

Source of flooding and location	*Elevation in feet (NGVD)	Communities affected
Just upstream of Northeast 420th Avenue	*432	King County (Uninc. Areas) and City of North Bend.
At Borst Avenue Northeast	*441	
Upper South Overflow:		
Approximately 400 feet downstream of Ballarat Avenue North	*437	King County (Uninc. Areas) and City of North Bend.
At divergence from Middle Fork Snoqualmie River	*467	
Upper North Overflow:		
Approximately 150 feet downstream of Ogle Avenue Northeast	*441	King County (Uninc. Areas) and City of North Bend.
Approximately 400 feet downstream of 120th Street	*457	
Gardiner Creek:		
At Bolch Avenue Northwest	*429	King County (Uninc. Areas) and City of North Bend.
Upstream of Northwest Eighth Street	*435	

ADDRESSES

Unincorporated Areas King County

Maps are available for inspection at the King DDES, Black River Corp. Park, 900 Oaksdale Avenue Southwest, Suite 100, Renton, Washington.

City of North Bend

Maps are available for inspection at 1155 East North Bend Way, North Bend, Washington.

City of Snoqualmie

Maps are available for inspection at the Planning Directors Office, 8020 Railroad Avenue Southeast, Snoqualmie, Washington.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: December 1, 2004.

David I. Maurstad,

*Acting Director, Mitigation Division,
Emergency Preparedness and Response
Directorate.*

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AT64

Endangered Species Act Incidental Take Permit Revocation Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule describes circumstances in which the U.S. Fish and Wildlife Service may revoke incidental take permits issued under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended. On December 11, 2003, the U.S. District Court for the District of Columbia in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.), invalidated 50 CFR 17.22(b)(8) and 17.32(b)(8), the regulations addressing Service authority to revoke incidental take permits under certain circumstances. The court ruled that we had adopted those regulations without adequately complying with the public

notice and comment procedures required by the Administrative Procedure Act (APA) and remanded the regulations to us for further proceedings consistent with the APA. On May 25, 2004, we published in the **Federal Register** a final rule withdrawing the permit revocation regulations vacated by the court's order (69 FR 29669). On that same date we requested public comment on our proposal to reestablish the permit revocation regulations (69 FR 29681).

DATES: This rule is effective January 10, 2005.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Rick Sayers, Chief, Branch of Consultation and Habitat Conservation Planning, at the above address (Telephone 703/358-2106, Facsimile 703/358-1735).

SUPPLEMENTARY INFORMATION: This notice of rulemaking applies 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.

This rule applies only to 50 CFR 17.22(b) and 17.32(b), which pertain to incidental take permits. Regulations in 50 CFR 17.22(c) and 17.32(c), which pertain to Safe Harbor Agreements (SHAs), and in 50 CFR 17.22(d) and

17.32(d), which pertain to Candidate Conservation Agreements with Assurances (CCAAs), are not affected by this rule.

Background

Promulgation of the "Permit Revocation Rule"

The Service administers a variety of conservation laws that authorize the issuance of permits for otherwise prohibited activities. In 1974, we published 50 CFR part 13 to consolidate the administration of 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.

We subsequently 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 Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*); and added part 23 in 1977 to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The regulations in these parts contain their own specific permitting requirements that supplement the general permitting provisions of part 13.

With respect to the ESA, the combination of the general permitting

provisions in part 13 and the specific permitting provisions in part 17 has worked well in most instances.

However, the Service has found that, in some areas of permitting policy under the Act, the "one size fits all" approach of part 13 has been inappropriately constraining and narrow. Incidental take permitting under section 10(a)(1)(B) of the ESA is one such area.

On June 12, 1997 (62 FR 32189), we published proposed revisions to our general permitting regulations in 50 CFR part 13 to identify, among other things, the situations in which the permit provisions in part 13 would not apply to individual incidental take permits.

On June 17, 1999 (64 FR 32706), we published a final set of regulations that included two provisions that relate to revocation of incidental take permits. The first provides that the general revocation standard in 50 CFR 13.28(a)(5) will not apply to several types of ESA permits, including incidental take permits. The second provision, hereafter referred to as the Permit Revocation Rule, described circumstances under which incidental take permits could be revoked.

The Permit Revocation Rule, which was codified at 50 CFR 17.22(b)(8) (endangered species) and 17.32(b)(8) (threatened species), clarified that an incidental take permit "may not be revoked . . . 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." The criterion in section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild" is one of the statutory criteria that incidental take permit applicants must meet in order to obtain a permit. The criterion is substantially identical to the definition of "jeopardize the continued existence of" in the joint Department of the Interior/Department of Commerce regulations implementing section 7 of the ESA (50 CFR 402.02).

On February 11, 2000 (65 FR 6916), we published a request for additional public comment on several specific regulatory changes included in the June 17, 1999, final rule (64 FR 32706), including the Permit Revocation Rule. Based on our review of the comments we received in response to the February 11, 2000, request for comments, we published a notice on January 22, 2001 (66 FR 6483), that affirmed the provisions of the June 17, 1999 (64 FR 32706), final rule, including the Permit Revocation Rule.

The "No Surprises" Rule Litigation and the Order To Vacate the Permit Revocation Rule

On February 23, 1998 (63 FR 8859), the Service and the National Marine Fisheries Service, which also issues ESA incidental take permits, jointly promulgated the No Surprises Rule. The No Surprises Rule provides certainty to holders of incidental take permits by placing limits on the agencies' ability to require additional mitigation after an incidental take permit has been issued. The No Surprises Rule is codified by the Service at 50 CFR 17.22(b)(5) (endangered species) and 17.32(b)(5) (threatened species) and by the National Marine Fisheries Service at 50 CFR 222.307(g). For both agencies, the No Surprises Rule was added to pre-existing regulations pertaining to incidental take permits.

In July 1998, a group of environmental plaintiffs challenged the No Surprises Rule in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.). The Service promulgated the Permit Revocation Rule on June 17, 1999 (64 FR 32706). The plaintiffs subsequently amended their complaint to challenge the Permit Revocation Rule. The government explained in its briefs that the ESA itself authorizes the Service to revoke incidental take permits, and that the Rule simply confirmed that the Service would employ its statutory authority if the need arose.

On December 11, 2003, the court ruled that the Service had violated the public notice and comment procedures of the APA when promulgating the Permit Revocation Rule. The court did not rule on the substantive validity of the Permit Revocation Rule. The court vacated and remanded the Permit Revocation Rule to the Service for further consideration consistent with section 553 of the APA. The court did not rule on the validity of the No Surprises Rule, but found that the Permit Revocation Rule is relevant to the court's review of the No Surprises Rule. The court, therefore, ordered the Service to consider the No Surprises Rule together with the Permit Revocation Rule in any new rulemaking proceedings concerning revocation of incidental take permits containing No Surprises assurances. On May 25, 2004, we published in the **Federal Register** a final rule (69 FR 29669) withdrawing the permit revocation regulations vacated by the court's order. On that date, we also published a proposal to issue new permit revocation regulations (69 FR 29681). On June 10, 2004, the court further ordered the Service to

complete the rulemaking on the new revocation rule no later than December 10, 2004, and to refrain from approving new incidental take permits or related documents containing "No Surprises" assurances until we have completed all proceedings remanded by the court's December 11, 2003, order.

The government complied with the court's orders with this rulemaking action. The Service published a notice in the **Federal Register** on May 25, 2004, requesting public comment on proposed new permit revocation regulations (69 FR 29681). We requested comments on the proposed rule and its interrelationship with the No Surprises Rule (63 FR 8859). With this rule, we establish revocation regulations for incidental take permits at 50 CFR 17.22(b)(8) and 17.32(b)(8). In addition, the National Marine Fisheries Service has determined that the court's orders require no further action by the National Marine Fisheries Service.

Summary of Previously Received Comments

As stated in the proposed rule, we previously received comments on the Permit Revocation Rule in response to our **Federal Register** notice of February 11, 2000 (65 FR 6916). We addressed these comments in our affirmation of the final rule published in the **Federal Register** on January 22, 2001 (66 FR 6483). Because we received some of the same or similar comments in response to our request for public comment on our proposal of this rule, our response to comments below encompasses both the current and previous comments regarding incidental take permit revocation.

Summary of Comments Received

On May 25, 2004, we proposed to reestablish the Permit Revocation Rule as originally promulgated on June 17, 1999 (64 FR 32706). In our request for public comment on the proposed regulations, we specifically invited public comment on the following issues:

1. The proposal to reestablish the Permit Revocation Rule. This rule would allow the Service to revoke an incidental take permit as a last resort in the unexpected and unlikely situation in which continuation of the permitted activities would likely jeopardize the continued existence of the species covered by the permit and the Service is not able to remedy the situation through other means in a timely fashion.

2. The interrelationship of the Permit Revocation Rule and the No Surprises Rule, including whether the revocation standard in the Permit Revocation Rule is appropriate in light of the regulatory

assurances contained in the No Surprises Rule.

3. Whether the revocation standard in 50 CFR 13.28(a)(5) or some other revocation standard would be more appropriate for incidental take permits with No Surprises assurances.

The comment period closed on July 26, 2004. We received approximately 250 comments on our proposed rule from a variety of entities, including the National Marine Fisheries Service, two States, one Tribe, several county and other local agencies, conservation groups, industry and trade associations, and private individuals. Among the comments were several that questioned the Service's compliance with the APA and one that described difficulty understanding the proposal. We address these two issues under General Issues below. The remainder of the comments raised specific issues that are summarized below and discussed in detail, along with the Service's responses, under Specific Issues below.

Because most of the comments we received covered similar issues and many of them were form letters, we grouped the comments according to issues. The comments ranged widely, but generally fell into three categories: (1) the permit revocation regulations are appropriate as proposed; (2) the permit revocation regulations inappropriately limit when the Service can revoke incidental take permits; and (3) the permit revocation regulations are overly protective of listed resources and undermine the regulatory certainty provided by the No Surprises Rule. In addition to comments on the proposed regulations and the interrelationship of the proposed regulations and the No Surprises Rule, we also received numerous comments on the No Surprises Rule, habitat conservation planning, and specific Habitat Conservation Plans that are beyond the narrow scope of this particular rulemaking on the permit revocation regulations. While these comments are beyond the scope of this particular rulemaking and are not addressed here, we will retain this information for consideration in any future revisions of guidance, policy, or rules governing Habitat Conservation Planning and No Surprises assurances.

Most commenters who responded during this comment period supported the permit revocation regulations as proposed. Many of these commenters stated they thought it appropriate for the permit revocation standard to be the same as for permit issuance (*i.e.*, based on the criterion in section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that "the taking will not appreciably

reduce the likelihood of the survival and recovery of the species in the wild"). Many stated the proposed regulations allow for meaningful implementation of the No Surprises Rule in the context of Habitat Conservation Plans and associated incidental take permits. Many of these commenters stated that applying the general permit revocation standard at 50 CFR 13.28(a)(5) is inappropriate in the context of the No Surprises Rule and undercuts the very notion of regulatory certainty by expanding the conditions under which permits may be revoked. Additionally, some of these commenters stated they found it appropriate for the Service to step in with additional funding, lands, or other resources in the event a species was jeopardized as a result of any "unforeseen circumstance." These commenters did not view such a situation as burdensome for the Service or taxpayers, citing a number of potential funding sources and other opportunities.

Numerous commenters expressed concern that the permit revocation regulations inappropriately limit when permits may be revoked (*i.e.*, the regulations are not adequately protective of listed resources). Some of these commenters recommended revision of: (1) The No Surprises Rule; (2) the proposed permit revocation regulations; (3) the general permitting regulations at 50 CFR 13; or (4) some combination of these regulations. Some of these commenters objected to "boilerplate" language included in incidental take permits that provided the same No Surprises assurances to all permittees. Some of these commenters were concerned that the Service would be unable to revoke a permit if the permittee was unwilling to make monitoring, management, or other changes under an adaptive management plan or was otherwise out of compliance with the permit. These commenters: (1) Questioned why the old provision at 50 CFR 13.28(a)(5) should be replaced with a standard they viewed as less protective; (2) requested the word "shall" rather than "may" be used to indicate that revocation is not discretionary; (3) questioned why the Service should have to step in at public expense to remedy jeopardy situations before a permit can be revoked; (4) questioned what the standard "in a timely fashion" means or requested this term be further defined; (5) suggested that the revocation provision should also contain a reference to adverse modification of critical habitat; and (6) recommended that the word "jeopardy"

be used instead of "appreciable reduction in the likelihood of survival and recovery" because the commenter viewed "jeopardy" to be a higher standard.

A few commenters stated the permit revocation regulations undermined the No Surprises Rule (*i.e.*, the regulations are overly protective of listed resources). The commenters requested: (1) the Service reaffirm that permit revocation should be "an action of last resort;" and (2) the Service limit permit revocation to instances where the permittee is not in compliance with the permit (*i.e.*, no permit revocation even if a species would be jeopardized by the continuation of activities covered under the permit as long as the plan is being properly implemented).

The vast majority of commenters, regardless of the three categories into which they fell, expressed the view that the No Surprises Rule and concomitant permit revocation regulations are effective incentives that are responsible for the large increase in the number of non-federal landowners who have chosen to participate in the Habitat Conservation Planning program.

General Issues

Issue: We received several comments on the public notice process in which the commenters viewed the Service's decision to repropose the same regulations that were vacated by the court as a violation of APA procedural requirements. These commenters felt the Service should have proposed permit revocation regulations that differed from those promulgated in the June 17, 1999, final rule (64 FR 32706) and the January 22, 2001, affirmation of the final rule (66 FR 6483). A few commenters thought the proposed rule "deprived the public of meaningful notice," lacked sufficient explanation of the specific issues on which we were soliciting comments, and "cannot be interpreted to fairly apprise interested persons of the subjects and the issues." Some of these commenters thought the Service should have provided more explanation of the differences between the proposed rule and the revocation standard in the general permitting regulations (*i.e.*, 50 CFR 13.28(a)(5)).

Response: We considered the revocation standard at 50 CFR 13.28(a)(5), but thought this standard was not appropriate given the plain language of section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)). We reviewed the No Surprises assurances provided at 50 CFR 17.22(b)(5) and 17.32(b)(5) and came to the conclusion that the proposed rule appropriately describes the point at which permit

revocation should occur for a properly implemented HCP. Therefore, we repropose the same regulations that were vacated, explaining our reasoning and soliciting public comment. In its comments, the National Marine Fisheries Service agreed that the revocation standard contained in the proposed rule was appropriate. Our intent to clarify the relevant standards for revocation of incidental take permits was well described in the proposed rule, and the record of events that led to this rulemaking was well chronicled. In our proposal we specifically invited the public to comment on the appropriateness of the proposed standard and if they thought the revocation standards at 50 CFR 13.28(a)(5) or some other standard was more appropriate. Through this rulemaking process we have complied with the procedural requirements and the intent of the APA.

Issue: One commenter found it difficult to understand the proposed rule and “found the publication in the **Federal Register** to be totally inadequate for even an “informed citizen” to understand the intent of the proposal or the historical precedents which required this rules process.”

Response: The historical events that led to this rulemaking were well described in the proposal. Our intent was to clarify relevant standards for revocation of incidental take permits and solicit public comment on the appropriateness of the proposed standard. Based on the number of significant comments we received, the content of the proposal adequately described the historical precedents and the intent of the proposal.

Specific Issues

In this section we address specific issues relevant to the permit revocation regulations and the interrelationship of the permit revocation regulations and the No Surprises Rule that were raised by commenters.

Issue: Several commenters viewed the proposed revocation regulations coupled with No Surprises assurances as an inadequate standard to protect species. To remedy the perceived inadequacy, some of these commenters provided recommendations for revisions of the No Surprises Rule, the regulations governing incidental take permit revocation, or both. Suggested revisions generally included conditioning permits to allow for periodic evaluation in effectiveness, modifying the plan to incorporate new scientific information or changed conditions, and requiring performance bonds to ensure accountability. A couple of commenters

requested that the Addendum to the HCP Handbook, the so-called Five Point Policy (65 FR 35242), be promulgated as a regulation. Some of these commenters objected to “boilerplate” language included in incidental take permits that they thought provided the same level of No Surprises assurances to all permittees. They viewed this approach as inadequate to achieve regulatory assurances commensurate with the level of scientific rigor underlying the HCP, the level of uncertainty regarding the conservation of the species, and the duration of the associated incidental take permit. A couple of commenters thought there should be flexibility in the level of assurances provided and that the Service should negotiate the level of assurances and the conditions for permit revocation on a case-by-case basis.

Response: We address these comments together, because the concerns raised are related to several aspects of permit issuance and revocation. In order to provide a clear response to this suite of issues, we begin by summarizing the permit process, specifically permit issuance criteria and the No Surprises Rule. In order for an applicant to receive an incidental take permit with No Surprises assurances, the Service must receive commitments from the applicant. The specific commitments vary widely and are unique to each plan, but generally the applicant must submit a Habitat Conservation Plan (HCP) that, among other things, includes measures to minimize and mitigate impacts and ensures adequate funding to implement the proposed plan. The HCP must support findings that the amount of incidental take of species covered by the plan and included on the incidental take permit will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. In addition to these findings and other issuance criteria in section 10(a)(2)(B) of the ESA that must be met, an applicant must demonstrate that (1) the species are adequately covered by the plan, (2) the plan has included provisions for changed circumstances and unforeseen circumstances, and (3) the applicant has ensured funding for changed circumstances. Changed circumstances are changes affecting a species or geographic area covered by an HCP that can reasonably be anticipated and planned for by plan developers and the Service. Unforeseen circumstances are changes 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.

Most commenters’ concerns and suggested revisions to the No Surprises Rule or the permit revocation rule are already addressed in guidance developed jointly by the Service and the National Marine Fisheries Service in the form of an addendum to the HCP Handbook published on June 1, 2000, known as the “Five Point Policy” (65 FR 35242). The Five Point Policy provides clarifying guidance for the Service’s and the National Marine Fisheries Service’s administration of the incidental take permit program and for those applying for an incidental take permit. The Five Point Policy is considered agency policy, and the Service is fully committed to its implementation.

As described in the Five Point Policy, an HCP applicant must identify biological goals and objectives of the plan and must develop an operating conservation program (*i.e.*, conservation management activities expressly agreed upon and described in the HCP and implemented as part of the plan) to achieve these goals and objectives. As part of the operating conservation program, the applicant must develop a management plan with an appropriate level of flexibility, such as an adaptive management plan, and a monitoring program to assess the effectiveness of the management plan and other conservation measures being implemented under the operating conservation program. If all issuance criteria have been met, the duration of the permit is then determined by considering a number of factors, including the period of time over which the permittee’s activities will occur, the reliability of information underlying the HCP, the length of time necessary to implement and achieve the benefits of the operating conservation program, the extent to which the program incorporates adaptive management strategies, and the level of biological uncertainty associated with the plan. In general, a long permit duration is likely to require a comprehensive adaptive management plan and minimal biological uncertainty.

The Five Point Policy also extends the minimum public comment period for most HCPs based on the complexity of the proposed plans. This increased public comment period assists the Service and the applicant in gathering information that may have been missed during the development of the HCP.

Through this process, an applicant, with assistance from the Service, develops an HCP that includes periodic review, modification to the plan to accommodate new scientific information, and funding that is assured through a variety of means, including performance bonds, all of which are mutually agreed upon in the operating conservation program developed to implement the plan. Rather than negotiate a different set of assurances and a different set of revocation criteria for each incidental take permit, the Service chose a threshold approach, where the applicant only receives No Surprises assurances for species that are adequately covered by the HCP. Determinations as to whether a species is adequately covered by a plan are made on a case by case basis, a process in which the Service considers the scientific rigor underlying the particular plan and any uncertainty associated with the plan and its operating conservation program as described above, and then ensures that appropriate monitoring, reporting, modification, and funding measures are included, and determines the appropriate duration of the permit and what type and amount of take, if any, can be authorized for each species.

Once a permit is issued, the permittee must properly implement the plan (*i.e.*, fully implement all commitments and provisions agreed to in the HCP, associated Implementing Agreement (if any), and incidental take permit) to receive No Surprises assurances and the assurance that permit revocation would be an "action of last resort." This approach, which includes planning for change and contingencies, but uses one revocation standard for all, leads to greater consistency in our implementation of the Habitat Conservation Planning program while taking into account the unique circumstances associated with each plan.

Issue: One State and numerous other commenters expressed concern regarding the Service's ability to revoke a permit under the proposed permit revocation regulations if a permit holder is not in compliance with their permit and under what timeframe this action would occur.

Response: Nothing in the permit revocation regulations, including the provisions in 50 CFR 17.22(b)(8) and 17.32(b)(8) precludes the Service from suspending and, if necessary, revoking an incidental take permit if the permittee fails to comply with any of the terms and conditions of the incidental take permit. First, section 10(a)(2)(C) of the ESA provides that the

Service "shall revoke" an incidental take permit if the Service "finds that the permittee is not complying with the terms and conditions of the permit." Moreover, §§ 17.22(b)(8) and 17.32(b)(8) of the regulations state that the revocation provisions in 50 CFR 13.28(a)(1)–(4) apply to incidental take permits. Under these regulations, if a permittee is not properly implementing the HCP (for example, if the permittee is not adhering to the agreed-upon adaptive management program and monitoring regime or is not funding the operating conservation program as agreed), then the Service can suspend the permit (50 CFR 13.27(a)). And if the permittee fails within 60 days to correct deficiencies that were the cause of a permit suspension, then the Service can revoke the permit under 50 CFR 13.28(a)(2).

Issue: A few commenters were concerned that the Service would be unable to take any action if a permittee is in compliance with the plan, but the plan is not working as expected (*i.e.*, a substantial and adverse change in the status of a covered species has occurred) and the permittee is unwilling to modify the plan (*i.e.*, make monitoring, management, or other changes to the operating conservation program).

Response: The No Surprises Rule places limits on the Service's ability to require additional measures to respond to changes in circumstances after an incidental take permit is issued. It does not, however, affect the Service's revocation authority under the ESA. So long as the permittee is complying with the terms and conditions of the plan, the No Surprises Rule allows the Service to require additional conservation and mitigation measures of the permittee to respond to unforeseen circumstances; however, such measures must be limited to modifications of the conservation plan's operating conservation program that do not involve the commitment of additional land, water, or financial compensation or restrictions on the use of land, water, or other natural resources otherwise available for development or use under the HCP. The No Surprises Rule thus provides latitude to make changes to the plan as long as no additional cost (*i.e.*, land, water, funding, or other resources) is required of the permittee. However, the Service's revocation authority under the ESA allows the Service to revoke an incidental take permit even if the permittee is in compliance with the terms and conditions of the permit, if the permitted activity would appreciably reduce the likelihood of the survival and recovery of the species in the wild. This permit revocation rule

does not create or change this authority, but describes the circumstances under which the Service would exercise it.

Issue: Some commenters did not see why the old provision in 50 CFR 13.28(a)(5) should be replaced with a standard they viewed as less protective. They viewed the proposed incidental take permit revocation standard and the general permitting standard at § 13.28(a)(5) as significantly different. Some of these commenters viewed the general permitting revocation standard that allows the Service to revoke an incidental take permit when 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," as the appropriate standard. A couple of these commenters thought the Service should be able to revoke incidental take permits if they are found to impair a species' long-term recovery, not just their short-term survival. A couple of commenters requested the word "shall" rather than "may" be used in the rule to indicate that revocation is not discretionary.

Response: We think that the standard for revocation of a permit should be the same as the standard for issuing the permit. In its comments, the National Marine Fisheries Service agreed that this standard for revocation was appropriate. When Congress amended the ESA in 1982 to create the HCP permit program, it clearly indicated that the relevant focus would be at the species level. Section 13.28(a)(5) predates the 1982 amendments and focuses only on the wildlife population in the permitted area. We therefore believe that it is appropriate to replace § 13.28(a)(5) with a provision that more accurately reflects the congressional intent behind the 1982 amendments. The timeframes "short-term" and "long-term" referred to by the commenter in reference to survival and recovery of species are not applicable here and are not a condition imposed on the Service for permit revocation. Under the new revocation provision, a permit may be revoked if effects to a population of a species affected by the permitted activity are determined to appreciably reduce the likelihood of survival and recovery of the species in the wild regardless of the time period over which this decline in the species' status is expected to take. In the unlikely event that an activity covered by a properly implemented incidental take permit is found likely to appreciably reduce the likelihood of the survival and recovery of any listed species in the wild and the problem cannot be corrected through

the unforeseen circumstances procedure of 50 CFR 17.22(b)(5)(iii) or 50 CFR 17.32(b)(5)(iii) or the additional actions provisions of 50 CFR 17.22(b)(6) or 50 CFR 17.32(b)(6), the Service will, as a matter of last resort, undertake the revocation procedures as described in 50 CFR 13.28(b) and 50 CFR 13.29.

The new revocation provision established in §§ 17.22(b)(8) and 17.32(b)(8) is written in a manner that indicates when revocation is not permissible instead of when it is. As a result, the suggestion that the word "may" be changed to "shall" is not practical. In addition, decisions involving permit revocation are fact-intensive and will require the exercise of discretion on the part of the agency. It is therefore questionable whether permit revocation standards can be described as being mandatory versus discretionary. We decline to substitute "shall" for "may" in the rule as the regulations are phrased to describe only those circumstances under which revocation is permissible within the agency's discretion.

Issue: Several commenters recommended that the word "jeopardy" be used instead of "appreciable reduction in the likelihood of survival and recovery" because the commenters viewed "jeopardy" to be a higher standard.

Response: The revocation standard in §§ 17.22(b)(8) and 17.32(b)(8) is effectively the same as the jeopardy standard. As stated in the background section of this publication, the criterion at section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that the taking will not "appreciably reduce the likelihood of the survival and recovery" of the species in the wild is substantially identical to the definition of "jeopardize the continued existence of" in the joint Department of the Interior/Department of Commerce regulations implementing section 7 of the ESA (50 CFR 402.02). The Service is required to avoid jeopardizing the continued existence of any listed species under section 7 of the ESA and would do so by revoking the incidental take permit if other actions to avoid the jeopardy are not available.

Issue: A couple of commenters suggested that the revocation provision should also contain a reference to adverse modification of critical habitat.

Response: We do not see the need to add a reference to adverse modification of critical habitat. The statutory issuance criterion embodied in the new revocation provision applies only to actions that are likely to appreciably reduce the likelihood of the survival and recovery of the species in the wild,

and makes no reference to critical habitat. We decline to expand the revocation provisions beyond the scope of the statutory issuance criterion.

Issue: Both States and several other commenters recommended that the phrase "in a timely fashion" be further defined or a timeframe be added to the rule that would establish when the Service would take revocation action.

Response: The phrase "in a timely fashion" was included in the proposed revocation provision to indicate that the Service would not move to revoke an incidental take permit the instant a concern about the effect of an activity on the species' likelihood of survival and recovery is identified, but only if subsequent efforts to remedy the situation were not successful. Because each HCP is case-specific, it is not possible to define what remedying in "a timely fashion" will mean in all instances. Whether a response can be deemed timely or not will depend on highly fact-specific issues, including the species involved and the source of the problem. However, like other such subjective terms that appear in laws and regulations, "in a timely fashion" is intended to be a reasonable period of time to allow for a good faith effort on the part of the Service and other interested parties to remedy the situation for the specific case at hand. In most cases we assume "in a timely fashion" would likely be a few days to a few months depending on the species involved and the source of the problem, but a shorter or longer period of time may be appropriate in some situations. Because we cannot define a more precise timeframe, we have decided to delete the phrase "in a timely fashion" from the final rule.

This change in the rule will have no effect on the actual period of time it would take the Service to remedy such a situation or to come to the conclusion that we cannot remedy the situation and need to revoke the permit. The timeframe needed to make this determination is a function of the No Surprises procedures to determine if unforeseen circumstances exist (*see* 50 CFR 17.22(b)(5)(iii) and 50 CFR 17.32(b)(5)(iii)). We review that process here to clarify this issue. The Service has 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 Service 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.

If unforeseen circumstances are found to exist, the Service 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. Any adjustments or modifications will not include requirements for 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 HCP, unless the permittee consents to such additional measures or such measures are provided by some other interested party. The Service 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. If the Service determines additional mitigation on behalf of the species is needed, the Service may request, but cannot require, the permittee to voluntarily undertake such measures. The Service has a wide array of authorities and resources that can be used to provide additional protection for the species. The Service will also work with other appropriate entities to find a remedy. However, if it is determined that the continuation of the permitted activity would appreciably reduce the likelihood of survival and recovery for one or more species in the wild and no remedy can be found and implemented, the Service will move to revoke the permit in accordance with the administrative procedures of 50 CFR 13.28(b) and 13.29.

Issue: One commenter stated the terms "remedied" and "inconsistency" in the proposed rule are ambiguous and should be clarified. More specifically, the commenter requested we explain the process associated with the "remedy" and the public's role when the Service is pursuing "remedies?"

Response: The term "remedied" is case specific. As described in the response to the previous issue, through

the process of determining if unforeseen circumstances exist, the Service will identify a remedy, if any exists, specific to the situation. The term "inconsistent" means "not in accordance with." As used in the regulations it means that continuation of activities covered by the HCP will appreciably reduce the likelihood of the survival and recovery for one or more species in the wild. Pursuit of a remedy is not a public process; however, the Service will work with any appropriate entities, including members of the public, to identify a remedy.

Issue: The commenting Tribe recommended amending the proposed regulations to include language conditioning permit revocation such that a permit issued to an "Indian Tribe," as defined in Secretarial Order No. 3206, cannot be revoked unless the Department first determines that such inconsistency cannot be remedied through (1) the reasonable regulation of non-Indian activities, (2) revocation is the least restrictive alternative available to remedy the inconsistency, (3) revocation of the permit does not discriminate against Indian activities, either as stated or applied; and (4) voluntary tribal measures are not adequate to remedy the inconsistency.

Response: In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); E.O. 13175; and the Department of the Interior's Manual at 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to-Government basis. However, the permit revocation regulations pertain to voluntary agreements, Habitat Conservation Plans, in which Tribes and individuals are not required to participate unless they volunteer to do so. Therefore, these regulations may have effects on Tribal resources and Native American Tribes, but solely at their discretion, should those Tribes or individuals choose to participate in the voluntary program. We view the permit revocation regulations, as proposed, along with the No Surprises Rule and our responsibilities under Secretarial Order 3206 and other policies, to provide adequate assurances to allow Tribes to enter into these voluntary agreements without including the suggested revisions.

Issue: Several commenters questioned why the Service should have to step in

at public expense to remedy jeopardy situations before a permit can be revoked. One commenter stated that the Service is "ill-equipped to take on the responsibility of implementing mitigation measures when unforeseen circumstances arise."

Response: In the February 23, 1998, "No Surprises" final rule, we provided the rationale for committing the agency to step in and attempt to remedy jeopardy situations in cases where the permittee is in full compliance with the permit and has a properly implemented conservation plan in place. In exchange for assurances, the HCP permittee has agreed to undertake extensive planning and to include contingencies and assurances for additional funding for such contingencies, to address changed circumstances. This requirement does not exist in other Federal permitting programs. We believe it is fair, therefore, to commit the agency to step in and address unforeseen circumstances. The Service believes that it will be rare for unforeseen circumstances to result in a violation of an incidental take permit's issuance criteria. However, in such cases, the Service will use all of our authorities, will work with other Federal agencies and other appropriate entities to rectify the situation, and work with the permittee to redirect conservation and mitigation measures to remedy the situation. The Service has a wide array of authorities and resources that can be used to provide additional protection for threatened or endangered species covered by an HCP. Among those authorities and resources are a variety of grants administered by the Service, cooperative agreements with States, section 5 land acquisition authority, section 7(a)(1) interagency cooperation, recovery implementation, and other programs. Nevertheless, the new permit revocation rule recognizes that, if these efforts fail and jeopardy to a listed species persists, then the Service, pursuant to the ESA, may revoke the permit even if the permittee is fully complying with the terms and conditions of the permit.

Issue: One State commenter recommended close coordination with State fish and wildlife agencies during the mediation process to help in the determination of jeopardy for the species, and during the identification of potential alternatives to permit revocation.

Response: Under the Service's interagency cooperative policy regarding the role of State agencies in Endangered Species Act activities (59 FR 34275), it is the policy of the Service to utilize the expertise and solicit information and participation of State

agencies in all aspects of the Habitat Conservation Planning process. In the event of unforeseen circumstances, the Service will work with the permittee, the State, and any other appropriate entities to increase the effectiveness of the HCP's operating conservation program to address unforeseen circumstances without requiring the permittee to produce an additional commitment of resources as stated above and to identify alternatives to permit revocation. Under 50 CFR 17.22(b)(6) and 17.32(b)(6), the Service is not limited or constrained—nor is any other Federal, State, local, or tribal government agency, or a private entity constrained—from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Issue: A few commenters stated that the permit revocation regulations undermine the No Surprises Rule. A couple of these commenters thought the Service should limit permit revocation to instances where the permittee is not in compliance with the permit. One commenter questioned the Service's authority to revoke a permit, citing section 10(a)(2)(C) of the ESA, which states, "the Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit." This commenter viewed this revocation standard as negating the existence of any general authority to revoke incidental take permits on other conditions (*i.e.*, 50 CFR 13.28(a)(1) through (4)). Furthermore, this commenter did not think the Service could revoke a permit under the authority of section 7 of the ESA (16 U.S.C. section 1536(7)(a)(2)) to avoid jeopardy once an incidental take permit had been issued.

Response: Because this permit revocation rule codifies and clarifies the statutory permit revocation standard, it does not affect the No Surprises Rule. The Service's general permitting regulations in 50 CFR part 13 predate the 1982 amendments to the ESA that added the incidental take permit provisions to the ESA. By their terms, these regulations apply to all ESA permits, including incidental take permits (*see* 50 CFR 13.3). The Service has always considered incidental take permits to be subject to the general 50 CFR part 13 regulations and includes as a standard condition in all incidental take permits that they are subject to 50 CFR part 13. Nothing in section 10(a)(2)(C) indicates otherwise. It states that the Service shall revoke a permit if the permittee fails to comply with the

terms and conditions of the permit, but it does not indicate that this is the sole permissible basis for revocation. Moreover, the legislative history of the 1982 ESA amendments shows that the language was included simply to emphasize that an incidental take permit, like any other section 10 permit, should be revoked if the permittee fails to comply with its terms and conditions.

Furthermore, the Service's act of issuing an incidental take permit under section 10(a)(1)(B) is a Federal action, subject to the section 7(a)(2) duty to insure that the action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. Congress emphasized the importance of this duty in the incidental take permit context by expressly including an issuance criterion that mirrors the regulatory definition established for jeopardizing the continued existence of a listed species in the wild. If, at any time, carrying out such an action (*i.e.*, implementing an HCP) is found likely to appreciably reduce the likelihood of the survival and recovery for one or more species in the wild, the Service can no longer authorize such action and must amend or revoke the permit. Under the No Surprises Rule, if the Service finds that unforeseen circumstances exist and additional conservation measures are needed to avoid appreciably reducing the likelihood of survival and recovery of a listed species in the wild, the Service must remedy the situation at its own expense or in cooperation with the permittee or other appropriate entities. If no remedy can be found or implemented, the Service, as a last resort, will revoke the permit.

Issue: Many commenters requested the Service reaffirm that permit revocation should be "an action of last resort."

Response: As we stated in our notice of February 11, 2000 (65 FR 6916), and in our final rule of January 22, 2001 (66 FR 6483), "the Service is firmly committed, as required by the "No Surprises" final rule, to utilizing its resources to address any such unforeseen circumstances," and we view the revocation provision "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." We continue to adhere to this position and view permit revocation under the terms of this rule as an unlikely action of last resort.

Revisions to the Proposed Rule

In §§ 17.22(b)(8) and 17.32(b)(8) we deleted the phrase "in a timely fashion" from the regulations. Because each HCP is unique, the situation associated with a finding of unforeseen circumstances and a determination that continued activity under the permit would appreciably reduce the likelihood of survival and recovery of a species covered by the permit is case-specific; therefore, it is not possible to define what remedying a situation in "a timely fashion" will mean in all instances. Because we cannot define a precise timeframe in which we would remedy such a situation or revoke an incidental take permit, we have deleted this phrase from the final rule. However, the procedures in §§ 17.22(b)(5)(iii) and 17.32(b)(5)(iii) for determining if unforeseen circumstances exist describe the administrative steps that must be followed.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal or policy issues, and was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below.

(a) This rule will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) This rule is not expected to create inconsistencies with other agencies' actions. These regulations would amend potentially conflicting permitting regulations established for a voluntary program, Habitat Conservation Planning, for non-Federal property owners and would not create inconsistencies with the actions of non-Federal agencies.

(c) This regulation is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review. This rule is a direct response to a previous legal challenge.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment

a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, we certified to the Small Business Administration that these regulations would not have a significant economic impact on a substantial number of small entities. The proposed changes clarify the circumstances under which an incidental take permit issued under the authority of section 10(a)(1)(B) of the Endangered Species Act might be subject to revocation. As of September 27, 2004, the Service has approved 470 Habitat Conservation Plans (HCPs) and issued 737 incidental take permits associated with these HCPs, and none have required revocation. As identified in the preamble and the response to comments, the specific circumstances under which the proposed regulations would provide for revocation are expected to be extraordinarily rare.

Small Business Regulatory Enforcement Fairness Act

This regulation will not be a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

(a) This regulation would not produce an annual economic effect of \$100 million.

(b) This regulation would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) This regulation would 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.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore,

this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act

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

(a) The Service has determined and certifies pursuant to the Unfunded Mandates Reform 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 this rule. These regulations implement a voluntary program; no incremental costs are being imposed on non-Federal landowners.

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

Takings

In accordance with Executive Order 12630, these regulations do not have significant takings implications concerning taking of private property by the Federal Government. These regulations pertain to a voluntary program that does not require individuals to participate unless they volunteer to do so. Therefore, these regulations have no impact on personal property rights.

Federalism

These regulations will not have substantial direct effects on the States, in the 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 13132, the Service has determined that this rule does not have sufficient federalism implications to warrant a Federalism Assessment.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule would not impose any new requirements for collection of information associated with incidental take permits other than those already approved for incidental take permits under the Paperwork Reduction Act (44

U.S.C. 3501 *et seq.*). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

National Environmental Policy Act

The Department of the Interior has determined that the issuance of this rule is categorically excluded under the Department's NEPA procedures in 516 DM 2, Appendix 1.10.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); E.O. 13175; and the Department of the Interior's Manual at 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to-Government basis. However, these regulations pertain to voluntary agreements, Habitat Conservation Plans, in which Tribes and individuals are not required to participate unless they volunteer to do so. Therefore, these regulations may have effects on Tribal resources and Native American Tribes, but solely at their discretion, should those Tribes or individuals choose to participate in the voluntary program.

List of Subjects in 50 CFR Part 17

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

Final Regulation Promulgation

■ For the reasons set out in the preamble, the Service amends Title 50, Chapter I, subchapter B of the Code of Federal Regulations, as set forth below.

PART 17—[AMENDED]

■ 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. Amend § 17.22 by adding a new paragraph (b)(8) to read as follows:

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

* * * * *

(b) * * *

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section 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.

* * * * *

■ 3. Amend § 17.32 by adding a new paragraph (b)(8) to read as follows:

§ 17.32 Permits—general.

* * * * *

(b) * * *

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section 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.

* * * * *

Dated: November 23, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–27202 Filed 12–9–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 040617186–4302; I.D. 120704A]

International Fisheries; Pacific Tuna Fisheries; Restrictions for 2004 Purse Seine and Longline Fisheries in the Eastern Tropical Pacific Ocean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Fishing closure, restrictions.

SUMMARY: NMFS publishes this document to prevent overfishing of bigeye tuna in the eastern tropical Pacific Ocean (ETP), consistent with recommendations by the Inter-American Tropical Tuna Commission (IATTC) that have been approved by the Department of State (DOS) under the Tuna