



Thursday
June 17, 1999

Part IV

**Department of The
Interior**

Fish and Wildlife Service

**Department of
Commerce**

National Oceanic and Atmospheric
Administration

National Marine Fisheries Service

50 CFR 13 and 17

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

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR 13 and 17

RIN 1018-AD95

Safe Harbor Agreements and Candidate Conservation Agreements With Assurances

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

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

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

DATES: This rule is effective July 19, 1999.

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agreement as threatened or endangered under the Act.

Summary of Proposed Rule

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

Summary of Received Comments

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

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

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

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

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

have an opportunity to translocate affected individuals of covered species.

Revisions to the Proposed Rule

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

Description/Overview of the Final Rule

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

Conservation Agreement with Assurances.

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

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

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

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

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

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

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

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

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

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

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

Required Determinations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agreements per year at the FY 1999 funding level.

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

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

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

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

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

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

impact on a significant number of small entities.

Unfunded Mandates Reform Act

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

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

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

Takings Implication Assessment

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

Federalism Assessment

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

Civil Justice Reform

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

Paperwork Reduction Act

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

National Environmental Policy Act

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

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

Section 7 Consultation

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

List of Subjects

50 CFR Part 13

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

50 CFR Part 17

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

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

PART 13—[AMENDED]

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

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

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

§ 13.23 Amendment of permits.

* * * * *

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

* * * * *

3. Section 13.24 is revised to read as follows:

§ 13.24 Right of succession by certain persons.

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

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

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

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

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

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

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

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

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

4. Section 13.25 is revised to read as follows:

§ 13.25 Transfer of permits and scope of permit authorization.

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

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

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

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

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

Service determines is relevant to the processing of the submission.

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

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

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

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

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

§ 13.28 Permit revocation.

(a) * * *

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

* * * * *

6. Section 13.50 is revised to read as follows:

§ 13.50 Acceptance of Liability.

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

PART 17—[AMENDED]

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

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

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

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

* * * * *

(b) * * *

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

(A) The taking will be incidental;

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

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

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

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

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

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

* * * * *

(7) *Discontinuance of permit activity.*

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

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

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

(c)(1) *Application requirements for permits for the enhancement of survival through Safe Harbor Agreements.* The applicant must submit an application for a permit under this paragraph (c) to the appropriate Regional Director, U.S. Fish and Wildlife Service, for the Region where the applicant resides or where the proposed activity is to occur (for appropriate addresses, see 50 CFR 10.22), if the applicant wishes to engage in any activity prohibited by § 17.21. The applicant must submit an official Service application form (3-200.54) that includes the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Percentage of range conserved by the Agreement;

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

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

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

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

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

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

* * * * *

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

§ 17.32 Permits—general.

* * * * *

(b) * * *

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

(A) The taking will be incidental;

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

Safe Harbor policy available from the Service;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Percentage of range conserved by the Agreement;

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

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

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

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

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

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

Dated: May 11, 1999.

Donald J. Barry,

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

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