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 cirumstances, 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 jurisdicition 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 commerical 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.
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> 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 considerd in a conservation plan. The regulations do, however, refer explicity 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,
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> (ii) Specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impacts, and
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> (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 unforseen 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 he 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 proposes 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.
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> 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.
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> 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 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 . . ." 16 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 the 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 paragaph 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(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]

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