

HABITAT CONSERVATION PLANNING
AND
INCIDENTAL TAKE PERMIT PROCESSING
HANDBOOK

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U.S. Department of the Interior
Fish and Wildlife Service

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National Oceanic and Atmospheric Administration
National Marine Fisheries Service

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PREFACE

The habitat conservation planning (HCP) program under section 10(a)(1)(B) of the Endangered Species Act (ESA) has grown rapidly in recent years. In the first 10 years of the program (1983-1992), 14 incidental take permits were issued. As of the end of August, 1996, 179 incidental take permits had been issued and approximately 200 HCPs were being developed. In just a few years the HCP process has been transformed from a relatively little used option under the ESA to one of its most important and innovative conservation programs.

Another pattern has begun to emerge, as evidenced by the growing number of HCPs being developed and by the size of the conservation planning areas involved. As of late 1995, most HCPs approved were for planning areas less than 1,000 acres in size. However, of the HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres in size, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process adopted primarily to address single developments to a broad-based, landscape level planning tool utilized to achieve long-term biological and regulatory goals. It also suggests that the underlying spirit of the HCP process has begun to take hold.

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 logistic impacts of endangered species conservation among the community, and bringing a broad range of landowner activities under the HCPs' legal protection. In addition, the Services have helped reduce the burden on small landowners and have made it easier for them to be involved in the HCP process through streamlining measures in the HCP process.

The HCP process was patterned after the San Bruno Mountain HCP--an innovative land-use planning effort in California's San Francisco Bay area that began in the mid-1970s with a classic conflict between development activities and endangered species protection and culminated in the issuance of the first incidental take permit in 1983. What made the San Bruno Mountain case unusual was that it attempted to resolve these conflicts through negotiation and compromise rather than continued litigation. This fundamental approach was endorsed and codified by Congress when it incorporated the HCP process into the ESA in 1982.

One of the great strengths of the HCP process is its flexibility. Conservation plans vary enormously in size and scope and in the activities they address--from half-acre lots to millions of acres, from forestry and agricultural activities to beach development, and from a single species to dozens of species. Another key is creativity. The ESA and its implementing regulations establish basic biological standards for HCPs but otherwise allow the creative potential of HCP participants to flourish. As a result, the HCP program has begun to produce some remarkably innovative natural resource use and conservation programs.

The challenge of balancing biology with economics is a complex one, but is fundamental to the HCP process. Policy and procedure have at times frustrated HCP users and hampered the program's ability to meet its full potential. The HCP process was historically viewed as procedurally difficult; permit approvals took too long in some cases and long-term regulatory certainty under HCPs was widely desired by applicants but rarely available.

However, the U.S. Fish and Wildlife Service and National Marine Fisheries Service have made significant improvements in the HCP program in recent years. We have increased section 10 staff and improved guidance about section 10 objectives and standards, clarified and streamlined permit processing requirements, and substantially raised the certainty provided to HCP permittees. This handbook incorporates all these improvements and reflects updated policies and procedures in the HCP program.

The handbook is organized as follows. Chapter 1 provides a summary and overview of the HCP process. Chapter 2 summarizes the roles of the applicant and the Fish and Wildlife Service and National Marine Fisheries Services' Field, Regional, and Washington Offices. Chapter 3 explains the process of developing an HCP. Chapter 4 explains how unlisted species may be addressed in an HCP. Chapter 5 deals with section 10 NEPA requirements. Chapter 6 explains how to process and review an incidental take permit application. Chapter 7 explains the section 10 permit issuance criteria. Finally, Chapter 8 contains a glossary of important terms used throughout the handbook.

The handbook also contains numerous appendices, which include pertinent Federal regulations and policies; a reference list of publications about HCPs; "template" HCP documents that can be used as guides; and examples of HCP documents such as a permit application form and Federal Register notices. The handbook is organized to make information readily available. All important issues have labeled sections or subsections. The reader can find specific subjects of interest by scanning the Table of Contents and turning to the appropriate page.

Acting Director
U.S. Fish and Wildlife Service

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National Marine Fisheries Service

CHAPTER 1

THE ENDANGERED SPECIES ACT AND INCIDENTAL TAKE PERMITS

A. Purpose of the Habitat Conservation Planning Process

The purpose of the habitat conservation planning process and subsequent issuance of incidental take permits is to authorize the incidental take of threatened or endangered species, not to authorize the underlying activities that result in take. This process ensures that the effects of the authorized incidental take will be adequately minimized and mitigated to the maximum extent practicable.

B. Purpose of the Handbook

The purpose of this handbook is to guide the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) in processing incidental take permit applications and participating in associated habitat conservation planning efforts. The goals of the handbook are threefold: (1) to ensure that the goals and intent of the conservation planning process under the Endangered Species Act are realized; (2) to establish clear standards that ensure consistent implementation of the section 10 program nationwide; and (3) to ensure that FWS and NMFS offices retain the flexibility needed to respond to specific local and regional conditions and a wide array of circumstances. Although intended primarily as internal agency guidance, this handbook is fully available for public evaluation and use, as appropriate.

C. Background and Legal Authority

Section 9 of the Endangered Species Act of 1973, as amended (ESA), prohibits the "take" of any fish or wildlife species listed under the ESA as endangered; under Federal regulation, take of fish or wildlife species listed as threatened is also prohibited unless otherwise specifically authorized by regulation. Take, as defined by the ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

In the 1982 amendments to the ESA, Congress established a provision in section 10 that allows for the "incidental take" of endangered and threatened species of wildlife by non-Federal entities. Incidental take is defined by the ESA as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Prior to 1982, non-Federal parties undertaking otherwise lawful activities that were likely to result in take of listed species risked violating the section 9 prohibition but had no recourse under the law for exemption. Up to that time, only take occurring during scientific research and other conservation actions could be authorized under the ESA.

The "incidental take permit" process was established under section 10(a)(1)(B) of the ESA precisely to resolve this difficulty. Under this provision the Secretary of the Interior and Secretary of Commerce may, where appropriate, authorize the taking of federally listed wildlife or fish if such taking occurs incidentally during otherwise legal activities. The Secretaries of Interior and Commerce subsequently charged the Directors of the FWS and NMFS, respectively, with regulating the incidental taking of listed species under their jurisdiction.

Section 10(a)(2)(A) of the ESA requires an applicant for an incidental take permit to submit a "conservation plan" that specifies, among other things, the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts. Conservation plans under the ESA have come to be known as "habitat conservation plans" or "HCPs" for short. These terms are used interchangeably throughout this handbook. The terms incidental take permit, section 10 permit, and section 10(a)(1)(B) permit are also used interchangeably in the handbook. Section 10(a)(2)(B) of the ESA provides statutory criteria that must be satisfied before an incidental take permit can be issued.

Thus, section 10, as revised, provides a clear regulatory mechanism to permit the incidental take of federally listed fish and wildlife species by private interests and non-Federal government agencies during lawful land, water, and ocean use activities. However, Congress also intended this process to reduce conflicts between listed species and economic development activities, and to provide a framework that would encourage "creative partnerships" between the public and private sectors and state, municipal, and Federal agencies in the interests of endangered and threatened species and habitat conservation (H.R. Rep. No. 97-835, 97th Congress, Second Session).

This is critically important, for Congress was not instituting merely a permit procedure but a process that, at its best, would integrate non-Federal development and land use activities with conservation goals, resolve conflicts between endangered species protection and economic activities on non-Federal lands, and create a climate of partnership and cooperation.

Congress also intended that HCPs could include conservation measures for candidate species, proposed species, and other species not listed under the ESA at the time an HCP is developed or a permit application is submitted. This can benefit the permittee by ensuring that the terms of an HCP will not change over time with subsequent species listings. It can also provide early protection for many species and, ideally, prevent subsequent declines and in some cases the need to list such species.

Congress modeled the 1982 section 10(a) amendments after the conservation plan developed by private landowners and local governments to protect the habitat of two federally listed butterfly species on San Bruno Mountain in San Mateo County, California. Congress also

recognized that the circumstances surrounding the San Bruno Mountain HCP would not be universally applicable and that each HCP would be unique to its own factual setting.

The FWS published its final regulations for implementing the section 10 permit program in the Federal Register on September 30, 1985 (50 FR 39681-39691); NMFS published final regulations for the program on May 18, 1990 (55 FR 20603; see Appendix 1 for both regulations). However, because the process applies to a wide variety of projects and activities, the Services declined to promulgate "exhaustive, 'cookbook' regulations . . . detailing every possible element that could be required in conservation plans." Rather, the section 10 permit regulations reiterate ESA requirements and provide a framework for issuance and management of permits. Beyond that it is Service policy to promote "flexibility and ingenuity" in working with permit applicants and developing HCPs under the section 10 process.

In keeping with this policy, this handbook establishes detailed but flexible guidelines to be used in developing HCPs, processing section 10(a)(1)(B) permit applications, and managing ongoing HCP programs. It also attempts to correct the inevitable difficulties identified during the first 10 years of the section 10 program and to make it more efficient in the future. However, nothing in this handbook is intended to supersede or alter any aspect of Federal law or regulation pertaining to the conservation of endangered species.

D. Coordination Between FWS and NMFS

FWS and NMFS share joint authorities under the ESA for administering the incidental take permit program. Generally, the FWS is responsible for terrestrial and freshwater aquatic species while NMFS is responsible for listed marine mammals, anadromous fish, and other living marine resources. Thus, HCP efforts in which FWS is involved tend to be land-based, while HCPs in which NMFS is involved are generally aquatic, addressing either marine or anadromous species. NMFS also issues permits for incidental taking of listed fish species during other activities such as state-run hatchery operations and commercial or recreational fisheries. In some cases these responsibilities overlap and the agencies work closely together--for example, in the Pacific Northwest many HCPs are being developed which address terrestrial species and anadromous fish in the same planning effort.

This handbook is intended to serve the needs of each agency's incidental take permit program. Although to date the FWS has had a more active program, and some sections consequently are written more from the FWS's land-based perspective, it has been and is the intention of both agencies to develop and use the handbook jointly. It is also their intention to cooperate fully in joint administration of the section 10 program. However, there are procedural differences between the two agencies. Chapters 2 and 6 describe certain differences between FWS and NMFS with respect to organizational structure, permit delegation authority, and applicable Federal regulations, and Chapters 3 and 4 contain some information applicable to FWS only. All such differences are clearly indicated and unless

otherwise noted the policies and procedures described in the handbook apply jointly to FWS and NMFS.

E. Overview of the Incidental Take Permit Process

1. When is a Permit Needed?

The starting point for the section 10(a)(1)(B) permit process is a determination that "take" is likely to occur during a proposed non-Federal activity and a decision by the landowner or project proponent to apply for an incidental take permit. Federal activities and non-Federal activities that receive Federal funding or require a Federal permit (other than a section 10 permit) typically obtain incidental take authority through the consultation process under section 7 of the ESA. Thus, the HCP process is designed to address non-Federal land or water use or development activities that do not involve a Federal action that is subject to section 7 consultation.

In some cases, however, Federal agencies besides FWS or NMFS may be integrally involved in HCP efforts. In these cases, the action to be conducted by the Federal agency during the implementation of the HCP should be included as an additional element to be consulted on through the section 7 consultation conducted for the HCP. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any related and supportive Federal actions into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee. See Chapter 3, Section A.1 and A.6 for more information.

Before determining whether a section 10 permit is needed, the applicant, with Service technical assistance, should consider whether take during proposed project activities can be avoided. This is sometimes possible through relocation of project facilities, timing restrictions, or similar measures, depending on the nature and extent of the proposed activity and the biology of the species involved. If take cannot be avoided, the Services will recommend that an incidental take permit be obtained. The decision to obtain a permit lies with the prospective permit applicant. However, should the applicant ultimately elect not to obtain a permit, and an unauthorized take attributable to project activities occurs, the responsible individuals or entity would be liable under the enforcement provisions of the ESA.

2. What Kinds of Activities Can be Authorized?

A section 10(a)(1)(B) permit only authorizes take that is incidental to otherwise lawful activities. In this context, "otherwise lawful activities" means economic development or land or water use activities that, while they may result in take of federally listed species, are consistent with other Federal, state, and local laws. Take that occurs during other types of activities--i.e., take for scientific purposes, to enhance the propagation or survival of a listed species, or for purposes of establishment and maintenance of experimental populations--must be authorized by a permit under section 10(a)(1)(A) of the ESA (e.g., "Safe Harbor" or "recovery" permits). In some cases, however, take in the form of capture or harassment can be authorized under an incidental take permit, if the purpose of such actions is to minimize more serious forms of take (e.g., death or injury) or to conduct monitoring programs during activities authorized by the permit (see Chapter 7, Section B.1)

3. Phases of the Process.

Once the decision to obtain a permit has been made, the section 10 process consists of three phases: (1) the HCP development phase; (2) the formal permit processing phase; and (3) the post-issuance phase. The HCP development phase is the period during which the applicant's project or activity is integrated with species protection needs through development of the HCP. This phase is typically conducted by the applicant with technical assistance from FWS or NMFS Field Office and ends when a "complete application package" is forwarded to the appropriate permit issuing office. A complete application package consists of a permit application form, fee (if required), a completed HCP, a draft National Environmental Policy Act (NEPA) document (if required), and in some cases an Implementing Agreement (see Chapter 6, Section B.2).

The permit application processing phase involves review of the application package by the appropriate Regional Office or, in some cases, the NMFS Washington, D.C., office; announcement in the Federal Register of the receipt of the permit application and availability of the NEPA analysis for public review and comment; intra-Service consultation under section 7 of the ESA; and determination whether the HCP meets ESA statutory issuance criteria. If FWS or NMFS determines, after considering public comment, that the HCP is statutorily complete and that permit issuance criteria have been satisfied, it must issue the permit. The Field Office and Regional Office should coordinate regularly throughout these first two phases of the HCP process to avoid any renegotiation of the terms of the HCP by the Regional Office (see Chapter 6, Section C.1).

The post-issuance phase is the period during which the permittee and other responsible entities implement the HCP and its monitoring and funding programs. Service responsibilities, in addition to any identified in the HCP, are to monitor the permittee's compliance with the conservation program and other terms and conditions of the permit, and the HCP's long-term progress and success. When a permit is issued, it is also Service policy to notify the public of the outcome of the permit application through a Federal Register notice. An individual notice may be published for each permit decision, or a quarterly or

biannual list of permit decisions for that period may be published. There are also specific notification requirements under NEPA.

4. Compliance With NEPA and Section 7 of the ESA.

Issuance of an incidental take permit is a Federal action subject to National Environmental Policy Act compliance. The purpose of NEPA is to promote analysis and disclosure of the environmental issues surrounding a proposed Federal action in order to reach a decision that reflects NEPA's mandate to strive for harmony between human activity and the natural world. Although section 10 and NEPA requirements overlap considerably, the scope of NEPA goes beyond that of the ESA by considering the impacts of a Federal action on non-wildlife resources such as water quality, air quality, and cultural resources. Depending on the scope and impact of the HCP, NEPA requirements can be satisfied by one of the three following documents or actions: (1) a categorical exclusion; (2) an Environmental Assessment (EA); or (3) an Environmental Impact Statement (EIS).

An EIS is required when the project or activity that would occur under the HCP is a major Federal action significantly affecting the quality of the human environment. An EA is prepared when it is unclear whether an EIS is needed or when the project does not require an EIS but is not eligible for a categorical exclusion. An EA culminates in either a decision to prepare an EIS or a Finding of No Significant Impact (FONSI). Activities which do not individually or cumulatively have a significant effect on the environment can be categorically excluded from NEPA. Chapter 5 of the handbook discusses NEPA requirements.

Issuance of an incidental take permit is also a Federal action subject to section 7 of the ESA. Section 7(a)(2) requires all Federal agencies, in consultation with the Services, to ensure that any action "authorized, funded, or carried out" by any such agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. Because issuance of a section 10 permit involves an authorization, it is subject to this provision. Although the provisions of section 7 and section 10 are similar, section 7 and its regulations introduce several considerations into the HCP process that are not explicitly required by section 10-- specifically, indirect effects, effects on federally listed plants, and effects on critical habitat. Chapter 3, Sections B.2(e)-(h) discuss these issues in detail. Chapter 6, Section C.3 explains how section 7 consultation for issuance of section 10(a)(1)(B) permits is conducted.

5. Guiding Principles.

The section 10 process is an opportunity to provide species protection and habitat conservation within the context of non-Federal development and land and water use activities. Ideally, it may also allow for the conservation and recovery of federally listed, proposed, and candidate species as well as overall biological diversity. It thus provides a

mechanism for allowing economic development that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."

While species conservation is of course paramount, the section 10 process recognizes the importance of both biological and economic factors. Biologically, it provides FWS and NMFS with a tool to minimize and mitigate the incidental take of listed, proposed, and candidate species at the local, rangewide, or ecosystem level. For landowners and local governments, it provides long-term assurances that their activities will be in compliance with the requirements of the ESA. For both sides, the HCP process promotes negotiation and compromise and provides an alternative to conflict and litigation.

The Services recognize the importance of working in partnership with non-Federal interests under section 10 of the ESA. The Services are committed to facilitating such partnerships by participating in all phases of the HCP process, providing timely assistance to permit applicants, expeditiously processing permit applications, and generally undertaking all measures necessary to ensure that the section 10 program is able to meet the growing challenges and opportunities of integrating endangered species protection with economic activities and needs. These principles are discussed further throughout this chapter and the entire handbook.

F. Overview of Permit Processing Requirements

Processing an incidental take permit application consists of announcing the HCP and NEPA analysis in the Federal Register and making them available for public review and comment; evaluating comments received, if any; conducting a consultation under section 7 of the ESA; and determining whether the HCP meets statutory issuance criteria under section 10(a)(2)(B) of the ESA. These basic steps are required for all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved (see sections F.2-F.5 below). Other documents or actions that may be needed depending on the HCP include the Implementing Agreement (Chapter 3, Section B.8), Environmental Action Memorandum, a brief document that provides the Service's record of NEPA compliance for categorically excluded actions (Chapter 6, Section B.2), and legal review of the application package (Chapter 6, Section C.4).

1. Expeditious Processing of Permit Applications.

In the first ten years of the section 10 HCP program (1983-1992), 14 incidental take permits were issued. As of August, 1996, 179 incidental take permits have been issued, and approximately 200 are in development. To cope with this growing section 10 workload and anticipated continued increases in the program, the Services intend to streamline the HCP process to the maximum extent practicable and allowable by law.

To accomplish this, the handbook introduces numerous improvements to the section 10 program developed by the Services and the Departments of Interior and Commerce. First, the handbook establishes a category of HCPs called "low-effect HCPs" which will apply to activities that are minor in scope and impact; these HCPs will receive expedited handling during the permit application processing phase. Second, the handbook improves guidance to Service personnel about section 10 program standards and procedures. Third, the handbook institutes numerous mechanisms to expedite the permit processing phase for all HCPs. Fourth, the handbook establishes specific time periods for processing incidental take permit applications once an HCP is submitted to the FWS or NMFS for approval.

2. The Low-effect HCP Category.

For purposes of the section 10 program, the Services establish a special category for HCPs with relatively minor or negligible impacts. This "low-effect HCP" category is defined as follows:

Low-Effect HCPs -- Those involving: (1) minor or negligible effects on federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP. Factors relevant to the determination that an activity is a low-effect activity include, but are not limited to, the effect of the activity on the distribution or the numbers of the species.

The relationship between the geographic size of a project and the scope or severity of its impacts will not always be clear-cut. Projects that are large or small in size often will have commensurately high or low effects. However, a project may be large in size, but still be categorized as low-effect if it is expected to result in minor or negligible impacts. Similarly, a project could be small in size but capable of generating very significant impacts (e.g., if it affects a species with a highly-restricted range).

The Services must consider each HCP on a case-by-case basis in determining whether it belongs in the low-effect category, taking into account all relevant factors including biological factors. The determination of whether an HCP qualifies for the low-effect category must be based on its anticipated impacts prior to implementation of the mitigation plan. The purpose of this category is to expedite handling of HCPs for activities with inherently low impacts, not for projects with significant potential impacts that are subsequently reduced through mitigation programs. However, this determination should factor in actions taken by the applicant to avoid take, such as conducting activities during specific times to avoid the nesting season or by relocating project locations.

3. Processing Low-Effect Permit Applications.

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

This will be accomplished by: (1) establishing clear processing standards for all HCP permit applications; (2) eliminating or standardizing section 10 documents for low-effect projects, wherever possible; (3) eliminating unnecessary review procedures; (4) categorically excluding low-effect HCPs from NEPA requirements; and (5) utilizing other techniques described throughout the handbook.

4. Summary of Permit Processing Requirements.

The primary documentation and processing requirements for HCPs by category are as follows. Both categories also require the permit document with applicable terms and conditions.

Low-effect HCPs require: (1) an HCP; (2) an application form and fee (\$25); (3) publication in the Federal Register of a Notice of Receipt of a Permit Application; (4) formal section 7 consultation; (5) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA; and (6) an Environmental Action Memorandum, a brief document that serves as the Service's record of NEPA compliance for categorically excluded actions by explaining the reasons the Services concluded that there will be no individual or cumulative significant effects on the environment. Implementing Agreements will not be prepared for a low-effect HCP, unless requested by the permit applicant. In such cases, acceptance of the legal terms and conditions of the permit by the applicant will provide the necessary assurance that the plan will be implemented. Low-effect projects are categorically excluded from NEPA (see Chapter 5, Section A.2).

All other HCPs require: (1) an HCP; (2) an application form and fee (\$25); (3) an Implementing Agreement (optional, depending on Regional Director discretion); (4) the NEPA analysis, either an EA or EIS; (5) publication in the Federal Register of a Notice of Receipt of a Permit Application and Notice(s) of Availability of the NEPA analysis; (6) Solicitor's Office review of the application package; (7) formal section 7 consultation; and (8) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context

of permit issuance criteria found at section 10(a)(2)(B) of the ESA and 50 CFR Part 17. Note: For NMFS, the NOAA General Counsel's Office (either in the Region or Headquarters) reviews all documents relating to all HCPs.

An EA will satisfy NEPA requirements for a section 10 permit application and will conclude with a Finding of No Significant Impact (FONSI), unless it is determined during preparation of the EA that approval of the project is a major Federal action significantly affecting the quality of the human environment. It is not necessary to prepare an EA first, if it is determined from the start that an EIS is necessary, although an HCP that requires an EIS should be uncommon. In the latter case, an EIS and Record of Decision (ROD) is required. For some HCPs, it may be possible to prepare the EA in accordance with 40 CFR 1501.4(e)(2), which requires that any Finding of No Significant Impact (FONSI) in an EA be made available for public review for 30 days before an agency makes its final decision and can eliminate the need for an EIS [see Chapter 5, Section A.3].

Figure 1 shows a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for a low-effect HCP that is categorically excluded from NEPA. Figures 2 and 3 show a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for an HCP that requires an EA and an EIS, respectively.

5. Target Permit Processing Times.

The time required to process an incidental take permit application will vary depending on the size, complexity, and impacts of the HCP involved. The Services will work to complete all steps as expeditiously as possible. Procedurally, the most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under NEPA--whether an EIS, EA, or a categorical exclusion--although other factors such as public controversy can also affect permit processing times.

Figure 1: Typical Processing Steps for a Low-Effect Section 10(a)(1)(B)
Incidental Take Permit Application

Figure 2: Typical Processing Steps for a Section 10(a)(1)(B)
Incidental Take Permit Application Requiring an EA

Figure 3: Typical Processing Steps for a Section 10(a)(1)(B)
Incidental Take Permit Application Requiring an EIS

The handbook establishes the following target permit processing requirements for HCPs based on the NEPA action. Although not mandated by law or regulation, these targets are adopted as FWS and NMFS policy and all Service offices are expected to streamline their incidental take permit programs and to meet these targets to the maximum extent practicable.

Permit processing times are defined as the period between receipt of a complete application package, as defined in Chapter 6, Section B.2(b), to the issuance of the incidental take permit, including Federal Register notifications and public comment. The targets do not include any portion of the HCP development phase.

Section 10(a)(1)(B) Permit Application Processing Times:

HCP With EIS	less than 10 months
HCP With EA	3 - 5 months
Low-effect HCP (Categorically Excluded)	less than 3 months

These targets will apply as maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. However, in many cases it is expected actual processing times will be less than these targets and all FWS and NMFS offices are encouraged to improve on the targets whenever possible.

6. Benefits of Regional or Multi-species Conservation Planning.

Some HCP applicants may be tempted to segment (or "piecemeal") a project into parts to take advantage of reduced processing requirements for low-effect HCPs as compared to larger ones. The Services do not endorse such segmentation and will not allow use of the low-effect HCP category to avoid processing requirements without commensurate reductions in project impacts. In addition, a low-effect HCP may not be available for a segmented project or one component of a regional HCP because in determining whether an action is categorically excluded from NEPA the Services must consider cumulative effects. The Services must also consider the interrelated, interdependent, and cumulative effects analyzed through the section 7 analysis.

Potential HCP applicants considering regional or multi-species HCPs may initially conclude that such efforts are undesirable in light of more streamlined processing requirements for low-effect projects. However, regional or multi-species HCPs have many benefits. They can, for example: (1) maximize flexibility and available options in developing mitigation programs; (2) reduce the economic and logistic burden of these programs on individual landowners by distributing their impacts; (3) reduce uncoordinated decision making, which can result in incremental habitat loss and inefficient project review; (4) provide the permittee with long-term planning assurances and increase the number of species for which such assurances can be given; (5) bring a broad range of activities under the permit's legal

protection; and (6) reduce the regulatory burden of ESA compliance for all affected participants.

The cumulative total of HCP processing requirements is far greater when regional or area-wide activities are permitted individually than when addressed comprehensively under a regional HCP.

Consequently, a second guiding principle of this handbook is that FWS and NMFS will continue to encourage state and local governments and private landowners to undertake regional and multi-species HCP efforts as appropriate and will assist such efforts to the maximum extent practicable.

G. Helpful Hints

A successful HCP often requires consensus building and integration of numerous interests, especially for large-scale, regional planning efforts. Also, biological issues are not always clear-cut and sometimes are subject to interpretation. Service biologists must combine flexibility, creativity, good science, and good judgement in providing technical assistance to HCP applicants and making the section 10 program successful. The following "rules of thumb" should be helpful in meeting these challenges.

- o Review recovery plans for affected species and assess the extent to which HCP mitigation programs are consistent with them. Although FWS or NMFS cannot mandate that HCPs contribute to recovery, applicants should be encouraged to develop HCPs that produce a net positive effect on a species (see Chapter 3, Section B.3). Recovery plans should be used to help identify strategies to minimize and mitigate the effects of the HCP. When recovery plans are not available, contact recovery teams or other species experts to obtain information pertinent to HCP development. When appropriate, the development of the HCP could involve more active participation by recovery team members and species experts by providing technical assistance to the applicant.
- o Keep up-to-date on applicable statutes and policies, including the ESA, its implementing regulations, this handbook, and court decisions. Understand the authorities and limitations of the ESA and NEPA. Be up-to-date on new biological developments and state-of-the-art techniques such as population viability analysis. Keep reference materials on hand concerning legal and biological issues applicable to the section 10 program (Appendix 2 contains a list of reference materials).
- o The HCP is initiated by the applicant and is the applicant's document, not FWS's or NMFS's. The Services should assist the applicant and help guide the process by providing sufficient staff and technical advice. However, if the applicant insists on measures that would not allow the HCP to meet the section 10 issuance criteria, the

Service will inform the applicant of the deficiencies in writing and offer assistance in developing a solution. If deficiencies are not corrected, the FWS or NMFS may ultimately have to deny the permit (see Chapter 6, Section F.1). Providing technical assistance early and continuously through the HCP development process will hopefully prevent such situations from occurring.

- o Help the applicant determine early in the process what species are to be addressed in the HCP. This will depend on what species occur in the project area, whether they are likely to be affected by project activities, their listing status (listed, proposed, or candidate), the applicant's objectives, and other factors (see Chapter 3, Section A.5). The Service will encourage permit applicants to address any species in the plan area likely to be listed within the life of the permit. This can benefit the permittee in two ways: (1) the "No Surprises" policy applies to unlisted species that are adequately addressed in an HCP (see Chapter 3, Section B.5(a)); and (2) it prevents the need to revise an approved HCP should an unlisted species that occurs within the plan area but was not addressed in the HCP subsequently be listed (see Chapter 4). The Services should advise the applicant on this issue, but ultimately the decision about what species to include in the HCP is always the applicant's.
- o Work with the applicant to get important issues on the table as early as possible in the HCP development stage. Make sure the applicant understands the section 10 issuance criteria and any regulatory or biological issues that will need to be addressed in the HCP. Avoid "eleventh-hour" surprises that result in delays and bad feelings on all sides.
- o HCP mitigation programs will be as varied as the projects they address. Some will be simple while those for large-scale, regional planning efforts may be quite complicated. There are few ironclad rules for mitigation programs but make sure they address specific needs of the species involved and that they are manageable and enforceable. A monitoring plan should be developed that establishes reporting requirements, biological criteria for measuring program success, and procedures for addressing deficiencies in HCP implementation (see Chapter 3, Sections B.3-B.5).
- o Service Field Offices and Regional Offices must coordinate regularly throughout the HCP process and work as a team, not as isolated, separate players. This is essential to ensure that FWS or NMFS, as applicable, provide consistent, dependable assistance to the applicant in developing the HCP and that internal differences in approach are resolved prior to the submission of an HCP proposal to the Regional office for formal processing (see Chapter 6, Section C.1).
- o The same principle cited immediately above applies to coordination between FWS and NMFS when an HCP includes the jurisdiction of both agencies. It is also important to

obtain the views of the state wildlife and conservation agencies early and to address their comments.

- o Make sure the Services' section 7 obligations as they apply to issuance of a section 10 permit are explained to the permit applicant(s) and that section 7 considerations are introduced into the HCP from the beginning of the planning process. Compliance of the HCP with section 7 and 10 of the ESA should be regarded as concurrent, integrated processes, not as independent and sequential. (see Chapter 3, Section B.2(e) and Chapter 6, Section C.3).
- o The activities addressed under an HCP may be subject to Federal laws other than the ESA, such as the Coastal Zone Management Act, Archeological Resource Protection Act, and National Historical Preservation Act. Service staff should check the requirements of these statutes and ensure that Service responsibilities under these laws, if any, are satisfied, and that the applicant is notified of these other requirements from the beginning. The Service's staff should, to the extent feasible for all HCPs other than low-effect HCPs, integrate analysis done in compliance with other environmental and cultural review requirements into the NEPA analysis prepared for the proposed HCP.
- o Work with the permit applicant in good faith but ensure that the HCP established clearly measurable and enforceable compliance standards, including written documentation of all applicable biological results.
- o Once an incidental take permit has been issued, monitor permit compliance, and make sure monitoring activities are conducted and monitoring reports are submitted as defined by the HCP. Develop a tracking and accountability system for issued permits. Report all violations of permit conditions to the appropriate law enforcement personnel.

CHAPTER 2 OVERVIEW OF FWS AND NMFS ROLES AND RESPONSIBILITIES

A. Delegation of Permit Authority

In the past, the FWS's Office of Management Authority (OMA) in the Washington, D.C. area processed and issued all section 10(a)(1)(A) and 10(a)(1)(B) permits. Effective February 12, 1992, the FWS Director delegated incidental take permit responsibilities to the Regional Directors. For NMFS, the responsibility for issuing incidental take permits is divided between the Office of Protected Resources in Silver Spring, Maryland (Washington, D.C. area), and its west coast Regions.

B. Roles and Responsibilities

FWS and NMFS offices at the regional, field, and Washington, D.C. level, and the permit applicant, all have specific responsibilities in implementing the HCP program. This section summarizes the roles and responsibilities of each of these participants.

Keep in mind that specific HCP procedures may vary somewhat between FWS Regions or between FWS and NMFS. This is because the circumstances faced by individual HCP participants may differ widely across regional boundaries or agency jurisdictions, and this handbook, while establishing consistent program standards, also seeks to maintain the flexibility to adjust to specific local needs. Thus, while fundamental legal and policy issues will be consistent nationwide, individual procedures (e.g., document handling requirements) may vary depending on the decisions of FWS Regional Directors or the NMFS Regional or Washington, D.C. Offices.

1. Applicant.

The applicant is responsible for compliance with the take prohibition and exceptions under sections 9, 4(d), and 10(a) of the ESA. Once the decision to obtain a permit has been made, the applicant is also responsible for preparing the HCP and, if approved, for implementing it. Requesting technical assistance from FWS, NMFS, and other interests during preparation of the HCP is strongly recommended to ensure the HCP ultimately submitted for approval is biological sound and meets statutory requirements. The applicant:

- o Should coordinate with FWS, NMFS, affected Federal and state agencies, tribal governments, and where appropriate, affected private interests and organizations in preparing an HCP that satisfies the requirements of section 10(a)(1)(B) of the ESA and Federal regulations.

- o Generally, develops a draft Environmental Assessment (EA) with technical assistance from the Services, and draft Federal Register notices for Service use during the permit processing phase. Normally, EISs are also prepared by the applicant, or through a contractor, or an HCP applicant, under certain circumstances and strict guidance from FWS or NMFS, can assist in developing an EIS. However, FWS or NMFS is ultimately responsible for the content of all section 10 NEPA documents.
- o Submits a permit application (Form 3-200), a \$25 application fee (unless applicant is fee exempt), a completed HCP, draft NEPA analysis (optional) and an IA (as needed) to the appropriate FWS Field or Regional Office or NMFS Regional or Washington, D.C. Office (see Chapter 6, Section B.3).

For FWS applications, note that Federal regulation [50 CFR 13.11(b)] calls for the application to be submitted to the Arlington, Virginia office; however, these regulations are being amended to reflect delegation of the permit program to the Regional Directors. NMFS regulations [50 CFR 222.22] state that applications should be sent to the Silver Spring, Maryland Office, but applications involving west coast anadromous fish should be submitted to the Southwest or Northwest Regional Directors.

- o During the permit processing phase, coordinates with the appropriate FWS or NMFS Field Office to amend or correct the HCP or associated documents, as necessary. Also should provide the Field Office with additional information necessary for the Services to respond to public comments when appropriate.
- o If the permit is issued, implements all measures and programs required by the HCP permit and submits all documentation, monitoring reports, etc. as required over the life of the permit.

2. Field Office.

FWS Responsible Party - Field Supervisor.

NMFS Responsible Party - Field Supervisor.

The Field Office is responsible for assisting the applicant in preparing the HCP; ensuring that the HCP and associated documents are complete; and coordinating with the appropriate Regional Office (or NMFS Washington, D.C. Office) throughout HCP development, approval, and implementation. The Field Office:

- o Provides technical assistance to the permit applicant and serves as applicant's point of contact for information concerning HCP, permit processing, and NEPA

requirements during the HCP development phase. Provides assistance to the applicant's HCP steering committee, if any, as requested (see Chapter 3, Section A.3).

- o Encourages permit applicant to include affected state and Federal agencies and tribal governments to participate in the HCP process. Other Federal agencies might be involved, for example, if they are involved in adjacent planning areas or would administer mitigation lands under the HCP. Inclusion of affected state agencies insures efficient consideration of any additional requirements of state law.
- o Coordinates review of HCP development with FWS or NMFS Law Enforcement agents involved in enforcing permit conditions.
- o Stays informed on planning progress, problems, significant issues, and decisions; routinely advises the Regional Office of HCP progress on key policy and substantive issues (see Chapter 6, Section C.1).
- o Reviews drafts of the HCP and IA for adequacy and comments as necessary. Draft HCPs should be returned to the permit applicant within 30 days of submission, to the maximum extent possible.
- o Prepares NEPA analysis, or reviews draft documents if prepared by the applicant or contractor. Draft NEPA analysis should also be returned to the permit applicant within 30 days of submission, to the maximum extent possible.
- o Certifies to the Regional Office in writing that HCP documents have been reviewed by Field Office staff and are found to be statutorily complete, when the "complete application package" is transmitted to the Regional Office (see Chapter 6, Section B.2).
- o Reviews public comments received, if any, and coordinates necessary changes to the HCP or IA with the FWS or NMFS Regional HCP Coordinator during the permit application processing phase; notifies applicant(s) of recommended revisions to the draft HCP or IA, if any, identified as a result of legal or public review; and discusses remedies. Coordinates with FWS or NMFS Regional Office Environmental Coordinator, NMFS Washington, D.C. Office HCP Coordinator, or the applicant or applicant's contractor to make revisions to the NEPA document, if necessary.
- o For FWS, briefs the Regional Director, appropriate Assistant Regional Director, ARD for Law Enforcement, and the Solicitor's Office concerning HCP issues as

requested. For NMFS, briefs the Regional Director, Deputy Director, Law Enforcement, and General Counsel's Office, as requested.

- o Drafts the following documents (see Chapter 6, Section B.2):

NEPA analysis, either an EA or EIS that is integrated with the proposed HCP (unless drafted by the applicant or contractor).

Federal Register Notice of Receipt of permit application and Notice(s) of Availability of EA or EIS.

Biological opinion concluding formal section 7 consultation. The biological opinion concluding formal section 7 consultation may be done by the FWS or NMFS office that assisted in HCP development or by another office. To avoid possible biases, the staff member conducting the section 7 consultation should not be the section 10 biologist providing technical assistance to the HCP applicant. This will help ensure that the intra-Service section 7 consultation is an independent analysis of the proposed HCP. If, because of staff time constraints, this is not possible, then the biological opinion should be reviewed by another knowledgeable biologist before it is signed by the approving official. It is very important that the staff member that completes the section 7 consultation be involved in the initial stages of the HCP process. This will help ensure that the section 7 requirements are addressed in the HCP and that the two processes are integrated which will help expedite the permitting process. If the Regional Director has delegated the authority, the biological opinion may be signed by an approving official in the Field Office.

Set of Findings (see Chapter 6. Section B.2).

An Environmental Action Memorandum for low-effect HCPs that are categorically excluded from NEPA, Finding of No Significant Impact (FONSI) for the EA, or Record of Decision (ROD) for the EIS.

News releases as appropriate or requested by the Regional Office.

Responses to comments, as necessary.

Permit Terms and Conditions for inclusion in the permit (FWS's Form 3-201), if requested by the Regional Office or NMFS Washington, D.C. Office.

- o Monitors compliance with HCP provisions and permit terms and conditions and evaluates success of the HCP at least annually. Arranges for independent biological peer review, as appropriate.

- o Provides an accounting of fund expenditures administering the section 10 program to the Regional Office as requested.

3. Regional Office.

FWS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD); appropriate Assistant Regional Director (ARD); and Assistant Regional Director for Law Enforcement (ARD-LE).

NMFS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD).

For FWS, the Regional Office oversees and administers the incidental take permit program for its respective region. For NMFS, this is true for the Northwest and Southwest Regions only, and only for activities concerning west coast anadromous fish species; the Washington, D.C. Office administers the balance of the permit program. Currently, the only HCPs in development in these NMFS regions are for anadromous species. The FWS and applicable NMFS Regional Office is responsible for coordinating with the Field Office throughout the HCP process, reviewing and processing the permit application; and issuing or denying the permit. It is also responsible for ensuring that permit processing targets described in Chapter 1 and Chapter 6 are met. The Regional Office:

- o Receives complete permit application package with supporting documents from the Field Office or applicant, and accounts for fee processing (see Chapter 6, Section B.3).
- o Processes application check.
- o Coordinates with ARD-LE to have permit number assigned through LEMIS (Law Enforcement Management Information System); coordinates review of permit application by ARD-LE, as necessary (FWS only).
- o Reviews permit application package for adequacy and reports any deficiencies to the Field Office (Section 10 Coordinator reviews HCP and IA; Environmental Coordinator reviews NEPA analysis) (see Chapter 6, Section B.4 and C.1). Prior periodic Field Office review and reporting on key policy and substantive issues should result in the identification and elimination of most deficiencies prior to formal Regional Office review.
- o Transmits Federal Register notices to the Office of the Federal Register for publication (see Chapter 6, Section D).

- o Files copies of any draft and final EIS with the Environmental Protection Agency [see Chapter 5, Section A.4].
- o Reviews draft and finalizes internal section 7 consultation, if the biological opinion was drafted by the Field Office that participated in HCP development, or incorporates biological opinion completed by the Field Office into the administrative record.
- o Reviews and finalizes Set of Findings (unless finalized by the Field Office).
- o Prepares the Environmental Action Memorandum (EAM) for low-effect HCP permit applications (see Chapter 6, Section B.2).
- o Coordinates with the Assistant Director for Ecological Services for major policy issues to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP program.
- o Briefs the Director or Washington, D.C. Office on all significant HCP developments, permit application processing, and post-issuance efforts, as necessary. Reports HCPs in development and section 10 permits issued to Washington Office, as requested.
- o Coordinates with lead Region responsible for the species prior to issuance of the permit to ensure agency-wide consistency for species that overlap more than one FWS or NMFS Region.
- o Prepares permit and associated documents (IA, FONSI, ROD, EAM) for RD or DRD signature, as necessary or requested (see Chapter 6, Section C.5).
- o Issues or denies the permit and (FWS only) updates LEMIS. Sends the signed permit with terms and conditions or a denial letter to the permittee or applicant. Sends copies of these documents to the Field Office, other affected offices, and Division of Endangered Species (FWS) and Office of Protected Resources (NMFS) in Washington, D.C.
- o Sends Notice of Permit Issuance to the Office of the Federal Register for publication on a quarterly or biannual basis.
- o Coordinates Freedom of Information Act (FOIA) requests.

4. Washington Office.

FWS Responsible Parties - Director; Assistant Director of Ecological Services (AES); and Chief, Division of Endangered Species (DTE).

NMFS Responsible Parties - Director, Office of Protected Species; Chief, Endangered Species Division.

The FWS Washington Offices provide guidance and oversight to the Regional and Field Offices. It is responsible for nationwide administration of the program:

- o Develops regulations and national policy guidance.
- o Assists in resolving issues or disputes when requested by the Regional Offices.
- o Briefs Director or other authorities or coordinates such briefings as necessary.
- o Prepares HCP, NEPA, and other related training and technical assistance to Regional Offices and Field Offices, as needed.
- o Maintains and updates national list or data base of HCPs in development and permits issued.

The NMFS Washington, D.C. Office of Protected Resources has the same functions as described for FWS. It also processes all permit applications and issues or denies all permits, except for those concerning anadromous species in the Northwest or Southwest Regions. NMFS permits for activities such as state fish hatcheries, and commercial or recreational fisheries must comply with all statutory provisions of section 10(a)(1)(B) of the ESA, but may have fewer documentation requirements than other types of incidental take permits. (Refer to NMFS final regulations for the program contained in Appendix 1 (55 FR 20603)). The NMFS Washington, D.C. Office should be contacted for assistance in handling any such permits. Generally, all other NMFS-issued incidental take permits are subject to the documentation requirements described in this handbook.

5. Solicitor's Office/General Counsel Office.

FWS Responsible Parties - Solicitor's Office

NMFS Responsible Parties - General Counsel's Office

For FWS, the Solicitor's Office need review only those parts of the permit application package that the Regional Director request be reviewed--typically the HCP and Implementing Agreement. Coordination with the Regional Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and during the HCP development phase. After Solicitor review is complete, the

Regional Solicitor's office should forward a memorandum to the RD or appropriate ARD stating that he or she has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements. The Regional Solicitor's Office should review the documents, as necessary, throughout the HCP process to ensure regulatory and statutory compliance and to avoid "last minute" identification of problems in documents submitted for final approval. For NMFS, the General Counsel's Office (either in the Region or Headquarters) must review the entire application package and all supporting ESA and NEPA documentation.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the strict requirements of the ESA and its regulations. This is especially important for the HCP, which has specific legal requirements, and the Implementing Agreement, which legally binds the applicant to complying with the HCP and permit terms. For NMFS, legal review of all documents must be conducted by either the Headquarters or Regional General Counsel's Office.

CHAPTER 3

PRE-APPLICATION COORDINATION AND HCP DEVELOPMENT

Congress intended the HCP process to be used to reduce conflicts between federally listed species and non-Federal development and land use, and to provide a framework for "creative partnerships" between the public and private sectors in endangered species conservation. Congress also intended the FWS and NMFS to be not just regulators of the HCP program, but active participants in providing technical assistance, and that "comprehensive" HCPs could be developed jointly by the FWS, NMFS, the private sector, and local, state, and Federal agencies, with the Services as a technical advisor (H.R. Rep. No. 97-835, 97th Congress, Second Session).

This chapter discusses the Services' roles in the HCP process during the pre-application and HCP development phase. From a technical standpoint, this involves advising the permit applicant on the biological needs of the species involved, statutory HCP requirements and permit issuance criteria, NEPA requirements, and other technical issues.

The Services also have an important "leadership" role to play in the HCP program, which involves not only technical expertise but attitude and philosophy. Although FWS or NMFS typically do not initiate HCP efforts, they can and should encourage them and once initiated support them to the maximum extent possible. This means being actively involved during HCP development; providing advice on mitigation programs, monitoring measures, and reserve designs; providing timely review of draft documents; helping find solutions to contentious issues; and generally helping bring the HCP together.

A. Getting Started

Once a private or non-Federal entity (or entities) has decided to obtain a section 10(a)(1)(B) permit the first task that it needs to undertake are determining the appropriate applicant, deciding whether or not to establish a steering committee, and preparing a list of species to be addressed in the HCP.

1. Who Can Apply For a Section 10 Permit?

Section 10 permits can be issued to state, municipal, or tribal governments, corporations or businesses, associations, and private individuals. They can also be issued to entities that are a combination of these, such as joint power authorities, watershed councils, and other planning authorities.

The standard method of authorizing take for Federal agencies is through the section 7 consultation process. Actions authorized, funded, or carried out by Federal Agencies must go through the section 7(a)(2) consultation process. There are cases where a Federal agency

is a partner in an HCP, and has a minor, but integral role in the HCP. Examples of these types of HCPs would include HCPs where a Federal agency is involved in a cooperative planning effort in which both Federal and private lands are addressed under a single HCP but the Federal agency is not the applicant or the primary partner in the plan. In these cases, the specific identified actions to be conducted by the Federal agency during the implementation of the HCP should be consulted on as part of the section 7 consultation conducted for the HCP. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any specified or identified cooperative Federal action into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee.

Before processing a section 10 permit application involving a Federal agency, Service staff should consult with the appropriate Regional Director's or Solicitor's Office (FWS), or the Regional Director's Office or Washington, D.C. Office of Protected Resources Office (NMFS).

2. Determining the Appropriate Applicant.

The first step is to determine who the applicant is who ultimately will hold the permit. In many cases this is relatively straightforward--the applicant is the land or other natural resource owner who proposes the project or activity and is responsible for implementing the HCP.

In regional HCPs, the plan often relies upon local or regional authorities to implement the plan and regulate the taking of listed species addressed in the plan. The permittee must therefore be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit. For large-scale planning efforts involving only one or two landowners or types of activities, the landowners themselves are usually the appropriate permittee. For planning efforts involving numerous property owners and activities, the permittee is usually a local public agency--e.g., a city or county government or several local agencies acting jointly. In other cases, a state agency may obtain and hold a section 10 permit for certain types of state-regulated private activities (e.g., forestry activities).

When no government agency is available or interested in assuming the responsibility for an HCP, private groups wishing to obtain a permit for large-scale or multi-faceted projects may initiate an HCP without government involvement. They may, for example, form a consortium to develop the HCP, in which case the consortium would be the permittee. Or, they may jointly fund development of the HCP but maintain their individual identities by applying for separate permits, using the same HCP or individual HCPs modified from a

jointly-developed "template." Either approach is acceptable so long as the permittees have the authority to regulate or control all or applicable parts of the HCP program and the conditions of the HCP are enforceable.

3. Steering Committees.

An HCP "steering committee" is a group of persons who represent affected interests in a broad-scale HCP planning area and generally oversee HCP progress and development. Steering committees are not required by law and the Services do not require them, although they have proven useful to applicants in a variety of HCP settings. However, the Services cannot be the entities which establish them without compliance with the Federal Advisory Committee Act. It is important to remember that a steering committee's purpose is to advise the applicant in the development of the HCP, not to advise the Service on permit issuance.

The steering committee approach may not be appropriate for all situations. For some applicants, it may be too formal or complicated, or they may view it as giving "outside interests" too much access to proprietary data involving private lands. If this is the case during the pre-application phase, the Services should encourage the applicant to provide opportunities to brief or inform representatives of interested parties of key elements or issues to be addressed in the proposed HCP. This can be accomplished in several ways, such as formal or informal meetings, newsletters, etc.

When used in the HCP process, steering committees are usually appointed by the permit applicant and can fulfill several roles--they can assist the applicant in determining the scope of the HCP (size of the planning area, activities to include, etc.), help develop the mitigation program and other HCP conditions, provide a forum for public discourse and reconciling conflicts, and help meet public disclosure requirements. Steering committees are particularly useful in regional HCPs, especially those in which the prospective permittee is a state or local government agency, and are recommended for these types of HCP efforts. However, they are generally not utilized for low-effect HCPs or most single landowner projects.

Ideally, a steering committee should include representatives from the applicant; state agencies with statutory authority for endangered species; state or Federal agencies with responsibility for managing public lands within or near the HCP area (including other Service program areas such as the FWS's Refuges Division); tribal interests where applicable; affected industries and landowners (especially those with known or possible endangered species habitats); and other civic or non-profit groups or conservation organizations with an interest in the outcome of the HCP process.

For regional HCPs it is not practical to include every affected landowner or interest group on the steering committee. Instead, industry groups should be encouraged to assign a professional or trade organization to the committee to represent them--e.g., a farm bureau, cattlemen's association, or building industry association--though corporations with extensive

land holdings in the plan area may want to represent themselves. The steering committee needs to be representative, but its size must be manageable.

Another way to control numbers of participants in the HCP process is by using sub-committees. Sub-committees act as small working groups on behalf of the main committee and are an excellent means of addressing specific issues and developing specific components of the HCP. Sub-committees are more efficient than the larger steering committee for conducting certain tasks and generally help move the HCP process forward.

Prior to initiating an HCP effort, the newly-appointed steering committee may elect to develop a Memorandum of Understanding (MOU) or similar document to record "up front" the goals of the HCP, the composition of the committee, expectations of HCP participants, and other information unique to the locality or defined by the committee. Appendix 3 shows the MOU developed by participants of the Kern County, California HCP.

The question of whether to establish a steering committee may be difficult for non-governmental applicants. State or local governments typically embrace the steering committee idea early in the process because of their desire to obtain consensus from the community. On the other hand, private landowner applicants may feel that creation of a steering committee will lead to confrontation or the intrusion of outside interests into proprietary or sensitive economic matters. However, applicants should be aware of the potential benefits of a steering committee. These include identification and resolution of issues before they cause delays later in the process, development of an HCP that enjoys greater support in the community, and the cooperation of agencies or private conservation organizations that may be needed to help implement the conservation program. Permit applicants ultimately must weigh the risks of establishing or not establishing a steering committee with the expected benefits.

For large-scale or regional HCPs, one of the main functions of the steering committee is to build consensus among diverse organizations and interests, so it is important to promote good working relationships among committee participants. This does not mean that reaching agreement in complex HCP efforts will be easy! Often it is not. However, development of the HCP will be most effective when all interests in the community are represented in steering committee activities and their views and needs are given a fair hearing. A few suggestions:

- o Steering committee meetings should be open to the public. This allows interested persons who do not actually sit on the committee to attend meetings, monitor progress, and generally feel they are part of the process.
- o HCP participants should avoid creating an impression that they are pursuing unstated agendas or negotiating in bad faith. The trust developed between diverse and sometimes antagonistic HCP participants can be fragile, and this

impression can be damaging to a productive HCP even if untrue. Participants need to be sensitive to perception and avoid the impression of bad faith.

- o The FWS and NMFS should not assign inexperienced staff to provide technical assistance to large-scale or regional HCP steering committees. This can result in mistakes, lost opportunities, and suggests to the applicants that the agencies are disinterested in the planning process. Inexperienced staff should learn the HCP process by working on small HCPs and by assisting other staff on larger efforts. If no staff have specific HCP experience, then individuals who are otherwise seasoned FWS or NMFS professionals should be assigned. If such individuals are not available, other staff should be sent to monitor HCP progress but not to actively participate. In such cases, staff sent to monitor the HCP should make clear to the applicants the limitations of their participation and resist rendering advice on important issues. However, they can and should act as liaisons to more experienced staff in the Field Office in answering questions or obtaining advice.
- o The composition of the steering committee will depend on the type of HCP involved. Regional HCPs involving numerous activities and in which the applicant is a government entity ideally should include representatives from all affected interests. Steering committees for non-government HCPs can be organized according to the specific needs of the applicant, but at the least should include representatives from each permit applicant.
- o A good facilitator or consultant who is skilled at moderating committee meetings, building consensus, and handling uncooperative parties can help significantly to move the HCP process forward.

4. The Services' Roles on Steering Committees & HCP Efforts.

Neither the FWS nor NMFS is required by statute or regulation to serve on HCP steering committees. Nevertheless, it is strongly advised that section 10 applicants invite the Services to participate as technical advisors on their steering committees. This will help ensure that adequate biological standards are incorporated into the HCP and that the HCP and associated documents meet procedural requirements when the permit application is

submitted. An HCP prepared in the absence of Service technical participation could be judged inadequate late in the process and unnecessary delays could result. The same caveat applies to all HCPs, regardless of size or whether a steering committee is established.

However, a careful balance needs to be drawn between constructive Service involvement in HCP efforts and overly aggressive involvement. Too little involvement can leave the impression that FWS or NMFS are disinterested or unhelpful, while too much can create the perception that the Services are inflexible in their approach to the HCP process, rigidly dictating the mitigation program.

To avoid either impression, Service HCP representatives need to understand their role and make that role clear to the applicant and the steering committee. Their function as agency representatives is to provide guidance about statutory and policy standards and to help facilitate development of a suitable mitigation program that satisfies the requirements of section 10; it is not to dictate every element in the HCP. The option to ignore or modify Service recommendations remains with the applicant; of course, doing so might result in subsequent difficulties during the permit application processing phase and the disapproval of an inadequate HCP. Service representatives at the Field Office level cannot pre-approve an HCP because section 10 permits are issued by the Regional Office (or, for NMFS, the Washington, D.C. Office), and, although advance coordination between the Field and Regional Offices should ensure their agreement on the HCP's adequacy, the permit application must still be evaluated fully during the public comment period.

The Services' steering committee members should also abstain from formal voting procedures on HCP issues if the committee conducts such votes. This will prevent confusion and reinforce the Services' proper role as advisor. Until the HCP is completed and submitted for approval, specific HCP development decisions are up to the steering committee and the applicant.

During the HCP development phase, the Services should be prepared to advise section 10 applicants on the following (regardless of whether there is a steering committee):

- o Preparing the species list and identifying project scope and impacts.
- o Biological studies and data needed to assess project impacts;
- o NEPA requirements and the applicant's potential role in developing the NEPA analysis.
- o Applicability of state endangered species law and requirements, and any other Federal laws that may be applicable, if any.

- o Project modifications that would minimize take and reduce impacts, or, ideally, and with concurrence of the applicant, would generate an overall measurable net benefit to the affected species;
- o Design of mitigation, habitat enhancement, or mitigation programs;
- o Reserve design criteria and assistance in population viability assessments, if desired.
- o Methods for monitoring HCP progress and project impacts on affected species;
- o Biologically acceptable take limits and how to define them;
- o Criteria to track or determine success of the HCP; and,
- o Procedural and other HCP issues as requested by the committee.

5. Preparing the HCP Species List.

In many HCPs, there are one or two primary species that "trigger" the need for an incidental take permit (e.g., the northern spotted owl or salmon in the Pacific Northwest, desert tortoise in southwestern deserts, or red-cockaded woodpecker in the southeast), though other listed species may occur in the same planning areas. After the decision has been made to obtain a permit, one of the first decisions an HCP applicant must make is what species to address in the plan. Generally, permit applicants should be advised to include all federally listed wildlife species likely to be incidentally taken during the life of the project or permit. If the applicant does not address such species, it may not be possible to issue the permit (if the issuance of a more limited permit would violate section 7(a)(2) for the listed species not covered) or the project activities could be stopped or delayed after the permit has been issued if a listed species that was not addressed in the HCP is likely to be taken during project activities.

There are also advantages in addressing unlisted species in the HCP (proposed and candidate species as a minimum), particularly those that are likely to be listed within the foreseeable future or within the life of the permit. Doing so can protect the permittee from further delays--e.g., having to revise the HCP and amend the permit--should species that were not listed at the time the original HCP was approved subsequently become listed. In addition, the "No Surprises" policy (see below, Section B.5(a)), applies to listed as well as unlisted species if they are adequately addressed in the HCP.

The more species addressed in the HCP, the more potentially complicated the HCP may become. For example, in most state systems, primary jurisdiction over candidate species rests with the affected State fish and wildlife agency, thereby increasing the advisability of

that agency's participation in the HCP process. Thus, selecting the species list can become an exercise in balancing the need to obtain maximum regulatory certainty, with practical considerations such as manageability, availability of biological information, and cost. The Services should be prepared to advise the applicant about which listed species should be highest priority in the HCP, which unlisted species are most likely to be listed in the future, and which species, listed or unlisted, can otherwise be advantageously addressed in the HCP. Ultimately, the decision about what species to address in the HCP lies with the applicant. In any case, the species list should be developed and agreed upon early in the HCP process, since it forms much of the basis for future plan development.

When preparing the species list the applicant should be informed that the ESA generally does not prohibit the incidental take of federally listed plants. Nevertheless, the Services should encourage the applicants to consider including listed plants in HCPs because, although incidental take of plants may not be prohibited by section 9, the section 7(a)(2) prohibition against jeopardy does apply to plants. If the section 7 consultation on a section 10 permit application concludes that issuance of the HCP permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To avoid this outcome, the applicant should ensure that actions proposed in the HCP are not likely to jeopardize any federally listed plant species. In addition, not all species under the jurisdiction of NMFS listed as threatened are subject to the section 9 take prohibitions. Such prohibitions are applied through regulation, on a case-by-case basis. Therefore, an incidental take permit may not be required for these species. Specific regulations are provided at 50 CFR Part 227.

6. Involving Other Federal and State Agencies.

During the development stage of an HCP, the Services will provide technical assistance and information concerning regulatory and statutory requirements to the applicants to ensure completeness of the application. Throughout this developmental process, the Services will encourage applicants to invite and include other Federal and State agencies who can utilize their existing authorities, expertise, or lands, in support of the HCP development and implementation process. It is particularly important to encourage participation of other Federal and State agencies that manage nearby lands into the HCP development process, if the applicant is willing to do so. However, the Service must ensure that activities are not identified in the HCP that obligate other agencies to conduct mitigation or minimization activities for species covered by the HCP, unless specifically negotiated with the agency, and the agency was a partner in the development and implementation of the HCP.

The "No Surprises" policy, which provides the applicant with regulatory certainty, calls for the Services to assist with correcting any unforeseen circumstance that may arise. This means that in the face of unforeseen circumstances the FWS and NMFS will not require additional mitigation in the form of additional lands or funds from any permittee who is adequately implementing or has implemented an approved HCP. Once the permit is issued and its terms

are being complied with, the applicant will not be required to accept additional obligations of this type. The policy also protects the permittee from other forms of additional mitigation except in cases where "extraordinary circumstances" exist.

The Services can, however, encourage other Federal or State agencies to assist with any unforeseen circumstances. Other agencies will be better able to assist if they have been involved throughout the entire HCP development. Any Federal or State agency that could ultimately be affected by the implementation of an HCP will be notified during the developmental process, and once the HCPs are completed and the incidental take permit is issued the Services will provide copies to the affected agencies. This will help these agencies effectively manage their lands in a way that could support the HCP and promote the conservation and recovery of listed and unlisted species.

7. Treaty Rights and Trust Responsibilities.

A unique and distinctive relationship exists between the United States and Native American Tribes, as defined by treaties, executive orders, statutes, court decisions, and the United States Constitution. This relationship differentiates tribes from other entities that deal with, or are affected by, the Federal government.

Indian tribes are recognized under Federal law as separate sovereigns with governmental rights over their lands and people. These governmental rights and authorities extend to natural resources that are reserved by or protected in treaties, executive orders, and Federal statutes. Such reserved rights may include off-reservation rights to hunt, fish, or gather trust resources.

The United States has a Federal trust obligation towards Indian tribes to preserve and protect these rights and authorities. The Federal Indian trust responsibility is a legal enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian tribes and Alaskan Natives.

During habitat conservation planning negotiations with non-Federal landowners, the Services must consider whether proposed plans might affect tribal rights to trust resources. Whenever the Services have a reasonable basis for concluding that such effects might occur, they must notify the affected tribes and consult government to government in a meaningful way. Consultation with the affected tribe shall be completed within a timely manner. After careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the government's trust responsibilities. In light of this obligation, it is important that the Services identify and evaluate during the planning process, any anticipated effects of a proposed HCP upon Indian trust resources.

B. Developing the HCP

1. Mandatory Elements of an HCP.

Under the Endangered Species Act [Section 10(a)(2)(A)] and Federal regulation [50 CFR 17.22(b)(1), 17.32(b)(1), and 222.22], a conservation plan submitted in support of an incidental take permit application must detail the following information.

- o Impacts likely to result from the proposed taking of the species for which permit coverage is requested;
- o Measures the applicant will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances;
- o Alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized; and,
- o Additional measures FWS or NMFS may require as necessary or appropriate for purposes of the plan.

Each of these conservation plan elements are discussed in detail in the sections below. NMFS regulations (50 CFR 222.22) also require a list of all sources of data used in preparation of the plan.

Section 10 HCP requirements and permit issuance criteria must be clearly explained to any prospective permit applicant at the outset of an HCP effort. This is essential to ensure that the applicant understands the HCP process and that the HCP is developed within required legal parameters.

2. Identifying Project Impacts.

Four subtasks must be completed to determine the likely effects of a project or activity on federally listed or candidate species: (a) delineation of the HCP boundaries or plan area; (b) collection and synthesis of biological data for species to be covered by the HCP; (c) identifying activities proposed in the plan area that are likely to result in incidental take; and (d) quantifying anticipated take levels. To help expedite the section 7 process, the HCP should also assist the Services in: (e) satisfying the requirements of section 7 of the ESA; (f) addressing significant indirect effects of the project on federally listed species, if any; (g) addressing jeopardy to federally listed plants, if anticipated; and (h) addressing effects on critical habitat, if any. Section 7 should be addressed as early as is practicable in the HCP development process.

a. Delineation of HCP Boundaries. HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities likely to result in incidental take are expected to occur. HCP boundaries should also be as exact as possible to avoid later uncertainty about where the permit applies or where permittees have responsibilities under the HCP. For low-effect and many other HCPs, the plan area is usually synonymous with the project or land use site or the landowner's property. For regional HCPs, the size and configuration of the plan area will depend on various factors. Sometimes a regional HCP boundary will simply be a county line because a county government is the applicant. In other cases, it will be drawn to deliberately include or exclude certain areas or activities, depending on the participants' objectives [see Section B.2(c) below].

Generally, HCP applicants should be encouraged to consider as large and comprehensive a plan area as is feasible and consistent with their land or natural resource use authorities. Regional and other large-scale HCPs allow the permittee to address a broad range of activities and to bring them under the "umbrella" of the permit's legal protection. They also allow analysis of a wider range of factors affecting listed species, maximize flexibility needed to develop innovative mitigation programs, and minimize the burden of ESA compliance by replacing individual project review with comprehensive, area-wide review.

On the other hand, considering a large and complicated planning area has its own potential difficulties. Attempts to satisfy too many land use or endangered species issues in one effort can be frustrated by excessive complexity, shortages of biological information, and difficulties in securing the consensus of HCP participants. However, these are judgment calls, and the final size and configuration of an HCP planning area will often be a compromise between the need to be as comprehensive as possible and the inherent risks of an over-extended, protracted HCP effort.

Regional HCPs sometimes can be simplified by dividing the planning area into separate planning units with different conditions and requirements for each area. This approach was adopted in the San Bruno Mountain HCP. Coordination with individual landowners and local land use authorities will help determine when subdivision of a plan area will yield substantial advantages.

In any case, neither the ESA nor its implementing regulations limits the size of an HCP planning area. No matter how large or small, HCP areas are acceptable so long as the HCP is statutorily complete and meets the section 10 issuance criteria. With respect to small projects, the FWS section 10 regulations state that, "The Service believes that Congress did not intend to exclude projects from the incidental take provisions of section 10(a) merely because the projects were of more limited duration or geographical scope [than the San Bruno Mountain HCP]" (50 FR 39681-39691).

The HCP plan area might also include areas necessary for the mitigation. The exception to this general rule may be where the mitigation consists of reserves apart from the area in which incidental take is authorized. This will entail various considerations--e.g., the distance from permitted activities to reserve areas (see below, Section B.2(c)) and the ability of the permit applicant or its designee to regulate activities inside the reserve. Private, state, or locally-owned lands should never be considered for inclusion in HCPs as reserves without the concurrence of the landowners or their representatives.

b. Collection and Synthesis of Biological Data. Preparing an acceptable HCP requires the availability of up-to-date biological information on the species being considered within the plan area. First, the applicant should collate and review existing information about species distribution, occurrence, and ecology. FWS or NMFS can assist in this process by directing the applicant to available information. Second, the applicant should determine whether the available information is adequate to proceed with the planning process. If not, FWS or NMFS should recommend the type, scope, and design of biological studies that can reasonably be developed to support the HCP. However, research efforts on behalf of an HCP should be confined to distribution studies or other studies with a direct bearing on the needs of the HCP. Permit applicants should not be expected to undertake studies that do not directly affect the outcome of the HCP. Determining the availability of existing information is especially important for regional HCPs, since they may involve species whose biology is not well known. Low-effect HCPs typically will not require additional studies beyond surveys needed to determine the distribution of the species within the plan area.

Another approach to consider for HCPs is habitat-based HCPs (see Chapter 3, Section C.1) in which the presence of a particular species can be assumed based on the presence of its habitat type; if that habitat type is then addressed in the HCP and included in the mitigation program, additional distribution studies may not be necessary.

c. Determination of Proposed Activities. The applicant should be encouraged to include in the HCP a description of all actions within the planning area that: (1) are likely to result in incidental take; (2) are reasonably certain to occur over the life of the permit; and (3) for which the applicant or landowner has some form of control. For many HCPs, this will usually involve a specific well-defined project (e.g., home construction; water use development) or land use activity (e.g., forestry). For regional and other large-scale planning efforts, the applicants will need to determine what activities they wish to include in the HCP and, if necessary, which ones they wish to exclude. Generally, applicants should be encouraged to include as comprehensive a set of activities in the HCP as is practicable. This will maximize the permittee's long-term planning assurances, broaden legal coverage, and minimize the possibility that some future activity will not be covered by an issued permit.

What is being authorized in a section 10 permit is incidental take, not the activities that result in the take. Similarly, a violation of the permit occurs only if the amount or extent of authorized take is exceeded or if the terms and conditions of the HCP or the permit are not

implemented, not necessarily because some unspecified activity has occurred. The legality of an incidental take occurring during a specific activity will depend on how the HCP is structured. In some regional HCPs, the permit may specify that a certain number of habitat acres may be modified during construction activities, but the specific types of construction are unspecified--in which case the construction type *per se* would not affect the legality of any resulting incidental take. However, other HCPs may analyze incidental take in the context of a specified activity to be conducted across the HCP area, such as forest management. In such cases, incidental take is only authorized in association with specifically analyzed activities.

Even in the former case, an activity type that is not implicitly or explicitly covered by an HCP should not be allowed to "use" portions of the incidental take authorization at the expense of activities that are described. Unless broadly defined types of activities are described in the HCP (e.g., timber harvest, agriculture, or construction activities), then incidental take occurring during such activities within the plan area generally would not be authorized. In any case, the specificity with which activities are described in the HCP will depend on the applicant's objectives. They should be sufficiently described (as included or excluded) that the permittee or landowners subject to the permit can determine the applicability of the incidental take authorization to the activities they undertake.

Determining appropriate activities to include in the HCP can involve the same considerations as those described in Section B.2(a) concerning the HCP boundary. Here again the desire for a comprehensive HCP must be balanced against the risk of over-complicating the plan. Also a factor is the willingness of any particular group to participate in the HCP process. No group can be forced to participate. Of course, not participating in the responsibilities of the HCP also means not enjoying the benefits of protection from the incidental take prohibition and regulatory streamlining.

In some cases, specific landowners or industries may be reluctant to become involved in the HCP process. In such cases, Service representatives should assist the remaining participants in good faith, while encouraging "sideliners" to observe the benefits of the program. Of course, "non-participants" should understand that if their activities are not addressed in the HCP, either specifically or generically, they will not be covered by the incidental take permit. Moreover, if the permit applicant is a state, regional, or local governmental agency, "non-participants" may ultimately be affected by the terms and conditions of an HCP once the permittee begins to implement the HCP through the exercise of its regulatory powers. In other cases, a landowner may elect not to participate in an HCP for other reasons--for example, if they are negotiating a separate agreement or are operating under an existing permit.

These factors can result in HCPs with unusual inclusions and exclusions. For example, in the Metropolitan Bakersfield HCP in California, oil development activities are specifically excluded from the planning area but are proposed for inclusion in the Kern County HCP,

which overlays the Bakersfield HCP (see Appendix 3). Sometimes a new HCP will overlay multiple existing HCPs, or some applicants may elect to pursue an HCP on their own even though a regional HCP is being developed in the same area. Also, more than one regional HCP may occur near each other within the same bio-regional province, or two such HCPs may occur within the range(s) of the same species. Such inclusions and exclusions are perfectly acceptable. Nevertheless, participants should be aware of coordination problems that can develop between HCPs in these types of cases. For example, it is important to ensure that mitigation programs for the same species are identical in adjacent HCPs. Also, the Services should not issue more than one permit for identical activities in the same area at the same time, since this could result in two differing sets of conditions for the same activities. In cases where a new HCP overlays an existing one, neither the Services nor the new permit-holder can force existing permittees to adopt conditions of the new permit without their consent--(however, there may be exceptions, such as when the new permittee is a state or local government with its own regulatory authority). Generally, however, the Services will not seek additional mitigation from existing HCP permit holders for the same activities affecting the same species under a broad regional plan.

d. Determining Anticipated Incidental Take Levels. In determining the amount of incidental take that will be authorized during the life of the permit, three things must be determined: (1) how incidental take will be calculated; (2) the level of incidental take and related impacts expected to result from proposed project activities; and (3) the level of incidental take that the section 10 permit will actually authorize.

The first depends on the ability of HCP participants to determine, to the extent possible, the number of individual animals of a covered species occupying the project or land use area or the number of habitat acres to be affected. Depending on this information, proposed incidental take levels can be expressed in the HCP in one of two ways: (1) in terms of the number of animals to be "killed, harmed, or harassed" if those numbers are known or can be determined; or (2) in terms of habitat acres or other appropriate habitat units (e.g., acre-feet of water) to be affected generally or because of a specified activity, in cases where the specific number of individuals is unknown or indeterminable. The latter is typically expressed as all individuals occupying a given area of habitat, in whatever habitat unit is being used.

The next aspect depends on the number of animals or habitat units that occur in the project or planning area, and the likelihood that any given activity will result in take. This can be determined by first "overlaying" data on proposed activities--often in the form of maps--with biological data compiled from existing sources and collected in the field by the applicant. When this is completed, the effects of particular activities on species occupying project areas can be analyzed.

Under Federal regulation (50 CFR 17.3), "harm" in the definition of take can include "significant habitat modification or degradation where it actually kills or injures wildlife by

significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." Therefore, habitat modification or destruction, to the extent the above effects occur, can constitute take and must be detailed in the HCP and authorized by the permit.

"Harassment" is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." As with "harm," any action qualifying as harassment under this definition must be described in the HCP and authorized by the permit (see Chapter 7, Section B.1).

After expected take levels have been estimated based on a comparison of proposed activities with species distribution in the plan area, the applicant and the Services can begin to determine the final outcome of the HCP. In general terms, this is done by determining what incidental take levels can be authorized that are consistent with the section 10 issuance criteria (i.e., that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild"), and developing a mitigation program that is also consistent with the issuance criteria (i.e., that will minimize and mitigate "to the maximum extent practicable"). If, in the Services' judgment, initially anticipated incidental take levels exceed what can be permitted under the section 10 issuance criteria, additional take avoidance and other mitigation measures must be developed.

These processes--determining anticipated incidental take, development of the mitigation program, and establishing authorized incidental take levels--are dynamic and do not necessarily occur in consecutive order as the above description might infer.

e. Coordinating the HCP With Section 7 of the ESA. Section 7(a)(2) of the ESA requires all Federal agencies "in consultation with and with the assistance of the Secretary" to ensure that "any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. The section 7 implementing regulations (50 CFR Part 402) require, among other things, analysis of the direct and indirect effects of a proposed action, the cumulative effects of other activities on listed species, and effects of the action on critical habitat, if applicable.

Consultation under section 7 of the ESA is the Federal agency's responsibility, not the applicant's. In the case of issuance of a section 10(a)(1)(B) permit, FWS or NMFS must conduct an intra-Service (or internal) consultation to ensure compliance of permit issuance with the provisions of section 7. However, although the consultation responsibilities is not the permit applicants, the applicant should help ensure that those considerations required of the Services by section 7 have been addressed in the HCP. Otherwise, the Services' section 7 consultation on proposed permit issuance might result in a jeopardy or adverse modification finding with respect to indirect or cumulative effects, listed plants, or critical habitat if the HCP has inadequately considered these issues.

However, despite these additional considerations, in most cases the applicant will not actually experience a significant increase in responsibilities under the HCP because of the Services' associated section 7 responsibilities. This is because there are relatively high thresholds under section 7 (i.e., jeopardy), and many of the same relevant biological considerations are already integrated into the HCP process [see Sections B.2(f)-(h) below].

In many cases, the procedural aspects of the section 7 consultation are more important to the applicant's interests than its substantive outcome. In the past, some have viewed the section 7 consultation for a section 10(a)(1)(B) permit as an independent review process that occurs after the HCP has been prepared and during the permit application processing phase. However, this approach left the permit applicant with no guarantee that the process of meeting the requirements of section 10(a)(1)(B) would result in issuance of the permit, since a section 7 consultation conducted late in the process could result in the discovery of unresolved issues, the return of an inadequate HCP to the applicant, or a jeopardy biological opinion.

To avoid this, it is now Service policy to begin integrating the section 7 and section 10 processes from the beginning of the HCP development phase, and to regard them as concurrent and related, not independent and sequential, processes.

In procedural terms, this means that considerations of section 7 consultation requirements should start at the beginning of the HCP development phase, not during the permit processing phase. It also means that if the Services and the applicant work together to develop an adequate HCP--one that meets the section 10 issuance criteria as well as the Services' applicable section 7 standards--then a "no jeopardy" biological opinion at the close of the section 7 consultation should be virtually assured. Service representatives should explain to HCP applicants at the outset of any HCP effort the Services' section 7 obligations, how those obligations affect the applicant, and how the two processes (sections 7 and 10) will be integrated.

f. Addressing Indirect Project Effects. In some cases, it may be determined that activities being considered in an HCP would be likely to result in indirect effects to listed species. The implementing regulations of section 7 of the ESA define indirect effects as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." In the HCP context, this would typically mean that activities under the HCP are expected to affect species outside the HCP plan area, or species that are inside the plan area but are not otherwise directly covered by the terms of the HCP. If expected indirect effects are serious enough to result in jeopardy or result in adverse modifications to critical habitat, and they have not been adequately treated in the HCP, the Services would have to deny the permit. Thus, indirect effects issues must be treated carefully during any HCP negotiation process.

From a practical standpoint, one problem is that large-scale projects of the type addressed in many HCPs can have "ripple" effects that continue long past their point of origin. Following

a causation chain of indirect effects from their point of origin to some specific effect, or vice versa, can be difficult, and assigning responsibility for all potential subsequent effects to the originator of a particular action may not be justified or practical.

For example, some species addressed in HCPs occupy small habitat areas or have narrow habitat requirements and are therefore unusually vulnerable to biotic and abiotic factors such as fire, vegetation succession, predation, and interspecific competition. In these cases, human alteration of the landscape in and around such habitats can have heightened adverse effects or specific indirect effects that must be addressed if the habitats are to be considered viable and affected populations are to persist. A good example is development in endangered beach mice habitat, which results in increased pet populations and then increased predation on beach mice. The HCP in such cases must address these types of effects. In the southeast, for example, some approved HCPs have been predicated on the successful control of post-project, human-induced effects on endangered species populations that remain or are protected after development of adjacent areas. Permittees have agreed to provide funding to control predators and competitors of listed species, nuisance or exotic vegetation, or pollution, and to meet education and information needs in the local community.

With these considerations in mind, the following guidance is provided about how to address indirect effects issues in HCPs. If a species is likely to be jeopardized as a result of the indirect effects of activities proposed in an HCP, the Services may not issue the permit unless these effects are adequately addressed. However, before an HCP is required to contain additional requirements to adequately address indirect effects under section 7: (1) the risk of jeopardy should be clear and reasonably certain to occur; and (2) the indirect effects in question must be reasonably foreseeable and a proximate consequence of the activities proposed under the HCP. The standard for imposing additional requirements on an HCP is the likelihood of jeopardy, not just the existence of indirect effects.

g. Consideration of Plants in the HCP and Permit. The take prohibition for federally listed plants under the ESA is more limited than for listed animals. Section 9(a)(2)(B) prohibits the removal of listed plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of listed plants on non-Federal areas in violation of state law or regulation. Thus, the ESA does not prohibit the incidental take of federally listed plants on private lands unless the take or the action resulting in the take is a violation of state law (which in most cases eliminates the need for an incidental take permit for plants).

Nevertheless, the Services recommend that permit applicants consider listed plants in HCPs. This is because the section 7(a)(2) prohibition against jeopardy applies to plant as well as wildlife species; and if the section 7 consultation on a section 10 permit application concludes that issuance of the permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To avoid this outcome, the applicant should ensure that actions proposed in the HCP are not likely to jeopardize any federally listed plant species.

However, if it is determined that the proposed HCP is not likely to jeopardize the continued existence of any federally listed plant species, then any such plants present within the HCP area that are on private or other non-Federal lands are protected against incidental take only to the extent that state law applies. Beyond that the applicant has no further responsibility with respect to listed plants. In the spirit of the conservation planning process, however, the Services will encourage applicants to address endangered or threatened plants in their HCPs.

Although take of listed plants does not require a section 10 permit in most cases, the names of any plants addressed in the HCP can be placed on the permit at the request of the applicant when it is issued. This might be done: (1) because a particular plant is protected by state law and is subject to the section 9 take prohibition; or (2) to protect the permittee's interests should the legal status of any plant change during the life of the permit as a result of changes to the ESA. This approach is acceptable and is encouraged if the permit applicant requests it or it otherwise increases the applicant's confidence in the long-term assurances under the permit. It is also consistent with the treatment of unlisted wildlife species in section 10 permits as described in Chapter 4.

h. Addressing Effects on Critical Habitat. Section 7(a)(2) prohibits the "destruction or adverse modification" of designated critical habitat by any action authorized, funded, or carried out by a Federal agency. The section 7 regulations define "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." The regulations for section 4 of the ESA (50 CFR 424.12) describe the "constituent elements" of critical habitat as "those that are essential to the conservation of the species" including, but not limited to, "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

Thus, in issuing section 10 permits, the Services must ensure that the constituent elements of critical habitat will not be altered or destroyed by proposed activities to the extent that the survival and recovery of affected species would be appreciably reduced. However, these section 7 obligations typically impose few restrictions on the HCP applicant in addition to those required by section 10, because the section 10 issuance criteria also prohibit appreciably reducing the "likelihood of the survival and recovery of the species in the wild" [section 10(a)(2)(B)]. In other words, the inherent biological value of areas designated as critical habitat typically would prevent significantly greater alteration of their constituent habitat elements under section 10 than would be permissible under section 7. Nevertheless, to the extent that a proposed HCP might result in impacts to critical habitat, such impacts should be described and evaluated in the biological opinion concluding section 7 consultation on the permit application.

Some HCPs encompass areas that have been or have the potential to be designated as critical habitat. To fulfill the Service's section 7 compliance responsibilities, all HCPs must be

reviewed to determine whether they are likely to jeopardize the continued existence of the species or cause adverse modification to designated critical habitat. The Services will provide technical assistance and work closely with the applicant throughout the development of the HCP to reduce the probability of developing an HCP that would not meet these criteria.

It is possible to approve an HCP that authorizes land use or development activities within an area designated as critical habitat. The activities approved under an HCP could include a variety of land or natural resource use activities that modify critical habitat on a large scale without the activities being deemed an adverse modification contrary to the requirements of section 7(a)(2). The authorization of activities in critical habitat through the HCP process is possible because the adverse modification of critical habitat is analyzed by determining the effects on the entire area designated as critical habitat or an administrative part or unit of the critical habitat, not on a smaller scale of particular individual acres. In addition, the HCP permittee must minimize and mitigate for any effects caused by the authorized activity, which would offset or reduce the significance of adverse effects to the critical habitat. Thus, the overall net affect of authorized land use activities for a particular HCP can be brought within the range of effects which is allowable under section 7.

3. Mitigation Programs & Standards.

Mitigation programs under HCPs and section 10 permits are as varied as the projects they address. Consequently, this handbook does not establish specific "rules" for developing mitigation programs that would limit the creative potential inherent in any good HCP effort. On the other hand, the standards used in developing HCPs must be adequate and consistent regardless of which Service office happens to work with a permit applicant. Mitigation programs should be based on sound biological rationale; they should also be practicable and commensurate with the impacts they address. This section sets forth some fundamental standards for mitigation programs and suggests some broad mitigation strategies, but leaves the development of specific programs to individual applicants and Service personnel.

Mitigation actions under HCPs usually take one of the following forms: (1) avoiding the impact (to the extent practicable); (2) minimizing the impact; (3) rectifying the impact; (4) reducing or eliminating the impact over time; or (5) compensating for the impact. For example, project effects can be (1) avoided by relocating project facilities within the project area; (2) minimized through timing restrictions and buffer zones; (3) rectified by restoration and revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management, monitoring, and adaptive management; and (5) compensated by habitat restoration or protection at an onsite or offsite location. In practice, HCPs often use several of these strategies simultaneously or consecutively. Other types of mitigation not mentioned may also be used.

a. Regulatory Standards & Relationship to Recovery.

Issuance criteria under section 10 of the ESA require that the HCP applicant "minimize and mitigate" the impacts of any incidental taking authorized by a section 10 permit, and that issuance of the permit not "appreciably reduce the likelihood of the survival and recovery of the species in the wild" (see Chapter 7). Section 7(a)(2) of the ESA requires that issuance of a permit does not "jeopardize the continued existence of" any federally listed species, or result in "destruction or adverse modification" of designated critical habitat. The implementing regulations of section 7 define "jeopardize" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of that species"--this is essentially identical to the section 10 issuance criterion cited above. Section 7(a)(2) also requires use of "the best scientific and commercial data available" in fulfilling its provisions. No other specific mitigation standards for HCPs are specified under the ESA.

Issuance of a section 10 permit must not "appreciably reduce" the likelihood of the survival and recovery of the species in the wild. Note that this does not explicitly require an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan. This reflects the fact that HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools.

However, recovery is nevertheless an important consideration in any HCP effort. This is because, some HCPs may encompass all or much of a species' range and address crucial biological issues; because of the inherent biological significance of such planning areas, a poorly designed HCP could readily trigger the "appreciably reduce" or "jeopardize" standard. Second, many HCPs, even smaller ones, can be said to contribute to recovery to the extent that individually or collectively they provide for dependable conservation actions and long-term biological protections. Thus, contribution to recovery is often an integral product of an HCP, but it is not an explicit statutory requirement.

To put this in practical terms, applicants should be encouraged to develop HCPs that produce a net positive effect for the species or contribute to recovery plan objectives. The Services should also assess the extent to which an HCP's mitigation program is consistent with recovery plans. In general, conservation plans that are not consistent with recovery plan objectives should be discouraged.

Similarly, HCPs that might preclude a significant recovery option, unless they otherwise contribute substantially to the goal of recovery should also be discouraged. In cases where a recovery plan is not available, the Services must use other available biological information and its best judgement to encourage the development of HCPs that would aid in a species' recovery.

b. Must An HCP Benefit the Species?

Whether or not an HCP must benefit a species is similar to its relationship to recovery objectives. No explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species. However, just as they can contribute to recovery, HCPs can also benefit the species they address because of the conservation programs they establish and the long-term assurances they provide. This is especially true of regional and other large-scale HCPs that address all or much of a species' range. Wherever feasible, the FWS and NMFS should encourage HCPs that result in a "net benefit" to the species.

c. Mitigation for Habitat Loss.

Activities conducted under HCPs frequently involve permanent habitat losses (or temporary habitat disturbances), for which the permittee mitigates by acquiring or otherwise protecting replacement habitat at an onsite or offsite location. Commonly referred to as "habitat mitigation," this strategy is acceptable under the HCP process so long as such mitigated habitat losses are consistent with the section 10 issuance criteria.

One form of habitat mitigation is the "habitat bank" approach, in which habitats are "banked" (protected through conservation easement or other means) prior to a project. These lands are then utilized as needed for mitigation purposes. A variation on this scheme is the "mitigation credit" system--in which "banked" habitats are established as "credits" (usually on a per-acre basis), and the habitat banker then uses the credits as needed or sells them to other parties requiring mitigation lands at a fair market price. The latter system has considerable promise as a mitigation strategy because: (1) it allows owners of endangered species habitat to derive economic value from their land as habitat; (2) it allows parties with mitigation obligations to meet their obligations rapidly (mitigation lands are simply purchased as credits); and (3) the mitigation lands are provided prior to the impact (eliminating uncertainty about whether a permittee might fail to fulfill the HCP's obligations after the impact has occurred). Still another approach is the "mitigation fund," in which a permittee pays a cash amount as determined by the HCP into an account administered by a suitable entity, and where other such contributions are pooled into a habitat acquisition fund.

The type of mitigation habitat and its proximity to the area of impact will need to be considered. Generally, the location of replacement habitats should be as close as possible to the area of impact; it must also include similar habitat types and support the same species affected by the HCP. However, there may be good reason to accept mitigation lands that are distant from the impact area--e.g., if a large habitat block as opposed to fragmented blocks can be protected or if the mitigation lands are obtained through a mitigation fund. Ultimately, the location of mitigation habitat must be based on individual circumstances and good judgement.

Potential types of habitat mitigation include, but are not limited to: (1) acquisition

of existing habitat; (2) protection of existing habitat through conservation easements or other legal instruments; (3) enhancement or restoration of disturbed or former habitats; (4) prescriptive management of habitats to achieve specific biological characteristics; and (5) creation of new habitats. Here again, the specific strategy or combination of strategies used will depend on the species and type of habitat involved. In some cases, acquisition of high-quality existing habitat will be the best approach--for example, where the habitat type takes years to develop (e.g., old-growth forest). However, if such habitat is continually being lost, a strategy based on this method alone could result in net loss of habitat value. In other cases, restoring degraded habitat or creating new ones is the best strategy--for example, where the habitat type is relatively easy to manipulate (e.g., grasslands). Where affected species depend on natural disturbance regimes that can be replicated through management regimes (e.g., prescribed fire or flooding), prescriptive management may be preferable to habitat acquisition or protection alone.

Certain caveats may apply to these strategies, however. For example, when a mitigation program involves creation of new habitat or restoration of degraded habitats, HCP participants should ensure that techniques used are proven and reliable or, if relatively new, that contingency measures or adaptive management procedures are included to correct for failures.

Sometimes, the HCP applicant may need to conduct activities prior to the time when replacement habitats can be provided. This is acceptable so long as the HCP provides legal or financial assurances that the permittee will fulfill the HCP's obligations. One way to accomplish this is through Letters of Credit controlled by the government until the mitigation lands have been provided. Another method is requiring a specified cash payment into a mitigation fund prior to commencement of HCP activities. However, such payments alone are not regarded as acceptable mitigation. Unless the fund is ultimately used and habitat is otherwise acquired. Mitigation funds have often been used in regional HCPs in which the responsible party for habitat mitigation under the HCP is a state or local government agency. Other examples are mitigation funds or other well-established mitigation programs utilized by small-landowners [see below, Section B.3(d)]. In such cases, the responsibilities of individual contributors may end with the payment, and any additional performance requirement would either be waived or would belong to the permitted agency.

One common issue raised during HCP negotiations is how long mitigation lands must be conserved. When habitat losses permitted under an HCP are permanent, protection of mitigation lands normally should also be permanent (i.e., "in perpetuity"). Mitigation for temporary habitat disturbances can be treated more flexibly; however, management logistics and other considerations may still dictate permanent mitigation for temporary impacts, though typically at a lesser rate than for permanent ones.

d. Funding Recovery Measures as Mitigation.

Another issue in cases where habitat is lost during HCP activities is whether funds contributed for purposes other than habitat acquisition or protection--e.g., species research--can serve as habitat mitigation. First and foremost, mitigation should address compensate for habitat lost through the permitted activities of the HCP by establishing suitable habitat for the species that will be held in perpetuity, if possible. For example, the mitigation requirement for low-effect HCPs that have a negligible effect on habitat could be to enhance existing habitat so that it meets the species' requirements. Generally, research is not considered a preferred mitigation strategy, since the type of mitigation is usually related directly to the type of effect.

It is acceptable in some cases for funding to be provided to State or Federal agencies to implement recovery actions within critical habitat, to restore degraded habitat, to address anthropogenic influences, and for conservation actions on larger, more secure populations of the affected species on public lands. In some cases, matching Federal/private funding has been developed under HCPs for such purposes.

e. Mitigation for Small-Scale, Low-Effect Projects.

It is important that methods be established by state and Federal wildlife agencies and other organizations that allow proponents of small projects or small-scale land use proposals to participate in larger HCPs, or that make convenient mitigation strategies accessible to low-effect HCPs. For example, it is often difficult for an individual to locate and acquire a few acres of mitigation habitat, since lands are usually sold by the lot or in large segments. A good way to accommodate this problem is to establish mitigation fund accounts that accumulate funds until relatively large-scale acquisitions can be effected [see above, Section B.3(c)]. Habitat banks are another good way to handle this situation. Avoid requiring permittees to meet habitat mitigation requirements without a practical, accessible means of meeting that requirement. In general, flexibility is needed in addressing the unique circumstances often associated with small landowners and small-scale, low-effect HCPs.

f. Consistency in Mitigation Standards.

Mitigation measures required by individual FWS or NMFS offices should be as consistent as possible for the same species. This can be challenging when a species encompasses multiple offices or regions, but is essential. The first step is good communication between offices. The next is establishment of specific standards--e.g., for survey methods, buffer zones, or mitigation methods--and consistent implementation of those standards. Field Offices should coordinate these standards between biologists in the same office; Regional Offices should ensure consistency among Field Offices. Mitigation standards should also be developed in coordination with state wildlife agencies. The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained. Consistent mitigation strategies help streamline the

HCP development process--especially for smaller HCPs--by providing readily available standards which applicants can adopt in their HCPs.

g. Adaptive Management.

The Services often incorporate adaptive management concepts into the HCP process to minimize the uncertainty associated with listed or unlisted species where there are gaps in the scientific information or their biological requirements. Over the years, there has been an increase in the diversity and geographical size of HCPs. As of late 1995, most HCPs approved were for planning areas of less than 1,000 acres. However, of the 200 HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process developed primarily to address single developments to broad-based, landscape level planning tools utilized to achieve long-term conservation goals for listed and unlisted species, while allowing applicants to proceed with their land use and development.

For some species, not all of the scientific information needed to develop comprehensive long-term conservation strategies to conserve species may be available at the time of HCP development. Where these data gaps occur, not all of the questions regarding the long-term effects of implementing these HCPs can be answered. When significant uncertainty exists, it can be addressed through the incorporation and implementation of adaptive management measures into HCPs. For those HCPs with significant uncertainty, incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species. For example, an applicant's commitment to conduct watershed analyses (scientifically examining the conditions within watersheds and making site-specific recommendations) and then adjusting management strategies based on the results of the analyses for part or all of their lands is one form of adaptive management that has been applied to HCPs in the Pacific Northwest.

Through adaptive management, the biological objectives (or goals) of a conservation strategy 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 mitigation is needed to achieve a biological objective, then an adaptive management approach can be used in the HCP. The primary reason for using adaptive management in HCPs is to allow for changes in the mitigation strategies that may be necessary to reach the long-term goals (or biological objectives) of the HCP, and to ensure the likelihood of survival and recovery of the species in the wild. Under adaptive management, the mitigation activities of the HCP could be monitored and analyzed to determine if they are producing the required results (e.g., properly functioning riparian habitats). If the desired results were not being achieved, then adjustments in the mitigation strategy could be considered through an adaptive management clause of the HCP.

Research can fill data gaps and/or test the effectiveness of management and mitigation strategies, which can then be modified as new information is obtained. Adaptive management, if used, can provide a reliable means for assessing the mitigation and minimizing strategies outlined in HCPs, producing better ecological knowledge, and developing appropriate modifications that would improve the mitigation strategy for a species.

The base mitigation strategy or initial minimization and mitigation measures which are implemented must be sufficiently vigorous so that the Service may reasonably believe that they will be successful. An adaptive management approach is particularly useful when significant questions remain regarding an HCP's initial mitigation strategy. The Services should not approve an HCP using conservation strategies that have a low likelihood of success.

Monitoring is an important tool in an adaptive management approach and should be designed in a way that ensures data will be properly collected, analyzed, and used to adjust mitigation strategies, as appropriate. A key element of adaptive management is the establishment of testable hypotheses linked to the conservation strategies and their biological objectives. If monitoring determines that biological conditions are outside specific parameters or thresholds, which are defined in the HCP, the conservation strategies should be reviewed. The "thresholds" for review should be linked to key elements of the HCP and should be obtainable through monitoring data collected during the implementation of the HCP. These "threshold" levels should be clearly defined in the HCP and should be based upon measurable criteria, and monitoring should be clearly linked to those measurable criteria. The establishment of measurable criteria would dictate the type of monitoring including the number of samples, distribution of samples, and use of controls.

Prior to the issuance of a permit, there should be a clear understanding and agreement between the Services and the permittee as to the mitigation range of adjustments which might be required as a result of any adaptive management provisions. A mechanism for determining the magnitude of strategy change to be employed, based upon the results of the monitoring and the level of deviation significance from the desired condition, should be developed in advance so all parties are clear in this regard and can react at the appropriate time.

Corrective actions to any of the conservation strategies in the HCP should be based on significant "non-achievement" of the HCP's base mitigation. This does not preclude the Services from working with the applicant to develop a strategy to compensate for external factors (e.g., catastrophic fires) or requesting the applicant to voluntarily increase the base mitigation strategy because of these external factors.

4. Monitoring Measures.

The section 10 regulations require that an HCP specify the measures the applicant will take to "monitor" the impacts of the taking resulting from project actions [50 CFR 17.22(b)(1)(iii)(B) and 50 CFR 222.22(b)(5)(iii)]. Monitoring measures described in the HCP should be as specific as possible and be commensurate with the project's scope and the severity of its effects.

For regional and other large-scale HCPs, monitoring programs should include periodic accountings of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements (e.g., habitat acres acquired). Monitoring plans for HCPs should establish target milestones, to the extent practicable, or requirements throughout the life of the HCP, and where appropriate, adaptive management options (see Chapter 3, Section B.3(g)).

The following steps are logical elements for consideration in developing HCP monitoring programs for regional or other large-scale HCPs:

- o Develop objectives for the monitoring program. Any monitoring program associated with HCPs should answer specific questions or lead to specific conclusions. If the objectives are well-developed, they will help shape a complete monitoring program.
- o Describe the subject of the monitoring program--e.g., effects on populations of affected species, effects on the habitat of the species, or effects on both.
- o Describe variables to be measured and how the data will be collected. Make sure these are consistent with the objectives of the monitoring program.
- o Detail the frequency, timing, and duration of sampling for the variables. Determining how frequently and how long to collect data is important to the success or failure of the monitoring program. If the interval between samples is too long or too short, the monitoring program may not detect an effect. The frequency, timing, and duration of the sampling regimen should also relate to the type of action being evaluated, the species affected by the action, and the response of the species to the effects produced by the action.
- o Describe how data are to be analyzed and who will conduct the analyses. A monitoring program is more effective when analytical methods are integrated into the design. For example, parametric and non-parametric statistical analyses require different sample sizes, which affect the frequency, timing, and duration of sampling.

- o Monitoring must be sufficient to detect trends in species populations in the plan area but should be as economical as possible. Avoid costly monitoring schemes that divert funds away from other important HCP programs, such as mitigation.
- o Monitoring programs can be carried out by a mutually-identified party other than the permittee, so long as this is specified in the HCP, funding is provided, and the party is qualified.

The FWS and NMFS also have a responsibility to monitor the implementation and success of HCPs. The Services may agree to specific monitoring responsibilities under the HCP, Implementing Agreement, or as part of the incidental take statement issued in conjunction with the section 7 biological opinion. Even if not specified in this manner, the agency still has the responsibility to monitor compliance with the terms of particular HCPs, including any adaptive management commitments incorporated into the HCP, and the section 10 program generally. One way to achieve this is to ensure that requirements for monitoring and status reports are included in HCPs where needed and by ensuring that such reports are submitted by permittees and reviewed by FWS or NMFS staff.

For regional HCPs, another way is to establish technical review teams to periodically evaluate HCP compliance and the success of adaptive management programs. Such teams could include species experts and representatives of the permittee, FWS, NMFS, and other affected public agencies. To maintain the credibility of the HCP, it may be beneficial to submit the technical team's findings to occasional review by recognized experts in pertinent fields (e.g., conservation biologists, re-vegetation specialists, etc.).

Not all of the above steps are necessary for small-scale, low-effect HCPs, and should only be used as appropriate.

5. Unforeseen Circumstances/Extraordinary Circumstances.

Congress recognized in the section 10 amendments that "...circumstances and information may change over time and that the original 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." (H.R. Rep. No. 97-835, 97th Congress, Second Session). Accordingly, Federal regulation requires such procedures to be detailed in the HCP [50 CFR 17.22(b)(1)(iii)(C)]. At the same time the legislative history states that:

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." (H.R. Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691.)

This Congressional history illustrates the potential tension between two primary goals of the HCP program: (1) adequately minimizing and mitigating for the incidental take of listed species, and (2) providing regulatory assurances to section 10 permittees that the terms of an approved HCP will not change over time, or that necessary changes will be minimized to the extent possible, and will be agreed to by the applicant. How to reconcile these objectives remains one of the central challenges of the HCP program.

"Unforeseen circumstances," also referred to as "extraordinary circumstances," in the past have been broadly defined to include a variety of changing circumstances that may occur over the life of an ongoing HCP. However, it is important to distinguish between the terms "unforeseen circumstances," or "extraordinary circumstances," versus "changed circumstances." "Changed circumstances" are not uncommon during the course of an HCP and can reasonably be anticipated and planned for (e.g., the listing of new species, modifications in the project or activity as described in the original HCP, or modifications in the HCP's monitoring program). "Unforeseen circumstances" or "extraordinary circumstances" however, means changes in circumstances surrounding an HCP that were not or could not be anticipated by HCP participants and the Services, that result in a substantial and adverse change in the status of a covered species.

With respect to anticipated and possible changed circumstances, the HCP should discuss measures developed by the applicant and the Services to meet such changes over time, possibly by incorporating adaptive management measures for covered species in the HCP. HCP planners should identify potential problems in advance and identify specific strategies or protocols in the HCP for dealing with them, so that adjustments can be made as necessary without having to amend the HCP.

The "Unforeseen/Extraordinary Circumstances" section of the HCP should be more limited. It should discuss how those changes in the circumstances surrounding the HCP that cannot effectively be anticipated by HCP negotiators will be dealt with in the future. It must also be consistent with the Department of Interior's and Department of Commerce's "No Surprises" policy.

a. The "No Surprises" Policy.

To address the problem of maintaining regulatory assurances and providing regulatory certainty in exchange for conservation commitments, the Department of the Interior (DOI) and Department of Commerce (DOC) have jointly established a "No Surprises" policy for HCPs.

The "No Surprises" policy sets forth a clear commitment by the FWS, NMFS, DOI, and DOC that, to the extent consistent with the requirements of the Endangered Species Act and other Federal laws, the government will honor its agreements under an approved HCP for which the permittee is in good faith implementing the HCP's terms and conditions. The specific nature of these provisions will vary among HCPs depending upon individual habitat and species needs.

The "No Surprises" policy provides certainty for private landowners in ESA Habitat Conservation Planning through the following assurances:

- o In negotiating "unforeseen circumstances" provisions for HCPs, the Fish and Wildlife Service and National Marine Fisheries Service shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS and NMFS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstances.

This means that if unforeseen circumstances occur during the life of an HCP, the FWS and NMFS will not require additional lands, additional funds, or additional restrictions on lands or other natural resources released for development or use, from any permittee, who in good faith, is adequately implementing or has implemented an approved HCP. Once a permit has been issued and its terms are being complied with, the permittee may remain secure regarding the agreed upon cost of mitigation, because no additional mitigation land, funding, or land use restrictions will be requested by the Services. The policy also protects the permittee from any other forms of additional mitigation, except where extraordinary circumstance exist.

Other methods of responding to the needs of the affected species, such as government action and voluntary conservation measures by the permittee, remain available to assure the requirements of the ESA are satisfied.

Consequently, the "No Surprises" policy also provides that:

- o If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the obligation for such measures shall not rest with the HCP permittee.

This means that in cases where the status of a species addressed under an HCP worsens, the primary obligation for implementing additional conservation measures would be borne by the Federal government, other governmental agencies, private conservation organizations, or other private landowners who have not yet developed an HCP.

"Adequately covered" for listed species refers to any species addressed in an HCP which has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For unlisted species, the term refers to any species which is addressed in an HCP as if it were listed pursuant to section 4 of the ESA, and in which HCP conditions for that species would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were listed. "No Surprises" assurances apply only to species that are adequately covered in the HCP. Species should not be included in the HCP permit if data gaps or insufficient information makes it impossible to craft conservation/mitigation measures for them. Such data gaps can be overcome, however, through the inclusion of adaptive management clauses in the HCP (See Chapter 3, Section 3.B(g)).

- o If extraordinary circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation shall maintain the original terms of the HCP to the maximum extent possible. Further, any such changes shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee.

This means that if extraordinary circumstances are found to exist, the Services will consider additional mitigation measures; however, such measures must be as close as possible to the terms of the original HCP and must be limited to modifications within Conserved Habitat areas or the HCP's operating conservation program or to lands that are already protected by the HCP. New mitigation measures should not include requirements for additional land protection, payment of funds, or apply to lands 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 limiting such changes to plan areas explicitly designated for habitat protection or other conservation uses, or redirecting or increasing the intensity, range, or effectiveness of conservation efforts in such areas, provided that any such changes do not impose new restrictions or financial compensation on the permittee's activities. For example, if a developer had agreed to dedicate a certain amount of funding annually in support of a particular conservation program (e.g., habitat restoration) but subsequent research demonstrated that greater conservation benefits could be achieved by redirecting funding into depredation control, and extraordinary circumstances warranted such a shift, the No Surprises policy would allow the modification since it would impose no new funding burden on the permittee.

The policy also sets out criteria for determining whether and when extraordinary circumstances arise where the government could request review of certain aspects of the HCP's conservation program.

- o The FWS and NMFS shall have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. Their findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.
- o In deciding whether any extraordinary circumstances exist which might warrant requiring additional mitigation from an HCP permittee, FWS and NMFS shall consider, but not be limited to, the following factors: (a) size of the current range of affected species; (b) percentage of range adversely affected by the HCP; (c) percentage of range conserved by the HCP; (d) ecological significance of that portion of the range affected by the HCP; (e) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP; (f) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (g) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

The first of these two measures, on the burden of proof, is self-explanatory. The second identifies some factors to be considered by the Services in determining whether extraordinary circumstances exist. Generally, the primary focus of inquiry would be level of biological peril to species covered by the HCP in question, and the degree to which the welfare of those species is tied to a particular HCP. For example, if the species is declining rapidly, and the HCP in question encompasses an ecologically insignificant portion of the species' range, then extraordinary circumstances typically would not exist. Conversely, if the HCP in such circumstances encompasses a majority of the species' range, then extraordinary circumstances justifiably could be said to exist.

- o The FWS and NMFS shall not seek additional mitigation for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the HCP which have been or are being met.

This provision means that the Services will not attempt to impose additional mitigation measures of any type where and HCP was intentionally designed to have a net positive impact upon a species. It is intended to encourage HCP applicants to develop HCPs that provide an overall net benefit to affected species. It does not mean that any HCP must in

fact have already achieved a net benefit before the "No Surprises" policy applies. Rather, the achievement of such benefits should be measured through a clearly articulated set of biological goals and an adequate monitoring program for measuring progress for achieving those goals.

"Properly functioning HCP" means any HCP whose provisions have been or are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit.

- o Nothing in this policy shall be construed to 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 an HCP.

This means the Services can intercede on behalf of a species at their own expense at any time and be consistent with the assurances provided the permittee under this policy and the permit. Neither is there anything in the "No Surprises" policy that prevents the Services from requesting a permittee to voluntarily undertake additional mitigation on behalf of affected species, though of course the permittee is under no obligation to comply.

FWS and NMFS have a wide array of authorities and resources that can be utilized to provide additional protection for threatened or endangered species included in an HCP. Therefore, in meeting their commitment under the "No Surprises" policy (consistent with their obligations under the ESA), it is extremely unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress. In such an unlikely event, such actions would necessarily be subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated by the Congress.

Sample language for including "No Surprises" assurances in the HCP or Implementing Agreements is provided in Sections 8.4 and 13.3(a) of the "template" Implementing Agreement in Appendix 4.

b. HCP Amendments.

Amendment of a section 10(a)(1)(B) permit is 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, addition of a species to the permit that was not addressed in the original HCP, or adjustments to the HCP necessitated by unforeseen circumstances. A permit amendment consists of the same process as the original permit application, requiring an amendment to the HCP addressing the new circumstance(s), a Federal Register notice, NEPA compliance, and an intra-Service section 7 consultation.

Some amendments to an HCP commonly needed over the life of a permit are minor and can be incorporated in a more expedited fashion. These types of amendments include corrections in land ownership; minor revisions to survey, monitoring, or reporting protocols; and minor changes in reserve boundaries that result in no net loss of reserve land or do not otherwise alter the effectiveness of the HCP. They can be incorporated into the HCP in one of two ways.

First, the HCP and permit can be formally amended just as with more significant changes. However, documentation requirements are often less for a permit amendment than for the original permit application. For example, the NEPA analysis for the amendment can be tiered off the NEPA analysis for the original permit (40 CFR 1502.20), or the original NEPA analysis can be incorporated by reference into the amendment's supporting documents (50 CFR 1502.21). Also, where an original permit application required an EIS, the amendment application might require an EA only. Where appropriate, a permit amendment can also be treated as a low-effect HCP, which is categorically excluded from NEPA [see Chapter 1, Section F.2].

The HCP can also be amended administratively without formal amendment of the permit itself. This type of expedited amendment procedure is encouraged, but only when: (1) the amendment has the unanimous consent of the permittee and FWS or NMFS; (2) the original HCP established specific procedures for incorporating minor amendments so that the public had an opportunity to comment on the process, and such amendments are consistent with those procedures; (3) the HCP defines what types of amendments are considered minor; (4) a written record of any such amendments is prepared; and (5) the net effect on the species involved and level of take resulting from the amendment is not significantly different than analyzed under the original HCP and the Service's decision documents.

It is important to distinguish between amendments to the HCP and amendments to the permit itself. Changed circumstances might require an amendment to both, but an amendment to either the HCP or the permit without an associated amendment to the other is possible. Minor changes in the HCP can be completed administratively without amending the permit. Similarly, amendment to the permit without a change in the HCP can also occur--for example, when an unlisted species that was addressed in the HCP is subsequently listed and is added to the permit, though permit amendments in such cases are not always necessary. Chapter 4 describes the procedures for addressing unlisted species in section 10 permits. Chapter 6, Section G contains further discussion about permit amendments generally.

6. Funding.

The ESA requires that the HCP detail the funding that will be made available to implement the proposed mitigation program. Measures requiring funding in an HCP typically include onsite measures during project implementation or construction (e.g., pre-construction surveys, biological monitors, exclusion fences, etc.), as well as onsite and offsite measures

required after completion of the project or activity (e.g., revegetation of disturbed areas and acquisition of mitigation lands). Large-scale, regional HCPs should require funds for long-term needs such as biological monitoring and habitat acquisition programs. Some will even require perpetual funding mechanisms to support long-term management of mitigation lands or for monitoring. For low-effect HCPs with minor impacts, funding needs may be limited to activities such as pre-construction, post-construction, habitat restoration, or surveys and payment into a mitigation fund; longer-term funding measures typically are not needed.

For relatively small- to medium-sized projects involving only one or two applicants, the funding source is usually the permittee and funding is provided immediately before project activities commence, immediately after, or in stages. However, when habitat modification or other take occurs before mitigation measures (e.g., acquisition of mitigation lands) are implemented, completion of the mitigation requirements should be ensured through a Letter of Credit or other means [see above, Section B.3].

Funding of regional HCPs can be more complicated because they generally cover large areas, many activities, and require significant budgets. Consequently, regional HCPs usually are funded jointly rather than by any single contributor. Funding strategies for regional HCPs can include: (1) development fees paid on a per-acre (or other) basis; (2) other types of mitigation fees (e.g., water surcharges, fees targeted to specific activities or industries); (3) funds contributed by non-profit or private interests; (4) state or Federal funds; (5) assessment districts under state law or county ordinance; and (6) tax check-off programs.

Because of their size and scope, regional HCPs often face two funding challenges--the costs of developing and implementing the HCP. Funding problems for these HCPs can be especially difficult during the HCP development phase, which typically occurs before funding mechanisms for the completed HCP are in place. Where appropriate, FWS and NMFS personnel should assist local governments in seeking out HCP funding assistance. However, the demand for such funds is likely to grow and the availability of funds to be limited; consequently, guarantees cannot be provided to any particular HCP applicant that funding would be available. Consistent with the requirements of the Anti-Deficiency Act, any commitment of Federal funding is always subject to the availability of appropriated funds.

When perpetual funding is needed, the HCP must establish programs or mechanisms to generate such funds. One way of achieving this is through payment of development fees by the applicant or other affected parties into an interest-bearing bank account, from which the interest, not the principal, is used to fund the program. The HCP should detail fund collection and management mechanisms for this purpose, as well as remedies for failure to meet funding obligations by signatory members. The IA must always contain a provision stating that any Federal funding is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds.

Whatever the proposed funding mechanism is, failure to demonstrate the requisite level of funding prior to permit approval or to meet funding obligations after the permit is issued are grounds for denying a permit application or revoking or suspending an existing permit, respectively.

In some cases, conservation funds may be transferred to a government agency to be utilized in furthering the purposes of the HCP. FWS or NMFS can accept contributed funds for mitigation purposes, monitoring, research, permit administration, and other activities. However, because of Federal procedural requirements in administering such funds and the potential for an appearance of a conflict of interests, the FWS Administrative Services Division and Department of the Interior Solicitor's Office (or equivalent office for NMFS) should be consulted before agreeing to any such mechanism.

7. Alternatives Analyzed.

Some applicants find this a difficult element of the HCP because they are uncertain about which or how many alternatives to consider. In some cases, the HCP process may not be initiated until the applicant has planned the project, only to discover that endangered species are present on the project site and an incidental take permit is needed.

The Act requires a description of "alternative actions to such taking." Thus two alternatives commonly included in the "Alternatives Analyzed" section of the HCP are: (1) any specific alternative, whether considered before or after the HCP process was begun, that would reduce such take below levels anticipated for the project proposal; and (2) a "no action" alternative, which means that no permit would be issued and take would be avoided or that the project would not be constructed or implemented. For low-effect HCPs in which the project or impact on endangered or threatened species is minor or negligible, a "no action" alternative alone may suffice.

For some HCPs, several alternatives may have been considered during project development. Each should be discussed in the "Alternatives Analyzed" section; or, where they are too numerous, the principal ones should be discussed. The applicant also must explain in this section why these alternatives were not adopted. If the applicant ultimately selects an alternative that the FWS or NMFS agrees will not result in take, no section 10 permit or NEPA compliance is needed. Chapter 3, Section B.7 explains how the alternatives analysis requirements under section 10 and NEPA compare.

Permit applicants commonly ask whether economic considerations can be cited as a reason for rejecting project alternatives. Such considerations are permissible, especially when the effects on the applicant would be significantly adverse or economically infeasible. However, if economic considerations are the basis for rejecting alternatives, data supporting this decision must be provided to the extent that it is reasonably available and non-proprietary. While applicants may be hesitant to provide such information, it can be important in making

the required finding that the HCP represent minimization and mitigation to the maximum extent practicable.

Neither the FWS nor NMFS have the authority to impose a choice among the alternatives analyzed in the HCP. The Services' role during the HCP development phase is to advise the applicant in developing an acceptable HCP, and, when necessary to try to dissuade the applicant from selecting alternatives not consistent with permit issuance criteria. Nevertheless, if the applicant proceeds with such an alternative, recognizing the increased chance of denial of the permit, the Services must process the application and provide an opportunity for Federal Register notice and public comment (see Chapter 6, Section D).

8. Additional Measures - Implementing Agreements.

Whether or not an Implementing Agreement should be prepared for a given HCP will depend on the size and scope of the HCP and the wishes of either the Services or the applicant. Implementing agreements are not required for low-effect HCPs, and should be done only when one is requested by the permit applicant. In other HCPs, the development of the IA is left to the discretion of the Regional Director. Implementing Agreements are recommended for regional or other large-scale HCPs that address significant portions of a species range or involve numerous activities or landowners, for HCPs with long-term mitigation and monitoring programs, or where habitat protection programs are complicated or have other special features.

Section 10(a)(2)(B) of the ESA--which describes issuance criteria for incidental take permits--authorizes the Services to obtain "such other assurances as [they] may require that the plan will be implemented." This provision allows the Services broad latitude to require measures as necessary to accommodate the wide variety of circumstances often encountered in HCPs.

Implementing Agreements can help assure the government that the applicant will implement the mitigation program and other conditions of the HCP, while assuring the applicant that agreed upon procedures will be followed for any changes in the conditions of the permit or the conservation measures for species addressed in the HCP. Although the Services and permit applicant possess these rights and responsibilities under the permit, both sides may prefer the additional specificity of an Implementing Agreement because the Agreement is tailored for the HCP in question, can be more detailed than the permit conditions, and is signed by all parties, thus providing the explicit consent of each party to abide by the terms of the HCP.

Implementing Agreements can also strengthen a Finding of No Significant Impact under NEPA by ensuring implementation of the mitigation program. This can be especially important for "mitigated EAs" [see Chapter 5, Section A.3(a)]. They can also extend responsibilities under an HCP beyond the life of the permit itself (e.g., by requiring perpetual

protection of mitigation lands) and can set out a process for implementing the assurances under the "No Surprises" policy [see above, Section B.5(a)].

Typically, an Implementing Agreement includes one or more of the following elements: (1) defines the obligations, benefits, rights, authorities, liabilities, and privileges of all signatories and other parties to the HCP; (2) assigns responsibility for planning, approving, and implementing specific HCP measures; (3) specifies the responsibilities of the FWS, NMFS, or other state and Federal agencies in implementing or monitoring the HCP's conservation program; (4) provides for specific measures when habitat acquisition, transfer, or other protections are part of the HCP's mitigation program; (5) establishes a process for amendment of the HCP, where necessary; and (6) provides for enforcement of HCP measures and for remedies should any party fail to perform on its obligations under the HCP.

The handbook delegates to the Regional Directors (or, where appropriate, the NMFS Director, Office of Protected Resources in Washington, D.C.) the discretion to decide if HCP Implementing Agreements are beneficial on a case-by-case basis. IAs are not done for low-effect HCPs unless requested by the applicant. Each Regional Director or the NMFS Office of Protected Resources Director shall determine the circumstances under which Implementing Agreements may be required for HCPs under his or her respective jurisdiction.

Chapter 6, Section B.2(g) provides further information about developing and processing Implementing Agreements. Appendix 4 contains a "template" Implementing Agreement that can be used to develop Agreements for individual projects. The template is intended to expedite development of Implementing Agreements for HCPs, because it identifies the basics needed for developing Agreements. The template has all necessary legal elements for Agreements for HCPs except project-specific information, which can be filled in as indicated.

C. Alternative HCPs

1. Addressing Species Through Habitat-Based HCPs.

Most of the HCPs that are being developed address the requirements of section 10(a)(2) on a species-by-species basis. A smaller number of HCPs, however, have focused on specific types of habitat rather than on a particular listed species. The rationale for a habitat-based approach is that if certain habitat-types are scientifically selected and assessed, and adequately protected under the terms of the HCP, the HCP could protect a broader range of species than the few "target" species that might otherwise be addressed by a conventional HCP. This approach may address all species within habitat-types within the plan area, or habitat-types in conjunction with a specific list of species that will be covered by the permit.

HCPs developed in conjunction with the Natural Communities Conservation Program in Southern California are examples of habitat-based HCPs. The State of California, under the Natural Community Conservation Planning Act of 1991 (NCCP), has initiated a program to

conserve populations of California native animal and plant species and their habitats in areas large enough to ensure their long-term viability. The initial NCCP effort is focusing on the coastal sage scrub community in southern California for the development of subregional HCPs.

In the habitat-based approach, a particular habitat type within a planning area is selected and then adequately addressed in the HCP, based on criteria agreed to by the Services and the applicant. The Service and the applicant generally use indicator species to set management parameters for the covered habitat in the HCP. A further test must be completed to ensure that the needs of all endemic and sensitive species (listed, proposed, candidate, or species of concern) associated with the covered habitat types are adequately addressed in the HCPs.

An entire list of known covered species (listed and unlisted) adequately addressed in the habitat-based HCP could also be included on a permit. This list may include proposed and candidate species; however, since such species are only subject to State--as opposed to Federal--jurisdiction, there should be a delayed effective date for the permit for such species. That delayed effective date should be the date the affected species is subsequently listed. Including an unlisted species on the permit in this way requires that the Services analyze the effects of the proposed HCP on that species under sections 7 and 10 of the ESA, just as if that species were listed. Under this method, the assurances of the "No Surprises" policy would apply to all covered species associated with the habitat-type as described in the list of species that are adequately covered in the HCP. If an unlisted species, which was adequately covered by the HCP and listed on the permit, is subsequently listed after permit issuance, the HCP permit would not have to be formally amended because all procedural permit requirements for these species were met when the permit was originally issued and the species was included on the permit with the delayed effective date (the subsequent date of listing). However, if an unlisted species associated with a habitat-type adequately covered in the HCP is subsequently listed, and it was not originally included on the permit, the Services would have to formally amend the permit and satisfy all procedural permit amendment requirements before it could authorize incidental take.

Prior to amending the permit, the applicant would have to make sure the species was adequately addressed in the HCP, and the Services would have to conduct independent assessments of the proposed actions under section 7 of the Act, make findings under section 10 of the ESA, and also ensure that the HCP complies with NEPA. Including covered species (listed and unlisted) in the original permit will help eliminate additional work associated with amending the permit, minimize duplication of effort, and minimize the cost associated with developing an HCP.

Habitat-based HCPs are new to the section 10 program and the Service is exploring this approach carefully. Adaptive management clauses (see Chapter 3, Section B.3(g)) may be helpful in defining where data gaps or uncertainty exists and, thus, areas where the Service and the applicant agree future modifications to the HCP may be needed. For further

information about habitat-based HCPs, contact the Washington, D.C. Division of Endangered Species Section 10 Coordinator (FWS) or the Washington, D.C. Office of Protected Resources (NMFS).

2. Programmatic HCPs.

The programmatic HCP is a relatively new concept that has begun to emerge recently in HCPs developed with the FWS. The FWS has begun to develop programmatic HCPs for County and State governments, such as the "state-wide" HCP being developed with the State of Georgia for the red-cockaded woodpecker. The programmatic HCP allows numerous entities to be involved in the HCP through "Certificates of Inclusion" or "Participation Certificates," which convey the take authorization of the official section 10(a)(1)(B) permit to the certificate recipient. A programmatic HCP can be used to address a group of actions as a whole, rather than one at a time in separate HCPs. For example, a programmatic HCP might address a single related action occurring in many different places (e.g., the development of single family houses in the same vicinity or the harvesting of trees in the presence of red-cockaded woodpeckers), or address a group of different actions occurring in the same place. Programmatic HCPs can reduce staff and preparation time, but are appropriate only in certain types of situations.

The central problem in preparing a programmatic HCP is having sufficient information to determine and evaluate effects when the exact number and scope of actions taking place may be uncertain. As a result, programmatic HCPs will be successful only when the activities being addressed are well-defined, similar in nature, and occur within a described geographical area or at similar points in time.

Because this is a relatively new concept, the Service strongly encourages that programmatic HCPs be developed in conjunction with the Regional and Washington Office. In addition, this type of a section 10(a)(1)(B) permit should not be issued to representatives of Federal agencies since section 7 is the correct avenue for dealing with "may effect" situations and possible incidental take by Federal agencies.

NMFS provides for "Certificates of Inclusion" in its regulations (50 CFR 222.22(f)). Certificates are issued by NMFS to any individual who wishes to conduct an activity covered by a general incidental take permit. The general permit can be applied for by any group or organization whose members conduct the same or similar activity and have the same or similar impacts on endangered marine species. For example, a fisheries organization or a state regulatory agency may apply for a general incidental take permit so that "Certificates of Inclusion" would then be required by its members or regulated entities. These groups also may apply for a standard permit. Applicants should discuss the alternatives with NMFS to determine which is the most appropriate.

D. Addressing Migratory Birds and Eagles (FWS Only)

In the past, section 10 applicants faced an additional issue when listed migratory birds or bald eagles occurred in an HCP planning area. The Migratory Bird Treaty Act (MBTA) and Bald and Golden Eagle Protection Act (BGEPA) prohibit the take of migratory birds and bald eagles, respectively. Consequently, questions have arisen as to whether a section 10 permittee remained legally liable for the incidental take of listed species protected by the MBTA and BGEPA, if take of the same species was authorized by an ESA section 10 permit.

This situation has now been clarified. The FWS has concluded that under certain conditions, a section 10 permit for listed migratory birds is sufficient to relieve an HCP permittee from liability under the MBTA and BGEPA for those species covered by the HCP permit. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR § 21.27. For BGEPA, it is accomplished by utilizing the FWS's prosecutorial discretion to state that FWS would not prosecute an incidental take under the BGEPA if such take is in compliance with an ESA section 10 permit. However, the following conditions must be satisfied before either of these protections apply: (1) any species to be so treated with respect to the MBTA and BGEPA must also be listed under the ESA; and (2) the incidental take of any such species must be authorized, subject to applicable terms and conditions, under section 10(a)(1)(B) of the ESA (see Appendix 5). The Service believes that this approach is warranted because the permittee already would have agreed to a package of mitigation measures designed to minimize and mitigate the take of the listed species of migratory birds to the maximum extent practicable.

In qualifying cases, the following language concerning MBTA- and BGEPA-protected species shall be included in the terms and conditions of a section 10 permit when the above conditions have been satisfied:

[For listed species other than the bald eagle] This permit also constitutes a Special Purpose Permit under 50 CFR § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712).

[For the bald eagle] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

E. Coordinating HCPs With National Wildlife Refuges (FWS Only)

National Wildlife Refuges (NWRs) occur nationwide, and HCPs are now being developed in most areas of the country. When planning efforts under these two programs occur in the same geographic vicinity, it creates significant opportunities for joint NWR/HCP habitat protection programs in which the two programs can support and complement each other. However, it also raises important questions regarding the relationship between the two programs--e.g., what are the government's and permittee's respective roles and responsibilities in such joint NWR/HCP efforts, and how should such programs be jointly managed?

The FWS has developed a policy to assist its offices and staff in integrating the NWR and HCP programs. In brief, the policy states that the primary objective of integrating any NWR with an HCP is to increase benefits to the species involved, and that a NWR is not to be established or integrated with an HCP merely to substitute for the mitigation responsibilities of the section 10 permittee. This policy and additional guidance about integrating HCPs with National Wildlife Refuges is provided in Appendix 6.

F. "Safe Harbor" Policy: Linking Safe Harbor Assurances to Habitat Conservation Plans

The "Safe Harbor" approach is a strategy that provides private landowners, who undertake voluntary conservation actions on their lands, assurances that their future land-use activities will not be restricted further as a result of these proactive conservation efforts. If a landowner voluntarily enters into an agreement to manage his or her lands in a manner that attracts endangered or threatened species or otherwise increases their presence, the "Safe Harbor assurances" guarantee no additional regulatory requirements for those lands will be imposed on the landowners as a result of the proactive conservation measures. The purpose of the "Safe Harbor" approach is to reduce the disincentives (e.g., fear of regulatory restrictions) that often cause landowners to avoid or prevent land use practices that would otherwise benefit endangered species.

If it is determined that it is appropriate to link Safe Harbor assurances with HCPs, specific directions for incorporating will be described in a forthcoming final Safe Harbor policy (see Appendix 7). [Note: If the draft Safe Harbor policy has not been published in the Federal Register by the time this guidance is published, Appendix 7 will be reserved for this policy.]

The Services are currently considering whether, and if so, under what circumstances, it may be appropriate to allow a landowner to link a Safe Harbor Agreement to an HCP. The Services intend to submit this issue for further public analysis and comment.

CHAPTER 4 TREATMENT OF UNLISTED SPECIES

Treatment of unlisted species is a crucial issue for HCPs and the section 10 process. One of the most common questions asked by permit applicants is, "What happens if a new species is listed after my section 10 permit has been issued?" Congress considered this issue during the 1982 ESA amendments and clearly intended that the section 10 process would provide for conservation of unlisted and listed species, and protect section 10 permittees from the uncertainties of future species listings:

"Although the conservation plan is keyed to the permit provisions of the Act, which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species...In the event that an unlisted species addressed in the approved conservation plan subsequently is 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." (H.R. Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691.)

A. Addressing Unlisted Species in the HCP

While HCPs are developed for listed species, they can also cover proposed, candidate or other rare or declining unlisted species. The inclusion of proposed, candidate, or unlisted species in an HCP is voluntary and is the decision of the applicant. The Services should explain to any HCP applicant the benefits of addressing unlisted species in the HCP and the risks of not doing so, and should strongly encourage the applicant to include as many proposed and candidate species as can be adequately addressed and covered by the permit. The primary reasons for addressing unlisted species with the listed species are: (1) to provide more planning certainty to the permittee in the face of future species listings; and (2) to increase the biological value of HCPs through comprehensive multi-species or ecosystem planning that provides early, proactive consideration of the needs of unlisted species. When including species other than listed species the applicant must ensure that these species are adequately covered in the HCP. (See the discussion of what it means for a species to be "adequately covered" under an HCP in the "No Surprises" policy section of this handbook and section A.3 of this Chapter).

If an unlisted species that was not addressed in an HCP becomes listed after the permit for that HCP has been issued, and if project activities are likely to result in take of the species, the permittee remains subject to the take prohibitions under section 9 or 4(d) of the ESA for the new species regardless of the fact that a permit is held for other listed species. In such a case, the permittee must either avoid take of the species or revise the existing HCP and

associated documents and obtain a permit amendment to take the newly listed species. This can result in unwanted complications and delays.

However, if the newly-listed species had been adequately addressed in the original HCP--even though it was unlisted--the permittee's situation would be different. Depending on how the unlisted species was treated in the HCP and the permit, the permittee may need to amend the permit only (not the HCP), or may need to take no additional action whatever to be in compliance with the ESA for the new species. Addressing unlisted species in an HCP provides the permittee with regulatory certainty in the event of future species listings, simplifies (or eliminates the need for) the permit amendment process, and provides the unlisted species with conservation benefits before they could be legally required under the ESA.

There are also significant biological advantages. At their best, HCPs can be comprehensive planning documents that address species conservation needs collectively on a community, habitat-type, or even ecosystem level. Increasingly, HCP applicants are turning to these types of planning efforts as an alternative to inefficient, piecemeal approaches to land-use planning, because they believe that in the long run addressing the interests of wildlife serves their interests as well (e.g., by protecting ecosystem health, protecting the natural qualities of their communities, or preventing species declines in the first place), and to increase regulatory certainty and minimize future Federal requirements.

The Services must also explain to the applicant that the primary jurisdiction over unlisted species usually rests with the affected state fish and wildlife agency, and that it is advisable to have the appropriate state agency's participation in the HCP process. This increases the likelihood that the HCP will adequately address both State and Federal mitigation requirements for the affected species in one unified set of mitigation measures, thus providing further regulatory certainty to the applicant.

1. Deciding How to Address Unlisted Species.

Procedurally, there are two possible ways to handle unlisted species: (1) do not address them at all in the HCP; and (2) address them in the HCP and name them on the permit.

With respect to unlisted species that are adequately addressed in the HCP, most applicants prefer to have such species named on the original permit albeit with a delayed effective date tied to the date of any future listing. Others prefer to leave such species off the permit and to amend the permit later if necessary. Either way is acceptable, although, an applicant is well advised to include on the permit unlisted species that are proposed or likely to be listed within the foreseeable future. If the applicant strongly opposes the inclusion of unlisted species covered under the HCP on the permit, then exceptions can be made, but are not recommended. Most applicants would be expected to prefer that all covered unlisted species be included on the permit.

To some extent, the decision whether or not to address unlisted species will be influenced by the likelihood of whether a particular species will be listed in the foreseeable future or otherwise within the life of the permit. Generally, the permit applicant is well advised to address those species most likely to be listed--e.g., species that are proposed for listing, candidate species, and other species for which conservation concerns exist. The decision may also depend on the applicant's objectives in the HCP. If the object is a comprehensive ecosystem-based HCP, the applicant may elect to address unlisted species even if they are not likely candidates for listing. In any case, if the applicant elects not to address unlisted species in the HCP and such species are subsequently listed and could be incidentally taken within the planning area, the permittee may have to substantially amend and supplement the HCP to cover that species to remain in compliance with the requirements of the ESA.

2. Addressing Unlisted Species in the HCP and Permit.

If the permittee has elected to address unlisted species in the HCP and to have them included on the permit with a delayed effective date (the date of future listing), and such species are subsequently listed, the permittee will be in full ESA compliance for those species and no further action by the permittee is required.

In such cases, the name of the unlisted species should appear directly on the permit, even though, technically, they are not protected against take and no Federal permit is needed to incidentally take them at that time. The permit terms and conditions must make clear that the permit does not become effective with respect to unlisted species named on it until they are listed. The following language is suggested:

The permittees, and their designated agents, are authorized to incidentally take (kill, injure, harm, harass) the *[provide species common and scientific names]*, which are listed or may be listed in the future under the Federal Endangered Species Act of 1973, as amended (Act), to the extent that take of these species would otherwise be prohibited under section 9 of the Act, and its implementing regulations, or pursuant to a rule promulgated under section 4(d) of the Act. Such take must be incidental to *[name the type of activity]* as described in the permit application and associated documents and as conditioned herein. This permit is immediately effective for species currently listed under the Act. This permit shall become effective for currently unlisted species named above upon any future listing of these species under the Act.

Compliance with the entire HCP and associated documents is a condition of the permit. Furthermore, if measures described in an HCP for the conservation of unlisted species are not implemented, and the species is subsequently listed, the permittee would be found to be out of compliance with the permit with respect to that species and the incidental take of the species would therefore not be authorized. Consequently, it is in the permittee's best interests to implement conservation measures described in an HCP for unlisted species.

3. Standards for "Covering" Species Under a Permit.

Under the "No Surprises" policy (see Chapter 3, Section B.5(a)) an unlisted species is said to be "adequately covered" by an HCP and subject to the assurances of "No Surprises" when the species is addressed in the HCP "as if it was listed pursuant to section 4 of the ESA, and in which HCP measures for that species would satisfy permit issuance criteria under section 10(a)(1)(B) of the ESA if the species was listed." For purposes of this chapter the term "adequately covered" shall have the same meaning as it does under the "No Surprises" policy. Unlisted species must be "adequately covered" under the original HCP before FWS or NMFS will name (i.e., "cover") such species on a permit or provide assurances that, upon the request of the permittee, a permit will be amended to include such a species upon the listing of such species and compliance with section 7.

B. Challenges in Treating Unlisted Species

Development of HCPs that treat unlisted species as though they were listed constitutes good conservation planning, but it is not without its challenges. One problem in treating unlisted species is similar to the problem of determining the HCP plan area as discussed in Chapter 3, Section B.2(a)--i.e., balancing the need for a comprehensive plan with one that is manageable in size and scope. Here too there are no simple formulae and inclusion of candidate species may be a compromise between these two goals.

Another problem is that biological information on candidate and other unlisted species can be more limited, making it more difficult to determine project impacts, develop suitable mitigation programs, and meet the section 10 issuance criteria. There are several ways this situation can be addressed. The applicant may elect to acquire additional biological information prior to the issuance of the permit. The permittee could also agree to adaptive management provisions designed to adjust management prescriptions or land use practices to reflect enhanced information on an unlisted species. Or, HCP planners can elect to address the species to the extent that information is available, but agree to reduced coverage for that species under the permit in the absence of further study data. Remember that for legal coverage under the permit to apply for unlisted species, the species must be "adequately addressed" in the HCP--i.e., treated as if it was listed and was otherwise able to satisfy the section 10 criteria.

CHAPTER 5

ENVIRONMENTAL ANALYSIS AND DOCUMENTATION

The National Policy Act of 1969 as amended (NEPA), is this country's basic charter for the protection of the environment. It established policies, goals, and a mechanism for reaching these goals. The Council on Environmental Quality (CEQ) regulations implementing the procedural provisions of NEPA (at 40 CFR §§ 1500-1508) require all agencies to analyze the impacts of their proposed actions and to include other agencies and the public in the process.

A. General Information

The goals and mechanisms of NEPA and the ESA, as they relate to incidental take permits and HCPs are similar and functionally compatible in many respects. It is important to recognize the similarities and differences in the requirements and to integrate those requirements in a manner that provides useful information to the decisionmaker and to the public. While some NEPA compliance for proposed HCPs has been well integrated with the HCP process and the HCP documentation, in other cases, NEPA compliance has been treated as a process requiring separate public meetings and separate documentation that in large part is duplicative of work already done. Such practices are neither useful or efficient. The FWS's amended procedures implementing NEPA and this handbook provide important new direction on implementing the requirements of these two environmental statutes.

1. Scope of the NEPA Analysis.

When thinking about the NEPA analysis as it relates to an incidental take permit and an HCP, it is important to be precise about the nature of the underlying action. The purpose of an HCP process is to provide an incidental take permit to the applicant that authorizes the take of federally listed species in the context of a conservation plan. The HCP will specify the impacts that will likely result from the taking, what steps the applicant will take to minimize and mitigate such impacts, what alternative actions are not being utilized and such other measures as may be required by the Services.

The scope of the NEPA analysis therefore covers the direct, indirect, and cumulative effects of the proposed incidental take and the mitigation and minimization measures proposed from implementation of the HCP. The specific scope of the NEPA analysis will vary depending on the nature of the scope of activities described in the HCP. In some cases, the anticipated environmental effects in the NEPA analysis that address the HCP may be confined to effects on endangered species and other wildlife and plants, simply because there are no other important effects. In other cases, the NEPA analysis will focus on the effects of the minimization and mitigation actions on other wildlife and plants and will examine any alternatives or conservation strategies that might not otherwise have been considered. In

other cases, the minimization and mitigation activities proposed in the HCP may affect a wider range of impacts analyzed under NEPA, such as cultural resources or water use. It is important to keep in mind, however, that the NEPA analysis for an HCP should be directed towards analyzing direct, indirect, and cumulative impacts that would be caused by the approval of the HCP, that are reasonably foreseeable, and that are potentially significant.

2. Categorical Exclusions.

CEQ regulations (40 CFR 1508.4) define categorical exclusions as "...a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."

U.S. Fish and Wildlife Service procedures for implementing categorical exclusions are found in the Department of Interior Manual (516 DM 6, Appendix 1; and 516 DM 2, Appendix 1 & 2). The Departmental manual categorically excludes the issuance of permits involving fish, wildlife, or plants, when such permits cause no or negligible environmental disturbance. National Marine Fisheries Service procedures for implementing categorical exclusions are found in the NOAA Administrative Order Series 216-6, Sections 602b.3 and 602c.3. That order categorically excludes permits for scientific research and public display under the ESA and Marine Mammal Protection Act, and other categories of actions which would not have significant environmental impacts including routine operations, routine maintenance, actions with short-term effects, or actions of limited size or magnitude. However, a memo for the record should be made listing the categorical exclusion.

Low-effect HCPs are defined as those involving: (1) minor or negligible effects on federally listed and candidate species and their habitats; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, individually or cumulatively, have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP.

Another consideration in meeting the requirements of this categorical exclusion is cumulative impacts. CEQ regulations define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (50 CFR 1508.7). Once the draft NEPA procedures (516 DM 6, Appendix 1) are revised, section 10 permits developed with technical assistance from the FWS may be categorically excluded from NEPA, subject to meeting specific criteria. The current NEPA procedures in 516 DM 6, Appendix 1 shall remain in effect, until the final revised procedures are published in the Federal Register. When

categorically excluding a section 10 permit application, the Services must ensure that the impacts of the project, considered together with the impacts of other permitted projects, will not be "significant." For example, if numerous low-effect projects in a given species' habitat are categorically excluded, the Services must ensure that issuance of section 10 permits for these projects does not result, over time, in cumulative habitat losses to the extent that such losses become significant.

3. Environmental Assessments.

The FWS has also determined in the proposed revised NEPA procedures that most HCPs, other than those that are low-effect, will normally require preparation of analysis that meets the requirements for an EA [516 DM 6, Appendix 1]. The purpose of an EA is to briefly analyze the impacts of a proposed action to determine the significance of the impacts and to determine whether an EIS is needed, to analyze alternatives for proposals which involve unresolved conflicts concerning uses of available resources, and to aid an agency's compliance with achieving NEPA's purposes when preparation of an EIS is not necessary.

An EA consists of a brief discussion or description of: (1) the purpose and need for the proposed action; (2) the nature of the proposed action; (3) alternatives to the proposed action that were considered; (4) the environmental impacts of the proposed action and its alternatives; and (5) a list of agencies and persons consulted in the NEPA review process. Public review procedures for EAs vary depending on the scope of the proposed action [see this chapter, Section A.3 and A.5]. The culmination of the EA process is a Finding of No Significant Impact (FONSI) or a decision to prepare an EIS.

a. Use of EAs When Mitigation Reduces Significant Impacts.

Normally, the Service believes that analysis at the level of an EA will be sufficient for HCPs. At times, an HCP that might otherwise require an EIS can be analyzed with an EA, if mitigation measures that would ensure that environmental impacts do not reach the significant level are part of the original project proposal (in this case, part of the HCP) and are enforceable. This type of EA can be used when an HCP would otherwise be expected to have significant environmental impacts but, with mitigation, those impacts can be reduced to less than significant levels. The basis for this type of EA is found at 40 CFR 1501.3(b), 1501.4(e)(2), and 1508.9(a)(2). A brief discussion of the subject also occurs in the CEQ publication, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026-18038, Nos. 39 and 40).

Under the right conditions, EAs of this type are a useful tool for complying with NEPA and saving paperwork and time. In fact, HCPs are excellent candidates for this type of EA since most of the requirements ("up front" mitigation and enforceability) are already standard HCP components. The main differences between this type of EA and other EAs prepared for HCPs are that: (1) the impact of the project would result in significant environmental impacts

but for the mitigation program (in many EAs, the environmental effects would be less than significant even without the mitigation program); and (2) a 30-day public comment period must be observed before the decision is made not to prepare an EIS (CEQ regulations otherwise require no delay in deciding not to prepare an EIS). This 30 day period should be combined with the 30 day public notice of the proposed section 10 permit.

If the Services decide to use this provision to issue an EA and a FONSI for a particular proposed HCP, they should be able to make a clear finding that the HCP, considered together with mitigation measures that are part of the HCP submitted with the permit application and would be enforceable, will not result in significant environmental effects.

FWS and NMFS encourage preparation of this type of EA as a way of streamlining the section 10 and NEPA processes. However, FWS and NMFS staff should consult the Regional Director's Office, Environmental Coordinators in the Regional Office, or the Washington, D.C. Office before initiating this type of EA for the first time.

b. Programmatic EAs.

A programmatic EA is an EA that addresses a group of actions by different applicants as a whole, rather than one at a time in separate EAs. For example, a programmatic EA might address a group of different actions occurring in the same place, or a single action occurring in many different places. Programmatic EAs can save great amounts of staff and preparation time, but are appropriate only in certain types of situations.

The central problem in preparing a programmatic EA is having sufficient information to determine and evaluate effects when the exact number and scope of actions taking place may be uncertain. As a result, programmatic EAs typically will be successful only when the activities being addressed in proposed HCPs are relatively well-defined and not overly conjectural, are similar in nature or geography, and occur at similar points in time or within a predictable time line. Programmatic EAs can be prepared at the time a group of actions is proposed. To expedite small-scale actions, they can also be prepared prior to specific project proposals if the proposals can be defined in advance and are reasonably foreseeable.

Because of the problem of analyzing effects, FWS and NMFS staffs should consult their Regional Office Environmental Coordinator or other NEPA experts when preparing a programmatic EA.

4. Environmental Impact Statements.

If the conclusion is reached that a particular HCP will have a significant environmental impact and thus requires preparation of an EIS, refer to the procedures outlined in the FWS's NEPA guidance (30 AM 2-3 and 550 FW 3), and Director's Order No. 11, dated April 18, 1985 or for NMFS the NEPA procedures are found in the NOAA Administrative

Order Series 216-6, dated June 21, 1991. For further assistance, consult the appropriate Regional Office or NMFS, Washington Office D.C. Environmental Coordinator.

B. Techniques for Streamlining Section 10 and NEPA Planning

CEQ regulations encourage agencies to focus on the purpose of the NEPA process; making better decisions. Amassing needless detail is discouraged; integration of the analysis with the other planning and environmental review requirements so that all procedures run concurrently rather than consecutively is explicitly encouraged. The Services fully endorse these goals. All FWS and NMFS offices are expected to streamline their section 10 permit and NEPA analyses to the maximum extent practicable, while ensuring compliance with both ESA and NEPA. The process should be streamlined by integrating the analyses in the same document, to the extent possible, by running the processes concurrently, not consecutively, and by conducting joint processes with state and local agencies as applicable.

1. Combining HCP/NEPA Analysis.

The CEQ regulations specifically permit NEPA documents to be combined with other agency documents to reduce duplication and paperwork (40 CFR§§1506.4). The Services policy is to combine the HCP and NEPA analysis into a single document titled, “Proposed HCP and Environmental Assessment for the [insert name of the HCP document].”

This technique should not be viewed as preparation of two separate documents that are then published under the same cover, but rather one integrated analysis that meets the requirements of both NEPA and ESA. For example, the alternatives section of the combined document should include alternatives that satisfy both the requirements of section 10 and NEPA. Similarly, the discussion of effects should include analysis of both the impacts of the proposed HCP as well as other environmental effects that should be analyzed under NEPA.

FWS and NMFS should work closely with the applicant(s) so that any environmental documents they draft meet NEPA and section 10 permit application requirements. Appendix 8 contains an example of an integrated HCP/EA. This is one way of integrating the two documents. Another way of integrating the analysis even more would be to include the full text of the proposed HCP in the alternative section as the preferred alternative.

2. Joint Federal-State Processes.

Some states have enacted laws that parallel or expand NEPA requirements at the state or local level (e.g., the California Environmental Quality Act). CEQ regulations (40 CFR 1506.2) and Department of Interior procedures (516 DM 4.18) and NOAA require its

agencies to cooperate, to the fullest extent possible, with the applicant and state and local officials to reduce duplication between NEPA, state and local environmental requirements, and ESA requirements.

FWS and NMFS should cooperate with state and local agencies to avoid duplication and reduce the time and costs of planning by:

- o Conducting joint planning;
- o Conducting joint environmental research and studies;
- o Conducting joint public hearings; and
- o Producing joint environmental documents (however, FWS or NMFS is responsible for submitting Federal Register notices).

3. Incorporation By Reference.

Incorporation by reference can be used in an EA or EIS to avoid including bulky documents or written material in support of conclusions. Material incorporated by reference from another source into the NEPA analysis must be cited and its contents briefly described. It should not be incorporated by reference unless it is reasonably available for inspection by interested parties within the time allowed for public comment.

C. Internal Service Guidance and Assistance

FWS procedures for complying with NEPA are found in 30 AM 2-3, and 550 FW3. The Regional Environmental Coordinator should be familiar with these techniques and be able to assist Regional and Field Office personnel on NEPA matters. NMFS procedures are found in the NOAA Administrative Order Series 216-6, dated June 21, 1991.

CHAPTER 6

APPLICATION REQUIREMENTS AND PROCESSING PROCEDURES

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this chapter--particularly with respect to permit denial, suspension, and revocation procedures--may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Except where noted, the procedures described in this chapter apply to both FWS and NMFS. For NMFS, 50 CFR 222.22 contains regulations specific to incidental take permits. General permit procedures are found in 50 CFR 217, 220, as well as 222. NMFS is also in the process of revising its ESA regulations at 50 CFR parts 217-227. Therefore, citations to NMFS regulations may change from those provided in this handbook.

A. Guidance to the Applicant

1. What to Provide the Applicant.

The following documents should be provided to any prospective permit applicant or applicant's consultant.

- o For FWS, Federal Fish and Wildlife License/Permit Application (Form 3-200) with "Incidental Take Permit Application" supplement, instructions, and Notice of Permit Application Fee/Privacy Act Notice (Appendix 9).
- o For NMFS, incidental take application instructions (Appendix 9).
- o This handbook, if appropriate (some applicants may find it too technical; although it may be useful to experienced consultants).
- o List of candidate, proposed, endangered, and threatened species of wildlife and plants for the prospective planning area.
- o List of appropriate local, state, and federal contacts, such as state conservation agencies.

- o General Permit Procedures - for FWS, 50 CFR Part 13; for NMFS, 50 CFR 217, 220, and 222 (Appendix 11).
- o Endangered and Threatened Wildlife and Plant Permit procedures - for FWS, excerpts from 50 CFR Part 17; for NMFS, 50 CFR 222.22 (Appendix 11).

2. Application Form and Instructions.

For FWS, an applicant must complete and submit an official Form 3-200 [50 CFR 17.22(a)(1)]. Instructions for this form are provided below and in Appendix 9. The appropriate Regional Office address and phone number should be typed on the top of the form where it reads "Send Application To." NMFS does not have an official permit application form but provides instructions for what information the applicant needs to submit and where (see Appendix 9). A list of FWS and NMFS Regional Offices is provided in Appendix 12.

3. Name of the Applicant.

For FWS, if the applicant is an individual, that person must sign the application and complete block 4 of Form 3-200. If the applicant is a city, county, business, or consortium, the application must be signed by the appropriate authority responsible for actions granted under the permit and block 5 must be completed. In all cases, there must be an **original** signature and date in the certification block. An application form may be faxed to begin the permit processing phase, but only if the original application with an original signature is submitted immediately afterward. The application will not be considered complete without the original application form. For NMFS, the applicant should follow the application instructions in Appendix 9.

4. Application Fee.

The processing fee for FWS and NMFS is \$25.00 for each new permit application, amendment request, or renewal, except as noted below. Money orders or checks should be made payable to the "U.S. Fish and Wildlife Service" or "National Marine Fisheries Service." The fee is for processing the application, not for the permit, and therefore is non-refundable if the application is abandoned or the permit is denied. The fee may be refunded only if the applicant withdraws the application in writing before any significant processing of the application has occurred. For FWS, if the check has been forwarded to the Denver Finance Center, request the Finance Center to send a refund to the applicant. State or local government agencies or any individual or institution under contract to such agency to conduct proposed activities are fee exempt.

Checks and money orders must be safeguarded as if they are cash; they should be placed in a fire-proof safe except when being processed by employees designated as collection officers.

Application fees need to be deposited in a timely manner and each Regional Office should establish deposit procedures. For FWS, since Regional Division of Law Enforcement offices already have such procedures, the Assistant Director for Ecological Services may wish to coordinate with the Assistant Director for Law Enforcement in handling application fees.

5. Providing the General Permit Requirements.

The applicant should be provided copies of the general permit procedures and pertinent excerpts from the procedures for endangered and threatened species permits. By signing Form 3-200, the applicant is certifying (1) that the applicant has read and is familiar with applicable regulations; (2) that the information submitted in the application is complete and accurate; and (3) that the applicant understands that any false statements may result in criminal penalties.

50 CFR Part 13 provides conditions for the general administration of FWS's fish, wildlife, and plant permit program. 50 CFR Part 17 provides conditions for endangered and threatened species incidental take permits specifically. It should be explained to the applicant that if any general provision of Part 13 is inconsistent with Part 17 or with provisions of section 10(a) of the ESA governing incidental take permits, it is the intention of the FWS to seek regulatory clarifications which would provide that the more specific provisions of Part 17 or the statute apply. This also applies to NMFS, except that 50 CFR Part 222 takes precedent over Parts 217 and 220. The FWS is currently drafting language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future.

B. Processing the Application

1. Processing Time.

No mandatory time frames for processing incidental take permit applications have been established under Section 10 or its implementing regulations. However, this handbook establishes the following target processing times, depending on the type of NEPA action associated with the permit application [see Chapter 1, Section F.1].

Permit processing times are defined as the period between receipt of a complete application package by the responsible Regional Office and issuance of the incidental take permit, including Federal Register public comment notifications. The targets do not include any portion of the HCP development phase.

HCP With EIS	less than 10 months
HCP With EA	3 to 5 months
Low-effect HCP (Categorically Excluded)	less than 3 months

These targets will apply as the maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. All affected FWS and NMFS offices are expected to streamline their incidental take permit programs and to meet these processing targets to the maximum extent practicable. In many cases it is expected actual processing times will be less than these targets and Service offices are encouraged to improve on the targets whenever possible.

2. Timing of Document Preparation and Submission.

The Section 10 permit process consists of three phases: (1) the HCP development phase; (2) the formal permit application processing phase; and (3) the post-issuance phase.

The length of the HCP development phase will vary depending on the complexity and scope of the project and length of time required to prepare the HCP. It concludes when a "complete application package" with a Field Office certification that it has reviewed the HCP and found it to be statutorily complete is forwarded to the appropriate Regional Office [see below, Sections B.2(b)-(c)]. The formal permit application processing phase begins with receipt of the complete application package by the Regional Office. Permit processing requirements will also depend on the scope and complexity of the HCP.

a. Description of Required HCP Documents.

The following documents are needed (or are optional as indicated) to apply for and issue an incidental take permit:

Must be Provided Before Federal Register Notice Can Be Published

- o A Habitat Conservation Plan including the elements required by section 10(a)(2)(A) of the ESA.
- o For FWS, a permit application form (3-200) and fee (see Appendix 9). For NMFS, an application according to the instructions in Appendix 9.
- o A NEPA analysis (either an EA or EIS, unless the HCP is categorically excluded) pursuant to the National Environmental Policy Act. The section 7 biological opinion should be prepared in conjunction with the NEPA analysis.
- o Certification by the Field Office that assisted the applicant with the HCP to the issuing Regional Office that the HCP and associated documents are statutorily complete.
- o An Implementing Agreement, if requested by the applicant or otherwise required by Regional Director policy (see Chapter 3, Section B.8).

- o Federal Register Notices; a Notice of Receipt of a Permit Application and Notices of Availability of the NEPA analysis (see Appendix 16).

Can Be Prepared During or After the Public Comment Period

- o A biological opinion concluding formal section 7 consultation and providing the Services' findings with respect to the effects of the action on federally listed species.
- o If required by Regional Director policy, a Set of Findings documenting how the HCP meets statutory issuance criteria and optionally including the Field Office's recommendation about whether to issue the permit [see Section B.2(d) below and Appendix 13).
- o For FWS, an Environmental Action Memorandum (EAM) describing what action the FWS took with respect to NEPA and explaining the reasons why the action is considered categorically excluded. (For low-effect, categorically excluded HCPs only (see Appendix 14 and definition in Chapter 8)). Public comments will be addressed and, if applicable, will help shape the final decision.
- o For FWS, the draft permit (Form 3-201) with proposed terms and conditions; for NMFS, the permit is printed on agency letterhead with terms and conditions and a cover letter. The draft permit and terms and conditions must be further reviewed in light of any substantive public comments received.

b. Submitting a Complete Application Package.

The formal application phase begins with receipt by the appropriate Regional Office of a "complete permit application" package consisting, at a minimum, of the application form, application fee (if applicable), the proposed HCP, the Implementing Agreement (if required), draft NEPA analysis (EAM, EA, or EIS), which was submitted by the applicant, and a certification by the Field Office that it has reviewed these documents and finds them to be statutorily complete. Prompt submission of each of these documents is essential to efficient processing of the permit application because they either initiate the processing phase or are required for the Federal Register notice initiating the 30-day public comment period.

The Implementing Agreement (if required) should be submitted as part of the complete application package and is usually included as an appendix to the HCP. Since the IA can help enforce the implementation of the HCP, it should be included with the complete package so the public can get a sense of how implementation of the HCP will be managed. It should also be included when the HCP is provided to persons wishing to comment on the permit application.

c. Certification of Application Documents By the Field Office.

When the Field Office that assisted the applicant in developing the HCP forwards the application package to the Regional Office for processing, it should include a certification memo. The Regional Office should not initiate the formal permit processing phase without this certification. (see below, Section B.5 for a discussion of what to do when the Field Office believes the HCP to be inadequate but the applicant wishes to submit the package for formal processing against Field Office recommendation). This certification should include: (1) a statement that the Field Office has conducted a preliminary review of the application package and believes it to be complete; (2) the date of the HCP documents to which the memo refers; (3) a recommendation by the Field Office that the HCP qualifies for the "low-effect" category, if applicable [see Chapter 1, Section F.2]; (4) exceptions to standard processing procedures it recommends, if any, and the reason for those exceptions; and (5) other pertinent information as needed. The Field Office certification can be in memorandum format, a signed standardized form, or any other format mutually agreed to by the Field and Regional Offices.

d. Timing of Other Application Documents.

Another document needed early in the process is the Notice of Receipt of an Incidental Take Permit Application for publication in the Federal Register. Typically, this is drafted and forwarded to the Regional Office by the Field Office. The Regional Office then finalizes and signs the notice and sends it to the Federal Register (see below, Section D). The draft Federal Register notice is not a required part of the complete application package. It can be prepared while the HCP, NEPA analysis, and Implementing Agreement are being reviewed in the Regional office so long as it is completed when these documents are ready for transmission to the Federal Register. To expedite the public notification process, the Federal Register Notice of Availability of the NEPA analysis should be published jointly with the Notice of Receipt of the permit application (see Appendix 16).

In addition to the above documents, processing the permit application will require a: biological opinion on the proposed incidental take; Set of Findings; for FWS, an Environmental Action Memorandum (EAM) for categorically excluded HCPs only; and the permit (for FWS, Form 3-201) or permit letter (for NMFS). The Set of Findings provides an administrative record of how the HCP program satisfies each of the section 10(a)(2)(B) issuance criteria, responses to public comments received, if any, and may include a recommendation from the appropriate ARD to the Regional Director's Office (for FWS) whether to issue or deny the permit. However, it is not required by regulation or Director's Order and whether to include it as a processing requirement is at the discretion of the Regional Directors (see Appendix 13 for examples of a Set of Findings). The EAM is a record of FWS's NEPA decision and is required by Director's Order No. 11, but only for HCPs that are categorically excluded (see definition, Chapter 8, and Appendix 14).

How these documents are handled may vary. Typically, the Field Office drafts the biological opinion [see below, Section C.3(b)], FONSI or ROD, and Set of Findings, and forwards the draft documents to the Regional Office to be finalized. The applicant should not draft these documents because they involve internal Service decisions. The Regional Office typically prepares the EAM and permit. The permit usually includes an attachment incorporating terms and conditions of the HCP and referencing applicable Federal regulations and other conditions, including the permitted incidental take levels and terms and conditions.

In the interests of efficient processing, the Field Office should prepare a draft biological opinion and draft Set of Findings and forward them to the Regional Office as soon as possible during the permit processing phase--typically during or immediately after the close of the 30-day public comment period. The biological opinion can be finalized by the Field Office. The Regional Office should not finalize and sign the biological opinion, FONSI or ROD, or Set of Findings until after the public comment period has terminated and public comments have been addressed.

To meet the target section 10 permit processing times, it is essential that formal application processing steps overlap, not run consecutively. The formal processing phase begins when the Regional Office receives the application form, fee (if applicable), HCP, IA (if required), draft NEPA analysis, and certification memo from the Field Office. Publication of a notice in the Federal Register requires the HCP, IA, NEPA analysis, and Federal Register notice. Issuing the permit requires all the above plus the biological opinion, signed FONSI or ROD, Environmental Action Memorandum (for low-effect HCPs only), Set of Findings, and the permit.

Try to complete each document as early as possible in the process, but do not hold up one stage while waiting for non-essential components of the previous stage. Whenever possible, complete the components of one stage while another is underway. The Field Office can begin drafting the FR Notice while the Regional Office reviews the application package; the Field Office can draft the biological opinion and Set of Findings during the public comment period; and so on.

e. Labeling the Documents as Draft/Final.

The HCP and IA (if required) are subject to change during Regional Office review and the public comment period, and for this reason they need to be labeled as "drafts" and dated when submitted for processing. The EA should be labeled draft until the Regional Office Environmental Coordinator or HCP Coordinator has reviewed the document, and until the public comments, if any, are incorporated; the accompanying FONSI should be labeled as "preliminary" until public comment, if any, are incorporated into the HCP and EA. An EIS must always be announced in the Federal Register as a draft and final EIS and must be so labeled.

f. Dating Section 10 Documents.

Since HCPs can go through many drafts during the HCP development phase, all HCP copies, draft and final, should bear a date on the front page or inside title page that includes the month, year, and day. This will confirm at any stage in the process what HCP draft or version is being referenced in correspondence or discussions and which is the most up-to-date.

To ensure a complete administrative record, the Field Office and Regional Office should state in writing what measures and revisions they recommend to the applicant or Field Office, respectively, throughout the HCP development and formal application processing phases. Also, all Offices should reference the date of the specific HCP to which it refers in any written correspondence or other records.

g. Finalizing the Implementing Agreement.

The following process should be followed, if the applicant and Regional Director have decided to complete an IA; remember this document is optional, left to the discretion of the Regional Director, and not required for a low-effect HCP. The timing of finalization of the Implementing Agreement is essential, because improper handling of the Agreement can result in unnecessary delays. All signatories to the Implementing Agreement should have reviewed draft versions of the Agreement and all non-federal signatories should have agreed to its provisions before it is forwarded to the Regional Office with the complete application package. It should not be signed at that point because it must still be submitted for public comment with the HCP and may require Solicitor's Office review. If the Agreement was already signed when submitted with the application package, and subsequent changes are required, re-circulation for a second signing may be necessary. This is frustrating for permit applicants, particularly when the Agreement requires approval by local authorities (e.g., a county Board of Supervisors), which must then re-approve the Agreement. However, the Agreement must be signed prior to permit issuance. The Implementing Agreement should be circulated for signature after the public comment period has closed and changes to the HCP or IA, if any, have been incorporated. An original signature copy of the Implementing Agreement should be provided to each signatory to the Agreement. For FWS, signature authority for the Implementing Agreement lies with the Regional Director's Office. For NMFS, this authority lies with either the Regional Director or the Director of the Office of Protected Resources, Washington, D.C.

3. Who Submits the Application Package?

There are several ways the complete application package can be submitted to the Regional Office. The HCP, IA, and draft NEPA analysis (if not prepared by the FWS or NMFS), can be forwarded by the applicant to the Field Office, and the Field Office then forwards these materials, together with its certification memo, to the Regional Office. Or, the Field Office

and applicant can forward to the Regional Office, respectively, the documents for which they are responsible; in this case the Regional Office would compile the complete application package and supply the Field Office with the final versions of the HCP and IA. There are other possible variations; however, most FWS Offices prefer that the Field Office submit the entire application package to the Regional Office.

This handbook delegates to the Regional Offices the task of establishing specific methods by which permit application packages will be submitted. Each Regional Office must develop clear protocols for this procedure, and notify all affected Field Offices.

4. Judging the Application for Completeness.

The applicant must provide all information requested on the application form or in the application instructions for NMFS (Appendix 9). If the form has not been completed correctly, the applicant should be notified, in writing or by phone with an accompanying memo that should be filed in the administrative record, and asked to correct the deficiency or submit additional information. Requests for information should include notification that if the information is not received within the allotted time, the application will be deemed inactive [50 CFR 13.11(e) or 50 CFR 220.13]. The applicant should refer to the inactive application if he or she reapplies in the future. This paragraph refers only to data required on the application form; it does not apply to requests for further biological information or other information upon which a substantive decision with respect to the permit application would be made.

To determine whether the HCP is complete, see Chapter 3, Section B.1, B.8, and Chapter 6, Section B.4. To determine whether the NEPA analysis is complete, see Chapter 5, Sections A.1-4. In most HCPs, however, the adequacy of these documents will be evaluated during the HCP development phase, not after the permit application is submitted. Only in relatively rare cases--e.g., when an applicant has prepared the HCP without Service assistance--will their adequacy need to be evaluated for the first time at the beginning of the formal permit processing phase.

5. Problems Identified During the HCP Development.

Problems identified during the HCP development phase should be elevated to the Regional Offices early in the process for suggestions that might be helpful to the applicant and the Field Office for resolving differences. Even if the Services perceive that problems remain, the applicant is entitled to submit a permit application. The Services should publish a Notice of Receipt of the permit application in the Federal Register and duly process the application. However, prior to announcing receipt of such an application in the Federal Register, FWS or NMFS may detail the HCP's deficiencies and the reasons for them to the applicant in writing.

The above discussion applies to biological issues and issues of scientific judgement only. The Services need not process a permit application that lacks statutory HCP components or other application components required by Federal regulation.

6. FWS Law Enforcement LEMIS System.

For FWS, all permits and permit numbers issued under the ESA must be issued through LEMIS (Law Enforcement Management Information System), managed by the FWS Law Enforcement Division. LEMIS contains the following information for each permit and permit application:

- o Basic information on the permit applicant (e.g., name, address, telephone number);
- o Pertinent dates (e.g., application receipt date, issuance and expiration dates, report due dates, and revocation dates);
- o Permit authorizations and/or conditions;
- o Species involved;
- o Location of the authorized activities; and,
- o Identity of the permit issuing office.

Once the application review process is complete and a decision is made to issue the permit, the permit must be issued with a LEMIS number and the issuance must be recorded in LEMIS. The terms and conditions that go with the permit are often printed on a separate sheet of paper and are attached to the permit (see Appendix 15 for a sample permit form and Appendix 17 for examples of issued permits).

C. Internal FWS/NMFS Review

1. Early Coordination Between the Field and Regional Office.

To ensure timely processing of permit applications, the Regional Office, Field Office, Solicitor's Office (FWS) or General Counsel's Office (NMFS), and in some cases the NMFS Office of Protected Resources, should begin communicating about an HCP effort as soon as possible after serious discussions on the HCP begin. Early coordination helps avoid processing delays by identifying and resolving internal disagreements and other problems before the HCP is completed. This allows Regional Office staff to provide technical assistance to the Field Office as needed, and ensuring Regional Office familiarity with the HCP when the application is received by that office and formal permit processing begins.

Management should always be involved early in the process. Under no circumstances should the Field Office and Regional Office find themselves in serious disagreement on the substantive aspects of an HCP after a permit applicant who has requested Field Office assistance in developing the HCP has submitted the application to the Regional Office for approval.

There are various ways that coordination between the Field Office and Regional Office on a developing HCP can occur: (1) periodic briefing statements from the Field Office to the Regional Office; (2) meetings between Field Office and Regional Office staff; (3) joint Field/Regional review of HCP drafts; and (4) participation by Regional Office staff management in important meetings (sometimes referred to as "milestone" meetings). Specific methodologies are left to the discretion of the individual Regions.

At a minimum, during the HCP development phase the Field Office should regularly apprise the Regional Office about: (1) the proposed project or activity; (2) the species involved; (3) current status of the planning effort including primary features of the mitigation program; (4) positions with respect to the planning effort of affected public and private interests; (5) any obvious or underlying controversies or issues that could affect the final outcome of the HCP or the permit processing phase; and (6) any pertinent information that would help the Regional Office understand the HCP and process the application when it is submitted. Questions about HCP policy interpretation or procedure by the Field Office should be elevated quickly to the Regional Office when they arise. The Regional Office should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the Assistant Director for Ecological Services to ensure the interpretation of the policy is sufficient and within the overall National policy guidance for the HCP program. The Regional Office should also keep the Solicitor's or General Counsel's Office informed and request assistance on legal issues promptly when needed.

If the Regional Office, Solicitor's Office, or General Counsel's Office has specific concerns about ongoing or pending HCPs or foresees any problems with pending permit applications in light of section 10 permit issuance criteria or other requirements, it should notify the Field Office as soon as possible. The Field Office and Regional Office must then jointly resolve any outstanding internal concerns. Briefing statements and other written records of coordination between the Field and Regional Office during the HCP development phase should be maintained as part of the administrative file. They may also be forwarded to other FWS/NMFS Regions to aid inter-Regional awareness of HCP activities.

2. Distribution of the Application Package.

The Regional Office that receives the permit application package should send the package to the following offices for review, generally requesting comments within 30 days; this should be done as early as possible so that this review period can run concurrently with the 30-day public comment period:

- o The appropriate Solicitor's (FWS) or General Counsel's (NMFS) Office with a written request for review, unless legal review is waived (see Section C.4 below).
- o For FWS, the Assistant Regional Director(s) of Law Enforcement with jurisdiction over the applicant's Region of residence, and the Region(s) where the proposed taking would occur. The appropriate ARD and ARD-LE should jointly determine whether, and under what circumstances, FWS law enforcement personnel need to review the entire application package. Such review is advised if there are questions about the enforceability of the HCP or the HCP involves other potential law enforcement issues.

For FWS, check with Law Enforcement whether LEMIS gives a "PRIOR INVESTIGATION RECORD" warning about the applicant. If such a warning appears, a permit may not be issued until the ARD-LE approves.

For NMFS, the Regional Law Enforcement Division with jurisdiction over the applicant's Region of residence, and the Region where the proposed taking would occur. The Regional Director and Law Enforcement Division will determine whether further review is necessary.

- o If the application package is submitted to a Regional Office other than the Regional Office with lead responsibility for the affected species, comments from the lead Region and other Regions in the species' range should be requested.
- o The Field Office conducting the internal section 7 consultation, if that office is different than the Field Office that assisted in developing the HCP [see Section C.3(b) below].
- o The state fish and wildlife conservation agencies of states in which the proposed taking will occur, as well as any Federal agencies that are directly involved in or affected by the HCP program. This may not be necessary if these agencies received the package directly from the permit applicant.
- o Where appropriate, technical scientific comment could be solicited from species experts within or outside the Services and from the recovery team if one is available.

3. Internal Section 7 Consultation.

Under section 7 of the ESA, issuance of an incidental take permit by FWS or NMFS is a Federal action subject to section 7 compliance. This means the Services must conduct an internal (or intra-Service) formal section 7 consultation on permit issuance. For FWS, this

can be conducted between the Regional Director's office, which issues the permit, and the Ecological Services office, which is responsible for the endangered species program. It may also be conducted between the Assistant Regional Director for Ecological Services and the Field Office that assisted the applicant in developing the HCP. It is strongly encouraged to include the section 7 biologist in the developmental process of the HCP, so that the section 7 requirements can be addressed early in the process to eliminate possible difficulties or the potential call of jeopardy at the end of the process. The Services regard these two processes as concurrent and related.

For NMFS, consultation may be conducted between the Field Office and the Regional Director or between the Endangered Species Division and the Office of Protected Resources in Washington, D.C. In the HCP context, informal consultation may be considered to include all Service Field Office/Regional Office coordination and assistance to the applicant during the HCP development phase. Formal consultation on a section 10 permit typically is not initiated until the permit processing phase.

a. Role of the Section 7 Consultation.

The purpose of any formal consultation is to insure that any action authorized, funded, or carried out by the Federal government 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. Formal consultation terminates with preparation of a biological opinion, which provides the Services' determination as to whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Internal consultation on a section 10 action ensures that issuance of the permit meets ESA standards under section 7. In practice, because one of the section 10 issuance criteria is the same as the regulatory definition of jeopardy under section 7 (see Chapter 7, Section B.4), the section 7 consultation represents a last internal "check" that the fundamental standard of avoiding jeopardy has been satisfied.

Another purpose of formal section 7 consultation is to develop reasonable and prudent measures and terms and conditions to minimize anticipated incidental take, or, if necessary, reasonable and prudent alternatives to eliminate the risk of jeopardy. These are included with the biological opinion. However, since the Services ordinarily will have provided technical assistance in developing the HCP, and included all necessary mitigation, reasonable and prudent measures or alternatives rarely will need to be developed during the section 7 consultation. This should be necessary only in cases where an applicant did not consult with the FWS or NMFS in developing the HCP or did not incorporate Service recommendations and such measures or alternatives are necessary to satisfy the requirements of section 7.

Reasonable and prudent measures are defined as required actions identified during formal intra-Service consultation which the Regional Director believes necessary or appropriate to minimize the impacts of incidental take. Reasonable and prudent measures, if necessary, can

be used to modify the HCP. However, such adjustments should be made only if they are minor in scope, and they ensure compliance with the requirements of the ESA. There should be very few cases where the Services introduce reasonable and prudent measures at the end of the HCP process since such matters should have been fully discussed with the permit applicant prior to the submission of the HCP. Any changes necessitated by the reasonable and prudent measures should be discussed in advance with the applicant.

b. Who Conducts the Section 7 Consultation?

The Services must be held to the same rigorous consultation standards that other Federal agencies are required to meet under section 7. This means, in part, that internal consultations on section 10 permit applications should be as impartial as possible. However, it is also important that section 7 consultation on a permit application does not result in otherwise avoidable delays when meeting target permit processing times. Such delays may result if the section 7 consultation is assigned to an office too far removed from the location and circumstances of the HCP. The biological opinion concluding formal section 7 consultation may be done by the FWS or NMFS office that assisted in HCP development or by another office. To avoid possible biases, the staff member conducting the section 7 consultation should not be the section 10 biologist providing technical assistance to the HCP applicant. This will help ensure that the intra-Service section 7 consultation is an independent analysis of the proposed HCP. If, because of staff time constraints, this is not possible, then the biological opinion should be reviewed by another knowledgeable biologist before it is signed by the approving official. It is very important that the staff member that completes the section 7 consultation be involved in the initial stages of the HCP process. This will help ensure that the section 7 requirements are addressed in the HCP and that the two processes are integrated which will help expedite the permitting process. If the Regional Director has delegated the authority, the biological opinion may be signed by an approving official in the Field Office. The biological opinion is then reviewed and finalized by the Regional Office processing the permit application. This ensures a good balance between independent review and timely permit processing. The biological opinion may also be finalized and signed by the Field Office, if the Regional Director has delegated the authority to do so.

This handbook allows FWS and NMFS Regional Offices and Field Offices the discretion to use any reasonable method for conducting internal section 7 consultations, so long as (1) the resulting determination is reviewed or finalized by Service staff other than the Field Office staff HCP representative; and (2) the method does not result in failures to meet permit processing times described on pages 1-14 and 6-3.

c. Conferences on Proposed Species.

Under Section 7(a)(4) of the ESA and 50 CFR 402.10, a Federal agency must "confer" with the FWS or NMFS "...on any agency action which is likely to jeopardize the continued

existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." Thus, the Services must confer, formally or informally, on any HCP and section 10 permit application that addresses proposed species or proposed critical habitat. Technically, this needs only be done if issuance of the permit is likely to result in jeopardy to a proposed species or adverse modification of proposed critical habitat; this should not occur if the FWS or NMFS has assisted the applicant in preparing the HCP. Nevertheless, the Services should document any conclusion reached that issuance of the section 10 permit is not likely to jeopardize proposed species or adversely modify proposed critical habitat. This information can be included with the biological opinion prepared for listed species addressed in the HCP, thus avoiding the need for a second section 7 document. The FWS/NMFS section 7 handbook contains further information about preparation of section 7 conference documents.

For purposes of section 10 permit applications, FWS and NMFS will treat candidate species or any species (e.g., unlisted species) that are adequately covered in an HCP (see Chapter 4, Section A) in the same manner as proposed species with respect to conferencing procedures. This will ensure that such species have been addressed by the Services with respect to section 7 requirements should they become listed after the permit has been issued. Refer to the FWS's Endangered Species Act Intra-Service Consultation Handbook for further guidance.

d. Biological Opinion Formats/Requirements.

It is essential that section 7 consultation on a section 10 permit application be expeditiously completed and that the resulting biological opinion is legally sound. The following suggestions are provided.

Incorporation by Reference between the Biological Opinion & Set of Findings A biological opinion for an HCP and the Set of Findings (which describes how the HCP meets statutory issuance criteria) can also be duplicative. To avoid this, the Set of Findings may incorporate the biological opinion by reference to the extent that they duplicate each other. This may include incorporating the description of the project and the jeopardy analysis.

Cross Referencing An HCP contains many of the same components typically provided in biological opinions--including a project description, assessment of impacts, and description of a mitigation program. Significant consolidations to the HCP, through cross referencing, should be avoided since the HCP must meet the statutory requirements of section 10(a)(2)(A) and be a stand alone document, however, the biological opinion can be treated more flexibly. When possible without the loss of clarity or legal adequacy, the biological

opinion could cross-reference technical information provided in the HCP rather than repeat the same information.

Requirements of the Biological Opinion Under Federal regulation [50 CFR 402.14(h)-(i)] and section 7(b)(3) and 7(b)(4) of the ESA, the biological opinion for a section 10(a)(1)(B) permit application must contain, at a minimum:

- o A summary of the information on which the opinion is based. This should include a brief description of the HCP and other documents prepared with the HCP, including memoranda of understanding, biological reports, and the NEPA analysis.
- o A detailed discussion of the effects of the action on listed species or critical habitat.
- o The Services' opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. This constitutes the Service's "jeopardy" or "no jeopardy" determination with respect to the permit application.

In most cases, reasonable and prudent measures and terms and conditions will simply require compliance with the permit, HCP, or IA, since these documents typically have identified the equivalent of such measures and ensured their implementation. The only exception to this is if the Services determine that additional measures are needed to minimize the impact of taking, or the Services and applicant agree to include additional terms and conditions not otherwise specified in the HCP. Reasonable and prudent alternatives are only needed in those rare cases when the Services determine that permit issuance would be likely to jeopardize the continued existence of the species involved.

The Incidental Take Statement Section 7(o)(2) states that "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section [referring to the terms and conditions] shall not be considered to be a prohibited taking of the species concerned." This "incidental take statement" provides a take authorization mechanism for Federal actions similar to section 10(a)(1)(B) for non-Federal actions.

What is the role of the incidental take statement in a biological opinion for an HCP application? This can create considerable confusion among HCP reviewers since the take proposed under an HCP ultimately is authorized by the section 10(a)(1)(B) permit, not the incidental take statement. At the same time, the section 7 implementing regulations [50 CFR 402.14(i)] require an incidental take statement in a biological opinion where the Federal action is expected to result in take but will not violate section 7(a)(2).

Clearly, the Service action of issuing an incidental take permit will result in take. Thus, inclusion of an incidental take statement with a biological opinion for an HCP application is necessary to avoid any uncertainty about regulatory compliance with 50 CFR 402.14(I). At the same time, any reasonable and prudent measures or terms and conditions included with an incidental take statement for an HCP application should be consistent with the conservation program in the HCP and any terms and conditions included with the permit except in instances described above. It is also wise to avoid unnecessary duplication between the terms and conditions of the permit and those of the incidental take statement.

With these considerations in mind, the following language is recommended for the incidental take statement for any section 10(a)(1)(B) permit application:

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the proposed action is not considered to be prohibited taking under the Act provided that such taking is in compliance with this Incidental Take Statement.

The proposed [*name*] HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions described in any associated Implementing Agreement and any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR 402.14(I). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed [*name*] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit[s].

In some cases, the Service(s) must specify authorized levels of incidental take in the incidental take statement as well as in the HCP and permit. However, the incidental take

levels specified in the HCP and permit and those specified in the incidental take statement should be consistent with each other. In such cases, the following introductory paragraph should be included:

Based on the proposed [*name*] HCP and on the analysis of the effects of the proposed action provided above, the Service[s] anticipates that the following take may occur as a result of the proposed action:

If requested by the applicant, the following paragraph may be included where plants are addressed in the HCP and are named on the permit.

Generally, section 9 take prohibitions do not apply to listed plant species on non-Federal lands. Therefore, listed plants typically do not have to be included in the incidental take permit. However, State law may have take prohibitions associated with the HCP. In addition, the Service must review the effects of its own actions on listed plants, even when those listed plants are found on private lands. In approving an HCP and issuing an incidental take permit during the intra-Service section 7 consultation, the Service must determine that the permit will not “jeopardize the continued existence” of listed plants. In the interest of conserving listed plants, the Service may request that the landowner voluntarily assist the Service in restoring or enhancing listed plant habitats that are present within the area covered by the HCP.

4. Legal Review of the Application Package.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the legal requirements of the ESA. This is especially important for an HCP, which has specific requirements, and for Implementing Agreements which address unique or first impression issues. It is also important for large-scale or regional HCPs which are often complex and address a variety of activities. The need for legal review of "low-effect" HCPs is less critical, since these projects are by definition minor in scope and impact (see Chapter 8).

For NMFS, all section 10 permit applications must receive legal review by the General Counsel's Office. For FWS, it is agency policy to require Solicitor's Office review of all section 10 permit applications, with the exception noted below. This will be true unless additional exceptions are allowed by a line authority no lower than the Assistant Regional Director for Ecological Services. However, Solicitor's review of HCPs categorized as "low-effect" can be waived if the HCP meets all applicable criteria for low-effect HCPs as defined in Chapter 1, Section F.2. The template in Appendix 4 can be used as a basis for developing Implementing Agreements for HCPs that are not low-effect, though Solicitor's Office review would be required in such cases.

For FWS, the Solicitor's Office need review only those parts of the permit application package that the Regional Director request be reviewed--typically the HCP and Implementing Agreement. Coordination with the Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and ideally during the HCP development phase. After Solicitor review is complete, the Solicitor's Office should forward a memorandum to the RD or appropriate ARD stating that it has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements.

5. Preparing the Signature Package.

When all HCP and NEPA analyses have been completed and reviewed by appropriate Service staff, the Regional Ecological Services Office (FWS), or Endangered Species Division or Environmental and Technical Services Division (NMFS), should sign those for which it has signature authority and assemble those and all others that are necessary for permit issuance into a "signature package." This package is then forwarded to the Regional Director's Office for finalization and signature (for FWS), or to the Regional Director's Office or Office of Protected Resources in Washington, D.C. (for NMFS). Signature authority for HCP documents may vary somewhat from Region to Region. Typically, for FWS documents requiring signature by the appropriate ARD are the: (1) biological opinion (unless signed by the Field Office) and (2) Set of Findings. Documents requiring signature by the Regional Director or Deputy Regional Director are the: (1) Implementing Agreement; (2) NEPA decision document (EAM, FONSI, or ROD); and (3) the permit. The signed biological opinion and Set of Findings should be attached to the signature package for the Regional Director's or Deputy Regional Director's reference. Where applicable, the Solicitor's memorandum stating that the HCP and associated documents meet statutory requirements also should be attached to the signature package. For NMFS, the permit documents will require the signature of the Chief, Endangered Species Division, and Director, Office of Protected Resources, if the permit is issued in Washington, D.C., or the Regional Director and Environmental and Technical Services Division if it is issued by the Regional Office. All of the supporting documents must be signed prior to the issuance of the permit.

The incidental take permit is considered effective as of the date and time the permit is signed. Immediately upon signature, the original permit and one original copy of the Implementing Agreement (if required) must be forwarded to the new permittee.

6. New Policies or Legal Questions.

Both FWS and NMFS should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the appropriate legal counsel and the Assistant Director for Ecological Services (FWS) to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP

program or the new policy. Additionally, it is imperative to discuss any legal questions (e.g., statutory or regulatory issues) or uncertainties with the appropriate legal counsel (the Solicitor for FWS and the General Counsel for NOAA) early in the permit development or permit processing phases.

D. Federal Register Notices of Receipt

1. Timing of the Notice.

Under section 10(c) of the ESA and Federal regulation [50 CFR 17.22 and 17.32(b)(1) (ii) or 50 CFR 217], publication of a Notice of Receipt of a permit application in the Federal Register is required for each section 10 permit application received by the FWS or NMFS. NEPA regulations or FWS policy also require publication of Notices of Availability of NEPA analysis (see Chapter 5, Section A). These Federal Register notices should be published after submission of the complete application package and final review of the application package by Regional Office staff, but as early in the formal processing phase as possible. The notices must offer the public at least 30 days to comment on the documents where an EA is being prepared. A longer review is required for a draft EIS.

To streamline the public review process, the Notice of Receipt of a Permit Application and Notice of Availability of the NEPA analysis should be published concurrently.

2. Content of the Notice.

The Federal Register Notice of Receipt of an Incidental Take Permit Application must include the following information (see Appendix 16 for sample Notices of Receipt):

- o Applicant's name and city and state of residence;
- o For FWS, the application file number (PRT-____) as issued by LEMIS;
- o A brief description of the proposed activity, the species involved, estimated number of individual animals or habitat quantity to be taken, affected locations, and proposed length of the permit, if known;
- o Length of the comment period (minimum is 30 days from date of publication); for a draft EIS, a minimum 45-day comment period is required;
- o Name and mailing address of the office(s) from which a copy of the application package may be obtained; street address and business hours where persons may view the application in person; and address of office where comments are to be submitted, including FAX number, if available;

- o The name, address, and telephone number of a Service employee to contact for further information; and
- o Supplementary information including a brief description of the measures the applicant will implement to minimize, mitigate, and monitor the incidental taking; a summary of the alternatives considered; a description of long-term funding, if any; and a summary of significant environmental effects. The notice should be brief but of sufficient detail to convey the main aspects of the proposed activity.

3. Submission to the Office of the Federal Register and PDM.

For FWS, when the Federal Register notice is ready for publication, **three** copies of the notice with **original** signatures by the appropriate ARD on all copies, and the name and title of the signatory below the signature, must be submitted to the Office of the Federal Register at the address below. A transmittal letter is usually included.

U.S. Mail

National Archives & Records Administration
Office of the Federal Register
Washington, D.C. 20408
(Telephone 202/523-3187)

Overnight/Courier Delivery

Office of the Federal Register
Room 700
800 North Capitol Street, Northwest
Washington, D.C. 20002
(Telephone 202/523-3187)

Federal Register notices generally are published within 3 working days after receipt by the Office of the Federal Register, if received prior to 2:00 p.m.

A copy of the Federal Register notice, with the originating office's billing code, should also be sent to the FWS Division of Policy and Directives Management (PDM) in Washington, D.C. at the address below. The notice should be sent to PDM no later than the time it is sent to the Office of the Federal Register. The purpose of this is to allow the Washington D.C., PDM Office to assist in prompt publication of the notice in case questions arise after the notice has been submitted.

U.S. Fish and Wildlife Service
Division of Policy and Directives Management
ARLSQ-224
4401 N. Fairfax Drive

Arlington, VA 22203
FAX: 703-358-2269

For NMFS, all Federal Register notices must be cleared through the Office of Fisheries Conservation and Management in Washington, D.C. (see Appendix 12 for address).

If the Regional Office believes an HCP permit application is potentially controversial, faces a likelihood of legal challenge, or otherwise address issues deserving of Secretarial attention, it should notify the Regional Public Affairs Office and request the Regional Public Affairs Officer to coordinate with appropriate FWS or Department personnel in Washington, D.C. For NMFS, the Office of Protected Resources should be notified (see Appendix 12 for address).

4. Providing HCP Documents to the Public/FOIA Considerations.

Once a permit application is received, the Service should encourage the applicant to involve all appropriate parties. This is especially true for complex and controversial projects. The Service should also notify interested parties when documents (e.g., NEPA analysis or HCP) become available for public review. In addition, during the public comment period the Service may wish to hold informational meetings and answer questions that members of the public may have regarding the HCP or permit issuance.

During the comment period, the Services should provide the permit application package to those requesting copies. The Services should provide information that documents compliance with the requirements of section 10 (a)(2) of the ESA. The Service should not release confidential, proprietary, or individual privacy information which may be protected under 43 CFR 2.13(c)(4) and (6) respectively. If the applicant is a business or sole proprietorship, the Services should review the application for any information that may be deemed "confidential business information" or could cause "competitive harm." In such cases, the program should release information in accordance with guidance found in 43 CFR 2.15(d). If the applicant is an individual, the information in block 4 of the application (date of birth, social security number, etc.) must be blocked out before mailing in accordance with the Privacy Act and FOIA (see Appendix 11). The program should also review the remainder of the application for information that could invade personal privacy.

In both cases, the Services should send the requestor a note explaining what was deleted and that it may be available under the FOIA. If the requestor filed a FOIA request initially for the information, the program in consultation with the Solicitor's office, must provide an explanation of what material was exempted and why; and provide appeal rights to the requestor in accordance with the FOIA.

Documents that reflect intra-agency or inter-agency deliberations are most likely exempt under the FOIA. Exemption would depend on whether the agency can show such

information is predecisional and deliberative, foreseeable harm will result in their release; and apply to both the deliberations and any other information which is not reasonably segregated from them.

After the comment period, the Services should provide copies of applications and related material to those requesting a copy. Though a FOIA request is not required to receive information, release of the information should still be done in accordance with the FOIA.

The application package, including the NEPA analysis, must be provided to all affected interests who request the package or have a record of significant interest in the planning program. For EISs it is wise to prepare a distribution list before the EIS is printed, since an adequate number of copies must be printed to meet the demand. For HCPs, Field Offices should estimate the number of copies needed to send to commenters and the affected public and arrange for duplication.

When requested, copies of the application package should be mailed immediately since the public has a limited time to review documents and submit comments.

If additional significant information is submitted by the applicant after the 30-day comment period has closed, which requires a change to the application, the comment period should be reopened through a second Federal Register notice.

The Services are not obligated to consider comments received after the 30-day comment period has closed, but may elect to do so, especially if they contain significant biological information or if discussions with the applicant have continued after the close of the comment period. All late comments must then be considered, however. If any new information received from either commenters or the applicant is of relevance to the decision regarding issuance of the permit, it will be necessary to reopen the public comment period.

5. Objection to the Permit.

Any individual may object to issuance of an incidental take permit for an **endangered** species during the 30-day comment period. An objection should be in writing, refer to the permit application number, and provide specific, substantive reasons why the individual believes the application does not meet the permit issuance criteria or other reasons why the permit should not be issued. For FWS, if the objector requests notification of the final action in writing and the FWS decides to issue the permit, the agency must notify the objector in writing that the permit will be issued. A reasonable effort must be made to accomplish this notification at least 10 days before permit issuance. If notification is verbal, it must later be followed in writing. If notification prior to permit issuance could lead to harm to the endangered species or population involved, or unduly hinder proposed activities to be authorized, FWS may dispense with prior notification; however, written explanation for doing so must be provided to the objector following permit issuance.

The objection process described above does not apply to **threatened** species. Under 50 CFR 17.32(b)(1)(ii), the FWS must publish notice in the Federal Register for each application to incidentally take a threatened species, and the notice should invite written comments from interested parties during a 30-day comment period. The FWS is not required to address objections to permit issuance for threatened species in the manner described above, though doing so is recommended.

6. Notice of Permit Issuance, Amendment, Denial, or Abandonment.

Although not required by law or Federal regulation, it is FWS policy to notify the public of their section 10 permit application decisions. NMFS is required by its regulations at 50 CFR 222.24(c) to publish a notice of the decision within 10 days after the date of issuance or denial. Notices of permit issuances, denials, and amendments should be published in the Federal Register on a quarterly or biannual basis. A 45-day waiting period is recommended prior to publication of permit denial notices to allow time for appeals by the applicant. Appendix 18 contains "templates" for preparing Notices of Issuance for a single permit and for multiple permits. Notice of the abandonment of a permit application by the applicant need not be published.

E. Permit Issuance Conditions and Reporting Requirements

The permit (for FWS, Form 3-201; for NMFS, agency letterhead) must identify the species, stipulate the activities authorized, and indicate the location(s) where the activities can be conducted. The permit, together with its attached terms and conditions, must contain sufficient information so that no question remains by the permittee or an enforcement officer as to the scope of the authorized taking. Appendix 17 contains examples of issued FWS incidental take permits.

1. Permit Conditions.

The Services have the authority to impose terms and conditions in the permit necessary to carry out the purposes of the permit, including but not limited to, monitoring and reporting requirements necessary for determining whether such terms and conditions are being complied with. The terms and conditions placed in the permit should be the same as, or a restatement of, those described in the final HCP, with the exception of standard conditions that go into all permits. However, in some cases FWS or NMFS may need to incorporate additional conditions resulting from the section 7 consultation. Reasonable and prudent alternatives, if provided in the section 7 consultation to avoid jeopardy, as well as reasonable and prudent measures and terms and conditions, if included in the incidental take statement, must be included in the permit conditions. Permits should also identify protocols for handling dead and/or injured specimens of protected species taken under authority of the permit.

2. Permit Duration. [See 50 CFR 13.21(f) or 50 CFR 222.22(e)]

The Conference Report for the 1982 Section 10 amendments states, "The Secretary is vested with broad discretion in carrying out the conservation plan provision to determine the appropriate length of any section 10(a) permit issued pursuant to this provision in light of all of the facts and circumstances of each individual case" (H.R. Rep. No. 97-835, 97th Congress, Second Session).

Thus, the allowable duration of a permit is flexible but an expiration date **must** be specified (for FWS, in block 7 of the permit Form 3-201). The duration of planned activities, the potential positive effects to listed species provided under the permit, and the potential negative effects to the species that may result from premature permit expiration should be considered in determining permit length. Also, local government agencies may wish to tie the permit expiration date to local land use plans. Development or land use activities and the conservation program proposed in the HCP may require years to implement. The Services must assure the applicant that authorizations under the permit will be available for the life of the project, and the public that conservation measures under the permit will remain in effect for as long as necessary to implement the conservation program.

3. Distribution of Copies of the Permit.

A copy of the issued permit should be provided to the Endangered Species Division in Washington, D.C. (FWS and NMFS), applicable Field Offices, other Federal agencies involved in the HCP, and affected state wildlife and conservation agencies.

4. Reporting Requirements. [See 50 CFR 13.45; 50 CFR 17.22(b)(3) and 17.32(b)(3) or 50 CFR 222.22(d)(1)]

The permit should include reporting requirements necessary to track take levels occurring under the permit and to ensure the conservation program is being properly implemented. Federal regulation (50 CFR 13.45) requires annual reports unless otherwise specified by the permit. The HCP itself will often specify reporting requirements. Unless reporting requirements in addition to those in the HCP are deemed to be necessary, reporting requirements in the HCP and the permit should be the same. Failure to submit adequate reports as required by the permit is a violation of the permit and may lead to permit suspension or revocation.

- o Each permittee must file a report, even if no activity was conducted under the permit in that reporting interval.
- o No permittee should be required to include in a report information of a private or personal nature (for individuals). Sensitive business information or information

that is otherwise considered proprietary (for businesses) should also generally not be required.

- o If a report required by the permit is not submitted or is inadequate, the permittee should be notified in writing and offered at least 30 days to demonstrate compliance. If the permittee fails to comply within the allotted time, permit suspension procedures (50 CFR 13.27) or revocation procedures (50 CFR 13.28 for FWS, 50 CFR 222.27 for NMFS) should be initiated.
- o Report due dates should be flexible and wherever possible tailored to the activities being conducted under the permit (e.g., due at the end of a particular stage of the project). If possible, the due date should also be coordinated with other (e.g., state) reporting requirements so the permittee can satisfy more than one reporting requirement with a single report. For low-effect HCPs in which the project or activity is completed in less than a year or in which annual reporting is otherwise deemed to be unnecessary, a single "post-activity" or "post-construction" report is often adequate.
- o A copy of the report, or a notice that it is available should be sent to state wildlife agencies and other appropriate parties, either by the applicant or the FWS or NMFS.
- o Reports should be monitored closely to ensure that they contain adequate information and the permittee is complying with the authorizations and conditions of the permit. For FWS, information about apparent violations should be forwarded to the appropriate ARD-LE Office and Law Enforcement special agent. The Regional Office, in coordination with Law Enforcement, should immediately notify the permittee of apparent noncompliance and request an explanation. For NMFS, permit violations should be reported to the appropriate Regional Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation.

F. Permit Denial, Review, and Appeal Procedures

1. Permit Denial.

If the HCP and associated documents do not satisfy issuance criteria under the ESA and Federal regulation, the permit application must be denied. The applicant must be notified of the denial in writing and the reasons for the denial, of applicable regulations resulting in the denial, and of the applicant's right to request reconsideration of the permit application. For NMFS, denials must be made in accordance with 15 CFR part 904.

2. Review Procedures. [See 50 CFR 13.29 or 50 CFR 220.21]

A section 10 applicant has access to a two-tiered system of review of a permit denial within the issuing office: (1) if the permit is denied, the applicant can request reconsideration of the permit application; and (2) if the request for reconsideration is denied, the applicant can appeal the decision. To ensure independent review of a permit denial at each stage, review decisions and signature authority should be as follows:

- o For FWS, initial permit denials should be signed by the appropriate Assistant Regional Director;
- o Decisions on requests for reconsideration should be signed by the Deputy Regional Director (DRD);
- o Appeal decisions (the final administrative action) should be signed by the Regional Director (RD).

For NMFS, the above decisions must be signed by the Regional Director or the Director of the Office of Protected Resources Division in Washington, D.C.

3. Requests for Reconsideration. [See 50 CFR 13.29(a)-(d) or 50 CFR 220.21]

For FWS, a permit applicant may request reconsideration of (1) denial of a permit application, renewal, or amendment request; and (2) amended, suspended, or revoked permits, except for permit actions required by changes in statute or regulations. The applicant's request must meet the criteria outlined in 50 CFR 13.29, be in writing, be signed by the applicant or a designated representative, and be addressed to the Deputy Regional Director.

When the DRD's office receives a request for reconsideration, the ARD that issued the denial must forward a copy of the applicant's file, along with a summary of the file's pertinent points, to the DRD. If the DRD determines that permit issuance criteria have been satisfied, the denial is reversed and a permit may be issued. If the denial is sustained, the DRD must notify the applicant of the decision within 45 calendar days of receipt of the request. This notification must be in writing, state the reasons for the decision, and describe the evidence used to make it. The letter must also provide information concerning the applicant's right to appeal, the office to which the appeal should be made, and the procedures for making the appeal.

For NMFS, procedures for requests for reconsideration are addressed in 50 CFR 220.21.

4. Appeal. [See 50 CFR 13.29(e)-(f)]

For FWS, an applicant may appeal a second denial of the permit in accordance with 50 CFR 13.29(e)-(f). The written appeal request must be signed by the applicant or a designated

representative and be addressed to the Regional Director. Before a decision is made, the appellant may present oral arguments before the RD if the RD believes this could clarify issues raised in the written record.

The RD shall provide the appellant with written notification of the appeal decision within 45 calendar days of receipt of the request. This time frame may be extended with good cause if the appellant is notified of and concurs with the extension. The RD's decision on a permit appeal constitutes the final administrative decision of the Department of the Interior.

5. Copies of Denials.

For FWS, a copy of all section 10 permit denials, including denial of reconsideration and appeal requests, should be sent to all affected Field Offices, the ARD-LE, and the Division of Endangered Species in Washington, D.C. For NMFS, copies should be sent to affected Field Offices and Regional Offices and the Endangered Species Division in Washington, D.C.

G. Permit Amendments [See 50 CFR 13.23 or 50 CFR 222.25]

For FWS, amendment of existing permits may be requested by a dated letter signed by the applicant and referencing the permit number. The \$25 application fee is required unless the applicant is fee exempt (see Appendix 10). Procedurally, a permit amendment application is treated in the same way as the original permit application. However, documentation needed in support of a permit amendment will vary depending on the nature of the amendment and the content of the original HCP. If the amendment involves an action that was not addressed in the original HCP, Implementing Agreement, or NEPA analysis, these documents may need to be revised or new versions prepared addressing the amendment submitted. If the circumstances necessitating the amendment were addressed in the original documents (e.g., a previously unlisted species adequately addressed in the HCP is subsequently listed), then only amendment of the permit itself is generally needed. See Chapter 4 for a discussion of how previously unlisted species are treated if they are listed.

For NMFS, applications to modify a permit are subject to the same issuance provisions as an original permit application as provided in 50 CFR 222.22.

H. Permit Renewal [See 50 CFR 13.22 or 50 CFR 220.24]

For FWS, Federal fish and wildlife permits may be renewed if indicated in block 4 of the permit. Whether or not the permit is renewable should be determined by the Regional Office when the permit is issued.

If the permittee files a renewal request and the request is on file with the issuing FWS office at least 30 days prior to the permit's expiration, the permit will remain valid while the renewal is being processed, provided the existing permit is renewable. The permittee may

not take listed species beyond the quantity authorized by the original permit, however. A renewal request must:

- o Be in writing;
- o Reference the permit number;
- o Certify that all statements and information in the original application are still correct or include a list of changes;
- o Provide specific information concerning what take has occurred under the existing permit and what portions of the project are still to be completed; and
- o Request renewal.

If a permittee fails to file a renewal request 30 days prior to permit expiration, the permit becomes invalid after the expiration date. If the permittee seeks extension of the expiration date only and proposes no additional taking, a public comment period generally is required. A permittee must have complied with annual reporting requirements to qualify for renewal.

For NMFS, requirements for permit renewal are contained in 50 CFR 220.24.

I. Permit Transferals

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this section may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Congress amended section 10(a)(1) of the Act in 1982 to authorize new incidental take permits associated with HCPs. Many HCP permits involve long-term conservation commitments that run with the affected land for the life of the permit. The Services negotiate such long-term permits recognizing that a succession of owners may purchase or resell the affected property during the term of the permit. In other HCP situations, the HCP permittee may be a State or local agency that intends to issue subpermits that authorize the incidental take for the permit to those entities involved in the HCP.

The Services do not view these situations as problems since the terms of such permits frequently run with the land, binding successive owners to the terms of the HCP. Landowners similarly do not view this as a problem as long as the Services can easily transfer incidental take authorization from one purchaser to another. However, the new landowners must be able and willing to assume the responsibilities associated with the permit (i.e., the minimization/mitigation strategy and the terms and conditions of the permit) to receive the assurances of the permit.

If a landowner, who is a section 10(a)(1)(B) permittee, transfers ownership of the land that occurs within an approved HCP, the Services will regard the new owner as having the same rights with respect to the permit as the original landowner, provided that the new owner agrees to be bound by the terms and conditions of the original permit. Actions taken by the new landowner resulting in the incidental take of species covered by the permit would be authorized if the new landowner agrees to the permit and continues to implement the minimization and mitigation strategies of the HCP.

To ensure that original permittees inform new landowners of their rights and responsibilities, a section 10(a)(1)(B) permit must commit the permittee to notify the Services of any transfer of ownership of any lands subject to the permit before the transfer is finalized. The Services should attempt to contact the new landowner to explain the prior permit, and determine whether the new landowner would like to continue the original permit or enter into a new permit. In addition, the original permittee needs to work with the new landowner(s) to ensure they understand the obligations associated with permit transfer. The Services will provide any technical assistance necessary to ensure that all parties understand their rights and responsibilities.

If, however, the new landowner does not agree to the terms and conditions of the original permit, the original permittee must work with the Services to determine whether, and under what circumstances, the permit can be terminated. In order to terminate the permit, the Services must determine if the minimization and mitigation measures that were conducted up to that point were commensurate with the amount of incidental take that occurred during the term of the permit. If the incidental take occurred during the initial stages of implementing the permit, but the minimization and mitigation measures occur throughout the term of the permit, the Services shall require that the remainder of the minimization and mitigation measures be implemented before the permit is terminated. In this fashion, the Services will be able to ensure that there is adequate and sufficient minimization and mitigation for the incidental take that occurred during the term of the permit.

J. Permit Violations, Suspensions, and Revocations

On occasion, the Services may find that a permittee has violated conditions of the permit. This may become evident through review of a permittee's annual report, a field inspection, or

other means. Implementing Agreements sometimes contain provisions concerning the failure of signatory parties to perform their assigned responsibilities under an HCP.

1. Notifying Law Enforcement.

In the event of a known or suspected permit violation, the appropriate ARD-LE and Law Enforcement Special Agent must be notified before any official action is taken (for FWS). If the violation is deemed technical or inadvertent in nature, the ARD-LE may advise that the permittee be sent a notice of noncompliance by certified mail or may recommend alternative action to regain compliance with the terms of the permit. Concurrence from the ARD-LE should be obtained before mailing any correspondence concerning an alleged permit violation to avoid wording that could compromise a current or future investigation. For NMFS, the appropriate Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation should be notified.

2. Permit Suspension/Revocation. [See 50 CFR 13.27 and 13.28]

The Services may suspend or revoke all or part of the privileges authorized by a permit, if the permittee does not:

- o Comply with conditions of the permit or with applicable laws and regulations governing the permitted activity; or
- o 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 Regional Office instructions. For further information, consult the regulations on procedures to suspend or revoke permits.

CHAPTER 7 ISSUANCE CRITERIA FOR INCIDENTAL TAKE PERMITS

Upon receiving a permit application and conservation plan completed in accordance with the requirements of section 10(a)(2)(A) of the ESA and Chapter 3 above, FWS and NMFS must consider the issuance criteria described at section 10(a)(2)(B) of the ESA in determining whether to issue the permit. All applicable criteria must be satisfied before a permit may be issued. If the application fails to meet any of the criteria, the permit must be denied. In addition, the FWS must ensure that general permit issuance criteria described at 50 CFR 13.21 and criteria specific to section 10(a)(1)(B) permits described at 50 CFR 17.22(b)(2) and 50 CFR 17.32(b)(2) are satisfied. However, issuance criteria under at 50 CFR Part 17 are essentially identical to those under the ESA. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222, and denials of permits must be made pursuant to Subpart D of 15 CFR part 904.

A. General Permit Issuance Criteria

The FWS cannot issue a permit if any of the following apply:

- (1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility;
- (2) The applicant has failed to disclose material information, or has made false statements as to any material fact in connection with the application;
- (3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;
- (4) The authorization requested threatens the continued existence of a wildlife or plant population.
- (5) The FWS finds through further inquiry or investigation, or otherwise, that the applicant is not qualified to conduct the proposed activities.

In addition to the above, FWS regulations cite four factors relating to felony violations of national wildlife laws and violation of conditions within other permits that could disqualify an

applicant from receiving a section 10 permit. These factors are described at 50 CFR 13.21(c). NMFS regulations describe similar conditions under which a permit could not be issued (see 50 CFR 220.21).

B. Endangered/Threatened Species Permit Issuance Criteria

Section 10(a)(2)(B) of the ESA requires the following criteria to be met before the FWS or NMFS may issue an incidental take permit. If these criteria are met and the HCP and supporting information are statutorily complete, the permit must be issued.

1. The taking will be incidental.

Under the ESA, all taking of federally listed fish and wildlife species as detailed in the HCP must be incidental to otherwise lawful activities and not the purpose of such activities. For example, deliberate shooting or wounding a listed species ordinarily would not be considered incidental take and would not qualify for an incidental take permit. Conversely, the destruction of an endangered species or its habitat by heavy equipment during home construction or other land use activities generally would be construed as incidental and could be authorized by an incidental take permit.

a. Authorizing Take Associated With Mitigation Activities.

Mitigation and monitoring programs sometimes require actions that, strictly speaking, may be construed as a deliberate take. A good example is trapping endangered or threatened animals at a project site to re-locate or protect them in some fashion or to monitor their presence or activities.

Generally, actions that result in deliberate take can be conducted under an incidental take permit, if: (1) the take results from mitigation measures (e.g., capture/relocation) specifically intended to minimize more serious forms of take (e.g., killing or injury) or are part of a monitoring program specifically described in the HCP; and (2) such activities are directly associated in time or place with activities authorized under the permit. Examples include capture of endangered animals from a project site and removal to adjacent or nearby habitat, capture and release of animals accidentally entrapped at the site (e.g., in a pipeline trench), capture/release studies for monitoring purposes, even permanent capture for purposes of donation to a captive breeding or research facility. However, where such activities require special qualifications, the HCP should require written FWS or NMFS authorization before any individual is permitted to conduct the work.

b. Authorizing Take For Scientific Purposes.

Other types of activities cannot be authorized by an incidental take permit because they include actions that are not generally needed to implement an HCP or include long-term components that are not "incidental" to the activity described in the HCP. Examples of these types of activities include holding endangered or threatened animals in captivity for propagation purposes or scientific research; euthanizing them for research purposes; and taking tissue samples for laboratory testing. However, such activities qualify as take for "scientific purposes" or purposes of "enhancement of propagation or survival" and can be authorized under section 10(a)(1)(A) of the ESA.

If an HCP calls for activities of this type, the applicant should specify that the project will result in incidental take and take for scientific purposes or for purposes of enhancement of propagation or survival. Application requirements for scientific permits must then be addressed. These are described at 50 CFR 17.22(a)(1)(i-ix) for endangered species and 50 CFR 17.32(a)(1)(i-ix) for threatened species (FWS) and 50 CFR 217, 220, and 222 (NMFS). In addition, FWS must address issuance criteria under 50 CFR 17.22(a)(2) for endangered species and 50 CFR 17.32 (a)(2) for threatened species to issue permits for these purposes. Generally, if proposed activities are well-described in the HCP, including those requiring a scientific permit, and if all incidental take permit application requirements have been met, the only additional information needed for a scientific permit is resumes of individuals who would be conducting permitted activities. The permit issued can be a joint section 10(a)(1)(A) section 10(a)(1)(B) permit--i.e., only one permit need be issued.

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

The applicant decides during the HCP development phase what measures to include in the HCP (though, obviously, the applicant does so in light of discussions with and recommendations from FWS or NMFS). However, the Services ultimately decide, at the conclusion of the permit application processing phase, whether the mitigation program proposed by the applicant has satisfied this statutory issuance criterion.

This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. Analysis of the alternatives that would require additional mitigation

in the HCP and NEPA analysis, including the costs to the applicant is often essential in helping the Services make the required finding.

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

These issuance criteria are identical to HCP requirements discussed in Chapter 3. The Services must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. Without such findings, the section 10 permit cannot be issued. Examples of funding mechanisms and methods of ensuring funding are discussed in Chapter 3, Section B.6.

The "Unforeseen or Extraordinary Circumstances " discussion in the HCP must be consistent with the joint Department of Interior/Department of Commerce "No Surprises" policy and should impose no higher standard on the permit applicant with respect to unforeseen circumstances than that described under this policy (see Chapter 3, Section B.5(a)).

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

This is a critically important criterion for incidental take permits because it establishes a fundamental "threshold" standard for any listed species affected by an HCP. Furthermore, the wording of this criterion is identical to the "jeopardy" definition under the section 7 regulations (50 CFR Part 402.02), which defines the term "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."

Congress was explicit about this link, stating in the Conference Report on the 1982 ESA amendments that the Services will determine whether or not to grant a permit, "in part, by using the same standard as found in section 7(a)(2) of the ESA, as defined by the [Services'] regulations." Congress also directed the Services 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." (H.R. Report No. 97-835, 97th Congress, Second Session).

Thus, since the issuance of a section 10 permit is a Federal action subject to section 7 of the ESA (see Chapter 3, Section B.2(e)), the law prohibits any non-Federal activity under an HCP from "jeopardizing" a species under two standards: (1) the section 7 jeopardy standard; and (2) the incidental take permit issuance criteria. There is one difference between these two standards--the section 10 issuance criteria apply only to listed fish and wildlife species (because listed plants typically are not protected against take on non-Federal lands), while

the jeopardy standard under section 7(a)(2) applies to plants as well as animals. However, the practical effect is the same--the ESA requires a "no-jeopardy" finding for all affected federally listed species as a precondition for issuance of an incidental take permit. The basis for this finding is the Service's biological opinion.

5. The applicant will ensure that other measures that the Services may require as being necessary or appropriate will be provided.

This criterion is equivalent to the requirement that HCPs include other measures as necessary or appropriate for purposes of the plan. Because the HCP process deals with numerous kinds of proposals and species, this criterion authorizes the Services to impose additional measures to protect listed species where deemed necessary. Although these types of measures should have been discussed during the HCP development phase and incorporated into the HCP, FWS or NMFS must ensure that the applicant has included all those measures the Services consider necessary "for purposes of the plan" before issuing the permit. The principal additional measure that the Services may require at this time is the Implementing Agreement. Other measures the Services might recommend during HCP negotiations could include those necessary to guarantee funding for the mitigation program and monitoring and reporting requirements to ensure permit compliance. Also, any incidental take permit issued will be subject to the general permit conditions described at 50 CFR Part 13, Subpart D (FWS) or 50 CFR Part 220 (NMFS) regarding the display of permits, maintenance of records, filing of reports, etc.

6. The Services have received such other assurances as may be required that the HCP will be implemented.

The applicant must ensure that the HCP will be carried out as specified. Since compliance with the HCP is a condition of the permit. The authority of the permit is a primary instrument for ensuring that the HCP will be implemented. When developed, Implementing Agreements also provide assurances that the HCP will be properly implemented. Where a local government agency is the applicant, the Agreement should detail the manner in which local agencies will exercise their existing authorities to effect land or water use as set forth in the HCP. Under an HCP, government entities continue to exercise their duly constituted planning, zoning, and permitting powers. However, actions that modify the agreements upon which the permit is based (e.g., rezoning an area contrary to land uses specified in the HCP) could invalidate the permit. In addition, failure to abide by the terms of the HCP and Implementing Agreement (if required) is likely to result in suspension or revocation of the permit.

Some HCPs may involve interests other than the applicant or permittee. In these cases, the applicant must have specific authority over the other parties affected by the HCP and be willing to exercise that authority, or must secure commitments from them that the terms of the HCP will be upheld. In the latter case, agreements between the FWS or NMFS and the

other groups, or legally binding contracts between the applicant and such individuals or interests, may be necessary to bind all parties to the terms of the HCP.

Any Implementing Agreement submitted in support of an HCP should be consistent with the discussion in Chapter 3, Section B.8, and, where applicable, with the Implementing Agreement "template" in Appendix 4.

CHAPTER 8 - DEFINITIONS

Candidate species - Under FWS's ESA regulations, "...those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support proposals to the list them as endangered or threatened species. Proposal rules have not yet been issued because this action is precluded..." (See Federal Register, Volume 61, No. 49, page 7598.) For those species under the jurisdiction of NMFS, candidate species means a species for which concerns remain regarding their status, but for which more information is needed before they can be proposed for listing.

Categorical exclusion - Under NEPA regulations, a category of actions that does not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a Federal agency pursuant to NEPA. (40 CFR 1508.4)

Complete application package - Section 10 permit application package presented by the permit applicant to the Field Office or Regional Office for processing. It contains an application form, fee (if required), HCP, EA or EIS. In order to begin processing, the package must be accompanied by a certification by the Field Office that it has reviewed the application documents and finds them to be statutorily complete.

Conservation plan - Under section 10(a)(2)(A) of the ESA, a planning document that is a mandatory component of an incidental take permit application, also known as a Habitat Conservation Plan or HCP.

Conservation plan area - Lands and other areas encompassed by specific boundaries which are affected by the conservation plan and incidental take permit.

"Covered species" - Unlisted species that have been adequately addressed in an HCP as though they were listed, and are therefore included on the permit or, alternately, for which assurances are provided to the permittee that such species will be added to the permit if listed under certain circumstances. "Covered species" are also subject to the assurances of the "No Surprises" policy.

Cumulative impact or effect - Under NEPA regulations, the incremental environmental impact or effect of the action together with impacts of past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions. (40 CFR 1508.7) Under ESA section 7 regulations, the effects of future state or private activities not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02).

Delist - To remove from the Federal list of endangered and threatened species (50 CFR 17.11 and 17.12) because such species no longer meets any of the five listing factors provided under section 4(a)(1) of the ESA and under which the species was originally listed (i.e., because the species has become extinct or is recovered).

Development or land use area - Those portions of the conservation plan area that are proposed for development or land use or are anticipated to be developed or utilized.

Downlist - To reclassify an endangered species to a threatened species based on alleviation of any of the five listing factors provided under section 4(a)(1) of the ESA.

Effect or impact - Under NEPA regulations, a direct result of an action that occurs at the same time and place; or an indirect result of an action which occurs later in time or in a different place and is reasonably foreseeable; or the cumulative results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions (40 CFR 1508.8). Under ESA section 7 regulations, "effects of the action" means "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline (50 CFR 402.02).

Endangered species - "...any species [including subspecies or qualifying distinct population segment] which is in danger of extinction throughout all or a significant portion of its range." [Section 3(6) of ESA]

Endangered Species Act of 1973, as amended - 16 U.S.C. 1513-1543; Federal legislation that provides means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and provides a program for the conservation of such endangered and threatened species.

Environmental Action Memorandum (EAM) - A FWS document prepared to explain the Service's reasoning in finalizing an action that is categorically excluded from NEPA; decisions based on EAs for which a notice is not published in the Federal Register; emergency actions under CEQ's NEPA regulations (40 CFR 1506.11); EAs which conclude that an EIS is necessary (since no FONSI is prepared in such cases); and any decision where additional documentation of the Service's decision is desirable (Director's Order No. 11).

Environmental Assessment (EA) - A concise public document, prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an Environmental Impact Statement or Finding of No Significant Impact (40 CFR 1508.9).

Environmental impact statement (EIS) - A detailed written statement required by section 102(2)(C) of NEPA containing, among other things, an analyses of environmental impacts of a proposed action and alternative considered, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the environment versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources (40 CFR 1508.11 and 40 CFR 1502).

Finding of no significant impact (FONSI) - A document prepared in compliance with NEPA, supported by an EA, that briefly presents why a Federal action will not have a significant effect on the human environment and for which an EIS, therefore, will not be prepared (40 CFR 1508.13).

Formal permit application phase - The phase of the section 10 process that begins when the Regional Office receives a "complete application package" and ends when a decision on permit issuance is finalized.

Habitat - The location where a particular taxon of plant or animal lives and its surroundings, both living and non-living; the term includes the presence of a group of particular environmental conditions surrounding an organism including air, water, soil, mineral elements, moisture, temperature, and topography.

Habitat conservation plan (HCP) - See "conservation plan."

"Harm" - Defined in regulations implementing the ESA promulgated by the Department of the Interior as an act "which actually kills or injures" listed wildlife; harm may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." (50 CFR 17.3) NMFS has not defined "harm" by regulation.

"Harass" - Defined in regulations implementing the ESA promulgated by the Department of the Interior as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, and sheltering." (50 CFR 17.3) NMFS has not defined "harass" by regulation.

Implementing Agreement - An agreement that legally binds the permittee to the requirements and responsibilities of a conservation plan and section 10 permit. It may assign the responsibility for planning, approving, and implementing the mitigation measures under the HCP.

Incidental take - Take of any federally listed wildlife species that is incidental to, but not the purpose of, otherwise lawful activities (see definition for "take") [ESA section 10(a)(1)(B)].

Incidental take permit - A permit that exempts a permittee from the take prohibition of section 9 of the ESA issued by the FWS or NMFS pursuant to section 10(a)(1)(B) of the ESA. In this handbook, also referred to as a section 10(a)(1)(B) or section 10 permit.

Listed species - Species, including subspecies and distinct vertebrate populations, of fish, wildlife, or plants listed as either endangered or threatened under section 4 of the ESA.

Mitigation - Under NEPA regulations, to moderate, reduce or alleviate the impacts of a proposed activity, including: a) avoiding the impact by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action; c) rectifying the impact by repairing, rehabilitating or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; e) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

National Environmental Policy Act (NEPA) - Federal legislation establishing national policy that environmental impacts will be evaluated as an integral part of any major Federal action. Requires the preparation of an EIS for all major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4321-4327).

Person - "...an individual, corporation, partnership, trust association, or any other private entity; or any officer, employee, agent, department or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States" [Section 3(12) of the ESA].

Plan area - See "conservation plan area."

HCP development phase - The period in the section 10 process during which the applicant works with the FWS or NMFS Field Office to develop the HCP and associated documents. This phase ends when the Field Office forwards a "complete application package" to the Regional Office.

Proposed action - Under NEPA regulations, a plan that has a goal which contains sufficient details about the intended actions to be taken or that will result, to allow alternatives to be developed and its environmental impacts to be analyzed (40 CFR 1508.23).

Proposed species - A species for which a proposed rule to add the species to the Federal list of threatened and endangered species has been published in the Federal Register.

Record of Decision - Under NEPA regulations, a concise public record of decision prepared by the Federal agency, pursuant to NEPA, that contains a statement of the decision, identification and discussion of all factors used by the agency in making its decision,

identification of all alternatives considered, identification of the environmentally preferred alternative, a statement as to whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted (and if not, why they were not), and a summary of monitoring and enforcement measures where applicable for any mitigation (40 CFR 1505.2).

Section 7 - The section of the ESA which describes the responsibilities of Federal agencies in conserving threatened and endangered species. Section 7(a)(1) requires all Federal agencies "in consultation with and with the assistance of the Secretary [to] utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species." Section 7(a)(2) requires Federal agencies to "ensure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of..." designated critical habitat.

Section 9 - The section of the ESA dealing with prohibited acts, including the "take" of any listed species without specific authorization of the Fish and Wildlife Service or the National Marine Fisheries Service for species under the jurisdiction of each agency.

Section 10 - The section of the ESA dealing with exceptions to the prohibitions of section 9 of the ESA.

Section 10(a)(1)(A) - That portion of section 10 of the ESA that allows for permits for the taking of threatened or endangered species for scientific purposes or for purposes of enhancement of propagation or survival.

Section 10(a)(1)(B) - That portion of section 10 of the ESA that allows for permits for incidental taking of threatened or endangered species.

Set of Findings - FWS document (also used by NMFS) that evaluates, for the administrative record, a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA and 50 CFR Part 17.

Species - "...any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature" [Section 3(15) of the ESA].

Steering committee - Group or panel of individuals representing affected interests or stakeholders in a conservation planning program, the private sector, and the interested public, which may be formed by the applicant to guide development of the HCP, recommend appropriate development, land use, and mitigation strategies, and to communicate progress to their larger constituencies. FWS and NMFS representatives may participate to provide information on procedures, statutory requirements, and other technical information.

Take - Under section 3(18) of the ESA, "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally listed endangered species of wildlife. Federal regulations provide the same taking prohibitions for threatened wildlife species [50 CFR 17.31(a)].

Threatened species - "...any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" [Section 3(19) of the ESA].

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 17

**Endangered and Threatened Wildlife
and Plants; Prohibitions and Permits**

AGENCY: Fish and Wildlife Service,
Interior.

ACTION: Final rule.

SUMMARY: This Fish and Wildlife Service (Service) revises its regulations to implement the incidental take permit and other provisions of the 1982 amendments to the Endangered Species Act (EAS) of 1973. The final rule is not significantly different from the proposed rule. The final rule (1) provides, under limited circumstances, for permits to take endangered and threatened species incidental to, and not the purpose of, otherwise lawful activities, and (2) adds a prohibition against removing and reducing to possession endangered and threatened plants from areas under Federal jurisdiction. An applicant for an incidental taking permit must submit a conservation plan that specifies: (1) The impacts that will likely result from such taking; (2) what steps the applicant will take to minimize and mitigate those impacts; (3) what other alternatives were analyzed that would not result in the takings; and (4) why those

alternatives were not adopted. To issue the permit, the Service must find that the taking will be incidental, that the applicant will minimize and mitigate the impact of the taking, that the applicant will ensure that there will be adequate funding for the conservation plan, and that appropriate measures will be taken by the permittee to successfully conduct the activities authorized by the permit.

EFFECTIVE DATE: October 30, 1985.

FOR FURTHER INFORMATION CONTACT:

Mr. Larry LaRochelle, Staff Biologist, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, 1000 N. Glebe Road, Room 611, Arlington, Virginia 22201 (703/235-1903).

SUPPLEMENTARY INFORMATION:

I. Background

On July 8, 1983 (48 FR 31417), the Service published proposed regulations to implement certain aspects of the 1982 amendments to the Endangered Species Act of 1973 (ESA). The first, an amendment to section 10(a) of the ESA, 16 U.S.C. 1539(a), allows permits for takings of endangered species incidental to, but not the purpose of, otherwise lawful activities. The second, addition of a new section 9(a)(2)(B) of the ESA, 16 U.S.C. 1538(a)(2)(B), prohibits removal and reduction to possession of protected plants from areas under Federal jurisdiction. The July 8, 1983, notice discussed the need, purpose and details of the Service's proposal and invited comments from interested parties until August 8, 1983.

The Service received comments from 13 parties: 1 port authority, 2 Federal agencies, 2 electric utility organizations, 3 conservation organizations, and 5 oil or gas corporations. Some comments were brief while others were lengthy, substantive, and analytical. All generally supported the Service's proposed rule though various clarifications were sought and alternate procedures and regulatory language were offered. Two commenters recommended that the Service's final rule be identical to the proposed rule. Each comment has been considered in preparing this final rule. In addition, the Service has relied upon its substantial experience in developing and implementing programs affecting endangered species. The significant comments pertinent to the Service's Notice of Proposed Rule are summarized and discussed below together with the Service's responses.

II. Comments

A. Incidental Take Regulations

The preamble to the proposed regulations contained an extended

quotation from the Conference Report on the 1982 amendments to the ESA. This material was included in the notice of proposed rulemaking because it illuminates in detail Congress' intent in enacting the incidental take permit provisions. Unfortunately, and inadvertently, only the first paragraph of the quotation was properly typeset to show that it was a quotation, creating among many commenters the impression that the rest of the material was drafted by the Service. In fact, all of the material from the bottom of the third column of 48 FR 31417 through the top of the first column of 48 FR 31419 is a quotation from the Conference Report and therefore represents Congress' detailed views on incidental take permits. The Service apologizes for the misunderstandings that were created by this typographical error.

1. Joint Promulgation of These Regulations by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (NMFS)

Four commenters urged the Service and NMFS to coordinate their efforts so as to develop similar or identical requirements if each chose to develop its own regulations, to have NMFS adopt the Service's regulations, or to promulgate joint regulations. Certain species of fish, whales, seals, sea turtles, and other marine species listed as endangered or threatened under the ESA are under the jurisdiction of NMFS (50 CFR Parts 222 and 227). All of the ESA-listed marine mammals are subject to the Marine Mammal Protection Act (MMPA), however, which prohibits, except for scientific research, any takings of endangered or threatened species because they are considered "depleted" within the meaning of the MMPA, 16 U.S.C. 1371(a)(3)(B). ESA incidental take permits therefore may be available for only a few of the species under the jurisdiction of NMFS.

The Service agrees that coordination with NMFS on incidental take permit issues is important. The Service has consulted with NMFS throughout the process of drafting these regulations in order to ensure that the final regulations take into account the special aspects of NMFS's responsibility for regulating marine species and therefore are suitable for adoption by NMFS. The final regulations reflect this effort. NMFS will consider adopting the Service's regulations for species under its jurisdiction at a later date.

2. San Bruno Mountain Permit as a Model

The only incidental take permit that the Service has processed to date is

associated with residential and commercial development on San Bruno Mountain in the San Francisco metropolitan area. The legislative history of the 1982 incidental take permit amendment states that the San Bruno Mountain plan served as the model for the amendments to section 10(a) of the ESA. H.R. Rep. No. 835, 97th Cong., 2nd Sess. 31 (1982) (hereafter "Conf. Rep. at ____"). Several commenters asserted, however, that the San Bruno plan is uncommonly complex and controversial and is therefore not a proper model for the Service's regulations. These commenters cited the difficulty of extrapolating from the San Bruno experience to other situations and activities.

Congress, not the Service, modeled the section 10(a) incidental take permit amendment on the San Bruno Mountain project. The courts that have reviewed and upheld the San Bruno incidental take permit agree that Congress intended that project to serve as a model. See, e.g., *Friends of Endangered Species v. Jantzen*, 76 F.2d 976 (9th Cir. 1985). The Service does, of course, have the discretion and the responsibility to implement the requirements of section 10(a) in regulations that are not only consistent with section 10(a), but which are also flexible and versatile. In drafting the regulations, the Service has naturally drawn upon its experience in processing and granting the San Bruno permit. The Service believes that the final regulations, which are largely identical to the express language of section 10(a), will accommodate projects that differ substantially from the San Bruno project in size; planned duration; the number of different local, State, and Federal agencies that have jurisdiction over some aspect of the project; or the number of listed and unlisted species that may be involved. The promise offered by the incidental take amendment—a means of reconciling conflicts which would otherwise exist between development and endangered species conservation—is available to a large variety of projects, provided they protect and conserve the affected species.

3. An all-inclusive Final Rule

Several commenters encouraged the Service to develop "cookbook" regulations that would include specific procedures, types of alternatives to be considered, detailed criteria and definitions, and a number of other items to cover the entire range of incidental take permit applications that might be filed. These commenters believed this approach would protect applicants from

arbitrary or inordinate requirements and protect listed species from exploitation. The Service recognizes that the incidental take permit provisions will have numerous and diverse applications, and that the administration of the provisions will require considerable ingenuity and flexibility. The wide-ranging experience of the Service in managing fish, wildlife, and plant resources has demonstrated, however, that it is neither possible nor practical to provide for every situation that might occur through the promulgation of detailed regulations such as the commenters suggested. Broader regulations will ensure that the Service is able to handle all incidental take situations that arise. The Service has therefore chosen to promulgate the final regulations in relatively broad terms consistent with the statutory language and Congressional intent.

It should be noted that the Service processed the complex San Bruno Mountain incidental take permit application and negotiated the implementing agreement among the involved parties without the benefit of incidental taking regulations and solely on the basis of the language of section 10(a), as amended.

4. Consideration of Unlisted Species in Conservation Plans

Several commenters addressed the issue of whether a conservation plan submitted in support of an incidental take permit application may (or should or must, depending upon the commenter) consider the impacts of the proposed activity on unlisted as well as listed species. While the proposed regulation was silent on this issue, its preamble quoted pertinent portions of the Conference Report. That language demonstrates Congressional intent that treatment of unlisted species in conservation plans be voluntary.

It also made clear however, that incidental take permit applicants will benefit in many, if not most, instances from consideration of unlisted species:

Although the conservation plan is keyed to the permit provisions of the Act, which only apply to listed species, the Committee intends that Conservation plans may address both listed and unlisted species.

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 an 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. Rep. at 30]. In other words, failure to consider an unlisted species in a conservation plan exposes the permit applicant to the risk that if the species is subsequently listed, the activities covered by the permit might have to be halted pending amendment of the incidental take permit to incorporate the newly listed species.

The final regulations therefore do not impose a requirement that unlisted species, whether candidate, proposed, or not be considered in a conservation plan. The regulations do, however, refer explicitly to the option of considering unlisted species in order to encourage proponents of conservation plans to do so.

5. Interaction of Sections 7, 9, and 10 of the Endangered Species Act

Numerous commenters raised issues concerning the interaction of the section 10(a) incidental take permit provision with the requirement in section 7(a)(2) for Federal interagency consultation on actions that may affect listed species and the prohibition in section 9 on takings of listed species. These comments were engendered in large part by the fact that section 7 was also affected by the 1982 amendments to the Act.

A few commenters asserted that because incidental take permit applicants are private parties, no section 7 consultation will be required with respect to an incidental take permit and associated conservation plan. This is clearly wrong, for any action undertaken pursuant to such a permit would be an action authorized by a Federal agency, the U.S. Fish and Wildlife Service, and the permit decision would therefore be subject to the section 7(a)(2) consultation requirement. Moreover, Congress expressly linked incidental take permits with the consultation requirement by including one of the section 7(a)(2) standards as a necessary criterion for issuing an incidental take permit. [Conf. Rep. at 29-30; H.R. Rep. No. 567, 97th Cong., 2nd Sess. 31 (1982)]. The section 10(a)(2)(B)(iv) criterion, whether "the taking will . . . appreciably reduce the likelihood of the survival and recovery of the species in the wild," is identical to the Service's regulatory definition of the section 7(a)(2) "jeopardize the continued existence of" standard (See 50 CFR 402.03). Thus, section 10(a) reinforces the consultation requirement with

respect to incidental take permits by requiring a non-jeopardy finding (or a jeopardy finding with reasonable and prudent alternatives that are implemented by the Federal agency or applicant) as a precondition to issuance of a permit.

Other commenters discussed the interrelationship of section 10(a) and section 7(b)(4), which refers to incidental taking identified in section 7(a)(2) consultations that have resulted in "no jeopardy" opinions, including the issue of whether section 7(b)(4) empowers the Secretary to recommend substantial alternatives to a proposed project where a no jeopardy opinion has been prepared for the project as originally planned. Section 7(b)(4) was added to the Act and section 7(o) was amended:

To resolve the situation in which a Federal agency or a permit or license applicant has been advised that the proposed action will not violate section 7(a)(2) of the Act but the proposed action will result in the taking of some species incidental to that action—a clear violation of section 9 of the Act which prohibits any taking of a species. The Federal agency or permit or license applicant is then confronted with the dilemma of having a biological opinion which permits the activity to proceed but is, nevertheless, proscribed from incidentally taking any species even though the incidental taking was contemplated in the biological opinion and determined not to be violation of section 7(a)(2)

[H.R. Rep. No. 567, 97th Cong., 2nd Sess. 26 (1982)]. Section 7(b)(4) provides that if section 7(a)(2) consultation results in a "no jeopardy" opinion, yet the proposed action would nevertheless involve incidental taking of a listed species but at a level low enough so that it would not violate section 7(a)(2), the Secretary must provide a written statement that:

- (i) Specifies the impact of such incidental taking on the species,
- (ii) Specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impacts, and
- (iii) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with to implement the measures specified under (ii).

Section 7(o)(2) further provides that any incidental taking in compliance with the terms and conditions set forth in section 7(b)(4)(iii) shall not be a taking prohibited by the Act or its implementing regulations.

One commenter argued that the section 7(b)(4) "reasonable and prudent measures" specified to minimize the impact of the incidental taking can include substantial alternatives to the proposed action and that the Service

would therefore be obliged to recommend alternatives to a proposed project that would cause incidental takes even though it meets the section 7(a)(2) standard. The Service notes that if consultation demonstrates that a proposed action is likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, the Secretary must, under section 7(b)(3)(A), suggest "reasonable and prudent alternatives" that would not violate section 7(a)(2). Section 7(b)(3)(A) *Alternatives* may involve substantial changes in the routing and design of a project so long as they can be implemented in a manner consistent with the intended purpose of the proposed action. Section 7(b)(4) reasonable and prudent *measures*, on the other hand, must be limited to minor design changes that would not substantially alter the project as proposed. The Service therefore disagrees with the commenter.

Section 10(a)(2)(A)(iii) does require that each conservation plan submitted in support of an incidental take permit application must identify and analyze alternatives to the incidental taking and discuss why they are not being utilized. This provision does not, however, authorize the Service to impose one of these alternatives on an applicant for an incidental take permit. Rather, without the concurrence of the permit applicant, the Service's only recourse upon receiving an inadequate plan is to deny the permit application. Such a denial must be in accordance with § 13.21(d) and will detail the reasons for the denial. Parties so denied may appeal the Service's decision in accordance with § 13.32, addressing the Service's reasons therefore and may provide new information or justification why the action in question should not have been taken.

One commenter urged the Service to employ not only the jeopardy standard, but also the adverse modification of critical habitat standard of section 7(a)(2) as a criterion for determining whether to grant an incidental take permit. The Service has not accepted this comment because it was not included by Congress as one of the permit issuance criteria in section 10(a)(2)(B). The Service agrees, however, that since all incidental take permit applications will be subject to section 7(a)(2) consultation, they would not be approved if they resulted in the destruction or adverse modification of the critical habitat of a listed species.

6. Interaction With Other Statutes

Several commenters expressed concern that the Service had exceeded its statutory authority under the ESA in referring to the Fish and Wildlife Act of 1956 and the Fish and Wildlife Coordination Act in the preamble to the proposed rule (48 FR 31418). As discussed previously in this notice, that language is in fact quoted from the Conference Report on the 1982 amendments to the Endangered Species Act, though it was inadvertently typeset as if it were not a quotation. The essential observation made by the Conference Committee is extremely useful: Individual species should not be viewed in isolation. Neither should the section 10(a) requirements be viewed in isolation from the other statutory and regulatory requirements that may apply to the proposed project. Section 10(a) does not itself expressly require compliance with such laws as the National Environmental Policy Act, the Clean Water Act, or the Fish and Wildlife Coordination Act, but it provides an excellent opportunity for a project proponent to prepare and implement a comprehensive, integrated plan that addresses for the present and for the future all of the various requirements that apply to the project. In the words of the Conference Committee, section 10(a) will "encourage creative partnerships between public and private sectors and among governmental agencies in the interest of species and habitat conservation." [Conf. Rep. at 30].

7. Monitoring Implementation of Conservation Plans

One commenter argued that both the applicant and the Service should monitor the implementation of a conservation plan in order to ensure that its requirements and those of section 10(a) are met. Such monitoring can also serve to identify areas in which modification of a conservation plan may be necessary, particularly with incidental take permits of long duration. The Service agrees. Sections 17.22(b)(1)(iii)(B), 17.22(b)(3), 17.32(b)(1)(iii)(B), and 17.32(b)(3) have therefore been revised to require that conservation plans specify the monitoring measures to be used and to authorize imposition of necessary monitoring as a condition of each permit.

8. Modification of Conservation Plans

The same commenter noted that the proposed regulations contained no express provisions pertaining to modifications in conservation plans

required by changed or unforeseen circumstances. The Service agrees that such a provision is needed. As stated in the Conference Report:

... circumstances and information may change over time and . . . the original 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. Rep. at 31]. The Service believes that, while such provisions may be of most value for long-term permits, circumstances requiring modification of a conservation plan could arise even during the life of a permit with a relatively short term. Incorporation of modification procedures into a conservation plan at the outset should ensure both that the affected species will be conserved regardless of changed conditions and that the applicant's activities are not unduly interrupted when the new conditions take effect. Sections 17.22(b)(1)(iii)(B) and 17.32(b)(1)(iii)(B) therefore require conservation plans to include specific measures for addressing unforeseen circumstances and §§ 17.22(b)(2)(iii) and 17.32(b)(2)(iii) make the existence of these measures a precondition to permit issuance.

9. Other Elements of Conservation Plans

Several parties commented that the statement in section 10(a)(2)(A)(iv) of the Act that a conservation plan must include "such other measures that the Secretary may require" obliges the Service to include in these regulations a full list of the measures the Service may so require. Other commenters asked that examples of such measures be included in the regulations, while still others asserted that this provision must be deleted from the regulations. Still another commenter suggested that this provision will be workable only if the Service is available for pre-application consultation and advice as to measures that might be required. The Service agrees with the latter commenter while respectfully disagreeing with the other commenters.

As noted previously in this notice, the Service has declined to promulgate exhaustive, "cookbook" regulations detailing every possible element that could be required in a conservation plan. The variety of projects that might be the subject of a conservation plan is wide, and features appropriate for some conservation plans will be unworkable for others. It is unrealistic to think the Service could develop a list of conservation plan elements applicable to all potential incidental take permits.

Congress, however, modeled section 10(a), at least generally, after the San Bruno plan and was well aware that the Service and the San Bruno permit applicants engaged in extensive pre-application discussions extending well over a year. The Service believes a sensible and practical reading of section 10(a)(2)(A)(iv) is that the unique and, in most cases, fairly complex nature of an incidental take permit will require discussions between a potential applicant and the Service. Through this process, the Service will identify specific measures, in addition to those listed in section 10(a)(2)(A)(i) through (iii), that are necessary and appropriate for the purposes of the conservation plan.

10. Public Notice of and Public Comment on Incidental Take Permit Applications

Section 10(a)(2)(B) of the ESA mandates an opportunity for public comment prior to any decision on an incidental take permit application. Several commenters expressed concern that the proposed regulations did not adequately implement this requirement. They noted that section 10(c) also requires public notice and comment for any section 10 endangered species permit application.

The Service agrees that the ESA requires notice and an opportunity for comment for these permit applications and has revised the introductory paragraphs to §§ 17.22, 17.23 and 17.32(b) accordingly.

11. Permit Conditions

One commenter argued that the Service is under a duty, in imposing reporting requirements as a permit condition, to rely upon existing reporting requirements to the maximum extent practicable. This commenter relied upon legislative history indicating that reporting requirements imposed under section 7(b)(4), to allow monitoring of the impact of incidental taking identified in section 7(a)(2) consultation, should be incorporated into existing reporting requirements where possible. [H.R. Rep. No. 567, 97th Cong., 2nd Sess. 26-27 (1982)]. The Service agrees that this Congressional directive is equally applicable to reporting requirements established for incidental take permits, as reflected in §§ 17.22(b)(3) and 17.32(b)(3) of the final rule.

Another party stated that the reference in proposed §§ 17.22(b)(3) and 17.32(b)(3) to "terms and conditions . . . necessary to carry out the purposes of the permit" might convey the impression that terms and conditions designed to ensure compliance with the species conservation goal of the conservation

plan would not be appropriate. In order to make clear that permit conditions relating to conservation of the affected species will be imposed where necessary, the phrase "and the conservation plan" has been added to final §§ 17.22(b)(3) and 17.32(b)(3).

12. Duration of Permits

Congress clearly intended to provide for long-term incidental take permits where needed. [Conf. Rep. at 31]. One commenter was concerned, however, that the proposed regulations improperly implied that the only issue involved in deciding on a request for a long-term permit is whether the applicant needs the assurance of a long-term permit in order to obtain financing. The Service did not intend to imply that financing of the project was the only issue involved in setting the duration of the permit.

The Conference Report states:

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.

The Secretary is vested with broad discretion in carrying out the conservation plan provision to determine the appropriate length of any section 10(a) permit issued pursuant to this provision in light of all of the facts and circumstances of each individual case. Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land. It is recognized that in issuing such permits, the Secretary will, by necessity, consider the possible positive and negative effects associated with permits of such duration.

The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should 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. Rep. at 31]. Final § 17.22(b)(4) and 17.32(b)(4) have been revised to be consistent with the Conference Report.

13. Permits for Activities of Short Duration and/or Limited Scope

A related issue concerns permits for takings of listed species incidental to activities that will be relatively short in duration and/or that will affect a limited area that comprises only a small portion of a listed species' entire range. The term of the San Bruno permit is 30 years

and its conservation plan covers over 3000 acres, including the great majority of the habitats of the species. Other incidental take permit applications may, however, involve considerably shorter terms and involve activities that would affect smaller areas and only portions of a species' range. The Service believes that Congress did not intend to exclude projects from the incidental take provisions of section 10(a) merely because the projects were of more limited duration or geographical scope. Final §§ 17.22(b)(2) and 17.32(b)(2) have been revised to make this explicit. In particular, the Director will consider whether the mitigation measures in the conservation plan and the funding for implementing the plan are commensurate with the duration of the project and its geographic scope, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected. Mitigation throughout the entire range of a listed species probably would not be required for a proposed project that would affect only a small portion of that range and have a minor impact on the species as a whole. That a project might be completed within a short time and affect only a portion of a species' habitat would not, however, relieve the Director of his duty under sections 7(a)(2) and 10(a)(2)(B)(iv) of the Act and §§ 17.22(b)(2)(iv) and 17.32(b)(2)(iv) of the regulations to ensure that no jeopardy to the species would ensue from issuance of the permit.

14. Objection to Permit Issuance

Section 17.22 contains explicit provisions for objecting to the issuance of an endangered species permit and for notification to objectors of the impending issuance of that permit. One commenter suggested that § 17.32 be revised to include an objection provision. The Service has not accepted this suggestion because threatened species are less vulnerable than are endangered species to potential adverse impacts from permitted activities. Advance notice of permit issuance is thus not necessary.

15. Appeals

Several commenters noted the need for provisions for appealing the suspension or revocation of a permit or the terms or conditions of a permit. There should be considerable contact and discussion between an applicant and the Service both prior to and during the Service's review of an application for an incidental take permit. Should a permit nonetheless be issued containing

terms or conditions unacceptable to the permittee, or should a permit be suspended or revoked during its term, the permittee may appeal the action under the provisions of 50 CFR 13.32.

B. Plant Regulations

1. Exemption for Certain Official Duties

An exemption from the § 17.61(c)(1) prohibition on removal and reduction to possession of endangered plants from areas under Federal jurisdiction has been added at § 17.61(c)(2) to allow certain designated officials to care for, dispose of, or salvage specimens without a permit when acting in the course of their official duties. Exemptions from the § 17.61(c)(1) prohibition have been added at §§ 17.61(c)(3) and 17.71(b), which allow qualified employees of State conservation agencies, party to a Cooperative Agreement with the Service in accordance with section 6(c) of the ESA, to conduct the activities specified in that Cooperative Agreement.

2. Describing Location of Removal and Reduction to Possession in Permit Application

Existing §§ 17.62(a)(1)(iii) and 17.72(a)(1)(iii) require applicants for permits to conduct otherwise prohibited activities with respect to listed plants to describe the location from which the plants were or will be taken. The Service proposed to revise these sections to require further information where removal and reduction to possession of a listed plant from an area under Federal jurisdiction would be involved. Comments received on this aspect of the proposed regulations indicate that separate treatment of the latter information requirement is needed. The final regulations therefore include new §§ 17.62(a)(1)(iv) and 17.72(a)(1)(iv) that require separate information with respect to removal and reduction from an area under Federal jurisdiction.

3. Removal and Reduction to Possession of Seeds and Cultivated Plants

A few commenters observed that the proposed regulations did not appear to apply to seeds and cultivated plants, which are treated in §§ 17.62(a)(2) and 17.72(a)(2). This was an inadvertent omission. Final §§ 17.62(a)(2)(v) and 17.72(a)(2)(v) contain the same location information requirements with respect to removal and reduction to possession of seeds and cultivated plants from an area under Federal jurisdiction that are included in §§ 17.62(a)(1)(iv) and 17.72(a)(1)(iv) for listed plants.

4. Explanation of "Remove and Reduce to Possession"

While no commenter raised the issue, the Service believes that an explanation of its interpretation of the phrase "remove and reduce to possession" will be beneficial. Based upon the legislative history of the 1982 amendments, the Service has concluded that section 9(a)(2)(B) was intended to proscribe the removal of an endangered plant when combined with a taking of possession. Accordingly, a person who removes an endangered plant from its location on an area under Federal jurisdiction and holds it as his/her own would violate section 9 of the ESA. Examples of this activity would be plant collectors, persons seeking a transplant to their own property, and those gathering seeds or cuttings. The destruction of a plant on an area under Federal jurisdiction would not, however, be a violation of section 9 of the ESA, since no taking of possession would have occurred.

Removal incident to purposes other than taking of possession is likewise not proscribed. An example of behavior not prohibited would be development activities that physically displace an endangered plant. These activities would not violate section 9 of the ESA.

A second issue is whether a violation of the ESA occurs when a person receives a plant that has been illegally reduce to possession by someone else. Section 9(a)(1) of ESA, which lists prohibited actions in regard to endangered fish or wildlife, makes it unlawful to possess such fish or wildlife after an illegal taking or importation. This prohibition applies whether or not the fish or wildlife possessed are being transported in interstate commerce or were received in intrastate commerce. Section 9(a)(2) of the ESA, which sets forth prohibited acts with regard to listed plants, does not prohibit their possession after an illegal taking or importation. It does prohibit their receipt or shipment in interstate or foreign commerce and in the course of a commercial activity, but does not cover purely intrastate commercial activities or non-commercial interstate shipment and receipt. However, the Lacey Act amendments of 1981 make it unlawful for any person "to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States . . ." 18 U.S.C. 3372(a)(1). Thus, while receiving an unlawfully taken endangered plant may not violate the ESA, it would violate the Lacey Act, as amended.

III. Miscellaneous

Section 13.12(b) is amended by adding the permit for incidental taking now available at 17.22(b)(1).

Sections 17.22(c) and 17.32(c) are redesignated as 17.22(a)(3) and 17.32(a)(3), respectively, and altered slightly to make them consistent with each other and to make clear that each permit issued pursuant to these sections shall contain a condition requiring reporting of escaped wildlife covered by the permit.

New 50 CFR 17.62(a)(3)(iii) and 17.72(a)(3)(iii) are added in compliance with the Paperwork Reduction Act, 44 U.S.C. 3507.

Required Determinations

The Service has determined that these final regulations are categorically excluded for further National Environmental Policy Act (NEPA) requirements. Part 516 of the Departmental Manual, Chapter 6 Appendix I, section A(3) categorically excludes the issuance of regulatory procedures when the impacts are limited to administrative or technological effects.

The Department of the Interior has determined that this is not a major rule under Executive Order 12291, nor does it have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act. The potential applicants are not identified as small business in the Regulatory Flexibility Act. The Service anticipates that fewer than 10 permit applications will be received annually. The Determination of Effects on this proposed rule is available from the individual identified under the section "FOR FURTHER INFORMATION CONTACT."

Information Collection

The information collection requirements contained in this Part 17 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1018-0022.

List of Subjects

50 CFR Part 13

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

50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture) Regulations promulgation.

For the reasons set out in the preamble, Subchapter B, Chapter 1 of

Title 50, Code of Federal Regulations is amended as follows:

PART 13—GENERAL PERMIT PROCEDURES

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

Authority: 18 U.S.C. 42; sec. 4, Pub. L. 97-79, 95 Stat. 1074 (16 U.S.C. 3373); sec. 7, Pub. L. 97-78, 95 Stat. 1078 (16 U.S.C. 3376); sec. 3, Pub. L. 65-186, 40 Stat. 755 (16 U.S.C. 704); sec. 3(h)(3), Pub. L. 95-616, 92 Stat. 3112 (16 U.S.C. 712); sec. 2, 54 Stat. 251, as amended by sec. 9, Pub. L. 95-616, 92 Stat. 3114 (16 U.S.C. 668a); sec. 102, 76 Stat. 73 (19 U.S.C. 1202), "Schedule 1, Part 15D, Headnote 2(d), Tariff Schedules of the United States"; sec. 9(d), Pub. L. 93-205, 87 Stat. 893 (16 U.S.C. 1538(d)); sec. 6(a)(1), Pub. L. 96-159, 93 Stat. 1228 (16 U.S.C. 1537a); E.O. 11911, 41 FR 15683, 3 CFR, 1976 Comp., p. 112; sec. 10, Pub. L. 93-205, 87 Stat. 896, as amended by secs. 2 and 3, Pub. L. 94-359, 90 Stat. 3760; sec. 7, Pub. L. 96-359, 90 Stat. 911 and 912; sec. 5, Pub. L. 95-632, 92 Stat. 3760; sec. 7, Pub. L. 96-159, 93 Stat. 1230 (16 U.S.C. 1539); sec. 11, Pub. L. 93-205, 87 Stat. 897, as amended by sec. 6(4), Pub. L. 95-632, 92 Stat. 3761 (16 U.S.C. 1504(b)(2)(f)); sec. 13(d), 86 Stat. 905, amending 85 Stat. 480 (16 U.S.C. 742j-1); Title 1, sec. 112, Pub. L. 92-522, 86 Stat. 1042, as amended by Title II, sec. 201(e), Pub. L. 96-470, 94 Stat. 2241 (16 U.S.C. 1382); 65 Stat. 290 (31 U.S.C. 483(a)).

§ 13.12 (Amended)

1. Amend § 13.12(b) by removing the language at the entry for permits under § 17.22 and inserting the following § 13.12 information requirements on permit applications.

(b) * * *

Scientific, enhancement of propagation or survival, incidental taking for wildlife.

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS—[AMENDED]

Accordingly, under the authority of 16 U.S.C. 1538-39, Part 17, Subchapter B of Chapter 1, Title 50 of the Code of Federal Regulations, is amended as set forth below:

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

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531, *et seq.*), unless otherwise noted.

§ 17.3 (Amended)

2. In § 17.3 add, in alphabetical order, the following definition:

"Incidental taking" means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the

carrying out of an otherwise lawful activity.

3. Section 17.22 is revised to read as follows:

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

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, or for the incidental taking of endangered wildlife. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time. (See § 17.32 for permits for threatened species.) The Director shall publish notice in the **Federal Register** of each application for a permit that is made under this section. 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. The 30-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened and no reasonable alternative is available to the applicant. Notice of any such waiver shall be published in the **Federal Register** within 10 days following issuance of the permit.

(a)(1) *Application requirements for permits for scientific purposes or for the enhancement of propagation or survival.* Applications for permits under this paragraph must be submitted to the Director, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, 1000 N. Glebe Road, Room 611, Arlington, Virginia 22201, by the person wishing to engage in the activity prohibited by § 17.21. Each application must be submitted on an official application (Form 3-200) provided by the Service and must include as an attachment, all of the following information:

(i) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking, exporting, selling in interstate commerce);

(ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;

(iii) A resume of the applicant's attempts to obtain the wildlife sought to

be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife:

(iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by the permit was born in captivity, the country and place where such wildlife was born;

(v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;

(vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those person who will be caring for the wildlife;

(vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;

(viii) If the application is for the purpose of enhancement of propagation, a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

(ix) The information collection requirements contained in this paragraph have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

(i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the

wildlife sought to be covered by the permit;

(iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

(iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;

(v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

(3) *Permit conditions.* In addition to the general conditions set forth in Part 13 of this subchapter, every permit issued under this paragraph shall be subject to the special condition that the escape of living wildlife covered by the permit shall be immediately reported to the Service office designated in the permit.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be designated on the face of the permit.

(b)(1) *Application requirements for permits for incidental taking.* Applications for permits under this paragraph must be submitted to the Director, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, 1000 N. Clebe Road, Room 611, Arlington, Virginia 22201, by the person wishing to engage in the activity prohibited by § 17.21(c). Each application must be submitted on an official application (Form 3-200) provided by the Service and must include as an attachment all of the following information:

(i) A complete description of the activity sought to be authorized;

(ii) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known;

(iii) A conservation plan that specifies: (A) The impact that will likely result from such taking; (B) what steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances; (C) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed

to be utilized; and (D) such other measures that the Director may require as being necessary or appropriate for purposes of the plan;

(iv) The information collection requirements contained in this paragraph have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications. This information will be used to review permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

(2) *Issuance criteria.* 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 criteria in § 13.21(b) of this subchapter and shall issue the permit if he finds that: (i) The taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; (v) the measures, if any, required under subparagraph (b)(1)(iii)(D) of this section will be met; and (vi) he has received such other assurances as he may require that the plan will be implemented. In making his 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.

(3) *Permit conditions.* In addition to the general conditions set forth in Part 13 of this subchapter, every permit issued under this paragraph shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation plan including, but not limited to, monitoring and reporting requirements deemed necessary for determining whether such terms and conditions are being complied with. The Director shall rely upon existing reporting requirements to the maximum extent practicable.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be sufficient to provide adequate

assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.

(c) *Objection to permit issuance.* (1) In regard to any notice of a permit application published in the Federal Register, any interested party that objects to the issuance of a permit, in whole or in part, may, during the comment period specified in the notice, request notification of the final action to be taken on the application. A separate written request shall be made for each permit application. Such a request shall specify the Service's permit application number and state the reasons why that party believes the applicant does not meet the issuance criteria contained in §§ 13.21 and 17.22 of this subchapter or other reasons why the permit should not be issued.

(2) If the Service decides to issue a permit contrary to objections received pursuant to paragraph (c)(1) of this section, then the Service shall, at least ten days prior to issuance of the permit, make reasonable efforts to contact by telephone or other expedient means, any party who has made a request pursuant to paragraph (c)(1) of this section and inform that party of the issuance of the permit. However, the Service may reduce the time period or dispense with such notice if it determines that time is of the essence and that delay in issuance of the permit would: (i) Harm the specimen or population involved; or (ii) unduly hinder the actions authorized under the permit.

(3) The Service will notify any party filing an objection and request for notice under paragraph (c)(1) of this section of the final action taken on the application, in writing. If the Service has reduced or dispensed with the notice period referred to in paragraph (c)(2) of this section, it will include its reasons therefore in such written notice.

§ 17.23 [Amended]

4. The introductory paragraph of § 17.23 is revised to read as follows:

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in

accordance with the issuance criteria of this section in order to prevent undue economic hardship. The Director shall publish notice in the **Federal Register** of each application for a permit that is made under this section. 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. The 30-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened and no reasonable alternative is available to the applicant. Notice of any such waiver shall be published in the **Federal Register** within 10 days following issuance of the permit.

5. § 17.32 is revised to read as follows:

§ 17.32 Permits—general.

Upon receipt of a complete application the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife. Such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in § 17.40 to 17.48, of this part provides otherwise. Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time.

(a)(1) *Application requirements for scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or special purposes consistent with the purposes of the Act.* Applications for permits under this paragraph must be submitted to the Director, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, 1000 N. Glebe Road, Room 611, Arlington, Virginia 22201, by the person wishing to engage in the prohibited activity. Each application must be submitted on an official application (Form 3-200) provided by the Service, and must include, as an attachment, as much of the following information which relates to the purpose for which the applicant is requesting a permit:

(i) The Common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking,

exporting, selling in interstate commerce);

(ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;

(iii) A resume of the applicant's attempts to obtain the wildlife sought to be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife;

(iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by permit was born in captivity, the country and place where such wildlife was born;

(v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;

(vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those persons who will be caring for the wildlife;

(vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;

(viii) If the application is for the purpose of enhancement of propagation, a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

(ix) The information collection requirements contained in this paragraph have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in

§ 13.21(b) of this subchapter, the following factors:

(i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;

(iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

(iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;

(v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

(3) *Permit conditions.* In addition to the general conditions set forth in Part 13 of this subchapter, every permit issued under this paragraph shall be subject to the special condition that the escape of living wildlife covered by the permit shall be immediately reported to the Service office designated in the permit.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be designated on the face of the permit.

(b)(1) *Application requirements for permits for incidental taking.* (i) Applications for permits under this paragraph must be submitted to the Director, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, 1000 N. Glebe Road, Room 611, Arlington, Virginia 22201, by the person wishing to engage in the activity prohibited by § 17.31.

(ii) The director shall publish notice in the **Federal Register** of each application for a permit that is made under this section. 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.

(iii) Each application must be submitted on an official application

(Form 3-200) provided by the Service, and must include as an attachment, all of the following information:

(A) A complete description of the activity sought to be authorized;

(B) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known;

(C) A conservation plan that specifies: (1) The impact that will likely result from such taking; (2) what steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances; (3) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized; and (4) such other measures that the Director may require as being necessary or appropriate for purposes of the plan.

(1) The information collection requirements contained in this paragraph have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

(2) *Issuance criteria.* 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 criteria in § 13.21(b) of this subchapter and shall issue the permit if he finds that: (i) The taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; (v) the measures, if any, required under subparagraph (b)(1)(iii)(D) will be met; and (vi) he has received such other assurances as he may require that the plan will be implemented. In making his 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.

(3) *Permit conditions.* In addition to the general conditions set forth in Part 13 of this subchapter, every permit issued under this paragraph shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation plan including, but not limited to, monitoring and reporting requirements deemed necessary for determining whether such terms and conditions are being complied with. The Director shall rely upon existing reporting requirements to the maximum extent practicable.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be sufficient to provide adequate assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.

§ 17.61 [Amended]

6. In § 17.61, paragraph (a) is amended by replacing the phrase "paragraphs (b) through (d)" with the phrase "paragraphs (b) through (e)."

7. Section 17.61 is amended by redesignating paragraphs (c) and (d) as (d) and (e), respectively, and by adding the following new paragraph (c):

§ 17.61 Prohibitions.

(c) *Remove and reduce to possession.*
(1) It is unlawful to remove and reduce to possession any endangered plant from an area under Federal jurisdiction.

(2) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, or a State conservation agency, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession endangered plants from areas under Federal jurisdiction without a permit if such action is necessary to: (i) Care for a damaged or diseased specimen; (ii) dispose of a dead specimen; or (iii) salvage a dead specimen which may be useful for scientific study.

(3) Any removal and reduction to possession pursuant to paragraph (c)(2)

of this section must be reported in writing to the U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 28006, Washington, D.C. 20005, within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with written directions from the Service.

(4) Notwithstanding paragraph (c)(1) of this section, any qualified employee or agent of a State conservation agency which is a party to a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those endangered plants which are covered by an approved cooperative agreement for conservation programs in accordance with the Cooperative Agreement, provided that such removal is not reasonably anticipated to result in: (i) The death or permanent damage of the specimens; (ii) the removal of the specimen from the State where the removal occurred; or (iii) the introduction of the specimen so removed, or of any propagules derived from such a specimen, into an area beyond the historical range of the species.

8. In § 17.62, is amended by redesignating paragraphs (a)(1)(iv) through (a)(1)(vii) as paragraphs (a)(1)(v) through (a)(1)(viii) and by adding new paragraphs (a)(1)(iv), (a)(2)(v), and (a)(3)(iii) to read as follows:

§ 17.62 Permits for scientific purposes or for the enhancement of propagation or survival.

(a)
(1)
(iv) If the activities would involve removal and reduction to possession of a plant from an area under Federal jurisdiction, the year, State, county, or any other description such as place name, township, and range designation that will precisely place the location where the proposed removal and reduction to possession will occur, the name of the Federal entity having jurisdiction over the area, and the name, title, address, and phone number of the person in charge of the area.

(2)
(v) If the activities would involve removal and reduction to possession of seeds from an area under Federal jurisdiction, the year, State, county or

any other description such as place name, township, and range designation that will precisely place the location where the proposed removal and reduction to possession will occur, the name of the Federal entity having jurisdiction over the area and the name, title, address, and phone number of the person in charge of the area.

(3) * * *

(iii) The information collection requirements contained in this section have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

9. Section 17.71 is amended by redesignating paragraph (b) as (c) and adding the following new paragraph (b):

§ 17.71 Prohibitions.

(b) In addition to any provisions of this Part 17, any employee or agent of the Service or of a State Conservation Agency which is operating a conservation program pursuant to the terms of a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those threatened species of plants which are covered by an approved Cooperative Agreement to carry out conservation programs.

10. In section 17.72, is amended by redesignating paragraphs (a)(1)(iv) through (a)(1)(vi) as paragraphs (a)(1)(v) through (a)(1)(vii) and by adding new paragraphs (a)(1)(iv), (a)(2)(iv), and (a)(3)(iii) to read as follows:

§ 17.72 Permits—general.

(a) * * *

(1) * * *

(iv) If the activities would involve removal and reduction to possession of a plant from an area under Federal jurisdiction, the year, State, county or any other description such as place name, township, and range designation that will precisely place the location where the proposed removal and reduction to possession will occur, the

name of the Federal entity having jurisdiction over the area and the name, title, address, and phone number of the person in charge of the area.

(2) * * *

(iv) If the activities would involve removal and reduction to possession of seeds from an area under Federal jurisdiction, the year, State, county, or any other description such as place name, township, and range designation that will precisely place the location where the proposed removal and reduction to possession will occur, the name of the Federal entity having jurisdiction over the area and the name, title, address, and phone number of the person in charge of the area.

(3) * * *

(iii) The information collection requirements contained in this section have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications and make decisions, according to criteria established in various Federal wildlife and plant conservation statutes and regulations, on the issuance or denial of permits. The obligation to respond is required to obtain or retain a permit.

Dated: August 22, 1985.

P. Daniel Smith,

Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 85-23104 Filed 9-27-85; 8:45 am]

BILLING CODE 4310-55-M

APPENDIX 2:

**Reference List of Publications On
HCPs and Conservation Biology**

Reference List of Publications Concerning HCPs and Conservation Biology

- Bean, M.J., S.G. Fitzgerald, and M.A. O'Connell. 1991. Reconciling conflicts under the Endangered Species Act: The habitat conservation planning experience. World Wildlife Fund. Harper's Graphics/St. Mary's Press, Waldorf, Maryland. (Order from WWF Publications, P.O. Box 4866, Hampden Post Office, Baltimore, MD 21211.)
- Beatley, T. 1990. Balancing urban development and endangered species: The Coachella Valley habitat conservation plan. *Environmental Management*. Vol. 16, No. 1, pp. 7-20.
- Beatley, T. 1994. *Habitat conservation planning: Endangered species and urban growth*. University of Texas Press, Austin.
- Budd, W.W., and P.L. Cohen. 1987. Stream corridor management in the Pacific Northwest: 1. Determination of stream-corridor widths. *Environmental Management*, Vol. 11, No. 5.
- Butler, K.S., and J. Crumley. The Balcones Canyonlands habitat conservation plan. Preserving biodiversity and endangered species in an urban area. *Environmental Planning Quarterly*, Winter 1991-1992, Vol. 9, No. 1.
- Carter, C.H. 1991. A dual track for incidental takings: Reexamining sections 7 and 10 of the Endangered Species Act. *Boston College Environmental Affairs Law Review*, Vol. 19, No. 1, pp. 135-171.
- Cohen, P.L., P.R. Saunders, and W.W. Budd. 1987. Stream corridor management in the Pacific Northwest: II. Management strategies. *Environmental Management*, Vol. 11, No. 5.
- Conner, R.N. 1988. Wildlife populations: Minimally viable or ecologically functional? *Wildl. Soc. Bull.*, Vol. 16, No. 1:80-84.
- Harris, L.D. 1985. Conservation corridors - a highway system for wildlife. ENFO.
- Harris, L.D. 1984. *The fragmented forest: Island biogeography theory and the preservation of biotic diversity*. University of Chicago Press, Chicago, Ill.
- Harris, R.B., L.A. Maguire, and M.L. Shaffer. 1987. Sample sizes for minimum viable population estimation. *Conservation Biology*, Vol. 1, No. 1.
- Heinen, J., and G.H. Cross. 1983. An approach to measure interspersion, juxtaposition, and spatial diversity from cover-type maps. *Wildl. Soc. Bull.*, Vol. 11, No. 3.

- Hemingson, T.K. 1992. A nationwide survey of habitat conservation plans. M.S. Thesis, University of Texas, Austin.
- Houck, O.A. 1993. The Endangered Species Act and its implementation by the U.S. Departments of Interior and Commerce. *University of Colorado Law Review*. 64:277-370.
- Irvin, W.R. 1993. The Endangered Species Act: Keeping every cog and wheel. *Natural Resources and Environment*, Vol. 8, No. 1.
- Lehmkuhl, J.F. 1984. Determining size and dispersion of minimum viable populations for land management planning and species conservation. *Environmental Management*, Vol. 8, No. 2.
- Mager, A. 1990. National Marine Fisheries Service habitat conservation efforts in the southeastern United States for 1988. *Marine Fisheries Review (J. Alt. Name: Commercial Fisheries Review)*. Vol. 52, No. 1.
- Marsh, L.L., and R.D. Thornton. 1987. San Bruno Mountain habitat conservation plan. In: *Managing land use conflicts; case studies in special area management* (D.J. Brower and D.S. Carol, Eds.). Duke University Press, Durham, North Carolina.
- Murphy, D.D., and B. Noon. 1992. Integrating scientific methods with habitat conservation planning: Reserve design for northern spotted owls. *Ecological Applications*, a Publication of the Ecological Society of America, Vol. 2, No. 1, pp. 3-17.
- Noss, R.F. 1987. Corridors in real landscapes: A reply to Simberloff and Cox. *Conservation Biology*, Vol. 1, No. 2.
- Reed, J.M., P.D. Doerr, and J.R. Walters. 1986. Determining minimum population sizes for birds and mammals. *Wildl. Soc. Bull.*, Vol. 14, No. 3:255-261.
- Rohlf, D.J. 1989. *The Endangered Species Act: A guide to its protections and implementation*. Stanford Environmental Law Society, Stanford, California.
- Ruhl, J.B. 1990. Regional habitat conservation planning under the Endangered Species Act: Pushing the legal and practical limits of species protection. *Southwestern Law Journal*, Vol. 44, No. 1, pp. 1393-1425.
- Samples, K.C., J.A. Dixon, and M.M. Gowen. 1986. Information disclosure and endangered species valuation. *Land Economics*, Vol. 62, No. 3.
- Samson, F.B., F. Perez-Trejo, H. Salwasser, L.F. Ruggiero, and M.L. Shaffer. 1985. On determining and managing minimum population size. *Wildl. Soc. Bull.*, Vol. 13, No. 4:425-433.

- Scott, J. Michael, et al. [no date]. Beyond endangered species: An integrated conservation strategy for the preservation of biological diversity. *Endangered Species Update* 5(10).
- Severinghaus, W.D. 1981. Guild theory development as a mechanism for assessing environmental impact. *Environmental Management*, Vol. 5, No. 3.
- Simberloff, D., and J. Cox. 1987. Consequences and costs of conservation corridors. *Conservation Biology*, Vol. 1, No. 1.
- Shaw, D.M. 1989. Remote sensing and GIS for the Austin region habitat conservation plan. University of North Texas, Denton, Texas.
- Soule, M.E., and B. Wilcox (eds). 1980. *Conservation biology*. Sinauer Associates, Inc. ISBN 087893800.
- Stangel, P.W. 1987. Conservation genetics of endangered species. In: *Proceedings of the 3rd nongame and endangered wildlife symposium* [Odum Riddleberger, and J.C. Ozier (eds)]. August 8-10, 1987, Athens, Georgia. Georgia Department of Natural Resources, Game and Fish Division, Atlanta, Georgia.
- Thornton, R.D. 1990. Takings under the Endangered Species Act section 9. *Natural Resources and Environment*. Vo. 4.
- Thornton, R.D. 1991. Searching for consensus and predictability: Habitat conservation planning under the Endangered Species Act of 1973. *Environmental Law* 21 :603-55.
- Thornton, R.D. 1993. The search for a conservation planning paradigm: Section 10 of the ESA. *Natural Resources & Environment*. 8:21-23.
- Webster, R.W. 1987. Habitat conservation plans under the Endangered Species Act. *San Diego Law Review* 24:243-71.
- Wood, T. 1992. A comparison of habitat conservation plans prepared under the Endangered Species Act of 1973, as amended. M.S. Thesis, University of San Francisco, San Francisco, California.

APPENDIX 3:

Example of an HCP Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING

BY AND BETWEEN

U.S. FISH AND WILDLIFE SERVICE

U.S. BUREAU OF LAND MANAGEMENT,

CALIFORNIA DEPARTMENT OF FISH AND GAME,

CALIFORNIA ENERGY COMMISSION,

**CALIFORNIA DEPARTMENT OF CONSERVATION
DIVISION OF OIL AND GAS,**

and the

COUNTY OF KERN

**TO ESTABLISH A PROGRAM FOR THE CONSERVATION OF SPECIES OF CONCERN
IN KERN COUNTY.**

This Memorandum of Understanding ("Memorandum") is made and entered into this *17th day of April, 1989*, by and between U.S. Fish and Wildlife Service, hereinafter called the Service, U.S. Bureau of Land Management, hereinafter called the Bureau, California Department of Fish and Game, hereinafter called the Department, California Energy Commission, hereinafter called the Commission, California Department of Conservation, Division of Oil and Gas, hereinafter called the Division, and the County of Kern represented by the Kern County Department of Planning and Development Services, hereinafter called Kern County (collectively, "Public Agencies").

WITNESSETH:

WHEREAS, the Public Agencies are among the Federal, State, and local agencies that have regulatory authority or responsibility under certain Federal and State statutes, including the Endangered Species Act of 1973, as amended ("ESA"), the California Endangered Species Act of 1984 ("CESA"), the National Environmental Policy Act ("NEPA"), the California Environmental Quality Act ("CEQA"), and State Planning and Zoning Law, to protect "Species

of Concern” and their habitats from adverse effects resulting from public and private development actions, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program, enlisting the efforts of all levels of government, to provide for the long-term survival of the Species of Concern in Kern County, and

WHEREAS, because of the overlap and concurrent jurisdiction of the Public Agencies, the private sector lacks assurances that compliance with requirements imposed by any one Public Agency will be timely and will satisfy requirements that may be imposed by any other agency, and

WHEREAS, the Public Agencies desire that their respective concerns and responsibilities with regard to the conservation of Species of Concern be integrated and coordinated in such a manner as to ensure effective, timely, and mutually beneficial resolution of such issues within Kern County, and

WHEREAS, the Public Agencies together with representatives from private conservation groups, and oil and gas, agriculture, and urban development, have voluntarily and mutually established a multi-agency work group, known as the Kern County Threatened and Endangered Species Work Group (“Work Group”), for the purpose of developing a program to conserve the Species of Concern in Kern County, with emphasis on the valley floor portion of the county, and

WHEREAS, Kern County is desirous that their local land use regulations and development decisions comply with State and Federal environmental and endangered species statutes and regulations, and, along with local industry, that planning within the County provides for continued economic growth and development and ensures a healthy economic environment for its citizens and industries,

THEREFORE, it is mutually agreed and understood that:

1.0 PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to define relationships and agencies with permit or regulatory authority over Species of Concern and to develop a cooperative program called the Kern County Endangered Species Program, which will ensure that the activities of private parties will comply with applicable laws and regulations concerning the Species of Concern in Kern County, and which will provide long-term protection of such species.

2.0 PURPOSES OF THE PROGRAM

The purposes of the Kern County Endangered Species Program, hereinafter called the Program, are as follows:

2.1 Protection of Species of Concern. To conserve and protect Species of Concerns and their habitats within Kern County.

2.2 Assurances to Private Sector. To provide a means to standardize and integrate mitigation/compensation measures for Species of Concern so that public and private development actions together with mitigation/compensation measures established by the Program for such action(s) will satisfy concurrently without duplication or unnecessary delay applicable provisions of Federal and State laws and applicable local ordinances and regulations.

2.3 Cumulative Effects. To specify mitigation measures needed to lessen or avoid the cumulative effects of development activities on Species of Concern and eliminate, where possible, the requirement of case-by-case review of all such effects that will be mitigated by the specific measures.

The foregoing shall be accomplished through certain procedural components of the Program, as described below, including, but not limited to, (a) an Endangered Species Element to be adopted by the Board of Supervisors of Kern County that addresses the conservation of Species of Concern, (b) a conservation plan(s) for such species in the valley floor portion and perhaps other parts of Kern County which may affect adjoining counties (e.g., San Luis Obispo - Carrizo Plain), (c) an implementing agreement between the public and private sector participants to ensure execution of the conservation plan(s), and (d) Section 10(a) permit(s) pursuant to the ESA to authorize incidental taking of federally listed species.

2.4 Equitable Distribution of Mitigation/Compensation Obligations. To ensure that the costs of mitigation/compensation measures apply equitably to all agencies and private sector groups conducting activities affecting Species of Concern.

3.0 COMPONENTS OF THE PROGRAM

The program will include the following components:

3.1 Endangered Species Element: The Element will establish county-wide goals, policies, and implementation programs for addressing issues affecting Species of Concern and their habitats. The Element will provide a comprehensive policy framework that links State and Federal species conservation programs with local land use planning to ensure coordinated, effective, and timely resolution of conflicts between development and the conservation of Species of Concern, especially listed species.

3.1.1 The Element will provide broad based policy, foundation, and direction for the preparation of conservation plan(s) and other related programs in the county. The Element will be broader in scope and more comprehensive than the area-specific conservation plan(s).

3.1.2 The Element will address the full range of land use issues, including urban, oil and gas, mineral and agricultural development. The State requirement for consistency between general plan elements will afford the opportunity to conform land use planning programs, including the land use, conservation, and open space elements of the general plan, with the Endangered Species Element, and to provide for the necessary linkage with local permit, zoning, and subdivision ordinances.

3.1.3 The Element will be prepared concurrent with and independent of the preparation of any conservation plans to be prepared pursuant to Section 3.2, below.

3.2 Conservation Plan: A conservation plan will be prepared by Kern County for Species of Concern within the valley floor portion of Kern County (shown on Exhibit A) concurrent with the preparation of the Element described in Section 3.1, above. Other portions of the county may be similarly addressed later. Kern County will submit the plan to (1) the U.S. Fish and Wildlife Service as part of County's application for a Federal permit authorizing incidental taking of federally listed endangered and threatened species pursuant to Section 10(a) of the ESA and to (2) the other Federal and State agencies party to this Memorandum for their respective review and approval. The plan will identify the mitigation/compensation measures that will satisfy the requirements of Federal, State, and local law, including but not limited to ESA, CEQA, and CESA, regarding the protection of the Species of Concern and their habitats. Development of the conservation plan must comply with requirements described in 50 CFR Part 17. (For additional details, see Federal Register 50:39681-39691, 1985.) The Section 10(a) permit will authorize Kern County, and private parties operating under the authority of the permit, to carry out activities that result in the incidental take of Species of Concern that are federally listed.

3.2.1 It is intended that the review and approval of the conservation plan by the participating Federal, State, and local agencies will satisfy the requirements of applicable Federal and State environmental law. It is the intent of the parties to eliminate project-by-project review of the effect of development activities on the Species of Concern, to the full extent authorized by law, and to ensure that mitigation/compensation measures are not imposed beyond those detailed in the conservation plan(s) for such development activities provided conditions under which the conservation plan was formulated have not significantly changed. Such a conservation plan will satisfy the participating Federal and State agencies with respect to the protection of the Species of Concern by, among other possible mechanisms, providing uniform and biologically viable mitigation/compensation measures for application to development activities. Such mitigation measures will be developed subject to the approval of participating Federal and State agencies.

3.2.2 Individual landowners, groups of landowners, or development interests may choose to comply with the terms and conditions of an applicable and approved conservation plan affecting their proposed activities. Alternately, they may choose to prepare and submit their own conservation plan and Section 10(a) permit application when their activities may result in incidental take of federally listed species and, if State or local agency approval is required, they may choose to submit their proposal outside the existing conservation plan umbrella.

3.3.3 The conservation plan for the valley floor will be prepared concurrent with and independent of the preparation of the Element prepared pursuant to Section 3.1, above.

3.3 Implementing Agreement. The conservation plan shall be implemented through an enforceable agreement. The agreement shall specify the operating parameters of the conservation plan for the valley floor and any other area in the county. The Agreement specifies the obligations, authorities, responsibilities, liabilities, benefits, rights, and privileges of all parties or signatories to the subject conservation plan to be prepared and submitted with the Section 10(a) permit application. It is intended that the agreement will be entered into by Kern County, the other Public Agencies approving the conservation plan, and any private party having an obligation or role in implementing the conservation plan. The agreement will provide specific mitigation commitments for private parties and Public Agencies conducting development activities, and assurances by the Public Agencies to prevent the imposition of inconsistent or overlapping mitigation/compensation requirements under any Federal, State, or local law.

4.0 STEERING COMMITTEE

Kern County will appoint steering committee(s), consisting of representatives of the parties of this Memorandum, insofar as each may agree to so serve, and other members as may be determined by the County, including, but not limited to, the private sector members of the Work Group, to oversee preparation of the Element, conservation plan(s), and associated environmental documents. Actual preparation of these documents will be undertaken by the County and/or their consultant.

5.0 ENVIRONMENTAL REVIEW

5.1 CEQA Compliance - Conservation Plan. Adoption of an Endangered Species Element by Kern County and approval of a conservation plan(s) and implementation agreements(s) by the State agencies are actions subject to CEQA Review. It is understood the County will act as the lead agency and prepare an Environmental Impact Report ("EIR") or EIR's for the Element and the valley floor conservation plan. In the preparation of the environmental documents for the conservation plans, the participating State agencies shall act as responsible agencies in accordance with Section 15096 of the CEQA Guidelines. The EIR of the Element and

the valley floor conservation plan shall operate ad Program EIR(s) pursuant to Section 15168 of the CEQA Guidelines. The preparation of the Program EIR(s) will provide for the certification of appropriate environmental documents (e.g., negative declarations), if necessary, by Kern County and other agencies for projects within the conservation plan area that comply with the measures described in the plan that avoid or mitigate significant impacts to Species of Concern, as defined under Section 15065 of the CEQA Guidelines. The preparation of a Program EIR(s) will avoid duplicative reconsideration of basic policy considerations and ensure consideration of cumulative effects of individual project impacts. Upon certification of the Program EIR(s), all subsequent projects, as defined in the PRC 21065 and Section 15378 of the CEQA Guidelines, shall continue to be processed by the lead agency through preparation of an initial study and circulation of that study for comment by trustee agencies.

5.1.1 CEQA Compliance - Project. It is not the intent of this Memorandum to create new discretionary permit requirements or to increase unnecessary land use regulation. The lead agency will comply with CEQA requirements to mitigate adverse impacts to Species of Concern by implementing the mitigation requirements established by the Program EIR. All permits and other entitlement shall be issues as early in the process as is feasible for project development. Nothing in this Memorandum is intended to modify or alter the requirements of CEQA with regard to review of projects by lead, trustee, or responsible agencies. Further this Memorandum shall not have the effect of transforming discretionary approvals into ministerial acts or ministerial acts into discretionary approvals.

5.2 NEPA Compliance. Issuance of a Section 19(a) permit by the Service is an action subject to NEPA review. It is understood that the Service will act as the lead agency under NEPA and will prepare either an Environmental Assessment (“EA”) or an Environmental Impacts Statement (“EIS”), as appropriate with regard to the Section 19(a) permit and accompanying conservation plan. The EA and EIR may be prepared and circulated concurrently with the Program EIR.

6.0 FUNDING

The Work Group will attempt to secure funding for preparation of these documents and the associated environmental reports. The group will explore all potential sources, including but not limited to Federal and State agencies, conservation organizations, and private industry. Work will continue on Program development so long as sufficient funding is available to Kern County to offset all costs.

7.0 SPECIES OF CONCERN

Species to be specifically addressed in the Endangered Species Element and any area-specific conservation plan will be determined by Kern County based upon recommendations to be provided by the Steering Committee, following opportunity for public input.

8.0 Public Involvement

It is the intent of the parties to this agreement that the public will be afforded sufficient opportunity to provide input to the Element and the conservation plan for the valley floor, not only during the required CEQA and NEPA review process, but during the scoping and planning process, as well.

9.0 RELATIONSHIP OF PROGRAM TO THE ESA AND CESA

9.1 Section 4 of the ESA. Because of the requirements of Section 4(f) of ESA, as amended in 1988, the preparation or revision by the Service of recovery plans for any Species of Concern must be closely coordinated and consistent with the terms of any conservation plan or other program affecting such species. In addition, the Service will, to the maximum extent practicable, incorporate in each recovery plan objective, measurable criteria that when met would result in the delisting of such species.

9.2 Section 7 of the ESA. Section 7 of the ESA requires all Federal agencies to initiate formal consultation if their action may affect federally listed species (50 CFR § 402.14). Though a conservation plan may address in some fashion Federal lands, the issuance of a Section 10(a) permit does not eliminate the need for Federal agencies to comply with Section 7. Nonetheless, the appropriate use by a Federal agency, regardless whether that agency is a signatory to this Memorandum or any conservation plan, of mitigation/compensation measures established by an approved conservation plan will satisfy the requirements of Section 7. Moreover, in the case of jeopardy biological opinion, the Service intends to use, where appropriate, such measures as reasonable and prudent alternatives.

9.3 CESA. Section 2053 of the Fish and Game Code establishes State policy that State agencies should not approve projects that would jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of habitat essential to the continued existence of those species. Further Section 2080 of the Fish and Game Code prohibits the import or export from California, or take, possession or sale within California of any threatened or endangered species. It is the intent of this Memorandum to implement the identified provision of CESA by establishing a planning process that will avoid the adverse modification of habitat essential to the species, and ensure the continued existence of such species.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth below, as of the day and year first above written.

By _____ Date _____
Regional Director,
U.S. Fish and Wildlife Service,
Portland, Oregon

By _____ Date _____
State Director,
U.S. Bureau of Land Management,
Sacramento, California

By _____ Date _____
Director
California Department of Fish and Game
Sacramento, California

By _____ Date _____
Executive Director,
California Energy Commission,
Sacramento, California

By _____ Date _____
Director,
California Department of Conservation,
Division of Oil and Gas,
Sacramento, California

By _____ Date _____
Chairman,
Kern County Board of Supervisors
Bakersfield, California

APPENDIX 4:

"Template" Implementing Agreement

"Template" Implementing Agreement

This template has been designed primarily for use with simple HCPs, but may also be used in other cases.

Important Notice:

U.S. Fish and Wildlife Service. The template may be used to develop Implementing Agreements by filling in project-specific information where indicated. When used in this manner, no Solicitor's Office review is necessary. However, when provisions in addition to those provided in the template are included, or if any provisions are deleted or the template is otherwise significantly modified, such agreements should be reviewed by the Solicitor's Office prior to approval by the appropriate FWS Regional Director. Attachments 1, if used to address habitat compensation measures in Implementing Agreements, should be reviewed by the Solicitor's Office prior to approval.

National Marine Fisheries Service. The template may also be used to develop Implementing Agreements for HCPs for marine species, anadromous species, and hatchery operations. However, it is NMFS policy that all Implementing Agreements will be reviewed by the National Oceanic and Atmospheric Administration's General Counsel's Office.

IMPLEMENTING AGREEMENT

by and between

[APPLICANT]

**U.S. FISH AND WILDLIFE SERVICE and/or
NATIONAL MARINE FISHERIES SERVICE**

and the

[STATE] DEPARTMENT OF FISH AND GAME [if applicable]

TO ESTABLISH A MITIGATION PROGRAM FOR ENDANGERED [THREATENED] SPECIES AT THE PROPOSED [APPLICANT] [PROJECT OR ACTIVITY SITE NAME] [SITE LOCATION, INCLUDING LEGAL DESCRIPTION, COUNTY, AND STATE].

This Implementing Agreement ("Agreement"), made and entered into as of the ___ day of _____, 199_, by and among [APPLICANT], the UNITED STATES FISH AND WILDLIFE SERVICE (FWS) and/or NATIONAL MARINE FISHERIES SERVICE (NMFS) (collectively, the Services), and the (STATE) DEPARTMENT OF FISH AND GAME (SDFG) [if applicable], hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the proposed [project or activity site name and location].

1.0 RECITALS

This Agreement is entered into with regard to the following facts:

WHEREAS, the proposed [project or activity name] site selected after environmental review has been determined to be habitat for the federally listed [species]; and,

WHEREAS, the proposed [project name] site also has been determined to be habitat for the [species], a Federal proposed or candidate species [if applicable], and the [species], a State listed species [if applicable] and the [species], a rare or declining species [if applicable]; and,

WHEREAS, [applicant], with technical assistance from the Service[s] and the SDFG, has developed a series of measures, described in the Habitat Conservation Plan, to minimize and mitigate the effects of the proposed [project or activity] upon the subject listed and unlisted species and their associated habitats; and,

THEREFORE, the Parties hereto do hereby understand and agree as follows:

2.0 DEFINITIONS

The following terms as used in this Agreement shall have the meanings set forth below:

- 2.1 The term "Permit" shall mean an incidental take permit issued by the Service[s] to [applicant] pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA).
- 2.2 The term "Permit Area" shall mean the [project or activity name] area consisting of approximately [x] acres in the [legal description] in [County and State] as depicted in Figure [x] of the [project or activity] Habitat Conservation Plan.
- 2.3 The term "Permittee" shall mean [applicant].
- 2.4 The term "Conservation Plan" shall mean the Habitat Conservation Plan prepared for the proposed [project or activity].
- 2.5 The term "Plan Species" shall mean species adequately covered in the HCP and identified in Section 1.0 of this Agreement.
- 2.6 [if applicable] The term "Compensation Lands" shall mean (a.) the [x] acres of land acquired by [applicant] and transferred to the Service[s] [if applicable], the SDFG [if applicable] or an approved third party for management pursuant to the terms of the Conservation Plan as habitat for the Plan Species pursuant to Section [x] of this Agreement [if applicable] or (b.) the [x] acres of land owned or controlled by [applicant] and reserved or set aside as habitat for the conservation of the Plan Species and to be managed pursuant to Section [x] of this Agreement and the terms of the Conservation Plan.
- 2.7 The term "unforeseen circumstances" means any significant, unanticipated adverse change in the status of species addressed under the HCP or in their habitats; or any significant unanticipated adverse change in impacts of the project or in other factors upon which the HCP is based. The term "unforeseen circumstances" as defined in this Agreement is intended to have the same meaning as "extraordinary circumstances" as used in the No Surprises policy.

3.0 HABITAT CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA and Section [x] of the [State] Endangered Species Act [if applicable], [applicant, hereinafter referred to as Permittee] has prepared a Habitat Conservation Plan (HCP) and submitted it to the Service[s] with a request that the Service[s] issue a Permit (Permit) to allow subject Plan species to be incidentally taken within the Permit Area as depicted and described in Figure [x] of the HCP. The HCP proposes a mitigation program for the subject Plan Species and their habitats.

4.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other.

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service[s] to issue the Permit, the HCP sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Plan Species in the wild. It also includes measures that have been suggested by the Service[s] as being necessary or appropriate for purposes of the HCP.

6.0 COOPERATIVE EFFORT [This may not be applicable to all HCPs.]

In order that each of the legal requirements as set forth in Paragraph 5.0 hereof are fulfilled, each of the Parties to this Agreement must perform certain specific tasks as more particularly set forth in the HCP. The HCP thus describes a cooperative program by Federal and State agencies and private interests to mitigate the effects of the proposed [project or activity name] on the Plan Species.

7.0 TERMS USED

Terms defined and utilized in the HCP and the ESA shall have the same meaning when utilized in this Agreement, except as specifically noted.

8.0 PURPOSES

The purposes of this Agreement are:

- 8.1** To ensure implementation of each of the terms of the HCP;
- 8.2** To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 8.3** As stated in paragraph 12.3.a hereof, to provide assurances to the Permittee(s) and other non-Federal landowner(s) participating in the HCP [if applicable] that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.

9.0 TERM

- 9.1** Stated Term. This Agreement shall become effective on the date that the Service[s] issue(s) the Permit requested in the HCP and shall remain in full force and effect for a period of [x] years or until termination of the Permit, whichever occurs sooner.
- 9.2** [For development HCPs with permanent habitat set-asides]: Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once the Plan Species have been incidentally taken and their habitat modified pursuant to the HCP, the take and habitat modification will be permanent. It is therefore the intention of the Parties that the provisions

of the HCP and of this Agreement regarding the establishment and maintenance of habitat for the Plan Species shall likewise, to the extent permitted by law, be permanent and extend beyond the terms of this Agreement.

10.0 FUNDING

- 10.1** [Permittee] will provide such funds as may be necessary to carry out its obligations under the HCP. The Permittee should notify the Services, if the Permittee's funding resources have materially changed, including a discussion of the nature of the change, from the information provided in section [x] of the HCP.
- 10.2** [For long term Permits] The Permittee shall further ensure that funding is available to meet its obligations under this Agreement, the Permit and the HCP through an account solely designated for this purpose. The account may be a trust account, irrevocable letter of credit, insurance or surety bond. The account, letter of credit, surety or insurance must not be disapproved by the Service, shall be in the amount of no less than \$____, and shall be maintained for the life of the Permit. Funds from the account, insurance letter, or surety shall only be used if the Permittee is otherwise unable to meet its obligations under this Agreement, the Permit, or the HCP.
- 10.3** [if applicable] Prior to site disturbing activities, the Permittee will acquire and transfer to SDFG or the Service(s) [if applicable] or a third party approved by SDFG [if applicable] and the Service[s] offsite habitat compensation lands and associated enhancement and endowment funds [if applicable] as described in the HCP, or will guarantee performance of those duties through an irrevocable Letter of Credit, a trust account, insurance, or surety bond [if applicable] in favor of the Service[s], SDFG, or other third party approved by SDFG and the Service[s] and secured against [Permittee]. Such Letter of Credit, proof of trust account, insurance policy, or surety bond shall be delivered to the Service[s] [if applicable], SDFG or approved third party within [x] days of issuance of the Permit and prior to site disturbing activities [if applicable].

11.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEE

- 11.1** Responsibilities of the Permittee.
- a. The HCP will be properly functioning if the terms of the Agreement have been or are being fully implemented.
 - b. The Permittee shall undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including adaptive management procedures described in subparagraph (c) below, if applicable.
 - c. Describe the adaptive management process agreed to by the parties to ensure the terms of the HCP are fully implemented, if applicable.
 - d. [if applicable] The Permittee shall submit an annual [or specify other reporting period] report describing its activities and an analysis of whether the terms of the

HCP were met for the reporting period. The report shall provide all reasonably available data regarding the incidental take, and where requested by the Service(s), changes to the overall population of Plan Species that occurred in the Permit area during the reporting period. In the case of a corporate Permittee, the report shall also include the following certification from a responsible company official who supervised or directed the preparation of the report: Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete.

11.2 Responsibilities of the Service(s).

- a. The Service[s] shall cooperate and provide, to the extent funding is available, technical assistance to the Permittee as detailed in Section [x] of the HCP and [optionally] summarized below. Nothing in this Agreement shall require the Service(s) to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- b. After issuance of the Permit, the Service[s] shall monitor the implementation thereof, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP and this Agreement.

11.3 Responsibilities of the SDFG (if applicable). The SDFG shall cooperate and provide, to the extent that adequate funding is available, technical assistance to the Permittee as detailed in Section [x] of the HCP and [optionally] summarized below.

12.0 **REMEDIES AND ENFORCEMENT**

12.1 **REMEDIES IN GENERAL**

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, subject to the following:

a. **NO MONETARY DAMAGES**

No Party shall be liable in damages to the any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

(1) **Retain Liability**

All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

(2) **Land Owner Liability**

All Parties shall retain whatever liability they possess as an owner of interests in land.

(3) Responsibility of the United States

Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the Plan Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

12.2 THE PERMIT

a. SEVERABILITY

[For use in HCPs involving multiple Permittees]: The violation of the Permit by any Permittee with respect to any one or more particular parcels of land or portions thereof owned or controlled or within the jurisdiction of any such Permittee shall not adversely affect or be attributed to, nor shall it result in a loss or diminution of any right, privilege, or benefit hereunder, of any other Permittee.

b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27 through 13.29 (1994), as the same exists as of the date hereof.

[NOTE: On September 5, 1995, the FWS published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The FWS is currently drafting additional language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future. Consequently, some information contained in this template may be outdated upon publication of a final rule. Users of this template should check the revised permit procedures when available.]

12.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

a. NO SURPRISES POLICY

Subject to the availability of appropriated funds as provided in Paragraph 14.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the proposed [project or activity] upon the Plan Species may be required from a

Permittee who has otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional mitigation may not require additional land use restrictions or financial compensation from the Permittee without his/her written consent.

b. **PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES**
UNAFFECTED

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of the Permittee to the use or development of those lands, or interests in lands, constituting the Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other limitations as may apply to such lands, or interests in lands, under other laws of the United States and the State of [].

13.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

14.2 SUCCESSORS AND ASSIGNS

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

[NOTE: On September 5, 1995, the FWS published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The FWS is currently drafting additional language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future.

Consequently, some information contained in this template may be outdated upon publication of a final rule. Users of this template should check the revised permit procedures when available.]

14.3 NOTICE

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

Assistant Regional Director
United States Fish and Wildlife Service
[Street Address]
[City, State, Zip Code]

Assistant Regional Director [if applicable]
National Marine Fisheries Service
[Street Address]
[City, State, Zip Code]

Director [if applicable]
[State] Department of Fish and Game
[Street Address]
[City, State, Zip Code]

[Permittee's Name or Representative]
[Company or Agency Name]
[Street Address or Post Office Box]
[City, State, Zip Code]

14.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between the Parties. It supersedes any and all other Agreements, either oral or in writing among the Parties with respect to the subject matter hereof and contains all of the covenants and Agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or Agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.5 ELECTED OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

14.6 AVAILABILITY OF FUNDS

Implementation of this Agreement and the HCP by the Services is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. treasury. The parties acknowledge that the Services will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14.7 DUPLICATE ORIGINALS

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

14.8 THIRD PARTY BENEFICIARIES

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

14.10 REFERENCES TO REGULATIONS

Any reference in this Agreement, the HCP, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.11 APPLICABLE LAWS

All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable State and Federal laws and regulations.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

BY _____ Date _____
Regional Director
United States Fish and Wildlife Service
[City, State]

BY _____ Date _____
Regional Director [if applicable]
National Marine Fisheries Service
[City, State]

BY _____ Date _____
Director [if applicable]
[State] Department of Fish and Game
[City, State]
(With reference to Part [x] of this Agreement only [as applicable])

BY _____ Date _____
[Name], President [Director, etc.]
[Company, Organization, Agency]

ATTACHMENT 1:
Optional Provisions to be Used When the HCP Includes
Habitat "Compensation Credit" Requirements

Note: The material below is provided to aid Service staffs to develop suitable provisions when an HCP includes habitat "compensation credit" requirements. However, it should not be used in an Implementing Agreement without review by the Solicitor's Office (FWS) or General Counsel's Office (NMFS).

11.4 HABITAT COMPENSATION CREDITS

- a. As mutually agreed between the Service[s], SDFG [if applicable] and [Permittee], habitat compensation credits shall be established for a maximum of [x] acres of the habitat compensation lands acquired by [Permittee] pursuant to Part 11.1(a) of this Agreement. [Permittee] may sell habitat compensation credits to other project applicants whose projects require acquisition of habitat compensation lands, subject to the following conditions.
- (1) A habitat compensation credit is defined as the equivalent of one acre of any parcel of habitat compensation lands which the Service[s] and SDFG [if applicable] have designated in writing to be available for sale to other project applicants. Other project applicants may purchase such compensation credits in lieu of acquiring habitat to satisfy habitat compensation requirements for certain projects as described in Paragraph 11.4(a)(2).
 - (2) [If applicable] The project of any applicant or other project proponent to which habitat compensation credits may be sold by [Permittee] shall be located outside the [acquisition area], as depicted in Attachment 1 of this Agreement, or any other reserve area designated by the Service[s] and/or SDFG [if applicable].
 - (3) Compensation lands utilized as habitat compensation credits by [Permittee] shall be acquired and deeded to the Service[s] [if applicable], SDFG [if applicable] or an approved third party [if applicable] prior to any compensation credit transaction, unless otherwise authorized in writing by the Service[s] and SDFG.
 - (4) All compensation credit transactions shall be approved in advance and in writing by the Service[s] and SDFG [if applicable].
 - (5) [Permittee] shall retain the right to determine the sales price of habitat compensation credits. [Permittee] is under no

obligation to sell habitat compensation credits and may choose to retain these credits indefinitely. [Permittee] shall bear all costs associated with mitigation credit transactions.

- b. [If applicable] [Permittee] may defer payment of habitat enhancement and endowment fees for the [x] acres of compensation lands designated as compensation credits until either the time of sale of such credits or 12 months from the date that compensation lands totaling [x] acres are transferred to the Service[s] [if applicable], SDFG [if applicable] or the approved third party [if applicable] in accordance with Section 11.1(a) of this Agreement. At the time of each sale of compensation credits, either [Permittee] or the purchaser of such credits shall be required to contribute habitat enhancement and endowment fees in the amount of [\$__] cash for each acre of habitat deeded to the Service[s] [if applicable], SDFG [if applicable] or the approved third party. If [Permittee] does not sell all or a portion of the designated habitat compensation lands totaling [x] acres to the Service[s] [if applicable], SDFG [if applicable] or the approved third party, [Permittee] shall immediately pay in cash to the Service[s] [if applicable], SDFG [if applicable] or the approved third party all remaining habitat enhancement and endowment fees allocated to the unsold credits.

- c. Upon documentary evidence of sale of habitat compensation credits and deposit of cash fees for habitat enhancement and endowment, [Permittee] may request that the Service[s] [if applicable] and/or SDFG [if applicable], as the beneficiary of the Letter of Credit, join with [Permittee] to request from the issuer an equitable reduction of the Principal Sum of the Letter of Credit. However, the Principal Sum of the Letter of Credit shall not be reduced below an amount determined by the Service[s] [if applicable] and/or SDFG [if applicable] to be reasonably necessary to cure any potential future default by [Permittee].

APPENDIX 5:

FWS Guidance on Addressing Migratory Birds and Eagles (FWS Only)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

In Reply Refer To:
FWS/TE

FEB - 9 1996

Memorandum

To: Regional Directors, Regions 1, 2, 3, 4, 5, 6, and 7

From: Director

Subject: Incidental Take of Migratory Birds and Bald Eagles

Under the Endangered Species Act, the Fish and Wildlife Service may grant a permit (section 10) or issue a statement (section 7) that allows the incidental take of endangered species. Some migratory birds, including the bald eagle, are ESA-listed species. The Migratory Bird Treaty Act prohibits the take of migratory birds, including any species also listed under the ESA. None of the regulations promulgated under the MBTA expressly provide for permits for incidental take.

Likewise, the Bald and Golden Eagle Protection Act prohibits the taking of bald eagles. The regulations promulgated under the BGEPA do not allow for permits to be issued for incidental take of eagles.

In many instances, Service biologists have concluded that incidental take of certain ESA-listed migratory birds (including bald eagles) could be allowed without harm to the species and their inclusion in a particular ESA section 7 statement or section 10 permit would be appropriate. However, the apparent inability to grant incidental take under the MBTA or BGEPA has caused confusion both within the Service and among permit applicants.

A means to allow incidental take of ESA-listed migratory birds, including the bald eagle, when such incidental take has been judged permissible under the ESA, and to remove the threat of prosecution under the MBTA and BGEPA (when warranted), has been needed. The Solicitor's Office has provided the attached opinion on this issue. We have determined to adopt the approach suggested by the Solicitor's Office as a matter of policy in the following manner:

1. In the ESA section 7 context, the following language should be included when appropriate in any incidental take statement concluding that take of ESA-listed migratory birds (including bald eagles) will result from the actions under consultation:

To the extent that this statement concludes that take of any threatened or endangered species of migratory bird will result from the agency action for which consultation is being made, the Service will not refer the incidental take of any such migratory bird for prosecution under the MBTA of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

2. In the ESA section 10 context, the Service will insert, when appropriate, the following language into any permit concerning the incidental take of ESA-listed migratory birds (including the bald eagle):

[For species other than the bald eagle] This permit also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed, and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12).

[For the bald eagle] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 68-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

This memorandum will serve to transmit these recommendations to the Regions as working interim guidance, and when appropriate, section 7(a)(2) incidental take statements and section 10(a)(1)(B) permits should incorporate this language regarding the incidental take of ESA-listed migratory birds. The Service will incorporate final guidance in the final versions of the section 7 and the Habitat Conservation Planning [section 10(a)(1)(B)] handbooks. However, until the section 7 and section 10(a)(1)(B) handbooks have been modified to ensure that their procedures guarantee consistency with the standards of the MBTA and BGEPA, and the procedural requirements of 50 C.F.R. § 21.27, if applicable, any section 7 statement or section 10 permit including the above language should be reviewed by the regional Migratory Bird Coordinator.

Comments on this interim guidance are welcomed and to the extent possible, will be used in the final guidance. Comments should be sent to the Chief, Division of Endangered Species, within 30 days of receiving this memorandum.

Attachment

United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

FEB - 5 1996

Memorandum

To: John Rogers, Deputy Director, U.S. Fish and Wildlife Service

From: Pete Raynor, Assistant Solicitor, Fish and Wildlife Branch

Subject: Permitted Incidental Take of Migratory Birds Listed Under the Endangered Species Act

You have asked whether an incidental take statement, under § 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, or an incidental take permit, under § 10 of the ESA, 16 U.S.C. § 1539, (collectively, incidental take documents) can be used to provide an applicant or permittee with some assurance that the applicant or permittee will not be prosecuted under either the Migratory Bird Treaty Act (MBTA) or the Bald and Golden Eagle Protection Act (BGEPA) for that take expressly allowed under the ESA document. We conclude that the Service currently has the authority to do so, using a combination of permitting provisions under the Service's discretion in the enforcement of these statutes.

I. BACKGROUND

Under the ESA, the Service may grant a permit allowing the take of an endangered species incidental to an otherwise lawful activity. Section 10(a)(1). Similarly, pursuant to a consultation under § 7, the Service may issue a statement that incidental take resulting from a federal action will not jeopardize the continued existence of a listed species. Section 7(b)(4). Take of a listed species consistent with an incidental take statement, by the acting agency or an applicant before that agency, does not constitute a violation of the ESA. Section 7(o)(2).

The MBTA prohibits the take of migratory birds, 16 U.S.C. § 703, including migratory birds listed under the ESA. The MBTA authorizes the Secretary of the Interior to permit take consistent with the underlying treaties pursuant to regulation. None of the regulations promulgated under the MBTA expressly allows a permit to be issued for incidental take. See generally 50 C.F.R. part 21. However, 50 C.F.R. § 21.27 provides for the availability of "special purpose permits" for activities outside the scope of the standard permits. The general MBTA permits are not available for eagles; permits for eagles are controlled by the BGEPA regulations, found in 50 C.F.R. part 22. 50 C.F.R. § 21.4(b).

Like the MBTA, the BGEPA prohibits the taking of bald eagles and golden eagles, 16 U.S.C. § 668, except as otherwise permitted pursuant to regulation, id. § 668a. The regulations under the BGEPA allow for the issuance of permits for scientific or exhibition purposes, 50 C.F.R. § 22.21, for Indian religious purposes, id. § 22.22, to take depredating eagles, id. § 22.23, for falconry purposes, id. § 22.24, and to take golden eagle nests, id. § 22.25. The BGEPA regulations do not contain a provision equivalent to the special purpose permit under § 21.27.

Currently, ESA incidental take documents do not provide any relief from the prohibitions of the MBTA and BGEPA; indeed, some of those documents specifically state that they do not provide any such relief. Therefore, an applicant that wants complete protection from prosecution for the take of an ESA-listed migratory bird pursuant to an ESA incidental take document must also seek a permit under the MBTA, or if that bird is a bald eagle, the BGEPA. However, no such permit is currently available under the BGEPA, and § 21.27 under the MBTA has not traditionally been used to provide permits for unintentional take. Thus, applicants in the past have not been provided with assurance that they would not be prosecuted under the MBTA or BGEPA.

II. ALTERNATIVES

There are a number of theories on which ESA incidental take documents could be used to provide relief from liability under the MBTA and BGEPA. The first alternative is that the ESA documents could be expanded to act as permits under the other acts and their existing regulations as well. However, care would have to be taken to ensure that the ESA permit process was consistent with the legal requirements of the other applicable acts and their regulations. Some of the significant legal hurdles are:

- ESA § 7 incidental take statements are not considered to be permits. The process in which these statements are generated is one of scientific analysis. Adapting this process to conform to the procedural requirements of a permit-granting process would be difficult. Among other things, a permitting process may require NEPA analysis, currently not part of the § 7 process.
- An ESA permit could apply to the BGEPA only to the extent which the activity to be permitted falls within the existing permit structure of the BGEPA regulations. This will rarely, if ever, be the case.
- The application of § 21.27 of the MBTA is limited to the "activities related to migratory birds." However, we can argue that activity otherwise unrelated to birds can be considered an "activity related to migratory birds" by virtue of the fact that the activity causes bird mortality.
- An applicant for a permit under § 21.27 must demonstrate "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justifications." Thus, most applications for a permit for

take under the MBTA to be used in conjunction with an ESA incidental take document would require either a compelling justification or perhaps sufficient mitigation to show a positive benefit to the migratory bird resource.

We note that although § 21.27 appears to be broad enough to encompass the permitting of unintentional take for the purposes of the MBTA, that section is not narrowly focused on incidental take. A regulatory permitting program specifically geared to the problems of incidental take may be advisable. Indeed, such a program would be necessary in order to issue permits for incidental take with respect to the BGEPA, under which regulatory permitting authority for incidental take is essentially lacking. In the meantime, the use of § 21.27 to permit take in conjunction with an ESA § 10 permit is an acceptable approach.

A second alternative, in situations where 50 C.F. R. § 21.27 is not available, would be to include in ESA incidental take documents a statement of enforcement policy to the effect that the Service would not refer the beneficiary of the document for prosecution under the MBTA or BGEPA for the take of the ESA-listed migratory birds covered by the document, provided that such take was consistent with the terms and conditions of the document. The main advantage of this solution is its simplicity; the complications inherent in the permit alternative, discussed above, are avoided. In addition, there is authority to support the argument that such an announcement of enforcement policy under the MBTA is not subject to judicial review. See Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 938 (9th Cir. 1987) ("The discretion granted to the Fish and Wildlife Service precludes our review of the Service's failure to enforce the MBTA"), cert. denied, 485 U.S. 988 (1988), on remand, No. J84-013CIVIL, slip op. at 15-16 (June 29, 1988) (distinguishing between reviewable agreement not to enforce and non-reviewable statement of enforcement priorities); see also 53 Fed. Reg. 16877 (May 12, 1988) (statement referred to by district court on remand). An announcement of enforcement policy may not be as satisfactory as an applicable permit to those seeking a safe haven from prosecution under the MBTA and BGEPA, but it will certainly provide a short-term solution pending development of a regulatory approach.

A third alternative would be to argue that the ESA, a comprehensive and more recent statute; trumps those areas in which it overlaps with the MBTA and the BGEPA. Under this theory, there would be no violation of the other statutes for ESA-listed birds if the ESA was complied with. There is no direct support for such a position; indeed it would be contrary, at a minimum, to a Memorandum from the Assistant Solicitor, Fish and Wildlife, dated Aug. 27, 1980, which stated that the BGEPA, as the more specific statute, governed any situation in which it and the ESA conflict. Arguing, that the ESA trumps the other statutes could have significant, unforeseen consequences, and thus seems an unwise course to pursue, particularly given the other options available.

III. RECOMMENDATION

In order for the Service to give, consistent with the current regulatory authority, the maximum assurance of freedom from prosecution under the MBTA and BGEPA for the take of ESA-listed species consistent with ESA incidental take documents, we recommend the following.

1. In the ESA § 10 context, the § 10 handbook should be revised to require that the standards and procedures of 50 C.F.R. § 21.27 be included in the § 10 process if the permit will cover any non-eagle migratory bird. In addition, the Service should insert the following language into any permit allowing the incidental take of migratory birds:

[For species other than the bald eagle] This permit also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed, and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12).

[For the bald eagle] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 68-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

2. In the ESA § 7 context, the Service should include the following language in any incidental take statement concluding that take of ESA-listed migratory birds will result from the subject of the consultation:

To the extent that this statement concludes that take of any threatened or endangered species of migratory bird will result from the agency action for which consultation is being made, the Service will not refer the incidental take of any such migratory bird for prosecution under the MBTA of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

3. The Division of Endangered Species and the Office of Migratory Bird Management should meet to discuss whether any additions to the ESA § 7 and § 10 processes are necessary in order to reflect the goals of the MBTA and BGEPA.

4. Consistent with the standard in Dunkle, under no circumstances should the Service bargain or extract concessions in return for the inclusion in an ESA incidental take document of the above language stating that the Service will not refer take for prosecution.

Should the Service decide to use ESA incidental take documents to provide assurances with regard to the MBTA and BGEPA, we would appreciate an opportunity to review the vehicle by which the Service implements any policy change. Please note that the above analysis and recommendations apply only to migratory birds that are also listed as threatened or endangered under the ESA. The Service should take steps to address the question of how to handle the incidental take of non-ESA-listed migratory birds. If you have any questions concerning the above, please contact me or Ben Jesup at (202) 208-6172.

cc: Jamie Clark
John Doggett
Paul Schmidt

APPENDIX 6:

FWS Guidance on Integrating HCPs With National Wildlife Refuges



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington,

D.C. 20240

In Reply Refer To:
FWS/AES/TE

APR 5 1996

Memorandum

To: Regional Directors, Regions 1, 2, 3, 4, 5, 6,
Assistant Director - Ecological Services
Assistant Director - Fisheries
Assistant Director - Refuges and Wildlife
Assistant Solicitor - Fish and Wildlife

From: Deputy Director

Subject: Relationship of National Wildlife Refuges and Habitat Conservation
Planning Efforts

In recent years, the Habitat Conservation Plan program under section 10(a)(1)(B) of the Endangered Species Act has grown rapidly. When Congress enacted the HCP provisions into law in 1982, it stressed the need for developing "creative partnerships" between the public and private sector in resolving endangered species issues, especially on private lands.

One of the ways the Fish and Wildlife Service is developing these "creative partnerships" is through the integration of the National Wildlife Refuge System with HCPs in many areas. These partnerships, although very effective, raise several important questions regarding the relationship between Federal habitat acquisition and HCP efforts.

Some have questioned government land acquisition programs in HCP planning areas, claiming that such programs, in effect, absolve private land developers of their obligations to mitigate the impacts of their activities on listed species. This misconception can be clarified by ensuring that the Federal activity of establishing a NWR, in conjunction with a HCP, does not obviate the habitat mitigation requirements for the incidental take permittee. Under section 10 of the Act, an incidental take permittee is required to "minimize and mitigate" the effects of his/her taking of listed species and the permittee has specific conservation responsibilities within any HCP program. The incidental take permittee **must** mitigate regardless of what is required of or carried

out by other entities within the HCP, to the extent deemed appropriate, as defined in an approved HCP.

2

The Service believes that HCPs and NWRs each have their respective roles in habitat conservation efforts and also believes that, in many cases, the two can work together to achieve greater results. However, because HCP efforts sometimes require a public agency funding component in establishing a preserve system, it is critically important to define the relationship between NWR and HCP efforts occurring in the same geographic area early in the planning process. Through proper planning and design a NWR and an HCP can be integrated so that greater benefits to the species can be achieved while, at the same time, the incidental take permittee fulfills their mitigation requirements under the HCP. In other cases, physical separation of the NWR and HCP can result in greater benefits to the species than would integration.

The following simple guidelines are provided for determining appropriate courses of action in cases involving establishment and management of NWRs and HCPs occurring in the same geographical area.

(1) The primary objective in deciding whether it is desirable to integrate any NWR within any HCP program is to maximize benefits to the species and the ecosystem upon which they depend.

(2) A NWR must not be established or managed to substitute for the mitigation required of an incidental take permittee, although the NWR may complement an HCP by helping to meet comprehensive conservation and recovery goals for the species or the ecosystem.

Additional guidance and examples can be found in the Service's Habitat Conservation Planning and Incidental Take Permit Processing Handbook.

Additional Guidance and Examples Detailing the Relationship of National Wildlife Refuges and Habitat Conservation Planning Efforts

In recent years, the Habitat Conservation Plan (HCP) program under section 10(a)(1)(B) of the Endangered Species Act has grown rapidly. At the same time, Congress and the Service have begun to play a larger role in helping to fund and support HCP efforts. For example, Congress appropriated funds to the Service to assist in development of the Brevard County HCP in Florida; these funds were subsequently distributed through a Service grant to the HCP applicant. In other cases, Congress has appropriated funds under the Land and Water Conservation Fund (LWCF) for habitat acquisition in areas where HCP efforts are also underway to maximize cooperative Federal, State, and local land protection efforts (e.g., in the Washington County HCP in Utah and Balcones Canyonlands HCP in Texas). By law, lands acquired by the Service with LWCF or Migratory Bird Funds, must be managed as part of the National Wildlife Refuge System (NWR).

These trends raise several important questions concerning the relationship between the two programs (i.e., habitat acquisition under privately funded HCP efforts and publicly funded NWRs) and how such programs should be jointly managed. Some have criticized government land acquisition programs in HCP planning areas, claiming that such programs, in effect, absolve private land developers of their obligations to mitigate the impacts of their activities on listed species.

The Service believes that HCPs and NWRs each have their respective roles in habitat conservation efforts and that the two can actually work together to achieve mutual goals. It is critically important to clearly define the relationship between a NWR and HCP efforts occurring in the same vicinity and establish to what extent and how the efforts may be complementary. However, the Federal activity of establishing a NWR should never be considered a substitute for the habitat mitigation requirements for the incidental take permittee that are established by the HCP.

This memorandum provides guidance that will help define the relationship between NWRs and HCPs occurring in the same geographic area, as well as to help determine how the programs should be managed. The guidance is provided to help determine the appropriate courses of action in cases involving joint establishment and management of NWRs and HCPs.

- (1) The primary objective in integrating any NWR with any HCP program is to increase benefits to the species and the ecosystem upon which it depends. The option that most benefits the species is preferable.
- (2) A NWR should not be established or managed to substitute for the mitigation required by an HCP, but may complement an HCP in meeting comprehensive conservation and recovery goals for the species or the ecosystem. Endangered species habitat acquisition under NWR and HCP programs that occurs in the same are generally is regarded as independent, but complimentary.

To the extent that establishment of a NWR helps a community initiate, complete, or maintain an HCP program by sharing the burden of habitat protection, it has contributed to species conservation and recovery. However, the Federal activity of establishing a NWR should never be considered a substitute for the habitat mitigation requirements for the incidental take permittee that are established by the HCP. Under section 10 of the Act, an incidental take permittee is required to “minimize and mitigate” the effects of its taking of listed species and the permittee has specific conservation responsibilities within any HCP program. It must be stressed that the incidental take permittee **must** mitigate regardless of what is required of or carried out by other entities in terms of habitat management and protection, to the extent deemed appropriate, as defined in an approved HCP.

When developing a NWR in conjunction with an HCP, the lands available to the incidental take permittee for mitigation purposes must be clearly identified in the HCP. The area targeted by the HCP for acquisition by the Service for the refuge is separate from the targeted for acquisition by the incidental take permittee to fulfill mitigation requirements. The lands acquired for mitigation purposes by the permittee could subsequently become part of the refuge and managed as such. Mitigation required by an HCP should compensate for lost habitat, whereas the establishment of the NWR in conjunction with an HCP should be complementary to the HCP, but should not be compensation for habitat lost through the HCP.

With respect to this guidance, the Service's first responsibility is to promote the conservation and recovery of endangered and threatened species, whereas the responsibility of the incidental take permittee is to meet the habitat mitigation requirements of the HCP. NWRs can clearly contribute to listed species recovery where they protect large or important listed species habitat areas. Large-scale regional HCPs, such as those in the Balcones Canyonlands, TX and Washington County, UT areas, also contribute to endangered species recovery by establishing predictable, enforceable conservation programs across large areas. If one program in an area helps listed species, two different, but complementary programs working together synergistically can support species recovery needs even more.

Through proper planning and design a NWR and an HCP can be integrated so that the species is conserved or recovered while, at the same time, the incident take permittee meets the mitigation requirements of the HCP. The integration of a NWR into an HCP can be accomplished, if the two are established through a coordinated effort and incorporated into the initial planning processes for the HCP. However, this is true only if the NWR and HCP are managed in a coordinated manner so the benefits of both programs exceed the benefits of either program working alone. Maximum benefit for the species can be derived by cooperatively establishing a NWR that would help support a regional HCP initiative. The Federal activity of establishing a NWR, in conjunction with a HCP, does not replace the habitat mitigation requirements for the incidental take permittee. However, as part of the mitigation requirements and conditions of an HCP, permittees may purchase land specifically designated in the HCP, that eventually could become part of the NWR and be managed as such, if the plan is properly coordinated and planned.

Many factors can affect how Federal and private habitat protection efforts should be coordinated, and what is appropriate in one situation may not be appropriate in another. We believe the principles outlined above--adherence to the provisions of the HCP (particularly the mitigation requirement), adherence to the NWR's purpose, and cooperative efforts to increase the benefits to the species--should provide the basis for any future decisions of this type. The following two examples (i.e., independent project and complementary project) represent different relationships between NWRs and HCPs and illustrate why these relationships need to be defined on a case-by-case basis.

Independent Project: An HCP for the Balcones Canyonlands in Travis County, TX was initiated in 1988 to address the conservation needs of the golden-cheeked warbler, black-capped vireo, and several cave invertebrates. The draft Balcones HCP calls for acquisition by the permittee of approximately 30,500 acres of warbler and vireo habitat. Of this area, 22,000 acres has already been acquired. Meanwhile, in 1991, the Service decided to establish the Balcones Canyonlands NWR in the same vicinity as the Balcones HCP. The environmental assessment for the project, completed in December 1991, projected a 41,000-acre Refuge (an additional 5,000 acres was later authorized). The area targeted for refuge acquisition was separate from the area targeted by the HCP acquisition.

A potential conflict arose when a developer proposed to purchase private lands inside the Balcones NWR acquisition boundary for use as mitigation lands for development activities in the Balcones HCP area. The issue was whether the Service should accept private lands purchased inside the Refuge boundary as mitigation lands for purposes of the HCP.

Planners for both the HCP and NWR envisioned that the two programs would be independent with respect to land acquisition (i.e., Refuge acquisition would not occur in targeted HCP reserves and vice versa). The Golden-cheeked Warbler Recovery Plan, approved September 1992, divides the warbler's range into eight "recovery regions" and requires protection of sufficient breeding habitat to maintain a viable warbler population in each of these regions. Habitat areas targeted for acquisition under the Balcones HCP and NWR are in the same recovery plan region and both are necessary for fulfillment of the recovery goal for that region. This means that acquiring habitat independently under the two programs will best achieve golden-cheeked warbler recovery. Allowing "cross over," or purchase inside the Refuge boundary by private developers, may ultimately slow or decrease progress toward recovery.

Based on these considerations, the Service did not allow land procurement for HCP mitigation purposes inside the boundary of the Balcones NWR and maintained the independence of the two programs. This does not mean that land purchases inside the Refuge boundary by private entities cannot occur, only that such purchases would not count toward the mitigation goals under the HCP.

Complementary Project: A complementary agreement is currently being developed between the Service and the private sector through the establishment of a NWR and an HCP in southern California. The goal of this specific HCP is to conserve 87 listed and non-listed species within a 164,000 acre preserve in southern San Diego County. To accomplish this goal, the Service has

entered into the preserve process both in its Federal capacity and as a partner. The Service has committed funds, land, and personnel to the planning and implementation process of the preserve.

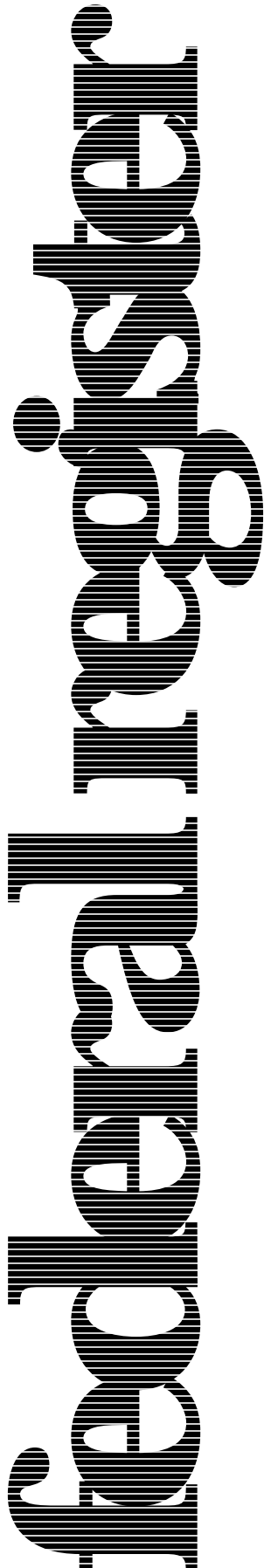
The Federal government's contribution to the San Diego habitat protection effort will include a variety of activities. In addition to participation with the local communities on developing a Multiple Species Conservation Planning (MSCP) effort, the Federal government will also be a land manager. Lands currently administered by the Bureau of Land Management (BLM) will become a part of the overall habitat preserve. The Service is planning to establish the San Diego National Wildlife Refuge, and lands that would be acquired with LWCF or other sources within the San Diego NWR boundary, which partially overlays the proposed preserve, will become part of the NWR. The Federal activities associated with establishment, acquisition and management of the NWR, in conjunction with San Diego's HCP, will not replace the mitigation requirements of incidental take permittees in the HCP.

The expectation is that the overall preserve will consist of a mosaic of ownerships, including land acquired by the HCP incidental take permittees, local governments, State resource agencies, and the Federal government, including the Service. The approved refuge boundary would also likely consist of a mosaic of ownerships. BLM lands within the boundary may have management responsibilities transferred to the Service; State and local government agencies may enter into cooperative management agreements with the Service for management of their properties; and lands acquired by other entities to meet mitigation requirements of the HCP for off-site development may also be included. Entities may enter into mitigation banking agreements with the Service by purchasing lands within the refuge boundary, transferring title to the Service for management and credit for future mitigation needs, under an approved HCP or other agreements. The area will also contain inholdings of privately-owned lands, some of which may be contributed to the preserve as mitigation for on-site land disturbances. The Service will prioritize the private land holdings within the refuge boundary and seek to purchase lands or conservation easements from willing sellers as funding is available. The NWR will also focus on providing connecting links between habitats protected through the overall HCP/refuge preserve. These links are essential for the MSCP and for the conservation of the whole ecosystem upon which the threatened and endangered species depend.

When Congress enacted the HCP provisions into law in 1982, it stressed the need for developing "creative partnerships" between the public and private sector in resolving endangered species issues, especially on private lands. We believe that establishing and managing NWRs within the vicinity of HCP planning areas based on the principles outlined above is consistent with the intent of the HCP process and the Service's mission to protect and recover federally listed species.

APPENDIX 7:

Safe Harbor Policy



Thursday
June 12, 1997

Part III

**Department of the
Interior**

Fish and Wildlife Service

**Department of
Commerce**

National Oceanic and Atmospheric
Administration

50 CFR Parts 13 and 17

**Announcements: Draft Safe Harbor Policy
and Candidate Conservation Agreements
Draft Policy, Notices; and Safe Harbor
and Candidate Conservation Agreements;
Proposed Rule**

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****Announcement of Draft Safe Harbor Policy**

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

ACTION: Announcement of draft policy; request for public comments.

SUMMARY: The Fish and Wildlife Service and the National Marine Fisheries Service (Services) announce a joint Draft Safe Harbor Policy under the Endangered Species Act of 1973, as amended (Act). Many endangered and threatened species occur exclusively or to a large extent upon privately owned property; the involvement of the private sector in the conservation and recovery of species is critical to the eventual success of these efforts. This policy would provide incentives for private and other non-Federal property owners to restore, enhance or maintain habitats for listed species. Either Service, or the Services jointly, will closely coordinate with the appropriate State agencies and any affected Native American Tribal governments before entering into Safe Harbor Agreements (Agreements). Under the policy, either Service, or the Services, jointly, would provide participating property owners with technical assistance in the development of Agreements and would provide assurances that additional land-use or resource-use restrictions as a result of their voluntary conservation actions to benefit covered species would not be imposed. If the Agreement provides a net conservation benefit to the covered species and the property owner meets all the terms of the Agreement, the Services would authorize the incidental taking of the covered species to enable the property owner to ultimately return the enrolled property back to agreed upon baseline conditions. The Services seek public comment on the draft policy. Additionally, the Fish and Wildlife Service (FWS) has published in today's **Federal Register** a proposed rule that contains the necessary regulatory changes to implement this policy. The Services also seek public comment on the appropriateness of allowing a property owner to enter into a Safe Harbor Agreement in conjunction with a Habitat Conservation Plan (HCP) under section 10(a)(1)(B) of the Act.

DATES: Comments on the draft policy must be received by August 11, 1997.

ADDRESSES: Send any comments or materials concerning the Draft Safe Harbor Policy to the 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) You may examine comments and materials received during normal business hours in room 452, Arlington Square Building, 4401 North Fairfax Drive, Arlington, Virginia. You must make an appointment to examine these materials.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Fish and Wildlife Service, Division of Endangered Species (Telephone (703)358-2171) or Nancy Chu, National Marine Fisheries Service, Chief, Endangered Species Division (Telephone (301) 713-1401).

SUPPLEMENTARY INFORMATION:**Background**

Much of the nation's current and potential fish and wildlife habitat is on non-Federal property, owned by private citizens, States, municipalities, Native American Tribal governments, and other non-Federal entities. Conservation efforts on non-Federal property are critical to the survival and recovery of many endangered and threatened species. The Services strongly believe that a collaborative stewardship approach to the proactive management of listed species involving government agencies (Federal, State, and local) and the private sector is critical to achieving the ultimate goal of the Endangered Species Act (Act). The long-term recovery of certain species can benefit from short-term and mid-term enhancement, restoration, or maintenance of terrestrial and aquatic habitats on non-Federal property.

Many property owners are willing to voluntarily manage their property to benefit listed fish and wildlife, provided that such actions do not result in new restrictions being placed on the future use of their property. Beneficial management could include actions to enhance, restore, or maintain habitat (e.g., restoring fire by prescribed burning, restoring hydrological conditions), so that it is suitable for listed species. Such proactive management actions cannot be mandated or required by the Act. Thus, failure to conduct habitat enhancement or restoration activities would not violate any of the Act's provisions. Although property owners recognize the benefits of proactive habitat conservation activities to help listed

species, some are still concerned about additional land-use or resource-use restrictions that may result if listed species colonize their property or increase in numbers or distribution because of their conservation efforts. Concern centers on the applicability of the Act's section 9 "take" prohibitions if listed species occupy their property and on future property-use restrictions that may result from their conservation-oriented property management actions. The potential for future land- or resource-use restrictions has led property owners to avoid or limit property management practices that could enhance or maintain habitat and benefit or attract fish and wildlife that are currently Federally listed as endangered or threatened.

A fundamental purpose of section 2 of the Act, is to conserve the ecosystems upon which endangered and threatened species depend and to conserve listed species. Section 9 of the Act prohibits the "take" of listed fish and wildlife species, which is defined in section 3(18) to include, among other things, killing, harming or harassing. The Act's implementing regulations (50 CFR 17.3), as promulgated by the FWS, 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 and sheltering." Regulations in 50 CFR 17.31 extend the prohibition against take to threatened fish and wildlife species. Consequently, property owners whose properties support endangered or threatened species could violate section 9 of the Act if the property owners significantly develop, modify, or manage those properties in a way that causes harm to listed species.

The Services' draft Safe Harbor Policy encourages property owners to voluntarily conserve threatened and endangered species without the risk of further restrictions pursuant to section 9. Previously the FWS has provided safe harbor type assurances to non-Federal property owners based on various authorities under the Act, including incidental take statements under section 7(a)(2) and incidental take permits under section 10(a)(1)(B). After further consideration of such alternatives and other provisions of the Act, the Services have determined that the section 10(a)(1)(A) "enhancement of survival" permit provisions of the Act provide the best mechanism to carry out the Safe Harbor Policy and provide the necessary assurances for participating property owners while also providing conservation benefits to the covered species. Assurances already provided by

the FWS under sections 7 or 10(a)(1)(B) would still be valid, and revision of those proactive Agreements is unnecessary. The Services are developing this policy to provide national consistency in the development of Safe Harbor Agreements and link the policy to an expanded enhancement of survival permit program through section 10(a)(1)(A) of the Act.

The FWS's proposed regulatory changes necessary to implement this draft policy were published in today's **Federal Register**. The proposed rule provides the FWS's procedures to implement the Safe Harbor Policy as well as other changes to Parts 13 and 17. The National Marine Fisheries Service will develop and propose regulatory changes to implement this policy at a later date.

Draft Safe Harbor Policy

Part 1. Purpose

Because many endangered and threatened species occur exclusively, or to a large extent, upon privately owned property, the involvement of the private sector in the conservation and recovery of species is critical to the eventual success of these efforts. Private property owners are willing to be partners in the conservation and recovery of fish, wildlife, and plant species and their habitats. However, property owners often are reluctant to undertake proactive activities that increase the likelihood or extent of use of their properties by endangered and threatened species, due to fear of future additional property-use restrictions. Safe Harbor Agreements are a means of providing an incentive to property owners to restore, enhance, or maintain habitats resulting in a net conservation benefit to endangered and threatened species. Although such Agreements may not permanently conserve such habitats, they nevertheless offer important short-term and mid-term conservation benefits. These net conservation benefits may result from reduction of fragmentation and increasing the connectivity of habitats, maintaining or increasing populations, insuring against catastrophic events, enhancing and restoring habitats, buffering protected areas, and creating areas for testing and implementing new conservation strategies.

The purpose of the Safe Harbor Policy is to ensure consistency in the development of Safe Harbor Agreements. Safe Harbor Agreements encourage proactive species conservation efforts by private and other non-Federal property owners while providing certainty relative to future

property-use restrictions, if these efforts attract listed species onto their properties, or areas affected by actions undertaken on their property, or increase the numbers or distribution of listed species already present on their properties. These voluntary Agreements will be developed between, either Service, or the Services jointly, and private and other non-Federal property owners. The Services will closely coordinate development of these 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 partnerships that exist between the States and the Services in recovering listed species. Under a Safe Harbor Agreement, participating property owners would voluntarily undertake management activities on their property to enhance, restore, or maintain habitat to benefit Federally-listed species.

Safe Harbor Agreements may be initiated by property owners, or, either Service or the Services jointly, may take the initiative on their own or in concert with other Federal or State agencies to encourage property owners to voluntarily enter Safe Harbor Agreements for a given area, particularly when many non-Federal parcels of property are involved. Either Service or the Services jointly, will work with the participating landowner in the development of their permit application and the Safe Harbor Agreement. The Services will provide the necessary technical assistance to the landowner in developing mutually agreeable management actions that the landowner is willing to voluntarily undertake or forgo that will provide a net conservation benefit and help the landowner describe how these activities will benefit covered species. Development of an acceptable permit application and an adequate Safe Harbor agreement is intricately linked. Either Service or the Services jointly will process the participating landowner's permit application following the Safe Harbor permitting process as described in Title 50 of the Code of Federal Regulations Part 17. During this process all parties to the Agreement will work in close coordination in the development of the Agreement to ensure that measures included in the agreement are consistent with the terms and conditions of the permit. Once the permit is issued the parties to the Agreement can finalize and sign the Agreement.

The Services recognize that Safe Harbor Agreements are not appropriate

under all circumstances. In particular, in situations when property owners are seeking immediate take authorization, development of a Habitat Conservation Plan (HCP) and issuance of an incidental take permit under section 10(a)(1)(B) would be more appropriate. Safe Harbor Agreements are also not appropriate in situations that do not meet the net conservation benefit standards of this policy. For example, where either Service or the Services jointly, reasonably anticipate that a proposed Agreement would only redistribute the existing population of a listed species or attract a species away from a habitat that enjoys long-term protection to a habitat without such protection, the Services would not enter into the Agreement. As another example, where a species is so depleted or its habitat so degraded that some improvement over baseline conditions is necessary to result in a net conservation benefit, a Safe Harbor Agreement may not be appropriate. For instance, certain aquatic, riverine, and/or riparian species may present a challenge in reaching a net conservation benefit since returning to the baseline conditions could have serious negative effects and would negate or outweigh the benefits achieved through the Agreement. In these cases, if a net conservation benefit cannot be achieved after taking into consideration the return to the baseline conditions, the Services will not enter into a Safe Harbor Agreement unless the Services and the property owner agree to appropriate conditions that provide such a benefit.

Availability of resources will also be a governing factor for the Services. The Services expect the interest in Safe Harbor Agreements to rise and the demand for technical assistance to property owners to increase. Safe Harbor Agreements are developed using limited funds appropriated for recovery activities. Priority will, therefore, be given to Agreements that provide the greatest contribution to the recovery of multiple listed species. Another governing factor will be whether there is sufficient information to develop sound conservation measures. The Services will work with State, Tribal, and other interested parties to fill information gaps for species requirements that have not been adequately documented in the scientific literature.

Part 2. Definitions

The following definitions apply for the purposes of this policy.

"*Baseline conditions*" for covered species means population estimates and distribution (if available or determinable) and/or habitat

characteristics of enrolled property that sustain seasonal or permanent use, at the time the Safe Harbor Agreement is executed between either Service or the Services jointly and the property owner.

"Covered species" means a species that is the intended subject of a Safe Harbor Agreement. Covered species are limited to species that are Federally listed as endangered or threatened.

"Enhancement of Survival Permit" means a permit issued under the authority of section 10(a)(1)(A) of the Act.

"Enrolled property" means all private or non-Federal property or waters covered by a Safe Harbor Agreement to which safe harbor assurances apply and on which incidental taking is authorized under the enhancement of survival permit.

"Management activities" are voluntary conservation actions to be undertaken by a property owner that either Service or the Services jointly believe will benefit the status of the covered species.

"Net conservation benefit" means the cumulative results of the management activities identified in an Agreement that provide for an increase in a species' population and/or the enhancement, restoration or maintenance of covered species' suitable habitat within the enrolled property, taking into account the length of the Agreement and the incidental taking allowed by the permit. Net conservation benefits must be sufficient to contribute to the recovery of the covered species if undertaken by other property owners similarly situated within the range of the covered species.

"Property owner" includes, but is not limited to, private individuals, organizations, businesses, Native American Tribal governments, State and local governments, and other non-Federal entities.

"Safe Harbor Agreement" means an Agreement signed by either Service, or both Services jointly and a property owner and any other cooperator, if appropriate, that: (a) Sets forth specific management activities that the private or non-Federal property owner will voluntarily undertake or forgo that will provide a net conservation benefit to covered species; and (b) provides the property owner with the Safe Harbor assurances described within the Agreement and authorized in the enhancement of survival permit.

"Safe Harbor Assurances" are assurances provided in the Agreement and authorized in the enhancement of survival permit for covered species, by either Service, or both jointly, to a non-Federal property owner. These assurances would allow the property

owner to alter or modify enrolled property, even if such alteration or modification will result in the incidental take of a listed species that would return the species back to the originally agreed upon baseline conditions. Such assurances may apply to whole parcels, or portions thereof, of the property owner's property as designated in the Agreement. These assurances are dependent upon compliance with the property owners' obligations in the Agreement and in the enhancement of survival permit.

Part 3. Cooperation and Coordination With the States and Tribes

Coordination with the appropriate State agencies and any affected Tribal governments is critical for the success of the Services' collaborative stewardship approach to recovery through these Safe Harbor Agreements, which is the underlying principle of the Safe Harbor Policy. Coordination among the State fish and wildlife agencies, Tribal governments, the Services, and the property owners are key to effectively implementing a successful Safe Harbor Agreement. This coordination allows the special local knowledge of all appropriately affected entities to be considered in the Agreements. The Services will work in close partnership with State agencies on matters involving the distribution of materials describing the Safe Harbor Agreement policies and programs, the determination of acceptable baseline conditions and development of appropriate monitoring efforts. Because of the Services' trust responsibilities, the Services will also closely coordinate and consult with any affected Tribal government which has a treaty right to any fish or wildlife resources covered by a Safe Harbor Agreement.

Part 4. Species Net Benefit From Safe Harbor Agreements

Before entering into any Safe Harbor Agreement, either Service, or the Services jointly, must make a written finding that all covered species would receive a net conservation benefit from management actions undertaken pursuant to the Agreement. Net conservation benefits must contribute to the recovery of the covered species. Although a Safe Harbor Agreement does not have to provide permanent conservation for enrolled property, Agreements must nevertheless be of sufficient design and duration to provide a net conservation benefit to all covered listed species.

Conservation benefits from Safe Harbor Agreements may include reduction of habitat fragmentation rates;

the maintenance, restoration or enhancement of habitats; increase in habitat connectivity; maintenance or increase of population numbers or distribution; reduction of the effects of catastrophic events; establishment of buffers for protected areas; and establishment of areas to test and develop new and innovative conservation strategies. The Services believe a "net conservation benefit" test is necessary to justify the issuance of an enhancement of survival permit under section 10(a)(1)(A) of the Act. The contribution to the recovery of listed species by Safe Harbor Agreements must be evaluated carefully, since realized benefits from these agreements will be affected by the duration of the Agreement.

The Services believe that there are many listed species that will benefit from management actions carried out for the duration of Safe Harbor Agreements even if there is a return to baseline conditions. Returning the habitat or population numbers to the baseline conditions must be possible without negating the net conservation benefit provided by the Agreement. If this net conservation benefit standard cannot be met, then the Services will not enter into the Agreement. For example, where the Services reasonably anticipate that a proposed Agreement would only redistribute the existing population of a listed species or attract a species away from a habitat that enjoys long-term protection to a habitat without such protection, the Services would not enter into the Agreement. Aquatic, riverine, and/or riparian species may present an additional challenge in reaching a net conservation benefit since returning to the baseline conditions could have a serious negative effect and would negate or outweigh the benefits achieved through the Agreement. In these cases, if a net conservation benefit cannot be achieved, and still allow for the return to the baseline conditions, the Services will not enter into a Safe Harbor Agreement.

Part 5. Standards for and Development of a Safe Harbor Agreement and Permit Issuance Under Section 10(a)(1)(A) of the Act

A property owner may obtain a permit to incidentally take a listed species of fish and wildlife above the agreed upon baseline conditions of the Safe Harbor Agreement, if the Agreement satisfies the following requirements:

The Agreement must—

(1) Specify the species and/or habitats and identify the enrolled property covered by the Agreement;

(2) Describe the agreed upon baseline conditions for each of the covered species within the enrolled property;

(3) Identify management actions that would accomplish the expected net conservation benefits to the species and the agreed upon timeframes for these management actions to remain in effect in order to achieve the anticipated net conservation benefits;

(4) Describe the anticipated results of the management actions and any incidental take associated with the management actions;

(5) Incorporate a notification requirement, where appropriate and feasible, to provide either Service, or Services jointly, or appropriate State agencies with a reasonable opportunity to rescue individual specimens of a covered species before any authorized incidental taking occurs;

(6) Describe the nature of the expected incidental take upon termination of the Agreement (i.e., back to baseline conditions);

(7) Satisfy other requirements of section 10 of the Act; and

(8) Identify the responsible parties that will monitor maintenance of baseline conditions, implementation of terms and conditions of the Agreement, and any incidental take as authorized in the permit.

Issuance of a Safe Harbor permit by the Services is subject to consultation under the intra-Service consultation provisions of section 7 of the Act.

Part 6. Baseline Conditions

Either Service, or the Services jointly, the property owner, and any other cooperator(s) must accurately describe the baseline conditions for the property and species covered by the Safe Harbor Agreement to ensure that the Agreement will not reduce current protection for covered species that presently may use the enrolled property, or result in additional restrictions for such species beyond the baseline conditions. The baseline conditions must reflect the known biological and habitat characteristics that are necessary to support existing levels of use of the property by species covered in the Agreement. However, in light of circumstances beyond the control of the property owner (e.g., loss of nest trees due to storm damage), the parties to the Agreement may revise the baseline conditions to reflect the new circumstances and may develop a new baseline upon which all parties agree.

(A) Determining the Baseline Conditions

This Policy requires a full description of baseline conditions for any species covered in an Agreement (see Part 5

above). Either Service or the Services jointly, or appropriate State or Tribal agencies, with the concurrence of the participating property owner, will describe the baseline conditions for the enrolled property in terms appropriate for the covered species such as: number and location of individual animals, if available or determinable; necessary habitat characteristics that support the species covered by the Agreement; and other appropriate attributes. On-site inspections, maps, aerial photographs, remote sensing, or other similar means can help determine baseline conditions. To the extent determinable, the parties to the Agreement must identify and agree on the level of occupation (permanent or seasonal) by covered species on the enrolled property. For species that are extremely difficult to survey and quantify, an estimate or an indirect measure (e.g., number of suitable acres of habitat needed to sustain a member of the species) is acceptable. Either Service or the Services jointly, will develop the estimate following a protocol agreed upon by all parties to the Agreement. Baseline conditions are then set, based upon the agreed upon measurements or estimates. Either Service or the Services jointly, the property owner or the property owner and any other appropriate agency or government acting in cooperation with either Service or the Services jointly, may determine the baseline conditions. When either Service does not directly determine the baseline conditions, they must review and concur with the determination before entering into an Agreement. Formulation of baseline conditions can incorporate information provided by the property owner, any other appropriate agency, or species experts, as appropriate.

(B) Plants

The Act's "take" prohibitions generally do not apply to listed plant species on private property. Therefore, the incidental take assurances provided in this policy are usually not necessary for listed plant species. However, the Services strongly encourage and often enter into Agreements with non-Federal property owners to restore and enhance habitats for listed plants.

Either Service or the Services jointly, must review the effects of their own actions (e.g., issuance of a permit) on listed plants, even when those plants are found on private property under section 7 of the Act. In approving an enhancement of survival permit and entering into a Safe Harbor Agreement, either Service or the Services jointly, must also confirm under section 7 that

the Agreement will not "jeopardize the continued existence" of listed plants. In the interest of conserving listed plants and complying with their responsibilities under section 7, either Service or the Services jointly, may negotiate with the property owner to voluntarily assist the Services in restoring or enhancing listed plant habitats present within the enrolled property.

(C) Future Section 7 Considerations and Assurances

Before entering into a Safe Harbor Agreement, the either Service or the Services jointly, must conduct an intra-Service section 7 review. During that process, either Service or the Services jointly, must determine that future property use changes within the enrolled property and incidental take consistent with the established baseline conditions will neither jeopardize listed species of fish and wildlife or plants, nor destroy or adversely modify critical habitat at the time of signing the Agreement. If a future Federal nexus to the enrolled property prompts the need for a section 7 review and take of the listed species above the baseline conditions is likely, either Service or the Services jointly, will issue a non-jeopardy biological opinion and incidental take statement to the Federal action agency. As required by section 7 and its implementing regulations, either Service or the Services jointly, will also provide the Federal agency with reasonable and prudent measures that are necessary or appropriate to minimize the effects of the action. Those measures will only require implementation of the same terms and conditions provided to the participating landowner in his/her Safe Harbor Agreement and associated 10(a)(1)(a) permit. This approach is warranted and consistent with section 7 consultation procedures because the effects of any incidental take consistent with the established baseline conditions would have been previously considered during the Services' intra-agency section 7 review for the proposed Agreement.

Part 7. Assurances to Property Owners

A property owner who enters an Agreement and wishes to return enrolled property to the baseline conditions would need to show that the agreed upon baseline conditions were maintained and that activities identified in the Agreement as necessary to achieve the net conservation benefit were carried out for the duration of the agreement. If the property owner carried out the management actions and complied with the permit and the

Agreement conditions, the property owner would be authorized to utilize his/her property in a manner which returns the enrolled property to baseline conditions.

Part 8. Occupation by Non-Covered or Newly Listed Species

After an Agreement is signed and an enhancement of survival permit is issued, a species not addressed in the Agreement may occupy enrolled property. If either Service or the Services jointly, conclude that the species is present as a direct result of the property owner's conservation actions taken under the Agreement, either Service or the Services, will:

(1) At the request of the property owner, amend the Agreement to reflect the changed circumstances and revise the baseline condition description, as appropriate; and

(2) Review and revise the permit, as applicable, to address the presence of additional listed species on enrolled property.

Assurances in the permit may not necessarily be extended to a non-covered species if the species was specifically excluded from the original Agreement as a result of the participating property owner's request, or its presence is a result of activities not directly attributable to the property owner. In these cases, enhancement or maintenance actions that are specific to the non-covered species under consideration must be developed, and baseline conditions determined that will provide a net conservation benefit to that species.

Any substantial change to a Safe Harbor Agreement or a revision to an enhancement of survival permit because of non-covered species would be subject to the same review process (i.e., section 7 of the Act or public review) as the original Safe Harbor agreement and enhancement of survival permit.

Part 9. National Environmental Policy Act Compliance

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 utilize 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 by either a Categorical Exclusion,

Environmental Assessment (EA), or Environmental Impact Statement (EIS), depending on the effects of their proposed action.

Either Service or the Services jointly, will review each permit action 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 either Service or the Services jointly, expect that significant impact could occur, the issuance of a permit would require preparation of an EA or EIS. 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. If a Safe Harbor Agreement/permit is not expected to individually or cumulatively have a significant impact on the quality of the human environment, then the Agreement/permit may be categorically excluded.

Part 10. Transfer of Ownership

If a property owner who is party to a Safe Harbor Agreement transfers ownership of the enrolled property, either Service or the Services, will regard the new owner as having the same rights and obligations with respect to the enrolled property 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 baseline conditions. The new property owner, however, would neither incur responsibilities under the Agreement nor receive any assurances relative to section 9 restrictions from the Agreement unless the new property owner becomes a party to the Agreement.

A Safe Harbor 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 to contact the new property owner to explain the prior Safe Harbor 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 Safe Harbor Agreement, either Service or the Services jointly, will honor the baseline

conditions for the enrolled property under consideration.

Part 11. Property Owner Discretion

Nothing in this policy prevents a participating property owner from implementing management actions not described in the Agreement, so long as such actions maintain the baseline conditions. Either Service or the Services jointly, will provide technical advice, to the maximum extent practicable, to the property owner when requested.

Part 12. Discretion of All Parties

Nothing in this policy compels any party to enter a Safe Harbor Agreement at any time. Entering a Safe Harbor Agreement is voluntary and presumes that the Agreement will serve the interests of all affected parties. Unless specifically noted, an Agreement does not otherwise create or waive any legal rights of any party to the Agreement.

Part 13. Scope of Policy

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

Required Determinations

A major purpose of this proposed policy is the facilitation of voluntary cooperative programs for the proactive management of non-Federal lands and waters for the benefit of listed species. From the Federal Government's perspective, implementation of this policy would result in minor expenditures (e.g., providing technical assistance in the development of site-specific management plans). The benefits derived from such management actions on non-Federal lands and waters would significantly advance the recovery of listed species. Non-Federal program participants would be provided regulatory certainty as a result of their voluntary management actions. In some cases, such participants may incur minor expenditures to carry out some management actions on their lands or involving their water. The Services have determined that the proposed policy would not result in significant costs of implementation to the Federal Government or to non-Federal program participants.

The Director of the Fish and Wildlife Service certified to the Chief Counsel for Advocacy of the Small Business Administration that a review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) has revealed that this policy would not have a significant effect on a substantial number of small

entities, which includes businesses, organizations, or governmental jurisdictions. Because of the completely voluntary nature of the Safe Harbor program, no significant effects are expected on non-Federal cooperators exercising their option to enter into a Safe Harbor Agreement. Therefore, this policy would have minimal effect on such entities.

This policy has been determined to be not significant for purposes of Executive Order 12866. Therefore, it was not subject to review by the Office of Management and Budget.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et seq.*, that this proposed policy will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The Departments have determined that these proposed policy meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

The Services have examined this proposed policy under the Paperwork Reduction Act of 1995 and found it to contain no requests for additional information or increase in the collection requirement other than those already approved under the Paperwork Reduction Act of 1995 for incidental take permits with OMB approval #1018-0022 which expires July 31, 1997. The Service requested renewal of the OMB approval and in accordance with 5 CFR 1320 will not continue to collect the information, if the approval has expired, until OMB approval has been obtained.

The Department has determined that the issuance of the proposed policy is categorically excluded under the Department of 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 proposed policy qualifies for a categorical exclusion and falls within the categorical exclusion criteria in NOAA 216-3 Administrative Order, Environmental Review Procedure.

Public Comments Solicited

The Services request comments on their Draft Safe Harbor Policy. Particularly sought are comments on the procedures or methods for enhancing the utility of the Safe Harbor Policy in carrying out the purposes of the Act.

The Services also are interested in the views of interested parties on the appropriateness of linking "Safe Harbor" Agreements to incidental take permits issued under section 10(a)(1)(B) of the Act. In certain situations, HCP permittees might be willing to conduct

activities that would enhance listed species populations above their mitigation obligations under an incidental take permit or HCP. The Services are interested in ideas, comments, and suggestions on this concept. The Services also are requesting ideas, comments or suggestions on how to delineate the baseline conditions for a Safe Harbor Agreement that is linked to an HCP incidental take permit. After consideration of all comments received on this question, the Services will decide whether it is appropriate to utilize Safe Harbor Agreements in connection with HCPs.

If the Services decide that it is appropriate to provide these assurances to incidental take permittees, the Services will publish a proposed policy on how best to provide such assurances.

In addition, situations may arise where a property owner may want to recover or conserve numerous species, both listed and unlisted on their property, and may want to enter into both a Safe Harbor Agreement and a Candidate Conservation Agreement. The Services are also seeking comments, and are interested in ideas and suggestions on the ways to streamline and combine these processes when developing these two types of agreements with the same property owner.

The Services will take into consideration the comments and any additional information received by the Services by August 11, 1997. To ease review and consideration of submitted comments, the Services prefer that reviewers organize their comments by part (e.g., Part 1. Purpose, Part 2. Definitions, and linking Safe Harbor Agreements with HCP permits).

Dated: May 27, 1997.

John G. Rogers,

Acting Director, Fish and Wildlife Service.

Dated: June 2, 1997.

Rolland A. Schmitt,

*Assistant Administrator for Fisheries,
National Oceanic and Atmospheric
Administration.*

[FR Doc. 97-15250 Filed 6-9-97; 1:26 pm]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Announcement of Draft Policy for Candidate Conservation Agreements

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

ACTION: Announcement of draft policy; request for public comments.

SUMMARY: The Fish and Wildlife Service and the National Marine Fisheries Service (Services) announce a joint Draft Policy for Candidate Conservation Agreements (Agreements) under the Endangered Species Act of 1973, as amended (Act). This policy would provide incentives for private and other non-Federal property owners, and State and local land managing agencies, to restore, enhance, or maintain habitats for proposed, candidate and certain other unlisted species. Candidate Conservation Agreements would be developed by participating property owners or State or local land managing agencies to remove the need to list the covered species as threatened or endangered under the Act. The Services will coordinate closely with the appropriate State agencies and any affected Native American Tribal governments before entering into Candidate Conservation Agreements with property owners to conserve covered species.

Under this policy, either Service, or the Services jointly, would provide participating property owners and State and local land managing agencies with technical assistance in the development of Candidate Conservation Agreements and would provide assurances that, if covered species are eventually listed, the property owners or agencies would not be required to do more than those actions agreed to in the Candidate Conservation Agreement. If a species is listed, incidental take authorization would be provided to allow the property owner or agency to implement management activities that may result in take of individuals or modification of habitat consistent with those levels agreed upon and specified in the Agreement.

Published concurrently in this **Federal Register** are the Fish and Wildlife Service's (FWS) proposed regulations necessary to implement this policy. The Services seek public comment on this proposed draft policy.

APPENDIX 8:

Example of an Integrated HCP/EA

**Environmental Assessment/
Habitat Conservation Plan for
Issuance of an Endangered Species Section
10(a)(1)(B) Permit for the Incidental Take of the
Golden-cheeked Warbler (*Dendroica chrysoparia*)
for Construction of a Single Family Residence on
_ acres on (LOCATION), Austin, Travis County, Texas**

**U.S. Fish and Wildlife Service
Ecological Services
10711 Burnet Road, Suite 200
Austin, Texas 78758**

(DATE)

COVER SHEET

Title for Proposed Action: Issuance of Endangered Species Act section 10(a)(1)(B) permit allowing incidental take of the endangered golden-cheeked warbler (*Dendroica chrysoparia*) during construction of a single family residence on ___ acres on **(LOCATION)**, Austin, Travis County, Texas.

Unit of Fish and Wildlife Service Proposing Action: Permits Branch, U.S. Fish and Wildlife Service, P.O. Box 329, Albuquerque, New Mexico 87103

Legal Mandate for Proposed Action: Endangered Species Act of 1973, as amended, section 10(a)(1)(B), as implemented by 50 CFR 17.22 for endangered species.

Document Author: **(BIOLOGIST NAME)**, Ecological Services, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758.

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1.0 INTRODUCTION

(**APPLICANT'S NAME**) (Applicant) proposes to construct a single family residence on ___ acres on (**LOCATION**), Austin, Travis County, Texas, (Figure 1).



Figure 1. General location of property in Austin, Travis County, Texas.

The golden-cheeked warbler (warbler) (*Dendroica chrysoparia*), a listed endangered song bird, has been documented to use portions of, or the immediate vicinity of the subject tract. Upon review of biological information submitted by the Applicant and other sources, the U.S. Fish and Wildlife Service (Service) has determined that the proposed development would result in an incidental take of the warbler and the Applicant has submitted the necessary 3-200 form for a permit under section 10(a)(1)(B) of the Endangered Species Act (Act) for incidental taking.

This document provides the required National Environmental Policy Act (NEPA) documentation for a Federal action (section 10(a)(1)(B) permit issuance) and the components of a Habitat Conservation Plan (HCP) as mandated by section 10 of the Act.

The duration of this section 10(a)(1)(B) permit (**PRT-**) is for __ years from the date of issuance. This allows the Applicant or their successors to take the golden-cheeked warbler within the geographic boundaries identified in the HCP over that time period. After the expiration of this permit, any “take” within the said geographic boundaries requires reauthorization. However, the term and conditions contained in the HCP do not expire and would be covered by the enforcement authority of section 11(b) of the Endangered Species Act.

2.0 PURPOSE AND NEED FOR ACTION

The purpose of this Environmental Assessment/Habitat Conservation Plan (EA/HCP) is to evaluate the environmental impacts of the proposed action and alternatives of the project. The assessment is required because of the proposed issuance of a section 10(a)(1)(B) incidental take permit by the Service pursuant to the Endangered Species Act (Act) of 1973, as amended.

The Applicant has submitted an application for a permit to allow the incidental take of the federally listed golden-cheeked warbler which has been documented on portions of the subject tract. The implementing regulations for section 10(a)(1)(B) of the Act, as provided by 50 CFR 17.22, specify the criteria by which a permit allowing the incidental take of listed species pursuant to otherwise lawful activities may be obtained. The purpose and need for the section 10(a)(1)(B) permit is to ensure that incidental taking resulting from the proposed development will be minimized and mitigated to the maximum extent practicable and will not appreciably reduce the likelihood of the survival and recovery of this listed species in the wild.

The submission of the 10(a)(1)(B) permit application requires the development of an HCP which is designed to ensure the continued existence and aid in the recovery of the listed species while allowing for the limited, incidental take of the species during the construction and operation of the proposed project.

3.0 DESCRIPTION OF THE AFFECTED ENVIRONMENT

3.1 VEGETATION

The woodlands in Travis County are generally dominated by Ashe juniper (*Juniperus ashei*), plateau live oak (*Quercus fusiformis*), Texas oak (*Quercus buckleyi*), cedar elm (*Ulmus crassifolia*), and hackberry (*Celtis laevigata*). Other frequent to occasional species include bumelia (*Bumelia lanuginosa*), Texas persimmon (*Diospyros texana*), elbowbush (*Forestiera pubescens*), yaupon (*Ilex vomitoria*), redbud (*Cercis canadensis*), rough-leaf dogwood (*Cornus drummondii*), and Texas mountain laurel (*Sophora secundiflora*).

At least one of three general woodland communities (plateaus, canyons, and ecotonal areas) exist in the project area. The plateau areas, which comprise a majority of the site, tend to be generally xeric in nature due to various geologic and surface drainage characteristics. The plateau community is typically dominated by Ashe juniper with occasional plateau live oak and shin oak (*Quercus sinuata* var. *breviloba*).

The canyon areas, conversely, tend to be mesic and support a greater diversity and stature of woodland species. Ashe juniper is again usually dominant canopy species. Texas oak with mixtures of live oak, cedar elm, hackberry, Arizona walnut (*Juglans major*) and escarpment black cherry (*Prunus serotina* var. *eximia*).

The ecotonal zone between the upper plateaus and the canyon contain a mixture of the plateau and canyon communities with Ashe juniper being dominant and occasional live oak, Texas oak, and shin oak.

Grasslands in the area are vegetated predominantly with silver bluestem (*Bothriochloa saccharoides*), little bluestem (*Schizachyrium scoparium*), threeawn (*Aristida* sp.), buffalograss (*Buchloe dactyloides*), and miscellaneous herbs and forbs.

3.2 WILDLIFE

Wildlife of the generally wooded areas is typified by the common woodland species of central Texas. Common bird species include northern mockingbird (*Mimus polyglottos*), northern cardinal (*Cardinalis cardinalis*), Carolina chickadee (*Parus carolinensis*), hermit thrush (*Hylocichla guttata*), tufted titmouse (*Parus bicolor*), black and white warbler (*Mniotilta varia*), and other common woodland bird species. Common mammals include the white-tailed deer (*Odocoileus virginianus*), raccoon (*Procyon lotor*), Virginia opossum (*Didelphus virginiana*), fox squirrel (*Sciurus niger*), eastern cottontail (*Sylvilagus floridanus*), and nine-banded armadillo (*Dasypus novemcinctus*). Herpetofauna include aquatic and terrestrial reptile and amphibian species. Common reptiles include the Texas rat snake (*Elaphe obsoleta*), patch-nosed snake (*Salvadora grahamiae*), northern fence lizard (*Sceloperus undulatus*), and ground skink (*Scincella lateralis*).

3.3 THREATENED OR ENDANGERED SPECIES

Within Travis County, eight vertebrate and invertebrate species are currently listed as endangered by the Service. Two bird species, the golden-cheeked warbler and the black-capped vireo (vireo) (*Vireo atricapillus*); and six cave-dwelling invertebrates, the Tooth Cave ground beetle (*Rhadine persephone*), Bee Creek Cave harvestman (*Texella reddelli*), Tooth Cave spider (*Neoleptoneta myopica*), Tooth Cave pseudoscorpion (*Tartarocreagris texensis*), Kretschmarr Cave mold beetle (*Texamaurops reddelli*), and the Bone Cave harvestman (*Texella reyesi*) have been placed on the federal endangered species list.

The six species of endangered cave invertebrates occur within a karsted geologic region known generally as the Edwards geologic formation in Travis and Williamson Counties. The subject site has been evaluated for the presence of surface karst features (caves, sinks, fissures) that might indicate the presence of subsurface voids that could support the listed karst invertebrates. No surface karst features have been located. The absence of surface karst features is generally held to indicate a low probability for the occurrence of the listed karst species.

Spring breeding surveys for the black-capped vireo and the golden-cheeked warbler did not locate any black-capped vireos in the project area. However, warblers were found during surveys conducted between 1989 and 1993 in the project area. During those surveys, four warblers were observed in the canyon north of the property.

The following species are Species of Concern, those for which listing under the Act may be warranted, but for which biological information is lacking. The Jollyville Plateau salamander (*Eurycea spp.*) has been documented in various spring outlets throughout the Jollyville Plateau region. This species has not been documented on this development site. The bracted twist-flower (*Streptanthus bracteatus*) and the canyon mock-orange (*Philadelphus ernestii*) occur in the general area of the subdivision but are not known to occur on the project site.

3.4 WETLANDS

Areas subject to jurisdiction under section 404 of the Clean Water Act include those areas that fall at or below the "plane of ordinary high water" of these waterways as defined by 33 CFR 323.2. No areas of the subject tract defined as wetlands by the criteria established in the 1987 Corps of Engineers Wetland Delineation Manual have been identified on the subject tract.

3.5 GEOLOGY/SOILS

The project site is underlain by the Glen Rose geologic formations of the Lower Cretaceous age. The Glen Rose formation is composed of alternating marl, dolomite, and limestone strata which frequently results in a stair-step topography due to differential erosion rates of various strata. The Glen Rose is very slowly permeable and horizontal movement of water along the hard limestone strata often results in seepages where the strata becomes exposed on hillsides.

Soils on the project site are of the Tarrant Series according to the Soil Conservation Service (SCS) Soil Survey of Travis County, Texas, issued June 1974. These soils consist of shallow to very shallow, well-drained, stoney, clayey soils overlaying limestone. There are random outcrops of limestone and loose stones that cover up to 50 percent of the surface. These soils occupy the upper plateau area of the subject site, with rock outcrops not uncommon in the hilly breaks.

3.6 LAND USE

The subject property is in an established residential subdivision bordered on the east and west by a residential development. A mature oak/juniper forested canyon lies to the north and south.

The proposed project site is located in southwest Travis County, but within an area that has been experiencing urban development for the past 15 to 20 years. Past land uses have included livestock grazing, agriculture, deer hunting, and open space. In recent years, intensive urban development has encroached around much of the site.

3.7 AIR QUALITY

Travis County and the Austin metropolitan area are currently full attainment areas for all air quality criteria pollutants of the Environmental Protection Agency (EPA) and Texas Natural Resource Conservation Commission (TNRCC). However, potential degradation of air quality, particularly from automobile exhaust, in the Austin metropolitan area has been a topic of discussion over the past decade.

3.8 WATER RESOURCES AND WATER QUALITY

Water quality on the proposed development site is presently estimated to be good because it is an undeveloped lot with no current commercial or residential use.

All streams in the vicinity are listed as compliance streams suitable for contact recreation by the TNRCC.

3.9 CULTURAL RESOURCES

There are no properties or archeological sites listed on the National Register of Historic Places on this site.

4.0 ALTERNATIVES INCLUDING THE PROPOSED ACTION

This section presents details of the proposed action and the reasonably practicable alternatives that have been considered. The alternatives include: 1) proposed (preferred) action, 2) selection of an alternate site, 3) modification of site design and layout, 4) waiting on approval of a regional section 10(a)(1)(B) permit, and 5) no action. The environmental consequences of these various alternatives are presented in section 5.0.

4.1 ALTERNATIVE 1 - PROPOSED (PREFERRED) ACTION

The proposed action is the issuance of a permit under section 10(a)(1)(B) of the Act to authorize the incidental take of the endangered golden-cheeked warbler during the development of a single

family residence on __ acres on **(LOCATION)**, Austin, Travis County, Texas. The anticipated onsite and offsite impacts of the proposed action are addressed in section 5.1.

An HCP has been developed as part of the preferred alternative as mitigation for the incidental taking of the warbler. The conservation plan indicates that \$1,500 will be placed in a fund held by the City of Austin Balcones Canyonlands Conservation Fund for use in land acquisition/management within golden-cheeked warbler Recovery Unit 5 for the conservation of the golden-cheeked warbler (Figure 2). The HCP is detailed more fully in section 6.0.

This alternative was selected as the preferred action as it will allow development of the property and the conservation plan minimizes and offsets the potential impact to the warbler by providing for offsite conservation measures which will be utilized to better manage the recovery of the species.

4.2 ALTERNATIVE 2 - ALTERNATE SITE LOCATION

This alternative assumes that the Applicant could equitably divest the subject property and construct a single family residence elsewhere that would not result in the take of the warbler.

4.3 ALTERNATIVE 3 - ALTERNATE SITE DESIGN

This alternative assumes that alteration of site layout is possible and that relocation of the residence would eliminate take of the warbler.

4.4 ALTERNATIVE 4 - WAIT ON A REGIONAL 10(a)(1)(B) PERMIT

This alternative assumes that the Applicant could wait on the completion and implementation of a regional section 10(a)(1)(B) permit for continuation of development plans.

4.5 ALTERNATIVE 5 - NO ACTION ALTERNATIVE

This alternative assumes that all proposed development does not occur and that no application for incidental take is processed.

5.0 ENVIRONMENTAL CONSEQUENCES

5.1 ALTERNATIVE 1- PROPOSED (PREFERRED) ALTERNATIVE

5.1.1 Onsite Impacts

5.1.1.1 Vegetation

The proposed action of permit issuance will result in the surface and/or vegetational alteration of less than one (1) acre (Figure 3). Most of the vegetative resources associated with construction of a single family residence will be altered. Vegetation within the steep canyon area will not be altered by the proposed development.

5.1.1.2 Wildlife

Wildlife over the area planned for development would largely be displaced to adjacent areas, which could result in increased competition for nesting, foraging, breeding, and feeding areas. Landscape vegetation will provide habitat for those species of wildlife suited for coexistence with urban development. The undevelopable portions of the canyon system are expected to remain in their natural vegetational state and would continue to provide habitat for the wildlife species that currently utilize this area. Undetermined negative or positive effects associated with the promotion of urban wildlife species and human activities associated with the planned development may result in negative impacts to certain species while others may be unaffected or positively affected from this development.

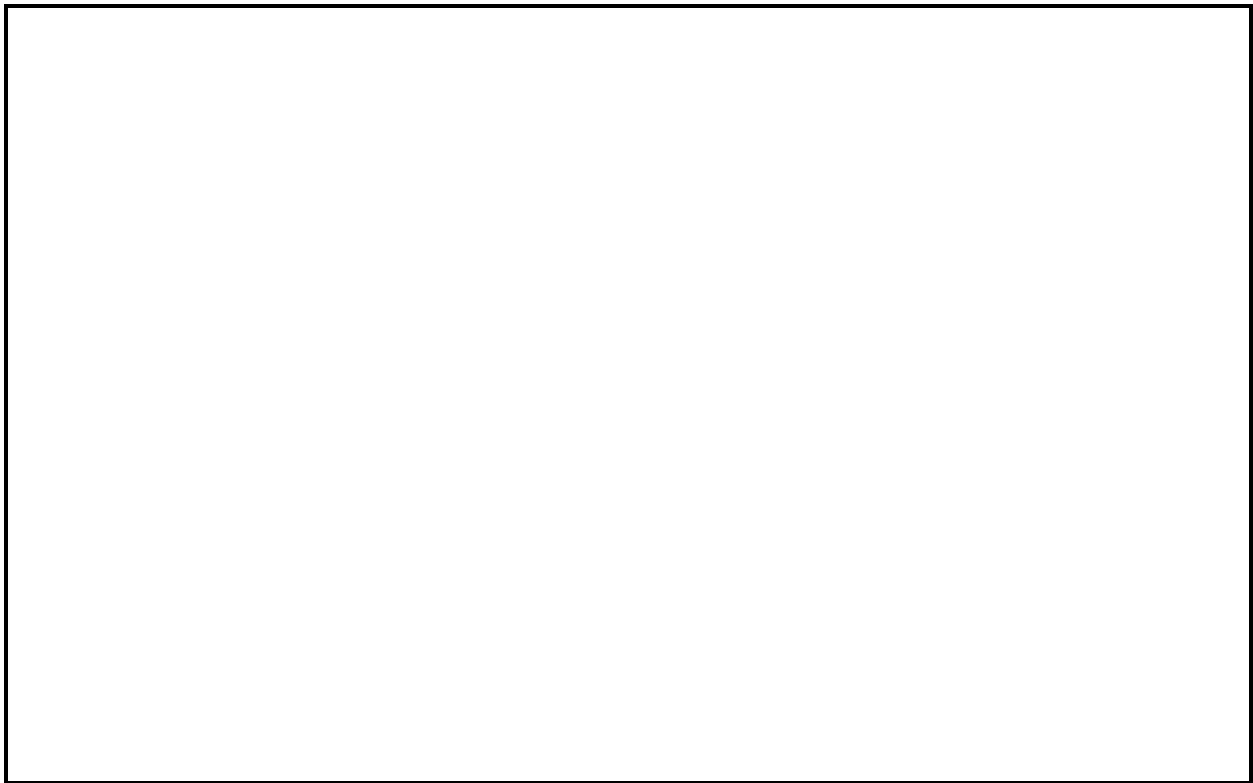


Figure 3. (APPLICANT'S NAME) lot and approximate location of proposed construction.

5.1.1.3 Endangered Species

The black-capped vireo and the six species of cave-adapted invertebrates have not been documented to occur on the subject site nor has suitable habitat been identified for these species.

Spring surveys for the warbler were conducted between 1989 and 1993 in the project area. During those surveys, __ (#) warblers were observed in the canyon north of the property. Based on the Service's definition of warbler habitat, the forested community found on the subject property would be considered warbler habitat. Much of the forested canyon and ecotonal areas are, to some degree, utilized by the warbler. Forested areas on the plateaus which contribute to the overall habitat continuity on this site have not been found to be directly utilized by warblers.

5.1.1.4 Assessment of Take

Development of __ acres on **(LOCATION)**, Austin, Travis County, Texas is subject to the City of Austin and Travis County Land Development Code which limits development on slopes of greater than 25 percent. This precludes the use of those portions of the lot that include the canyon area. Direct alteration of habitat areas known to be utilized by the warbler will be limited to intrusions within the ecotonal transition zones between the upper plateau and the canyon habitat. The Service currently believes that development activities in general will cause indirect impacts to the warbler due to habitat fragmentation, and an overall decrease of the contiguous habitat patch size. Encroachment of noise and activity within close proximity to nesting pairs, and introduction or increase of predator species (i.e., cowbirds, jays, house cats, fire ants) into otherwise low-predator-density areas are also potential indirect impacts of adjacent development.

Based on the results of previous warbler surveys, the Service has concluded that up to 1 pair of warblers occur in the project area during the nesting season and that this project will result in the direct and/or indirect destruction of approximately 1 acre of warbler habitat, which contributes to the support of one warbler pair.

No take is anticipated for any other federally listed or proposed species. No populations of the candidate plant species or the Barton Springs salamander have been identified on the subject site, and are, therefore, not anticipated to be impacted.

5.1.1.5 Wetlands

Areas subject to section 404 of the Clean Water Act jurisdiction are limited to the existing surface creek channel and is not proposed for development. Runoff into this area is to be treated according to local regulations and EPA standards for nonpoint-source pollution and sedimentation prevention. No impacts are expected.

5.1.1.6 Geology/Soils

No significant geologic alterations are anticipated from the proposed project.

Some surface soil alterations will result from the proposed development.

5.1.1.7 Land Use

Current and past land use trends in the vicinity are toward single-family residential use.

5.1.1.8 Water Resources

Surface water resources will be directed to appropriate filtration and sedimentation facilities. Subsurface groundwater resources will be slightly altered by the construction of impervious cover in the form of roadways and building foundations. Water that would have seeped into the geologic strata will become surface runoff and channeled to the appropriate facility. There could be slight increases in sediment loading and other pollutants in surface water runoff, however, these increases are not believed to be significant given the sedimentation facilities' ability to capture these pollutants and the small size of the project.

5.1.1.9 Air and Water Quality Impacts

The proposed development may contribute to increased local traffic noise and exhaust emissions by increasing the number of gasoline-powered vehicles in the immediate vicinity. The addition of one residence with fireplaces would be expected to contribute to carbon dioxide, particulate and other emissions in the local area.

The removal of trees associated with the proposed development will slightly reduce the local air filtering capabilities.

A temporary increase of fugitive dust emissions and noise will be expected during construction activities.

No significant impacts are expected to occur from runoff of the developed areas. All City of Austin and Travis County Land Development Codes are expected to be complied with during all aspects of the development. All impervious cover runoff will be directed to the filtration and sedimentation facilities, as required by the applicable City ordinances.

5.1.1.10 Cultural Resources

According to Texas Historic Commission files, no registered archaeological sites exist for the subject tract. No impacts are expected to occur to any significant sites of historical value.

5.1.2 Offsite Impacts

5.1.2.1 Vegetation

No offsite impacts to vegetation are expected to occur.

5.1.2.2 Wildlife

Displacement of certain wildlife species is expected to occur from the developed lot into the undeveloped canyon as well as adjacent, undeveloped properties. Wildlife over the subject lot would largely be displaced to adjacent areas, which could result in increased competition for nesting, foraging, breeding, and feeding areas.

5.1.2.3 Endangered Species

Offsite impacts pertaining to endangered species may ultimately include the displacement of warblers that have been documented to utilize the areas adjacent to the subject sites.

Implementation of the conservation measures described in section 6.0 illustrate the method to be utilized to minimize and mitigate potential onsite impacts. The actions described for the conservation/mitigation measures would address any offsite impacts that may result due to the proposed development.

5.1.2.4 Wetlands

As previously discussed, the onsite sedimentation and nonpoint-source pollution controls will minimize the amount of sediment and other pollutants introduced into downstream jurisdictional areas. No offsite impacts to jurisdictional areas are expected to occur.

5.1.2.5 Geology/Soils

No offsite impacts to geologic or soil resources are expected to occur.

5.1.2.6 Land Use

No significant alterations to existing or proposed land uses are expected to occur as a result of the proposed action.

5.1.2.7 Air and Water Quality

As previously discussed in the onsite impacts section, vehicle emissions and noise levels, as well as emissions from fireplaces, are expected to increase locally due to an increase in the number of

vehicles and residences in the area. This local increase may have minor effects on the regional air quality conditions.

The proposed water quality control devices are discussed in the onsite impacts section. Existing offsite water quality conditions are expected to be maintained by these control devices.

Potential offsite, indirect water quality impacts would relate to roadway surface runoff pollution as a result of the increase in vehicle traffic in the area. This increase will be insignificant because the action is construction of one single family residence.

5.1.2.8 Water Resources

Offsite surface and groundwater resources are not expected to be impacted by this activity. Natural water volumes exiting from the site are expected to remain consistent with normal weather patterns, with slight increases in surface water runoff due to the increase in impervious cover due to development.

5.1.2.9 Cultural Resources

No offsite impacts to cultural resources are expected.

5.1.3 Cumulative Impacts Analysis - This section considers the past, present, and future projects, authorized or under review, that are considered to contribute to the cumulative loss of species of concern.

5.1.3.1 Vegetation - As the proposed action would result in disturbance of less than 1 acre of vegetation, primarily juniper-live oak woodland, it would cumulatively contribute to disturbance of this vegetation type in Travis County resulting from development, road construction, and other land use projects.

5.1.3.2 Wildlife - The proposed action will contribute to a cumulative reduction of habitat for some wildlife species when added to impacts resulting from other development, road construction, and other land use projects in Travis County. Wildlife species associated with urban and suburban settings would likely increase while species intolerant of development would locally decrease. No significant cumulative impacts to wildlife species currently occurring in Travis County or the region would be expected.

5.1.3.3 Threatened or Endangered Species - The proposed action will contribute to "take" of golden-cheeked warblers and/or their habitat in the region when added to section 10(a)(1)(B) incidental take permits that have been or will be issued by the Service for other projects. To date, 70 incidental take permits have been issued in the Austin area. These permits cover approximately 5,417 acres a portion of which included warbler habitat. There are currently 19 active incidental take permit applications, 8 of which are single family residence applications,

being considered by the Service in the Austin area. These permits cover in excess of 4,229 acres, of which a portion is suitable warbler habitat. The level of impacts resulting from projects for which permits are currently being considered is dependent on the amount of take resulting from the actual number of these permits issued by the Service. Cumulatively, the known activities would not result in a significant impact to the warbler because each activity is being evaluated with respect to its impact on the warbler's recovery unit number 5.

5.1.3.4 Wetlands - There are not impacts to wetlands as a result of this project. Therefore, no cumulative impacts are anticipated.

5.1.3.5 Geology and Soils - No significant cumulative impacts to geology and soils would occur as a result of the proposed action.

5.1.3.6 Land Use - The proposed action contributes to the conversion of undeveloped land to developed land in the Austin area. Past, present, and future developments must comply with all development codes and cumulative impacts will be the same for all alternatives.

5.1.3.7 Air and Water Quality - The proposed action will contribute to limited degradation of air quality in the Austin area, primarily through a slight increase in automobile exhaust emissions. The significance of the impact will depend upon air quality requirements for construction activities and automobiles. The continued development of the area could result in a significant cumulative impact on air quality.

The proposed action, complying with local water quality codes, will cause some change in existing water quality. However, this change will not result in a significant cumulative impact from the single family residential lots that are anticipated to undergo this process. However, uncontrolled development in areas that do not have adequate water quality standards will result in a significant cumulative impact on the water quality.

5.1.3.8 Cultural Resources - This project, because of its limited scope, will not result in cumulative impacts to sites eligible for the National Register of Historic Places.

5.2 ALTERNATIVE 2 - ALTERNATE SITE LOCATION

With the steady encroachment of urbanization around the property during the past decade, and commensurate increases in property taxes and expenses, the previous uses of the land have either become impractical or uneconomical in terms of providing adequate return against expenses. The property location is situated within a rapidly urbanizing area within the Austin community.

While it is possible to construct a single family residence on property other than the subject site and not within suitable warbler habitat, it is not economically practicable for the Applicant to divest the subject parcel at a non-development market price and then purchase another site at or above development market price. Therefore, this alternative was considered non-practicable.

5.3 ALTERNATIVE 3 - ALTERNATIVE SITE LAYOUT

An alternative site layout design would not eliminate the incidental take of the golden-cheeked warbler. Therefore, this alternative was considered non-practicable.

5.4 ALTERNATIVE 4 - WAIT ON THE REGIONAL 10(a)(1)(B) PERMIT

Following discovery of the warbler near the site and the potential for take from construction of a single family residence, the Service recommended that the Applicant should apply for an individual section 10(a)(1)(B) permit or wait on completion of the regional section 10(a)(1)(B) permit.

From 1990 to present, a proposed regional HCP has met with numerous delays. In November 1993, Travis County voters denied a bond proposition to provide major funding for that HCP. Due to uncertainties as to when a regional plan might be available, this alternative was considered non-practicable.

5.5 ALTERNATIVE 5 - NO ACTION

This scenario would not result in the near-term disturbance of portions of the site proposed for development, nor the attendant potential take of the warbler. Since the site is privately owned, there is constant economic maintenance of the property, particularly in taxes and upkeep. The sale of the property for purposes other than development is not economically feasible. The Applicant no longer can afford to hold the property without reasonable economic return. Therefore, this alternative was considered non-practicable under current and foreseeable circumstances.

6.0 HABITAT CONSERVATION PLAN

As part of the proposed action, an HCP has been proposed to minimize the potential take described in section 5.1.1.4 above and assure that this action does not reduce the potential for survival and recovery of the warbler in the wild, as mandated by requirements of 50 CFR Part 17.22(b)(1)(iii). The HCP includes the following features:

- The donation of \$1,500 to the City of Austin Balcones Canyonlands Conservation Fund for the specific purpose of land acquisition/management within golden-cheeked warbler Recovery Unit 5 for the conservation of the golden-cheeked warbler. The lands acquired/managed through this fund are to be approved by the Fish and Wildlife Service. These funds are not required at the time of permit application but must be provided prior to any clearing activities or house construction.

- Minimization or avoidance of clearing within the canyon habitats on the development site;
- The use of herbicides and pesticides will be kept to a minimum and will fully comply with the label guidelines for application; and
- Clearing and construction within the proposed development area shall be consistent with the current practices recommended by the Texas Forest Service to prevent the spread of oak wilt.

The following conservation recommendations will be followed where possible:

- Clearing within the development area will be limited to what is necessary for residential construction and revegetation of non-impervious disturbances will be with native vegetation; and
- New construction onsite will not be initiated during the warbler breeding/nesting period between 1 March and 1 August within 300 feet of the edge of a documented warbler territory, if possible.

This conservation plan is intended to minimize the potential impact to the warbler and provide for its continued existence.

One of the four conservation planning requirements is a requirement that sufficient funding be made available to implement the HCP. **(APPLICANT'S NAME)** is committed to provide the necessary funding to support the mitigation as outlined above.

6.1 AMENDMENT PROCEDURE

It is necessary to establish a procedure whereby the section 10(a)(1)(B) permit can be amended. However, it is extremely important that the cumulative effect of amendments will not jeopardize any endangered species or other species of concern. Amendments must be evaluated based on their effect on the habitat as a whole. The Service must be consulted on all proposed amendments. The types of proposed amendments and the applicable amendment procedures are as follows:

6.2 AMENDMENTS TO THE DEVELOPMENT PLANS

It is acknowledged that upon the written request of **(APPLICANT'S NAME)**, the local agency having land use regulatory jurisdiction, is authorized in accordance with applicable law to approve amendments to development plans for the subject property which do not encroach on any endangered species habitat that is not presently contemplated to be taken as a consequence of the development, and which do not alter the conditions set forth in this HCP.

6.3 MINOR AMENDMENTS TO THE HCP

Minor amendments involve routine administrative revisions or changes to the operation and management program and which do not diminish the level or means of mitigation. Such minor amendments do not alter the terms of the section 10(a)(1)(B) permit.

Upon the written request of (**APPLICANT'S NAME**), the Service is authorized to approve minor amendments to this HCP, if the amendment does not conflict with the primary purpose of this HCP as stated in section 2.0.

6.4 ALL OTHER AMENDMENTS

All other amendments will be considered an amendment to the section 10(a)(1)(B) permit, subject to any other procedural requirements of federal law or regulation which may be applicable to amendment of such a permit.

7.0 REFERENCES

- Balcones Canyonlands Conservation Plan (BCCP), 1988. Prepared for The BCCP Executive Committee by The Butler/EHA team. February, 1992. Final Draft.
- Garner, L.E. and Young, K.P. 1976. Environmental Geology of the Austin Area: An Aid to Urban Planning. Bureau of Economic Geology, Report of Investigation No. 86, University of Texas at Austin.
- Soil Conservation Service (SCS). 1974. Soil Survey of Travis County, Texas. U.S. Department of Agriculture.
- U.S. Fish and Wildlife Service. 1992. Golden-cheeked Warbler (*Dendroica chrysoparia*) Recovery Plan. Albuquerque, New Mexico. 88 pp.
- Wahl, C.R., D.D. Diamond and D. Shaw. 1989. The Golden-cheeked Warbler: A Status Review, Texas Parks and Wildlife Department, Austin, Texas.

APPENDIX 9:

**FWS Fish and Wildlife Permit Application Form
(Form 3-200)**

**With Endangered/Threatened Species Attachment, Privacy Act Notices, FOIA Notice,
Application Fee Notice, and Instructions**

and

NMFS Incidental Take Application Instructions



FEDERAL FISH AND WILDLIFE LICENSE/PERMIT APPLICATION FORM

RETURN TO:

Type of Activity:

3-200-56 NATIVE ENDANGERED AND THREATENED SPECIES - INCIDENTAL TAKE

A. COMPLETE IF APPLYING AS AN INDIVIDUAL			
1. Name:			
2. Street address:			3. County:
4. City, State, Zip code:			
5. Date of birth:	6. Social Security No.:	7. Occupation:	
8. List any business, agency, organizational, or institutional affiliation associated with the wildlife to be covered by this license or permit:			
9. Home telephone number:	10. Work telephone number:	11. Fax number:	12. E:mail address:

B. COMPLETE IF APPLYING AS A BUSINESS, CORPORATION, PUBLIC AGENCY OR INSTITUTION			
1. Name of business, agency or institution:			2. Tax identification no.:
3. Street address:			4. County:
5. City, State, Zip code:			
6. Describe the type of business, agency, or institution:			
7. Name and title of person responsible for permit (president, principal officer, director, etc.):			
8. Home telephone number:	9. Work telephone number:	10. Fax number:	11. E:mail address:

C. ALL APPLICANTS COMPLETE	
1. Do you currently have or have you had any Federal Fish and Wildlife License or Permit? Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, list license or permit numbers:	
2. Have you obtained any required state or foreign government approval to conduct the activity you propose? Yes <input type="checkbox"/> No <input type="checkbox"/> Not required <input type="checkbox"/> If yes, provide a copy of the license or permit.	
3. Enclose check or money order payable to the U.S. FISH AND WILDLIFE SERVICE in the amount of \$25. Institutions which qualify under 50 CFR 13.11(d)(3) may be exempt from fees.	
4. ATTACHMENTS: Complete the additional pages of this application. Application will not be considered complete without these pages. Incomplete applications may be returned.	
5. CERTIFICATION: I hereby certify that I have read and am familiar with the regulations contained in Title 50, Part 13, of the Code of Federal Regulations and the other applicable parts in subchapter B of Chapter I of Title 50, and I further certify that the information submitted in this application for a license or permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to the criminal penalties of 18 U.S.C. 1001.	
6. Signature (in ink) of applicant or person responsible for permit in Block A or B	7. Date:

Endangered Species Incidental Take Permits

For Incidental Take Permit applications, the following specific information must be provided in addition to the general information on page one of this application:

1. Physical address or location of activities: Section/Township/Range, County tax parcel number, or other formal legal description.
2. A complete description of activity(ies) to be authorized.
3. The common and scientific names of the species sought to be covered by the permit, as well as, the number, age, and sex of such species, if known.
4. A conservation plan that specifies:
 - a. The impact that will likely result from the incidental taking.
 - b. What steps will be taken to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to deal with unforeseen circumstances.
 - c. What alternative actions to such incidental taking have been considered and the reasons why these alternatives are not proposed for use.
5. A certification notice that states: By submitting this application and receiving an incidental take permit pursuant to Section 10(a)(1)(B) of the Endangered Species Act, the landowner/permittee agrees that he/she owns the lands indicated in this application, or has sufficient authority or rights over these lands to implement the measures of the Habitat Conservation Plan. Further, upon receipt of the incidental take permit, the permittee signing Form 3-200 will conduct the activities as specified in the Habitat Conservation Plan and implementation agreement according to the terms and conditions, of the permit and supporting documents.

The public reporting burden for these reporting requirements is estimated to be 2.5 hours, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms. Comments regarding the burden estimate or any other aspect of the reporting requirement(s) should be directed to the Service Information Collection Clearance Officer, MS 224 ARLSQ, Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Interior; Washington, DC 20503.

An agency may not conduct and a person is not required to respond to a collection of information unless a currently valid OMB control number is displayed.

**NOTICE TO:
APPLICANTS FOR FEDERAL FISH AND WILDLIFE LICENCES/PERMITS**

PRIVACY ACT- NOTICE

In accordance with the Privacy Act of 1974 (S U.S.C. 552a), please be advised that:

1. The gathering of information on fish and wildlife is authorized by:
(a) Bald Eagle Protection Act (16 U.S.C. 663a); (b) Endangered Species Act of 1973 (16 U.S.C. 1539); (c) Migratory Bird Treaty Act (16 U.S.C. 703-711); (d) Marine Mammal Protection Act of 1972 (16 U.S.C. 1371-1383); (e) Lacey Act (18 U.S.C. 42 & 44); and (f) Title 50, Part 13, Code of the Code of Federal Regulations.
2. Submission of requested information is required in order to process applications for licenses or permits authorized under the above acts. With the exception of your social security number, failure to provide all requested information may be sufficient cause for the U.S. Fish and Wildlife Service to deny a permit.
3. Applications for licenses or permits authorized under the Endangered Species Act of 1973 (16 U.S.C. 1539) and the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371-1383) may be published in the *Federal Register* as required by the two acts.
4. In the event a violation of a statute, regulations, rule, order, or license, whether civil, criminal, or regulatory in nature is discovered during the application review process, the requested information may be transferred to the appropriate Federal, State, local, or foreign agency charged with investigating or prosecuting such violations.
5. In the event of litigation involving the records or the subject matter of the records, the requested information may be transferred to the U.S. Department of Justice or appropriate law enforcement authorities.
6. Information provided in the application may be disclosed to subject matter experts, and State and other Federal agencies, for the sole purpose of obtaining advise relevant to issuance of the permit.
7. For individuals, personal information such as home address and telephone number, financial data, and personal identifiers (social security number, birth date, etc.) will be removed prior to any release of the application.

FREEDOM OF INFORMATION ACT- NOTICE

8. For organizations, businesses, or individuals operating as a business (i.e., permittees not covered by the Privacy Act), we request that you identify any information that should be

considered privileged and confidential business information to allow the Service to meet its responsibilities under FOIA. Confidential business information must be clearly marked "Business Confidential" at the top of the letter or page and each succeeding page, and must be accompanied by a nonconfidential summary of the confidential information. The nonconfidential summary and remaining documents may be made available to the public under FOIA [43 CFR 2.13(c)(4), 43 CFR 2.15(d)(1)(i)].

**NOTICE TO:
APPLICANTS FOR FEDERAL FISH AND WILDLIFE LICENSES/PERMITS (CONT.)**

APPLICATION FEE- NOTICE

There is a \$25.00 processing fee for incidental take permit applications under the Endangered Species Act [50 CFR 17.22(b) and 50 CFR 17.32(b)]. The fee applies to permit applications, renewals, and amendments.

A check (it does not need to be certified) or money order should be made payable to the "**U.S. Fish and Wildlife Service**". The processing fee will not be refunded if the permit application is abandoned or the permit is issued or denied. The fee may be refunded if the permit application is withdrawn in writing before significant processing has occurred.

Fee Exemption: State or local government agencies or individuals or institutions under contract to such agencies for proposed activities are exempt from paying this fee. Until further notice, the fee will be waived for public institutions. As defined in 50 CFR 10.12, the term "public" as used in reference to museums, zoological parks, and scientific institutions, refers to such as are open to the general public and are privately owned and organized but are not operated for profit.

APPENDIX 10:

General Permit Conditions

50 CFR Part 13 (FWS)

50 CFR Part 217, 220, 222 (NMFS)

§ 12.42

(g) If the Solicitor decides that relief should not be granted, the Solicitor shall so notify the petitioner in writing, stating in the notification the reasons for denying relief. The petitioner may then file a supplemental petition, but no supplemental petition shall be considered unless it is received within 60 days from the date of the Solicitor's notification denying the original petition.

[45 FR 17864, Mar. 19, 1980, as amended at 47 FR 56861, Dec. 21, 1982]

§ 12.42 Recovery of certain storage costs.

If any wildlife, plant, or evidentiary item is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling, or storage of such property. If any fish, wildlife or plant is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371, *et seq.*, any person convicted thereof, or assessed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, the Service shall send to such person by registered or certified mail, return receipt requested, a bill for such fee. The bill shall contain an itemized statement of the applicable costs, together with instructions on the time and manner of payment. Payment shall be made in accordance with the bill. The recipient of any assessment of costs under this section who has an objection to the reasonableness of the costs described in the bill may, within 30 days of the date on which he received the bill, file written objections with the Regional Director of the Fish and Wildlife Service for the Region in which the seizure occurred. Upon receipt of the written objections, the appropriate Regional Director will promptly review them and within 30 days mail his final decision to the party who filed objections. In all cases, the Regional Director's decision

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shall constitute final administrative action on the matter.

[47 FR 56861, Dec. 21, 1982]

Subpart F—Return of Property

§ 12.51 Return procedure.

If, at the conclusion of the appropriate proceedings, seized property is to be returned to the owner or consignee, the Solicitor or Service shall issue a letter or other document authorizing its return. This letter or other document shall be delivered personally or sent by registered or certified mail, return receipt requested, and shall identify the owner or consignee, the seized property, and, if appropriate, the bailee of the seized property. It shall also provide that upon presentation of the letter or other document and proper identification, and the signing of a receipt provided by the Service, the seized property is authorized to be released, provided it is properly marked in accordance with applicable State or Federal requirements.

PART 13—GENERAL PERMIT PROCEDURES

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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.

SOURCE: 39 FR 1161, Jan. 4, 1974, unless otherwise noted.

Subpart A—Introduction

§ 13.1 General.

Each person intending to engage in an activity for which a permit is required by this subchapter B shall, before commencing such activity, obtain a valid permit authorizing such activity. Each person who desires to obtain the permit privileges authorized by this subchapter must make application for such permit in accordance with the requirements of this part 13 and the other regulations in this subchapter which set forth the additional requirements for the specific permits desired. If the activity for which permission is sought is covered by the requirements of more than one part of this subchapter, the requirements of each part must be met. If the information required for each specific permitted activity is included, one application will be accepted for all permits required, and a single permit will be issued.

§ 13.2 Purpose of regulations.

The regulations contained in this part provide uniform rules, conditions, and procedures for the application for and the issuance, denial, suspension, revocation, and general administration of all permits issued pursuant to this subchapter B.

[54 FR 38147, Sept. 14, 1989]

§ 13.3 Scope of regulations.

The provisions in this part are in addition to, and are not in lieu of, other permit regulations of this subchapter and apply to all permits issued thereunder, including "Import and Marking" (part 14), "Feather Imports" (part 15), "Injurious Wildlife" (part 16), "En-

dangered Wildlife and Plants" (part 17), "Marine Mammals" (part 18), "Migratory Birds" (part 21), "Eagles" (part 22) and "Endangered Species Convention" (part 23). As used in this part 13, the term "permit" shall refer to either a license, permit, or certificate as the context may require.

[42 FR 10465, Feb. 22, 1977, as amended at 42 FR 32377, June 24, 1977; 45 FR 56673, Aug. 25, 1980]

§ 13.4 Emergency variation from requirements.

The Director may approve variations from the requirements of this part when he finds that an emergency exists and that the proposed variations will not hinder effective administration of this subchapter B, and will not be unlawful.

§ 13.5 Information collection requirements.

(a) The Office of Management and Budget approved the information collection requirements contained in this part 13 under 44 U.S.C. and assigned OMB Control Number 1018-0092. The Service may not conduct or sponsor, and you are not required to respond, to a collection of information unless it displays a currently valid OMB control number. We are collecting this information to provide information necessary to evaluate permit applications. We will use this information to review permit applications and make decisions, according to criteria established in various Federal wildlife conservation statutes and regulations, on the issuance, suspension, revocation, or denial permits. You must respond to obtain or retain a permit.

(b) We estimate the public reporting burden for these reporting requirements to vary from 15 minutes to 4 hours per response, with an average of 0.803 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms. Direct comments regarding the burden estimate or any other aspect of these reporting requirements to the Service Information Collection Control Officer, MS-222 ARLSQ, U.S. Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork

Reduction Project (1018-0092), Washington, DC 20603.

[63 FR 52634, Oct. 1, 1998]

Subpart B—Application for Permits

§ 13.11 Application procedures.

The Service may not issue a permit for any activity authorized by this subchapter B unless the applicant has filed an application in accordance with the following procedures. Applicants do not have to submit a separate application for each permit unless otherwise required by this subchapter.

(a) *Forms.* Applications must be submitted in writing on a Federal Fish and Wildlife License/Permit Application (Form 3-200) or as otherwise specifically directed by the Service.

(b) *Forwarding instructions.* Applications for permits in the following categories should be forwarded to the issuing office indicated below.

(1) Migratory bird banding permits (50 CFR 21.22)—Bird Banding Laboratory, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Laurel, Maryland 20708. (Special application forms must be used for bird banding permits. They may be obtained by writing to the Bird Banding Laboratory).

(2) Exception to designated port (50 CFR part 14), import/export license (50 CFR 14.93), migratory bird permit, other than banding (50 CFR part 21) and Bald or Golden eagle permits (50 CFR part 22)—Assistant Regional Director for Law Enforcement of District in which the applicant resides (see 50 CFR 10.22 for addresses and boundaries of the Law Enforcement Districts).

(3) Feather quota (50 CFR part 15), injurious wildlife (50 CFR part 16), endangered and threatened species (50 CFR part 17), marine mammal (50 CFR part 18) and permits and certificates for the Convention on International Trade in Endangered Species (CITES) (50 CFR part 23)—U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, P.O. Box 3654, Arlington, Virginia 22203.

(c) *Time notice.* The Service will process all applications as quickly as possible. However, it cannot guarantee final action within the time limits the applicant requests. Applicants for en-

dangered species and marine mammal permits should submit applications to the Office of Management Authority which are postmarked at least 90 calendar days prior to the requested effective date. Applicants for all other permits should submit applications to the issuing office which are postmarked at least 60 days prior to the requested effective date.

(d) *Fees.* (1) Unless otherwise exempted by this paragraph, applicants for issuance or renewal of permits must pay the required permit processing fee at the time of application. Applicants should pay fees by check or money order made payable to “U.S. Fish and Wildlife Service.” The Service will not refund any application fee under any circumstances if the Service has processed the application. However, the Service may return the application fee if the applicant withdraws the application before the Service has significantly processed it.

(2) Except as provided in paragraph (d)(4) of this section the fee for processing any application is \$25.00. If regulations in this subchapter require more than one type of permit for an activity, and the permits are issued by the same office, the issuing office may issue one consolidated permit authorizing the activity. The issuing office may charge only the highest single fee for the activity permitted.

(3) A fee shall not be charged to any Federal, State or local government agency, nor to any individual or institution under contract to such agency for the proposed activities. The fee may be waived or reduced for public institutions (see 50 CFR 10.12). Proof of such status must accompany the application.

(4) *Nonstandard fees.*

Type of permit	Fee
Import/Export License (Section 14.93)	\$50.
Marine Mammal (Section 18.31)	\$100.
Migratory Bird-Banding or Marking (21.22)	None.
Bald or Golden Eagles (Part 22)	None.

(e) *Abandoned or incomplete applications.* Upon receipt of an incomplete or improperly executed application, or if the applicant does not submit the proper fees, the issuing office will notify the applicant of the deficiency. If the

applicant fails to supply the correct information to complete the application or to pay the required fees within 45 calendar days of the date of notification, the Service will consider the application abandoned. The Service will not refund any fees for an abandoned application.

[47 FR 30785, July 15, 1982, as amended at 50 FR 52889, Dec. 26, 1985; 54 FR 4031, Jan. 27, 1989; 54 FR 38147, Sept. 14, 1989; 61 FR 31868, June 21, 1996]

§ 13.12 General information requirements on applications for permits.

(a) General information required for all applications. All applications must contain the following information:

(1) Applicant's full name, mailing address, telephone number(s), and,

(i) If the applicant is an individual, the date of birth, height, weight, hair color, eye color, sex, and any business or institutional affiliation of the applicant related to the requested permitted activity; or

(ii) If the applicant is a corporation, firm, partnership, association, institution, or public or private agency, the name and address of the president or principal officer and of the registered agent for the service of process;

(2) Location where the requested permitted activity is to occur or be conducted;

(3) Reference to the part(s) and section(s) of this subchapter B as listed in paragraph (b) of this section under which the application is made for a permit or permits, together with any additional justification, including supporting documentation as required by the referenced part(s) and section(s);

(4) If the requested permitted activity involves the import or re-export of wildlife or plants from or to any foreign country, and the country of origin, or the country of export or re-export restricts the taking, possession, transportation, exportation, or sale of wildlife or plants, documentation as indicated in § 14.52(c) of this subchapter B;

(5) Certification in the following language:

I hereby certify that I have read and am familiar with the regulations contained in title 50, part 13, of the Code of Federal Regulations and the other applicable parts in sub-

chapter B of chapter I of title 50, Code of Federal Regulations, and I further certify that the information submitted in this application for a permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to suspension or revocation of this permit and to the criminal penalties of 18 U.S.C. 1001.

(6) Desired effective date of permit except where issuance date is fixed by the part under which the permit is issued;

(7) Date;

(8) Signature of the applicant; and

(9) Such other information as the Director determines relevant to the processing of the application.

(b) *Additional information required on permit applications.* As stated in paragraph (a)(3) of this section certain additional information is required on all applications. These additional requirements may be found by referring to the section of this subchapter B cited after the type of permit for which application is being made:

Type of permit	Section
Importation at nondesignated ports:	
Scientific	14.31
Deterioration prevention	14.32
Economic hardship	14.33
Marking of package or container:	
Symbol marking	14.83
Import/export license	14.93
Feather import quota: Importation or entry	15.21
Injurious wildlife: Importation or shipment	16.22
Endangered wildlife and plant permits:	
Similarity of appearance	17.52
Scientific, enhancement of propagation or survival, incidental taking for wildlife	17.22
Scientific, propagation, or survival for plants	17.62
Economic hardship for wildlife	17.23
Economic hardship for plants	17.63
Threatened wildlife and plant permits:	
Similarity of appearance	17.52
General for wildlife	17.32
American alligator-buyer or tanner	17.42(a)
General for plants	17.72
Marine mammals permits:	
Scientific research	18.31
Public display	18.31
Migratory bird permits:	
Banding or marking	21.22
Scientific collecting	21.23
Taxidermist	21.24
Waterfowl sale and disposal	21.25
Special aviculturist	21.26
Special purpose	21.27
Falconry	21.28
Raptor propagation permit	21.30
Depredation control	21.41
Eagle permits:	
Scientific or exhibition	22.21
Indian religious use	22.22
Depredation control	22.23
Falconry purposes	22.24

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Type of permit	Section
Take of golden eagle nests	22.25
Endangered Species Convention permits	23.15

[39 FR 1161, Jan. 4, 1974, as amended at 42 FR 10465, Feb. 22, 1977; 42 FR 32377, June 24, 1977; 44 FR 54006, Sept. 17, 1979; 44 FR 59083, Oct. 12, 1979; 45 FR 56673, Aug. 25, 1980; 45 FR 78154, Nov. 25, 1980; 46 FR 42680, Aug. 24, 1981; 48 FR 31607, July 8, 1983; 48 FR 57300, Dec. 29, 1983; 50 FR 39687, Sept. 30, 1985; 50 FR 45408, Oct. 31, 1985; 54 FR 38147, Sept. 14, 1989]

Subpart C—Permit Administration

§ 13.21 Issuance of permits.

(a) No permit may be issued prior to the receipt of a written application therefor, unless a written variation from the requirements, as authorized by § 13.4, is inserted into the official file of the Bureau. An oral or written representation of an employee or agent of the United States Government, or an action of such employee or agent, shall not be construed as a permit unless it meets the requirements of a permit as defined in 50 CFR 10.12.

(b) Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit unless:

(1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility.

(2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application;

(3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;

(4) The authorization requested potentially threatens a wildlife or plant population, or

(5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

(c) *Disqualifying factors.* Any one of the following will disqualify a person from receiving permits issued under this part.

(1) A conviction, or entry of a plea of guilty or nolo contendere, for a felony violation of the Lacey Act, the Migratory Bird Treaty Act, or the Bald and Golden Eagle Protection Act disqualifies any such person from receiving or exercising the privileges of a permit, unless such disqualification has been expressly waived by the Director in response to a written petition.

(2) The revocation of a permit for reasons found in § 13.28 (a)(1) or (a)(2) disqualifies any such person from receiving or exercising the privileges of a similar permit for a period of five years from the date of the final agency decision on such revocation.

(3) The failure to pay any required fees or assessed costs and penalties, whether or not reduced to judgement disqualifies such person from receiving or exercising the privileges of a permit as long as such moneys are owed to the United States. This requirement shall not apply to any civil penalty presently subject to administrative or judicial appeal; provided that the pendency of a collection action brought by the United States or its assignees shall not constitute an appeal within the meaning of this subsection.

(4) The failure to submit timely, accurate, or valid reports as required may disqualify such person from receiving or exercising the privileges of a permit as long as the deficiency exists.

(d) *Use of supplemental information.* The issuing officer, in making a determination under this subsection, may use any information available that is relevant to the issue. This may include any prior conviction, or entry of a plea of guilty or nolo contendere, or assessment of civil or criminal penalty for a violation of any Federal or State law or regulation governing the permitted activity. It may also include any prior permit revocations or suspensions, or any reports of State or local officials. The issuing officer shall consider all relevant facts or information available, and may make independent inquiry or investigation to verify information or substantiate qualifications asserted by the applicant.

(e) *Conditions of issuance and acceptance.* (1) Any permit automatically incorporates within its terms the conditions and requirements of subpart D of

this part and of any part(s) or section(s) specifically authorizing or governing the activity for which the permit is issued.

(2) Any person accepting and holding a permit under this subchapter B acknowledges the necessity for close regulation and monitoring of the permitted activity by the Government. By accepting such permit, the permittee consents to and shall allow entry by agents or employees of the Service upon premises where the permitted activity is conducted at any reasonable hour. Service agents or employees may enter such premises to inspect the location; any books, records, or permits required to be kept by this subchapter B; and any wildlife or plants kept under authority of the permit.

(f) *Term of permit.* Unless otherwise modified, a permit is valid during the period specified on the face of the permit. Such period shall include the effective date and the date of expiration.

(g) *Denial.* The issuing officer may deny a permit to any applicant who fails to meet the issuance criteria set forth in this section or in the part(s) or section(s) specifically governing the activity for which the permit is requested.

[39 FR 1161, Jan. 4, 1974, as amended at 42 FR 32377, June 24, 1977; 47 FR 30785, July 15, 1982; 54 FR 38148, Sept. 14, 1989]

§ 13.22 Renewal of permits.

(a) *Application for renewal.* Applicants for renewal of a permit must submit a written application at least 30 days prior to the expiration date of the permit. Applicants must certify in the form required by § 13.12(a)(5) that all statements and information in the original application remain current and correct, unless previously changed or corrected. If such information is no longer current or correct, the applicant must provide corrected information.

(b) *Renewal criteria.* The Service shall issue a renewal of a permit if the applicant meets the criteria for issuance in § 13.21(b) and is not disqualified under § 13.21(c).

(c) *Continuation of permitted activity.* Any person holding a valid, renewable permit, who has complied with this section, may continue the activities authorized by the expired permit until

the Service has acted on such person's application for renewal.

(d) *Denial.* The issuing officer may deny renewal of a permit to any applicant who fails to meet the issuance criteria set forth in § 13.21 of this part, or in the part(s) or section(s) specifically governing the activity for which the renewal is requested.

[54 FR 38148, Sept. 14, 1989]

§ 13.23 Amendment of permits.

(a) *Permittee's request.* Where circumstances have changed so that a permittee desires to have any condition of his permit modified, such permittee must submit a full written justification and supporting information in conformity with this part and the part under which the permit was issued.

(b) *Service reservation.* The Service reserves the right to amend any permit for just cause at any time during its term, upon written finding of necessity.

(c) *Change of name or address.* A permittee is not required to obtain a new permit if there is a change in the legal individual or business name, or in the mailing address of the permittee. A permittee is required to notify the issuing office within 10 calendar days of such change. This provision does not authorize any change in location of the conduct of the permitted activity when approval of the location is a qualifying condition of the permit.

[54 FR 38148, Sept. 14, 1989]

§ 13.24 Right of succession by certain persons.

(a) Certain persons, other than the permittee are granted the right 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; and

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

(b) In order to secure the right provided in this section the person or persons desiring to continue the activity

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shall furnish the permit to the issuing officer for endorsement within 90 days from the date the successor begins to carry on the activity.

[54 FR 38149, Sept. 14, 1989]

§ 13.25 Permits not transferable; agents.

(a) Permits issued under this part are not transferable or assignable. Some permits authorize certain activities in connection with a business or commercial enterprise and in the event of any lease, sale, or transfer of such business entity, the successor must obtain a permit prior to continuing the permitted activity. However, certain limited rights of succession are provided in § 13.24.

(b) 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, as an agent for the permittee.

[54 FR 38149, Sept. 14, 1989]

§ 13.26 Discontinuance of permit activity.

When a permittee, or any successor to a permittee as provided for by § 13.24, discontinues activities authorized by a permit, the permittee shall within 30 calendar days of the discontinuance return the permit to the issuing office together with a written statement surrendering the permit for cancellation. The permit shall be deemed void and cancelled upon its receipt by the issuing office. No refund of any fees paid for issuance of the permit or for any other fees or costs associated with a permitted activity shall be made when a permit is surrendered for cancellation for any reason prior to the expiration date stated on the face of the permit.

[54 FR 38149, Sept. 14, 1989]

§ 13.27 Permit suspension.

(a) *Criteria for suspension.* The privileges of exercising some or all of the permit authority may be suspended at any time if the permittee is not in compliance with the conditions of the permit, or with any applicable laws or

regulations governing the conduct of the permitted activity. The issuing officer may also suspend all or part of the privileges authorized by a permit if the permittee fails to pay any fees, penalties or costs owed to the Government. Such suspension shall remain in effect until the issuing officer determines that the permittee has corrected the deficiencies.

(b) *Procedure for suspension.* (1) When the issuing officer believes there are valid grounds for suspending a permit the permittee shall be notified in writing of the proposed suspension by certified or registered mail. This notice shall identify the permit to be suspended, the reason(s) for such suspension, the actions necessary to correct the deficiencies, and inform the permittee of the right to object to the proposed suspension. The issuing officer may amend any notice of suspension at any time.

(2) Upon receipt of a notice of proposed suspension the permittee may file a written objection to the proposed action. Such objection must be in writing, must be filed within 45 calendar days of the date of the notice of proposal, must state the reasons why the permittee objects to the proposed suspension, and may include supporting documentation.

(3) A decision on the suspension shall be made within 45 days after the end of the objection period. The issuing officer shall notify the permittee in writing of the Service's decision and the reasons therefore. The issuing officer shall also provide the applicant with the information concerning the right to request reconsideration of the decision under § 13.29 of this part and the procedures for requesting reconsideration.

[54 FR 38149, Sept. 14, 1989]

§ 13.28 Permit revocation.

(a) *Criteria for revocation.* A permit may be revoked for any of the following reasons:

(1) The permittee willfully violates any Federal or State statute or regulation, or any Indian tribal law or regulation, or any law or regulation of any foreign country, which involves a violation of the conditions of the permit

or of the laws or regulations governing the permitted activity; or

(2) The permittee fails within 60 days to correct deficiencies that were the cause of a permit suspension; or

(3) The permittee becomes disqualified under § 13.21(c) of this part; or

(4) A change occurs in the statute or regulation authorizing the permit that prohibits the continuation of a permit issued by the Service; or

(5) The population(s) of the wildlife or plant that is 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.

(b) *Procedure for revocation.* (1) When the issuing officer believes there are valid grounds for revoking a permit, the permittee shall be notified in writing of the proposed revocation by certified or registered mail. This notice shall identify the permit to be revoked, the reason(s) for such revocation, the proposed disposition of the wildlife, if any, and inform the permittee of the right to object to the proposed revocation. The issuing officer may amend any notice of revocation at any time.

(2) Upon receipt of a notice of proposed revocation the permittee may file a written objection to the proposed action. Such objection must be in writing, must be filed within 45 calendar days of the date of the notice of proposal, must state the reasons why the permittee objects to the proposed revocation, and may include supporting documentation.

(3) A decision on the revocation shall be made within 45 days after the end of the objection period. The issuing officer shall notify the permittee in writing of the Service's decision and the reasons therefore, together with the information concerning the right to request and the procedures for requesting reconsideration.

(4) Unless a permittee files a timely request for reconsideration, any wildlife held under authority of a permit that is revoked must be disposed of in accordance with instructions of the issuing officer. If a permittee files a timely request for reconsideration of a proposed revocation, such permittee may retain possession of any wildlife held under authority of the permit

until final disposition of the appeal process.

[54 FR 38149, Sept. 14, 1989]

§ 13.29 Review procedures.

(a) *Request for reconsideration.* Any person may request reconsideration of an action under this part if that person is one of the following:

(1) An applicant for a permit who has received written notice of denial;

(2) An applicant for renewal who has received written notice that a renewal is denied;

(3) A permittee who has a permit amended, suspended, or revoked, except for those actions which are required by changes in statutes or regulations, or are emergency changes of limited applicability for which an expiration date is set within 90 days of the permit change; or

(4) A permittee who has a permit issued or renewed but has not been granted authority by the permit to perform all activities requested in the application, except when the activity requested is one for which there is no lawful authority to issue a permit.

(b) *Method of requesting reconsideration.* Any person requesting reconsideration of an action under this part must comply with the following criteria:

(1) Any request for reconsideration must be in writing, signed by the person requesting reconsideration or by the legal representative of that person, and must be submitted to the issuing officer.

(2) The request for reconsideration must be received by the issuing officer within 45 calendar days of the date of notification of the decision for which reconsideration is being requested.

(3) The request for reconsideration shall state the decision for which reconsideration is being requested and shall state the reason(s) for the reconsideration, including presenting any new information or facts pertinent to the issue(s) raised by the request for reconsideration.

(4) The request for reconsideration shall contain a certification in substantially the same form as that provided by § 13.12(a)(5). If a request for reconsideration does not contain such certification, but is otherwise timely

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and appropriate, it shall be held and the person submitting the request shall be given written notice of the need to submit the certification within 15 calendar days. Failure to submit certification shall result in the request being rejected as insufficient in form and content.

(c) *Inquiry by the Service.* The Service may institute a separate inquiry into the matter under consideration.

(d) *Determination of grant or denial of a request for reconsideration.* The issuing officer shall notify the permittee of the Service's decision within 45 days of the receipt of the request for reconsideration. This notification shall be in writing, shall state the reasons for the decision, and shall contain a description of the evidence which was relied upon by the issuing officer. The notification shall also provide information concerning the right to appeal, the official to whom an appeal may be addressed, and the procedures for making an appeal.

(e) *Appeal.* A person who has received an adverse decision following submission of a request for reconsideration may submit a written appeal to the Regional Director for the region in which the issuing office is located, or to the Director for offices which report directly to the Director. An appeal must be submitted within 45 days of the date of the notification of the decision on the request for reconsideration. The appeal shall state the reason(s) and issue(s) upon which the appeal is based and may contain any additional evidence or arguments to support the appeal.

(f) *Decision on appeal.* (1) Before a decision is made concerning the appeal the appellant may present oral arguments before the Regional Director or the Director, as appropriate, if such official judges oral arguments are necessary to clarify issues raised in the written record.

(2) The Service shall notify the appellant in writing of its decision within 45 calendar days of receipt of the appeal, unless extended for good cause and the appellant notified of the extension.

(3) The decision of the Regional Director or the Director shall constitute

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the final administrative decision of the Department of the Interior.

[54 FR 38149, Sept. 14, 1989]

Subpart D—Conditions

§ 13.41 Humane conditions.

Any live wildlife possessed under a permit must be maintained under humane and healthful conditions.

[54 FR 38150, Sept. 14, 1989]

§ 13.42 Permits are specific.

The authorizations on the face of a permit which set forth specific times, dates, places, methods of taking, numbers and kinds of wildlife or plants, location of activity, authorize certain circumscribed transactions, or otherwise permit a specifically limited matter, are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction.

[39 FR 1161, Jan. 4, 1974, as amended at 42 FR 32377, June 24, 1977]

§ 13.43 Alteration of permits.

Permits shall not be altered, erased, or mutilated, and any permit which has been altered, erased, or mutilated shall immediately become invalid. Unless specifically permitted on the face thereof, no permit shall be copied, nor shall any copy of a permit issued pursuant to this subchapter B be displayed, offered for inspection, or otherwise used for any official purpose for which the permit was issued.

§ 13.44 Display of permit.

Any permit issued under this part shall be displayed for inspection upon request to the Director or his agent, or to any other person relying upon its existence.

§ 13.45 Filing of reports.

Permittees may be required to file reports of the activities conducted under the permit. Any such reports shall be filed not later than March 31 for the preceding calendar year ending December 31, or any portion thereof, during which a permit was in force, unless the regulations of this subchapter

B or the provisions of the permit set forth other reporting requirements.

§ 13.46 Maintenance of records.

From the date of issuance of the permit, the permittee shall maintain complete and accurate records of any taking, possession, transportation, sale, purchase, barter, exportation, or importation of plants obtained from the wild (excluding seeds) or wildlife pursuant to such permit. Such records shall be kept current and shall include names and addresses of persons with whom any plant obtained from the wild (excluding seeds) or wildlife has been purchased, sold, bartered, or otherwise transferred, and the date of such transaction, and such other information as may be required or appropriate. Such records shall be legibly written or reproducible in English and shall be maintained for five years from the date of expiration of the permit.

[39 FR 1161, Jan. 4, 1974, as amended at 42 FR 32377, June 24, 1977; 54 FR 38150, Sept. 14, 1989]

§ 13.47 Inspection requirement.

Any person holding a permit under this subchapter B shall allow the Director's agent to enter his premises at any reasonable hour to inspect any wildlife or plant held or to inspect, audit, or copy any permits, books, or records required to be kept by regulations of this subchapter B.

[39 FR 1161, Jan. 4, 1974, as amended at 42 FR 32377, June 24, 1977]

§ 13.48 Compliance with conditions of permit.

Any person holding a permit under subchapter B and any person acting under authority of such permit must comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity.

[54 FR 38150, Sept. 14, 1989]

§ 13.49 Surrender of permit.

Any person holding a permit under subchapter B shall surrender such permit to the issuing officer upon notification that the permit has been suspended or revoked by the Service, and

all appeal procedures have been exhausted.

[54 FR 38150, Sept. 14, 1989]

§ 13.50 Acceptance of liability.

Any person holding a permit under subchapter B assumes all liability and responsibility for the conduct of any activity conducted under the authority of such permit.

[54 FR 38150, Sept. 14, 1989]

PART 14—IMPORTATION, EXPORTATION, AND TRANSPORTATION OF WILDLIFE

Subpart A—Introduction

Sec.

- 14.1 Purpose of regulations.
- 14.2 Scope of regulations.
- 14.3 Information collection requirements.
- 14.4 Definitions.

Subpart B—Importation and Exportation at Designated Ports

- 14.11 General restrictions.
- 14.12 Designated ports.
- 14.13 Emergency diversion.
- 14.14 In-transit shipments.
- 14.15 Personal baggage and household effects.
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- 14.17 Personally owned pet birds.
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- 14.19 Special ports.
- 14.20 Exceptions by permit.
- 14.21 Shellfish and fishery products.
- 14.22 Certain antique articles.
- 14.23 Live farm-raised fish and farm-raised fish eggs.
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Subpart C—Designated Port Exception Permits

- 14.31 Permits to import or export wildlife at nondesignated port for scientific purposes.
- 14.32 Permits to import or export wildlife at nondesignated port to minimize deterioration or loss.
- 14.33 Permits to import or export wildlife at nondesignated port to alleviate undue economic hardship.

Subpart D [Reserved]

Subpart E—Inspection and Clearance of Wildlife

- 14.51 Inspection of wildlife.
- 14.52 Clearance of imported wildlife.

taking and a description of any measures that will be taken in the following year to prevent exceeding the authorized incidental take level.

(5) Results of any population assessment studies made on marine mammals in the Outer Sea Test Range during the previous year.

§ 216.156 Renewal of Letter of Authorization.

(a) A Letter of Authorization issued under § 216.106 for the activity identified in § 216.151(a) will be renewed annually upon:

(1) Timely receipt of the reports required under § 216.155(f) and (g), which have been reviewed by the Assistant Administrator for Fisheries, NOAA, and determined to be acceptable;

(2) A determination that the maximum incidental take authorizations in § 216.151(b) will not be exceeded; and

(3) A determination that the mitigation measures required under § 216.153(b) and the Letter of Authorization have been undertaken.

(b) If a species' annual authorization is exceeded, the National Marine Fisheries Service will review the documentation submitted with the annual report required under § 216.155(g), to determine that the taking is not having more than a negligible impact on the species or stock involved.

(c) Notice of issuance of a renewal of the Letter of Authorization will be published in the FEDERAL REGISTER.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15890–15891, Apr. 10, 1996]

§ 216.157 Modifications to Letter of Authorization.

(a) In addition to complying with the provisions of § 216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under § 216.146, without modi-

fication, is not considered a substantive modification.

(b) If the National Marine Fisheries Service determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.151, or that significantly and detrimentally alters the scheduling of explosives detonation within the area specified in § 216.151, the Letter of Authorization issued pursuant to § 216.106, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the FEDERAL REGISTER subsequent to the action.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15891, Apr. 10, 1996]

Subparts O–Q [Reserved]

PART 217—GENERAL PROVISIONS

Subpart A—Introduction

Sec.

217.1 Purpose of regulations.

217.2 Scope of regulations.

217.3 Other applicable laws.

217.4 When regulations apply.

Subpart B—Definitions

217.12 Definitions.

Subpart C—Addresses

217.21 Assistant Administrator.

217.22 Office of Marine Mammals and Endangered Species.

217.23 Enforcement Division.

AUTHORITY: 16 U.S.C. 742a *et seq.*, 1361 *et seq.*, and 1531–1544, unless otherwise noted.

Subpart A—Introduction

§ 217.1 Purpose of regulations.

The regulations of parts 216 through 227 are promulgated to implement the following statutes enforced by the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, which regulate the taking, possession, transportation, sale, purchase,

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barter, exportation, and importation of wildlife.

(Endangered Species Act of 1973, section 11(f), 87 Stat. 884, Pub. L. 93-205; Fish and Wildlife Act of 1956, 16 U.S.C. 742a-1)

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.2 Scope of regulations.

The various provisions of parts 216 through 227 of this chapter are inter-related, and particular note should be taken that the parts must be construed with reference to each other. The regulations in parts 216 through 227 apply only for fish or wildlife under the jurisdictional responsibilities of the Secretary of Commerce for the purpose of carrying out the Endangered Species Act of 1973 (see part 222, § 222.23(a)). Endangered species of fish or wildlife other than those covered by these regulations are under the jurisdiction of the Secretary of the Interior. For rules and procedures relating to such species, see 50 CFR parts 10 through 17.

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.3 Other applicable laws.

No statute or regulation of any State shall be construed to relieve a person from the restrictions, conditions, and requirements contained in parts 216 through 227 of this chapter. In addition, nothing in parts 216 through 227 of this chapter, nor any permit issued under parts 217 through 228 of this chapter, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any State or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other National Marine Fisheries Service enforced statutes or regulations.

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.4 When regulations apply.

The regulations of parts 216 through 227 of this chapter shall apply to all matters, including the processing of permits, arising after the effective date of such regulations, with the following exception:

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(a) *Civil penalty proceedings.* Except as otherwise provided in § 218.25, the civil penalty assessment procedures contained in parts 216 through 227 of this chapter shall apply only to any proceeding instituted by notice of violation dated subsequent to the effective date of these regulations, regardless of when the act or omission which is the basis of a civil penalty proceeding occurred.

(b) [Reserved]

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

Subpart B—Definitions

§ 217.12 Definitions.

Accelerator funnel means a device used to accelerate the flow of water through a shrimp trawl net.

Act means the Endangered Species Act of 1973, as amended (Pub. L.

93-205).

Approved TED means:

(1) A hard TED that complies with the generic design criteria set forth in 50 CFR 227.72(e)(4)(i). (A hard TED may be modified as specifically authorized by 50 CFR 227.72(e)(4)(iv)); or

(2) A soft TED that complies with the provisions of 50 CFR 227.72(e)(4)(iii); or

(3) A special hard TED which complies with the provisions of 50 CFR 227.72(e)(4)(ii).

Assistant Administrator means the Assistant Administrator for Fisheries of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, or his authorized representative.

Atlantic Area means all waters of the Atlantic Ocean south of 36°33'00.8" N. latitude (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports).

Atlantic Shrimp Fishery-Sea Turtle Conservation Area (Atlantic SFSTCA) means the inshore and offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Georgia and South Carolina from the Georgia-Florida border (defined as the line along 30°42'45.6" N. lat.) to the North Carolina-South Carolina border

(defined as the line extending in a direction of 135°34'55" from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33° 51'07.9" N. lat., 078°32'32.6" W. long.).

Authorized officer means:

(1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;

(2) Any special agent or enforcement officer of the National Marine Fisheries Service;

(3) Any officer designated by the head of a Federal or state agency that has entered into an agreement with the Secretary or the Commandant of the Coast Guard to enforce the provisions of the Act; or

(4) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Bait shrimper means a shrimp trawler that fishes for and retains its shrimp catch alive for the purpose of selling it for use as bait.

Commercial activity means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include the exhibition of commodities by museums or similar cultural or historical organizations.

Country of exportation means the last country from which the animal was exported before importation into the United States.

Country of origin means the country where the animal was taken from the wild, or the country of natal origin of the animal.

Fish or wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Fishing, or to fish, means:

(1) The catching taking or harvesting of fish or wildlife;

(2) The attempted catching, taking, or harvesting of fish or wildlife;

(3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish or wildlife; or

(4) Any operations on any waters in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition.

Footrope means a weighted rope or cable attached to the lower lip (bottom edge) of the mouth of a trawl net along the forwardmost webbing.

Footrope length means the distance between the points at which the ends of the footrope are attached to the trawl net, measured along the forwardmost webbing.

Foreign commerce includes, among other things, any transaction (1) between persons within one foreign country, or (2) between persons in two or more foreign countries, or (3) between a person within the United States and a person in one or more foreign countries, or (4) between persons within the United States, where the fish or wildlife in question are moving in any country or countries outside the United States.

Four-seam, straight-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing are parallel over the entire length.

Four-seam, tapered-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing converge toward the rear of the trawl.

Gulf Area means all waters of the Gulf of Mexico west of 81° W. longitude (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).

Gulf Shrimp Fishery-Sea Turtle Conservation Area (Gulf SFSTCA) means the offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Texas and Louisiana from the South Pass of the Mississippi River (west of 89°08.5' W. long.) to the U.S.-Mexican border.

Hard TED means a rigid deflector grid and associated hardware designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

Headrope means a rope that is attached to the upper lip (top edge) of the mouth of a trawl net along the forwardmost webbing.

Headrope length means the distance between the points at which the ends of the headrope are attached to the trawl net, measured along the forwardmost webbing.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the tariff laws of the United States.

Inshore means marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Leatherback conservation zone means all inshore and offshore waters bounded on the south by a line along 28°24.6' N. lat. (Cape Canaveral, FL), and bounded on the north by a line along 36°30.5' N. lat. (North Carolina-Virginia border).

Length in reference to a shrimp trawler, means the distance from the tip of the vessel's bow to the tip of its stern.

North Carolina restricted area means that portion of the offshore waters bounded on the north by a line along 34°17.6' N. latitude (Rich Inlet, North Carolina) and 34°35.7' N. latitude (Browns Inlet, North Carolina) to a distance of 1 nautical mile seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972).

Offshore means marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration

(Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Permit or "*Certificate of exemption*" means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends or renews any permit or certificate of exemption.

Person means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

Possession means the detention and control, or the manual or ideal custody of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. Possession includes constructive possession which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody.

Pre-Act endangered species part means any sperm whale oil, including derivatives and products thereof, which was lawfully held within the United States on December 28, 1973 in the course of a commercial activity; or any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

Pusher-head trawl (chopsticks) means a trawl that is spread by poles suspended in a "V" configuration from the bow of the trawler.

Right whale, as used in subpart D of this part, means any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

Scrimshaw product means any art form which involves the substantial etching or engraving of designs upon,

or the substantial carving of figures, patterns, or designs from any bone or tooth of any marine mammal of the order Cetacea. For purposes of this part, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving or carving.

Secretary means the Secretary of Commerce or his authorized representative.

Shrimp means any species of marine shrimp (Order Crustacea) found in the Atlantic Area or the Gulf Area, including, but not limited to:

- (1) Brown shrimp (*Penaeus aztecus*);
- (2) White shrimp (*P. setiferus*);
- (3) Pink shrimp (*P. duorarum*);
- (4) Rock shrimp (*Sicyonia brevirostris*);
- (5) Royal red shrimp (*Hymenopenaeus robustus*); and
- (6) Seabob shrimp (*Xiphopenaeus kroyeri*).

Shrimp trawler means any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp, or whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Skimmer trawl means a trawl that extends from the outrigger of a vessel with a cable and a lead weight holding the trawl mouth open.

Soft TED means a panel of polypropylene or polyethylene netting designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

Stretched mesh size means the distance between the centers of the two opposite knots in the same mesh when pulled taut.

Summer flounder means the species *Paralichthys dentatus*.

Summer flounder fishery-sea turtle protection area means:

- (1) All offshore waters, bounded on the north by a line along 37°05' N. latitude (Cape Charles, VA) and bounded on the south by a line along 33°35' N. latitude (North Carolina-South Caro-

lina border), except as provided in paragraph (2) of this definition.

(2) [Reserved]

Summer flounder trawler means any vessel that is equipped with one or more bottom trawl nets, and that is capable of, or used for, fishing for flounder, or whose on-board or landed catch of flounder is more than 100 pounds (45.4 kg).

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.

Taper, in reference to the webbing used in trawls, means the angle of a cut used to shape the webbing, expressed as the ratio between the cuts that reduce the width of the webbing by cutting into the panel of webbing through one row of twine (bar cuts) and the cuts that extend the length of the panel of webbing by cutting straight aft through two adjoining rows of twine (point cuts). For example, sequentially cutting through the lengths of twine on opposite sides of a mesh, leaving an uncut edge of twines all lying in the same line, produces a relatively strong taper called "all-bars"; making a sequence of 4-bar cuts followed by 1-point cut produces a more gradual taper called "4 bars to 1 point" or "4b1p"; similarly, making a sequence of 2-bar cuts followed by 1-point cut produces a still more gradual taper called "2b1p"; and making a sequence of cuts straight aft does not reduce the width of the panel and is called a "straight" or "all-points" cut.

Taut means a condition in which there is no slack in the net webbing.

TED (turtle excluder device) means a device designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

Test net, or try net, means a net pulled for brief periods of time just before, or during, deployment of the primary net(s) in order to test for shrimp concentrations or determine fishing conditions (e.g., presence or absence of bottom debris, jellyfish, bycatch, seagrasses, etc.).

Tongue means any piece of webbing along the top, center, leading edge of a trawl, whether lying behind or ahead of

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the headrope, to which a towing bridle can be attached for purposes of pulling the trawl net and/or adjusting the shape of the trawl.

Transportation means to ship, convey, carry or transport by any means whatever, and deliver or receive for such shipment, conveyance, carriage, or transportation.

Triple-wing trawl means a trawl with a tongue on the top, center, leading edge of the trawl and an additional tongue along the bottom, center, leading edge of the trawl.

Two-seam trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel and a bottom panel of webbing that are directly attached to each other down the sides of the trawl.

Underway, with respect to a vessel, means that the vessel is not at anchor, or made fast to the shore, or aground.

United States means the several States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

Vessel includes every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Vessel restricted in her ability to maneuver has the meaning specified for this term at 33 U.S.C. 2003(g).

Whoever means the same as person.

Wildlife means the same as fish or wildlife.

Wing net (butterfly trawl) means a trawl with a rigid frame, rather than trawl door, holding the trawl mouth open.

(Sec. 3(d), Fish and Wildlife Act of 1956, as amended, 88 Stat. 92 (16 U.S.C. 742b); sec. 11(f), Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (16 U.S.C. 1540))

[45 FR 57132, Aug. 27, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 217.12, see the List of CFR Sections Affected in the Finding Aids section of this volume.

Subpart C—Addresses

AUTHORITY: Sec. 3(d), Fish and Wildlife Act of 1956, as amended, 88 Stat. 92 (16 U.S.C.

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742b); sec. 11(f), Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (16 U.S.C. 1540).

SOURCE: 45 FR 57133, Aug. 27, 1980, unless otherwise noted.

§ 217.21 Assistant Administrator.

Mail forwarded to the Assistant Administrator for Fisheries should be addressed:

Assistant Administrator for Fisheries, F
National Marine Fisheries Service
Washington, DC 20235.

§ 217.22 Office of Marine Mammals and Endangered Species.

Mail in regard to permits should be addressed to:

Office of Marine Mammals and Endangered
Species, F/MM
National Marine Fisheries Service
Washington, DC 20235.

§ 217.23 Enforcement Division.

Mail in regard to enforcement and certificates of exemption should be addressed to:

Enforcement Division, F/CM5
National Marine Fisheries Service
Washington, DC 20235.

PART 220—GENERAL PERMIT PROCEDURES

Subpart A—Introduction

Sec.

- 220.1 General.
- 220.2 Purpose of regulations.
- 220.3 Scope of regulations.
- 220.4 Emergency variation from requirements.

Subpart B—Application for Permits

- 220.11 Procedure for obtaining a permit.
- 220.12 [Reserved]
- 220.13 Abandoned application.

Subpart C—Permit Administration

- 220.21 Issuance of permits.
- 220.22 Duration of permit.
- 220.23 [Reserved]
- 220.24 Renewal of permit.
- 220.25 Permits not transferable; agents.
- 220.26 Right of succession by certain persons.
- 220.27 Change of mailing address.
- 220.28 Change in name.
- 220.29-220.30 [Reserved]
- 220.31 Discontinuance of activity.

Subpart D—Conditions

- 220.42 Permits are specific.
- 220.43 Alteration of permits.
- 220.44 Display of permit.
- 220.45 Filing of reports.
- 220.46 Maintenance of records.
- 220.47 Inspection requirement.

Subpart E—Permits Involving Endangered or Threatened Sea Turtles

- 220.50 Purpose.
- 220.51 Permit applications.
- 220.52 Issuance of permits.
- 220.53 Other requirements.

AUTHORITY: Endangered Species Act of 1973, sec. 11(f), 87 Stat. 884, Pub. L. 93-205; act of August 31, 1951, Ch. 376, Title 5, sec. 501, 65 Stat. 290 (31 U.S.C. 483a).

SOURCE: 39 FR 41373, Nov. 27, 1974, unless otherwise noted.

Subpart A—Introduction**§ 220.1 General.**

Each person intending to engage in an activity for which a permit is required by parts 217 through 222 of this chapter or the Endangered Species Act of 1973 shall, before commencing such activity, obtain a valid permit authorizing such activity. Each person who desires to obtain the permit privileges authorized by parts 217 through 222 of this chapter must make application for such permit in accordance with the requirements of this part 220 of this chapter and the other regulations in parts 217 through 222 of this chapter which set forth the additional requirements for the specific permits desired. If the activity for which permission is sought is covered by the requirements of more than one part of parts 217 through 222 of this chapter, the requirements of each part must be met. If the information required for each specific permitted activity is included, one application may be accepted for all permits required, and a single permit may be issued.

§ 220.2 Purpose of regulations.

The regulations contained in this part will provide uniform rules and procedures for application, issuance, renewal, conditions, and general administration of permits issuable pursuant to parts 217 through 222 of this chapter.

§ 220.3 Scope of regulations.

The provisions in this part are in addition to, and are not in lieu of, other permit regulations of parts 217 through 222 of this chapter and apply to all permits issued thereunder, including ‘‘Endangered Fish or Wildlife’’ (part 222).

§ 220.4 Emergency variation from requirements.

The Director may approve variations from the requirements of this part when he finds that an emergency exists and that the proposed variations will not hinder effective administration of parts 217 through 222 of this chapter, and will not be unlawful.

Subpart B—Application for Permits**§ 220.11 Procedure for obtaining a permit.**

The following general procedures apply to applications for permits:

(a) *Forms.* Applications must be submitted by letter containing all necessary information, attachments, certification, and signature. In no case will oral or telephone applications be accepted.

(b) *Forwarding instructions.* Applications must be submitted to the Director, National Marine Fisheries Service. The address is listed in § 217.21.

(c) *Time requirement.* Applications must be received by the appropriate official of the National Marine Fisheries Service at least 90 calendar days prior to the date on which the applicant desires to have the permit made effective. The National Marine Fisheries Service will, in all cases, attempt to process applications deemed sufficient in the shortest possible time. The National Marine Fisheries Service does not, however, guarantee 90 days issuance after publication in the FEDERAL REGISTER of receipt of a permit application and some permits cannot be issued within that time period.

§ 220.12 [Reserved]**§ 220.13 Abandoned application.**

Upon receipt of an insufficiently or improperly executed application, the

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applicant shall be notified of the deficiency in the application. If the applicant fails to supply the deficient information or otherwise fails to correct the deficiency within 60 days following the date of notification, the application shall be considered abandoned.

Subpart C—Permit Administration

§ 220.21 Issuance of permits.

(a) No permit may be issued prior to the receipt of a written application therefor, unless a written variation from the requirements, as authorized by § 220.4 is inserted into the official file of the National Marine Fisheries Service. Any representation of an employee or agent of the United States Government shall not be construed as a permit unless it meets the requirements of a permit as defined in 50 CFR 217.12.

(b) The Director shall issue the appropriate permit unless—

(1) Denial of a permit has been made pursuant to subpart D of 15 CFR part 904;

(2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application;

(3) The applicant has failed to demonstrate a valid justification for the permit or a showing of responsibility;

(4) The authorization requested potentially threatens a wildlife population, or

(5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

(c) Each permit shall bear a serial number. Such number may be reassigned to the permittee to whom issued so long as he maintains continuity of renewal.

(d) The applicant shall be notified in writing of the denial of any permit request, and the reasons therefor. If authorized in the notice of denial, the applicant may submit further information, or reasons why the permit should not be denied. Such further submissions shall not be considered a new application. The final action by the Director shall be considered the final ad-

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ministrative decision of the Department.

[39 FR 41373, Nov. 27, 1974, as amended at 49 FR 1042, Jan. 6, 1984]

§ 220.22 Duration of permit.

Permits shall entitle the person to whom issued to engage in the activity specified in the permit, within the limitations of the applicable statute and regulations contained in parts 217 through 222 of this chapter for the period stated on the permit, unless sooner modified, suspended, or revoked pursuant to subpart D of 15 CFR part 904.

[49 FR 1042, Jan. 6, 1984]

§ 220.23 [Reserved]

§ 220.24 Renewal of permit.

Where the permit is renewable and a permittee intends to continue the activity described in the permit during any portion of the year ensuing its expiration, he shall, unless otherwise notified in writing by the Director, file a request for permit renewal, together with a certified statement that the information in his original application is still currently correct, or a statement of all changes in the original application, accompanied by any required fee at least 30 days prior to the expiration of his permit. Any person holding a valid renewable permit, who has complied with the foregoing provision of this section, may continue such activities as were authorized by his expired permit until his renewal application is acted upon.

§ 220.25 Permits not transferable; agents.

(a) Permits issued under parts 220 through 222 are not transferable or assignable. Some permits authorize certain activities in connection with a business or commercial enterprise and in the event of any lease, sale, or transfer of such business entity, the successor must obtain a permit prior to continuing the permitted activity. However, certain limited rights of succession are provided in § 220.26.

(b) Except as otherwise stated on the face of a permit, any person who is under the direct control of the permittee, or who is employed by or under

contract to the permittee for the purposes authorized by the permit, may carry out the activity authorized by the permit.

§ 220.26 Right of succession by certain persons.

(a) Certain persons, other than the permittee, are granted the right 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; and

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

(b) In order to secure the right 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.

§ 220.27 Change of mailing address.

During the term of his permit, a permittee may change his mailing address without procuring a new permit. However, in every case notification of the new mailing address must be forwarded to the issuing official within 30 days after such change. This section does not authorize the change of location of the permitted activity for which an amendment must be obtained.

§ 220.28 Change in name.

A permittee continuing to conduct a permitted activity is not required to obtain a new permit by reason of a mere change in trade name under which a business is conducted or a change of name by reason of marriage or legal decree: *Provided*, That such permittee must furnish his permit to the issuing official for endorsement within 30 days from the date the permittee begins conducting the permitted activity under the new name.

§§ 220.29–220.30 [Reserved]

§ 220.31 Discontinuance of activity.

When any permittee discontinues his activity, he shall, within 30 days thereof, mail his permit and a request for cancellation to the issuing officer, and said permit shall be deemed void upon receipt. No refund of any part of an amount paid as a permit fee shall be made where the operations of the permittee are, for any reason, discontinued during the tenure of an issued permit.

Subpart D—Conditions

§ 220.42 Permits are specific.

The authorizations on the face of a permit which set forth specific times, dates, places, methods of taking, numbers and kinds of fish or wildlife, location of activity, authorize certain circumscribed transactions, or otherwise permit a specifically limited matter, are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction.

§ 220.43 Alteration of permits.

Permits shall not be altered, erased, or mutilated, and any permit which has been altered, erased, or mutilated shall immediately become invalid.

§ 220.44 Display of permit.

Any permit issued under parts 220 through 222 shall be displayed for inspection upon request to the Director or his agent, or to any other person relying upon its existence.

§ 220.45 Filing of reports.

Permittees may be required to file reports of the activities conducted under the permit. Any such reports shall be filed not later than March 31 for the preceding calendar year ending December 31, or any portion thereof, during which a permit was in force, unless the regulations of parts 217 through 222 of this chapter or the provisions of the permit set forth other reporting requirements.

§ 220.46 Maintenance of records.

From the date of issuance of the permit, the permittee shall maintain complete and accurate records of any taking, possession, transportation, sale, purchase, barter, exportation, or importation of fish or wildlife pursuant to such permit. Such records shall be kept current and shall include names and addresses of persons with whom any fish or wildlife has been purchased, sold, bartered, or otherwise transferred, and the date of such transaction, and such other information as may be required or appropriate. Such records, unless otherwise specified, shall be entered in books, legibly written in the English language. Such records shall be retained for 5 years from the date of issuance of the permit.

§ 220.47 Inspection requirement.

Any person holding a permit under parts 217 through 222 of this chapter shall allow the Director's agent to enter his premises at any reasonable hour to inspect any fish or wildlife held or to inspect, audit, or copy any permits, books, or records required to be kept by regulations of parts 217 through 222 of this chapter or by the Endangered Species Act of 1973.

Subpart E—Permits Involving Endangered or Threatened Sea Turtles

SOURCE: 43 FR 32809, July 28, 1978, unless otherwise noted.

§ 220.50 Purpose.

This subpart establishes procedures for issuance of permits for scientific purposes or to enhance the propagation or survival of "endangered" or "threatened" sea turtles and zoological exhibition or educational purposes for "threatened" sea turtles.

§ 220.51 Permit applications.

Applications for permits to take, import, export or engage in any other prohibited activity involving any species of sea turtle listed in 50 CFR 17.11 shall be submitted to the Wildlife Permit Office (WPO) of the U.S. Fish and Wildlife Service in accordance with either, 50 CFR 17.22(a) (Endangered Spe-

cies) or 50 CFR 17.32(a) (Threatened Species) as appropriate. Applications involving activities under the jurisdiction of the National Marine Fisheries Service (NMFS) as defined in 50 CFR 222.23(a) and 50 CFR 227.4 shall be forwarded by the WPO to NMFS.

§ 220.52 Issuance of permits.

(a) Applications under the jurisdiction of the WPO shall be reviewed and acted upon in accordance with 50 CFR 17.22 or 50 CFR 17.32 as appropriate.

(b) NMFS shall make a complete review of applications forwarded to it by the WPO in accordance with § 220.51 and determine the appropriate action to be taken in accordance with 50 CFR 220.21(b) and 222.23(c). In instances where the application involves activities solely within NMFS jurisdiction, NMFS shall issue permits or letters of denial and provide WPO with copies of its actions.

(c) Where a permit application involves activities under both NMFS and FWS jurisdiction, each agency will process the application for activities under its jurisdiction. WPO will issue either a permit or a letter of denial.

(d) Where a permit application for activities under NMFS jurisdiction also requires a permit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (TIAS 8249, July 1, 1975) (CITES) (50 CFR part 23), NMFS will process the application for activities under its jurisdiction. WPO will issue the final document by means of a combination ESA/CITES permit or a letter of denial.

§ 220.53 Other requirements.

Permits issued by NMFS under this subpart shall be administered and comply with the provisions of 50 CFR parts 217 through 227 as appropriate.

PART 221—DESIGNATED PORTS

AUTHORITY: Endangered Species Act of 1973, sec. 11(f), 87 Stat. 884, Pub. L. 93-205.

§ 221.1 Importation and exportation at designated ports.

Any fish or wildlife (other than shellfish and fishery products which (a) are

not endangered or not threatened species, and (b) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) which is subject to the jurisdiction of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce and is intended for importation into or exportation from the United States, shall not be imported or exported except at a port or ports designated by the Secretary of the Interior. The Secretary of the Interior may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or for other reasons if he deems it appropriate and consistent with the purpose of facilitating enforcement of the Endangered Species Act and reducing the costs thereof. Importers and exporters are advised to see 50 CFR part 14 for importation and exportation requirements and information.

[39 FR 41375, Nov. 27, 1974]

PART 222—ENDANGERED FISH OR WILDLIFE

Subpart A—Introduction

Sec.

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- 222.3 Definitions.

Subpart B—Certificates of Exemption for Pre-Act Endangered Species Parts

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- 222.11-2 Application renewal procedure.
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- 222.11-4 Procedures for issuance of renewals of certificates of exemption.
- 222.11-5 Application for modification of certificate of exemption by holder.
- 222.11-6 Amendment of certificates of exemption.
- 222.11-7 Procedures for suspension, revocation, or modification of certificates of exemption.
- 222.11-8 Purchaser provisions.
- 222.11-9 Duration of certificate of exemption.
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- 222.12-1 Certificate of exemption not transferable; exception.

- 222.12-2 Change of address.
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- 222.12-4 Change in trade name.
- 222.12-5 State or other law.
- 222.12-6 Right of entry and examination.
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- 222.12-8 Record of receipt and disposition.
- 222.12-9 Importation.
- 222.13 Exportation.
- 222.13-1 Procedure by exporter.
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Subpart C—Endangered Fish or Wildlife Permits

- 222.21 General permit requirement.
- 222.22 Permits for the incidental taking of endangered species.
- 222.23 Permits for scientific purposes or to enhance the propagation or survival of the affected endangered species.
- 222.24 Procedures for issuance of permits.
- 222.25 Applications for modification of permit by permittee.
- 222.26 Amendment of permits by NMFS.
- 222.27 Procedures for suspension, revocation, or modification of permits.
- 222.28 Possession of permits.

Subpart D—Special Prohibitions

- 222.31 Approaching humpback whales in Hawaii.
- 222.32 Approaching North Atlantic right whales.
- 222.33 Special prohibitions relating to endangered Steller sea lion protection.

Subpart E—Incidental Capture of Endangered Sea Turtles

- 222.41 Policy regarding incidental capture of sea turtles.
- 222.42 Special prohibitions relating to leatherback sea turtles.

AUTHORITY: 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 *et seq.*

Subpart A—Introduction

§ 222.1 Purpose of regulations.

The regulations contained in this part identify the species or subspecies of fish or wildlife determined to be endangered under either the Endangered Species Conservation Act of 1969 or the Endangered Species Act of 1973, and presently deemed endangered species under the Endangered Species Act of 1973, which are under the jurisdiction of the Secretary of Commerce, and establish procedures and criteria for

issuance of permits for the taking, importation, exportation, or otherwise prohibited acts, involving endangered fish or wildlife. The regulations of this part implement, in part, the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93–205, as amended.

[45 FR 57133, Aug. 27, 1980]

§ 222.2 Scope of regulations.

(a) The regulations of this part apply only to endangered fish or wildlife.

(b) The provisions in this part are in addition to, and are not in lieu of, other regulations of parts 217 through 222 of this chapter which may require a permit or prescribe additional restrictions or conditions for the taking, importation, exportation, and interstate transportation of fish or wildlife. (See also parts 220 and 221 of this chapter.)

[45 FR 57133, Aug. 27, 1980]

§ 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.

[63 FR 8872, Feb. 23, 1998]

Subpart B—Certificates of Exemption for Pre-Act Endangered Species Parts

SOURCE: 45 FR 57134, Aug. 27, 1980, unless otherwise noted.

§ 222.11–1 General certificate of exemption requirements.

(a) The Assistant Administrator, pursuant to the provisions of the Endangered Species Act, and pursuant to the provisions of this paragraph, may exempt any pre-Act endangered species part from one or more of the following:

(1) The prohibition, as set forth in section 9(a)(1)(A) of the Act, to export any such species part from the United States;

(2) The prohibitions, as set forth in section 9(a)(1)(E) of the Act, to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of

a commercial activity any such species part;

(3) The prohibitions, as set forth in section 9(a)(1)(F) of the Act, to sell or offer for sale in interstate or foreign commerce any such species part.

(b) No person shall engage in any of the above activities involving any pre-Act endangered species part without a valid certificate of exemption, or evidence of a right thereunder, issued pursuant to this subpart B.

(c) After January 31, 1984, no person may export; deliver, receive, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless that person has been issued a valid certificate of exemption and the product or the raw material for such product was held by such certificate holder on October 13, 1982.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12808, Apr. 1, 1985]

§ 222.11-2 Application renewal procedure.

(a) Any person to whom a certificate of exemption has been issued by the National Marine Fisheries Service and who desires to obtain a renewal of such certificate of exemption may make application therefor to the Assistant Administrator. The sufficiency of the application shall be determined by the Assistant Administrator in accordance with the requirements of this part and, in that connection, he may waive any requirement for information, or require any elaboration for further information deemed necessary.

(b) One copy of a completed application for renewal shall be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(c) The outside of the envelope should be marked, ATTENTION: Enforcement Division, "Certificate of Exemption Request." Assistance may be obtained by writing or calling the Enforcement Division, NMFS, in Washington, DC (AC 202, 634-7265). At least 15 days should be allowed for processing. An application for a certificate of exemption shall provide the information contained in § 222.11-3 (when the informa-

tion requested is not applicable, put "N.A.") and such other information that the Assistant Administrator may require.

[45 FR 57134, Aug. 27, 1980]

§ 222.11-3 Application renewal requirements.

(a) The following information will be used as the basis for determining whether an application for renewal of a certificate of exemption is complete:

(1) Title: Application for Renewal of Certificate of Exemption Under Pub. L. 97-304.

(2) The date of application.

(3) The identity of the applicant including complete name, original certificate of exemption number, current address, and telephone number, including zip and area codes. If the applicant is a corporation, partnership, or association set forth the details.

(4) The period of time for which a renewal of the certificate of exemption is requested; however, no renewal of certificate of exemption, or right claimed thereunder, shall be effective after the close of the three-year period beginning on the date of the expiration of the previous renewal of the certificate of exemption.

(5)(i) A complete and detailed updated inventory of all pre-Act endangered species parts for which the applicant seeks exemption. Each item on the inventory must be identified by the following information: a unique serial number; the weight of the item in grams, to the nearest whole gram; and a description in detail sufficient to permit ready identification of the item. Small lots, not exceeding five pounds (2,270 grams), of scraps or raw material, which may include or consist of one or more whole raw whale teeth, may be identified by a single serial number and total weight. All finished scrimshaw items subsequently made from a given lot of scrap may be identified by the lot serial number plus additional digits to signify the piece number of the individual finished item. Identification numbers will be in the following format: 00-000000-0000. The first two digits will be the last two digits of the appropriate certificate of exemption number; the next six digits, the serial number of the individual piece or lot of scrap or

raw material; and the last four digits, where applicable, the piece number of an item made from a lot of scrap or raw material. The serial numbers for each certificate holder's inventory must begin with 000001, and piece numbers, where applicable, must begin with 0001 for each separate lot.

(ii) Identification numbers may be affixed to inventory items by any means, including, but not limited to, etching the number into the item, attaching a label or tag bearing the number to the item, or sealing the item in a plastic bag, wrapper or other container bearing the number. Provided that, the number must remain affixed to the item until it is sold to an ultimate user, as defined in § 222.11-8(b) of this part.

(iii) No renewals will be issued for scrimshaw products in excess of any quantities declared in the original application for a certificate of exemption.

(6) A certification in the following language:

I hereby certify that the foregoing information is complete, true, and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining a renewal of my certificate of exemption under the Endangered Species Act of 1973, as amended by Pub. L. 94-359, 90 Stat. 911, Pub. L. 96-159, 93 Stat. 1225, Pub. L. 97-304, 95 Stat. 715, and the Department of Commerce regulations issued thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to the penalties under the Endangered Species Act of 1973.

(7) Signature of the applicant.

(b) Upon receipt of an incomplete or improperly executed application for renewal, the applicant shall be notified by Certified Mail of the deficiency in the application for renewal. If the application for renewal is not corrected and received by the Assistant Administrator within 30 days following the date of receipt of notification, the application for renewal shall be considered as having been abandoned.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12808, Apr. 1, 1985]

§ 222.11-4 Procedures for issuance of renewals of certificates of exemption.

Whenever application for a renewal of a certificate of exemption is received

by the Assistant Administrator which the Assistant Administrator deems sufficient, he shall, as soon as practicable, issue a certificate of renewal to the applicant.

§ 222.11-5 Application for modification of certificate of exemption by holder.

Where circumstances have changed so that an applicant or certificate of exemption holder desires to have any material term or condition of his application or certificate modified, he must submit in writing full justification and supporting information in conformance with the provisions of this part.

§ 222.11-6 Amendment of certificates of exemption.

All certificates are issued subject to the condition that the Assistant Administrator reserves the right to amend the provisions of a certificate of exemption for just cause at any time. Such amendments take effect on the date of notification, unless otherwise specified.

§ 222.11-7 Procedures for suspension, revocation, or modification of certificates of exemption.

Any violation of the applicable provisions of parts 217 through 222 of this chapter, or of the Act, or of a condition of the certificate of exemption may subject the certificate holder to the following:

(a) The penalties provided in the Act; and

(b) Suspension, revocation, or modification of the certificate of exemption, as provided in subpart D of 15 CFR part 904.

[49 FR 1042, Jan. 6, 1984]

§ 222.11-8 Purchaser provisions.

(a) Any person granted a certificate of exemption, including a renewal, under this subpart, upon a sale of any exempted pre-Act endangered species part, must provide the purchaser in writing with a description (including full identification number) of the part sold, and must inform the purchaser in writing of the purchaser's obligation

under paragraph (b) of this section, including the address given in the certificate to which the purchaser's report is to be sent.

(b) Any purchaser of pre-Act endangered species parts included in a valid certificate of exemption, unless an ultimate user, must within 30 days after the receipt of such parts submit a written report to the address given in the certificate specifying the quantity of such parts or products received, the name and address of the seller, a copy of the invoice or other document showing the serial numbers, weight, and descriptions of the parts or products received, the date on which such parts or products were received, and the intended use of such parts by the purchaser. An ultimate user, for purposes of this paragraph, means any person who acquired such endangered species part or product for his own consumption or personal use (including as gifts), and not for resale.

(c) After January 31, 1984, no purchaser may export; deliver, receive, carry or transport in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered species part or product even though such part or product was acquired under a certificate of exemption either prior to or subsequent to that date.

[50 FR 12808, Apr. 1, 1985]

§ 222.11-9 Duration of certificate of exemption.

A certificate of exemption is valid only if renewed in accordance with the procedures set forth in § 222.11-3 of this part. All certificates so renewed will be valid for a period beginning April 1, 1985, and ending no later than March 31, 1988. A renewed certificate of exemption entitles the holder to engage in the business or activity specified in the certificate of exemption, within the limitations of the Act and the regulations contained in this subpart, for the period stated in the certificate of exemption, unless sooner terminated.

[50 FR 12808, Apr. 1, 1985, as amended at 50 FR 25713, June 21, 1985]

§ 222.12 Locations covered by certificate of exemption.

The certificate of exemption covers the business or activity specified in the certificate of exemption at the address described therein. No certificate of exemption is required to cover a separate warehouse facility used by the certificate of exemption holder solely for storage of pre-Act endangered species parts, if the records required by this subpart are maintained at the address specified in the certificate of exemption which is served by the warehouse or storage facility.

[50 FR 12809, Apr. 1, 1985]

§ 222.12-1 Certificate of exemption not transferable; exception.

Certificates of exemption issued under this subpart are not transferable: *Provided*, That in the event of the lease, sale or other transfer of the operations or activity authorized by the certificate of exemption the successor is not required by this subpart to obtain a new certificate of exemption prior to commencing such operations or activity. In such case, the successor will be treated as a purchaser and must comply with the record and reporting requirements set forth in § 222.11-8.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12-2 Change of address.

A certificate of exemption holder may during the term of the certificate of exemption move his business or activity to a new location at which he intends regularly to carry on such business or activity, without obtaining a new certificate of exemption. However, in every case, notification of the new location of the business or activity must be given in writing within 10 days of such move to the Assistant Administrator. In each instance, the certificate of exemption must be endorsed by the Assistant Administrator. After endorsement of the certificate of exemption the Assistant Administrator will provide an amended certificate of exemption to the person to whom issued.

§ 222.12-3 Certain continuance of business.

A certificate of exemption holder who requests that his certificate of exemption be amended by the Assistant Administrator for corrections or endorsement in compliance with the provisions contained in this subpart, may continue his operations while awaiting action by the Assistant Administrator.

§ 222.12-4 Change in trade name.

A certificate holder continuing to conduct business at the location shown on his certificate of exemption is not required to obtain a new certificate of exemption by reason of a change in trade name under which he conducts his business: *Provided*, That such certificate of exemption holder requests in writing that his certificate of exemption be endorsed to reflect such change of name to the Assistant Administrator within 30 days from the date the certificate of exemption holder begins his business under the new name.

§ 222.12-5 State or other law.

A certificate of exemption issued under this subpart confers no right or privilege to conduct a business or an activity contrary to State or other law. Similarly, compliance with the provisions of any State or other law affords no immunity under any Federal laws or regulations of any other Federal Agency.

§ 222.12-6 Right of entry and examination.

Any person authorized to enforce the Act may enter during business hours the premises, including places of storage, of any holder of a certificate of exemption or of any purchaser for the purpose of inspecting or examining any records or documents required to be kept by such certificate of exemption holder or successor under this subpart, and any endangered species parts at such premises of location.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12-7 Records.

The records pertaining to pre-Act endangered species parts prescribed by this subpart shall be in permanent

form, and shall be retained at the address shown on the certificate of exemption, or at the principal address of a purchaser in the manner prescribed by this subpart.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12-8 Record of receipt and disposition.

(a) Holders of certificates of exemption must maintain records of all pre-Act endangered species parts they receive, sell, transfer, distribute or dispose of otherwise. Purchasers of pre-Act endangered species parts, unless ultimate users, must similarly maintain records of all such parts or products they receive.

(b) Such records as referred to in paragraph (a) of this section may consist of invoices or other commercial records which must be filed in an orderly manner separate from other commercial records maintained, and be readily available for inspection. Such records must (1) show the name and address of the purchaser, seller, or other transferor; (2) show the type, quantity, and identity of the part or product; (3) show the date of such sale or transfer; and (4) be retained, in accordance with the requirements of this subpart, for a period of not less than three years following the date of sale or transfer. Each pre-Act endangered species part will be identified by its number on the updated inventory required to renew a certificate of exemption.

(c)(1) Each certificate of exemption holder must submit a quarterly report (to the address given in the certificate) containing all record information required by paragraph (b) on all transfers of pre-Act endangered species parts made in the previous calendar quarter, or such other record information the Assistant Administrator may specify from time to time.

(2) Quarterly reports are due on January 15, April 15, July 15, and October 15. The first report is due on October 15, 1985.

(d) The Assistant Administrator may authorize the record information to be submitted in a manner other than that prescribed in paragraph (b) of this section when it is shown by the record

holder that an alternate method of reporting is reasonably necessary and will not hinder the effective administration or enforcement of this subpart.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12-9 Importation.

No pre-Act endangered species part shall be imported into the United States, and a certificate of exemption issued in accordance with the provisions of this subpart confers no right or privilege to import into the United States any such part.

§ 222.13 Exportation.

(a) Any person desiring to export from the United States any pre-Act endangered species part or scrimshaw product, must possess a valid certificate of exemption issued in accordance with the provisions of this subpart.

(b) In addition to other information, which may be required by this subpart, the exporter will notify the Assistant Administrator by letter which shall show the name and address of the foreign consignee, the intended port of exportation, and a complete description of the parts to be exported. Such information should reach the Assistant Administrator not less than 10 days prior to shipment.

(c) No pre-Act endangered species part or scrimshaw product which is to be exported from the United States under a certificate of exemption issued therefor, shall be exported except at a port or ports designated by the Secretary of the Interior. The Secretary of the Interior may permit the exportation at non-designated ports for any reason if he deems it appropriate and consistent with the purposes of the Endangered Species Act, as amended, or it will facilitate the administration or enforcement of the Act and reducing the costs thereof. Exporters are advised to see 50 CFR part 14 for a listing of the designated ports.

§ 222.13-1 Procedure by exporter.

Shipment may not be made until the requirements of § 222.13 are met by the exporter. A copy of the certificate of exemption, and any endorsements thereto, must be sent by the exporter to the District Director of Customs at

the port of exportation, and must precede or accompany the shipment in order to permit appropriate inspection prior to lading.

§ 222.13-2 Action by Customs.

Upon receipt of a certificate of exemption authorizing the exportation of pre-Act endangered species parts or scrimshaw products, the District Director of Customs may order such inspection as deemed necessary prior to lading of the merchandise. If satisfied that the shipment is proper and agrees with the information contained in the certificate, and any endorsement thereto, the District Director of Customs will clear the merchandise for export. The certificate, and any endorsements, will be forwarded to the Chief, Enforcement Division, F/CM5 National Marine Fisheries Service, Washington, DC 20235.

§ 222.13-3 Transportation to effect exportation.

Notwithstanding any provision of this subpart, it shall not be required that authorization be obtained from the Assistant Administrator for the transportation in interstate or foreign commerce of pre-Act endangered species parts to effect an exportation of such parts authorized under the provisions of this subpart.

§ 222.13-4 Burden of proof; presumption.

Any person claiming the benefit of any exemption or certificate of exemption under the Act or regulations, shall have the burden of proving that the exemption or certificate is applicable, has been granted, and was valid and in force at the time of the alleged violation.

Subpart C—Endangered Fish or Wildlife Permits

SOURCE: 39 FR 41375, Nov. 27, 1974, unless otherwise noted.

§ 222.21 General permit requirement.

No person shall take, import, export, or engage in any other prohibited activity involving, any species or subspecies of fish or wildlife which the Secretary has determined to be endangered under the Endangered Species

Act of 1973, as evidenced by its inclusion on the list of endangered fish or wildlife (see 50 CFR chapter I, part 17) or which the Secretary of the Interior determined to be endangered under the Endangered Species Conservation Act of 1969 and which are now under the jurisdictional responsibilities of the Secretary of Commerce, without a valid permit issued pursuant to this part.

(Pub. L. 94-359)

[41 FR 36028, Aug. 26, 1976]

§ 222.22 Permits for the incidental taking of endangered species.

(a) *Scope.* (1) The Assistant Administrator may issue permits to take endangered marine species incidentally to an otherwise lawful activity under section 10(a)(1)(B) of the Endangered Species Act of 1973. The regulations in this section apply only to those endangered species under the jurisdiction of the Secretary of Commerce identified in § 222.23(a).

(2) If the applicant represents an individual or a single entity, such as a corporation, the Assistant Administrator will issue an individual incidental take permit. If the applicant represents a group or organization whose members conduct the same or a similar activity in the same geographical area with similar impacts on endangered marine species, the Assistant Administrator will issue a general incidental take permit. To be covered by a general incidental take permit, each individual conducting the activity must have a certificate of inclusion issued under paragraph (f) of this section.

(b) *Permit application procedures.* Applications should be sent to the Assistant Administrator for Fisheries, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910. The sufficiency of the application will be determined by the Assistant Administrator in accordance with the requirements of this section. At least 120 days should be allowed for processing. Each application must be signed and dated and include the following:

(1) The type of application, either:

(i) Application for an Individual Incidental Take Permit under the Endangered Species Act of 1973, or

(ii) Application for a General Incidental Take Permit under the Endangered Species Act of 1973.

(2) The name, address and telephone number of the applicant. If the applicant is a partnership, corporate entity or is representing a group or organization, the applicable details.

(3) The species or stocks, by common and scientific name, and a description of the status, distribution, seasonal distribution, habitat needs, feeding habits and other biological requirements of the affected species or stocks.

(4) A detailed description of the proposed activity, including the anticipated dates, duration and specific location. If the request is for a general incidental take permit, an estimate of the total level of activity expected to be conducted.

(5) A conservation plan, based on the best scientific and commercial data available, which specifies

(i) The anticipated impact (*i.e.*, amount, extent and type of anticipated taking) of the proposed activity on the species or stocks;

(ii) The anticipated impact of the proposed activity on the habitat of the species or stocks and the likelihood of restoration of the affected habitat;

(iii) The steps (specialized equipment, methods of conducting activities, or other means) that will be taken to monitor, minimize and mitigate such impacts, and the funding available to implement such measures; and

(iv) The alternative actions to such taking that were considered and the reasons why those alternatives are not being used.

(v) A list of all sources of data used in preparation of the plan, including reference reports, environmental assessments and impact statements, and personal communications with recognized experts on the species or activity who may have access to data not published in current literature.

(c) *Issuance criteria.* (1) In determining whether to issue a permit, the Assistant Administrator will consider the following:

(i) The status of the affected species or stocks;

(ii) The potential severity of direct, indirect and cumulative impacts on the

APPENDIX 11:

Endangered and Threatened Species Permit Conditions

50 CFR Part 17 Excerpts (FWS)

50 CFR 222.22 (NMFS)

§ 17.1

- 17.62 Permits for scientific purposes or for the enhancement of propagation or survival.
- 17.63 Economic hardship permits.

Subpart G—Threatened Plants

- 17.71 Prohibitions.
- 17.72 Permits—general.
- 17.73–17.78 [Reserved]

Subpart H—Experimental Populations

- 17.80 Definitions.
- 17.81 Listing.
- 17.82 Prohibitions.
- 17.83 Interagency cooperation.
- 17.84 Special rules—vertebrates.
- 17.85 Special rules—invertebrates. [Reserved]
- 17.86 Special rules—plants. [Reserved]

Subpart I—Interagency Cooperation

- 17.94 Critical habitats.
- 17.95 Critical habitat—fish and wildlife.
- 17.96 Critical habitat—plants.

Subpart J—Manatee Protection Areas

- 17.100 Purpose.
- 17.101 Scope.
- 17.102 Definitions.
- 17.103 Establishment of protection areas.
- 17.104 Prohibitions.
- 17.105 Permits and exceptions.
- 17.106 Emergency establishment of protection areas.
- 17.107 Facilitating enforcement.
- 17.108 List of designated manatee protection areas.

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.

SOURCE: 40 FR 44415, Sept. 26, 1975, unless otherwise noted.

Subpart A—Introduction and General Provisions**§ 17.1 Purpose of regulations.**

(a) The regulations in this part implement the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531–1543, except for those provisions in the Act concerning the Convention on International Trade in Endangered Species of Wild Fauna and Flora, for which regulations are provided in part 23 of this subchapter.

(b) The regulations identify those species of wildlife and plants determined by the Director to be endangered or threatened with extinction under

section 4(a) of the Act and also carry over the species and subspecies of wildlife designated as endangered under the Endangered Species Conservation Act of 1969 (83 Stat. 275, 16 U.S.C. 668cc–1 to 6) which are deemed endangered species under section 4(c)(3) of the Act.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 10465, Feb. 22, 1977]

§ 17.2 Scope of regulations.

(a) The regulations of this part apply only to endangered and threatened wildlife and plants.

(b) By agreement between the Service and the National Marine Fisheries Service, the jurisdiction of the Department of Commerce has been specifically defined to include certain species, while jurisdiction is shared in regard to certain other species. Such species are footnoted in subpart B of this part, and reference is given to special rules of the National Marine Fisheries Service for those species.

(c) The provisions in this part are in addition to, and are not in lieu of, other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation, and interstate transportation of wildlife.

(d) The examples used in this part are provided solely for the convenience of the public, and to explain the intent and meaning of the regulation to which they refer. They have no legal significance.

(e) Certain of the wildlife and plants listed in §§ 17.11 and 17.12 as endangered or threatened are included in Appendix I, II or III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The importation, exportation and reexportation of such species are subject to additional regulations provided in part 23 of this subchapter.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 10465, Feb. 22, 1977]

§ 17.3 Definitions.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

Act means the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884);

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.

Alaskan Native means a person defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1603(b) (85 Stat. 588)) as a citizen of the United States who is of one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town. Any citizen enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part;

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo which (a) were commonly produced on or before December 28, 1973, and (b) are composed wholly or in some significant respect of natural materials, and (c) are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing mod-

ern implements such as sewing machines or modern techniques at a tannery registered pursuant to §18.23(c) of this subchapter (in the case of marine mammals) may be used so long as no large scale mass production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups such as cooperatives, is permitted so long as no large scale mass production results;

Bred in captivity or captive-bred refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

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).

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."

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

Convention means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

Enhance the propagation or survival, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

Endangered means a species of wildlife listed in §17.11 or a species of plant listed in §17.12 and designated as endangered.

Harass in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,

(2) Breeding procedures, or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures,

or provisions are not likely to result in injury to the wildlife.

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Incidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Industry or trade in the definition of “commercial activity” in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit;

Native village or town means any community, association, tribe, clan or group;

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.

Population means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature;

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.

Specimen means any animal or plant, or any part, product, egg, seed or root of any animal or plant;

Subsistence means the use of endangered or threatened wildlife for food, clothing, shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native

consumption within native villages and towns;

Threatened means a species of wildlife listed in §17.11 or plant listed in §17.12 and designated as threatened.

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.

Wasteful manner means any taking or method of taking which is likely to result in the killing or injury of endangered or threatened wildlife beyond those needed for subsistence purposes, or which results in the waste of a substantial portion of the wildlife, and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of the wildlife, or which is not immediately followed by a reasonable effort to retrieve the wildlife.

[40 FR 44415, Sept. 26, 1975, as amended at 42 FR 28056, June 1, 1977; 44 FR 54006, Sept. 17, 1979; 46 FR 54750, Nov. 4, 1981; 47 FR 31387, July 20, 1982; 50 FR 39687, Sept. 30, 1985; 63 FR 8870, Feb. 23, 1998; 63 FR 48639, Sept. 11, 1998]

EFFECTIVE DATE NOTE: At 63 FR 48639, Sept. 11, 1998, §17.3 was amended by revising the definition of "Harass", effective Oct. 13, 1998. For the convenience of the user, the superseded text is set forth as follows:

§ 17.3 Definitions.

* * * * *

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

* * * * *

§ 17.4 Pre-Act wildlife.

(a) The prohibitions defined in subparts C and D of this part 17 shall not apply to any activity involving endangered or threatened wildlife which was held in captivity or in a controlled environment on December 28, 1973: *Provided,*

(1) That the purposes of such holding were not contrary to the purposes of the Act; and

(2) That the wildlife was not held in the course of a commercial activity.

Example 1. On January 25, 1974, a tourist buys a stuffed hawksbill turtle (an endangered species listed since June, 1970), in a foreign country. On December 28, 1973, the stuffed turtle had been on display for sale. The tourist imports the stuffed turtle into the United States on January 26, 1974. This is a violation of the Act since the stuffed turtle was held for commercial purposes on December 28, 1973.

Example 2. On December 27, 1973 (or earlier), a tourist buys a leopard skin coat (the leopard has been listed as endangered since March 1972) for his wife in a foreign country. On January 5, he imports it into the United States. He has not committed a violation since on December 28, 1973, he was the owner of the coat, for personal purposes, and the chain of commerce had ended with the sale on the 27th. Even if he did not finish paying for the coat for another year, as long as he had possession of it, and he was not going to resell it, but was using it for personal purposes, the Act does not apply to that coat.

Example 3. On or before December 28, 1973, a hunter kills a leopard legally in Africa. He has the leopard mounted and imports it into the United States in March 1974. The importation is not subject to the Act. The hunter has not engaged in a commercial activity, even though he bought the services of a guide, outfitters, and a taxidermist to help him take, preserve, and import the leopard. This applies even if the trophy was in the possession of the taxidermist on December 28, 1973.

Example 4. On January 15, 1974, a hunter kills a leopard legally in Africa. He has the leopard mounted and imports it into the United States in June 1974. This importation is a violation of the Act since the leopard was not in captivity or a controlled environment on December 28, 1973.

(b) Service officers or Customs officers may refuse to clear endangered or threatened wildlife for importation into or exportation from the United States, pursuant to §14.53 of this subchapter, until the importer or exporter can demonstrate that the exemption referred to in this section applies. Exempt status may be established by any sufficient evidence, including an affidavit containing the following:

- (1) The affiant's name and address;
- (2) Identification of the affiant;

§ 17.5

(3) Identification of the endangered or threatened wildlife which is the subject of the affidavit;

(4) A statement by the affiant that to the best of his knowledge and belief, the endangered or threatened wildlife which is the subject of the affidavit was in captivity or in a controlled environment on December 28, 1973, and was not being held for purposes contrary to the Act or in the course of a commercial activity;

(5) A statement by the affiant in the following language:

The foregoing is principally based on the attached exhibits which, to the best of my knowledge and belief, are complete, true and correct. I understand that this affidavit is being submitted for the purpose of inducing the Federal Government to recognize an exempt status regarding (*insert description of wildlife*), under the Endangered Species Act of 1973 (16 U.S.C. 1531-1543), and regulations promulgated thereunder, and that any false statements may subject me to the criminal penalties of 18 U.S.C. 1001.

(6) As an attachment, records or other available evidence to show:

(i) That the wildlife in question was being held in captivity or in a controlled environment on December 28, 1973;

(ii) The purpose for which the wildlife was being held; and

(iii) The nature of such holding (to establish that no commercial activity was involved).

(c) This section applies only to wildlife born on or prior to December 28, 1973. It does not apply to the progeny of any such wildlife born after December 28, 1973.

§ 17.5 Alaska natives.

(a) The provisions of subpart C of this part relating to the importation or the taking of endangered wildlife, and any provision of subpart D of this part relating to the importation or the taking of threatened wildlife, shall not apply to:

(1) Any Indian, Aleut, or Eskimo who is an Alaskan native and who resides in Alaska; or

(2) Any non-native permanent resident of an Alaskan native village who is primarily dependent upon the taking of wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing:

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If the taking is primarily for subsistence purposes, and is not accomplished in a wasteful manner.

(b) Edible portions of endangered or threatened wildlife taken or imported pursuant to paragraph (a) of this section may be sold in native villages or towns in Alaska for native consumption within native villages and towns in Alaska.

(c) Non-edible by-products of endangered or threatened wildlife taken or imported pursuant to paragraph (a) of this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing.

§ 17.6 State cooperative agreements. [Reserved]

§ 17.7 Raptor exemption.

(a) The prohibitions found in §§ 17.21 and 17.31 do not apply to any raptor [a live migratory bird of the Order *Falconiformes* or the Order *Strigiformes*, other than a bald eagle (*Haliaeetus leucocephalus*) or a golden eagle (*Aquila chrysaetos*)] legally held in captivity or in a controlled environment on November 10, 1978, or to any of its progeny, which is:

(1) Possessed and banded in compliance with the terms of a valid permit issued under part 21 of this chapter; and

(2) Identified in the earliest applicable annual report required to be filed by a permittee under part 21 of this chapter as in a permittee's possession on November 10, 1978, or as the progeny of such a raptor.

(b) This section does not apply to any raptor intentionally returned to the wild.

[48 FR 31607, July 8, 1983]

§ 17.8 Permit applications and information collection requirements.

(a) Address permit applications for activities affecting species listed under the Endangered Species Act, as amended, as follows:

(1) Address activities affecting endangered and threatened species that are native to the United States to the Regional Director for the Region in which the activity is to take place. You can find addresses for the Regional

Directors in 50 CFR 2.2. Send applications for interstate commerce in native endangered and threatened species to the Regional Director with lead responsibility for the species. To determine the appropriate region, call the nearest Regional Office:

Region 1 (Portland, OR): 503-231-6241
 Region 2 (Albuquerque, NM): 505-248-6920
 Region 3 (Twin Cities, MN): 612-713-5343
 Region 4 (Atlanta, GA): 404-679-7313
 Region 5 (Hadley, MA): 413-253-8628
 Region 6 (Denver, CO): 303-236-8155, ext 263
 Region 7 (Anchorage, AK): 907-786-3620
 Headquarters (Washington, DC): 703-358-2106

(2) Submit permit applications for activities affecting native endangered and threatened species in international movement or commerce, and all activities affecting nonnative endangered and threatened species to the Director, U.S. Fish and Wildlife Service, (Attention Office of Management Authority), 4401 N. Fairfax Drive, Room 700, Arlington, VA 22203.

(b) The Office of Management and Budget approved the information collection requirements contained in this part 17 under 44 U.S.C. 3507 and assigned OMB Control Numbers 1018-0093 and 1018-0094. The Service may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. We are collecting this information to provide information necessary to evaluate permit applications. We will use this information to review permit applications and make decisions, according to criteria established in various Federal wildlife conservation statutes and regulations, on the issuance, suspension, revocation, or denial of permits. You must respond to obtain or retain a permit. We estimate the public reporting burden for these reporting requirements to vary from 2 to 2½ hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms. Direct comments regarding the burden estimate or any other aspect of these reporting requirements to the Service Information Collection Control Officer, MS-222 ARLSQ, U.S. Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction

Project (1018-0093/0094), Washington, DC 20603.

[63 FR 52635, Oct. 1, 1998]

Subpart B—Lists

§ 17.11 Endangered and threatened wildlife.

(a) The list in this section contains the names of all species of wildlife which have been determined by the Services to be Endangered or Threatened. It also contains the names of species of wildlife treated as Endangered or Threatened because they are sufficiently similar in appearance to Endangered or Threatened species (see § 17.50 *et seq.*).

(b) The columns entitled "Common Name," "Scientific Name," and "Vertebrate Population Where Endangered or Threatened" define the species of wildlife within the meaning of the Act. Thus, differently classified geographic populations of the same vertebrate subspecies or species shall be identified by their differing geographic boundaries, even though the other two columns are identical. The term "Entire" means that all populations throughout the present range of a vertebrate species are listed. Although common names are included, they cannot be relied upon for identification of any specimen, since they may vary greatly in local usage. The Services shall use the most recently accepted scientific name. In cases in which confusion might arise, a synonym(s) will be provided in parentheses. The Services shall rely to the extent practicable on the *International Code of Zoological Nomenclature*.

(c) In the "Status" column the following symbols are used: "E" for Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) The other data in the list are non-regulatory in nature and are provided for the information of the reader. In the annual revision and compilation of this title, the following information may be amended without public notice: the spelling of species' names, historical range, footnotes, references to certain other applicable portions of this title, synonyms, and more current names. In any of these revised entries,

606—62 FR 4182; January 29, 1997.
 609—62 FR 5551; February 6, 1997.
 611—62 FR 14351; March 26, 1997.
 613—62 FR 27978; May 22, 1997.
 615—62 FR 31748; June 11, 1997.
 619—62 FR 33037; June 18, 1997.
 620—62 FR 33373; June 19, 1997.
 623—62 FR 40973; July 31, 1997.
 624—62 FR 42702; August 8, 1997.
 625—62 FR 54807; October 22, 1997.
 627—62 FR 61925; November 20, 1997.
 635—63 FR 19849; April 22, 1998.
 640—63 FR 43115; August 12, 1998.
 641—63 FR 44594; August 20, 1998.
 643—63 FR 49034; September 14, 1998.
 644—63 FR 49021; September 14, 1998.

EDITORIAL NOTE 1: For FEDERAL REGISTER citations affecting the table in § 17.12(h), see the listing above.

EDITORIAL NOTE 2: For FEDERAL REGISTER citations affecting § 17.12, see the List of CFR Sections Affected in the Finding Aids section of this volume.

Subpart C—Endangered Wildlife

§ 17.21 Prohibitions.

(a) Except as provided in subpart A of this part, or under permits issued pursuant to § 17.22 or § 17.23, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed, any of the acts described in paragraphs (b) through (f) of this section in regard to any endangered wildlife.

(b) *Import or export.* It is unlawful to import or to export any endangered wildlife. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(c) *Take.* (1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas. The high seas shall be all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.

(2) Notwithstanding paragraph (c)(1) of this section, any person may take

endangered wildlife in defense of his own life or the lives of others.

(3) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service, or a State conservation agency, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take endangered wildlife without a permit if such action is necessary to:

(i) Aid a sick, injured or orphaned specimen; or

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen which may be useful for scientific study; or

(iv) Remove specimens which constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area.

(4) Any taking pursuant to paragraphs (c) (2) and (3) of this section must be reported in writing to the U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, DC 20036, within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with directions from Service.

(5) Notwithstanding paragraph (c)(1) of this section, any qualified employee or agent of a State Conservation Agency which is a party to a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties take those endangered species which are covered by an approved cooperative agreement for conservation programs in accordance with the Cooperative Agreement, provided that such taking is not reasonably anticipated to result in:

(i) The death or permanent disabling of the specimen;

(ii) The removal of the specimen from the State where the taking occurred;

(iii) The introduction of the specimen so taken, or of any progeny derived

from such a specimen, into an area beyond the historical range of the species; or

(iv) The holding of the specimen in captivity for a period of more than 45 consecutive days.

(d) *Possession and other acts with unlawfully taken wildlife.* (1) It is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any endangered wildlife which was taken in violation of paragraph (c) of this section.

Example A person captures a whooping crane in Texas and gives it to a second person, who puts it in a closed van and drives thirty miles, to another location in Texas. The second person then gives the whooping crane to a third person, who is apprehended with the bird in his possession. All three have violated the law—the first by illegally taking the whooping crane; the second by transporting an illegally taken whooping crane; and the third by possessing an illegally taken whooping crane.

(2) Notwithstanding paragraph (d)(1) of this section, Federal and State law enforcement officers may possess, deliver, carry, transport or ship any endangered wildlife taken in violation of the Act as necessary in performing their official duties.

(e) *Interstate or foreign commerce.* It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.

(f) *Sale or offer for sale.* (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered wildlife.

(2) An advertisement for the sale of endangered wildlife which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the U.S. Fish and Wildlife Service shall not be considered an offer for sale within the meaning of this section.

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States provided

either that the wildlife is of a taxon listed in paragraph (g)(6) of this section, or that the following conditions are met:

(i) The wildlife is of a species having a natural geographic distribution not including any part of the United States, or the wildlife is of a species that the Director has determined to be eligible in accordance with paragraph (g)(5) of this section;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export from the United States; and

(v) Any person subject to the jurisdiction of the United States who engages in any of the activities authorized by this paragraph does so in accordance with paragraphs (g) (2), (3) and (4) of this section, and with all other applicable regulations in this Subchapter B.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph must first register with the Service (Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, Virginia 22203). Requests for registration must be submitted on an official application form (Form 3-200-41) provided by the Service, and must include the following information:

(i) The types of wildlife sought to be covered by the registration, identified by common and scientific name to the taxonomic level of family, genus or species;

(ii) A description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered by the registration, and when appropriate, in conducting research directly related to maintaining and propagating such wildlife;

(iii) Photograph(s) or other evidence clearly depicting the facilities where such wildlife will be maintained; and

(iv) a copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR part 2).

(3) Upon receiving a complete application, the Director will decide whether or not the registration will be approved. In making this decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Public education activities may not be the sole basis to justify issuance of a registration or to otherwise establish eligibility for the exception granted in paragraph (g)(1) of this section. Each person so registered must maintain accurate written records of activities conducted under the registration, and allow reasonable access to Service agents for inspection purposes as set forth in §§ 13.46 and 13.47. Each person registered must submit to the Director an individual written annual report of activities, including all births, deaths and transfers of any type.

(4) Any person subject to the jurisdiction of the United States seeking to export or conduct foreign commerce in captive-bred endangered wildlife that will not remain under the care of that person must first obtain approval by providing written evidence to satisfy the Director that the proposed recipient of the wildlife has expertise, facilities or other resources adequate to enhance the propagation or survival of such wildlife and that the proposed recipient will use such wildlife for purposes of enhancing the propagation or survival of the affected species.

(5)(i) The Director will use the following criteria to determine if wildlife of any species having a natural geographic distribution that includes any part of the United States is eligible for the provisions of this paragraph:

(A) Whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons, and

(B) Whether the wild populations of the species are effectively protected from unauthorized taking as a result of

the inaccessibility of their habitat to humans or as a result of the effectiveness of law enforcement.

(ii) The Director will follow the procedures set forth in the Act and in the regulations thereunder with respect to petitions and notification of the public and governors of affected States when determining the eligibility of species for purposes of this paragraph.

(iii) In accordance with the criteria in paragraph (g)(5)(i) of this section, the Director has determined the following species to be eligible for the provisions of this paragraph:

Laysan duck (*Anas laysanensis*).

(6) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by paragraph (g)(1) of this section may do so without first registering with the Service with respect to the bar-tailed pheasant (*Syrnaticus humiae*), Elliot's pheasant (*S. ellioti*), Mikado pheasant (*S. mikado*), brown eared pheasant (*Crossoptilon mantchuricum*), white eared pheasant (*C. crossoptilon*), cheer pheasant (*Catreus wallichii*), Edward's pheasant (*Lophura edwardsi*), Swinhoe's pheasant (*L. swinhoii*), Chinese monal (*Lophophorus lhuysii*), and Palawan peacock pheasant (*Polyplectron emphanum*); parakeets of the species *Neophema pulchella* and *N. splendida*; the Laysan duck (*Anas laysanensis*); the white-winged wood duck (*Cairina scutulata*); and the inter-subspecific crossed or "generic" tiger (*Panthera tigris*) (*i.e.*, specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (*Panthera tigris tigris*, *P.t. sumatrae*, *P.t. altaica* and *P.t. corbetti*, respectively) provided:

(i) The purpose of such activity is to enhance the propagation or survival of the affected exempted species;

(ii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iii) Each specimen to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export of the specimen from the United States;

(iv) No specimens of the taxa in this paragraph (g)(6) of this section that were taken from the wild may be imported for breeding purposes absent a definitive showing that the need for new bloodlines can only be met by wild specimens, that suitable foreign-bred, captive individuals are unavailable, and that wild populations can sustain limited taking, and an import permit is issued under § 17.22;

(v) Any permanent exports of such specimens meet the requirements of paragraph (g)(4) of this section; and

(vi) Each person claiming the benefit of the exception in paragraph (g)(1) of this section must maintain accurate written records of activities, including births, deaths and transfers of specimens, and make those records accessible to Service agents for inspection at reasonable hours as set forth in §§ 13.46 and 13.47.

[40 FR 44415, Sept. 26, 1975, as amended at 40 FR 53400, Nov. 18, 1975; 41 FR 19226, May 11, 1976; 44 FR 31580, May 31, 1979; 44 FR 54007, Sept. 17, 1979; 58 FR 68325, Dec. 27, 1993; 63 FR 48640, Sept. 11, 1998]

EFFECTIVE DATE NOTE: At 63 FR 48640, Sept. 11, 1998, § 17.21 was amended by revising paragraph (g), effective Oct. 13, 1998. For the convenience of the user the superseded text is set forth as follows:

§ 17.21 Prohibitions.

* * * * *

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; import or export; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States, provided the principal purpose of these activities is to facilitate captive breeding, and provided the following conditions are met:

(i) The wildlife is a species having a natural geographic distribution not including any part of the United States, or the wildlife is a species that the Director has determined to be eligible in accordance with paragraph (g)(5) of this section;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export from the United States, and

(v) Any person subject to the jurisdiction of the United States who engages in any of the activities authorized by this paragraph does so in accordance with paragraphs (g) (2), (3) and (4) of this section.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph must first register with the Service (Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, DC 20240). Requests for registration must be submitted on an official application form (Form 3-200) provided by the Service, and must include the following information:

(i) The types of wildlife sought to be covered by the registration, identified by common and scientific name to the taxonomic level of family, genus or species;

(ii) A description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered by the registration, or in conducting research directly related to maintaining and propagating such wildlife;

(iii) A description, if appropriate, of the means by which the applicant intends to educate the public about the ecological role and conservation needs of the affected species;

(iv) Photograph(s) or other evidence clearly depicting the facilities where such wildlife will be maintained; and

(v) A copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR part 2).

(3) Upon receiving a complete application, the Director will decide whether or not the registration will be approved. In making his decision, the Director will consider, in addition to the general criteria in § 13.2(b) of this subchapter, whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Each person so registered must maintain accurate written records of activities conducted under the registration and must submit to the Director a written annual report of such activities.

(4) Any person subject to the jurisdiction of the United States seeking to export or conduct foreign commerce in captive-bred endangered wildlife which will not remain under the care of that person must first obtain approval by providing written evidence to satisfy the Director that the proposed recipient of the wildlife has expertise, facilities or other resources adequate to enhance the propagation or survival of such wildlife

and that the proposed recipient will use such wildlife for purposes of enhancing the propagation or survival of the affected species.

(5)(i) The Director shall use the following criteria to determine if wildlife of any species having a natural geographic distribution that includes any part of the United States is eligible for the provisions of this paragraph:

(A) Whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons, and

(B) Whether the wild populations of the species are effectively protected from unauthorized taking as a result of the inaccessibility of their habitat to man or as a result of the effectiveness of law enforcement.

(i) The Director shall follow the procedures set forth in section 4(b) and section 4(f)(2)(A) of the Act and in the regulations promulgated thereunder with respect to petitions and notification of the public and governors of affected States when determining the eligibility of species for purposes of this paragraph.

(iii) In accordance with the criteria in paragraph (g)(5)(i) of this section, the Director has determined the following species to be eligible for the provisions of this paragraph:

Laysan teal (*Anas laysanensis*).

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

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, or for the incidental taking of endangered wildlife. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time. (See § 17.32 for permits for threatened species.) The Director shall publish notice in the FEDERAL REGISTER of each application for a permit that is made under this section. 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. The 30-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened and no reasonable alternative is available to the applicant.

Notice of any such waiver shall be published in the FEDERAL REGISTER within 10 days following issuance of the permit.

(a)(1) *Application requirements for permits for scientific purposes or for the enhancement of propagation or survival.* A person wishing to get a permit for an activity prohibited by § 17.21 submits an application for activities under this paragraph. The Service provides Form 3-200 for the application to which all of the following must be attained:

(i) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking, exporting, selling in interstate commerce);

(ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;

(iii) A resume of the applicant's attempts to obtain the wildlife sought to be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife;

(iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by the permit was born in captivity, the country and place where such wildlife was born;

(v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;

(vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those person who will be caring for the wildlife;

(vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;

(viii) If the application is for the purpose of enhancement of propagation, a

statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

(i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;

(iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

(iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;

(v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

(3) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under this paragraph shall be subject to the special condition that the escape of living wildlife covered by the permit shall be immediately reported to the Service office designated in the permit.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be designated on the face of the permit.

(b)(1) *Application requirements for permits for incidental taking.* A person wishing to get a permit for an activity prohibited by § 17.21(c) submits an application for activities under this paragraph. The Service provides Form 3-200 for the application to which all of the following must be attached:

(i) A complete description of the activity sought to be authorized;

(ii) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known;

(iii) A conservation plan that specifies:

(A) The impact that will likely result from such taking;

(B) What steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances;

(C) What alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized; and

(D) Such other measures that the Director may require as being necessary or appropriate for purposes of the plan;

(2) *Issuance criteria.* 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 criteria in § 13.21(b) of this subchapter and shall issue the permit if he finds that: (i) The taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; (v) the measures, if any, required under paragraph (b)(1)(iii)(D) of this section will be met; and (vi) he has received such other assurances as he may require that the plan will be implemented. In making his 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.

(3) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under this paragraph shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation plan including, but not limited to, monitoring and reporting requirements deemed necessary for determining whether such terms and conditions are being complied with. The Director shall rely upon existing reporting requirements to the maximum extent practicable.

(4) *Duration of permits.* The duration of permits issued under this paragraph shall be sufficient to provide adequate assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.

(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 pro-

gram, 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:

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(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.

(c) *Objection to permit issuance.* (1) In regard to any notice of a permit application published in the FEDERAL REGISTER, any interested party that objects to the issuance of a permit, in whole or in part, may, during the comment period specified in the notice, request notification of the final action to be taken on the application. A separate written request shall be made for each permit application. Such a request shall specify the Service's permit application number and state the reasons why that party believes the applicant does not meet the issuance criteria contained in §§13.21 and 17.22 of this subchapter or other reasons why the permit should not be issued.

(2) If the Service decides to issue a permit contrary to objections received pursuant to paragraph (c)(1) of this section, then the Service shall, at least ten days prior to issuance of the permit, make reasonable efforts to contact by telephone or other expedient means, any party who has made a request pursuant to paragraph (c)(1) of this section and inform that party of the issuance of the permit. However, the Service may reduce the time period or dispense with such notice if it determines that time is of the essence and that delay in issuance of the permit

would: (i) Harm the specimen or population involved; or (ii) unduly hinder the actions authorized under the permit.

(3) The Service will notify any party filing an objection and request for notice under paragraph (c)(1) of this section of the final action taken on the application, in writing. If the Service has reduced or dispensed with the notice period referred to in paragraph (c)(2) of this section, it will include its reasons therefore in such written notice.

[50 FR 39687, Sept. 30, 1985, as amended at 63 FR 8871, Feb. 23, 1998; 63 FR 52635, Oct. 1, 1998]

§17.23 Economic hardship permits.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by §17.21, in accordance with the issuance criteria of this section in order to prevent undue economic hardship. The Director shall publish notice in the FEDERAL REGISTER of each application for a permit that is made under this section. 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. The 30-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened and no reasonable alternative is available to the applicant. Notice of any such waiver shall be published in the FEDERAL REGISTER within 10 days following issuance of the permit.

(a) *Application requirements.* Applications for permits under this section must be submitted to the Director by the person allegedly suffering undue economic hardship because his desired activity is prohibited by §17.21. Each application must be submitted on an official application form (Form 3-200) provided by the Service, and must include, as an attachment, all of the information required in §17.22 plus the following additional information:

(1) The possible legal, economic or subsistence alternatives to the activity sought to be authorized by the permit;

(2) A full statement, accompanied by copies of all relevant contracts and

correspondence, showing the applicant's involvement with the wildlife sought to be covered by the permit (as well as his involvement with similar wildlife), including, where applicable, that portion of applicant's income derived from the taking of such wildlife, or the subsistence use of such wildlife, during the calendar year immediately preceding either the notice in the FEDERAL REGISTER of review of the status of the species or of the proposal to list such wildlife as endangered, whichever is earliest;

(3) Where applicable, proof of a contract or other binding legal obligation which:

(i) Deals specifically with the wildlife sought to be covered by the permit;

(ii) Became binding prior to the date when the notice of a review of the status of the species or the notice of proposed rulemaking proposing to list such wildlife as endangered was published in the FEDERAL REGISTER, whichever is earlier; and

(iii) Will cause monetary loss of a given dollar amount if the permit sought under this section is not granted.

(b) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (a) of this section, the Director will decide whether or not a permit should be issued under any of the three categories of economic hardship, as defined in section 10(b)(2) of the Act. In making his decisions, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

(1) Whether the purpose for which the permit is being requested is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(2) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;

(3) The economic, legal, subsistence, or other alternatives or relief available to the applicant;

(4) The amount of evidence that the applicant was in fact party to a contract or other binding legal obligation which:

(i) Deals specifically with the wildlife sought to be covered by the permit; and

(ii) Became binding prior to the date when the notice of a review of the status of the species or the notice of proposed rulemaking proposing to list such wildlife as endangered was published in the FEDERAL REGISTER, whichever is earlier.

(5) The severity of economic hardship which the contract or other binding legal obligation referred to in paragraph (b)(4) of this section would cause if the permit were denied;

(6) Where applicable, the portion of the applicant's income which would be lost if the permit were denied, and the relationship of that portion to the balance of his income;

(7) Where applicable, the nature and extent of subsistence taking generally by the applicant; and

(8) The likelihood that applicant can reasonably carry out his desired activity within one year from the date a notice is published in the FEDERAL REGISTER to review status of such wildlife, or to list such wildlife as endangered, whichever is earlier.

(c) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under this section shall be subject to the following special conditions:

(1) In addition to any reporting requirements contained in the permit itself, the permittee shall also submit to the Director a written report of his activities pursuant to the permit. Such report must be postmarked or actually delivered no later than 10 days after completion of the activity.

(2) The death or escape of all living wildlife covered by the permit shall be immediately reported to the Service's office designated in the permit.

(d) Duration of permits issued under this section shall be designated on the face of the permit. No permit issued under this section, however, shall be valid for more than one year from the date a notice is published in the FEDERAL REGISTER to review status of such wildlife, or to list such wildlife as endangered, whichever is earlier.

[40 FR 44415, Sept. 26, 1975, as amended at 40 FR 53400, Nov. 18, 1975; 40 FR 58307, Dec. 16, 1975; 50 FR 39688, Sept. 30, 1985]

Subpart D—Threatened Wildlife**§ 17.31 Prohibitions.**

(a) Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 shall apply to threatened wildlife, except § 17.21(c)(5).

(b) In addition to any other provisions of this part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency which is operating a conservation program pursuant to the terms of a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take those threatened species of wildlife which are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.

[43 FR 18181, Apr. 28, 1978, as amended at 44 FR 31580, May 31, 1979]

§ 17.32 Permits—general.

Upon receipt of a complete application the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife. Such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in §§ 17.40 to 17.48, of this part provides otherwise. Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time.

(a)(1) *Application requirements for permits for scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhi-*

bition, or educational purposes, or special purposes consistent with the purposes of the Act. A person wishing to get a permit for an activity prohibited by § 17.31 submits an application for activities under this paragraph. The Service provides Form 3–200 for the application to which as much of the following information relating to the purpose of the permit must be attached:

(i) The Common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking, exporting, selling in interstate commerce);

(ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;

(iii) A resume of the applicant's attempts to obtain the wildlife sought to be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife;

(iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by permit was born in captivity, the country and place where such wildlife was born;

(v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;

(vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those persons who will be caring for the wildlife;

(vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;

(viii) If the application is for the purpose of enhancement of propagation, a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

this section, all prohibitions of 50 CFR 17.31 and exemptions of 50 CFR 17.32 shall apply to the bull trout Columbia River and Klamath River population segments within the contiguous United States.

(2) *Exceptions.* No person shall take this species, except in accordance with applicable State and Native American Tribal fish and wildlife conservation laws and regulations, as constituted in all respects relevant to protection of bull trout in effect on June 10, 1998.

(3) Any violation of applicable State and Native American Tribal fish and wildlife conservation laws or regulations with respect to the taking of this species is also a violation of the Endangered Species Act.

(4) No person shall possess, sell, deliver, carry, transport, ship, import, or export, any means whatsoever, any such species taken in violation of this section or in violation of applicable State and Native American Tribal fish and game laws and regulations.

(5) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (v) (2) through (4) of this section.

[40 FR 44415, Sept. 26, 1975]

EDITORIAL NOTE: For FEDERAL REGISTER citations to § 17.44, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 17.45 Special rules—snails and clams. [Reserved]

§ 17.46 Special rules—crustaceans.

(a) Madison Cave isopod (*Antrolana lira*). (1) All provisions of § 17.31 (a) and (b) apply to this species except that it may be taken for scientific purposes without Federal permits issued pursuant to these regulations: *Provided*, that all other Federal, State, or local laws, regulations, ordinances or other restrictions or limitations have been complied with.

(b) [Reserved]

[47 FR 43701, Oct. 4, 1982]

§ 17.47 [Reserved]

§ 17.48 Special rules—common sponges and other forms. [Reserved]

Subpart E—Similarity of Appearance

SOURCE: 42 FR 32377, June 24, 1977, unless otherwise noted.

§ 17.50 General.

(a) Whenever a species which is not Endangered or Threatened closely resembles an Endangered or Threatened species, such species may be treated as either Endangered or Threatened if the director makes such determination in accordance with section 4(e) of the Act and the criteria of paragraph (b) of this section. After the Director has made such determination in accordance with the notification procedures specified in the Act, such species shall appear in the list in § 17.11 (Wildlife) or § 17.12 (Plants) with the notation “(S/A)” (similarity of appearance) in the “Status” column, following either a letter “E” or a letter “T” to indicate whether the species is being treated as Endangered or Threatened.

(b) In determining whether to treat a species as Endangered or Threatened due to similarity of appearance, the Director shall consider the criteria in section 4(e) of the Act, as indicated below:

(1) The degree of difficulty enforcement personnel would have in distinguishing the species, at the point in question, from an Endangered or Threatened species (including those cases where the criteria for recognition of a species are based on geographical boundaries);

(2) The additional threat posed to the Endangered or Threatened species by the loss of control occasioned because of the similarity of appearance; and

(3) The probability that so designating a similar species will substantially facilitate enforcement and further the purposes and policy of the Act.

Example 1. The ABC sparrow is Endangered wildlife. The ABD sparrow is a subspecies that is so similar to the ABC sparrow that

Act of 1973, as evidenced by its inclusion on the list of endangered fish or wildlife (see 50 CFR chapter I, part 17) or which the Secretary of the Interior determined to be endangered under the Endangered Species Conservation Act of 1969 and which are now under the jurisdictional responsibilities of the Secretary of Commerce, without a valid permit issued pursuant to this part.

(Pub. L. 94-359)

[41 FR 36028, Aug. 26, 1976]

§ 222.22 Permits for the incidental taking of endangered species.

(a) *Scope.* (1) The Assistant Administrator may issue permits to take endangered marine species incidentally to an otherwise lawful activity under section 10(a)(1)(B) of the Endangered Species Act of 1973. The regulations in this section apply only to those endangered species under the jurisdiction of the Secretary of Commerce identified in § 222.23(a).

(2) If the applicant represents an individual or a single entity, such as a corporation, the Assistant Administrator will issue an individual incidental take permit. If the applicant represents a group or organization whose members conduct the same or a similar activity in the same geographical area with similar impacts on endangered marine species, the Assistant Administrator will issue a general incidental take permit. To be covered by a general incidental take permit, each individual conducting the activity must have a certificate of inclusion issued under paragraph (f) of this section.

(b) *Permit application procedures.* Applications should be sent to the Assistant Administrator for Fisheries, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910. The sufficiency of the application will be determined by the Assistant Administrator in accordance with the requirements of this section. At least 120 days should be allowed for processing. Each application must be signed and dated and include the following:

(1) The type of application, either:

(i) Application for an Individual Incidental Take Permit under the Endangered Species Act of 1973, or

(ii) Application for a General Incidental Take Permit under the Endangered Species Act of 1973.

(2) The name, address and telephone number of the applicant. If the applicant is a partnership, corporate entity or is representing a group or organization, the applicable details.

(3) The species or stocks, by common and scientific name, and a description of the status, distribution, seasonal distribution, habitat needs, feeding habits and other biological requirements of the affected species or stocks.

(4) A detailed description of the proposed activity, including the anticipated dates, duration and specific location. If the request is for a general incidental take permit, an estimate of the total level of activity expected to be conducted.

(5) A conservation plan, based on the best scientific and commercial data available, which specifies

(i) The anticipated impact (*i.e.*, amount, extent and type of anticipated taking) of the proposed activity on the species or stocks;

(ii) The anticipated impact of the proposed activity on the habitat of the species or stocks and the likelihood of restoration of the affected habitat;

(iii) The steps (specialized equipment, methods of conducting activities, or other means) that will be taken to monitor, minimize and mitigate such impacts, and the funding available to implement such measures; and

(iv) The alternative actions to such taking that were considered and the reasons why those alternatives are not being used.

(v) A list of all sources of data used in preparation of the plan, including reference reports, environmental assessments and impact statements, and personal communications with recognized experts on the species or activity who may have access to data not published in current literature.

(c) *Issuance criteria.* (1) In determining whether to issue a permit, the Assistant Administrator will consider the following:

(i) The status of the affected species or stocks;

(ii) The potential severity of direct, indirect and cumulative impacts on the

species or stocks and habitat as a result of the proposed activity;

(iii) The availability of effective monitoring techniques;

(iv) The use of the best available technology for minimizing or mitigating impacts; and

(v) The views of the public, scientists and other interested parties knowledgeable of the species or stocks or other matters related to the application.

(2) To issue the permit, the Assistant Administrator must find that:

(i) The taking will be incidental;

(ii) The applicant will, to the maximum extent practicable, monitor, minimize and mitigate the impacts of such taking;

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

(iv) The applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate; and

(v) There are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator.

(d) *Permit conditions.* In addition to the general conditions set forth in part 220 of this chapter, every permit issued under this section will contain such terms and conditions as the Assistant Administrator deems necessary and appropriate, including, but not limited to the following:

(1) Reporting requirements or rights of inspection for determining whether the terms and conditions are being complied with;

(2) The species and number of animals covered;

(3) The authorized method of taking;

(4) The procedures to be used to handle or dispose of any animals taken; and

(5) The payment of a fee to reimburse the National Marine Fisheries Service the cost of processing the application.

(e) *Duration of permits.* The duration of permits issued under this section will be such as to provide adequate assurances to the permit holder to commit funding necessary for the activities

authorized by the permit, including conservation activities. In determining the duration of a permit, the Assistant Administrator will consider the duration of the proposed activities, as well as the possible positive and negative effects associated with issuing a permit of the proposed duration on listed species, including the extent to which the conservation plan is likely to enhance the habitat of the endangered species or increase the long-term survivability of the species.

(f) *Certificates of inclusion.* (1) Any individual who wishes to conduct an activity covered by a general incidental take permit must apply to the Assistant Administrator for a certificate of inclusion. Each application must be signed and dated and include the following:

(i) The general incidental take permit under which the applicant wants coverage.

(ii) The name, address and telephone number of the applicant. If the applicant is a partnership or a corporate entity, the applicable details.

(iii) A description of the activity the applicant seeks to have covered under the general incidental take permit including the anticipated dates, duration, and specific location; and

(iv) A signed certification that the applicant has read and understands the general incidental take permit and the conservation plan, will comply with their terms and conditions, and will fund and implement applicable measures of the conservation plan.

(2) To issue a certificate of inclusion, the Assistant Administrator must find that:

(i) The applicant will be engaged in the activity covered by the general permit and

(ii) The applicant has made adequate assurances that the applicable measures of the conservation plan will be funded and implemented.

(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.

[55 FR 20606, May 18, 1990, as amended at 63 FR 8872, Feb. 23, 1998]

§ 222.23 Permits for scientific purposes or to enhance the propagation or survival of the affected endangered species.

(a) The Director, National Marine Fisheries Service, may issue permits for scientific purposes or to enhance the propagation or survival of the affected endangered species which authorize, under such terms and conditions as he may prescribe, taking, importation, or certain other acts with respect to endangered species otherwise prohibited by section 9 of the Endangered Species Act of 1973. The

species listed as endangered under either the Endangered Species Conservation Act of 1969 or the Endangered Species Act of 1973 and currently under the jurisdiction of the Secretary of Commerce are: Shortnose sturgeon (*Acipenser brevirostrum*); Totoaba (*Cynoscion macdonaldi*), Snake River sockeye salmon (*Oncorhynchus nerka*), Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*); Southern California steelhead (*Oncorhynchus mykiss*), which includes all naturally spawned populations of steelhead (and their progeny) in streams from the Santa Maria River, San Luis Obispo County, California (inclusive) to Malibu Creek, Los Angeles County, California (inclusive); Upper Columbia River steelhead (*Oncorhynchus mykiss*), which includes the Wells Hatchery stock and all naturally spawned populations of steelhead (and their progeny) in streams in the Columbia River Basin upstream from the Yakima River, Washington, to the United States-Canada Border; Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*); Western North Pacific (Korean) gray whale (*Eschrichtius robustus*), Blue whale (*Balaenoptera musculus*), Humpback whale (*Megaptera novaeangliae*), Bowhead whale (*Balaenamysticetus*), Right whales (*Eubalaena spp.*), Fin or finback whale (*Balaenoptera physalus*), Sei whale (*Balaenoptera borealis*), Sperm whale (*Physeter catodon*); Cochito (*Phocoena sinus*), Chinese river dolphin (*Lipotes vexillifer*); Indus River dolphin (*Platanista minor*); Caribbean monk seal (*Monachus tropicalis*) Hawaiian monk seal (*Monachus schauinslandi*); Mediterranean monk seal (*Monachus monachus*); Saimaa seal (*Phoca hispida saimensis*); Steller sea lion (*Eumetopias jubatus*), western population, which consists of Steller sea lions from breeding colonies located west of 144° W. long.; Leatherback sea turtle (*Dermochelys coriacea*), Pacific hawksbill sea turtle (*Eretmochelys imbricata bissa*), Atlantic hawksbill sea turtle (*Eretmochelys imbricata imbricata*), Atlantic ridley sea turtle (*Lepidochelys kempi*). Green sea turtle (*Chelonia mydas*) breeding colony populations in Florida and on the Pacific coast of Mexico, and the olive ridley

sea turtle (*Lepidochelys olivacea*) breeding colony population on the Pacific coast of Mexico. Of these, the National Marine Fisheries Service has sole agency jurisdiction for sea turtles while the turtles are in the water and the U.S. Fish and Wildlife Service has jurisdiction for sea turtles while the turtles are on land. Within the jurisdiction of a State, more restrictive State laws or regulations in regard to endangered species shall prevail in regard to taking. Proof of compliance with applicable State laws will be required before a permit will be issued.

(b) *Application procedures.* To obtain such a permit, an application must be made to the Director in accordance with this subpart, except for marine mammal permits which shall be issued in accordance with the provisions of part 216, subpart D of this chapter, and sea turtle permits which shall be issued in accordance with part 220, subpart E of this chapter. The sufficiency of the application shall be determined by the Director in accordance with the requirements of this part and, in that connection, he may waive any requirement for information, or require any elaboration or further information deemed necessary. The following information will be used as the basis for determining whether an application is complete and whether a permit for scientific purposes or to enhance the propagation or survival of the affected endangered species should be issued by the Director. An original and four copies of the completed application shall be submitted to the Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, Washington, DC 20235. Assistance may be obtained by writing the Director or calling the Marine Mammal and Endangered Species Division in Washington, DC (202-343-9445 and effective December 2, 1974, it will become 202-634-7529). At least 45 days should be allowed for processing. An application for a permit shall provide the following information (when the information requested is not applicable put "N.A.") and such other information that the Director may require:

(1) Title: As applicable, either:

(i) Application for Permit for Scientific Purposes under the Endangered Species Act of 1973; or

(ii) Application for Permit to Enhance the Propagation or Survival of the Endangered Species Under the Endangered Species Act of 1973.

(2) The date of the application.

(3) The identity of the applicant including complete name, address, and telephone number. If the applicant is a partnership or a corporate entity set forth the details. If the endangered species is to be utilized by a person other than the Applicant, set forth the name of that person and such other information as would be required if such person were an Applicant.

(4) A description of the purpose of the proposed acts, including:

(i) A detailed justification of the need for the endangered species, including a discussion of possible alternatives, whether or not under the control of the applicant; and

(ii) A detailed description of how the species will be used.

(5) A detailed description of the project, or program, in which the endangered species is to be used, including:

(i) The period of time over which the project or program will be conducted;

(ii) A list of the names and addresses of the sponsors or cooperating institutions and the scientists involved;

(iii) A copy of the formal research proposal or contract if one has been prepared;

(iv) A statement of whether the proposed project or program has broader significance than the individual researcher's goals (i.e., does the proposed project or program respond directly or indirectly to recommendation of any national or international scientific body charged with research or management of the endangered species, and, if so, how?); and

(v) A description of the arrangements, if any, for the disposition of any dead specimen or its skeleton or other remains, for the continued benefit to science, in a museum or other institutional collection.

(6) A description of the endangered species which is the subject of the application, including the following:

(i) A list of each species and the number of each, including the common and

scientific name; the subspecies (if applicable); population group, and range;

(ii) A physical description of each animal, including the age, size, and sex;

(iii) A list of the probable dates of capture or other taking, importation, exportation, and other acts which require a permit, for each animal, and the location of capture or other taking, importation, exportation, and other acts which require a permit, as specifically as possible;

(iv) A description of the status of the stock of each species related insofar as possible to the location or area of taking;

(v) A description of the manner of taking for each animal, including the gear to be used;

(vi) The name and qualifications of the persons or entity which will capture or otherwise take the animals;

(vii) If the capture or other taking is to be done by a contractor, a statement as to whether a qualified member of your staff (include name(s) and qualifications) will supervise or observe the capture or other taking. Accompany such statement with a copy of the proposed contract or a letter from the contractor indicating agreement to capture or otherwise taken the animals, should a permit be granted;

(7) A description of the manner of transportation of any live animal taken, imported, exported, or shipped in interstate commerce, including:

(i) Mode of transportation;

(ii) Name of transportation company;

(iii) Length of time in transit for the transfer of the animal(s) from the capture site to the holding facility;

(iv) Length of time in transit for any future move or transfer of the animal(s) that is planned;

(v) The qualifications of the common carrier or agent used for transportation of the animals;

(vi) A description of the pen, tank, container, cage, cradle, or other devices used, both to hold the animal at the capture site and during transportation;

(vii) Special care before and during transportation, such as salves, antibiotics, moisture; and

(viii) A statement as to whether the animals will be accompanied by a veterinarian or other similarly qualified person, and the qualifications of such person.

(8) Describe the contemplated care and maintenance of any live animals sought, including a complete description of the facilities where any such animals will be maintained including:

(i) The dimensions of the pools or other holding facilities and the number, sex, and age of animals by species to be held in each;

(ii) The water supply, amount, and quality;

(iii) The diet, amount and type, for all animals;

(iv) Sanitation practices used;

(v) Qualifications and experience of the staff; and

(vi) A written certification from a licensed veterinarian knowledgeable about the species (or related species) or group which is the subject of the application, or from a recognized expert on the species (or related species) or group covered in the application that he has personally reviewed the amendments for transporting and maintaining the animal(s) and that in his opinion they are adequate to provide for the well-being of the animal; and

(vii) The availability in the future of a consulting expert or veterinarian meeting paragraph (b)(8)(vi) requirements of this section;

(9) A statement of willingness to participate in a cooperative breeding program and maintain or contribute data to a stud book.

(10) A statement of how the applicant's proposed project or program will enhance or benefit the wild population.

(11) For the 5 years preceding the date of this application, provide a detailed description of all mortalities involving species which were under the control of or utilized by the applicant and are either presently listed as endangered species or are taxonomically related within the Order to the species which is the subject of this application, including:

(i) A list of all endangered species and species related to the species which is the subject of this application; captured, transported, maintained, or utilized by the applicant for scientific

purposes or to enhance the propagation or survival of the affected species, and/or for all such species caused to be captured, transported, maintained, or utilized for scientific purposes or to enhance the propagation or survival of the affected species, by the Applicant;

(ii) The numbers of mortalities among such animals by species, by date, location of capture, i.e., from which population, and location of such mortalities;

(iii) The cause(s) of any such mortalities; and

(iv) The steps which have been taken by Applicant to avoid or decrease any such mortalities.

(12) A certification in the following language:

I hereby certify that the foregoing information is complete, true and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining a permit under the Endangered Species Act of 1973 (87 Stat. 864, Pub. L. 93-205, 16 U.S.C. 1531 et seq.) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Endangered Species Act of 1973.

(13) The applicant and/or an officer thereof must sign the application.

(c) *Issuance criteria.* The Director shall specifically consider, among other criteria, the following in determining whether to issue a permit for scientific purposes or to enhance the propagation or survival of the affected endangered species:

(1) Whether the permit was applied for in good faith;

(2) Whether the permit if granted and exercised will not operate to the disadvantage of the endangered species;

(3) Whether the permit would be consistent with the purposes and policy set forth in section 2 of the Act;

(4) Whether the permit would further a bona fide and necessary or desirable scientific purpose or enhance the propagation or survival of the endangered species, taking into account the benefits anticipated to be derived on behalf of the endangered species;

(5) The status of the population of the requested species, and the effect of the proposed action on the population, both direct and indirect;

(6) If a live animal is to be taken, transported, or held in captivity—the applicant's qualifications for the proper care and maintenance of the species and the adequacy of his facilities;

(7) Whether alternative non-endangered species or population stocks can and should be used;

(8) Whether the animal was born in captivity or was (or will be) taken from the wild;

(9) Provision for disposition of the species if and when the applicant's project or program terminates;

(10) How the applicant's needs, program, and facilities compare and relate to proposed and ongoing projects and programs;

(11) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application;

(12) Opinions or views of scientists or other persons or organizations knowledgeable of the species which is the subject of the application or of other matters germane to the application; and

(d) Permits applied for under this section shall contain terms and conditions as the Director may deem appropriate, including:

(1) The number and kind of species which are covered;

(2) The location and manner of taking;

(3) Port of entry or export;

(4) The methods of transportation, care and maintenance to be used with live species;

(5) Any requirements for reports or rights of inspections with respect to any activities carried out pursuant to the permit;

(6) The transferability or assignability of the permit;

(7) The sale or other disposition of the species, its progeny or the species product;

(8) A reasonable fee covering the costs of issuance of such permit, including reasonable inspections and an appropriate apportionment of overhead and administrative expenses of the Department of Commerce. All such fees will be deposited in the Treasury to the credit of the appropriation which is

current and chargeable for the cost of furnishing the service.

[39 FR 41375, Nov. 27, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 222.23, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 222.24 Procedures for issuance of permits.

(a) Whenever application for a permit is received by the Director which the Director deems sufficient, he shall, as soon as practicable, publish a notice thereof in the FEDERAL REGISTER. Information received by the Director as a part of the application shall be available to the public as a matter of public record at every stage of the proceeding. An interested party may within 30 days after the date of publication of such notice, submit to the Director his written data, views, or arguments with respect to the taking, importation, or other action proposed in the application and may request a hearing in connection with the action to be taken thereon.

(b) If a request for a hearing is made within the 30-day period referred to in paragraph (a) of this section, or if the Director determines that a hearing would otherwise be advisable, the Director may, within 60 days after the date of publication of the notice referred to in paragraph (a) of this section, afford to such requesting party or parties an opportunity for a hearing. Such hearing shall also be open to participation by any interested members of the public. Notice of the date, time, and place of such hearing shall be published in the FEDERAL REGISTER not less than 15 days in advance of such hearing. Any interested person may appear in person or through representatives at the hearing and may submit any relevant material, data, views, comments, arguments, or exhibits. A summary record of the hearing shall be kept.

(c) Except as provided in subpart D of 15 CFR part 904, as soon as practicable but not later than 30 days after the close of the hearing (or if no hearing is held, as soon as practicable after the end of the 30 days succeeding publication of the notice referred to in paragraph (a) of this section) the Director

shall issue or deny issuance of the permit. Notice of the decision of the Director shall be published in the FEDERAL REGISTER within 10 days after the date of the issuance or denial and indicate where copies of the permit, if issued, may be obtained.

(d) If a permit is issued, the Director shall publish notice thereof in the FEDERAL REGISTER, including his finding that (1) such permit was applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of the Endangered Species Act of 1973. The requirements of this paragraph pertain solely to the permits issued under § 222.23.

(e) The Director may waive the thirty-day period in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Director in the FEDERAL REGISTER within ten days following the issuance of the certificate of exemption or permit.

[39 FR 41375, Nov. 27, 1974, as amended at 42 FR 28139, June 2, 1977; 49 FR 1042, Jan. 6, 1984; 55 FR 20607, May 18, 1990]

§ 222.25 Applications for modification of permit by permittee.

Where circumstances have changed so that an applicant or permittee desires to have any term or condition of his application or permit modified, he must submit in writing full justification and supporting information in conformance with the provisions of this part and the part under which the permit has been issued or requested. Such applications for modification are subject to the same issuance criteria as are original applications, as provided in §§ 222.22(c) and 222.23(c).

[39 FR 41375, Nov. 27, 1974, as amended at 55 FR 20607, May 18, 1990]

§ 222.26 Amendment of permits by NMFS.

All permits are issued subject to the condition that the National Marine Fisheries Service reserves the right to amend the provisions of a permit for just cause at any time during its term. Such amendments take effect on the

date of notification, unless otherwise specified.

[39 FR 41375, Nov. 27, 1974]

§ 222.27 Procedures for suspension, revocation, or modification of permits.

Any violation of the applicable provisions of parts 217 through 222 of this chapter, or of the Act, or of a condition of the permit may subject the certificate holder to the following:

(a) The penalties provided in the Act; and

(b) Suspension, revocation, or modification of the permit, as provided in subpart D of 15 CFR part 904.

[49 FR 1043, Jan. 6, 1984, as amended at 55 FR 20607, May 18, 1990]

§ 222.28 Possession of permits.

(a) Any permit issued under these regulations must be in the possession of the person to whom it is issued (or an agent of such person) during:

(1) The time of the authorized taking, importation, exportation, or other act;

(2) The period of any transit of such person or agent which is incident to such taking, importation, exportation, or other act; and

(3) Any other time while any animal under such permit is in the possession of such person or agent.

(b) A duplicate copy of the issued permit must be physically attached to the tank, container, package, enclosure, or other means of containment, in which the animal is placed for purposes of storage, transit, supervision, or care.

[39 FR 41375, Nov. 27, 1974]

Subpart D—Special Prohibitions

§ 222.31 Approaching humpback whales in Hawaii.

Except as provided in subpart C (Endangered Fish or Wildlife Permits) of this part it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of the Islands of Hawaii, any of the following acts with respect to humpback whales (*Megaptera novaeangliae*):

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(a) Operate any aircraft within 1,000 ft (300 m) of any humpback whale; or

(b) Approach by any means, within 100 yd (90 m) of any humpback whale; or

(c) Cause a vessel or other object to approach within 100 yd (90 m) of a humpback whale; or

(d) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

[60 FR 3775, Jan. 19, 1995]

§ 222.32 Approaching North Atlantic right whales.

(a) *Prohibitions.* Except as provided under paragraph (c) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, to solicit another to commit, or cause to be committed any of the following acts:

(1) Approach (including by interception) within 500 yards (460 m) of a right whale by vessel, aircraft, or any other means;

(2) Fail to undertake required right whale avoidance measures specified under paragraph (b) of this section.

(b) *Right whale avoidance measures.* Except as provided under paragraph (c) of this section, the following avoidance measures must be taken if within 500 yards (460 m) of a right whale:

(1) If underway, a vessel must steer a course away from the right whale and immediately leave the area at a slow safe speed;

(2) An aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

(c) *Exceptions.* The following exceptions apply to this section, but any person who claims the applicability of

an exception has the burden of proving that the exception is applicable:

(1) Paragraphs (a) and (b) of this section do not apply if a right whale approach is authorized by NMFS through a permit issued under subpart C (Endangered Fish or Wildlife Permits) of this part or through a similar authorization.

(2) Paragraphs (a) and (b) of this section do not apply where compliance would create an imminent and serious threat to a person, vessel, or aircraft.

(3) Paragraphs (a) and (b) of this section do not apply when approaching to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale, provided that permission is received from NMFS or a NMFS designee prior to the approach.

(4) Paragraphs (a) and (b) of this section do not apply to an aircraft unless the aircraft is conducting whale watch activities or is being operated for that purpose.

(5) Paragraph (b) of this section does not apply to the extent that a vessel is restricted in her ability to maneuver, and because of the restriction, cannot comply with paragraph (b) of this section.

[62 FR 6738, Feb. 13, 1997]

§ 222.33 Special prohibitions relating to endangered Steller sea lion protection.

General. The regulatory provisions set forth in part 227, which govern threatened Steller sea lions, shall also apply to the western population of Steller sea lions, which consists of all Steller sea lions from breeding colonies located west of 144 °W. long.

[62 FR 24355, May 5, 1997]

Subpart E—Incidental Capture of Endangered Sea Turtles

§ 222.41 Policy regarding incidental capture of sea turtles.

Shrimp fishermen in the southeastern United States and the Gulf of Mexico who comply with rules for threatened sea turtles specified in § 227.72(e) of this subchapter will not be subject

to civil penalties under the Act for incidental captures of endangered sea turtles by shrimp trawl gear.

[52 FR 24251, June 29, 1987]

§ 222.42 Special prohibitions relating to leatherback sea turtles.

Special prohibitions relating to leatherback sea turtles are provided at § 227.72(e)(2)(iv) of this chapter.

[60 FR 25623, May 12, 1995]

PART 225—FEDERAL/STATE COOPERATION IN THE CONSERVATION OF ENDANGERED AND THREATENED SPECIES

Sec.

- 225.1 Purpose of regulations.
- 225.2 Scope of regulations.
- 225.3 Definitions.
- 225.4 Cooperation with the States.
- 225.5 Cooperative agreement.
- 225.6 Allocation of funds.
- 225.7 Financial assistance.
- 225.8 Availability of funds.
- 225.9 Payments.
- 225.10 Assurances.
- 225.11 Submission of documents.
- 225.12 Project evaluation.
- 225.13 Contracts.
- 225.14 Inspection.

AUTHORITY: Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531-1543, Pub. L. 93-205.

SOURCE: 41 FR 24354, June 16, 1976, unless otherwise noted.

§ 225.1 Purpose of regulations.

The regulations in this part implement section 6 of the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 through 1543, Pub. L. 93-205 which provides, under certain circumstances, for cooperative agreements with and financial assistance to the States.

§ 225.2 Scope of regulations.

This part applies to endangered and threatened species under the jurisdiction of the Department of Commerce (see 50 CFR 222.23(a)).

§ 225.3 Definitions.

In addition to the definitions contained in the Act, and unless the context otherwise requires, in this part 225:

(a) *Act* means the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 through 1543, Pub. L. 93-205.

(b) *Agreements* mean signed documented statements of the actions to be taken by the State(s) and the Director in furthering certain purposes of the Act. They include:

(1) A Cooperative Agreement entered into pursuant to section 6(c) of the Act and, where appropriate, containing provisions found in section 6(d)(2) of the Act.

(2) A Grant-In-Aid Award which includes a statement of the actions to be taken in connection with the conservation of endangered or threatened species receiving Federal financial assistance, objectives and costs of such actions, and costs to be borne by the Federal Government and by the State(s).

(c) *Application for Federal Assistance* means a description of work to be accomplished, including objectives and needs, expected results and benefits, approach, cost, location and time required for completion.

(d) *Director* means the Director of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, or his authorized designee.

(e) *Program* means a State-developed plan for the conservation and management of all resident species which are deemed by the Secretary to be endangered or threatened and those which are deemed by the State to be endangered or threatened, which includes goals, priorities, strategies, actions, and funding necessary to accomplish the objectives on an individual species basis.

(f) *Project* means a substantial undertaking to conserve the various endangered or threatened species.

(g) *Project segment* means an essential part or a division of a project, usually separated as a period of time, occasionally as a unit of work.

(h) *Resident species* means, for purposes of these regulations, with respect to a State, a species which exists in the wild in that State during any part of its life.

(i) *Secretary* means the Secretary of Commerce or his authorized designee.

APPENDIX 12:

List of FWS/NMFS Washington, D.C. and Regional Offices

U.S. FISH & WILDLIFE SERVICE

Washington, D.C. Office:

Mailing Address:

U.S. Department of the Interior
U.S. Fish and Wildlife Service
Division of Endangered Species
1849 C St., N.W. - Mail Stop 420ARLSQ
Washington, D.C. 20240
(202) 208-4646

Express Mail Address:

U.S. Fish and Wildlife Service
Division of Endangered Species
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
(703) 358-2106

Region 1: (CA, HI, ID, NV, OR, WA, American Samoa, Territories of the Pacific Islands)

Regional Director
U.S. Fish and Wildlife Service
911 NE 11th Avenue
Portland, OR 97232-4181
Telephone: (503) 231-6118
Fax: (503) 231-2122

Region 2: (AZ, NM, OK, TX)

Regional Director
U.S. Fish and Wildlife Service
500 Gold Avenue S.W.
P.O. Box 1306
Albuquerque, NM 87103-1306
Telephone: (505) 248- 6920
Fax: (505) 248- 6922

Region 3: (IA, IL, IN, MI, MN, MO, OH, WI)

Regional Director
U.S. Fish and Wildlife Service
Bishop Henry Whipple Federal Building
1 Federal Drive
Fort Snelling, MN 55111-4056
Telephone: (612) 713-5350
Fax: (612) 713-5292

Region 4: (AL, AR, FL, GA, KY, LA, MS, NC, PR, SC, TN, U.S. VI)

Regional Director
U.S. Fish and Wildlife Service
1875 Century Blvd.
Atlanta, GA 30345
Telephone: (404) 679-4000
Fax: (404) 679-4006

Region 5: (CT, DC, DE, MA, MD, ME, NH, NJ, NY, PA, RI, VA, VT, WV)

Regional Director
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, MA 01035-9589
Telephone: (413) 253-8200
Fax: (413) 253-8308

Region 6: (CO, KS, MT, NE, ND, SD, UT, WY)

Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Lake Plaza North Building
134 Union Blvd., 4th Floor
Lakewood, CO 80228
Telephone: (303) 236-7920
Fax: (303) 236-6958

Region 7: (AK)

Regional Director
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, AK 99503
Telephone: (907) 786-3542
Fax: (907) 786-3350

NATIONAL MARINE FISHERIES SERVICE

Washington, D.C. Office:

Headquarters Office
National Marine Fisheries Service
Endangered Species Division
Office of Protected Resources
1315 East-West Highway, PR 3
Silver Spring, MD 20910
Telephone: (301) 713-1401
Fax: (301) 713-0376

National Marine Fisheries Service
Office of Fisheries Conservation and
Management
1315 East-West Highway
Silver Spring, MD 20910
(301) 713-2334

Northeast Region: (CT, DE, DC, IL, IN, ME, MD, MA, MI, MN, NH, NJ, NY, OH, PA, RI, VA, VT, WV, WI)

Regional Director
Northeast Regional Office
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 09130-2298
Telephone: (978) 281-9346
Fax: (978) 281-9394

Southeast Region: (AL, AR, FL, GA, IA, KS, KY, LA, MS, MO, NE, NM, NC, OK, PR, SC, TN, TX, U.S. VI)

Regional Director
Southeast Regional Office
National Marine Fisheries Service
9721 Executive Center Drive
St. Petersburg, FL 33702
Telephone: (727) 570-5312
Fax: (727) 570-5517

Southwest Region: (AZ, CA, GU, HI, NV, American Samoa, Territories of the Pacific Islands)

Regional Director
Southwest Regional Office
National Marine Fisheries Service
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802-4213
Telephone: (562) 980-4020
Fax: (562) 980-4027

Northwest Region: (CO, ID, MT, ND, OR, SD, UT, WA, WY)

Regional Director
Northwest Regional Office
National Marine Fisheries Service
7600 Sand Point Way, N.E.
BINC 15700 Building 1
Seattle, WA 98115-0070
Telephone: (206) 526-6150
Fax: (206) 526-6426

Alaska Region: (AK)

Regional Director
Alaska Regional Office
National Marine Fisheries Service
709 W. 9th Street, Federal Bldg. 461
Juneau, AK 99802-1668
Telephone: (907) 586-7235
Fax: (907) 586-7012

APPENDIX 15:

**FWS Federal Fish and Wildlife Permit
(Form 3-201)**

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE



FEDERAL FISH AND WILDLIFE PERMIT

3-201 (10/86)

2. AUTHORITY-STATUTES

REGULATIONS (ATTACHED)

3. NUMBER

4. RENEWABLE

5. MAY COPY

___ YES

___ YES

___ NO

___ NO

6. EFFECTIVE

7. EXPIRES

1. PERMITTEE

8. NAME AND TITLE OF PRINCIPAL OFFICER (IF # 1 IS A BUSINESS)

9. TYPE OF PERMIT

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED

11. CONDITIONS AND AUTHORIZATIONS:

- A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR § 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN BLOCK #2 ABOVE, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.
- B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL OR OTHER FEDERAL LAW.
- C. VALID FOR USE BY PERMITTEE NAMED ABOVE, AND HIS DESIGNATED AUTHORIZED AGENTS.

ADDITIONAL CONDITIONS AND AUTHORIZATIONS ON REVERSE ALSO APPLY

12. REPORTING REQUIREMENTS

ISSUED BY

TITLE

DATE

ORIGINAL

APPENDIX 16:

**Examples of Federal Register Notice of Receipt of a Permit Application
and
Notice of Availability of a NEPA Document**

The applicant requests amendment of their permit for take (capture and release) of the Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*) to include Monterey County, California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-797315

Applicant: Dr. Michael L. Morrison, Tucson, Arizona

The applicant requests a permit to take (capture, mark, and release) the salt marsh harvest mouse (*Reithrodontomys raviventris*) and the Fresno kangaroo rat (*Dipodomys nitratoides exilis*) at the Lemoore Naval Air Station in Fresno, California to conduct population/habitat studies and to determine presence or absence of the species for the purpose of scientific research and for enhancing its survival. These studies were previously authorized under the Regional Director's permit no. PRT-702631.

Permit No. PRT-798017

Applicant: Habitat Restoration Group, Felton, California

The applicant requests a permit to take (capture and release) the Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*) in Santa Cruz and Monterey Counties, California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-798025

Applicant: California Desert Studies Consortium, Fullerton, California

The applicant requests a permit to take (capture, mark, and release) the Mohave tui chub (*Gila bicolor mohavensis*) in Lake Tuendae, Desert Studies Center, Baker, California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-798003

Applicant: North State Resources, Inc., Redding, California

The applicant requests a permit to take (harass by survey, collect and sacrifice voucher specimens) the conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus wootoni*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in vernal pools throughout the species' range in California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-798015

Applicant: Mr. Michael Skenfield, Murphys, California

The applicant requests a permit to take (harass by survey, collect and sacrifice voucher specimens) the conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in vernal pools throughout the species' range in northern California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-795931

Applicant: Biota Biological Consulting, Sacramento, California

The applicant requests amendment of their permit to include take (harass by survey, collect and sacrifice) of the conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), and Riverside fairy shrimp (*Streptocephalus wootoni*) in vernal pools throughout the species' range in California to determine presence or absence of the species for the purpose of enhancing its survival.

Permit No. PRT-798018

Applicant: Golden Gate Raptor Observatory, San Francisco, California

The applicant requests a permit to take (capture, band, and release) the peregrine falcon (*Falco peregrinus*) in the Golden Gate National Recreation Area, Marin County, California for the purpose of enhancing its survival.

DATES: Written comments on the permit applications must be received on or before March 2, 1995.

ADDRESSES: Written data or comments should be submitted to the Chief, Division of Consultation and Conservation Planning, Ecological Services, U.S. Fish and Wildlife Service, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181. Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT:

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents, within 30 days of the date of publication of this notice, to the following office: U.S. Fish and Wildlife Service, Ecological Services, Division of Consultation and Conservation Planning, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181. Telephone: 503-231-2063; FAX: 503-

231-6243. Please refer to the respective permit number for each application when requesting copies of documents. [The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*)]

Dated: January 20, 1995.

Thomas Dwyer,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 95-2278 Filed 1-30-95; 8:45 am]

BILLING CODE 4310-55-P

Availability of an Environmental Assessment and Finding of No Significant Impact, and Receipt of an Application for an Incidental Take Permit for La Costa Villages, Carlsbad, CA

AGENCY: Fish and Wildlife Service, Interior Department.

ACTION: Notice.

SUMMARY: Fieldstone/La Costa Associates and the City of Carlsbad, California (applicants) have applied for an incidental take permit from the Fish and Wildlife Service (Service) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The proposed permit would authorize take of the threatened coastal California gnatcatcher (*Poliptila californica californica*) in San Diego County, California, for a period of 30 years. The proposed taking is incidental to planned home and road construction on 1,940 acres of land primarily owned by Fieldstone/La Costa Associates.

This notice advises the public that the Service has re-opened the comment period on the permit application and the environmental assessment (EA). The permit application includes a Habitat Conservation Plan (HCP), two HCP addendums, and an Implementing Agreement (IA). The EA package includes an EA, EA addendum, and a draft Finding of No Significant Impact (FONSI) which concludes that issuing the incidental take permit is not a major Federal action significantly affecting the quality of the human environment, within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969, as amended.

This notice is provided pursuant to section 10(c) of the Act and NEPA regulations (40 CFR 1506.6). The Service will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of

the Act. If it is determined that the requirements are met, a permit will be issued for the incidental take of the coastal California gnatcatcher. The final NEPA and permit determinations will not be completed until after the end of the 30-day comment period and will fully consider all public comments received during the comment period.

This notice supplements an earlier notice published in the **Federal Register** on October 28, 1994 (59 FR 54207). That notice announced an initial 30-day public comment period on the HCP, first HCP addendum, and draft EA. The draft EA was not available for public review until two weeks into the initial 30-day comment period. Subsequently, an addendum to the draft EA, a second addendum to the HCP, and an IA were completed that include a description of a change in mitigation for a portion of the proposed project. Consequently, the Service has re-opened the period for public comment on the NEPA documents and the complete application package, as revised.

DATES: Written comments on the HCP, HCP addendums, IA, EA, EA addendum, and draft FONSI should be received on or before March 2, 1995.

ADDRESSES: Comments should be addressed to Mr. Gail Kobetich, Field Supervisor, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008. Comments may be sent by facsimile to telephone (619) 431-9618. Please refer to permit No. PRT-795759 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Gail Kobetich (Field Supervisor) or Ken Corey (Biologist) at the above address, or telephone (619) 431-9440.

Individuals wishing copies of the documents should immediately contact Ken Corey. Documents also will be available for public inspection, by appointment, during normal business hours at the above address.

SUPPLEMENTARY INFORMATION: Proposed grading and construction activities would directly impact 30 of 48 pairs of the threatened coastal California gnatcatcher (gnatcatcher) and 550 of 1,064 acres of suitable gnatcatcher habitat on-site (506 of 944 acres of coastal sage scrub and 44 of 120 acres of southern maritime chaparral). In addition, 254 of 307 acres of grassland and 69 of 114 acres of riparian scrub/woodland would be directly impacted on-site. Approximately 18 pairs of gnatcatchers, 438 acres of coastal sage scrub, 76 acres of southern maritime chaparral, and 173 acres of associated habitats will be conserved and managed on-site in perpetuity. In addition, the

applicants will provide \$1,000,000 for purchase of an off-site mitigation parcel, within the City of Carlsbad, to be approved by the Service.

The applicants have requested the issuance of permits (immediately or when a species is listed) under section 10(a) of the Act that would authorize incidental take, in accordance with the terms of the HCP, for up to 66 sensitive species listed in the HCP. Of these species, the coastal California gnatcatcher is the only federally-listed species observed on-site. Section 10(a) permits are issued only for federally-listed species; however, unlisted species that subsequently become listed, and are adequately conserved by the original HCP, can be added by permit amendment.

A concern has been raised regarding the consistency of the HCP with certain subarea and subregional plans under the statewide Natural Community Conservation Planning program (NCCP) (see 59 FR 54208). All interested agencies, organizations, and individuals are urged to provide comments on the permit application, NEPA documents, and the NCCP consistency issue. All comments received by the closing date will be considered in finalizing NEPA compliance and permit issuance or denial.

The Service will publish a record of its final action in the **Federal Register**.

Dated: January 25, 1995.

Thomas J. Dwyer,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 95-2279 Filed 1-30-95; 8:45 am]

BILLING CODE 4310-55-P

National Park Service

Committee for the Preservation of the White House; Meeting

In compliance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the Committee for the Preservation of the White House. The meeting will be held at the Department of Commerce, Washington, DC at 1 p.m., Friday, February 17, 1995. It is expected that the agenda will include policies, goals and long range plans. The meeting will be open, but subject to appointment and security clearance requirements, including clearance information by February 10, 1995.

Inquiries may be made by calling the Committee for the Preservation of the White House between 9 a.m. and 4 p.m., weekdays at (202) 619-6344. Written comments may be sent to the Executive Secretary, Committee for the

Preservation of the White House, 1100 Ohio Drive, SW., Washington, DC 20242.

Dated: January 18, 1995.

James I. McDaniel,

Executive Secretary, Committee for the Preservation of the White House.

[FR Doc. 95-2256 Filed 1-30-95; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before January 21, 1995. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013-7127. Written comments should be submitted by February 15, 1995.

Carol D. Shull,

Chief of Registration, National Register.

ALABAMA

Jefferson County

Arlington Park, 800-840 First St. W., 815-909 Second St. W. and 100-269 Munger Ave., Birmingham, 95000097

Lauderdale County

Seminary—O'Neal Historic District, Roughly, Seminary St. between Hermitage Dr. and Irvine Ave. and Irvine between Seminary and Wood Ave., Florence, 95000092

DELAWARE

New Castle County

Merestone, 1610-1620 Yeatman's Mill Rd., Mill Creek Hundred (Delaware); Yeatman's Station Rd., New Garden Township (Pennsylvania), Newark vicinity, 95000093

IOWA

Humboldt County

Renwick Generating Plant, 103 N. Field St., Renwick, 95000099

Jackson County

Chicago, Milwaukee & St. Paul Narrow Gauge Depot—LaMotte (Advent & Development of Railroads in Iowa MPS), Market St., LaMotte, 95000105

Polk County

Camp Dodge Pool District, Buildings A22-A24, Camp Dodge, Johnston, 95000098

LOUISIANA

Terrebonne Parish

Cook, Herman Albert, House, 515 W. Main St., Houma, 95000107

Sec. 21;

Sec. 28;

Sec. 29, N $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$;

Sec. 30, lots 1, 4, and 6, N $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ NE, NE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, and S $\frac{1}{2}$ SE $\frac{1}{4}$;

Sec. 31, lots 1 to 4 inclusive, E $\frac{1}{2}$, and E $\frac{1}{2}$ W $\frac{1}{2}$;

Sec. 32;

Sec. 33.

T. 30 S., R. 38 E.,

All of the following land lying north of the northern right-of-way boundary of the highway known as the Redrock Randsburg Road:

Sec. 4, lot 2 of NE $\frac{1}{4}$, and E $\frac{1}{2}$ lot 2 of NW $\frac{1}{4}$.

Sec. 6, lot 1 of NE $\frac{1}{4}$, lot 1 of NW $\frac{1}{4}$, lot 2 of NE $\frac{1}{4}$, lot 2 of NW $\frac{1}{4}$, lot 1 of SW $\frac{1}{4}$, lot 2 of SW $\frac{1}{4}$, and SE $\frac{1}{4}$.

The area within the withdrawal contains approximately 16,560 acres.

Congress has mandated all the public lands described above be conveyed to the State of California, subject to valid existing rights, for inclusion in Red Rock Canyon State Park (California Desert Protection Act, 108 Stat. 4471, sec. 701.) The purpose of the proposed withdrawal is to protect the park values of this designated area until the lands can be conveyed to the State of California pursuant to the aforementioned act.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the California State Director of the Bureau of Land Management.

A public meeting is required to be held regarding the proposed withdrawal. Upon determination by the authorized officer of the location and date of the meeting, a notice of time and place will be published in the **Federal Register** and in a local newspaper at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300. Records relating to the application are available for examination in the BLM Public Room, 2800 Cottage Way, Sacramento, CA 95825.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date.

The temporary uses which will be permitted during this segregative period

are land uses consistent with the California Desert Conservation Area Plan and permitted by the Memorandum of Understanding between the Bureau of Land Management and the California Department of Parks and Recreation. Existing rights are not affected by this action.

David M. McIlroy

Chief, Branch of Lands

[FR Doc. 95-12205 Filed 5-17-95; 8:45 am]

BILLING CODE 4310-40-P

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for reinstatement approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Service Clearance Officer and the Office of Management and Budget, Paperwork Reduction Project (1018-0009) Washington, D.C. 20503, telephone 202-395-7340.

Title: Woodcock Wing Collection Envelope

OMB Approval Number: 1018-0009

Abstract: The Migratory Bird Treaty Act authorizes and directs the Secretary of the Interior to determine to what extent migratory game birds may be hunted. For several species of game birds, including the woodcock, this determination is based primarily on biological information gathered through surveys. Survey cooperators provide data on their harvests and hunting activities, and from each bird taken, they submit one wing for certain biological determinations.

Service Form Number: 3-156A.

Frequency: On occasion.

Description of Respondents: Individuals and households.

Completion Time: The overall reporting burden is estimated to average 4 minutes per response with a response rate average of 5 responses per respondent.

Annual Responses: 2,000.

Annual Burden Hours: 670.

Service Clearance Officer: Phyllis H. Cook, 703-358-1943 Mail Stop-224

Arlington Square, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

Dated: April 14, 1995.

John J. Doggett,

Acting Assistant Director—Refuges and Wildlife.

[FR Doc. 95-12224 Filed 5-17-95; 8:45 am]

BILLING CODE 4310-55-M

Endangered and Threatened Species Permit Application

AGENCY: Fish and Wildlife, Interior.

ACTION: Notice of document availability; request for comments.

Availability of an Environmental Assessment and Receipt of an Application for a Permit to Allow Incidental Take of Threatened and Endangered Species by Murray Pacific Corporation on its Mineral Tree Farm in Lewis County, Washington.

SUMMARY: This notice advises the public that Murray Pacific Corporation (Applicant) has applied to the U.S. Fish and Wildlife Service (FWS) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Applicant has requested the permit as an amendment to their existing permit (PRT-777837) authorizing incidental take of the northern spotted owl, which was issued on September 24, 1993, and have amended their existing Habitat Conservation Plan (HCP). The application has been assigned permit number PRT-777837. The Applicant has also requested to enter into a consensual agreement with the U.S. National Marine Fisheries Service (NMFS) to address the needs of anadromous salmonids being considered for listing under the Act, and with the FWS to conserve other fish and wildlife species which may be associated with habitats on their Mineral Tree Farm in Lewis County, Washington (Tree Farm). The requested permit would authorize the incidental take of all species presently listed under the Act, that may occur on the Applicant's Tree Farm. The proposed incidental take would occur as a result of timber harvest activities in the various habitat types that occur now, and will occur on the Tree Farm during the term of the proposed permit. The HCP Amendment includes an agreement for the issuance of additional permits for the incidental take of species not presently listed under the Act, but which may become listed during the term of the proposed permit, and which may occur in habitats on the Tree Farm.

The FWS in conjunction with NMFS announce the availability of an Environmental Assessment (EA) for the proposed issuance of the incidental take permit and signing of the agreement. The FWS is taking administrative responsibility for announcing the availability of the aforementioned documents. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the permit application and EA should be received on or before June 19, 1995.

ADDRESSES: Comments regarding the application or EA should be addressed to Mr. Curt Smitch, Assistant Regional Director, U.S. Fish and Wildlife Service, 3773 Martin Way East, Building C—Suite 101, Olympia, Washington 98501. Please refer to permit No. PRT-777837 when submitting comments. Individuals wishing copies of the application or EA for review should immediately contact the above office (360-534-9330).

FOR FURTHER INFORMATION CONTACT: Craig Hansen, U.S. Fish and Wildlife Service, 3773 Martin Way East, Building C—Suite 101, Olympia, WA., 98501; (360) 412-5465. Steve Landino, National Marine Fisheries Service, 3773 Martin Way East, Building C—Suite 101, Olympia, WA., 98501; (360) 412-5469.

SUPPLEMENTARY INFORMATION:

Background

Under section 9 of the Act and its implementing regulations, "taking" of a threatened or endangered species, is prohibited. However, the FWS and NMFS, under limited circumstances, may issue permits to take threatened and endangered wildlife species if such taking is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for threatened species are in 50 CFR 17.32 and in 50 CFR 17.22 for endangered species.

The Applicant proposes to implement an amendment to their HCP for the northern spotted owl that will allow timber harvest on portions of approximately 55,000 acres of their Tree Farm. The Applicant's proposed timber harvest may result in the take, as defined in the Act and its implementing regulations, of listed species. The HCP and permit would be in effect through the year 2094. The application includes an amended HCP and Implementation Agreement.

The Applicant proposes to mitigate for the incidental take of all listed species by maintaining at least 10 percent of the Tree Farm in non-harvestable reserves for the term of the

permit. Reserves would be established during a Watershed Analysis process which the Applicant would complete by 2004. The expected result of Watershed Analysis would place a majority of the reserves in riparian zones. In addition, the Applicant would be committed to a variety of special measures intended to mitigate and minimize impacts to the habitat types which occur on the Tree Farm, and specific State and Federal species of concern including the grizzly bear, gray wolf, bald and golden eagles, goshawk, Larch Mountain salamander, Townsend's big-eared bat, long-legged myotis (bat), and others. The Applicant also proposes to mitigate for impacts to anadromous salmonids through habitat conservation measures for these species.

The EA considers the environmental consequences of 5 alternatives, including the proposed action and no-action alternatives. The proposed action alternative is the issuance of a permit under section 10(a) of the Act that would authorize incidental take of all listed species, and signing of the agreement for currently unlisted species, that may occur in the habitats on the Applicant's Tree Farm. The proposed action would require the Applicant to implement their amended Habitat Conservation Plan. Under the no-action alternative, the Applicant would continue to implement their existing northern spotted owl HCP, and additional incidental take permits would not be issued. The third alternative is to maintain approximately 29 percent of the Tree Farm in reserves generated according to Watershed Analysis prescriptions. The fourth alternative is to maintain reserves on about 17 percent of the Tree Farm, and would allow the Applicant to harvest timber on a limited basis in the outer half of riparian reserves. The fifth alternative would place about 5 percent of the Tree Farm in riparian reserves with additional protection on steep slopes with wet talus habitat, the Applicant would commit to and complete further Watershed Analysis by the year 2004, and the Applicant would retain all live conifer and conifer snags greater than 40 inches in diameter at breast height.

Dated: May 12, 1995.

Thomas Dwyer,

Deputy Regional Director, Region 1, Fish and Wildlife Service, Portland, Oregon.

[FR Doc. 95-12204 Filed 5-17-95; 8:45 am]

BILLING CODE 4310-55-P

National Park Service

National Capital Memorial Commission; Public Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the National Capital Memorial Commission will be held on Tuesday, June 20, 1995, at 1 p.m., at the National Building Museum, Room 312, 5th and F Streets, NW.

The Commission was established by Public Law 99-652, the Commemorative Works Act, for the purpose of preparing and recommending to the Secretary of the Interior, Administrator, General Services Administration, and Members of Congress broad criteria, guidelines, and policies for memorializing persons and events on Federal lands in the National Capital Region (as defined in the National Capital Planning Act of 1952, as amended), through the media of monuments, memorials and statues. It is to examine each memorial proposal for adequacy and appropriateness, make recommendations to the Secretary and Administrator, and to serve as information focal point for those persons seeking to erect memorials on Federal land in the National Capital Region.

The members of the Commission are as follows:

Director, National Park Service
Chairman, National Capital Planning Commission
The Architect of the Capitol
Chairman, American Battle Monuments Commission
Chairman, Commission of Fine Arts
Mayor of the District of Columbia
Administrator, General Services Administration
Secretary of Defense

The purpose of the meeting will be to consider sites for the World War II Memorial. The meeting will be open to the public. Any person may file with the Commission a written statement concerning the matters to be discussed. Persons who wish to file a written statement or testify at the meeting or who want further information concerning the meeting may contact the Commission at 202-619-7097. Minutes of the meeting will be available for public inspection 4 weeks after the meeting at the Office of Land Use Coordination, National Capital Region, 1100 Ohio Drive, SW., Room 201, Washington, D.C., 20242.

Dated: May 11, 1995.

Robert Stanton,

Regional Director, National Capital Region.

[FR Doc. 95-12260 Filed 5-17-95; 8:45 am]

BILLING CODE 4310-70-M

boundary and subdivisional lines, and the survey of the centerline of the May to Patterson Road and Lot 2 in section 32, T. 15 N., R. 22 E., Boise Meridian, Idaho, Group No. 887, was accepted, May 24, 1995.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

All inquiries concerning the survey of the above described land must be sent to the Chief, Branch of Cadastral Survey, Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

Dated: May 31, 1995.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 95-14109 Filed 6-8-95; 8:45 am]

BILLING CODE 4310-GG-M

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for reinstatement approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Service Clearance Officer and the Office of Management and Budget, Paperwork Reduction Project (1018-0066) Washington, D.C. 20503, telephone 202-395-7340.

Title: Marking, Tagging and Reporting Regulations for Polar Bear, Sea Otter and Walrus.

OMB Approval Number: 1018-0066.

Abstract: The Marine Mammal Protection Act of 1972, (Act) as amended, authorized the Secretary of the Interior to prescribe marking, tagging and reporting regulations in 50 CFR 18.23(f), for Alaska Natives harvesting polar bear, seat otter, and walrus. Under the Act Alaska Natives residing in Alaska and dwelling on the coast of the North Pacific or arctic Oceans may harvest these species for subsistence or handicraft purposes. The marking and tagging program is intended to gather reports of all kills made, and to tag or mark, as appropriate, skins, skulls and tusks of marine mammals killed to reduce illegal

trading in walrus ivory, polar bear and sea otter skins. The information collected is used by the Fish and Wildlife Service to improve its decision-making ability by substantially expanding the quality and quantity of harvest and biological data upon which future management decisions can be based. It provides the Service with the ability to make inferences about the condition and general health of the populations and to consider the importance and impact to these populations from such processes as development activities and habitat degradation.

Service Form Number(s): R7-50 (Walrus Certificate); R7-51 (Polar Bear Certificate); R7-52 (Sea Otter Certificate)

Frequency: On occasion.

Description of Respondents: Individuals and household.

Completion Time: The reporting burden is estimated to average 15 minutes per respondent; respondents will average 1.46 responses per year.

Annual Responses: 2,925.

Annual Burden Hours: 732.

Service Clearance Officer: Phyllis H. Cook, 703-358-1943, Mail Stop-224 Arlington Square, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

Dated May 22, 1995.

Rowan W. Gould,

Acting Assistant Director—Fisheries.

[FR Doc. 95-14087 Filed 6-8-95; 8:45 am]

BILLING CODE 4310-55-M

Endangered and Threatened Species Permit Application

AGENCY: Fish and Wildlife, Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement (EIS) on the Proposed Issuance of an Incidental Take Permit for Desert Tortoises in Clark County, Nevada.

SUMMARY: This notice advises the public that the Final Environmental Impact Statement (EIS) on the proposed issuance of an incidental take permit for desert tortoises in Clark County, Nevada is available. The Record of Decision will be published no sooner than 30 days from this notice.

FOR FURTHER INFORMATION CONTACT: Dolores Savignano, U.S. Fish and Wildlife Service, 1500 North Decatur Boulevard, #01, Las Vegas, Nevada 89108 or Carlos Mendoza, U.S. Fish and Wildlife Service, 4600 Kietzke Lane, Building C, Room 125, Reno, Nevada 89502.

Individuals wishing copies of this Final EIS should immediately contact Christine Robinson, Clark County

Manager's Office, 225 Bridger Avenue, Las Vegas, Nevada 89155. Copies of the Final EIS have been sent to all agencies and individuals who previously received copies of the Draft EIS and to all others who have already requested copies.

SUPPLEMENTARY INFORMATION:

A. Background

On April 2, 1990, the U.S. Fish and Wildlife Service (Service) issued a final rule (55 FR 12178) that determined the desert tortoise to be a threatened species under the Endangered Species Act of 1973, as amended (Act). That regulation became effective on the date of its publication in the **Federal Register**. Because of its listing as a threatened species, the desert tortoise is protected by the Act's prohibition against "taking." The Act defines "take" to mean: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct. "Harm" is further defined by regulation as any act that kills or injures wildlife including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3).

The Service, however, may issue permits to carry out otherwise lawful activities involving take of endangered and threatened wildlife under certain circumstances. Regulations governing permits are in 50 CFR 17.22, 17.23, and 17.32. For threatened species, such permits are available for scientific purposes, enhancing the propagation or survival of the species, economic hardship, zoological exhibition or educational purposes, incidental taking, or special purposes consistent with the purposes of the Act.

Clark County; the cities of Las Vegas, North Las Vegas, Henderson, Mesquite, and Boulder City; and Nevada Department of Transportation (NDOT) (Applicants) submitted an application to the Service for a permit to incidentally take desert tortoises (*Gopherus agassizii*), pursuant to section 10(a)(1)(B) of the Act, in association with various proposed public and private projects in Clark County, Nevada. The proposed permit would allow incidental take of desert tortoises for a period of 30 years, resulting from development on up to 113,900 acres of private lands within Clark County, Nevada. The permit application was received September 28, 1994, and was accompanied by the *Clark County Desert Conservation Plan* (CCDCP), which serves as the Applicant's habitat

conservation plan and details their proposed measures to minimize, monitor, and mitigate the impacts of the proposed take on the desert tortoise.

The Applicants propose to expend \$1.35 million per year, and up to \$1.65 million per year for the first 10 years, to minimize and mitigate the potential loss of desert tortoise habitat. It is anticipated that the majority of these funds will be used to implement mitigation measures as described in the CCDCP. In addition, funds will be provided to State and Federal resource managers for implementing desert tortoise recovery measures recommended in the *Desert Tortoise* (Mojave Population) *Recovery Plan*, and for planning and managing lands both within and outside of desert wildlife management areas. The desert tortoise is only part of the desert ecosystem, and unless the various species of plants and animals which co-inhabit that system are likewise preserved, the status of the desert tortoise is likely to decline. Therefore, the needs of other plant and wildlife resources will be addressed, possibly avoiding the need to list these species as threatened or endangered under the Act in the future. The Applicants also propose to purchase a conservation easement that preserves, protects, and assures the management and study of the conservation values, and in particular the habitat of the desert tortoise, of more than 85,000 acres of non-Federal land in Clark County.

To minimize the impacts of take, the Applicants propose to provide a free pick-up and collection service for desert tortoises encountered in harm's way within Clark County. These desert tortoises will be made available for beneficial uses such as translocation studies and programs, research, education, zoos, museums, or other programs approved by the Service and Nevada Division of Wildlife. Sick or injured desert tortoises will be humanely euthanized. NDOT will incorporate specific measures into its operations to avoid or minimize impacts to desert tortoises. Clark County will also implement a public information and education program to benefit the desert tortoise and the desert ecosystem.

Clark County or the cities would approve the issuance of land development permits for otherwise lawful public and private project proponents during the 30-year period in which the proposed Federal permit would be in effect. Clark County or the cities would impose, and NDOT would pay, a fee of \$550 per acre of habitat disturbance to fund the measures to

minimize and mitigate the impacts of the proposed action on desert tortoises.

The underlying purpose or goal of the proposed action is to develop a program designed to ensure the continued existence of the species, while resolving potential conflicts that may arise from otherwise lawful private and public improvement projects.

B. Development of the Final EIS

This Final EIS has been developed by the U.S. Fish and Wildlife Service. In the development of this Final EIS, the Service initiated action to assure compliance with the purpose and intent of the National Environmental Policy Act of 1969, as amended (NEPA). Scoping activities were undertaken preparatory to developing a Draft EIS with a variety of Federal, State, and local entities. A Notice of Intent to prepare a Draft EIS was published February 4, 1994 (59 FR 5439); a public scoping meeting was held February 14, 1994; and a Notice of Availability of a Draft EIS and Receipt of an Application for an Incidental Take Permit for Desert Tortoises in Clark County, Nevada was published February 10, 1995 (60 FR 8058).

Potential consequences, in terms of adverse impacts and benefits associated with the implementation of each alternative selected for detailed analysis, were described in the Draft EIS. The Service received 13 letters of comment on the Draft EIS which focused on the following subject areas: (1) Survey and removal of desert tortoises; (2) translocation of tortoises to a sanctuary; (3) euthanasia of tortoises; (4) measurable criteria for short-term and long-term conservation goals; (5) tortoise adoption; (6) effects to other species and resources; and (7) financing implementation of the CCDCP.

Appendix A of the Final EIS contains copies of all comments received and responses to all comments received. The Final EIS was revised where appropriate based on public comment and review. Issues and potential consequences have remained identical from the draft to the final EIS.

C. Alternatives Analyzed in the Final EIS

Two alternatives were considered. Issuance of the permit with the mitigating, minimizing, and monitoring measures outlined in the CCDCP is the Service's preferred action and is discussed above. The Draft EIS outlined alternative measures that were considered by the Service prior to issuance of the permit. The other alternative selected for detailed evaluation was a No Action alternative.

The No Action alternative would benefit individual desert tortoises on private lands in the short-term, however, it has been determined that viable populations of desert tortoises will not persist in the urban areas over the long-term. The No Action alternative would, therefore, not provide the benefits of the long-term recovery efforts for the desert tortoise identified in the CCDCP. The No Action alternative was not identified as the preferred alternative because it would diffuse existing regional conservation planning efforts for the desert tortoise and possibly concentrate activity on individual project needs, not meet the purpose and needs of the Applicants, and not provide the long-term benefits to the desert tortoise. Additionally, the No Action alternative could result in adverse impacts to the social environment within Clark County due to constraints on land-use activities that would impact the desert tortoise.

Dated: June 1, 1995.

Thomas Dwyer,

Deputy Regional Director.

[FR Doc. 95-13901 Filed 6-8-95; 8:45 am]

BILLING CODE 4310-55-P

Finding of No Significant Impact for Incidental Take Permits for the Construction of Single-Family Residences at the Specific Site Locations Indicated Below in Travis County, Texas

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) has prepared an Environmental Assessment for issuance of a Section 10(a)(1)(B) permit for the incidental take of the federally endangered golden-cheeked warbler (*Dendroica chrysoparia*) during the construction and operation of single-family residences in Travis County, Texas.

Proposed Action

The proposed action is the issuance of permits under Section 10(a)(1)(B) of the Endangered Species Act to authorize the incidental take of the golden-cheeked warbler.

The Applicant (Steven G. Madere) plans to construct a single-family residence at the specific site indicated as Lot 22, Block H, Long Canyon Phase IIA, aka 9000 Bell Mountain Drive, Austin, Travis County, Texas (PRT-799859).

The Applicant (Larry Michael Beasley) plans to construct a single-family residence at the specific site

approximate time required to make their comments.

Open committee discussion. The committee will discuss data relevant to the new drug application (NDA) 20-569 ganciclovir intravitreal implant (Vitraser® Sterile Intravitreal Implant, Chiron Vision Corp.) for treatment of cytomegalovirus retinitis. The committee will also discuss data relevant to NDA 20-597 latanoprost (Xalatan™ Sterile Ophthalmic Solution, Pharmacia, Inc.) a topical ophthalmic drug indicated for the reduction of elevated intraocular pressure in patients with open-angle glaucoma and ocular hypertension.

FDA public advisory committee meetings may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. There are no closed portions for the meetings announced in this notice. The dates and times reserved for the open portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing

portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting may be requested in writing from the Freedom of Information Office (HFI-35), Food and Drug Administration, rm. 12A-16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting may be requested in writing from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

This notice is issued under section 10(a)(1) and (2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: November 13, 1995.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 95-28366 Filed 11-16-95; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. FR-3778-N-63]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: November 17, 1995.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Department of Housing and Urban Development, Room 7256, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708-1226; TDD number for the hearing- and speech-impaired (202) 708-2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1-800-927-7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: November 9, 1995.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 95-2828 Filed 11-16-95; 8:45 am]

BILLING CODE 4210-29-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of a Draft Environmental Impact Statement and Receipt of an Application for the Proposed Issuance of a Permit To Allow Incidental Take of Threatened and Endangered Species on Plum Creek Timber Company, L.P., Lands in the I-90 Corridor, King and Kittitas Counties, WA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability; request for comments.

SUMMARY: This notice advises the public that Plum Creek Timber Company, L.P. (Applicant) has applied to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together Services) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Applicant has also requested unlisted-species and safe-harbor provisions in an Implementation Agreement (Agreement) to cover vertebrate species which may be found in the planning area. The application has been assigned permit number PRT-808398. The requested permit would

authorize incidental take of currently listed threatened or endangered species that may occur within the planning area in King and Kittitas Counties, Washington, as a result of the Applicant's timber management activities. The unlisted-species provision provides for the issuance of further permits for the incidental take of species not presently listed under the Act, but which might become listed during the term of the proposed permit, and which might occur within the planning area.

The Services also announce the availability of a Draft Environmental Impact Statement (DEIS) for the proposed issuance of the incidental take permit and approval of the Agreement. All comments received will become part of the public record and may be released. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the permit application and DEIS should be received on or before January 7, 1996.

ADDRESSES: Comments regarding the application or DEIS, or requests for those documents, should be addressed to William Vogel, U.S. Fish and Wildlife Service, Pacific Northwest Habitat Conservation Plan Program, 3773 Martin Way East, Building C—Suite 101, Olympia, Washington 98501; (360) 534-9330. Please refer to permit No. PRT-808398 when submitting comments. Individuals wishing copies of the documents for review should immediately contact the office listed above. Copies of the documents are also available at the following libraries:

Wenatchee Public Library, Attention: Joy, 310 Douglas Street, Wenatchee, Washington 98801

University of Washington Library, Attention: Carolyn Aamot, Government Publications Department, 170 Suzzallo Library, Seattle, Washington 98195-2900

Seattle Public Library, Attention: Jeanette Voiland, Government Publications Department, 1000 Fourth Avenue, Seattle, Washington 98104

Evergreen State College, Attention: Lee Lyttle, Library Campus Parkway—L23100H, Olympia, Washington 98505

Central Washington University, Attention: Dr. Patrick McLaughlin, Library Collection Development, Ellensburg, Washington 98926

King County Library System, Attention: Cheryl Standley, Documents Department, 1111 110th Avenue Northeast, Bellevue, Washington 98004

FOR FURTHER INFORMATION CONTACT: William Vogel, U.S. Fish and Wildlife Service, or Steve Landino, National Marine Fisheries Service, at the office listed above.

SUPPLEMENTARY INFORMATION:

Background

Under section 9 of the Act and its implementing regulations, "taking" of threatened and endangered species is prohibited. However, the Service, under limited circumstances, may issue permits to take threatened or endangered wildlife species if such taking is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for threatened and endangered species are in 50 CFR 17.32 and 17.22.

The permit application includes a Habitat Conservation Plan (HCP) and the Agreement. In the HCP, the Applicant has addressed species conservation and ecosystem management on approximately 170,000 acres of its private land in the Cascade Mountains of Washington. The Applicant's ownership occurs in a "checkerboard" pattern in an area commonly referred to as the I-90 Corridor. The term "checkerboard" refers to alternate sections of public and private land. The "checkerboard" HCP planning area is approximately 419,000 acres in size. The term of the proposed permit is 50 years from the date of issuance, with a possible extension of an additional 50 years for safe-harbor provision purposes.

The Applicant is requesting a permit for the incidental take of northern spotted owls (*Strix occidentalis caurina*) (owls) which may occur as a result of timber harvest and related activities within a portion of the owl sites present on the Applicant's property. There are currently more than 100 owl sites that impact operations within the planning area. The Applicant plans to avoid the take of marbled murrelets (*Brachyramphus marmoratus*), but has included murrelets in the incidental take permit application in case some incidental take occurs. The Applicant has also included grizzly bears (*Ursus arctos* = *U.a. horribilis*) and gray wolves (*Canis lupus*) in the permit application to cover the circumstance where these species may occur on the subject property in the future and may at some point be subject to take. The Applicant has addressed numerous other species in their HCP and is requesting the unlisted-species and safe-harbor provisions in the Agreement for vertebrate species which may be found in habitats within the

planning area. At the time of termination for the HCP phase of the permit, the safe-harbor provision would provide the Applicant relief from regulatory restrictions on timber-management activities in habitats provided for listed species which are greater than the habitat amounts required under the HCP.

The HCP is designed to complement the Federal Northwest Forest Plan, and includes various forms of mitigation which are integral parts of the HCP. Mitigation includes a schedule of habitat amounts to be provided for each decade of the 50-year HCP. These habitats include eight stand-structure types (ranging from early-successional stages, such as stand initiation, to late-successional stages, such as old growth) and habitat for owls. Owl-habitat projections include projections for nesting, roosting, and foraging habitat, and for foraging and dispersal habitat. Mitigation for gray wolves and grizzly bears include avoidance of timber harvest and road construction in certain habitats, limits to road densities, provision of visual cover, and other specific management prescriptions. Minimum prescriptions are also provided for riparian and wetland areas, and Watershed Analysis will be completed on an accelerated basis. Specific prescriptions to minimize and mitigate impacts will also be implemented for other species and special habitats.

The DEIS considers four alternatives, including the Proposed Action and the No-action Alternatives. Under the No-action Alternative, the Applicant would avoid the take of all Federally listed species and no permit would be issued. Under the Riparian Alternative, emphasis for conservation of fish and wildlife species would be placed in riparian and wetland areas; other portions of the ownership would be managed for aggressive timber harvest. Under the Dispersal Alternative, riparian areas would be managed for fish and wildlife, but, in addition, upland areas would be managed to provide dispersal habitat for owls. The Proposed Action builds upon the benefits of the previous alternatives. It places emphasis for conservation on riparian and wetland areas, but, also, commits to implementation of the Applicant's Environmental Principles; provides for nesting, roosting, and foraging habitat for owls, and provides for habitat deferrals for owls and goshawks. The Proposed Action includes specific mitigation for other currently listed and unlisted wildlife species such as the gray wolf, grizzly bear, Larch Mountain salamander, and

other vertebrate species and special habitats.

Dated: November 6, 1995.

Thomas J. Dwyer,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 95-27962 Filed 11-16-95; 8:45 am]

BILLING CODE 4310-55-P

National Park Service

Fort McHenry National Monument and Historic Shrine, MD; Concession Contract

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to issue a concession contract for operations currently conducted by Evelyn Hill Corporation authorizing the continuation of gift and souvenir sales for the public at Fort McHenry National Monument And Historic Shrine, Baltimore, Maryland, for a period of five (5) years from January 1, 1996 through December 31, 2000.

EFFECTIVE DATE: January 16, 1996.

ADDRESS: Interested parties should contact the Superintendent, Fort McHenry National Monument and Historic Shrine, Baltimore, Maryland 21230-5393, for information as to the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract renewal has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing contract which expired by limitation of time on December 31, 1992, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the contract and in the negotiation of a new contract as defined in 36 CFR, Section 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60) day following publication of this notice to be considered and evaluated.

Dated: November 2, 1995.

Warren Beach,

Acting Director, Northeast Field Area.

[FR Doc. 95-28363 Filed 11-16-95; 8:45 am]

BILLING CODE 4310-70-M

General Management Plan/Development Concept Plan, Draft Environmental Impact Statement, Natural Bridges National Monument, UT

AGENCY: National Park Service, Interior.

ACTION: Availability of draft environmental impact statement and general management plan/development concept plan for Natural Bridges National Monument.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of a Draft Environmental Impact Statement/General Management Plan/Development Concept Plan (DEIS/GMP) for Natural Bridges National Monument, Utah.

DATES: The DEIS/GMP will remain available for public review until January 16, 1996. If any public meetings are held concerning the DEIS/GMP, they will be announced at a later date.

ADDRESSES: Comments of the DEIS/GMP should be sent to the Superintendent, Natural Bridges National Monument, Box 1—Natural Bridges, Lake Powell, Utah 84533-0101. Public reading copies of the DEIS/GMP will be available for review at the following locations:

Office of the Superintendent, Natural Bridges National Monument, Box 1—Natural Bridges, Lake Powell, Utah 84533-0101, (801) 692-1234
Office of Public Affairs, National Park Service, Department of the Interior, 18th and C Streets NW., Washington, DC 20240, Telephone: (202) 208-6843.

SUPPLEMENTARY INFORMATION: The DEIS/GMP analyzes two alternatives which are being considered to direct the management and development of Natural Bridges National Monument for a period of about ten years.

The alternatives include: (1) No Action—Under this alternative, existing facilities and management actions would remain unchanged; (2) Proposed Plan—Under the proposal, the administrative/visitor center would be expanded to provide 900-1,400 square feet of office and sales space; removal and rehabilitation of a small picnic area, the addition of a comfort station and benches for visitor comfort along the loop road; the addition of housing for 12 future employees; redesign of the visitor

center parking area to improve vehicular circulation; and the addition of a garage and storage building in the maintenance area.

The DEIS/GMP in particular evaluates the environmental consequences of the proposed action and the other alternative on water resources, flood plains, wetlands, geology, soils, vegetation, wildlife, threatened and endangered species, air quality, visual interpretation, socioeconomic data, health and safety, law enforcement, other agencies, management and operations, and cumulative impacts. The environmental consequences of the proposed action and alternative considered are fully disclosed in the DEIS/GMP/DCP.

FOR FURTHER INFORMATION: Contact Superintendent, Natural Bridges National Monument, at the above address and telephone number.

Dated: October 20, 1995.

Roy Everhart,

Intermountain Field Area, National Park Service.

[FR Doc. 95-28379 Filed 11-16-95; 8:45 am]

BILLING CODE 4310-70-P

Advisory Commission for the San Francisco Maritime National Historical Park; Meeting

Agenda for the December 7, 1995 Meeting of the Advisory Commission for the San Francisco Maritime National Historical Park

Public Meeting, Fort Mason, Building C, Room 370, 9:30 am-12:15 pm

9:30 am—At Building C

Welcome—Neil Chaitin, Chairman,
Proclamation Presentation—Neil Chaitin, Chairman,
Opening Remarks—Neil Chaitin, Chairman

William G. Thomas, Superintendent
Old Business
Approval of Minutes

9:45 am—Orientation to Park Departments

Collections, Judy Hitzeman,
Supervisory Archivist
Small Craft, William Doll, Curator of Small Craft

10:05 am—Update—Museum Accreditation San Francisco Maritime National Historical Park, Marc Hayman—Chief, Interpretation and Resource Management

10:15 am—Update—General Management Plan, William G. Thomas, Superintendent

10:30 am—Break.

10:45 am—FY-96 Ships Division Priorities, Acting Ships Manager

Name	Permit No.	Issuance date
Ray Griffiths	800793	6/22/95
Zentner and Zentner, Incorporated	800794	6/22/95
James Deacon	794782	6/27/95
Patricia Ann Hobell	789266	6/27/95
San Marino Environmental Consultants	781377	7/3/95
Louis Courtois	802446	7/20/95
Elaine Harding-Smith	802445	8/4/95
Biosearch Wildlife Surveys	768251	8/9/95
Jepson Prairie Reserve	800777	8/9/95
Donald L. Davis	800797	8/9/95
Carl J. Page	802094	8/11/95
Patricia Baird	802107	8/11/95
Manomet Observatory for Conservation Sciences	800922	8/11/95
John E. Moeur	802092	8/13/95
Stephen J. Myers	804203	8/13/95
A.G. Crook Company	802456	8/18/95
California Department of Water Resources	801821	9/5/95
Regional Environmental Consultants	797665	9/5/95
Lisa Webber	802086	9/5/95
Thomas Roberts	802103	9/5/95
Carolee Caffrey	802104	9/5/95
Robert A. Aramayo	804207	9/20/95
Assistant Regional Director-Ecological Services, Region 1, U.S. Fish and Wildlife Service	702631	10/19/95
Arthur Davenport	802450	10/30/95
Patrice Ashfield	807056	11/3/95
Enterprise Advisory Services, Incorporated	806723	11/10/95
Janet Randall	799486	12/4/95
Becky Yeager	804076	12/6/95

FOR FURTHER INFORMATION CONTACT: Chief, Division of Consultation and Conservation Planning, U.S. Fish and Wildlife Service, Ecological Services, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181 (tel: 503-231-2063; fax: 503-231-6243).

Dated: February 9, 1996.

Thomas Dwyer,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 96-3565 Filed 2-15-96; 8:45 am]

BILLING CODE 4310-55-P

Availability of an Environmental Assessment and Receipt of an Application Submitted by Ms. Suzanne Gasque and Ms. Jewel Felkel for an Incidental Take Permit for Red-cockaded Woodpeckers in Association With Timber Harvesting Activities on Their Property in Orangeburg County, South Carolina

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Ms. Suzanne Gasque and Ms. Jewel Felkel (Applicants) have applied to the U.S. Fish and Wildlife Service for an incidental take permit pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The proposed permit would authorize the incidental take of a federally endangered species, the red-cockaded woodpecker *Picoides borealis* (RCW)

known to occur on property owned by the Applicants in Orangeburg County, South Carolina. The Applicants propose to harvest 106 acres of timber on their 446-acre property located approximately 3.5 miles south of Ellore. The proposed permit would authorize incidental take of RCWs on this property in exchange for mitigation elsewhere as described further in the Supplementary Information Section below.

The Service also announces the availability of an environmental assessment (EA) and habitat conservation plan (HCP) for the incidental take application. Copies of the EA or HCP may be obtained by making a request to the Regional Office address below. Requests must be submitted in writing to be processed. This notice is provided pursuant to Section 10^c of the Act and National Environmental Policy Act Regulations (40 CFR 1506.6).

DATES: Written comments on the permit application, EA and HCP should be sent to the Regional Permit Coordinator in Atlanta, Georgia, at the address below and should be received on or before March 18, 1996.

ADDRESSES: Persons wishing to review the application, HCP, and EA may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office; or the

Asheville, North Carolina or Charleston, South Carolina Field Offices. Written data or comments concerning the application, EA, or HCP should be submitted to the Regional Office. Please reference permit under PRT-810934 in such comments.

U.S. Fish and Wildlife Service (AES/TE), 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345, Telephone: 404/679-7110, Fax: 404/679-7081

Field Supervisor, U.S. Fish and Wildlife Service, 160 Zillicoa Street, Asheville, North Carolina 28801, Telephone: 704/258-3939

Field Supervisor, U.S. Fish and Wildlife Service, 217 Fort Johnson Road, Charleston, South Carolina 29422-2559, Telephone: 803/727-4707.

FOR FURTHER INFORMATION CONTACT: Janice Nicholls at the Asheville, North Carolina Field Office, or Lori Duncan at the Charleston, South Carolina, Field Office, or Rick G. Gooch at the Atlanta, Georgia, Regional Office.

SUPPLEMENTARY INFORMATION: The RCW is a territorial, non-migratory cooperative breeding bird species. RCWs live in social units called groups which generally consist of a breeding pair, the current year's offspring, and one or more helpers (normally adult male offspring of the breeding pair from previous years). Groups maintain year-round territories near their roost and nest trees. The RCW is unique among the North American woodpeckers in

that it is the only woodpecker that excavates its roost and nest cavities in living pine trees. Each group member has its own cavity, although there may be multiple cavities in a single pine tree. The aggregate of cavity trees is called a cluster. RCWs forage almost exclusively on pine trees and they generally prefer pines greater than 10 inches diameter at breast height. Foraging habitat is contiguous with the cluster. The number of acres required to supply adequate foraging habitat depends on the quantity and quality of the pine stems available.

The RCW is endemic to the pine forests of the Southeastern United States and was once widely distributed across 16 States. The species evolved in a mature fire-maintained ecosystem. The RCW has declined primarily due to the conversion of mature pine forests to young pine plantations, agricultural fields, and residential and commercial developments, and to hardwood encroachment in existing pine forests due to fire suppression. The species is still widely distributed (presently occurs in 13 southeastern States), but remaining populations are highly fragmented and isolated. Presently, the largest populations occur on federally owned lands such as military installations and national forests.

In South Carolina, there are an estimated 681 active RCW clusters as of 1994; 67 percent are on Federal lands, 6 percent are on State lands, and 27 percent are on private lands. The populations on public lands are generally stable, and in some cases are increasing. The overall population trend on private lands in South Carolina, on the other hand, is downward. Most RCW populations on private lands are relatively small and isolated.

The Applicant's land in Orangeburg County hosts a small and isolated population of RCWs. As of 1995, there were 2 active RCW clusters; 1 breeding group and 1 solitary adult male. The nearest known RCW group occurs on private lands approximately 2.5 miles to the north of the Gasque/Felkel tract near Ellore. The nearest known RCW concentration (greater than 5 groups) occurs over 10-15 miles away on the Manchester State Forest/Shaw Air Force Base to the north in Sumter County, and on the privately-owned Norfolk Southern property located south of the Gasque/Felkel tract in Dorchester County. The Applicants propose to harvest timber on their property for supplemental income. Timber harvesting activities may result in death of, or harm to, any remaining RCWs through the loss of nesting and foraging habitat.

The EA considers the environmental consequences of three alternatives, including the proposed action. The proposed action alternative is issuance of the incidental take permit and implementation of the HCP as submitted by the Applicants. The HCP will provide for the provisioning of 4 clusters with artificial starts and cavities on suitable habitat on the Sandhills State Forest in Chesterfield County. The Sandhills State Forest is part of a designated recovery population for the RCW in the South Carolina Sandhills Physiographic Province. The State Forest has a total of 46,000 acres of which 40,000 acres are manageable pine lands (predominately longleaf pine). The State Forest currently has 55 active RCW groups with a long-term goal of increasing the population to assist with the recovery of the South Carolina Sandhills population. The HCP will also involve the translocation of any juveniles produced by the breeding pair on the Gasque/Felkel property to the provisioned sites at the Sandhills State Forest. Finally, the HCP will involve monitoring the provisioned sites for a specified time period at the State Forest to determine success of the provisioning efforts. The HCP provides a funding source for the mitigation measures.

Dated: January 9, 1996.

Noreen K. Clough,

Regional Director.

[FR Doc. 96-3566 Filed 2-15-96; 8:45 am]

BILLING CODE 4310-55-P

Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The Service announces the dates and locations of the 1996 Federal Duck Stamp Contest; the public is invited to attend.

DATES: 1. The 1996 contest opens for submission July 1, 1996.

2. The public may view the 1996 Federal Duck Stamp Contest entries on Tuesday, October 15, 1996, from 10:00 a.m. to 2:00 p.m., in the Department of the Interior Auditorium.

3. This year's judging will be held from October 16-17, 1996, beginning at 10:30 a.m. on Wednesday, October 16, and continuing at 9:00 a.m. on Thursday, October 17.

4. Persons wishing to enter this year's contest may submit entries anytime after Monday, July 1, but *all* must be postmarked no later than midnight Sunday, September 15, 1996.

ADDRESSES: Requests for complete copies of the regulations, reproduction rights and the display and participation agreements should be addressed to: Federal Duck Stamp Contest, U.S. Fish and Wildlife Service, Department of the Interior, 1849 C Street NW., Suite 2058, Washington, DC 20240.

Location of Contest: Department of the Interior Building, Auditorium (C Street entrance), 1849 C Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mrs. Lita F. Edwards, Telephone (202) 208-4354 or Fax (202) 208-6296.

SUPPLEMENTARY INFORMATION: The following *five* eligible species for the 1996-97 duck stamp contest are as follows:

- (1) Canada Goose
- (2) Greater Scaup
- (3) Green-Winged Teal
- (4) Northern Pintail
- (5) Black Duck

The primary author of this document is Mrs. Lita F. Edwards, U.S. Fish and Wildlife Service.

Dated: February 6, 1996.

John G. Rogers, Jr.,

Director.

[FR Doc. 96-3562 Filed 2-15-96; 8:45 am]

BILLING CODE 4310-55-M

Bureau of Land Management

[CACA 35919]

California; Classification of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice, CA-35919.

SUMMARY: The following described lands have been examined and found suitable for classification for recreation and public purposes under the provisions of the Recreation and Public Purposes Act (R&PP) of June 14, 1926, as amended (43 U.S.C. 869 et. seq.). The Bureau of Land Management will reclassify 160 acres of public land in San Bernardino County to facilitate the Colorado River Law Enforcement Shooting Range Project.

DATE: Comments must be received by April 1, 1996. Adverse comments will be reviewed by the State Director.

ADDRESS: Bureau of Land Management, Area Manager, Needles Resource Area, 101 W. Spikes Road, Needles, California, 92363.

FOR FURTHER INFORMATION CONTACT: George R. Meckfessel, Planning & Environmental Coordinator, (619) 326-3896.

SUPPLEMENTARY INFORMATION: On February 9, 1996 a decision was made

APPENDIX 17:

Examples of Issued Incidental Take Permits

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE



FEDERAL FISH AND WILDLIFE PERMIT

3-201 (10/86)

2. AUTHORITY-STATUTES

16 USC 1539(a)(1)(B)

REGULATIONS (ATTACHED)

50 CFR §13 & 17, & 21

3. NUMBER

PRT-XXXXX

4. RENEWABLE

XXXX YES
____ NO

5. MAY COPY

XXXX YES
____ NO

6. EFFECTIVE

09/21/96

7. EXPIRES

12/31/2095

1. PERMITTEE

NAME
ADDRESS
CITY, STATE, ZIP CODE
PHONE

8. NAME AND TITLE OF PRINCIPAL OFFICER (IF # 1 IS A BUSINESS)

N/A

9. TYPE OF PERMIT

INCIDENTAL TAKE - ENDANGERED SPECIES

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED

TWO TRACTS OF LAND, ONE ENCOMPASSING 7,200 ACRES. BOTH ARE LOCATED IN NORTH CAROLINA, AS DESCRIBED IN THE PERMITTEE'S HCP.

11. CONDITIONS AND AUTHORIZATIONS:

- A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR § 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN BLOCK #2 ABOVE, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.
- B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL OR OTHER FEDERAL LAW.
- C. VALID FOR USE BY PERMITTEE NAMED ABOVE, AND HIS DESIGNATED AUTHORIZED AGENTS.
- D. ACCEPTANCE OF THIS PERMIT SERVES AS EVIDENCE THAT THE PERMITTEE AND HIS AUTHORIZED AGENTS UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS PERMIT AND ALL SECTIONS OF TITLE 50 CODE OF FEDERAL REGULATIONS, PARTS 13 AND 17, PERTINENT TO ISSUED PERMITS. SECTION 11 OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED, PROVIDES FOR CIVIL AND CRIMINAL PENALTIES FOR FAILURE TO COMPLY WITH PERMIT CONDITIONS.

XX BLOCK 11 OF THIS PERMIT CONSISTS OF ITEMS A-P (5 PAGES TOTAL)

12. REPORTING REQUIREMENTS

REPORTS WILL BE PROVIDED TO THE U.S. FISH AND WILDLIFE SERVICE OFFICES APPEARING IN ITEMS N, O, AND PERMIT. THE FIRST REPORT IS DUE DECEMBER 31, 1996.

ISSUED BY:

TITLE

DATE

REGIONAL DIRECTOR, FWS,
SOUTHEAST REGION

ORIGINAL

NAME

STREET ADDRESS
CITY, STATE, ZIP CODE
PHONE
PERMIT NUMBER

- E. The Permittee owns the lands identified in Block #10, above. Within the 8,000-acres encompassed within the property, surveys indicate that approximately 1,121-acres are occupied by the endangered red-cockaded woodpecker, *Picoides borealis*, and that approximately 3,363 acres is currently unoccupied, but suitable *Picoides borealis* habitat. The Permit authorizes the take of the endangered red-cockaded woodpecker, *Picoides borealis*, incidental to lawful timber harvest and other land management activities (Project). Twelve *Picoides borealis* groups may be incidentally taken under the authority of this Permit, subject to the terms and conditions stipulated herein. Additionally, this Permit provides authorization to incidentally take any “future” *Picoides borealis* that may occupy the Project after the effective date of this Permit and for its duration, subject to the terms and conditions stipulated herein.
- F. Permittee is authorized to take all *Picoides borealis* cavity trees, located on the lands identified in Block 10 above, under the authority of this permit, subject to the terms and conditions stipulated herein. This permit also constitutes a Special Purpose Permit under 50 CFR § 21.27 for take of *Picoides borealis* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § § 703-12).
- G. The Permittee agrees to allow U.S. Fish and Wildlife Service personnel, personnel from the North Carolina Wildlife Resources Commission, or these agencies’ designated representatives to enter the property identified in Block 10 of this permit for general purposes as specified in 50 CFR §13.21(d)(2).
- H. The following measures will be employed to ensure that *Picoides borealis* take is minimized and successfully mitigated for the current *Picoides borealis* population. For purposes of this Item, success will be accomplished when the Permittee successfully creates twelve new *Picoides borealis* groups on private, State, and Federal lands in North Carolina within 3 years of the effective date of the permit, or December 31, 1999, whichever is sooner. The Permittee may not incidentally take one (1) extant *Picoides borealis* group until the successful creation (as defined in Item H.3) of one (1) *Picoides borealis* group off-site as stipulated herein. As new *Picoides borealis* groups are created successfully, the Permittee has the option to incidentally take an existing *Picoides borealis* group, so long as a 1:1 ratio (created:taken) is maintained.
1. The Permittee will fund the creation of a minimum of four (4) artificial cavities (either drilled or inserts) and two (2) cavity starts (forty-eight (48) cavities and twenty-four (24) starts in all) within a minimum of twelve (12) recipient sites. The recipient sites will be determined in cooperation with the Permittee and the U.S. Fish and Wildlife Service. Ultimate approval of the sites will rest with the U.S. Fish and Wildlife Service. Additionally:
 - I. The artificial cavities will be kept screened until all internal sap leakage ceases. If internal sap leakage is severe, the leaking cavity will be replaced with a new starts/cavities.
 - ii. Cavities damaged or made unsuitable due to modification by other species, such as pileated woodpeckers, will be repaired with cavity restrictors or replaced during the 3-year monitoring period.

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
PHONE
PERMIT NUMBER

H. (Continued)

2. The Permittee will fund the initial management prescriptions, if necessary, for the twelve (12) recipient sites. The management prescriptions may include hardwood mid-story removal and/or understory removal, with the express purpose of enhancing each site's potential to attract and maintain a *Picoides borealis* breeding group.
3. After cavity provisioning, all provisioned sites must be monitored for subsequent use and/or occupation every four (4) months (April, August, and December) through December 31, 1999, or until success is documented sooner. Success is defined as when each of the twelve (12) provisioned recipient sites is occupied by a *Picoides borealis* breeding group (as evidenced by observations of copulation during the breeding season, and/or eggs or nestlings; or observation of two adults at a site over a 6-month period during the breeding season).
4. The Permittee will provide funding for implementation of Conditions H.1 through H.3, not to exceed \$45,000 (Forty-five thousand dollars).
5. The Permittee agrees to provide a 60-day advance notice prior to timber harvesting and incidental taking of a existing *Picoides borealis* group, to allow the U.S. Fish and Wildlife Service, or its authorized agent(s), to capture and translocate juvenile *Picoides borealis* to either candidate sites or other sites selected by the U.S. Fish and Wildlife Service.

I. Approximately 3,363 acres of the Project area is currently suitable but unoccupied *Picoides borealis* habitat. The Permittee agrees to the following mitigation/minimization strategy in the event that, at some point after the effective date of this permit, additional ("future") *Picoides borealis* occupy these lands:

1. Continue to conduct *Picoides borealis*-compatible land management within the currently unoccupied acreage, including (but not limited to) thinning, prescribed burning, and hardwood mid-story control.
2. Avoid any activities that may result in incidental take during the nesting season (generally March through August), within the foraging and nesting area of a "future" *Picoides borealis* group.
3. Provide a 60-day advance notice to the U.S. Fish and Wildlife Service to allow for the capture and translocation of any adult and/or juvenile *Picoides borealis* that may be directly impacted by future timber-harvesting activities within the occupied and utilized habitat of these "future" *Picoides borealis* group.
4. Allow the U.S. Fish and Wildlife Service to enter the unoccupied 3,363 acres to provision suitable sites (at its expense) with the intent of accelerating the chances of *Picoides borealis* occupancy.
5. Allow the U.S. Fish and Wildlife Service to enter the areas of the Project site that are occupied by "future" *Picoides borealis* during the term of the Permit for the express purpose of *Picoides borealis* capture and translocation to sites selected by the U.S. Fish and Wildlife Service.

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
PHONE
PERMIT NUMBER

- J. The Permittee must select an experienced contractor to perform the mitigation and minimization and monitoring duties as described in this Permit. The selected contractor must be pre-approved by the contact office of the U.S. Fish and Wildlife Service and must obtain all necessary local, State, and Federal permits prior to initiating the work. The Permittee, upon further consultation and approval from the U.S. Fish and Wildlife Service, will select a contractor and develop an expenditure budget for the funds identified in Item H.4, above.
- K. By December 31, of each year this Permit is valid, (starting in 1996) the Permittee will submit an annual report to U.S. Fish and Wildlife Service offices listed in Items N, O, and P of this Permit. The annual reports are due as specified until the successful creation of twelve (12) *Picoides borealis* groups, as described in Item I, above, is achieved, or December 31, 1999, whichever is soon. The annual report shall outline and describe the implementation and success of mitigation and minimization measures as identified below:
1. Progress on compliance with the success criteria outlined in Condition I. Further, the annual report must specify the number of incidental take actions taken upon the existing twelve (12) *Picoides borealis* groups, if applicable.
 2. A copy of the executed contract with the qualified contractor, as outlined in Item J, if not previously provided.
 3. An accounting of the funding identified in Item H.4.
 4. Include any corrective measures or other changes that may be necessary to improve the efficacy of the Permit.
- L. Upon locating a dead, injured, or sick *Picoides borealis*, initial notification must be made immediately to the U.S. Fish and Wildlife Service Law Enforcement Office, Strom Thurman Federal Building, 1835 Assembly Street, Room 971-B, Columbia, South Carolina 29201. The phone number is 803/765-5626. Notification should also be made (by the next work day) to the U.S. Fish and Wildlife Service office appearing in Item N, below. Care should be taken in handling sick or injured specimens to ensure effective treatment and care in handling dead specimens to preserve biological materials in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured endangered species or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.
- M. The Permittee and the U.S. Fish and Wildlife Service acknowledge that even with the above detailed provisions for mitigating impacts to *Picoides borealis*, circumstances could arise which were not fully anticipated by this Permit and which are considered unforeseen. Such circumstances may become apparent either to the Permittee, his authorized agents, or to personnel of the U.S. Fish and Wildlife Service. For purposes of implementation of this condition, unforeseen circumstances are defined as any significant, unanticipated adverse change in the status of species; any significant, unanticipated adverse change in impacts of the Project or in other factors upon which the HCP and Permit are based; or any other significant new

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
PHONE
PERMIT NUMBER

M. (Continued)

information relevant to the Permit and Project that was unforeseen by the Permittee and the U.S. Fish and Wildlife Service that could give rise to the need to review the Permittee's conservation program. If unforeseen circumstances arise, the Permittee and the contact office of the U.S. Fish and Wildlife Service shall meet within twenty (20) working days following notice of such unforeseen circumstances. The Permittee shall develop appropriate measures and begin their implementation within an additional thirty (30) working days.

N. For purposes of administration of the monitoring and compliance aspects, addressing unforeseen circumstances, and other matters associated with implementation of this Permit, the contact office of the U.S. Fish and Wildlife Service is:

Field Supervisor (HCP Program)
U.S. Fish and Wildlife Service
160 Zillicoa Street
Asheville, North Carolina 28801
Phone: 704/258-3939

O. For purposes of administration of the monitoring and compliance aspects, addressing unforeseen circumstances, and other matters associated with implementation of this Permit, the alternative contact office of the U.S. Fish and Wildlife Service is:

Field Supervisor (HCP Program)
U.S. Fish and Wildlife Service
Department of Forest Resources
261 Lehotsky Hall, Box 341003
Clemson, South Carolina 29634-1003
Phone: 803/656-2432

P. Copies of annual reports will also be provided to the following U.S. Fish and Wildlife Service offices:

Endangered Species Permits (AES/TE/P)
U.S. Fish and Wildlife Service
1875 Century Boulevard, Suite 200
Atlanta, Georgia 30345
Phone: 404/679-7110

END

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE



FEDERAL FISH AND WILDLIFE PERMIT

3-201 (10/86)

2. AUTHORITY-STATUTES

16 USC 1539(a)(1)(B)

REGULATIONS (ATTACHED)

50 CFR §13 & 17, & 21

3. NUMBER

PRT-XXXXX

4. RENEWABLE

XXXX YES

_____ NO

5. MAY COPY

XXXX YES

_____ NO

6. EFFECTIVE

11/07/96

7. EXPIRES

11/07/2046

1. PERMITTEE

NAME
ADDRESS
CITY, STATE, ZIP CODE
PHONE

8. NAME AND TITLE OF PRINCIPAL OFFICER (IF # 1 IS A BUSINESS)

N/A

9. TYPE OF PERMIT

ENDANGERED/THREATENED SPECIES

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED

Orange County, California: on lands specified within the body of the permit.

11. CONDITIONS AND AUTHORIZATIONS:

- A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR § 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN **BLOCK #2 ABOVE**, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.
- B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL OR OTHER FEDERAL LAW.
- C. VALID FOR USE BY PERMITTEE NAMED ABOVE, AND HIS DESIGNATED AUTHORIZED AGENTS.
- D. FURTHER CONDITIONS OF AUTHORIZATION ARE CONTAINED IN THE ATTACHED SPECIES TERMS AND CONDITIONS.

12. REPORTING REQUIREMENTS

See permit conditions for reporting.

ISSUED BY:

TITLE

DATE

U.S. FISH AND WILDLIFE SERVICE, PORTLAND, OREGON
PERMIT CONDITIONS FOR PRT-784571

- D. Acceptance of this permit serves as evidence that the permittees, and their designated agents, understand and agree to abide by the "General Conditions for Native Endangered and Threatened Wildlife Species Permits" (copy attached).
- E. The permittees, and their designated agents, are authorized to incidentally take coastal California gnatcatchers (*Polioptila californica californica*) occupying 27 of the 142 acres of coastal sage scrub and 108 acres of cactus scrub habitat in the course of otherwise lawful development and conservation activities, as described in the permittees' application and supporting documents, and as conditioned herein.
- F. The permittees, and their designated agents, are authorized to incidentally take cactus wrens (*Campylorhynchus brunneicapillus cousei*) located in 83 of the 108 acres of cactus scrub and 142 acres of coastal sage scrub, in the course of otherwise lawful development and conservation activities, as described in the permittees' application and supporting documents, and as conditioned herein. Provided that this permit has become effective, per term and condition G below, take authorization for the cactus wren shall become effective upon the listing of the species under the Federal Endangered Species Act of 1973, as amended, (Act) to the extent that take would otherwise be prohibited under section 9 of the Act, and its implementing regulations, or pursuant to a rule promulgated under section 4(d) of the Act.
- G. As noted in the Implementing Agreement, Section V.A.3.a(1), take authorization for Western Shell Oil, Inc. (Shell) shall become effective upon demonstration in writing to the U.S. Fish and Wildlife Service (Service) of the transfer of ownership from Shell to the California Department of Parks and Recreation (State Parks) of the approximately 979-acre parcel depicted on Exhibit 23 of the Habitat Conservation Plan. Also as noted in the Implementing Agreement, Section V.A.3.a(2), take authorization for the Metropolitan Water District shall become effective upon demonstration in writing to the Service of the recordation of an open space/conservation easement and/or offer of dedication to State Parks.
- H. This permit shall remain in effect for 50 years or until an earlier time as provided in the Implementing Agreement, including Section III.B., VII, or VIII.E..
- I. The authorization granted by this permit is subject to full and complete compliance with, and implementation of, the Habitat Conservation Plan and Implementation Agreement, executed by the permittees, State Parks, and the Service. Attachment A summarizes the responsibilities of the applicants while conducting activities that may effect coastal California gnatcatchers and cactus wrens.
- J. Upon locating dead, injured, or sick federally-listed endangered or threatened species, initial notification must be made within three (3) working days of the finding to the Service's Division of Law Enforcement, Torrance, California at (370 Amapola Avenue, Suite 114, Torrance, California 90501, telephone 310-297-0062) and The Service's Carlsbad Field Office at (2730 Loker Avenue West, Carlsbad, California 92008, telephone 619-431-9440). Also, the Service must be notified immediately, in the event that habitat loss exceeds the amount authorized in the Habitat Conservation Plan and Implementing Agreement. Written notification to both offices must be made within 5 calendar days.

- K. As noted in the Implementing Agreement, Section V.A.3.b(3) and in the Habitat Conservation Plan, Section V, an annual report shall be prepared and submitted by a Shell/MWD funded biologist by December 31 of each year that the permit is in effect, beginning in 1997. One copy of the report shall be submitted to each of the following:
- 1) Regional Director, U.S. Fish and Wildlife Service 911 Northeast 11th Avenue, Portland, Oregon 97232, and
 - 2) Field Supervisor, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008.
- The annual report shall include the results of coastal sage scrub and cactus scrub habitat surveys, the cowbird trapping program, the population estimates, and the determination of the extent and the locations of habitat used by the coastal California gnatcatcher, cactus wren, and any other sensitive species present in the Northeast Preserve, Telegraph Canyon, and Carbon Canyon area. Following the completion of the restoration program, the Golf Course Habitat Conservation Area will be included in the annual reporting.
- L. A copy of this permit and Attachment A must be in the possession of the permittees and designated individuals while conducting taking activities (construction or grading). Please refer to the permit number in all correspondence and reports concerning permit activities. Any questions you may have about this permit should be directed to the Field Supervisor, Carlsbad Field Office.

ATTACHMENT A

A copy of this Attachment must be in the possession of the permittees and designated individuals while conducting activities that may effect the coastal California gnatcatcher and cactus wren or their habitats. The following construction management and monitoring measures shall be implemented to minimize impacts to coastal California gnatcatchers, cactus wrens, and coastal sage and cactus scrub habitats:

1. Construction will be monitored by a U.S. Fish and Wildlife Service (Service) approved biologist, responsible to the project applicant. The contractor and the monitor will review the rough grading plans and staking to ensure that the grading is within the project footprint as described in the HCP. All temporary fencing or other markers will be clearly visible to construction personnel. No construction access, parking or storage of equipment or materials will be permitted within such marked areas. A monitoring biologist(s) will be on-site during brush-clearing and grading of all coastal sage and cactus scrub vegetation.
2. Prior to any construction or grading activities, education of all project personnel regarding the prevention of harm, harassment, injury, or death of wildlife will be provided by the biological monitor. This instruction shall be given as often as necessary to ensure that all personnel working on-site are adequately briefed in the matter.
3. Except as necessary to respond to public health and safety concerns, or otherwise authorized by the Service, no physical disturbance of coastal sage or cactus scrub occupied by nesting coastal California gnatcatcher or cactus wrens will occur in the breeding season (approximately February 15 through August 30). Shell/MWD will provide the Service with maximum practicable notice of the need to proceed under such circumstances to allow for avoidance or other technique. With regard to construction required on the Shell project site, the breeding season limitation shall apply; provided that construction activities necessitating unexpected slope stabilization or erosion control measures and emergency facility repairs be undertaken subject to the foregoing notice provision and minimization of impacts requirement.
4. Shell/MWD, as appropriate, will notify the Service at least seven (7), preferably fourteen (14) calendar days prior to the clearing of cactus or coastal sage scrub habitat.
5. The monitoring biologist(s) will flush coastal California gnatcatchers, cactus wrens, and other wildlife from occupied habitat areas immediately prior to brush-clearing and earth-moving activities. The monitoring biologist(s) will ensure that no coastal California gnatcatchers or cactus wrens will be directly harmed by brush clearing and earth-moving equipment.
6. The monitor will be empowered to temporarily halt construction activities and make recommendations to ensure impact minimization, compliance with the relevant provisions of the incidental take statement, and that work does not take place in habitat areas outside the clearing limits as staked in the field.
7. Coastal sage or cactus scrub habitat within or immediately adjacent to project construction areas will be monitored. Prior to the commencement of grading operations or other activities involving significant soil disturbance, a survey will be conducted to locate all coastal California gnatcatchers and cactus wrens within 100 feet of the outer extent of projected soil disturbance activities, and will be clearly marked and identified on the construction grading/operations plans so that the monitor can make informed recommendations. The purpose of this monitoring will be either to verify that the construction does not adversely affect coastal California gnatcatcher or cactus wren activity or to determine whether "take" occurs, whichever the case may be. If this monitoring indicates that unauthorized take of coastal California gnatcatchers or cactus wrens has occurred, construction will cease pending coordination with the Service.

8. Vehicle transportation routes between cut-and-fill locations will be restricted to a minimum number during construction. Earth-moving equipment will be confined to the narrowest practicable corridor during construction. Waste dirt or rubble will not be deposited on adjacent, native vegetation. Earth-moving equipment will avoid unnecessary maneuvering in areas adjacent to protected habitat. Preconstruction meetings involving the monitoring biologist, construction supervisors, and equipment operators will be conducted and documented to ensure adherence to these measures.

APPENDIX 18:

“Template Federal Register Notices of Permit Issuance

Template Federal Register Notices of Permit Issuance

Example 1: One Permit

U.S. DEPARTMENT OF INTERIOR

Fish and Wildlife Service

and/or

U.S. DEPARTMENT OF COMMERCE

National Marine Fisheries Service

**Issuance of Permit for Incidental Take of Endangered
(or Threatened) Species**

On [date], a notice was published in the Federal Register ([vol. no.]) FR [first page no.], that an application has been filed with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service (Service or Services) by [applicant(s) name(s), city and state], for a permit to incidentally take, pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973 (16 USC 1539), as amended, [common and scientific name of species] on [location of activity(ies)] pursuant to the terms of the [name of Habitat Conservation Plan].

Notice is hereby given that on [date], as authorized by the provisions of the Act, the Service(s) issued a permit (PRT-____) to the above named party(ies) subject to certain conditions set forth therein. The permit was granted only after the Service(s) determined that it was applied for in good faith, that granting the permit will not be to the disadvantage of the endangered [and/or threatened] species, and that it will be consistent with the purpose and policy set forth in the Endangered Species Act, as amended.

Additional information on this permit action may be requested by contacting the [name, address, and telephone number of office] between the hours of [hours] weekdays.

Date: _____

[Name of person signing]
[Title of person signing]
U.S. Fish and Wildlife Service

[Name of person signing]
[Title of person signing]
National Marine Fisheries Service

Template Federal Register Notices of Permit Issuance

Example 2: Multiple Permits

U.S. DEPARTMENT OF INTERIOR

Fish and Wildlife Service

and/or

U.S. DEPARTMENT OF COMMERCE

National Marine Fisheries Service

**Issuance of Permit for Incidental Take of Endangered
(or Threatened) Species**

Notice is hereby given that the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (Service or Services has(ve) taken the following action with regard to permit applications duly received pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1974 (16 USC 1539), as amended. Each permit listed as issued was granted only after the Service(s) determined that it was applied for in good faith, that granting the permit will not be to the disadvantage of the endangered [and/or threatened] species, and that it will be consistent with the purpose and policy set forth in the Endangered Species Act, as amended.

Additional information on this permit action may be requested by contacting the [name, address, and telephone number of office] between the hours of [hours] weekdays.

Date: _____

[Name of person signing]
[Title of person signing]
U.S. Fish and Wildlife Service

[Name of person signing]
[Title of person signing]
National Marine Fisheries Service