

50 CFR part 13.25 is revised to read as follows:

Comment [NG1]: 50 CFR 13 deals with FWS general permit administration. NMFS can use this to consider whether/how this also will be addressed by NMFS in their regulations -- or whether it ought to be in some combined package.

Subpart C Permit Administration

Sec. 13.25 Transfer of permits and scope of permit authorization.

(a) Transfer of permits.

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

(2) Permits issued under Subpart G or H, 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:

Comment [NG2]: Need to insert appropriate citation here

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Deleted: Sec. 17.22(b) or Sec. 17.32(b) of this subchapter B

Comment [NG3]: Do we need to change this to "Secretary"

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

(ii) 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

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(iii) The proposed transferee has provided such other information as the Service determines is relevant to the processing of the submission.

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(3) In the case of the transfer of lands subject to an agreement and permit issued under Sec. 17.22(c) or (d) or Sec. 17.32 (c) or (d) of this subchapter B, the Service will transfer the permit to the new owner if the new owner agrees in writing to become a party to the original agreement and permit.

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(b) Scope of permit authorization.

(1) Except as otherwise stated on the face of the permit, any person who is under the direct control of the permittee, who is employed by or under contract to the permittee for purposes authorized by the permit, or who meets the requirements of subparagraph (b)(2) of this section may carry out the activity authorized by the permit.

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(2) In the case of permits issued under Subpart G or H, to a Federal, State, Tribal, or local governmental entity, or other entity administering the permit, a person is under the direct control of the permittee where:

Comment [NG4]: Need to insert appropriate citation

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Deleted: Sec. 17.22(b)-(d) or Sec. 17.32(b)-(d) of this subchapter

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

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

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50 CFR part 17 is revised to read as follows.

Comment [NG5]: Need to discuss how much of 50 CFR 17 will move to 410 and how much will remain in 17. In particular, 17.22(a) is the basis for scientific permits, permits used by the FWS international program, and some enhancement of survival permits for recovery actions that are not handled through HCPs or SHAs.

Sec. 17.1 Purpose of Regulations.

(a) The regulations in this part implement the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531-1543, except for those provisions in the Act concerning the Convention on International Trade in Endangered Species of Wild Fauna and Flora, for which regulations are provided in part 23 of this subchapter.

(b) The regulations identify those species of wildlife and plants determined by the Director to be endangered or threatened with extinction under section 4(a) of the Act and also carry over the species and subspecies of wildlife designated as endangered under the Endangered Species Conservation Act of 1969 (83 Stat. 275, 16 U.S.C. 668cc-1 to 6) which are deemed endangered species under section 4(c)(3) of the Act.

Sec. 17.2 Scope of regulations.

(a) The regulations of this part apply only to endangered and threatened wildlife and plants.

(b) By agreement between the Service and the National Marine Fisheries Service, the jurisdiction of the Department of Commerce has been specifically defined to include certain species, while jurisdiction is shared in regard to certain other species. Such species are footnoted in subpart B of this part, and reference is given to special rules of the National Marine Fisheries Service for those species.

(c) The provisions in this part are in addition to, and are not in lieu of, other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation, and interstate transportation of wildlife.

(d) The examples used in this part are provided solely for the convenience of the public, and to explain the intent and meaning of the regulation to which they refer. They have no legal significance.

(e) Certain of the wildlife and plants listed in §§ 17.11 and 17.12 as endangered or threatened are included in Appendix I, II or III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The importation, exportation and reexportation of such species are subject to additional regulations provided in part 23 of this subchapter.

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Sec. 17.3 Definitions.

[\[SEE 410.02 for our suggested edits to definitions\]](#)

Comment [NG6]: Several of these definitions would be removed from 17.3 if the only part that remains is 17.22 is 17.22(a)

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

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The term "Act" means the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884);

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

"Alaskan Native" means a person defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1603(b) (85 Stat. 588)) as a citizen of the United States who is of one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which the claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town. Any citizen enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part.

"Applicant" means, with respect to agreements pursuant to §§17.22(b), 17.22(c), 17.22(d), 17.32(b), 17.32(c), or 17.32(d), any property owner with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities on non-Federal land, or any Federal, state, tribal, local, or other entity proposing to hold and administer such a permit under which proposed management activities will be carried out by non-federal property owners on non-Federal land, subject to applicable state law.

“Authentic native articles of handicrafts and clothing” means items made by an Indian, Aleut, or Eskimo which (a) were commonly produced on or before December 28, 1973, and (b) are composed wholly or in some significant respect of natural materials, and (c) are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to Sec. 18.23(c) of this subchapter (in the case of marine mammals) may be used so long as no large scale mass production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups such as cooperatives, is permitted so long as no large scale mass production results.

“Bred in captivity” or “captive-bred” refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

“Captivity” means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

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

“Conservation plan” means the plan that an applicant must submit when applying for an incidental take permit under section 10(a)(1)(B), Safe Harbor Agreement, or Candidate Conservation Agreement with Assurances.

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

“Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

Comment [NG7]: Needs to be discussed; the definition at 410.02 does not broaden “conservation plan to include SHAs and CCAAs. We do not think the definition should be expanded as it has been here.

“Enhance the propagation or survival,” when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

- (1) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;
- (2) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and
- (3) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

“Endangered” means a species of wildlife listed in Sec. 17.11 or a species of plant listed in Sec. 17.12 and designated as endangered.

“Harass” in the definition of “take” in the Act means a persistent intentional or negligent act or acts causing individuals to abandon normal behavioral patterns such as breeding, feeding, or sheltering, resulting in significant adverse effects on the survival, recruitment, or reproductive output of the affected individuals. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act;
- (2) Breeding procedures; or
- (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

“Harm” in the definition of “take” in the Act means an act that causes injury to an individual member of a species of fish or wildlife. Such act may include significant habitat modification or degradation.

“Incidental taking” means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

"Industry or trade" in the definition of "commercial activity" in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit;

"Native village or town" means any community, association, tribe, clan or group.

"Net conservation benefit" means, with respect to species covered by permits issued for Safe Harbor Agreements pursuant to §§17.22(c) or 17.32(c), or Candidate Conservation Agreements with Assurances pursuant to §§17.22(d) or 17.32(d), the cumulative benefits of the management activities identified in an Agreement that are sufficient to contribute, either directly or indirectly, to bringing covered endangered or threatened species to the point where they are no longer in need of the protections of the Act or, in the case of covered proposed, candidate, or other unlisted species, are sufficient to remove or contribute to reducing threats that could be a basis for listing such species as endangered or threatened, taking into account the length of the Agreement and any offsetting adverse effects attributable to the incidental taking allowed by an enhancement of survival permit issued in association with the Agreement. For species covered under Safe Harbor Agreements, the determination of a net conservation benefit includes consideration of incidental taking involved in returning to baseline conditions.

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

"Population" means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature.

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

"Property owner" with respect to agreements outlined under Sec. 17.22(c), 17.22(d), 17.32(c), and 17.32(d) means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities, subject to applicable state law, on non-Federal land.

"Specimen" means any animal or plant, or any part, product, egg, seed or root of any animal or plant.

"Subsistence" means the use of endangered or threatened wildlife for food, clothing, shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native consumption within native villages and towns.

"Threatened" means a species of wildlife listed in Sec. 17.11 or plant listed in Sec. 17.12 and designated as threatened.

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

"Wasteful manner" means any taking or method of taking which is likely to result in the killing or injury of endangered or threatened wildlife beyond those needed for subsistence purposes, or which results in the waste of a substantial portion of the wildlife, and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of the wildlife, or which is not immediately followed by a reasonable effort to retrieve the wildlife.

Sec. 17.4 Pre-Act wildlife.

<< no changes >>

(a) The prohibitions defined in subparts C and D of this part 17 shall not apply to any activity involving endangered or threatened wildlife which was held in captivity or in a controlled environment on December 28, 1973: Provided,

(1) That the purposes of such holding were not contrary to the purposes of the Act; and

(2) That the wildlife was not held in the course of a commercial activity.

Example 1. On January 25, 1974, a tourist buys a stuffed hawksbill turtle (an endangered species listed since June, 1970), in a foreign country. On December 28, 1973, the stuffed turtle had been on display for sale. The tourist imports the stuffed turtle into the United States on January 26, 1974. This is a violation of the Act since the stuffed turtle was held for commercial purposes on December 28, 1973.

Example 2. On December 27, 1973 (or earlier), a tourist buys a leopard skin coat (the leopard has been listed as endangered since March 1972) for his wife in a foreign country. On January 5, he imports it into the United States. He has not committed a violation since on December 28, 1973, he was the owner of the

coat, for personal purposes, and the chain of commerce had ended with the sale on the 27th. Even if he did not finish paying for the coat for another year, as long as he had possession of it, and he was not going to resell it, but was using it for personal purposes, the Act does not apply to that coat.

Example 3. On or before December 28, 1973, a hunter kills a leopard legally in Africa. He has the leopard mounted and imports it into the United States in March 1974. The importation is not subject to the Act. The hunter has not engaged in a commercial activity, even though he bought the services of a guide, outfitters, and a taxidermist to help him take, preserve, and import the leopard. This applies even if the trophy was in the possession of the taxidermist on December 28, 1973.

Example 4. On January 15, 1974, a hunter kills a leopard legally in Africa. He has the leopard mounted and imports it into the United States in June 1974. This importation is a violation of the Act since the leopard was not in captivity or a controlled environment on December 28, 1973.

(b) Service officers or Customs officers may refuse to clear endangered or threatened wildlife for importation into or exportation from the United States, pursuant to Sec. 14.53 of this subchapter, until the importer or exporter can demonstrate that the exemption referred to in this section applies. Exempt status may be established by any sufficient evidence, including an affidavit containing the following:

- (1) The affiant's name and address;
- (2) Identification of the affiant;
- (3) Identification of the endangered or threatened wildlife which is the subject of the affidavit;
- (4) A statement by the affiant that to the best of his knowledge and belief, the endangered or threatened wildlife which is the subject of the affidavit was in captivity or in a controlled environment on December 28, 1973, and was not being held for purposes contrary to the Act or in the course of a commercial activity;
- (5) A statement by the affiant in the following language:

The foregoing is principally based on the attached exhibits which, to the best of my knowledge and belief, are complete, true and correct. I understand that this affidavit is being submitted for the purpose of inducing the Federal Government to recognize an exempt status regarding (insert description of wildlife), under the Endangered Species Act of 1973 (16 U.S.C. 1531-1543), and regulations promulgated thereunder, and that any false statements may subject me to the criminal penalties of 18 U.S.C. 1001.

- (6) As an attachment, records or other available evidence to show:

(i) That the wildlife in question was being held in captivity or in a controlled environment on December 28, 1973;

(ii) The purpose for which the wildlife was being held; and

(iii) The nature of such holding (to establish that no commercial activity was involved).

(c) This section applies only to wildlife born on or prior to December 28, 1973. It does not apply to the progeny of any such wildlife born after December 28, 1973.

Sec. 17.5

<<no changes>>

Sec. 17.6 State cooperative agreements. [Reserved]

<<no changes>>

Sec. 17.7 Raptor exemption.

<<No changes>>

Sec. 17.8 Permit applications and information collection requirements.

<<No Changes>>

Change (a)(2) to read as follows:

(2) Submit permit applications for activities involving the import, export, or foreign commerce of native endangered and threatened species, and all activities involving nonnative endangered and threatened species, to the U.S. Fish and Wildlife Service, Division of Management Authority, 4401 N. Fairfax Drive, Room 700, Arlington, VA 22203 – **or use address for main Interior., since we may move out of 4401.**

Comment [NG8]: FWS has technical amendments for 17.8(a)(2) to change the address in that section. NEED TO DISCUSS USING THE ADDRESS AT MAIN INTERIOR SINCE WE MAY MOVE FROM THE ARLINGTON ADDRESS

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Sec. 17.11 Endangered and threatened wildlife.

<<No changes>>

Sec. 17.21 Prohibitions.

<<no changes>>

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

The Director/Secretary may issue a permit authorizing any activity otherwise prohibited by Sec. 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

Comment [NG9]: The edits suggested to 17.22 and 17.22(a) make the text consistent with proposed rule that received public review and comment; this text was approved by the Assistant Secretary but the regulation did not become final for a variety of reasons. These are technical changes sought by the FWS international program.

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transaction, a series of transactions, or a number of activities over a specific period of time. (See Sec. 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.

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Comment [NG10]: Is there a publication requirement like this in 410?

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(a)(1) Application requirements for permits for scientific purposes or for the enhancement of propagation or survival. A person wishing to get a permit for an activity prohibited by § 17.21 submits an application for activities under this section. The Service provides Form 3-200 for the application to which all of the following must be attached:

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(i) The common and scientific names of the species to be covered by the permit, as well as the number, age, and sex of such species, and the activity to be authorized (such as take, export, or interstate commerce). If the purpose of the permit is for habitat restoration, scientific research, or other such situations where this information is undeterminable, the number, age, and sex of the species may not be required;

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(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;

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(iii) If the applicant seeks to obtain specimens of the wildlife to be covered by the permit, a resume of the applicant's attempts to obtain the wildlife in a manner that would not cause the death or removal from the wild of such wildlife;

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

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(v) If the wildlife to be covered by the permit is to be used for scientific purposes, or maintained for any reason at an institution or other facility, a complete description and address of the institution or other facility;

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

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

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(viii) If the application is for the purpose of enhancement of propagation, a statement of:

(A) The applicant's willingness to participate in a nationally or internationally recognized cooperative breeding program;

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(B) A description of how participation in such a breeding program will be carried out;

(C) The applicant's willingness to maintain or contribute data to a studbook; and

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(D) A description of how the propagation of the species will benefit the species in the wild.

(2) Issuance criteria.

(i) Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether the Service should issue a permit. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. In making this decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

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Comment [NG11]: Needs discussion with solicitors; concern that this violates a plain reading of Section 7(a)(2).

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(A) Whether the applicant's intended purpose for which the permit is required justifies allowing the applicant to engage in an otherwise prohibited activity;

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

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

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

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

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

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(3) Permit conditions.

(i) In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under this section that authorizes the keeping of living wildlife in captivity will be subject to the condition that the escape of wildlife covered by the permit will be immediately reported to the Service office designated in the permit.

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

[the text in (b)(1) through (d) is moved to 410 and would be deleted from 17.22]

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(b)(1) Application requirements for permits for incidental taking. A person wishing to get a permit for an activity prohibited by Sec. 17.21(c) submits an application for activities under this paragraph. The Service provides Form 3-200 for the application to which all of the following must be attached:

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— (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, including whether the steps will be taken on the applicant's property or through credits purchased in an established conservation

~~bank, 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) A description of why the probable direct and indirect effects of any incidental take authorized by the permit for species covered by the conservation plan will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species;~~

~~(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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. The Director shall consider the general issuance criteria in Sec. 13.21(b) of this subchapter, except for Sec. 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.

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

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

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

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

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

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

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

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

- ~~———— (i) Size of the current range of the affected species;~~
- ~~———— (ii) Percentage of range adversely affected by the conservation plan;~~
- ~~———— (iii) Percentage of range conserved by the conservation plan;~~
- ~~—— (iv) Ecological significance of that portion of the range affected by the conservation plan;~~
- ~~—— (v) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and~~
- ~~—— (vi) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.~~

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

~~(7) Discontinuance of permit activity. Notwithstanding the provisions of Sec. 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 Sec. 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 paragraph (b) of this section may not be revoked for any reason except those set forth in Sec. 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.~~

~~(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 proposed activity may be prohibited by Sec. 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 and any species that is proposed or is a candidate for listing, or species likely to become a candidate in the near future, for which the applicant requests incidental take authorization;~~
- ~~— (ii) A description of how incidental take of the listed species pursuant to the Safe Harbor Agreement is likely to occur, both as a result of management activities and as a result of the return to baseline;~~
- ~~— (iii) A description of why the probable direct and indirect effects of any authorized take for species covered by the Safe Harbor Agreement will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species; and~~
- ~~— (iv) 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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification~~

of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. The Director shall consider the general issuance criteria in Sec. 13.21(b) of this subchapter, except for Sec. 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 is reasonably expected to provide a net conservation benefit to the 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) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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 relocate 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, except that Federal agencies may hold such assurances for the~~

purpose of transferring them to non-Federal property owners for their covered actions on non-Federal lands when such Federal agencies are administering the permit and the Safe Harbor Agreement. The assurances provided in this section apply only to Safe Harbor permits issued after July 19, 1999.

—(ii) The Director and the permittee may agree to revise or modify the management measures set forth in a Safe Harbor Agreement if the Director determines that such revisions or modifications do not change the Director's prior determination that the Safe Harbor Agreement is reasonably expected to provide a net conservation benefit to the listed species. However, the Director may not require additional or different management activities to be undertaken by a permittee 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. The Director may not revoke a permit issued under paragraph (c) of this section except as provided in this paragraph. The Director may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the permitted activity would either appreciably reduce the likelihood of survival and recovery in the wild of any listed species or directly or indirectly alter designated critical habitat such that it appreciably diminishes the value of that critical habitat for both the survival and recovery of a listed species. Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third party acquisition of an interest in the property.

—(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 anticipates implementation of activities identified in the Agreement and otherwise prohibited by Sec. 17.21, 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;

—(iii) A description of why the probable direct and indirect effects of any authorized take for species covered by the Candidate Conservation Agreement with Assurances will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species; and

—(iv) An 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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. The Director shall consider the general issuance criteria in Sec. 13.21(b) of this subchapter, except for Sec. 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 with Assurances;

—(ii) The implementation of the terms of the Candidate Conservation Agreement is reasonably expected to provide a net conservation benefit to the affected species and the Agreement complies with the other 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 Agreement is consistent with applicable Federal, state, and tribal laws and regulations;

—(v) Implementation of the terms of the Agreement will not 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 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 with Assurances;~~

~~—(ii) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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 relocate 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 with Assurances.~~

~~—(4) Permit effective date. Permits issued under this paragraph (d) become effective for a species covered by a Candidate Conservation Agreement with Assurances 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, except that Federal agencies may hold such assurances for the purpose of transferring them to non-Federal property owners for their covered actions on non-Federal lands, when such Federal agencies are administering the permit and the Agreement.~~

~~—(i) Changed circumstances provided for in the Agreement. If the Director determines that additional conservation measures are necessary to respond to changed circumstances and these measures were set forth in the Agreement, the permittee will implement the measures specified in the Agreement.~~

~~—(ii) Changed circumstances not provided for in the Agreement. If the Director determines that additional conservation measures not provided for in the Agreement are necessary to respond to changed circumstances, the Director will not require any conservation 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 the Director determines additional conservation measures are 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 maintain the original terms of the Agreement to the maximum extent possible. Additional conservation 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.

—(7) 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.

—(8) Criteria for revocation. The Director may not revoke a permit issued under paragraph (d) of this section except as provided in this paragraph. The Director may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the permitted activity would either appreciably reduce the likelihood of survival and recovery in the wild of any listed species or directly or indirectly alter designated critical habitat such that it appreciably diminishes the value of that critical habitat for both the survival and recovery of a listed species. Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the

activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

—(9) Duration of the Candidate Conservation Agreement with Assurances. The duration of a Candidate Conservation Agreement with Assurances covered by a permit issued under this paragraph (d) must be sufficient to enable the Director to determine that the actions taken under the terms of the Agreement are reasonably expected to provide a net conservation benefit to the species covered by the Agreement.

—(10) Consideration of credits and agreements. Credits purchased in an established conservation bank as a means of benefiting candidate species or species likely to become candidates in the near future, or Candidate Conservation Agreements with Assurances established by Federal agencies with private or public landowners to manage lands for the benefit of such species, will be considered by the Service when making the determinations required by subsection (d)(2).

—(e) 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 Sec. 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.

Sec. 17.23 Economic hardship permits.

<<no changes>>

Comment [NG12]: NEED TO DISCUSS WHETHER THIS ALSO BELONGS IN 410

Subpart D – Threatened Wildlife

Sec. 17.31 Prohibitions.

(a) If the Secretary makes such a determination in the final rule listing the species as threatened except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in §17.21 shall apply to threatened wildlife, except §17.21(c)(5).

(b) In addition to any other provisions of this part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a state conservation agency which is operating a conservation program pursuant to the terms of a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take those threatened species of wildlife which are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a special rule in §§17.40 to 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.

Sec. 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.

Comment [NG13]: Same discussion needed as for 17.22 and 17.22(a)

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Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time.

(a)(1) *Application requirements for permits for scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or special purposes consistent with the purposes of the Act.* A person wishing to get a permit for an activity prohibited by § 17.31 submits an application for activities under this paragraph. The Service provides Form 3-200 for the application to which as much of the following information relating to the purpose of the permit must be attached:

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(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 to be authorized (such as take, export, or interstate commerce). IF the purpose of the permit is for habitat restoration, scientific research, or other such situations where this information is undeterminable, the numbe, age, and sex of the species may not be required;

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(ii) A statement as to whether, at the time of application, the wildlife 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;

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(iii) If the applicant seeks to obtain specimens of the wildlife to be covered by the permit, a resume of the applicant's attempts to obtain the in a manner that would not cause the death or removal from the wild of such wildlife;

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

(v) If the wildlife to be covered by the permit is to be used for scientific purposes, displayed for educational purpose, or maintained for any reason at an institution or other facility, a complete description and address of the institution or other facility;

(vi) If the applicant intends to house and/or care for live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house 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; and

(viii) If the application is for the purpose of enhancement of propagation, a statement of:

(A) The applicant's willingness to participate in a nationally or internationally recognizes cooperative breeding program;

(B) A description of how participation in such a breeding program will be carried out;

(C) The applicant's willingness to maintain or contribute data to a studbook; and

(D) A description of how the propagation of the species will benefit the species in the wild.

(2) Issuance criteria.

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(i) Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether the Service will issue a permit. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. In making this decision, the Director shall

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Comment [NG14]: Needs discussion with solicitors; concern is that this violates a plain reading of Section 7(a)(2)

consider, in addition to the general criteria in Sec. 13.21(b) of this subchapter, the following factors:

(A) Whether the applicant's intended purpose for which the permit is required justifies allowing the applicant to engage in an otherwise prohibited activity;

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

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

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

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

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

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(3) Permit conditions.

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(i) In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under this section that authorizes the keeping of living wildlife in captivity will be subject to the condition that the escape of wildlife covered by the permit will be immediately reported to the Service office designated in the permit.

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

[NOTE: (b)(1) through (d)(10) is addressed in 410]

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~~(b)(1) Application requirements for permits for incidental taking.~~

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— (i) A person wishing to get a permit for an activity prohibited by Sec. 17.31 submits an application for activities under this paragraph.

— (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, including whether the steps will be taken on the applicant's property or through credits purchased in an established conservation bank, 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.~~

~~—(iv) A description of why the probable direct and indirect effects of any incidental take authorized by the permit for species covered by the conservation plan will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species;~~

~~(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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. 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.~~

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

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

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

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

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

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

~~(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional~~

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

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

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

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

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

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

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

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

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

—(7) Discontinuance of permit activity. Notwithstanding the provisions of Sec. 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 Sec. 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 paragraph (b) of this section may not be revoked for any reason except those set forth in Sec. 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.~~

~~—(c)(1) Application requirements for permits for the enhancement of survival through Safe Harbor Agreements. 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 Sec. 17.22(c) for permit objection apply to any notice published by the Director under this paragraph (c). 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 proposed activity may be prohibited by Sec. 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 and any species that is proposed or is a candidate for listing, or species likely to become a candidate in the near future for which the applicant requests incidental take authorization;~~

~~—(ii) A description of how incidental take of the covered species pursuant to the Safe Harbor Agreement is likely to occur, both as a result of management activities and as a result of the return to baseline;~~

~~—(iii) A description of why the probable direct and indirect effects of any authorized take for species covered by the Safe Harbor Agreement will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species; and~~

~~—(iv) 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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. The Director shall consider the general issuance criteria in Sec. 13.21(b) of this subchapter, except for Sec. 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 is reasonably expected to provide a net conservation benefit to the 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) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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 relocate 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, except that Federal agencies may hold such assurances for the purpose of transferring them to non-Federal property owners for their covered actions on non-Federal lands, when such Federal agencies are administering the permit and the Safe Harbor Agreement. The assurances provided in this section apply only to Safe Harbor permits issued after July 19, 1999.

—(ii) The Director and the permittee may agree to revise or modify the management measures set forth in a Safe Harbor Agreement if the Director determines that such revisions or modifications do not change the Director's prior determination that the Safe Harbor Agreement is reasonably expected to provide a net conservation benefit to the listed species. However, the Director may not require additional or different management activities to be undertaken by a permittee 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. The Director may not revoke a permit issued under paragraph (c) of this section except as provided in this paragraph. The Director may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the permitted activity would either appreciably reduce the likelihood of survival and recovery in the wild of any listed species or directly or indirectly alter designated critical habitat such that it appreciably diminishes the value of that critical habitat for both the survival and recovery of a listed species. Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

—(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 anticipates implementation of activities identified in the Agreement and otherwise prohibited by Sec. 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;

—(iii) A description of why the probable direct and indirect effects of any authorized take for species covered by the Candidate Conservation Agreement with Assurances will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species; and

—(iv) An 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 Sec. 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. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that the permitted action will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Therefore, consultation under 50 CFR part 402 is not required for issuance of the permit. The Director shall consider the general issuance criteria in Sec. 13.21(b) of this subchapter, except for Sec. 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 with Assurances;

~~—(ii) The implementation of the terms of the Candidate Conservation Agreement with Assurances is reasonably expected to provide a net conservation benefit to the affected species and the 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 Agreement is consistent with applicable Federal, state, and tribal laws and regulations;~~

~~—(v) Implementation of the terms of the Agreement will not 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 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 with Assurances;~~

~~—(ii) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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 relocate 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 with Assurances.~~

~~—(4) Permit effective date. Permits issued under this paragraph (d) become effective for a species covered by a Candidate Conservation Agreement with Assurances 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, except that Federal agencies may hold such assurances for the purpose of transferring them to non-Federal property owners for their covered actions on non-Federal lands, when such Federal agencies are administering the permit and the Agreement.~~

~~—(i) Changed circumstances provided for in the Agreement. If the Director determines that additional conservation measures are necessary to respond to changed circumstances and these measures were set forth in the Agreement, the permittee will implement the measures specified in the Agreement.~~

~~—(ii) Changed circumstances not provided for in the Agreement. If the Director determines that additional conservation measures not provided for in the Agreement are necessary to respond to changed circumstances, the Director will not require any conservation 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 the Director determines additional conservation measures are 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 maintain the original terms of the Agreement to the maximum extent possible.~~

~~Additional conservation 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.~~

~~—(7) 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.~~

~~—(8) Criteria for revocation. The Director may not revoke a permit issued under paragraph (d) of this section except as provided in this paragraph. The Director may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the permitted activity would either appreciably reduce the likelihood of survival and recovery in the wild of any listed species or directly or indirectly alter designated critical habitat such that it appreciably diminishes the value of that critical habitat for both the survival and recovery of a listed species. Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third party acquisition of an interest in the property.~~

~~—(9) Duration of the Candidate Conservation Agreement with Assurances. The duration of a Candidate Conservation Agreement with Assurances covered by a permit issued under this paragraph (d) must be sufficient to enable the Director to determine that the actions taken under the terms of the Agreement are reasonably expected to provide a net conservation benefit to the species covered by the Agreement.~~

~~—(10) Consideration of credits and agreements. Credits purchased in an established conservation bank as a means of benefiting candidate species or species likely to become candidates in the near future, or Candidate Conservation Agreements with Assurances established by Federal agencies with private or public landowners to manage lands for the benefit of such species, will be considered by the Service when making the determinations required by subsection (d)(2).~~

Subpart D_Threatened Wildlife

Sec. 17.40 Special rules--mammals.

<<no changes>>

Sec. 17.41 Special rules--birds.

<<no changes>>

Sec. 17.42 Special rules--reptiles.

<<no changes>>

Sec. 17.43 Special rules--amphibians.

<<no changes>>

Sec. 17.44 Special rules--fishes.

<<no changes>>

Sec. 17.45 Special rules--snails and clams. [Reserved]

<<no changes>>

Sec. 17.46 Special rules--crustaceans.

<<no changes>>

Sec. 17.47 [Reserved]

<<no changes>>

Sec. 17.48 Special rules--common sponges and other forms. [Reserved]

<<no changes>>

Subpart E Similarity of Appearance

Sec. 17.50 General.

<<no changes>>

Sec. 17.51 Treatment as endangered or threatened.

<<no changes>>

Sec. 17.52 Permits--similarity of appearance.

<<no changes>>

Subpart F_Endangered Plants

Sec. 17.61 Prohibitions.

(a) Except as provided in a permit issued pursuant to §17.62 or §17.63, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed,

any of the acts described in paragraphs (b) through (e) of this section in regard to any Endangered plant.

(b) Import or export. It is unlawful to import or to export any Endangered plant. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(c) Remove and reduce to possession. (1) It is unlawful to:

- (i) remove and reduce to possession any endangered plant from an area under Federal jurisdiction;
- (ii) maliciously damage or destroy any such species on any such area; or
- (iii) remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law..

(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, DC 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.

(d) Interstate or foreign commerce. It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, an endangered plant.

(e) Sale or offer for sale. (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered plant.

(2) An advertisement for the sale of any endangered plant which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the Service, shall not be considered an offer for sale within the meaning of this paragraph.

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

<<no changes>>

Sec. 17.63 Economic hardship permits.

<<no changes>>

Sec. 17.71 Prohibitions.

(a) Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in Sec. 17.61 shall apply to threatened plants, with the following exception. Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of Sec. 17.61, provided that a statement that the seeds are of "cultivated origin" accompanies the seeds or their container during the course of any activity otherwise subject to these regulations.

(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.

(c) Whenever a special rule in Sec. Sec. 17.73 to 17.78 applies to a threatened species, none of the provisions of paragraph (a) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions. If indicated by special rule, the exception for seeds in paragraph (a) of this section shall not apply to the threatened species.

Sec. 17.72 Permits--general.

<<no changes>>

Subpart H_Experimental Populations

Sec. 17.80 Definitions.

<<no changes>>

Sec. 17.81 Listing.

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section; provided, that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The relative effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or state actions or private activities within or adjacent to the experimental population area. The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental population.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

(d) The Fish and Wildlife Service shall consult with appropriate state fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected state and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

(e) The Director shall not establish an experimental population or part thereof in any state without the concurrence of the Governor of the state. Failing such concurrence, the Secretary may establish such a population if the Secretary finds that it is essential to the continued existence of the species in the wild.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart shall be identified by special rule in §§17.84—17.86 as appropriate and separately listed in §17.11(h) (wildlife) or §17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential populations. In those situations where a portion or all of an essential experimental population overlaps

with a natural population of the species during certain periods of the year, no critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.

Sec. 17.82 Prohibitions.

<<no changes>>

Sec. 17.83 Interagency cooperation.

<<No changes>>

Sec. 17.84 Special rules--vertebrates.

<<no changes>>

Sec. 17.85 Special rules--invertebrates.

<<no changes>>

Sec. 17.86 Special rules--plants. [Reserved]

Subpart I_Interagency Cooperation

Sec. 17.94 Critical habitats.

<<no changes>>

Sec. 17.95 Descriptions of critical habitats

No changes

Part 81 is revised to read as follows.

Sec. 81.1 Definitions.

As used in this part, terms shall have the meaning ascribed in this section.

“Agreements” are signed documented statements of the actions to be taken by the state(s) and the Secretary in furthering the purposes of the Act. They include:

- (1) A Cooperative Agreement entered into pursuant to section (6)(c) of the Endangered Species Act of 1973 and section 81.2 of this part. There are “Full Authorities” Cooperative Agreements and “Limited Authorities” Cooperative Agreements for both fish and wildlife species and for plants. A Full Authorities Cooperative Agreement for endangered and threatened fish and wildlife species must meet all five of the criteria set out in section

81.2(a)-(e). A Full Authorities Cooperative Agreement for endangered and threatened plant species must meet all of the criteria set out in 81.2 (a)-(e), except for criteria (d). A Limited Authorities Cooperative Agreement concerning endangered and threatened fish and wildlife species must meet the criteria set out in 81.2(c), (d) and (e). A Limited Authorities Cooperative Agreement concerning threatened and endangered plant species must meet the criteria set out in section 81.2(c) and (e).

(2) A Project Agreement which includes a statement as to the actions to be taken in connection with the conservation of endangered or threatened species, benefits derived, cost of actions, and costs to be borne by the Federal Government and by the states.

“Conserve,” “conserving,” and “conservation.” The use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Endangered Species Act of 1973 are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

“Endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range (other than a species of the Class Insecta as determined by the Secretary to constitute a pest whose protection under the provisions of The Endangered Species Act of 1973 would present an overwhelming and overriding risk to man).

“Fish or wildlife.” Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

“Plant” means any member of the plant kingdom, including seeds, roots, and other parts thereof.

“Program” means a state-developed set of goals, objectives, strategies, action, and funding necessary to be taken to promote the conservation and management of resident endangered or threatened species. Such a program may be wholly contained within a state’s Comprehensive Wildlife Conservation Strategy, developed pursuant to the requirements for State Wildlife Grant funding under, (P.L. 107-63, 115 Stat. 414); or may be evidenced within other state legislation, regulations, and policy documents.

“Secretary” means the Secretary of the Interior or his authorized representative.

“Species.” This term includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

“State.” Means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

“State agency.” The state agency or agencies, or other governmental entity or entities which are responsible for the management and conservation of fish or wildlife resources within a state.

“Plan” means a course of action under which immediate attention will be given to a state's resident species determined to be endangered or threatened.

“Threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, as determined by the Secretary.

“Project.” A plan undertaken to conserve the various species of fish and wildlife or plants facing extinction.

“Act” means the Endangered Species Act of 1973, Pub. L. 93-205, 16 U.S.C. 1531 et seq.

“Project segment” is defined as an essential part or a division of a project, usually separated as a period of time, occasionally as a unit of work.

“Resident species.” For purposes of the Endangered Species Act of 1973, a species is resident in a state if it exists in the wild in that state during any part of its life.

Sec. 81.2 Cooperation with the States.

The Secretary is authorized by the act to cooperate with any state which establishes and maintains an adequate and active program for the conservation of various endangered and threatened species. In order for a state program to be deemed an adequate and active program, the Secretary must find and reconfirm, on an annual basis, that under the state program, either for a Full Authorities Cooperative Agreement or a Limited Authorities Cooperative Agreement:

(a) Authority resides in the state agency to conserve resident species of fish and wildlife or plants determined by the state agency or the Secretary to be endangered or threatened;

(b) The state agency has established an acceptable conservation program, consistent with the purposes and policies of the act, for all residents species of fish and wildlife or plants in the state which are deemed by the Secretary to be endangered or threatened; and has furnished a copy of such program together with all pertinent details, information, and data requested to the Secretary;

(c) The state agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife or plants;

(d) The state agency, in regard only to cooperative agreements for resident endangered and threatened species pursuant to the provisions of 6(c)(1) of the Endangered Species Act, is authorized to establish programs , including the acquisition of land or aquatic habitat or interests therein, for the conservation or resident endangered or threatened species; and

(e) Provisions are made for public participation in designating resident species of fish and wildlife or plants as endangered or threatened, or, under a state program, for a Limited Authorities Cooperative Agreement: (1) The requirements set forth in paragraphs (c), (d), and (e) of this section are complied with concerning fish and wildlife and in paragraphs (c) and (e) of this section concerning plants, and plans are included under which immediate attention will be given to those resident species of fish and wildlife or plants which are determined by the Secretary or the state agency to be endangered or threatened and which the Secretary and the state agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a state whose program is deemed adequate and active pursuant to this paragraph shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) of the Endangered Species Act of 1973 with respect to the taking of any resident endangered or threatened species.

Sec. 81.3 Cooperative Agreement.

(a) Upon determination by the Secretary that a state program is adequate and active and complies with Sec. 81.2, the Secretary shall enter into an Agreement with the state. A Cooperative Agreement is necessary before a Project Agreement can be approved for endangered or threatened species projects. A cooperative agreement under Sec. 81.2 must be reconfirmed annually to reflect new laws, species lists, rules and regulations, and programs, and to demonstrate that the program is still active and adequate.

(b) In conducting the annual review and reconfirmation that a state program is adequate and active for the conservation of endangered species and threatened species, the Secretary shall consider any pertinent changes that have occurred in a state's laws, species lists, rules, regulations, and programs, as well as any data or evidence regarding the state's program that may have been received at least 60 days before the anniversary of the approved state program, in a manner prescribed by the Secretary.

(c) For purposes of the reconfirmation process, the state's program shall be presumed to have remained compliant, unless there is substantive evidence demonstrating that the state no longer meets the required threshold for an adequate and active program for the conservation of endangered species and threatened species.

81.4 Determination of Species Most Urgently in Need of a Conservation Program.

The Secretary, in determining which species are most urgently in need of a conservation program as provided for in Section 81.2(e), shall cooperate to the maximum extent possible with the state agency, and shall apply the following criteria: (1) Concurrence with Congressionally mandated State Comprehensive Wildlife Strategy Plans; (2) The degree of threat to the continued existence of the species; (3) the recovery potential of the species; (4) the taxonomic status, e.g., giving full species priority over subspecies or populations; and (5) such other relevant biological factors as determined appropriate.

81.5 State ESA Authorities under Full Authorities Cooperative Agreements.

Pursuant to section 6(g)(2) of the Endangered Species Act, a state which is a party to a Full Authorities Cooperative Agreement may regulate the taking of any resident endangered species or threatened species, unless there is language to the contrary within the Agreement. The process by which the state would regulate the taking of such species is a component of the state's conservation programs which must be found by the Secretary to be adequate and active for the conservation of endangered species and threatened species in order for a cooperative agreement to be approved in the first place. The language of a Full Authorities Cooperative agreement may require that the FWS approve all taking of resident endangered or threatened species, may designate specific species for which a state may regulate take, or may recognize that the state will regulate all taking of resident endangered or threatened species

81.6 Additional Cooperative Efforts with States.

Section 6(a) of the Endangered Species Act provides that the Secretary shall cooperate to the maximum extent practicable with the states. Pursuant to this directive, Cooperative Agreements may contain any provisions involving the

sharing of Endangered Species Act functions which are not inconsistent with the requirements of the Endangered Species Act or any other Federal law. States, for example, may be given active roles in the development of Recovery Plans under Section 4(f) of the Endangered Species Act and in the Consultation process under Section 7 of the Endangered Species. All such shared responsibilities must be consistent with the requirements for an approved plan pursuant to Section 81.2, and ultimate authority for such functions rest with the Secretary as required by the Endangered Species Act.

Sec. 81.7 Allocation of funds.

The Secretary shall semi-annually allocate funds, appropriated for the purpose of carrying out Section 6, to various state programs using the following as the basis for his determination:

- (a) The international commitments of the United States to protect endangered or threatened species;
- (b) The readiness of a state to proceed with a conservation program consistent with the objectives and purposes of the Act;
- (c) The number of endangered and threatened species within a state;
- (d) The potential for restoring endangered and threatened species within a state; and
- (e) The relative urgency to initiate a program to restore and protect an endangered or threatened species in terms of survival of the species.

Sec. 81.8 Information for the Secretary.

Before any Federal funds may be obligated for any project to be undertaken in a state, the state must have entered into a Cooperative Agreement with the Secretary pursuant to section 6(c) of the Act.

Sec. 81.9 Project Agreement.

(a) Subsequent to the establishment of a Cooperative Agreement pursuant to Sec. 81.3, the Secretary may further agree with the states to provide financial assistance in the development and implementation of acceptable projects for the conservation of endangered and threatened species. Financial agreements will consist of an Application for Federal Assistance and a Project Agreement. Such agreements' continued existence, and continued financial assistance under such agreements, shall be contingent upon the continued existence of the Cooperative Agreement described in Sec. 81.3 of this part.

(b) The Application for Federal Assistance will show the need for the project, the objectives, the expected benefits and results, the approach, the period of time necessary to accomplish the objectives, and both the Federal and state costs. All of a state's activities proposed for this Federal grant support will be incorporated in one or more project applications.

(c) To meet the requirements of the Act, the Application for Federal Assistance shall certify that the state agency submitting the project is committed to its execution and that it has been reviewed by the appropriate state officials and is in compliance with other requirements of the Office of Management and Budget Circular No. A-95 (as revised).

(d) The Project Agreement will follow approval of the Application for Federal Assistance by the Secretary. The mutual obligations by the cooperating agencies will be shown in this agreement executed between the state and the Secretary. An agreement shall cover the financing proposed in one project segment and the work items described in the documents supporting it.

(e) The form and content for both the Application for Federal Assistance and the Project Agreement are provided in the Federal Aid Manual.

Sec. 81.10 Availability of funds.

Funds allocated to a state are available for obligation during the fiscal year for which they are allocated and until the close of the succeeding fiscal year. For the purpose of this section, obligation of allocated funds occurs when a Project Agreement is signed by the Secretary, or his authorized representative, attesting to his approval.

Sec. 81.11 Payments.

The payment of the Federal share of costs incurred in the conduct of activities included under a Project Agreement shall be in accordance with Treasury Circular 1075.

(a) Federal payments under the Act shall not exceed 75 percent of the program costs as stated in the agreement; except, the Federal share may be increased to 90 percent when two or more states having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such states, enter jointly into an agreement with the Secretary.

(b) The state share of program costs may be in the form of cash or in-kind contributions, including real property, subject to standards established by the Secretary as provided in Office of Management and Budget Circular A-102.

(c) Payments under the Endangered Species Act, including such preliminary costs and expenses as may be incurred in connection with projects, shall not be

made unless all documents that may be necessary or required in the administration of this Act shall have first been submitted to and approved by the Secretary. Payments shall be made for expenditures reported and certified by the state agencies. Payments shall be made only to the state office or official designated by the state agency and authorized under the laws of the state to receive public funds of the state.

(d) Vouchers and forms provided by the Secretary and certified as therein prescribed, showing amounts expended and the amount of Federal Aid funds claimed to be due on account thereof, shall be submitted to the Secretary by the state agency.

Sec. 81.12 Assurances.

The state must assure and certify that it will comply with all applicable Federal laws, regulations, and requirements as they relate to the application, acceptance, and use of Federal funds for projects under the Act in accordance with Office of Management and Budget Circular A-102.

Sec. 81.13 Submission of documents.

Papers and documents required by the Act or by regulations in this part shall be deemed submitted to the Secretary from the date of receipt by the Director of the U.S. Fish and Wildlife Service.

Sec. 81.14 Divergent opinions over project merits.

Any difference of opinion about the substantiality of a proposed project or appraised value of land to be acquired are considered by qualified representatives of the Secretary and the state. Final determination in the event of continued disagreement rests with the Secretary.

Sec. 81.15 Contracts.

The state may use its own regulations in obtaining services providing that they adhere to Federal laws and the requirements provided by Office of Management and Budget Circular A-102. The state is the responsible authority without recourse to the Secretary regarding settlement of contractual issues.

Sec. 81.16 Inspection.

Supervision of each project by the state shall include adequate and continuous inspection. The project will be subject to periodic Federal inspection.

Sec. 81.17 Comprehensive plan alternative.

In the event that the state elects to operate under a comprehensive fish and wildlife resource planning system, the Cooperative Agreement will be an

attachment to the plan. No Application for Federal Assistance will be required since the documentation will be incorporated in the plan. However, the continued existence of the comprehensive plan, and Federal financing thereunder, will be contingent upon the continued existence of the Cooperative Agreement described in Sec. 81.3, above.

Sec. 81.18 Audits.

The state is required to conduct an audit at least every two years in accordance with the provisions of Attachment P of OMB Circular A-102. Failure to conduct audits as required may result in withholding of grant payments or such other sanctions as the Secretary may deem appropriate.

Part 402 is revised to read as follows.

Sec. 402.01 Scope and Applicability.

(a) This part interprets and implements sections 7(a)(2)–(d) [16 U.S.C.1536(a)(2)–(d)] of the Endangered Species Act of 1973, as amended (“Act”). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (“listed species”) and habitat of such species that has been designated as critical (“critical habitat”).

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat.

Section 7(b) of the Act provides statutory requirements for completion of consultation, requires the Secretary, after the conclusion of consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat. Biological assessments are

required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity.

Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat

Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 223.102(a) and 224.101. If the subject species is cited in 50 CFR 223.102 or 224.101, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

(c) These regulations apply to only those portions of agency actions that are discretionary and may affect threatened or endangered species or designated critical habitat which occur in territories of the United States or on the high seas. Actions or their effects that occur outside these areas are governed by the provisions of Section 8 of the Act and any applicable treaties or regulations.

§ 402.02 Definitions.

“Act” means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

“Action authorized, funded, or carried out by such agency” means a specific and discrete affirmative determination on the part of a federal agency to authorize, fund, or carry out an activity in the United States, its territories, or upon the high seas

“Action area” means all areas within the United States, its territories or the high seas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

“Action in which there is discretionary Federal involvement or control” means that portion of an agency action occurring and having effects within the United States, its territories or on the high seas, that is authorized, funded, or carried out, (in

whole or in part) by an agency of the Federal government and for which the Federal agency has discretion to modify by imposing conditions that would purposefully inure to the benefit of listed species.

“Adversely modify” means to engage in a discretionary action or discretionary portion of an action that significantly alters:

(a) The physical or biological features essential to the conservation of the species existing at the time of designation that were the basis of the critical habitat designation; and

(b) The designated critical habitat to such an extent as to preclude its ability to fulfill its role in the conservation of the species.

For unoccupied habitat, only subparagraph (b) applies.

“Applicant” refers to any person or their designated representative, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the activity that is the subject of the consultation.

“Biological opinion” is the document that states the opinion of the Secretary as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

“Conference” is the process used to evaluate the effects of federal actions on species proposed for listing or on proposed critical habitat

“Conservation recommendations” are suggestions by the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information. Conservation recommendations that are adopted are considered actions that contribute to the conservation of the species and will be considered in status reviews and as part of the baseline for the species in future consultations.

“Consultation” is a process between the Service and a Federal agency that assists the Federal agency in fulfilling its responsibilities under section 7(a). There are many methods for conducting consultation using the components described within these regulations.

“Critical habitat” refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

“Designated non-Federal representative” refers to a person designated by the Federal agency as its representative to conduct consultation and/or to prepare any biological assessment.

“Destroy critical habitat” means to engage in a discretionary action or the discretionary portion of an action that results in the permanent loss:

(a) Of the physical or biological features essential to the conservation of the species existing at the time of designation that were the basis of the critical habitat designation; and

(b) To such an extent as to preclude the ability of the designated critical habitat to conserve the species.

For unoccupied habitat, only subparagraph (b) applies.

“Director” refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service Director, or his authorized representative.

“Discretionary Federal involvement or control” means, as determined by the action agency, that it has discretion to modify its action to inure to the benefit of listed species.

“Effects of the action” means, as determined by the action agency, those changes from the environmental baseline which are reasonably certain to occur and have a close causal connection, either directly or indirectly, to the discretionary portions of the action subject to consultation. A close causal connection means that no more than one additional or intervening human-caused action is needed for the effect to occur.

“Emergency consultation” means, a consultation on the response to situations where: 1) use of the regular consultation procedures would delay emergency response and potentially place human health or safety or the environment at risk; or 2) either a state government or the President has declared an emergency.

“Environmental baseline” means the reference condition representing the status of the species and the environmental conditions existing at the time the Agency requests consultation, and how those conditions are likely to change or remain the same into the future absent the action under consultation. The purpose of environmental baseline is to provide frame of reference to determine the effects of the action under consultation. The environmental baseline includes:

(a) The effects of all past actions;

(b) The anticipated impacts of all proposed federal actions that have undergone required consultation; and

(c) Those effects both beneficial and adverse of contemporaneous and future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

The environmental baseline does not include effects of the discretionary portion of the action under consultation. The environmental baseline does include the effects of the non-discretionary portion of the action under consultation.

“Incidental take” refers to takings that are caused by, but are not the purpose of, carrying out an activity conducted by the Federal agency or applicant.

“Jeopardize the continued existence of a species” means, to engage in an action that appreciably increases the risk of extinction of any listed species, considered in context with the temporal and spatial nature of the effects, the status of the species, and the species’ biology.

“Listed species” means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

“Major construction activity” is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C.4332(2)(C)].

“Minor effects” are effects, that are insignificant when considered in the context of the status of the species. Such effects may include limited take.

“Non-discretionary Federal involvement or control” means, as determined by the action agency, that it lacks discretion to modify its action to inure to the benefit of listed species.

“Not likely to adversely affect” means an action whose potential effects are:

(1) insignificant (meaning they cannot be meaningfully measured or described in terms of discernable effects on the ability to conserve a species); or

(2) extremely unlikely to occur; or

(3) wholly beneficial to the species.

“Preliminary biological opinion” refers to an opinion issued as a result of early consultation.

“Proposed critical habitat” means habitat for which a proposed regulation to designate critical habitat under section 4 of the Act has been published in the Federal Register.

“Proposed species” means any species of fish, wildlife, or plant for which a proposed regulation to list the species under section 4 of the Act has been published in the Federal Register.

“Reasonable and prudent alternatives” refer to alternative actions developed in coordination between the Service, the action agency, and the applicant (if any) that can be implemented in a manner consistent with the intended purpose of the action, that can be taken by the Federal agency or the applicant, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

“Reasonable and prudent measures” refer to those actions, developed in coordination between the Service, the action agency, and the applicant necessary or appropriate to minimize incidental take.

“Reasonably certain to occur” means likely to occur within a timeframe appropriate to the action subject to consultation. With regard to actions it is appropriate to consider economic, administrative, and legal requirements and constraints.

“Service” means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

“Technical assistance” refers to information and any other forms of assistance provided by the Service to action agencies to assist in fulfilling their responsibilities under section 7 of the Act.

§ 402.03 Applicability.

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control to take measures which would intentionally inure to the benefit of listed species. An action agency is not required to consult on non-discretionary activities. It is the sole responsibility of the action agency to identify the extent of any discretionary or non-discretionary Federal involvement or control. Where an action involves a mixture of

discretionary and non-discretionary activities, an action agency need only consult on the effects of the discretionary activities.

§ 402.04 Alternative Consultation Procedures

(a) The consultation procedures set forth in this part have general applicability but may be superseded for any Federal agency by agreement or joint counterpart regulations among the agency, the Fish and Wildlife Service, and/or the National Marine Fisheries Service. Any counterpart regulations shall be published in the Federal Register in proposed form and shall be subject to public comment for at least 60 days before final rules are published. The Secretary shall publish notice in the Federal Register of each agreement entered into under this section and solicit comments from interested parties for 30 days after the date of the notice.

(b) The Service and Federal agencies may, after consultation, enter into an agreement that allows the agencies to take actions that will have minor effects on listed species without further consultation with the Service. At a minimum, the contents of such agreements shall include the following:

(1) A description of the scope of activities to be covered by the agreement;

(2) A determination that the effects of the actions conducted under the agreement, will individually and cumulatively cause no more than minor effects;

(3) An estimate of the type and amount of incidental take that is likely to result from implementation of actions covered by the agreement;

(4) Provisions for training the federal agency on determinations to be made under the agreement;

(5) A provision for monitoring and reporting incidental take; and

(6) Terms and Conditions appropriate to avoid or minimize any incidental take of listed species.

(c) Other modified procedures for consultation may be implemented by agreements among the Service and federal agencies as long as the final procedures produce the functional equivalent of the required analysis set forth elsewhere in this part. Such alternative procedures must as a minimum include descriptions of the environmental baseline and effects of the action.

(d) (1) Notwithstanding the provisions of 402.13(a), the Service may enter into agreements with federal agencies to allow them to make determinations that actions are not likely to adversely affect listed species with no further consultation. The Service shall only enter into such agreements if they determine that the action agency has the appropriate scientific and technical ability to make such a determination.

(2) In making this determination the Service may consider any of the following factors:

- (i) Whether the action agency has statutory authority to undertake actions which would inure to the benefit of listed species;
- (ii) Whether the agency has developed a plan pursuant to Part 410 to utilize their authorities to carry out programs for the conservation of listed species;
- (iii) Whether the agency demonstrates that it has sufficient staff with the appropriate expertise to make such decisions; or
- (iv) Any other relevant factors.

§ 402.05 Emergency consultation.

Where emergency circumstances necessitate consulting in an expedited manner, consultation may be conducted through procedures that the Service determines to be consistent with the requirements of sections 7(a)(2)–(d) of the Act.

§ 402.06 Coordination with other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 shall be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq., implemented at 40 CFR Parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 et seq.) if requested by the action agency.

§ 402.07 Designation of lead agency.

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency.

§ 402.08 Designation of non-Federal representative.

A Federal agency may, with the consent of the applicant, if any, designate a non-Federal representative for all matters pertaining to consultation. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.09 Irreversible or irretrievable commitment of resources.

The prohibitions in Section 7(d) are in force during the consultation process and continue until the procedural requirements of section 7(a)(2) are satisfied.

§ 402.10 Conference on proposed species or proposed critical habitat.

(a) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts with species proposed for listing and habitat proposed for designation at an early stage in the planning process.

(b) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is appropriate for a particular action.

(c) An opinion issued at the conclusion of the conference shall be adopted as the biological opinion when the species is listed or critical habitat is designated, if no significant new information becomes available (including that which becomes available during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the conclusions of the opinion. An incidental take statement shall be provided with a conference opinion but it does not become effective unless the Service adopts the opinion once the listing is final.

(d) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant

§ 402.11 Early consultation.

(a) Pursuant to Section 7(a)(3), at the request of a federal agency, the Service shall coordinate with the agency on early consultation procedures. Such procedures may result in the issuance of a preliminary biological opinion.

(b) Confirmation of preliminary biological opinion as final biological opinion. A preliminary biological opinion may be confirmed as a biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation

of the preliminary biological opinion should be submitted after the prospective applicant applies to the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 30 days of receipt of the Federal agency's request, the Service shall either:

(1) Confirm that the preliminary biological opinion stands as a final biological opinion; or

(2) If the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

§ 402.12 Biological assessments.

(a) Purpose. The procedures of this section are required for all Federal actions that are "major construction activities"; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared

(b) Preparation requirement. The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) Request for information. The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) Service's response. Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director shall provide a list of candidate species that may be present in the action area. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

(1) If the Service advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required.) If only proposed species or

proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under §402.10, but preparation of a biological assessment is only required if the proposed listing or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Service will provide a species list or concur with the species list provided within 30 days. The Service will provide available information regarding these species and critical habitat and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) Verification of current accuracy of species list. If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun. The Service shall concur or provide an accurate species list within 30 days.

(f) Contents. The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

- (1) A description of the action, including identifying any discretionary or non-discretionary portions of the action;
- (2) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally;
- (3) The views of recognized experts on the species at issue;
- (4) A review of the literature and other information;
- (5) An analysis of the effects of the action on the species and habitat including any beneficial effects caused by the proposed action including consideration of the overall status of the species and effects arising from other Federal or non-Federal actions, and the results of any related studies;
- (6) The action agency's analysis of whether or not the proposed action is likely to jeopardize the continued existence of any listed species or result

in the destruction or adverse modification of critical habitat and a description of any reasonable and prudent alternatives that may be available;

(7) A description of the impact of any anticipated incidental taking of such listed species resulting from the action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures; and

(8) A summary of any information or recommendations from an applicant.

(g) Incorporation by reference. If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) If the action agency has made a finding pursuant to paragraph (f) (6) and (7) and if the Service concurs in that finding, the Service concludes such finding meets the standards of the Act, the Service may adopt such finding as the written statement setting forth the Secretary's opinion pursuant to Section 7(b)(3)(A) of the Act.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process designed to assist a Federal agency who does not have an agreement pursuant to 402.04(c) in determining whether formal consultation or a conference is required. Informal consultation can only be initiated through a request by the action agency. The request from the action agency must be accompanied by a written determination by an action agency that an action is not likely to adversely affect a listed species or critical habitat pursuant to 402.14(b). If the Service provides a written concurrence that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat

§ 402.14 Consultation procedures.

(a) Requirement for consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if the Director identifies any action of that agency that may affect listed species or critical habitat. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, pursuant to agreements established under §402.04 or as a result of informal consultation with the Service, the Federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, or

(2) A Federal agency need not initiate consultation if a preliminary biological opinion, issued after early consultation under §402.11, is confirmed as the final biological opinion.

(c) Initiation of consultation. If the procedures of §402.04 or 402.13 were not used, then a written request to initiate consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered, including identifying any discretionary or non-discretionary portions of the action;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner and extent to which the action is likely to adversely affect any listed species or critical habitat;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation. The Service shall advise the action agency of any other existing data that is relevant to the consultation. If the Service concludes information is lacking in the written request to initiate consultation, the Service must detail all deficiencies within 30 days. Consultation shall commence upon receipt of the information requested and acknowledgment by the Service or written confirmation from the action agency that no further information will be supplied. If the Service has not identified any deficiencies within 30 days from receipt of information, consultation commenced on the date the request for consultation was received by the Service.

(e) Duration and extension of formal consultation. Consultation shall be completed in accordance with Section 7(b)(1) of the Act.

(f) New data. When the Service determines that conducting additional studies resulting in new data that would provide a better information base from which to formulate a biological opinion, the Service may request and the action agency must concur with an extension of formal consultation. The action agency and the Service shall work to obtain, to the extent practicable, those new data that can be obtained within the scope of the extension. The Service's request for new data is not to be construed as the Service's opinion that the action agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Service will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action in the following manner:

(A) Determine and describe the existing environmental baseline. ;

(B) Determine and describe the effects of the proposed action;

(C) Determine whether the effects of the action will negatively modify the baseline.

(i) If there is a negative modification relative to the baseline, then determine whether that negative modification is likely to jeopardize the continued existence of the species. If so, then a biological opinion with accompanying reasonable and prudent alternatives, if available, shall be issued;

(ii) If there is not a negative modification relative to the baseline, a biological opinion concluding that the agency action is not likely to jeopardize the continued existence of the species, shall be issued.

(D) Determine whether the effects of the action will adversely modify or destroy critical habitat. If so, then a biological opinion concluding that the action will destroy or adversely modify critical habitat shall be issued with accompanying reasonable and prudent alternatives if available. If not, then a biological opinion concluding that the action is not likely to adversely modify or destroy critical habitat shall be issued.

(4) All draft jeopardy or adverse modification determinations and any draft jeopardy opinions issued pursuant to paragraph (5) shall be formally approved by the Director.

(5) Unless otherwise mutually agreed to by the action agency (and any applicant), the Service will deliver its final biological opinion no later than 45 days after conclusion of consultation. If requested by the action agency or applicant, the Service shall deliver a draft biological opinion and incidental take statement to the agency and any applicant no later than 35 days after conclusion of consultation. The Service will deliver a final biological opinion to the action agency on or before completion of the 135th

day after conclusion of consultation, as extended by the amount time that the draft biological opinion was under review by the action agency.

(6) Discuss with the Federal agency and any applicant the Service's review and draft evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any draft finding, and the availability of reasonable and prudent alternatives (if the draft opinion concludes that the proposed action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat) that the agency and the applicant can take to avoid the likelihood that the action will jeopardize the continued existence of a species or destroy or adversely modify critical habitat. The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. The 15-day period in which the draft biological opinion must be delivered will not be suspended unless the Federal agency concurs and secures the written consent of the applicant, if any, to an extension to a specific date. All comments on the draft biological opinion must be submitted within 15 days. The Service shall not issue its biological opinion while the draft is under review by the Federal agency and applicant, if any. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the final opinion, the Service is entitled to an automatic 10-day extension on the deadline for issuance of the final opinion.

(7) Formulate a statement concerning incidental take, if such take is likely to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) Biological opinions. (1) The biological opinion shall include:

(A) A summary of the information on which the opinion is based;

(B) A detailed discussion of the effects of the action on listed species or critical habitat;

(C) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat; or, the action is not likely to jeopardize the continued existence of a listed

species or result in the destruction or adverse modification of critical habitat.

(2) A biological opinion that concludes the proposed action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat shall include a detailed discussion of how the action is likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat and any reasonable and prudent alternatives available to avoid jeopardy or destruction or adverse modification of critical habitat. If the Service, in cooperation with the action agency and applicant, is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) Incidental take. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and any resultant incidental take of listed species is in compliance with section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, in qualitative or quantitative terms of any incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes and must be commensurate with the impacts on the species of the incidental take resulting from the action under consultation. The action agency will review the draft

reasonable and prudent measures and draft terms and conditions and will notify the Director if the measures are believed to be not reasonable or prudent.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the terms and conditions.

(4) If during the course of the action, the impact of the incidental taking is significantly greater than the impact specified under paragraph (g)(1)(a) of this Section, the Federal agency must notify the Service in order to review the incidental take statement and revise the reasonable and prudent measures or reinstate consultation as appropriate.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force. The Service shall only recommend voluntary conservation measures that are demonstrated to be effective in improving baseline conditions such that the improvements will be included in the baseline for future consultations if the action is implemented.

(k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) Termination of consultation. (1) Consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following receipt of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a biological opinion has found an agency's action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of consultation

(a) Reinitiation of consultation is required and shall be requested by the Federal agency of the Service, where discretionary involvement or control over the action has been retained or is authorized by law and:

(1) New information reveals effects of the action that may adversely affect listed species or critical habitat in a manner or to an extent not previously considered; or;

(2) The identified action is subsequently modified in a manner that causes an adverse effect to the listed species or critical habitat that was not considered in the biological opinion; or

(3) A new species is listed or critical habitat designated that may be adversely affected by the identified action.

Not every change in a proposed action will require reinitiation.

(b) During the course of any reinitiation of consultation, the existing biological opinion and incidental take statement remains valid and in effect until replaced by a new biological opinion and incidental take statement.

(c) Programmatic consultations for ongoing actions. Notwithstanding the provisions of (a), when the Services have issued a biological opinion on programmatic planning documents, an action agency is not required to reinitiate consultation on those documents until the agency revises the documents under its normal course of review. Provided that, individual actions within the program that may affect a listed species will themselves undergo consultation.

402.17 Minor amendments to biological opinions or incidental take statements

The Service, with the agreement of action agency and any applicants, may make such minor amendments to either its biological opinion or the accompanying incidental take statement as are appropriate based on new information. Such amendments may be effected without reinitiating consultation.

402.18 Joint Management Agreements

Where the Service and a private landowner enter into a management agreement on private lands for actions that will provide net benefits or have only minor effects, the Service may issue a biological opinion and authorize incidental take through an incidental take statement rather than through Section 10 of the Act.

50 C.F.R. Part 410 Conservation and Recovery Initiatives

Subpart A - General

410.01 Scope

(a) This part interprets and implements the purposes of the Endangered Species Act of 1973, as amended (“Act”) for conservation of threatened and endangered species and the ecosystems upon which they depend.

(b) This part addresses a number of conservation activities, some purely voluntary and some with a regulatory basis.

410.02 Definitions

In addition to the definitions contained in the Act and Parts 10 and 222 of this subchapter, the following definitions are applicable to this Part:

Comment [NG15]: Unclear; is the Service issuing a BO to the private landowner (i.e. what’s the federal nexus?) or is this an internal consultation and we pass the authorization through to the landowner? -- Note this does not convey assurances, just authorization for take.

Comment [NG16]: Need to check these to see if they include a definition of “candidate species” – if not, we need to add a definition below.

“Act” means the Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531 et seq.

“Adequately covered” means:

(1) with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under Subpart F, or a proposed agreement has satisfied the permit issuance criteria under Subpart G, and the permit, plan or the agreement specifically identifies the species; or

(2) with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under Subpart F, or a proposed agreement has satisfied the permit issuance criteria under Subparts G or H, that would otherwise apply if the unlisted species covered by the plan or agreement were actually listed.

“Applicant” means, with respect to permits or agreements pursuant to section 10 of the Act and Subpart F, G, or H of this Part, any Federal, state, tribal, local, or other entity proposing to hold and administer such a permit under which proposed management activities will be carried out by non-federal entities, on non-federal land or water, subject to applicable laws.

“Baseline conditions,” for purposes of agreements under Subpart G, means the biological and physical conditions, agreed upon by the Secretary and the applicant as the conditions to which the permittee may return upon expiration or termination of the agreement, for each species covered by the agreement on land and water subject to the agreement. The baseline conditions include, but are not necessarily limited to, population estimates and distribution and/or habitat characteristics and the determined areas of the enrolled property that sustain seasonal or permanent use by the covered species at the time the agreement is executed with the property owner.

“Bred in captivity” or “captive-bred” refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

“Candidate Conservation Agreements with Assurances” means an Agreement signed by one or both of the Services and a non-Federal property owner and any other cooperator, that (a) sets forth specific management activities that the non-Federal property owner will voluntarily undertake or forgo that will provide a net conservation benefit to covered species and (b) provides the non-Federal property owner with assurances described within the Agreement and authorized in the enhancement of survival permit, consistent with 410.XX.

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Comment [NG17]: Do we need to add that the permit or agreement specifically identifies the species?

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Deleted: any property owner with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities on non-federal land, or

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Comment [NG18]: Deal with “property owner” separately; including “property owner” here could limit certain types of permits issued under Section 10 that do not involve HCPs, SHAs, or CCAAs and do not involve a “property owner”

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Comment [NG19]: This addition conforms to the definition in the SHA policy. It also clarifies what needs to be addressed in describing the baseline conditions. ALSO: Need to check the preamble in relation to text in the responses to comments in the SHA policy, and the policy itself.

Comment [NG20]: This definition parallels the definition of a SHA (see below) and is BASED ON CHANGING THE STANDARD FOR A CCAA TO “NET CONSERVATION BENEFIT.” This would require a change in the CCAA policy, also. NOTE ALSO: WE MAY NEED TO CHANGE THIS IF WE DECIDE TO HAVE LANGUAGE ALLOWING A FEDERAL AGENCY TO HOLD THE CCAA PERMIT AND ASSURANCES FOR THE PURPOSE OF ADMINISTERING THE PER ... [1]

Deleted: an agreement issued pursuant to the Candidate Conservation Agreement with ... [2]

“Captivity” means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

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

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

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

“Enhance the propagation or survival,” when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(1) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(2) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

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Deleted: “Conservation” of recovery or critical habitat includes protection, maintenance, restoration, enhancement, and creation of that habitat.¶

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Comment [NG21]: The change in the definition suggested in 17.03 is not included here (in 17.03 the new text expands the definitions to include SHAs and CCAAs. Need to discuss whether we want to broaden the definition in that way or leave it as is, i.e. referring only to HCPs. We recommend leaving it specific to HCPs.

Comment [NG22]: No need to repeat the definition of conservation from the ESA. The two sentences added at the end are likely to cause considerable confusion and debate as to whether they are consistent with the definition in the ESA, and they are not written as a “definition.”

Deleted: “Conserve,” “conserving” and “conservation mean to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. Conservation is a process which contributes to improving the status of the species. Individual actions still may be considered conservation actions even though they do not result in the species being no longer in need of the protections of the Act.¶

Comment [NG23]: This differs from the current definition in the regulations at 17.3. There is no need to include this definition of “Endangered species” – it already in the Act.

Deleted: “Endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range (other than a species of the Class Insecta as determined by the Secretary to constitute a pest whose protection under the provisions of The Endangered Species Act of 1973... [3]

(3) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

A “Full Authorities Cooperative Agreement” is one entered into pursuant to section 6(c) of the Act and that satisfies the requirements in section 6(c)(1)(A) B (E) or 6(c)(2)(A-D).

“Harass” in the definition of “take” in the Act means a persistent intentional or negligent act or acts causing individuals to abandon normal behavioral patterns such as breeding, feeding, or sheltering, resulting in significant adverse effects on the survival, recruitment, or reproductive output of the affected individuals. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act;
- (2) Breeding procedures; or
- (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

“Harm” in the definition of “take” in the Act means an act that causes injury to an individual member of a species of fish or wildlife. Such act may include significant habitat modification or degradation.

“Incidental taking” means any taking prohibited by section 9 of the Act or by regulation promulgated pursuant to section 4(d) of the Act, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

A “Limited Authorities Cooperative Agreement” is one entered into pursuant to section 6(c) of the Act that does not satisfy the requirements in section 6(c)(1)(A) - (E) but satisfies the requirements in section 6(c)(1)(E)(i) and (ii) or 6(c)(2)(D)(i) and (ii).

“Net conservation benefit” means, the management activities in a Safe Harbor Agreement or Candidate Conservation Agreement that contribute to the conservation/recovery of the covered species.

benefits of the management activities identified in an Agreement <<outweigh the “harm”>> that are sufficient to contribute to the recovery of covered endangered or threatened species or, in the case of covered proposed or candidate species, or species that will likely become candidates in the near future, are sufficient to

Comment [NG24]: No need to include the definition of “Fish or wildlife” as it already is in the ESA.

Deleted: “Fish or wildlife.” Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof

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Comment [NG25]: See edits from Day 1 of meeting

Comment [NG26]: See edits from Day 1 of meeting

Comment [NG27]: The edit makes this the same as how this is treated in the ESA and the current definition in 17.3; omitting this phrase could be subject to misinterpretation.

Comment [NG28]: Need to make sure people understand this changes the standard for CCAAs and in some cases may result in less protection for the covered species. A CHANGE IN THE CCAA POLICY WILL BE NEEDED IF WE ADOPT THIS CHANGE. ALSO, THE EFFECT OF THIS CHANGE MAY RESULT IN LESS CONSERVATION FOR THE SPECIES COVERED IN A CCAA – ARE WE STILL WILLING TO ISSUE A PERMIT AND ASSURANCES FOR A LEVEL OF CONSERVATION THAT IS LOWER THAN WHAT WE CURRENTLY REQUIRE UNDER A CCAA?

Deleted: with respect to species covered by permits and agreements issued for Safe Harbor Agreements pursuant to Subpart G or the Candidate Conservation Agreements with Assurances to Subpart H,

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Comment [NG29]: NEEDS DISCUSSION: This terminology is consistent with the CCAA policy, but we need to consider whether we want to include this, and how we want to treat non-listed species under a SHA, since the incidental take authorization and assurances only go into effect if listing occurs. Also, we would may need a statement here or in a revised policy that we could not rely on the SHA efforts for unlisted species as the basis for a determination that listing is not necessary, since the applicant can return to baseline conditions. This may [... [4]

contribute to reducing threats that could be a basis for listing such species as endangered or threatened, taking into account the length of the Agreement and any offsetting adverse effects attributable to the incidental taking allowed by an enhancement of survival permit issued in association with the Agreement. For species covered under a Safe Harbor Agreement, the determination of a net conservation benefit includes consideration of incidental take involved in returning to the baseline conditions specified in the Agreement.

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

For purposes of Subpart E, “program” means a state-developed set of goals, objectives, strategies, action, and funding necessary to be taken to promote the conservation of resident endangered or threatened species. Such a program may be wholly contained within a state’s Comprehensive Wildlife Conservation Strategy, developed pursuant to the requirements for State Wildlife Grant funding under, (P.L. 107-63, 115 Stat. 414); or may be evidenced within other state legislation, regulations, and policy documents.

Comment [NG30]: Do we mean “species” here, rather than “member” – what does “member” mean in this context? ALSO: WHAT ABOUT THE FUNGI KINGDOM? (Formerly thought of as part of the plant kingdom; is it the intent to exclude fungi from the ESA?)

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“Plant” means any member of the plant kingdom, including seeds, roots, and other parts thereof.

“Project.” A plan undertaken to contribute to the conservation of one or more species of wildlife or plants.

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Comment [NG31]: Why is this definition needed?

Deleted: the various species of fish and wildlife or plants facing extinction

Comment [NG32]: Why is this definition needed?

“Project segment” is defined as an essential part or a division of a project, usually separated as a period of time, occasionally as a unit of work.

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

“Property owner” with respect to permits and agreements described in Subparts F, G and H, means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities on non-Federal land.

Comment [NG33]: The phrase “on non-Federal land” is part of the existing definition at the specific request of OMB (per discussion with OMB when the regulations were revised in 2003).

“Recovery habitat” means occupied or unoccupied habitat capable of furthering species recovery goals identified in Recovery Plans. Recovery habitat can be described by its physical or biological features, or by maps. The identified features or areas shall include a description of their contribution to the species’ conservation.

Comment [NG34]: Is this needed?

“Recovery plan” means a document that describes the management actions and objective and measurable criteria that when met, either in whole or in part to such a degree that the species is no longer threatened or endangered.

“Resident species.” For purposes of the Endangered Species Act of 1973, a species is resident in a state if it exists in the wild in that state during any part of its life. A species is a “resident species” in a state if it exists in the wild in that state during any part of its life.

“Safe Harbor Agreement” means an agreement signed by one or both of the Services and a non-Federal property owner and any other cooperator, that (a) sets forth specific management activities that the non-Federal property owner will voluntarily undertake or forgo that will provide a net conservation benefit to covered species and (b) provides the non-Federal property owner with Safe Harbor assurances described within the Agreement and authorized in the enhancement of survival permit.

Deleted: under the Safe Harbor Agreements policy issued by the Services in 64 Federal Register 32717 (June 17, 1999)

Comment [NG35]: This is shorter than the definition in the SHA policy. NOTE ALSO: WE MAY NEED TO CHANGE THIS IF WE DECIDE TO HAVE LANGUAGE ALLOWING A FEDERAL AGENCY TO HOLD THE SHA PERMIT AND ASSURANCES FOR THE PURPOSE OF ADMINISTERING THE PERMIT AND PASSING ASSURANCES THROUGH TO NON-FEDERAL PROPERTY OWNERS

“State.” Means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

“State agency.” The state agency or agencies, or other governmental entity or entities which are responsible for the management and conservation of fish, wildlife, or plant resources within a state.

Deleted: “Species.” This term includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.¶

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Comment [NG36]: What about plants?

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Deleted: “Threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, as determined by the Secretary.¶

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

Subpart B - Recovery plans

410.101 Scope and applicability

This section interprets and implements the provisions contained at 4(f) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1533(f). This subpart does not apply to species that reside solely outside the jurisdiction of the United States or its territories because the Service has determined that due to lack of ability to implement the plan and therefore establishing a plan would not promote the conservation of the species.

410.102 Recovery Team

(a) To the maximum extent practicable, within five years of listing a species a recovery plan shall be prepared. Every five years thereafter, the Secretary may revise, clarify, or update the recovery plan based on any new information or changes in threats to the species.

(b) If the Service determines that a recovery team is appropriate and practicable, it shall appoint the team not later than three years of listing of a species. Whenever possible, the team shall include a diverse mix of public and private agencies and institutions, other qualified persons, and technical and scientific experts.

(c) Members of the team shall be people with expertise in:

(1) The species, closely related species, ecosystem, or relevant disciplines, e.g., ecology, genetics; or

(2) The threats contributing to the status of the species, e.g., resource extraction operations, forestry, hydrology; or

(3) Various elements of recovery plan design or implementation, e.g., land-use planning or knowledge of alternatives to reduce socioeconomic effects of implementation.

(e) All final recovery plans shall be approved by the Service. Where the Service finds that a recovery team is not making substantial progress, that team may be dissolved and a new team named.

410.103 Recovery Plan Contents

All recovery plans shall contain the following:

(a) A description of the threats to the species based on the listing document and any subsequent status reviews;

(b) A description of measures, for reducing and eliminating the identified threats;

(c) Estimated costs for completing the measures;

(d) Objective measurable criteria for determining whether a threat has been removed or ameliorated to an acceptable level;

(e) Identification of Recovery Habitat;

(f) As appropriate, a strategy for applying and implementing these measures at local levels, including suggested management needs following delisting of the species; and

(g) Identification of areas where insufficient information is available or where research is needed to determine effective conservation measures.

410.104 Data Requirements

(a) In developing the recovery plan the Service shall use the descriptions, definitions, and procedures in Part 424. In particular:

(1) Threats to the species shall be addressed as required in 424.11

(2) Any habitat identified in a recovery plan under 410.103 (a)(v) and (a)(vi) shall be developed in the context of already designated critical habitat and pursuant to the requirements of 424.12.

(3) All data and studies used for this portion of the recovery plan must conform to the requirements of Part 424 of these regulations.

Subpart C - Federal agency conservation actions

410.201 Scope and applicability

The requirements in this section apply to all Federal agencies that have obligations under section 7(a)(1) of the Act to use their authority in furtherance of the purposes of the Act.

410.202 Federal Agency Conservation Actions

(a) Within two years of the effective date of this regulation, each Federal agency [with land management authorities; or whose organic Act requires consideration of the environment] will submit the U.S. Fish and Wildlife Service and the National Marine Fisheries Service a report detailing the voluntary conservation actions has taken under section 7(a)(1) of the Act.

(b) For those species for which the U.S. Fish and Wildlife Service and the National Marine Fisheries Service has established recovery plans, the report shall contain:

(1) Past conservation actions the agency has taken using its own authorities which contribute to achieving the recovery goals developed to satisfy §410.103. Such actions may include the protection, maintenance, restoration, enhancement, and creation of any critical habitat or recovery habitat for each such listed species that may be affected by the agency; and

(2) Any future conservation actions the Agency is considering which contribute to implementing the conservation actions contained in the Recovery Plan including the protection, maintenance, restoration, enhancement and creation of any critical habitat or recovery habitat for each such species that may be affected by agency action.

(c) For those species for which the U.S. Fish and Wildlife Service and the National Marine Fisheries Service has not yet established recovery plans, the report shall contain at a minimum:

(1) How the agency currently voluntarily furthers the purposes of the Act, and which authorities are used;

(2) How the agency has voluntarily furthered the purposes of the Act in the past and the authorities to do so;

(3) What, if any actions identified in (1) and (2) will continue into the future, and what if any additional future actions the agency is considering voluntarily undertaking, and the authority to undertake such action; and

(4) Costs associated with each of the activities. These costs shall include staff time in both dollars and FTEs, as well as any other funding, and/or in-kind exchanges.

(d) Each agency shall provide an update to its report every five years. The update shall include information on species with new or revised recovery plans and any voluntary actions that benefit the species

(f) Each report shall detail how the federal agency has consulted with NMFS and/or FWS on the agency's conservation actions. .

(g) Those elements of the conservation program which are consistent with a draft or final recovery plan that has been published in the Federal Register and have been implemented shall be incorporated into the environmental baseline on Endangered Species Act consultations for relevant projects and shall be considered in each status review of the species.

(h) Those elements which have no recovery plan as a reference may be included in the baseline and considered in the status review by the Service if the Service finds they contribute to the conservation of the species.

§ 410 Subpart D Recovery Management Agreements

[Language being finalized]

§ 410 Subpart E Cooperative Agreements with States

Section 410.401 Scope and Applicability

This section describes and implements the actions the Secretary will take to cooperate with states in carrying out the program authorized by Section 6(c) of the Act.

Section 410.402 Full Authorities Cooperative Agreements.

(a) Under section 6(c) of the Act, the Secretary may sign a Full Authorities Cooperative Agreement with a state that has established and that maintains an adequate and active program for the conservation of endangered and threatened species.

(b) In order for a state program to be deemed an adequate and active program, the Secretary must find and reconfirm pursuant to 410.405 on an annual basis, that:

(1) Authority resides in the state agency to conserve resident species of fish and wildlife or plants determined by the state agency or the Secretary to be endangered or threatened;

(2) The state agency has established an acceptable conservation program, consistent with the purposes and policies of the act, for all resident species of fish and wildlife or plants in the state which are deemed by the Secretary to be endangered or threatened; and has furnished a copy of such program together with all pertinent details, information, and data requested to the Secretary;

(3) The state agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife or plants;

(4) The state agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation or resident endangered or threatened species; and

(5) Provisions are made for public participation in designating resident species of fish and wildlife or plants as endangered or threatened.

Section 410.403 State ESA Authorities Under Full Authorities Cooperative Agreements

(a) Pursuant to section 6(g)(2) of the Endangered Species Act, a State which is a party to a Full Authorities Cooperative Agreement may regulate the taking of any resident endangered species or threatened species, except:

(1) If there is language to the contrary within the Agreement; or

(2) The regulated species is listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law.

(b) The Secretary may require in a Full Authorities Cooperative Agreement that:

(1) The Secretary approve all taking of resident endangered or threatened species;

(2) The Secretary may regulate taking for some but not all of resident endangered or threatened species; or

(3) The state regulate all taking of resident endangered or threatened species.

(c) In making a determination as to what authority to provide to a state under a Full Authorities Cooperative Agreement, for migratory species, the Secretary shall consult with all other states in which the species is resident, as defined in 410.02.

Section 410.404 Limited Authorities Cooperative Agreement

(a) Under section 6(c)(1)(E)(i-ii) with regard to fish and wildlife, and 6(c)(2)(D)(i-ii) with regard to plants, the Secretary may enter into Limited Authorities Cooperative Agreements with states.

(b) In order for the Secretary to enter into a Limited Authorities Cooperative Agreement, the Secretary must find and reconfirm on an annual basis:

(1) For resident species of fish and wildlife, the requirements set forth in paragraphs 410.402(b)(3)-(5) of this Subpart are met;

(2) For plants, the requirements in section 410.402(b)(3) are met; and

(3) Plans are included under which immediate attention will be given to those resident species of fish and wildlife or plants which are determined by the Secretary or the state agency to be endangered or threatened and which the Secretary and the state agency agree are most urgently in need of conservation programs

(c)(1) The Secretary, in determining which species are most urgently in need of a conservation program for a Limited Authorities Cooperative Agreement shall cooperate to the maximum extent possible with the state agencies for the state signing the agreement and, if applicable, for all other states in which a species is also a resident species.

(2) The Secretary shall apply the following criteria:

(A) Concurrence with Congressionally mandated State Comprehensive Wildlife Strategy Plans;

(B) The degree of threat to the continued existence of the species;

(C) The recovery potential of the species; and

(D) Such other relevant biological factors as determined appropriate.

(d) A Limited Authorities Cooperative Agreement entered into with a State shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) of the Endangered Species Act of 1973 with respect to the taking of any resident endangered or threatened species.

410.405 Annual Reconfirmation of State Programs

The Service will conduct an annual review of the State's program, considering any pertinent changes in a State's laws, species lists, rules, regulations, and programs. Substantive evidence must be presented in order to demonstrate that the state no longer has an active and adequate plan.

410.406 Allocation of Funds

The Secretary shall at least annually allocate funds, appropriated for the purpose of carrying out Section 6, to various states which have entered into Cooperative Agreements with the Secretary under section 6(c) of the Act, for programs using the following as the basis for his determination:

- (1) The international commitments of the United States to protect endangered or threatened species;
- (2) The readiness of a state to proceed with a conservation program consistent with the objectives and purposes of the Act;
- (3) The number of endangered and threatened species within a state;
- (4) The potential for restoring endangered and threatened species within a state;
- (5) The relative urgency to initiate a program to restore and protect an endangered or threatened species in terms of survival of the species;
- (6) The importance of monitoring the status of candidate species within a state to prevent a significant risk to the well being of any such species; and
- (7) the importance of monitoring the status of recovered species within a state to ensure that such species do not return to the point at which the measures provided pursuant to the Act are again necessary.

410.407 Project Agreement.

(a) Subsequent to the establishment of a Cooperative Agreement pursuant to 410.402 or 410.404, the Secretary may further agree with the states to provide financial assistance in the development and implementation of acceptable projects for the conservation of endangered and threatened species. Financial agreements will consist of an Application for Federal Assistance and a Project Agreement. Such agreements' continued existence, and continued financial assistance under such agreements, shall be contingent upon the continued existence of the Cooperative Agreement described in 410.402 or 410.404.

(b) The Application for Federal Assistance will show the need for the project, the objectives, the expected benefits and results, the approach, the period of time necessary to accomplish the objectives, and both the Federal and state costs. All of a state's activities proposed for this Federal grant support will be incorporated in one or more project applications.

(c) To meet the requirements of the Act, the Application for Federal Assistance shall certify that the state agency submitting the project is committed to its execution and that it has been reviewed by the appropriate state officials and is in compliance with other requirements of the Office of Management and Budget Circular No. A-95 (as revised).

(d) The Project Agreement will follow approval of the Application for Federal Assistance by the Secretary. The mutual obligations by the cooperating agencies will be shown in this agreement executed between the state and the

Secretary. An agreement shall cover the financing proposed in one project segment and the work items described in the documents supporting it.

(e) The form and content for both the Application for Federal Assistance and the Project Agreement are provided in the Federal Aid Manual.

(f) Funds allocated to a state are available for obligation during the fiscal year for which they are allocated and until the close of the succeeding fiscal year. For the purpose of this section, obligation of allocated funds occurs when a Project Agreement is signed by the Secretary, or his authorized representative, attesting to his approval.

(g) The payment of the Federal share of costs incurred in the conduct of activities included under a Project Agreement shall be in accordance with Treasury Circular 1075.

(1) Federal payments under the Act shall not exceed 75 percent of the program costs as stated in the agreement; except, the Federal share may be increased to 90 percent when two or more states having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such states, enter jointly into an agreement with the Secretary.

(2) The state share of program costs may be in the form of cash or in-kind contributions, including real property, subject to standards established by the Secretary as provided in Office of Management and Budget Circular A-102.

(3) Payments, including such preliminary costs and expenses as may be incurred in connection with projects, shall not be made unless all documents that may be necessary or required in the administration of this Act shall have first been submitted to and approved by the Secretary. Payments shall be made for expenditures reported and certified by the state agencies. Payments shall be made only to the state office or official designated by the state agency and authorized under the laws of the state to receive public funds of the state.

(4) Vouchers and forms provided by the Secretary and certified as therein prescribed, showing amounts expended and the amount of Federal Aid funds claimed to be due on account thereof, shall be submitted to the Secretary by the state agency.

(h) The state must certify that it will comply with all applicable Federal laws, regulations, and requirements as they relate to the application, acceptance, and use of Federal funds for projects under the Act in accordance with Office of Management and Budget Circular A-102.

(i) Papers and documents required by the Act or by regulations in this part shall be deemed submitted to the Secretary from the date of receipt by the relevant office of the Services.

(j) Any difference of opinion about the substantiality of a proposed project or appraised value of land to be acquired are considered by qualified representatives of the Secretary and the state holding the agreement and, if applicable, other states in which the species is also resident. Final determination in the event of continued disagreement rests with the Secretary.

(k) The state may use its own regulations in obtaining services providing that they adhere to Federal laws and the requirements provided by Office of Management and Budget Circular A-102. The state is the responsible authority without recourse to the Secretary regarding settlement of contractual issues.

(l) Supervision of each project by the state shall include adequate and continuous inspection. The project will be subject to periodic Federal inspection.

(m) In the event that the state elects to receive funding pursuant to its Comprehensive Wildlife Conservation Strategy, the Cooperative Agreement will be an attachment to the Strategy. No Application for Federal Assistance will be required since the documentation will be incorporated in the Strategy. However, the continued existence of the Strategy, and Federal financing thereunder, will be contingent upon the continued existence of a Cooperative Agreement under either 410.402 or 410.404.

(n) The state is required to conduct an audit at least every two years in accordance with the provisions of Attachment P of OMB Circular A-102. Failure to conduct audits as required may result in withholding of grant payments or such other sanctions as the Secretary may deem appropriate.

[Need to discuss the absence of a Subpart that parallels the current text at 50 CFR 17.22(a) and CFR 17.22(a)(1) regarding permits for scientific purposes, enhancement of propagation or survival, or for incidental taking. FWS uses that for some recovery permits]

Subpart F - Incidental Take Permits

Section 410.501 Scope

This Subpart implements the incidental take permit provisions of section 10(a)(1)(B) of the Act,

Section 410.502 Application requirements

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(a) A person wishing to get a permit for an activity prohibited by Section 9 or a regulation issued under section 4(d) of the Act submits an application for activities under this paragraph that must **contain**:

Comment [NG37]: Is it an OMB requirement to specify the form number?

- (1) A complete description of the activity sought to be authorized;
- (2) 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;
- (3) A conservation plan that specifies:

(A) The impact that will likely result from such taking, including the amount, extent or type of the impacts;

(B) What steps the applicant will take to monitor, minimize, and mitigate such impacts, including whether the steps will be taken on the applicant's property or through offsite actions (for example, through credits purchase in an established conservation bank), the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances;

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(C) What alternative actions to such taking the applicant considered and the reasons why such alternatives are not proposed to be utilized;

(D) Such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan; and

(E) A description of why the probable direct and indirect effects of any incidental take authorized by the permit for species covered by the conservation plan will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species or result in the destruction or adverse modification of any designated critical habitat.

Comment [NG38]: THIS NEEDS DISCUSSION: THIS IS NOT IN THE CURRENT REGULATIONS AND WOULD ESSENTIALLY REQUIRE THE APPLICANT TO CONDUCT A SECTION 7 ANALYSIS, WHICH COULD BE COSTLY AND TIME CONSUMING. IT WOULD SEEM MORE APPROPRIATE FOR THE SERVICES TO DO THIS AS PART OF MAKING THEIR DECISION AS TO WHETHER TO ISSUE THE PERMIT..

Section 410.503 Permit Issuance

(a) Upon receiving an application completed in accordance with section 401.502 of this Subpart, the Secretary will decide whether or not a permit should be issued. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that because the Secretary can not issue a permit for activities that jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, consultation under 50 CFR part 402 is not required for issuance of the **permit**. The Secretary

Comment [NG39]: There's more in this than criteria

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Comment [NG40]: Needs further discussion with solicitors; concern that it violates the plain language of section 7(a)(2) of the ESA

shall consider the general permit issuance criteria in Sections 13 and 222 of this Title, Sec. 13.21(b)(4), and shall issue the permit if he or she finds that:

- (1) The taking will be incidental;
- (2) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings;
- (3) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided;
- (4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild or destroy or adversely modify any designated critical habitat;
- (5) The measures, if any, required under section 410.602(a)(3)(D) of this section will be met; and
- (6) He or she has received such other assurances as he or she may require that the plan will be implemented.

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(b) In making his or her decision, the Secretary 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.

Section 410.504, Permit conditions

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In addition to the general conditions set forth in parts 13 and 222 of this Title, every permit issued under this paragraph shall contain such terms and conditions as the Secretary 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 Secretary shall rely upon existing reporting requirements to the maximum extent practicable.

Section 410.505, Duration of permits

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The duration of permits issued under this Subpart 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 Secretary 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.

Section 410.506 - Regulatory Assurances

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(a) The regulatory assurances described in subsections (b) and (c) apply only to incidental take permits issued in accordance with this Subpart when the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. The regulatory assurances do not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect.

(b) Changed Circumstances

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

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

(c) Unforeseen circumstances.

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(1) Should unforeseen circumstances arise, the Secretary will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

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

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(3) The Secretary 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 Secretary will consider, but not be limited to, the following factors:

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_(i) Size of the current range of the affected species;

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

_(iii) Percentage of range conserved by the conservation plan;

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

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

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

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

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(e) These assurances cannot be provided to Federal agencies, except when Federal agencies are administering an incidental take permit for activities occurring on multiple non-Federal lands Federal agencies may hold such assurances for the purpose of transferring them to those non-Federal property owners that choose to participate in the permit and the conservation plan.

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(f) A permittee under this Subpart who chooses to discontinue the permit activity 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 a conservation plan or permit even after surrendering the permit to the relevant Service. The permit shall be deemed canceled only upon a determination by that 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.

Comment [NG41]: NEEDS DISCUSSION: This text would allow Federal agencies to "hold" assurances for purposes of passing them on to non-Federal landowners

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Section 410.507 Revocation criteria

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A permit issued under this Subpart may not be revoked for any reason except those set forth in Sec. 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.

Comment [NG42]: Need to revise citation

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Comment [NG43]: This part of the text is new – need to ck the citation and make sure we understand what this means

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Comment [NG44]: Need to check on whether we have to specifically identify the form number – is this an OMB requirement?

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Comment [NG45]: NEEDS DISCUSSION: How do we want to treat non-listed species under a SHA, since the incidental take authorization and assurances only go into effect if listing occurs.? We may need a statement in the regulations and/or in a revised policy that we could not rely on the SHA efforts for unlisted species as the basis for a determination that listing is not necessary, since the applicant can return to baseline conditions. This may be more complicated than it is worth, and we may be better off promoting a combined SHA and CCAA for those who want to cover non-listed species, and drop the reference to non-listed species in the SHA part of the regulations.

Subpart G - Safe Harbor Agreements

Section 410.601 Scope and Applicability

This Subpart describes the issuance of permits under the Services= Safe Harbor Agreement Policy.

Section 410.602 Application Requirements

A person seeking permission to conduct an activity otherwise prohibited by Section 9 of the Act or a regulation issued under Section 4(d) of the Act must submit an application for a permit under this Subpart to the appropriate Service for the Region where the applicant resides or where the proposed activity is to occur. The application must include the following information:

(1) The common and scientific names of the listed species for which the applicant requests incidental take authorization, or any species that is proposed or is a candidate for listing, or is likely to become a candidate for listing in the near future, for which the applicant also requests incidental take authorization in association with the Agreement;

(2) A description of the proposed baseline conditions;

(3) A description of how incidental take of the species identified in permit application is likely to occur, both as a result of management activities and as a result of the return to baseline conditions; and

(4) A description of why the probable direct and indirect effects of any authorized take for species covered by a Safe Harbor Agreement will not be likely to jeopardize the continued existence of any listed species or destroy or adversely modify any designated critical habitat.

(4) A proposed Safe Harbor Agreement that complies with the Services' Safe Harbor Policy.

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Comment [NG46]: NEEDS DISCUSSION: This is not currently required of an applicant and it would entail considerable analysis and work by the applicant. Should this be done by the Services instead, as part of the permit issuance considerations, when they determine whether the Agreement meets the requirements of other aspects (... [5])

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Section 410.603 Issuance criteria

(a) Upon receiving an application completed in accordance with Section 410.602 of this section, the Secretary will decide whether to issue a permit. In satisfying

the issuance criteria established in this subsection, the Service's findings regarding issuance criteria will constitute its biological opinion, ~~re is a rebuttable presumption that because the Secretary cannot issue a permit for activities that jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, consultation under 50 CFR part 402 is not required for issuance of the permit.~~ The Secretary shall consider the general issuance criteria in Parts 13 and 22 of this Title, and may issue the permit if the he or she finds:

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Comment [NG47]: Need discussion with solicitors.

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

Comment [NG48]: This restores text that is in the current regulation.

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

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Comment [NG49]: This restores text that is in the current regulation and helps ensure understanding that the key standard is that there must be a contribution to recovery

(3) 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 or destroy or adversely modify any designated critical habitat;

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

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Comment [NG50]: This restores text that is in the current regulation

(5) 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

Comment [NG51]: May need to add text here if we decide to retain text about proposed, candidate or other non-listed species covered under a permit associated with an SHA

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

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(b) In addition to any applicable general permit conditions set forth in Parts 13 and 222 of this Title, every permit issued under this Subpart is subject to the following special conditions:

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

(2) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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

relocate affected individuals of the species, if possible and appropriate; and

Comment [NG52]: May need to expand this to include a non-listed species covered by the permit, if we retain that approach/text above

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

(c) **ADD TEXT FROM CURRENT REGULATION ON PERMIT EFFECTIVE DATE?**

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Section 410.604 Regulatory assurances

(a) The regulatory assurances in this section apply only to Safe Harbor permits issued in accordance with this Subpart when the Safe Harbor Agreement is being properly implemented, and apply only with respect to species adequately covered by the Agreement and permit. The assurances provided in this section apply only to Safe Harbor permits issued after July 19, 1999.

(b) The Secretary and the permittee may agree to revise or modify the management measures set forth in a Safe Harbor Agreement if the Secretary determines that such revisions or modifications do not change the Secretary's prior determination that the Safe Harbor Agreement is reasonably expected to provide a net conservation benefit to the listed species. However, the Secretary may not require additional or different management activities to be undertaken by a permittee without the consent of the permittee.

(c) These assurances cannot be provided to any Federal agency, but they may be transferred by the federal agency to the non-federal property owner when the Federal agency is administering a Safe Harbor Agreement and related permit for activities by non-Federal property owners on non-Federal lands or waters. A Federal agency may hold such assurances solely for the purpose of transferring them to those non-Federal property owners that choose to participate in the permit and the Safe Harbor Agreement. Cross walk to HCP.

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Deleted: The assurances do not apply to actions of the Federal agency, nor do they apply to actions by the non-Federal property owner on Federal land or water. ¶

(d) Additional actions. Nothing in this rule will be construed to limit or constrain the Secretary, 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.

Section 410.605 Revocation criteria

(a) The Secretary may not revoke a Safe Harbor permit except as provided in this Section.

(b)(1) The Secretary may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) or Part 222 of this Title or Part 904 of Title 14.

Comment [NG53]: Need to check/verify these citations

(2) The Secretary may revoke a permit if continuation of the permitted activity would either appreciably reduce the likelihood of survival and recovery in the wild of any listed species or directly or indirectly alter designated critical habitat such that it appreciably diminishes the value of that critical habitat for both the survival and recovery of a listed species. Before revoking a permit for either of the latter two reasons, the Secretary, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

Deleted: jeopardize the continued existence of

Comment [NG54]: NEEDS DISCUSSION: This restores the text that is in the existing regulation.

Deleted: destroy or adversely modify designated critical habitat

Section 410.606 Duration of permits

The duration of permits issued under this Subpart 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 Secretary 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.

Subpart H - Candidate Conservation Agreements with Assurances

410.701 Scope and applicability

This Subpart implements the issuance of Candidate Conservation Agreements with Assurances and the related permit under section 10(a)(1)(A).

410.702 Application requirements

An applicant wishing to conduct activities that would otherwise be prohibited by Section 9 of the Act or a regulation issued under section 4(d) of the Act for a listed species, but affecting only candidate species, should apply for a Candidate Conservation Agreement with Assurances and a permit under section 10(a)(1)(A) that will become effective if and when covered proposed, candidate or other unlisted species are listed as endangered or threatened. The applicant must submit the following information:

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

(2) The measures proposed to be taken that will remove or contribute to removing threats to the candidate species;

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

(4) A description of why the probable direct and indirect effects of any authorized take for species covered by the Candidate Conservation Agreement with Assurances will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species or destroy or adversely modify any designated critical habitat; and

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

Section 410.703 Issuance criteria

(a) Upon receiving an application completed in accordance with this Subpart, the Secretary will decide whether or not to enter a Candidate Conservation Agreement with Assurances and issue the permit. In satisfying the issuance criteria established in this subsection, there is a rebuttable presumption that because the Secretary cannot issue a permit for activities that jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, consultation under 50 CFR part 402 is not required for issuance of the permit.

Comment [NG55]: Needs discussion with solicitors.

(b) The Secretary shall consider the general issuance criteria in **Sec. 13.21(b)**, **except for Sec. 13.21(b)(4), and Part 222 of this Title** may issue the permit if he or she finds:

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Comment [NG56]: (1) 13.21 now applies only to FWS – how to address NMFS? (2) Is “Part 222” still the appropriate citation here?

(1) The implementation of the terms of the Candidate Conservation Agreement is reasonably expected to provide a net conservation benefit to the affected species and the Agreement complies with the other requirements of the Candidate Conservation Agreement with Assurances policy available from the Service;

(2) The take will be in accordance with the terms of the Candidate Conservation Agreement with Assurances;

(3) A description of why the probable direct and indirect effects of any authorized take for species covered by a Candidate Conservation Agreement with Assurances will not jeopardize the continued existence of any listed species or destroy or adversely modify any designated critical habitat;

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(4) Implementation of the terms of the Agreement will not be in conflict with any ongoing conservation programs for species covered by the permit; and

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

(c) In addition to any applicable general permit conditions set forth in Parts 13 or 222 of this Title, every permit issued under this Subpart is subject to the following special conditions:

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

(2) When appropriate, a requirement for the permittee to give the Service reasonable advance notice (generally at least 30 days) 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 relocate affected individuals of the species, if possible and appropriate; and

(3) Any additional requirements or conditions the Secretary deems necessary or appropriate to carry out the purposes of the permit and the Candidate Conservation Agreement with Assurances.

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

Section 410.704 Regulatory assurances

(a) The assurances in this section apply only to permits issued in accordance with this Subpart 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.

(b) The Secretary shall issue the following regulatory assurances for permits issued with Candidate Conservation Agreements with Assurances:

(1) Changed circumstances provided for in the Agreement. If the Secretary determines that additional conservation measures are necessary to respond to changed circumstances and these measures were set forth in the Agreement, the permittee will implement the measures specified in the Agreement.

(2) Changed circumstances not provided for in the Agreement. If the Secretary determines that additional conservation measures not provided

for in the Agreement are necessary to respond to changed circumstances, the Secretary will not require any conservation measures in addition to those provided for in the Agreement without the consent of the permittee, provided the Agreement is being properly implemented.

(3)(A) If unforeseen circumstances arise, the Secretary 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 the Secretary determines additional conservation measures are necessary to respond to unforeseen circumstances, the Secretary may require additional measures of the permittee where the Agreement is being properly implemented, but only if such measures maintain the original terms of the Agreement to the maximum extent possible. Additional conservation 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 Secretary 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 Secretary will consider, but not be limited to, the following factors:

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

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

(iii) Percentage of range conserved by the Agreement;

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

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

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

(c) Nothing in this Part will be construed to limit or constrain the Secretary, 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.

(d) These assurances cannot be provided to Federal agencies, except when Federal agencies are administering a Candidate Conservation Agreement with Assurances and related permit for activities occurring on multiple non-Federal lands Federal agencies may hold such assurances for the purpose of transferring them to those non-Federal property owners that choose to participate in the Candidate Conservation Agreement with Assurances and related permit.

Section 410.705 Revocation criteria

(a) The Secretary may not revoke a permit issued under this Subpart except as provided in this section.

(b)(1) The Secretary may revoke a permit for any reason set forth in Sec. 13.28(a)(1) through (4) or Part 222 of this Title or Part 904 of Part 15.

(2) The Secretary may revoke a permit if continuation of the permitted activity would either jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat of any listed species. Before revoking a permit for the reasons outline in subsection (b)(2), the Secretary, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

Section 410.706 Duration of the Candidate Conservation Agreement with Assurances and Permit

The duration of a Candidate Conservation Agreement with Assurances covered by a permit issued under this Subpart must be sufficient to enable the Secretary to determine that the actions taken under the terms of the Agreement are reasonably expected to provide a net conservation benefit to the species covered by the Agreement.

Section 410.707 Objection to permit issuance

(a) 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 this Subpart.

(b) If the Service decides to issue a permit contrary to objections received pursuant to subsection (a) 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 subsection (a) 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:

- (1) Harm the specimen or population involved; or
- (2) Unduly hinder the actions authorized under the permit.

(c) The Service will notify any party filing an objection and request for notice under subsection (a) 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 subsection (b) of this section, it will include its reasons therefore in such written notice.

Part 424 is revised to read as follows.

§ 424.01 Scope and purpose.

(a) Part 424 provides rules for revising the Lists of Endangered and Threatened Wildlife and Plants and, where appropriate, designating or revising their critical habitats. Criteria are provided for determining species to be endangered or threatened and for designating critical habitats. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species also are established.

(b) The purpose of these rules is to interpret and implement those portions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), that pertain to the classification of species as threatened or endangered and the designation of critical habitat.

§ 424.02 Definitions.

Unless otherwise noted, the definitions of terms in 50 CFR 402.02 shall apply to this part. In addition, the following definitions are applicable only to this part:

“Candidate” means any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule.

“Commercial data” are information on trade that conform with Departmental and Service guidelines implementing the Information Quality Act (44 U.S.C. 3502 as amended by P.L. 106-554, section 515) and ***[NOTE: NMFS/OMB are working on a new definition.]***

“Conservation,” “conserve,” and “conserving” mean to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. Conservation is a process which contributes to improving the status of the species. Individual actions still may be considered conservation actions even though they do not result in the species being no longer in need of the protections of the Act.

A “conservation effort” means a specific action, activity, or program designed to eliminate or reduce threats or otherwise improve the status of a listed species. A conservation effort may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial action.

“Critical habitat” means (1) the specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

“Endangered species” means a species that is in danger of extinction throughout all or a significant portion of its range.

“Foreseeable future” means 10 generations or 20 years, at the discretion of the Service, unless specified otherwise in a determination made pursuant to Section 4.

“Formalized conservation effort” is a conservation effort identified in a conservation agreement, conservation plan, management plan, or similar document. An agreement or plan may contain more than one conservation effort.

“In danger of extinction” means currently subject to threats (singly or in combination) that, if left unmitigated, are reasonably certain to lead to extirpation of the species in the wild in the foreseeable future.

“List” or “lists” means the Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

“Listing” means the process of making a determination that a species should be included on the List.

“Necessary biological functions of the species” are those functions that are indispensable to the viability of the species including, but not limited to, eating, sleeping, and breeding.

“Physical or biological features essential to the conservation of the species” are those features which are sufficient to support necessary biological functions.

“Plant” means any member of the plant kingdom, including, without limitation, seeds, roots, and other parts thereof.

“Primary constituent elements” are the specific elements that constitute the physical or biological features essential to the conservation of the species. For species whose necessary biological functions require ephemeral habitat conditions (such as early successional habitats or sand bars), PCEs may include those elements that allow for the required conditions to occur periodically over time.

“Scientific and commercial Information” means factual information, which may include personal observation, that may not necessarily rise to the level of rigor required to be considered scientific or commercial data in making a determination pursuant to §4(b)(3)(A) of the Act.

“Scientific data” means data that:

(1) conform with Departmental and Service guidelines implementing the Information Quality Act (44 U.S.C. 3502 as amended by P.L. 106-554, section 515); and

(2) either

(i) Have been subject to peer review and published or approved for publication in a scientific journal or government technical report; or

(ii) Have been included or reported in studies or analyses conducted according to generally-accepted scientific or statistical principles, and accompanied by information about the study and methods used sufficient to assess its validity;

“Secretary” means the Secretary of the Interior or the Secretary of Commerce, as appropriate, or their authorized representatives.

“Significant portion of its range” means a portion of a species’ current range in which the threats to the species can imperil the viability of the species as a whole, even if some portions of the range of the species are not directly subject to those threats. The Service determines whether a portion of the species’ range is “significant” based on the biological needs of the species and the nature of the threats to that species.

“Special management considerations or protection” means management measures that are currently maintaining primary constituent elements or that are required to maintain primary constituent elements as the elements existed at the time of designation.

“Species” includes any species or subspecies of fish, wildlife or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

“State agency” means any state agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant or wildlife resources within a state.

“Threatened species” means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

“Wildlife” or “fish and wildlife” means any member of the animal kingdom including, without limitation, any vertebrate, mollusk, crustacean, arthropod or other invertebrate whether or not bred, hatched or born in captivity, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof.

§ 424.10 General.

The Secretary may add a species to the lists or designate critical habitat, delete a species or critical habitat, change the listed status of a species, revise the boundary of an area designated as critical habitat, or adopt or modify special rules (see 50 CFR 17.40–17.48 and parts 222 and 227) applied to a threatened species only in accordance with the procedures of this part.

§ 424.11 Factors for listing, delisting, or reclassifying species.

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in Sec. 424.02(w) is eligible for listing under the Act. A taxon of higher rank than species may be listed only if all included species are individually found to be endangered or threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.

(b) The Secretary shall make any determination required by paragraphs (c) and (d) of this section solely on the basis of the best scientific and commercial data available regarding a species' status, without reference to possible economic or other impacts of such determination.

(c) A species shall be listed or its listing revised if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Overutilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

The factors considered under this heading may not be already considered in (1) through (4).

The Secretary must identify the factors and provide data to support the finding.

(d) The Secretary shall delist a species if one of the following is found based on the best scientific and commercial data available:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, the Secretary may cause to be published annually a list of endangered or threatened species believed to be extinct and request notice of any data regarding sighting of such species. If after 10 years, no information to the contrary has been reported, the species shall be presumed extinct and be removed from the list;

(2) No longer meets definition. A status review determines that a species no longer meets the definition of endangered or threatened based on an evaluation of the species' status relative to the factors in section 4(a)(1);

(3) Error. Subsequent investigations indicate that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

(e) In making a determination regarding the adequacy of existing regulatory mechanisms pursuant to paragraph (c)(4), the Secretary will evaluate whether formalized conservation efforts may form a basis for not listing a species or for listing a species as threatened rather than endangered. In conducting such an evaluation, the Secretary will consider the extent to which the formalized conservation effort is sufficiently certain to be implemented and effective such that it contributes to the elimination or adequate reduction of one or more threats to the species identified pursuant to paragraph (c). In undertaking this analysis, the Secretary may consider formalized conservation efforts that have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective at the time of a listing decision.

(f) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any state agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any state or foreign nation, to determine whether the species is endangered or threatened.

(g) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any state or foreign nation, or any political subdivision of a state or foreign nation, to

protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(h) Insufficient data to make a determination means that listing is not warranted.

§ 424.12 Criteria for designating critical habitat.

(a) Critical habitat shall be designated to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat shall be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic impact, national security impacts, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) Pursuant to § 4(a)(3) a designation of critical habitat shall be considered not prudent when any of the following situations exist:

- (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or
- (ii) Such designation of critical habitat would not be beneficial to the species because:
 - (A) Habitat is not a limiting factor; or
 - (B) Threats are not habitat-based; or
 - (C) No areas meet the definition of critical habitat

(2) Critical habitat is not determinable when one or both of the following situations exist:

- (i) Data sufficient to perform required analyses are lacking; or
- (ii) The biological needs of the species are not sufficiently well known to identify any area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary must first determine which specific areas were occupied by the species at the time it was listed.

(c) For areas identified per paragraph (b) above, the Secretary must:

- (1) Identify those necessary biological functions that are limited by habitat considerations;

(2) Identify the physical or biological features essential to the conservation of the species that support such necessary biological functions of the species;

(3) Identify the primary constituent elements that constitute each physical or biological feature;

(4) Identify specific areas that currently provide a sufficient combination and level of PCEs for carrying out one or more of its necessary biological functions identified in paragraph (1) of this subsection; and

(5) Determine whether the primary constituent elements in those areas may require special management considerations or protection.

(d) The Secretary must then determine if the specific areas occupied by the species at the time of listing are adequate to provide for the conservation of the species. If not, then the Secretary must identify any specific areas not occupied at the time of listing that are essential to the conservation of the species.

(e) Critical habitat designations must be defined in terms of one or more units. Each unit will be defined by specific limits using reference points and lines as found on standard topographic maps of the area. In the marine environment, the agency may use standard demarcations, including but not limited to latitude and longitude. Within the defined limits of critical habitat, particular sites or types of land may be excluded from the total area designated by narrative in the text of the designation, if the location of the sites or types of lands excluded is readily discernible. Each unit will be referenced to the state(s), county(ies), or other local governmental units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the state(s) and county(ies) are provided for information only and do not constitute the boundaries of the area.

(f)(1) A notice of a proposed or final rule designating critical habitat must for each unit containing specific areas designated under subsection (c) of this section:

(i) Identify the necessary biological function or functions that the unit serves;

(ii) Identify the relevant PCEs found in that unit and state the basis for the Secretary's determination that the area currently contains sufficient PCEs to support the necessary biological functions identified; and

(iii) State the basis for the Secretary's determination that the PCEs in that unit may require special management considerations or protection.

(2) If any or all of a unit is designated under subsection (d) of this section, the notice must state:

- (i) the specific rationale for the determination that the specific areas within the geographic area occupied by the species at the time of listing are inadequate to provide for the conservation of the species;
- (ii) the basis for the determination that the areas designated under subsection (d) of this section are essential for the conservation of the species; and
- (iii) if any area does not currently have sufficient PCEs to support at least one necessary biological function of the species, a detailed explanation as to why the area nonetheless is essential to the conservation of the species.

(g) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

(h) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(i) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary. In particular, critical habitat may be revised when a recovery plan identifies previously undesignated areas as essential for conservation, and a review of the habitat demonstrates that it meets the requirements of this Part for designation of critical habitat.

(j) Critical habitat shall not be designated within foreign countries or in other areas outside of the jurisdiction of the United States.

(k) Land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under Section 101 of the Sikes Act must not be designated as critical habitat if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated.

§ 424.13 Sources of information and relevant data.

(a) When considering any revision of the lists, the Secretary shall consult as appropriate with affected states, interested persons and organizations, other affected Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data used by the Secretary may include, but is not limited to, scientific or commercial publications,

administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties.

(b) In making a determination under section 4(a)(1) the Service will use the best scientific and commercial data available for the species and the factors in section 4(a)(1). Such determinations must reference primary sources.

(c) In making a determination under section 4(a)(3) the Service will use the best scientific data. Such determinations must reference primary sources.

(d) Where the available data provide conflicting interpretations, the Secretary will exercise best professional judgment as the final decisionmaker.

§ 424.14 Petitions.

(a) Any interested person may submit a written petition to the Secretary requesting that one of the actions described in section 424.10 be taken.

(b) The petition must clearly identify itself as such, be dated, and include a certification as to what states and agencies the petitioner provided copies of the petition and when the copies were provided. A petition must contain the following information where available and applicable:

(1) The name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner;

(2) The scientific and any common name of the species involved;

(3) The administrative action the petitioner seeks (e.g., listing or revision of critical habitat);

(4) Detailed narrative justification for the recommended measure;

(5) Information on current population status and trends and/or estimates of present populations and distributions both in captivity and the wild;

(6) Identification of the listing factors that threaten the species and where the threats occur;

(7) Where the petition asserts a species is threatened in a significant portion of its range, a description of the areas containing threats and an explanation of how that area represents a significant portion of the range;

(8) Whether the factors identified in section 4(a)(1) of the Act do or do not place the species in danger of extinction throughout all or a significant portion of its range, including a description of the immediacy and magnitude of the threats;

(9) A description of the primary constituent elements of critical habitat and their present locations;

(10) Any benefits or adverse effects on the species that would result from designation of critical habitat;

(11) Where the petitioner is requesting the action on the basis of a subspecies or distinct population segment, information demonstrating that the petitioned entity meets the appropriate definition;

(12) Appropriate supporting documentation such as reprints of pertinent publications, copies of maps, reports, or letters from authorities; and

(13) Information on regulatory protections and conservation activities underway.

A petition must be footnoted and references noted specifically enough for the Service to locate the information cited. Where large documents are cited, appropriate page numbers and/or chapters shall be included.

(c) The Secretary shall return without review a document that does not comply with the requirements of subsection (b) of this section. The Secretary shall acknowledge in writing within 30 days receipt of a petition that complies with the requirements of subsection (b) of this section. For a petition that complies with the requirements of subsection (b) of this section, the Service will coordinate with the relevant States.

(d)(1) To the maximum extent practicable, within 90 days of receiving a valid petition to list, delist, or reclassify a species, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. For the purposes of this section substantial information is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. The Service may consider information that it has in its possession at the time the determination is made. The Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.

(2) Upon making a positive finding under paragraph (b)(1) of this section, the Secretary shall commence a review of the status of the species

concerned and shall make, within 12 months of receipt of such petition, one of the following findings:

- (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.
- (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a proposed regulation to implement the action pursuant to Sec. 424.16 of this part, or
- (iii) The petitioned action is warranted, but that—
 - (A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or reclassify species; and
 - (B) Expeditious progress is being made to list, delist, or reclassify qualified species,

in which case such finding shall be promptly published in the Federal Register together with a description and evaluation of the reasons and data on which the finding is based. A determination of expeditious progress is made in relation to the funds available after complying with non-discretionary duties under section 4 of the Act and court orders and court-approved settlement agreements to take actions pursuant to section 4 of the Act.

(3) If a finding is made under paragraph (d)(2)(iii) of this section with regard to any petition, the Secretary shall, within 12 months of such finding, again make one of the findings described in paragraph (d)(2) with regard to such petition.

(e)(1) To the maximum extent practicable, within 90 days of receiving a petition to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.

(2) In making the finding required by paragraph (e)(1) of this section, the Secretary shall consider whether a petition contains--

- (i) Information indicating that areas petitioned to be added to critical habitat contain physical or biological features essential to, and that

may require special management to provide for, the conservation of the species involved; or

(ii) Information indicating that areas designated as critical habitat and petitioned for removal do not contain features essential to, or do not require special management to provide for, the conservation of the species involved; or

(iii) For areas that were not occupied by the species at the time of listing, the specific rationale that the present range is inadequate and the basis for determining that the petitioned, unoccupied lands are essential for the conservation of the species

(3) Within 12 months after receiving a petition found under paragraph (e)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(f) Upon receiving a petition to designate critical habitat or to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

§ 424.15 Notices of review.

(a) If the Secretary finds that one of the actions described in Sec. 424.10 may be warranted, but that the available evidence is not sufficiently definitive to justify proposing the action at that time, a notice of review may be published in the Federal Register. The notice will describe the measure under consideration, briefly explain the reasons for considering the action, and solicit comments and additional information on the action under consideration.

(b) The Secretary from time to time also may publish notices of review containing the names of species that are considered to be candidates for listing under the Act and indicating whether sufficient scientific or commercial information is then available to warrant proposing to list such species, the names of species no longer being considered for listing, or the names of listed species being considered for delisting or reclassification. However, none of the substantive or procedural provisions of the Act apply to a species that is designated as a candidate for listing.

(c) Such notices of review will invite comment from all interested parties regarding the status of the species named. At the time of publication of such a notice, notification in writing will be sent to State agencies in any affected States, known affected Federal agencies, and, to the greatest extent practicable, through

the Secretary of State, to the governments of any foreign countries in which the subject species normally occur.

§ 424.16 Proposed rules.

(a) General. Based on the information received through §§ 424.13, 424.14, 424.15, and 424.21, or through other available avenues, the Secretary may propose revising the lists as described in § 424.10.

(b) Contents. A notice of a proposed rule to carry out one of the actions described in § 424.10 shall contain:

(1) The complete text of the proposed rule;

(2) A summary of the data on which the proposal is based (including citation of primary sources), and shall show the relationship of such data to the rule proposed; and

(3) If such a rule designates or revises critical habitat, such summary shall, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat, or may be affected by such designation. Any proposed rule to designate or revise critical habitat shall contain a map of such habitat. Any such notice proposing the listing, delisting of a species or the designation or revision of critical habitat shall also include a summary of factors affecting the species and/or critical habitat. A proposed rule to list a species will also include an outline description of recommended measures to minimize the threats causing the species to be classified as threatened or endangered.

(c) Procedures--(1) Notifications. In the case of any proposed rule to list, delist, or reclassify a species, or to designate or revise critical habitat, the Secretary shall--

(i) Publish notice of the proposal in the Federal Register;

(ii) Give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction therein in which the species is believed to occur, and invite the comment of each such agency and jurisdiction;

(iii) Give notice of the proposed regulation to any Federal agencies, local authorities, or private individuals or organizations known to be affected by the rule;

(iv) Insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to list, delist, or reclassify a species to each

foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation;

(v) Give notice of the proposed regulation to such professional scientific organizations as the Secretary deems appropriate; and

(vi) Publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur.

(2) Period of public comments. At least 60 days shall be allowed for public comment following publication in the Federal Register of a rule proposing the listing, delisting, or reclassification of a species, or the designation or revision of critical habitat. All other proposed rules shall be subject to a comment period of at least 30 days following publication in the Federal Register. The Secretary may extend or reopen the period for public comment on a proposed rule upon a finding that there is good cause to do so. A notice of any such extension or reopening shall be published in the Federal Register, and shall specify the basis for so doing.

(3) Public hearings. The Secretary shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to list, delist, or reclassify a species, or to designate or revise critical habitat. Notice of the location and time of any such hearing shall be published in the Federal Register not less than 15 days before the hearing is held.

§ 424.17 Time limits and required actions.

(a) General. (1) Within 1 year of the publication of a rule proposing to determine whether a species is an endangered or threatened species, or to designate or revise critical habitat, the Secretary shall publish one of the following in the Federal Register:

(i) A final rule to implement such determination or revision;

(ii) A finding that such revision should not be made;

(iii) A notice withdrawing the proposed rule upon a finding that the best scientific and commercial data available do not justify the action proposed by the rule; or

(iv) A notice extending such 1-year period by an additional period of not more than 6 months because there is substantial disagreement among scientists knowledgeable about the species concerned regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.

(2) If an extension is made under paragraph (a)(1)(iv) of this section, the Secretary shall, within the extended period, take one of the actions described in paragraphs (a)(1) (i), (ii), or (iii) of this section.

(3) If a proposed rule is withdrawn under paragraph (a)(1)(iii) of this section, the notice of withdrawal shall set forth the basis upon which the proposed rule has been found not to be supported by the best available scientific or commercial data. The Secretary shall not again propose a rule withdrawn under such provision except on the basis of sufficient new information that warrants a reproposal.

(b) Critical habitat designations. A final rule designating critical habitat of an endangered or a threatened species shall to the extent permissible under Sec. 424.12 be published concurrently with the final rule listing such species, unless the Secretary deems that--

(1) It is essential to the conservation of such species that it be listed promptly; or

(2) Critical habitat of such species is not then determinable, in which case, the Secretary, with respect to the proposed regulation to designate such habitat, may extend the 1-year period specified in paragraph (a) of this section by not more than one additional year. Not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

§ 424.18 Final rules--general.

(a) Contents. A final rule promulgated to carry out the purposes of the Act will be published in the Federal Register. This publication will contain the complete text of the rule, a summary of the comments and recommendations received in response to the proposal (including applicable public hearings), summaries of the data on which the rule is based and the relationship of such data to the final rule, and a description of any conservation measures available under the rule. Publication of a final rule to list, delist, or reclassify a species or designate or revise critical habitat shall also provide a summary of factors affecting the species. A rule designating or revising critical habitat will also contain a description of the boundaries and a map of such habitat and will, to the maximum extent practicable, be accompanied by a brief description and evaluation of those activities (whether public or private) that might occur in the area and which, in the opinion of the Secretary, may adversely modify such habitat or be affected by such designation. A final rule to list a species will also include an outline description of recommended measures to minimize the threats causing the species to be classified as threatened or endangered.

(b) Effective date. A final rule shall take effect--

(1) Not less than 30 days after it is published in the Federal Register, except as otherwise provided for good cause found and published with the rule; and

(2) Not less than 90 days after (i) publication in the Federal Register of the proposed rule, and (ii) actual notification of any affected State agencies and counties or equivalent jurisdictions in accordance with § 424.16(c)(1)(ii).

(c) Disagreement with State agency. If a State agency, given notice of a proposed rule in accordance with § 424.16(c)(1)(ii), submits comments disagreeing in whole or in part with a proposed rule, and the Secretary issues a final rule that is in conflict with such comments, or if the Secretary fails to adopt a regulation for which a State agency has made a petition in accordance with § 424.14, the Secretary shall provide such agency with a written justification for the failure to adopt a rule consistent with the agency's comments or petition.

(d) The Secretary may list a species as follows:

1. Endangered, in which case, the full protections of the Act apply;
2. Threatened, in which case the Secretary shall determine whether regulations pursuant to Section 4(d) of the Act are necessary and advisable
3. With respect to any species over which program responsibility has been vested with the Secretary of the Interior, the Secretary will determine whether to apply Section 17.31.

§ 424.19 Final rules--impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

§ 424.20 Emergency rules.

(a) Sections 424.14, 424.16, 424.17, 424.18, and 424.19 notwithstanding, the Secretary may at any time issue a regulation implementing any action described in Sec. 424.10 in regard to any emergency posing a significant risk to the well-being of a species of fish, wildlife, or plant. Such rules shall, at the discretion of the Secretary, take effect immediately on publication in the Federal Register. In the case of any such action that applies to a resident species, the Secretary shall give actual notice of such regulation to the State agency in each State in which such species is believed to occur. Publication in the Federal Register of such an emergency rule shall provide detailed reasons why the rule is necessary. An emergency rule shall cease to have force and effect after 240 days unless the

procedures described in §§ 424.16, 424.17, 424.18, and 424.19 (as appropriate) have been complied with during that period.

(b) If at any time after issuing an emergency rule, the Secretary determines, on the basis of the best scientific and commercial data available, that substantial evidence does not then exist to warrant such rule, it shall be withdrawn.

§ 424.21 Periodic review.

At least once every 5 years, the Secretary shall conduct a review of each listed species to determine whether it should be delisted or reclassified. Each such determination shall be made in accordance with §§ 424.11, 424.16, and 424.17 of this part, as appropriate. A notice announcing those species under active review will be published in the Federal Register. Notwithstanding this section's provisions, the Secretary may review the status of any species at any time based upon a petition (see Sec. 424.14) or upon other data available to the Service.

Page 69: [1] Comment [NG20] **Nancy Green** **2/15/2007 8:37:00 PM**

This definition parallels the definition of a SHA (see below) and is BASED ON CHANGING THE STANDARD FOR A CCAA TO "NET CONSERVATION BENEFIT." This would require a change in the CCAA policy, also. NOTE ALSO: WE MAY NEED TO CHANGE THIS IF WE DECIDE TO HAVE LANGUAGE ALLOWING A FEDERAL AGENCY TO HOLD THE CCAA PERMIT AND ASSURANCES FOR THE PURPOSE OF ADMINISTERING THE PERMIT AND PASSING ASSURANCES THROUGH TO NON-FEDERAL PROPERTY OWNERS

Page 69: [2] Deleted **Nancy Green** **2/14/2007 2:56:00 PM**

an agreement issued pursuant to the Candidate Conservation Agreement with Assurances policy issued by the Services and contained in 64 Federal Register 32726 (June 17, 1999).

Page 70: [3] Deleted **Nancy Green** **2/13/2007 3:55:00 PM**

"Endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range (other than a species of the Class Insecta as determined by the Secretary to constitute a pest whose protection under the provisions of The Endangered Species Act of 1973 would present an overwhelming and overriding risk to man).

Page 71: [4] Comment [NG29] **Nancy Green** **2/15/2007 8:37:00 PM**

NEEDS DISCUSSION: This terminology is consistent with the CCAA policy, but we need to consider whether we want to include this. , and how we want to treat non-listed species under a SHA, since the incidental take authorization and assurances only go into effect if listing occurs. Also, we would may need a statement here or in a revised policy that we could not rely on the SHA efforts for unlisted species as the basis for a determination that listing is not necessary, since the applicant can return to baseline conditions. This may be more complicated than it is worth, and we may be better off promoting a combined SHA and CCAA for those who want to cover non-listed species.

Page 87: [5] Comment [NG46] **Nancy Green** **2/15/2007 8:37:00 PM**

NEEDS DISCUSSION: This is not currently required of an applicant and it would entail considerable analysis and work by the applicant. Should this be done by the Services instead, as part of the permit issuance considerations, when they determine whether the Agreement meets the requirements of other aspects of the regulations and the SHA policy?