Surprises rule.

The Services have made changes in the proposed rule where appropriate. In addition, the Services intend to revise the HCP Handbook, both to reflect the final No Surprises rule and to further enhance the effectiveness of the HCP process in general through expanded use of adaptive management, monitoring provisions, and the establishment of overall biological goals for HCPs.

The following is a summary of the comments on the proposed regulations, and the Services' response.

Issue 1: Many commenters believed that to provide regulatory No Surprises assurances, the Secretary was directed to " * * * consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem * * * " (Conf. Report at 31.) and that the Services have no legislative authority to provide regulatory assurances for HCPs that do not meet this standard.

Response 1: A proposed HCP must satisfy the specific issuance criteria enumerated in section 10(a)(2)(B) of the ESA. In deciding whether these criteria have been satisfied and whether the

permit should be issued for a given species, the Services consider, among other things, the extent to which the habitat of the affected species or its long-term survivability may be improved or enhanced. While it may be appropriate to consider an "enhancement factor" for an HCP, it is not a mandatory section 10(a)(2)(B) issuance criterion for all species.

Each HCP is analyzed on a case-by-case basis, using the best scientific information available. Habitat conditions are part of the data the Services evaluate to determine whether a proposed HCP meets the section 10 issuance criteria. The legislative history of the 1982 amendments to section 10 of the ESA indicates that Congress viewed habitat improvement and species conservation as appropriate considerations in determining whether to issue long-term incidental take permits. Certain types of HCPs, such as forest HCPs that include aquatic species, often allow for significant timber harvest and consequent species impacts during the initial years, while it may take decades before the riparian measures under the plan produce stream conditions that provide essential habitat functions for the listed species. The Services agree that, in appropriate situations, the legislative history supports including measures to provide for improved habitat over the life of the plan in section 10 permits. Severely depleted species and species for which the HCP covers all or a significant portion of the range are examples of circumstances in which essential habitat functions must be addressed to ensure that the conservation measures in the HCP provide a high probability that the habitat functions essential to the species' long-term survival will be achieved and maintained during the term of the permit.

Issue 2: Many commenters felt that this proposed regulation was driven solely by the needs of private landowners, and is not in the best interests of the species or other public concerns. Many commenters noted that the proposed regulation did not have commensurate certainties for protection of biological resources.

Response 2: The section 10(a) HCP provisions of the ESA were designed to help alleviate section 9 "take" liability for species on non-Federal lands. The ESA, as originally enacted, allowed the taking of listed species only under very limited circumstances, and did not, for example, allow the incidental take of listed species in the course of otherwise lawful activities. The 1982 ESA amendments to section 10(a) authorize the Services to issue HCP permits

allowing the incidental take of listed species in the course of otherwise lawful activities, provided the activities are conducted according to an approved habitat conservation plan that minimize and mitigate take and avoids jeopardy to the continued existence of the affected species.

The Services disagree that the No Surprises policy has a narrow focus that excludes the consideration of listed species conservation. To the contrary, a driving concern in the development of the policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities. The Services knew that much of the habitat of listed species is in non-Federal lands and believed that HCPs should play a major role in protecting this habitat. Yet, while thousands of acres of species habitat were disappearing each year, only a handful of HCPs had been sought and approved since 1982. The No Surprises policy was designed to rechannel this uncontrolled ongoing habitat loss through the regulatory structure of section 10(a)(1)(B) by offering regulatory certainty to non-Federal landowners in exchange for a long-term commitment to species conservation. Given the significant increase in landowner interest in HCPs since the development of the No Surprises policy, the Services believe that the policy has accomplished one of its primary objectives—to act as a catalyst for integrating endangered species conservation into day-to-day management operations on non-Federal lands. The Services also believe that the HCP process, which is a mechanism that reconciles economic development and the conservation of listed species, is good for rare and declining species, and encourages the development of more of these plans. If species are to survive and recover, such plans are necessary because more than half of the species listed have 80 percent of their habitat on non-Federal lands.

Issue 3: Many commenters stressed that the proposed regulation would unlawfully allow the Services to avoid their mandatory duties under section 7 of the ESA. They argued that the proposed regulation precludes the Services from meeting the regulatory and statutory requirements under 50 CFR 402.16 and section 7(d) because it makes reinitiation of consultation useless and precludes any meaningful reexamination of mitigation measures if the measures in the HCP are later found to be inadequate to avoid jeopardy as required under section 7(a)(2). If jeopardy did arise, commenters do not

feel that the Services would be able to implement the necessary mitigation to avoid the jeopardy because of lack of funding. Other concerns were also raised by commenters regarding the respective balance of responsibilities among the participants to an HCP containing a No Surprises assurance. Also, some commenters suggested the Services would not be fulfilling their mandatory conservation obligations under section 7(a)(1).

Response 3: The Services are committed to meeting their responsibilities under section 7(a)(2) of the ESA. As required by law, the Services conduct a formal intra-Service section 7 consultation regarding the issuance of each permit issued under section 10(a)(1)(B). The purpose of any consultation is to insure that any action authorized, funded, or carried out by the Federal government, including the issuance of an HCP permit, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species. In addition, the Services encourage all applicants to maximize benefits to species covered by their HCPs because of the Services' responsibilities under 7(a)(1). Moreover, as discussed in Response #1, in appropriate situations, such as when an HCP covers most or the entire range of a species or covers severely depleted species, the Services will seek measures necessary for the long-term survival of the species and its habitat.

The Services do not believe they are disregarding the requirements of section 7(d) in providing assurances to landowners through the section 10 process. During the formal section 7(a)(2) consultation process, and prior to the issuance of a final biological opinion, the Services (like any other Federal action agency) must not make any irreversible or irretrievable commitments of resources (in the case of proposing to issue an HCP permit, the Services cannot authorize incidental take) that would preclude the development of reasonable and prudent alternatives in the event that the action, as proposed, violates section 7(a)(2) of the ESA. In the context of HCP permit procedures, the only manner in which the Services could violate section 7(d) is if they authorized incidental take prior to making a final decision on a permit application, which is never the case.

In addition, the No Surprises assurances do not make reinitiation of consultation useless or preclude any meaningful reexamination of the HCP's operating conservation program. The Services will not require the landowner to provide additional mitigation

measures in the form of additional land, water, or money. However, additional mitigation measures can be provided by another entity. Similarly, the No Surprises rule does not preclude the Services from shifting emphasis within an HCP's operating conservation program from one strategy to another in an effort to enhance an HCP's overall effectiveness, provided that such a shift does not increase the HCP permittee's costs. For example, if an HCP's operating conservation program originally included a mixture of predator depredation control and captive breeding, but subsequent research or information demonstrated that one of these was considerably more effective than the other, the Services would be able to request an adjustment in the proportionate use of these tools, provided that such an adjustment did not increase the overall costs to the HCP permittee.

Moreover, if the Services reinitiate consultation on the permitting action, and if additional measures are needed, the Services will work together with other Federal, State, and local agencies, Tribal governments, conservation groups, and private entities to ensure additional measures are implemented to conserve the species.

Regarding the concerns on the respective balance of responsibilities among the participants to an HCP containing a No Surprises assurance, the Services believe the No Surprises rule places the preponderance of the responsibility for protection beyond the terms of a specific HCP upon the Services. The only impediments to the Services' assumption of this additional responsibility will arise from limits on authority or funding to provide this additional protection.

The Services have significant resources and authorities that can be utilized to provide additional protection for threatened or endangered species that are the subject of a given HCP including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. For example, lands managed by the Department of the Interior could be used to ensure listed species protection. Moreover, subsequent section 7 consultations and approval of subsequent section 10 permits will have to take into account the HCP and the status of the species at that time. The section 9 prohibition against unauthorized take by other landowners provides additional protection.

In addition, section 5 of the ESA authorizes the Services to acquire lands to conserve endangered and threatened fish, wildlife, and plants, and section 6

of the ESA authorizes the Services to cooperate with the States in conserving listed species. While many of these programs and authorities are subject to the availability of appropriations, others, such as the authority under the Federal Land Policy and Management Act to exchange land for conservation purposes, do not require appropriations. These authorities provide additional flexibility through which the Services could meet their section 7 responsibilities. While by no means exhaustive, the above discussion demonstrates the depth of authorities and resources available to the Services to meet their No Surprises commitments.

Utilizing these authorities and resources, the Services should be able to provide additional species protection that may be required in the unexpected event that an HCP falls short of providing sufficient protection.

Issue 4: Many commenters stated that the proposed regulation violates section 4(b)(8) of the ESA, which requires " * * * the publication in the **Federal Register** of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this ESA shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation * * *".

Response 4: The Services believe section 4(b)(8) is intended to apply only to listing and critical habitat decisions under section 4. However, even if section 4(b)(8) did apply to this rule, the Services have complied with its requirements. The proposed rule contained a thorough discussion of the basis for the proposed rule (62 FR 29091, May 29, 1997). In addition, the Services had previously explained the background of the No Surprises Policy in the draft HCP Handbook, which was published for public comment in the **Federal Register** (59 FR 65782, December 21, 1994).

Issue 5: Many commenters believe that the Secretary of the Interior does not have the authority to issue assurances for species covered by the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA).

Response 5: The FWS believes that the ESA is more restrictive and protective of species than the MBTA and the BGEPA, and that species covered under an HCP that are also covered by the MBTA and the BGEPA will adequately be protected as long as the HCP is properly implemented. The FWS has concluded that under certain

conditions, a section 10 permit allowing incidental take of listed migratory birds is sufficient to relieve the permittee from liability under the MBTA and BGEPA for taking those species. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR 21.27. For the BGEPA, the FWS would exercise its prosecutorial discretion not to prosecute an incidental take permittee under the BGEPA if such take is in compliance with a section 10 permit under the ESA.

However, there are conditions that must be satisfied before either of these protections apply, which are explained on pages 3-40 to 3-41 in the joint Endangered Species Habitat Conservation Planning Handbook (61 FR 63854, December 2, 1996). The FWS believes this approach is warranted because the permittee already would have agreed to an operating conservation program designed to conserve the species and minimize and mitigate the impacts of take of the listed species of migratory birds to the maximum extent practicable. Through the permitting provisions of the MBTA and the FWS's discretion in the enforcement of the BGEPA and the ESA, the FWS has the authority to provide a permittee with assurance that they will not be prosecuted under the MBTA or BGEPA for take expressly allowed under the ESA.

Issue 6: Many commenters stated that HCPs with No Surprises assurances are in conflict with the issuance criteria in the ESA because, in the event of unforeseen circumstances, the project impacts may not be fully mitigated and the plan may reduce the survival and recovery of a covered species.

Response 6: The assurances provided through this regulation are consistent with the issuance criteria of the ESA. Before issuing a permit, the Services ensure that the applicant minimizes and mitigates the project impacts, to the maximum extent practicable, and that the permitted activities avoid jeopardy to the continued existence of the affected species.

In addition, in cases where significant data gaps exist, adaptive management provisions are included in the HCP. The primary reason for using adaptive management in HCPs is to allow for up-front, mutually agreed upon changes in the operating conservation program that may be necessary in light of subsequently developed biological information. In the event of unforeseen circumstances, these strategies may be redirected as long as the redirection is consistent with the scope of the

mutually agreed-upon adaptive management provisions of the HCP.

Issue 7: Many commenters stated that the applicant is legally required to address all unforeseen circumstances in the HCP pursuant to section 10. They noted that fire, disease, drought, flood, global climate change, and non-point source pollution may be unforeseen, but are not uncommon. Also the proposed regulation does not direct the applicant to provide for all unforeseen circumstances that might occur during the length of the permit because it is the Services' responsibility to determine that there was an unforeseen circumstance that was not addressed and is not the fault of the permittee implementing the HCP. In addition, commenters noted that the nature of many of the HCPs that the Services are approving increases the likelihood for unforeseen events to happen (i.e., the permits are issued for many years and cover large areas and many species).

Response 7: The Services disagree that HCPs must address *all* hypothetical future events, no matter how remote the probability that they may occur. Rather, the Services believe that only reasonably foreseeable changes in circumstances need to be addressed in an HCP. Moreover, these circumstances are likely to vary from HCP to HCP given the ever changing mix of species and affected habitats covered by a given plan. Nevertheless, the Services agree that the proposed rule's treatment of unforeseen circumstances could be strengthened, and a definition of unforeseen circumstances has been codified in this rule. In particular, the Services would like to clarify that unforeseen circumstances will only include events that could not reasonably have been anticipated. *All reasonably foreseeable circumstances, including natural catastrophes that normally occur in the area, should be addressed in the HCP.* The final rule specifies how unforeseen circumstances will be addressed if they occur during the life of the permit.

Issue 8: Commenters believe that the proposed regulation would not allow for social changes that could occur over the lifetime of the permit. For example, they claim that the development and implementation of the Emergency Salvage Timber rider has affected the success of the conservation measures of several HCPs.

Response 8: There may be situations that do arise related to social changes that could occur during the lifetime of the permit. In these situations, the Services will use all of their legal authorities to adequately address the changes. The Timber Salvage rider to

the Appropriations bill is actually a good example of how the Administration responded to a change in social policy. On July 27, 1995, the President signed the Rescission Act (Public Law 104-19) that provided funds for disaster relief and other programs. This bill contained provisions for an emergency salvage timber sale, and directed the preparation, offer, and award of timber salvage sales nationwide. Although the bill passed, the President did not support the provision that waived compliance with environmental laws during timber salvage and directed the Secretaries of Agriculture, the Interior and Commerce, and the heads of other agencies, to move forward to implement the timber-related provisions of the bill in an expeditious and environmentally-sound manner. The Services worked with other Federal agencies to develop a process that, as a matter of Administration policy, addressed compliance with all environmental laws while also meeting the requirements of Pub. L. 104-19. An interagency team of Federal agencies then drafted a process that addressed compliance with the ESA through a streamlined section 7 consultation procedure to ensure that these sales did not jeopardize listed species. In this case, the Services and other Federal agencies cooperatively used their administrative discretion and legal authorities to ameliorate adverse impacts upon listed species conservation.

Issue 9: Several commenters believe that the proposed No Surprises rule negates adaptive management provisions incorporated into HCPs, and may not allow future jeopardy situations to be addressed, because adaptive management must allow for adaptations to changes as they occur rather than trying to plan for everything up front. In addition, many commenters believe that in order to get No Surprises assurances, an HCP must have an adaptive management program that addresses all foreseeable biological and environmental changes and that is designed so that new applicable scientific information and information developed through a monitoring program is incorporated into the plan.

Response 9: The Services do not believe that the proposed rule negates adaptive management provisions incorporated into HCPs for the species with biological data gaps. The No Surprises assurances only apply to an approved HCP that has otherwise satisfied the issuance criteria under section 10(a)(2)(B) of the ESA. When considering permits where there are significant biological data gaps, the

Services have two choices: either deny an HCP permit application due to the inadequacy of the overall proposed plan, or build in adaptive management and monitoring provisions where warranted because of biological data gaps and issue the permit. If there is significant uncertainty associated with the operating conservation program, adaptive management becomes an integral component of the HCP. Incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species when HCPs cover species with significant biological data gaps. Through adaptive management, the biological objectives of an operating conservation program are defined using techniques such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what conservation and mitigation measures are needed to achieve a biological objective, then an adaptive management approach should be used in the HCP. Under adaptive management, the HCP's operating conservation program can be monitored and analyzed to determine if it is producing the desired results (e.g., properly functioning riparian habitats). If the desired results are not being achieved, then adjustments in the program can be considered through an adaptive management clause of the HCP. Thus, adaptive management can be an integral part of the operating conservation program for an HCP and can be implemented to adjust strategies accordingly. The Services support continuing to strengthen the effectiveness of adaptive management provisions in HCPs and intend to do so in further revisions to the HCP Handbook.

Issue 10: Numerous commenters stated that the proposed regulation should identify secured sources of funding that do not rely on appropriations for the implementation of conservation measures that may be needed to address unforeseen circumstances.

Response 10: Funding mechanisms of this type would have to be established through Congressional action. Absent Congressional action on this matter, the Services must operate with the fiscal resources otherwise made available to them through the appropriations process. Moreover, in approving an HCP in the first instance, the Services must conclude that the permittee has provided for adequate funding to implement the terms of the HCP.

Issue 11: Many commenters stated that the Federal government is not capable of shouldering the financial burden of funding the implementation of conservation measures that may be needed to address unforeseen circumstances. The hardship of paying for any changes needed in the HCP on the government may have severe and far reaching effects on funding for other Federal activities. In addition, some commenters noted that the proposed regulation unlawfully shifts the burden of funding to the Services when section 10 clearly states that the applicant will provide the funding. Numerous commenters stated that the government does not have guaranteed funding for covering unforeseen circumstances and cannot make such guarantees in violation of the Anti-Deficiency Act.

Response 11: The ESA requires the Service to find that an incidental take permittee has provided adequate funding to implement an HCP in the first instance. In addition, the Services must ensure that HCPs are designed to adequately mitigate the incidental take authorized by the permit, include measures to deal with unforeseen circumstances that may arise, and comply with such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. Once the Services have concluded that a permittee has initially satisfied the issuance criteria in section 10(a), there is nothing in the ESA that precludes the Services from assuming additional responsibility for species covered under the terms of an HCP, especially when such responsibilities are limited to highly unlikely unforeseen circumstances. In fact, the Services have responsibility for listed species conservation regardless of whether an HCP is involved or not, and carrying out that responsibility (for example, through the initiation of litigation to enforce section 9 of the ESA) is also dependent upon the availability of appropriated funds. Therefore, at a conceptual level, the lack of guaranteed funding to handle a breakdown of an HCP due to unforeseen circumstances is no different from a lack of guaranteed funding to enforce the ESA generally.

The Anti-Deficiency Act applies to the Services' activities under the ESA as it does to their activities under all other environmental laws. In the face of an unexpected species decline, where additional conservation efforts are warranted, the Services have significant resources at their disposal to address the comparative needs of the species. As noted earlier in Response #3, the Services can also work with Congress,

other Federal, State, and local agencies, tribes, environmental groups, and private entities to help ensure the continued conservation of the species in the wild. The Services have a variety of tools available to ensure that the needs of the species affected by unforeseen circumstances are adequately addressed, including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques. Thus, the Services believe they have a wide array of options and resources available to respond to any unforeseen circumstances.

Issue 12: Many commenters noted that many HCPs do not have adequate funding, and the Services must not issue an incidental take permit unless an applicant has secured adequate funding to address all foreseeable changes that might be needed in the conservation measures during the lifetime of the permit. County or State Bonds that are not guaranteed should not be considered "adequate funding."

Response 12: Section 10(a)(2)(B)(iii) requires incidental take permit applicants to "ensure that adequate funding for the plan will be provided." This issuance criterion requires that the applicant detail the funding that will be available to implement the proposed operating conservation program. Therefore, all conservation plans specify funding requirements necessary to implement the plan. The Services issue a permit only when they have concluded that the operating conservation program will be adequately funded. No Surprises only applies to an HCP that is being properly implemented, and if a major component of an HCP, like its funding strategy, is never initiated or implemented, then No Surprises no longer applies and the assurances lapse.

The FWS has incorporated provisions into HCPs that allow for a reevaluation of species coverage in case a County or State Bond that is supposed to meet the adequate funding issuance criterion ultimately is not passed. Under these provisions, the list of species authorized for incidental take may be diminished if funding is not in place within a specified time frame, and any incidental take that would occur before the bond measure is acted upon would have to be adequately mitigated up-front. This reevaluation mechanism was used in the Multiple Species Conservation Program for southwestern San Diego County, California. This type of reevaluation process will be incorporated into other HCPs that rely on proposed bonds to provide required funding.

Issue 13: Many commenters stated that funding and accountability mechanisms are more complicated for permits that involve third party beneficiaries (e.g., certificates of inclusion), and that these types of permits should not include assurances.

Response 13: The Services believe that the assurances provided by the final rule should be available to individuals who participate in HCPs through a larger regional planning process. These large-scale, regional HCPs can significantly reduce the burden of the ESA on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistical impacts of endangered species conservation among the community, and bringing a broad range of landowner activities under the HCPs' legal protection. In addition, these large-scale HCPs allow for ecosystem planning, which can provide benefits to more species than small-scale HCPs. Large-scale HCPs also provide the Services with a better opportunity for analyzing the cumulative effects of the projects, which is more efficient than the piecemeal approach that could result if each landowner developed his/her own HCP. The Services do believe, however, that the party that holds the "overarching" permit, and issues subpermits (e.g., Certificates of Inclusion or Participation Certificates) must have the legal authority to enforce the terms and conditions of the permit and the underlying funding mechanisms for the HCP.

Issue 14: Many commenters requested the Services to remove the permit-shield provision from the proposed regulation because it improperly restricts the authority of the Secretary and citizens to enforce the requirements of the ESA. These commenters assert that the Services do not have the authority to prevent citizens from suing those who are in violation of the ESA. One commenter stated that the permit-shield provision lacks important limitations found in other permit-shield provisions, such as the Clean Water Act and Resource Conservation and Recovery Act. Commenters also stated that the proposed permit-shield provision conflicts with the citizen suit provision in section 11(g) of the ESA. Other commenters supported the proposed permit-shield provision and urged the Service to incorporate it into the final rule. These commenters believe failure to include a permit-shield provision would undercut the No Surprises assurances by exposing permit holders to potential enforcement actions even if they are complying fully with the terms and conditions of valid permits.

Response 14: After further review of the permit-shield concept, including a review of legal authorities, the Services have decided not to include a legally binding permit-shield provision in the final rule. The purpose of the permit-shield provision was to provide certainty to permittees regarding their legal obligations. The current statutory and regulatory framework appears to already provide permittees with that certainty. Although commenters stated that a permit holder might still be vulnerable to government-initiated enforcement actions notwithstanding the No Surprises assurances, the Services cannot identify situations in which a permittee would be in violation of Sections 9 or 11 of the ESA, if in fact they were acting within the permit's authorization and were complying with the terms and conditions of the permit.

In addition, as part of the review of legal authorities, the Services reviewed the court decision in *Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 761-765 (D.C. Cir. 1991), which addressed the legality of the Environmental Protection Agency's permit-shield rule for permits issued under the Resource Conservation and Recovery Act (RCRA). Although that decision upheld the RCRA permit-shield rule promulgated by the EPA, 40 CFR 270.4(a), the Services are concerned that the incidental take permit program is sufficiently different from the RCRA permit program that the *Shell Oil* decision may not support a permit-shield rule for incidental take permits. For instance, the court noted that the maximum term of RCRA permits is 10 years, which is considerably shorter than the terms of most incidental take permits. In addition, the EPA retains explicit authority to modify or terminate RCRA permits in response to information arising after a permit is issued that would have justified different permit terms had it existed when the permit was issued. In contrast, the No Surprises rule commits the Service to issue permits that do not require additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources if unforeseen circumstances arise.

Although the Services have decided not to include a legally binding permit-shield provision in the final rule, they nonetheless strongly support a policy that permittees should feel free of potential prosecution if they are acting under the authorizations of their permit and are complying with the terms and conditions of the permit. The Services therefore will continue their policy of not enforcing the prohibitions of Section

9 of the ESA against any incidental take permittee who complies fully with the terms and conditions of the permit.

Many commenters requested that the Services remove the permit-shield provision from the proposed regulation because it improperly restricts the authority of citizens to enforce the requirements of the ESA. The purpose of the proposed permit-shield provision was to provide that the Services would not utilize Section 11(e) of the ESA to enforce Section 9 prohibitions against a permittee who is in full compliance with the terms and conditions of a permit. The permit-shield provision would not, therefore, have restricted citizen suits.

Issue 15: Commenters believe that the regulatory assurances provided to the permittee deprive citizens of the right to have general oversight of HCPs, including challenging government's management decisions, guaranteeing that landowners are in compliance with the agreements, and ensuring that the plans are actually working to conserve listed species.

Response 15: The No Surprises assurances do not deprive citizens of HCP oversight or of their ability to challenge an improperly issued HCP permit. In addition, all Service decision documents (such as approval of HCP management plans) are part of the Administrative Record for any individual HCP and are available to any member of the public upon request. Nothing in this rule prevents citizens from challenging the adequacy of those decisions or bringing HCP permit terms and conditions compliance issues to the Services' attention. The Services welcome citizen input on HCP implementation. Public comments must be considered in all permit decisions. Providing No Surprises assurances to an HCP permittee does not eliminate this public comment period. In addition, the Services or any party designated as responsible by the Services (e.g., State wildlife agency, local government) in the HCP will be expected to monitor the project for compliance with the terms of the incidental take permit and HCP. The Services also require periodic reporting from the permittee in order to maintain oversight to ensure the implementation of the HCP's terms and conditions. The final rule does nothing to affect these reporting requirements.

Issue 16: Numerous commenters stated that the proposed regulation should provide for permits to contain a reopener clause. Any entity (e.g., landowners, government agencies, ecologists, environmentalists) would then be able to reopen the permit for any of the following reasons: 1) Any

party fails to implement the terms and conditions of the permit; (2) new listings of any species not covered; and (3) monitoring indicates that conservation goals are not being met and that the operating conservation program is ineffective.

Response 16: The HCP process already provides various mechanisms for reopening an HCP. First, the Services may suspend, or in certain circumstances, revoke all or part of the privileges authorized by a permit if the permittee does not comply with the terms and conditions of the permit or with applicable laws and regulations governing the permitted activity. If an HCP permit is suspended or revoked, incidental take must cease. The provisions of most HCPs expressly address permit suspension or revocation procedures. Second, if a species was not initially listed on a HCP permit, it may not be automatically covered by an HCP when subsequently listed. For example, if a species was not originally listed on a permit, the HCP must be formally amended. Amendment of a section 10(a)(1)(B) permit is also required when the permittee wishes to significantly modify the project, activity, or conservation program as described in the original HCP. Such modifications might include significant boundary revisions, alterations in funding or schedule, or an addition of a species to the permit that was not addressed in the original HCP. The Services encourage the public to provide them with applicable information concerning any approved HCP that would be useful in evaluating the effectiveness of the HCP or other concerns they may have.

Issue 17: Numerous commenters stated that the assurances provided through these proposed regulations should not be automatic and should be commensurate with risk, and that the Services should provide assurances to a permittee only if the HCP includes specific objectives or measurable biological goals that must be met and that would ensure the conservation of the species, if they are attained.

Response 17: The Services believe that the commitments of an HCP must be specifically identified and scientifically based, reflecting the particular needs of the species that are covered. Thus, the concept of comparative risk to various species is factored in by the Services as they assess the adequacy of the operating conservation program for a given HCP. The Services will not approve an HCP permit request found to be inadequate, but will provide No Surprises assurances to all HCPs that are found to be adequate.

For many recent HCPs, the Services are defining specific biological goals. Furthermore, comprehensive monitoring programs provide added value for measuring progress toward meeting the goals and commitments and ensuring that the permittee is in compliance with the permit. The Services often incorporate monitoring measures to assess whether goals are being met, especially in cases where additional information may be desirable or there is significant scientific uncertainty. If existing data makes it difficult to predict exactly what measures are needed to achieve a biological objective, then an adaptive management strategy is usually required. Adaptive management, which then becomes an integral component of the operating conservation program, is not negated by the No Surprises assurances because it was a part of the HCP's operating conservation program as approved by the Services.

Issue 18: Most commenters stated that to get assurances, a multispecies HCP must adequately cover each individual species rather than collectively cover a group of species defined by some type of commonality (e.g., guild or habitat).

Response 18: The Services believe that each species in a multispecies HCP must be adequately addressed by satisfying the permit issuance criteria under section 10(a)(2)(B) of the ESA. The Services believe, nevertheless, that in some cases, using a "girdling" or habitat-based approach to craft preserve designs or management measures may be appropriate.

However, even when such tools are used, the Services will ensure that for each species that receives assurances, the species must be specifically named in the HCP, and adequate conservation measures are included in the plan.

Issue 19: Commenters believe that to get assurances, an HCP must have an adequate and comprehensive biological monitoring program that addresses all foreseeable changes in circumstances that may occur over the lifetime of the permit.

Response 19: Monitoring is already an element of HCPs under the Services' Federal regulations [50 CFR 17.22(b)(1), 17.32(b)(1), and 222.22]. Monitoring is also an important tool for HCPs, and their associated permit and Implementing Agreements, and should be properly designed and implemented. The scope of the monitoring program should be sufficient to address reasonably foreseeable changes in circumstances that occur during the life of the permit. Monitoring is needed to obtain the information necessary to properly assess the impacts from the

HCP and to ensure that HCPs are properly implemented. Monitoring will also allow the use of the scientific data obtained on the effects of the plan's operating conservation program to modify specific strategies through adaptive management, and to enhance future strategies for the conservation of species and their habitat.

While the Services appreciate the numerous benefits of a well-developed monitoring program, some low-effect HCPs have minimal monitoring requirements because the impacts from the plan are minor or negligible, and the attempt by the commenters to make an extensive monitoring program a requirement for No Surprises assurances is misplaced. A well-developed monitoring program will add to the credibility of an HCP proposal and will facilitate the eventual approval of the HCP. Thus, the Services believe that the real test for receiving the No Surprises assurances should be whether the issuance criteria under section 10(a) have been satisfied, and not whether a particular conservation tool, such as monitoring, has been extensively employed under an HCP whether it is needed or not.

Issue 20: Numerous commenters stated that to get assurances for unlisted species, a plan must be in place that describes what is necessary for their long-term conservation. Commenters encouraged a standard for unlisted species equal to that used in the proposed policy and regulations for the Candidate Conservation Agreements (CCAs).

Response 20: While the Services agree that these two types of agreements are similar, the purposes of the proposed CCA policy and the No Surprises rule are somewhat different. As stated in the proposed CCA policy, the ultimate goal of these agreements is to encourage landowners and State and local land managing agencies to manage their lands in a manner that, if adopted on a broad enough scale by similarly situated landowners, would remove threats to species and thereby obviate the need to list them under the ESA. The purposes of including unlisted species in HCPs and of making them subject to No Surprises assurances, are to enlist landowners in efforts to conserve these species and to provide certainty to landowners who are willing to make long-term commitments to the conservation of listed and unlisted species that they will not be subjected to additional conservation and mitigation measures if one of the species is listed, except as provided in their HCPs. The standards for including an unlisted species under an HCP are the

issuance criteria under section 10(a)(2)(B) of the ESA. For HCPs, the Services will continue to use the conservation standard identified in the Habitat Conservation Planning Handbook for unlisted species. The Handbook clearly states that an unlisted species is "adequately covered" in an HCP only if it is treated as if it were listed pursuant to section 4 of the ESA, and if the HCP meets the permit issuance criteria in section 10(a)(2)(B) of the ESA with respect to the species. The No Surprises assurances apply only to species (listed and unlisted) that are adequately covered in the HCP. Species, whether listed or nonlisted, will not be included in the HCP permit if data gaps or insufficient information make it impossible to craft conservation and mitigation measures for them, unless these data gaps can be overcome through the inclusion of adaptive management clauses in the HCP.

Issue 21: Many commenters requested an addition to the rule that would address the early termination of an HCP. Commenters want the Services to discuss the possibility of terminating an HCP, including how the assurances and applicable mitigation apply to the termination.

Response 21: The Services believe that such a requested change is unnecessary. The No Surprises assurances apply during the life of the permit, provided that the HCP is properly implemented and the terms and conditions of the HCP incidental take permit are being followed. Should a permit be terminated early, the No Surprises assurances also terminate as of the same date. The question of how outstanding mitigation responsibilities should be handled upon early termination is a more generic HCP policy issue that is unrelated to the No Surprises assurances and is, therefore, beyond the scope of this particular rulemaking.

Issue 22: Several commenters stated that the proposed rule was confusing regarding the different level of assurances established in the proposed rule (for regular HCPs and for HCPs that provide a "net benefit" to the covered species) and that the distinction between the two levels should be clarified further or only one level of assurances should be provided to HCP permittees.

Response 22: The Services agree that these distinctions were unnecessarily confusing and have revised the final rule accordingly. The final rule requires the Services to provide only one level of assurances to any permittee that has an approved HCP permit. The Services eliminated the level of assurances for

HCPs that were developed to provide a net benefit for the covered species since the distinction between the two types of HCPs were very difficult to delineate in practice.

Issue 23: Commenters noted that there were differences between the regulations, such as FWS use of the term "unforeseen" circumstances throughout the proposed rule, whereas NMFS used the terms "unforeseen" and "extraordinary" circumstances in their proposed rule.

Response 23: The Services agree that there was some confusion and have made the regulations consistent between the two agencies, where possible. Moreover, there was never an intention in the August 1994 No Surprises announcement to create a substantive difference between "unforeseen" and "extraordinary" circumstances. NMFS will use the term "unforeseen" in its regulations in place of "extraordinary."

Revisions to the Proposed Rule

The following represents a summary of the revisions to the proposed rule as a result of the consideration of the public comments received during this rulemaking process. The Services have rewritten the "Assurances" section of the preamble and regulatory language to improve clarity and readability. Many commenters were confused by the language in the proposed rule, and asked the Services to provide a clearer explanation of this section. Accordingly, the Services have edited and reorganized the Assurances provision, but have not made any substantive changes.

(1) Some of the definitions used in this rulemaking process will now be codified as definitions in 50 CFR 17.3 for FWS and 50 CFR 222.3 for NMFS. These definitions were concepts identified in the "Background" section of the proposed rule.

(2) The rule was revised so the Services will only provide assurances for species listed on a permit that are adequately covered in the conservation plan and specifically identified on the permit.

(3) The Services have clarified that the duration of the assurances is the same as the length of the permit.

(4) The Services revised the rule so that there is only one level of assurances provided to permittees, instead of one level of assurances for standard HCPs and another level for HCPs that were developed to provide a "net benefit" for the covered species.

(5) The Services have clarified the rule so that it is apparent that No Surprises assurances do not apply to Federal agencies who have a continuing

obligation to contribute to the conservation of threatened and endangered species under section 7(a)(1) of the ESA.

(6) The Services believe that HCPs are, and will continue to be, carefully crafted so that unforeseen circumstances will be rare, if at all, and that the Services will be able to successfully handle any unforeseen circumstance so that species are not jeopardized. To help ensure that unforeseen circumstances are a rare occurrence, the Service revised the rule in appropriate areas.

(7) The Services replaced the term "properly functioning," which was used in the proposed rule to "properly implemented." This change accurately reflects the intent of the Services when discussing the implementation of HCPs.

(8) The Services eliminated the permit-shield provisions from the final rule.

(9) The Services revised the final rule by replacing the term "property interests" with the term "natural resources," which more accurately describes the intent of the Services.

Description/Overview of the Final Habitat Conservation Plan Assurances ("No Surprises" Policy) Rule

The information presented below briefly describes the "No Surprises" assurances adopted in this final rule. These assurances provide economic and regulatory certainty for non-Federal property owners that participate in the ESA's section 10(a)(1)(B) permitting process through the following:

1. *General assurances.* The No Surprises assurances apply only to incidental take permits issued in accordance with the requirements of the Services' regulations where the conservation plan is being properly implemented, and apply only to species adequately covered by the conservation plan.

Discussion: Once an HCP permit has been issued and its terms and conditions are being fully complied with, the permittee may remain secure regarding the agreed upon cost of conservation and mitigation. If the status of a species addressed under an HCP unexpectedly worsens because of unforeseen circumstances, the primary obligation for implementing additional conservation measures would be the responsibility of the Federal government, other government agencies, or other non-Federal landowners who have not yet developed an HCP.

"Adequately covered" under an HCP for listed species refers to any species addressed in an HCP that has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For

unlisted species, the term refers to any species that is addressed in an HCP as if it were listed pursuant to section 4 of the ESA and is adequately covered by HCP conditions that would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were actually listed. For a species to be covered under a HCP it must be listed on the section 10(a)(1)(B) permit. These assurances apply *only* to species that are "adequately covered" in the HCP.

"Properly implemented conservation plan" means any HCP, Implementing Agreement, and permit whose commitments and provisions have been and are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit, so the HCP is consistent with the agreed-upon operating conservation program for the project.

2. Changed circumstances provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changes in circumstances that were provided for in the plan's operating conservation program, the permittee will be expected to implement the measures specified in the plan.

3. Changed circumstances not provided for in the plan. If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances that were not provided for in the plan's operating conservation program, the Services will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

Discussion: It is important to distinguish between "changed" and "unforeseen" circumstances. Many changes in circumstances during the course of an HCP can reasonably be anticipated and planned for in the conservation plan (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events), and the plans should describe the modifications in the project or activity that will be implemented if these circumstances arise. "Unforeseen circumstances" are changes in circumstances affecting a species or geographic area covered by an HCP that could not reasonably have been anticipated by plan developers or the Services at the time of the HCP's negotiation and development, and that result in a substantial and adverse change in the status of a covered species (e.g., the eruption of Mount St. Helens was not reasonably foreseeable).

4. Unforeseen circumstances. In negotiating unforeseen circumstances,

the Services will not require without the consent of the permittee, the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, including quantity and timing of delivery, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan.

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Services may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or restrictions on the use of land, water (including quantity and timing of delivery), or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

In determining unforeseen circumstances, the Services will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Services will consider, but not be limited to, the following factors: size of the current range of the affected species; percentage of range adversely affected by the conservation plan; percentage of range conserved by the conservation plan; ecological significance of that portion of the range affected by the conservation plan; level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

Discussion: The first criterion is self-explanatory. The second identifies factors to be considered by the Services in determining whether the unforeseen circumstances are biologically significant. Generally, the inquiry would focus on the level of biological threats to the affected species covered by the HCP and the degree to which the

welfare of those species is tied to a particular HCP. For example, if a species is declining rapidly, and the HCP encompasses an ecologically insignificant portion of the species' range, then unforeseen circumstances warranting reconsideration of an HCP's conservation program typically would not exist because the overall effect of the HCP upon the species would be negligible or insignificant. Conversely, if a species is declining rapidly and the HCP in question encompasses a majority of the species' range, then unforeseen circumstances warranting a review of an HCP's conservation program probably would exist. If unforeseen circumstances are found to exist, the Services will consider changes in the operating conservation program or additional mitigation measures. However, measures required of the permittee must be as close as possible to the terms of the original HCP and must be limited to modifications within any conserved habitat area or to adjustments within lands or waters that are already set aside in the HCP's operating conservation program. "Conserved habitat areas" are areas explicitly designated for habitat restoration, acquisition, protection, or other conservation uses under an HCP. An "operating conservation program" consists of the conservation management activities, which are expressly agreed upon and described in an HCP or its Implementing Agreement and that are undertaken for the affected species when implementing an approved HCP. Any adjustments or modifications will not include requirements for additional land, water, or financial compensation, or additional restrictions on the use of land, water (including quantity and timing of delivery), or other natural resources otherwise available for development or use under the HCP, unless the permittee consents to such additional measures.

Modifications within conserved habitat areas or to the HCP's operating conservation program means changes to the plan areas explicitly designated for habitat protection or other conservation uses under the HCP, or changes that increase the effectiveness of the HCP's operating conservation program, provided that any such changes do not impose new restrictions or require additional financial compensation on the permittee's activities. Thus, if an HCP's operating conservation program originally included a mixture of predator depredation control and captive breeding, but subsequent

research or information demonstrated that one of these was considerably more effective than the other, the Services would be able to request an adjustment in the proportionate use of these tools, provided that such an adjustment did not increase the overall costs to the HCP permittee. Additionally, the No Surprises assurance does not preclude any Federal agency from exercising its Federal reserved water rights.

The "Unforeseen circumstances" section of the HCP should discuss the process for addressing those future changes in circumstances surrounding the HCP that could not reasonably be anticipated by HCP planners. While HCP permittees will not be responsible for bearing any additional economic burden for more mitigation measures, other methods remain available to respond to the needs of the affected species and to assure that the goals of the ESA are satisfied. These include increasing the effectiveness of the HCP's operating conservation program by adjusting the program in a way that does not result in a net increase in costs to the permittee, and actions taken by the government or voluntary conservation measures taken by the permittee.

When negotiating the unforeseen provisions in an HCP, the permittee cannot be required to commit additional land, funds, or additional restrictions on lands, water (including quantity and timing of delivery) or other natural resources released under an HCP for development or use from any permittee who is implementing the HCP and is abiding by all of the permit terms and conditions in good faith or has fully implemented their commitments under an approved HCP. Moreover, this rule does not preempt or affect any Federal reserved water rights.

In the event of unforeseen circumstances, the Services will work with the permittee to increase the effectiveness of the HCP's operating conservation program to address the unforeseen circumstances without requiring the permittee to provide an additional commitment of resources as stated above. The specific nature of the requested changes to the operating conservation program will vary among HCPs depending upon individual habitat and species needs.

5. Nothing in this rule will be construed to limit or constrain the Services, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Discussion: This means the Services or other entities can intervene on behalf

of a species at their own expense at any time and be consistent with the assurances provided to the permittee under this final rule. However, it is unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress in order to meet their commitment under this final rule (consistent with their obligations under the ESA). If this unlikely event occurred, these actions would be subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated by Congress.

Also, nothing in this final rule prevents the Services from asking a permittee to voluntarily undertake additional mitigation on behalf of affected species. While an HCP permittee who has been implementing the HCP and permit terms and conditions in good faith would not be obligated to provide additional mitigation, the Services believe that many landowners would be willing to consider additional conservation assistance on a voluntary basis if a compelling argument for assistance could be made.

The Services believe that it will be rare for unforeseen circumstances to result in a jeopardy situation. However, in such cases, the Services will use all of their authorities, will work with other Federal agencies to rectify the situation, and work with the permittee to redirect conservation and mitigation measures so as to offset the likelihood of jeopardy. The Services have a wide array of authorities and resources that can be used to provide additional protection for threatened or endangered species covered by an HCP.

Required Determinations

A major purpose of this final rule is to provide section 10(a)(1)(B) permittees regulatory assurances related to the issuance of an HCP permit. From the Federal government's perspective, implementation of this rule would not result in additional expenditures to the permittee that are above and beyond that already required through the section 10(a)(1)(B) permitting process. There are, however, benefits derived from HCPs for both the non-Federal permittees and the species covered by the HCPs. HCPs are mechanisms that allow non-Federal entities to continue with economic use or development activities, while factoring species' conservation needs into natural resource management decisions. Benefits to the covered species may include the conservation of lands and waters upon which the species depends, decreased habitat fragmentation, the removal of

threats to candidate, proposed, or other unlisted species, and in various instances, advancement of the recovery of listed species. Non-Federal entities are then provided regulatory assurances pursuant to an approved incidental take permit under section 10(a)(1)(B) of the ESA for those species that are adequately covered by the permit, conditioned, of course, on the proper implementation of the HCP. Since the Habitat Conservation Plan Assurances ("No Surprises" policy) impose no additional economic costs or burdens upon an HCP permittee, the Services have determined that the final rule would not result in significant costs of implementation to non-Federal entities.

Information Collection/Paperwork Reduction Act

No significant effects are expected on non-Federal entities exercising their option to enter into the HCP planning program because there is no additional information required during the HCP development or processing phase due solely to these regulatory assurances.

The Services have examined this final rule under the Paperwork Reduction Act of 1995 and found it to contain no requests for additional information or increase in the collection requirements associated with incidental take permits other than those already approved for incidental take permits with OMB approval #1018-0094, which has an expiration date of February 28, 2001.

Economic Analysis

This final rule was subject to Office of Management and Budget review under Executive Order 12866. However, the Services have determined that there will be no additional costs placed on the non-Federal entity associated with this final regulation. The No Surprises policy, which was drafted in 1994, went through a public comment period as part of the draft *1994 Habitat Conservation Planning Handbook* (59 FR 65782, December 21, 1994), was included in the final *1996 Habitat Conservation Planning Handbook* (61 FR 63854, December 2, 1996), and currently is being implemented in individual HCP permits as they are issued after an opportunity for public comment. The No Surprises assurances provided to permittees through these final rules apply to the HCP permitting process only, and the Services have determined that there will be no additional information required of non-Federal entities through the HCP permitting process to provide assurances to the permittee.

The Department of the Interior has certified that this rulemaking will not

have a significant economic impact on a substantial number of small entities, which includes businesses, organizations, or governmental jurisdictions. This final rule will provide non-Federal entities regulatory certainty pursuant to an approved incidental take permit under section 10(a)(1)(B) of the Act. No significant effects are expected on non-Federal entities exercising their option to enter into the HCP planning program because there will be no additional information required through the HCP process due to the application of assurances or "No Surprises." Therefore, this rule would have a minimal effect on such entities. NMFS has also reviewed this rule under the Regulatory Flexibility Act of 1980 and concurs with the above certification.

The implementation of the final Habitat Conservation Plan Assurances rule does not require any additional data not already required by the HCP process. Regulatory assurances are provided to the permittee if the HCP is properly implemented, and if all the terms and conditions of the HCP, permit, or Implementing Agreement are all being met. The underlying economic basis of comparing the final rule with and without the assurances was used to determine if there existed any potential economic effects from implementing this policy. Since the rule is being implemented with existing data, there are no incremental costs being imposed on non-Federal landowners. The benefits generated by this rule are being shared by the Services (*i.e.*, less habitat fragmentation, habitat management, and protection for covered species) and by non-Federal landowners (*i.e.*, assurances that approved HCPs will allow for future economic uses of non-Federal land without further conservation and mitigation measures).

There are no specific data to assess the effects on businesses from this rule. To the extent businesses are affected, however, such effects would be positive, not negative. Until specific HCPs are approved, it is not possible to determine effects on commodity prices, competition or jobs. Moreover, any economic effects would likely be tied to the cost of the development and implementation of the HCP itself and not to these assurances. There is a positive effect expected on the environment because these assurances act as an incentive for non-Federal entities to seek HCPs and to factor species conservation needs into national resources management decisions. No effect on public health and safety is expected from this rule. Therefore, this rule most likely would not have a

significant effect on a substantial number of small entities.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. No additional information will be required from a non-Federal entity solely as a result of these assurances.

Civil Justice Reform

The Departments have determined that these final regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

National Environmental Policy Act

The Department has determined that the issuance of the final rule is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10. NMFS concurs with the Department of Interior's determination that the issuance of the final rule qualifies for a categorical exclusion and falls within the categorical exclusion criteria in NOAA 216-3 Administrative Order, Environmental Review Procedure.

List of Subjects

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

50 CFR Part 222

Administrative practices and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

For the reasons set out in the preamble, the Services amend Title 50, Chapter I, subchapter B; and Title 50, Chapter II, subchapter C of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

Subpart C—Endangered Wildlife

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. The FWS amends § 17.3 by adding the following definitions alphabetically to read as follows:

* * * * *

Adequately covered means, with respect to species listed pursuant to

section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan, and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

* * * * *

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

* * * * *

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

* * * * *

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

* * * * *

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse

change in the status of the covered species.

* * * * *

3. The FWS amends § 17.22 by adding paragraphs (b) (5) and (6) to read as follows:

§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

* * * * *

(b) * * *

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such

measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

(1) Size of the current range of the affected species;

(2) Percentage of range adversely affected by the conservation plan;

(3) Percentage of range conserved by the conservation plan;

(4) Ecological significance of that portion of the range affected by the conservation plan;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Subpart D—Threatened Wildlife

4. The FWS amends § 17.32 by adding paragraphs (b)(5) and (6) to read as follows:

§ 17.32 Permits—general.

* * * * *

(b) * * *

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with

paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to [insert 30 days after the date of publication in the **Federal Register**]. The assurances provided in incidental take permits issued prior to [insert 30 days after the date of publication in the **Federal Register**] remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original

terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

- (1) Size of the current range of the affected species;
- (2) Percentage of range adversely affected by the conservation plan;
- (3) Percentage of range conserved by the conservation plan;
- (4) Ecological significance of that portion of the range affected by the conservation plan;
- (5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and
- (6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

PART 222—ENDANGERED FISH OR WILDLIFE

5. The authority citation for part 222 is revised to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

Subpart C—Endangered Fish or Wildlife Permits

6. In part 222, a new section is added to read as follows:

222.3 Definitions.

These definitions apply only to § 222.22:

Adequately covered means, with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species

covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

§ 222.22 [Amended]

7. In § 222.22, paragraphs (g) and (h) are added.

* * * * *

(g) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (g) apply only to incidental take permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25,

1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) *Unforeseen circumstances.* (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will

consider, but not be limited to, the following factors:

(A) Size of the current range of the affected species;

(B) Percentage of range adversely affected by the conservation plan;

(C) Percentage of range conserved by the conservation plan;

(D) Ecological significance of that portion of the range affected by the conservation plan;

(E) Level of knowledge about the affected species and the degree of specificity of the species' conservation

program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(h) Nothing in this rule will be construed to limit or constrain the Assistant Administrator, any Federal, State, local, or tribal government agency, or a private entity, from taking additional actions at its own expense to

protect or conserve a species included in a conservation plan.

Dated: February 13, 1998.

Rolland A. Schmitten,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

Dated: February 11, 1998.

Donald J. Barry,

*Acting Assistant Secretary, Fish, Wildlife, and
Parks, Department of Interior.*

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