DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Announcement of Draft Safe Harbor Policy

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Announcement of draft policy; request for public comments.

SUMMARY: The Fish and Wildlife Service and the National Marine Fisheries Service (Services) announce a joint Draft Safe Harbor Policy under the Endangered Species Act of 1973, as amended (Act). Many endangered and threatened species occur exclusively or to a large extent upon privately owned property; the involvement of the private sector in the conservation and recovery of species is critical to the eventual success of these efforts. This policy would provide incentives for private and other non-Federal property owners to restore, enhance or maintain habitats for listed species. Either Service, or the Services jointly, will closely coordinate with the appropriate State agencies and any affected Native American Tribal governments before entering into Safe Harbor Agreements (Agreements). Under the policy, either Service, or the Services, jointly, would provide participating property owners with technical assistance in the development of Agreements and would provide assurances that additional land-use or resource-use restrictions as a result of their voluntary conservation actions to benefit covered species would not be imposed. If the Agreement provides a net conservation benefit to the covered species and the property owner meets all the terms of the Agreement, the Services would authorize the incidental taking of the covered species to enable the property owner to ultimately return the enrolled property back to agreed upon baseline conditions. The Services seek public comment on the draft policy. Additionally, the Fish and Wildlife Service (FWS) has published in today's **Federal Register** a proposed rule that contains the necessary regulatory changes to implement this policy. The Services also seek public comment on the appropriateness of allowing a property owner to enter into a Safe Harbor Agreement in conjunction with a Habitat Conservation Plan (HCP) under section 10(a)(1)(B) of the Act.

DATES: Comments on the draft policy must be received by August 11, 1997.

ADDRESSES: Send any comments or materials concerning the Draft Safe Harbor Policy to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 452 ARLSQ, Washington, D.C. 20240 (Telephone 703/358–2171, Facsimile 703/358–1735) You may examine comments and materials received during normal business hours in room 452, Arlington Square Building, 4401 North Fairfax Drive, Arlington, Virginia. You must make an appointment to examine these materials.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Fish and Wildlife Service, Division of Endangered Species (Telephone (703)358–2171) or Nancy Chu, National Marine Fisheries Service, Chief, Endangered Species Division (Telephone (301) 713–1401).

SUPPLEMENTARY INFORMATION:

Background

Much of the nation's current and potential fish and wildlife habitat is on non-Federal property, owned by private citizens, States, municipalities, Native American Tribal governments, and other non-Federal entities. Conservation efforts on non-Federal property are critical to the survival and recovery of many endangered and threatened species. The Services strongly believe that a collaborative stewardship approach to the proactive management of listed species involving government agencies (Federal, State, and local) and the private sector is critical to achieving the ultimate goal of the Endangered Species Act (Act). The long-term recovery of certain species can benefit from short-term and mid-term enhancement, restoration, or maintenance of terrestrial and aquatic habitats on non-Federal property.

Many property owners are willing to voluntarily manage their property to benefit listed fish and wildlife, provided that such actions do not result in new restrictions being placed on the future use of their property. Beneficial management could include actions to enhance, restore, or maintain habitat (e.g., restoring fire by prescribed burning, restoring hydrological conditions), so that it is suitable for listed species. Such proactive management actions cannot be mandated or required by the Act. Thus, failure to conduct habitat enhancement or restoration activities would not violate any of the Act's provisions. Although property owners recognize the benefits of proactive habitat conservation activities to help listed species, some are still concerned about additional land-use or resource-use restrictions that may result if listed species colonize their property or increase in numbers or distribution because of their conservation efforts. Concern centers on the applicability of the Act's section 9 ''take'' prohibitions if listed species occupy their property and on future property-use restrictions that may result from their conservation-oriented property management actions. The potential for future land- or resource-use restrictions has led property owners to avoid or limit property management practices that could enhance or maintain habitat and benefit or attract fish and wildlife that are currently Federally listed as endangered or threatened.

A fundamental purpose of section 2 of the Act, is to conserve the ecosystems upon which endangered and threatened species depend and to conserve listed species. Section 9 of the Act prohibits the ''take'' of listed fish and wildlife species, which is defined in section 3(18) to include, among other things, killing, harming or harassing. The Act's implementing regulations (50 CFR 17.3), as promulgated by the FWS, define ''harm'' to include ''significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering.'' Regulations in 50 CFR 17.31 extend the prohibition against take to threatened fish and wildlife species. Consequently, property owners whose properties support endangered or threatened species could violate section 9 of the Act if the property owners significantly develop, modify, or manage those properties in a way that causes harm to listed species.

The Services' draft Safe Harbor Policy encourages property owners to voluntarily conserve threatened and endangered species without the risk of further restrictions pursuant to section 9. Previously the FWS has provided safe harbor type assurances to non-Federal property owners based on various authorities under the Act, including incidental take statements under section 7(a)(2) and incidental take permits under section 10(a)(1)(B). After further consideration of such alternatives and other provisions of the Act, the Services have determined that the section 10(a)(1)(A) ''enhancement of survival'' permit provisions of the Act provide the best mechanism to carry out the Safe Harbor Policy and provide the necessary assurances for participating property owners while also providing conservation benefits to the covered species. Assurances already provided by

the FWS under sections 7 or 10(a)(1)(B) would still be valid, and revision of those proactive Agreements is unnecessary. The Services are developing this policy to provide national consistency in the development of Safe Harbor Agreements and link the policy to an expanded enhancement of survival permit program through section 10(a)(1)(A) of the Act.

The FWS's proposed regulatory changes necessary to implement this draft policy were published in today's **Federal Register**. The proposed rule provides the FWS's procedures to implement the Safe Harbor Policy as well as other changes to Parts 13 and 17. The National Marine Fisheries Service will develop and propose regulatory changes to implement this policy at a later date.

Draft Safe Harbor Policy

Part 1. Purpose

Because many endangered and threatened species occur exclusively, or to a large extent, upon privately owned property, the involvement of the private sector in the conservation and recovery of species is critical to the eventual success of these efforts. Private property owners are willing to be partners in the conservation and recovery of fish, wildlife, and plant species and their habitats. However, property owners often are reluctant to undertake proactive activities that increase the likelihood or extent of use of their properties by endangered and threatened species, due to fear of future additional property-use restrictions. Safe Harbor Agreements are a means of providing an incentive to property owners to restore, enhance, or maintain habitats resulting in a net conservation benefit to endangered and threatened species. Although such Agreements may not permanently conserve such habitats, they nevertheless offer important short-term and mid-term conservation benefits. These net conservation benefits may result from reduction of fragmentation and increasing the connectivity of habitats, maintaining or increasing populations, insuring against catastrophic events, enhancing and restoring habitats, buffering protected areas, and creating areas for testing and implementing new conservation strategies.

The purpose of the Safe Harbor Policy is to ensure consistency in the development of Safe Harbor Agreements. Safe Harbor Agreements encourage proactive species conservation efforts by private and other non-Federal property owners while providing certainty relative to future property-use restrictions, if these efforts attract listed species onto their properties, or areas affected by actions undertaken on their property, or increase the numbers or distribution of listed species already present on their properties. These voluntary Agreements will be developed between, either Service, or the Services jointly, and private and other non-Federal property owners. The Services will closely coordinate development of these Agreements with the appropriate State fish and wildlife or other agencies and any affected Native American Tribal governments. Collaborative stewardship with State fish and wildlife agencies is particularly important given the partnerships that exist between the States and the Services in recovering listed species. Under a Safe Harbor Agreement, participating property owners would voluntarily undertake management activities on their property to enhance, restore, or maintain habitat to benefit Federally-listed species.

Safe Harbor Agreements may be initiated by property owners, or, either Service or the Services jointly, may take the initiative on their own or in concert with other Federal or State agencies to encourage property owners to voluntarily enter Safe Harbor Agreements for a given area, particularly when many non-Federal parcels of property are involved. Either Service or the Services jointly, will work with the participating landowner in the development of their permit application and the Safe Harbor Agreement. The Services will provide the necessary technical assistance to the landowner in developing mutually agreeable management actions that the landowner is willing to voluntarily undertake or forgo that will provide a net conservation benefit and help the landowner describe how these activities will benefit covered species. Development of an acceptable permit application and an adequate Safe Harbor agreement is intricately linked. Either Service or the Services jointly will process the participating landowner's permit application following the Safe Harbor permitting process as described in Title 50 of the Code of Federal Regulations Part 17. During this process all parties to the Agreement will work in close coordination in the development of the Agreement to ensure that measures included in the agreement are consistent with the terms and conditions of the permit. Once the permit is issued the parties to the Agreement can finalize and sign the Agreement.

The Services recognize that Safe Harbor Agreements are not appropriate under all circumstances. In particular, in situations when property owners are seeking immediate take authorization, development of a Habitat Conservation Plan (HCP) and issuance of an incidental take permit under section 10(a)(1)(B) would be more appropriate. Safe Harbor Agreements are also not appropriate in situations that do not meet the net conservation benefit standards of this policy. For example, where either Service or the Services jointly, reasonably anticipate that a proposed Agreement would only redistribute the existing population of a listed species or attract a species away from a habitat that enjoys long-term protection to a habitat without such protection, the Services would not enter into the Agreement. As another example, where a species is so depleted or its habitat so degraded that some improvement over baseline conditions is necessary to result in a net conservation benefit, a Safe Harbor Agreement may not be appropriate. For instance, certain aquatic, riverine, and/or riparian species may present a challenge in reaching a net conservation benefit since returning to the baseline conditions could have serious negative effects and would negate or outweigh the benefits achieved through the Agreement. In these cases, if a net conservation benefit cannot be achieved after taking into consideration the return to the baseline conditions, the Services will not enter into a Safe Harbor Agreement unless the Services and the property owner agree to appropriate conditions that provide such a benefit.

Availability of resources will also be a governing factor for the Services. The Services expect the interest in Safe Harbor Agreements to rise and the demand for technical assistance to property owners to increase. Safe Harbor Agreements are developed using limited funds appropriated for recovery activities. Priority will, therefore, be given to Agreements that provide the greatest contribution to the recovery of multiple listed species. Another governing factor will be whether there is sufficient information to develop sound conservation measures. The Services will work with State, Tribal, and other interested parties to fill information gaps for species requirements that have not been adequately documented in the scientific literature.

Part 2. Definitions

The following definitions apply for the purposes of this policy.

''Baseline conditions'' for covered species means population estimates and distribution (if available or determinable) and/or habitat

characteristics of enrolled property that sustain seasonal or permanent use, at the time the Safe Harbor Agreement is executed between either Service or the Services jointly and the property owner.

''Covered species'' means a species that is the intended subject of a Safe Harbor Agreement. Covered species are limited to species that are Federally listed as endangered or threatened.

''Enhancement of Survival Permit'' means a permit issued under the authority of section 10(a)(1)(A) of the Act.

''Enrolled property'' means all private or non-Federal property or waters covered by a Safe Harbor Agreement to which safe harbor assurances apply and on which incidental taking is authorized under the enhancement of survival permit.

''Management activities'' are voluntary conservation actions to be undertaken by a property owner that either Service or the Services jointly believe will benefit the status of the covered species.

''Net conservation benefit'' means the cumulative results of the management activities identified in an Agreement that provide for an increase in a species' population and/or the enhancement, restoration or maintenance of covered species' suitable habitat within the enrolled property, taking into account the length of the Agreement and the incidental taking allowed by the permit. Net conservation benefits must be sufficient to contribute to the recovery of the covered species if undertaken by other property owners similarly situated within the range of the covered species.

''Property owner'' includes, but is not limited to, private individuals, organizations, businesses, Native American Tribal governments, State and local governments, and other non-Federal entities.

''Safe Harbor Agreement'' means an Agreement signed by either Service, or both Services jointly and a property owner and any other cooperator, if appropriate, that: (a) Sets forth specific management activities that the private or non-Federal property owner will voluntarily undertake or forgo that will provide a net conservation benefit to covered species; and (b) provides the property owner with the Safe Harbor assurances described within the Agreement and authorized in the enhancement of survival permit.

''Safe Harbor Assurances'' are assurances provided in the Agreement and authorized in the enhancement of survival permit for covered species, by either Service, or both jointly, to a non-Federal property owner. These assurances would allow the property owner to alter or modify enrolled property, even if such alteration or modification will result in the incidental take of a listed species that would return the species back to the originally agreed upon baseline conditions. Such assurances may apply to whole parcels, or portions thereof, of the property owner's property as designated in the Agreement. These assurances are dependent upon compliance with the property owners' obligations in the Agreement and in the enhancement of survival permit.

Part 3. Cooperation and Coordination With the States and Tribes

Coordination with the appropriate State agencies and any affected Tribal governments is critical for the success of the Services' collaborative stewardship approach to recovery through these Safe Harbor Agreements, which is the underlying principle of the Safe Harbor Policy. Coordination among the State fish and wildlife agencies, Tribal governments, the Services, and the property owners are key to effectively implementing a successful Safe Harbor Agreement. This coordination allows the special local knowledge of all appropriately affected entities to be considered in the Agreements. The Services will work in close partnership with State agencies on matters involving the distribution of materials describing the Safe Harbor Agreement policies and programs, the determination of acceptable baseline conditions and development of appropriate monitoring efforts. Because of the Services' trust responsibilities, the Services will also closely coordinate and consult with any affected Tribal government which has a treaty right to any fish or wildlife resources covered by a Safe Harbor Agreement.

Part 4. Species Net Benefit From Safe Harbor Agreements

Before entering into any Safe Harbor Agreement, either Service, or the Services jointly, must make a written finding that all covered species would receive a net conservation benefit from management actions undertaken pursuant to the Agreement. Net conservation benefits must contribute to the recovery of the covered species. Although a Safe Harbor Agreement does not have to provide permanent conservation for enrolled property, Agreements must nevertheless be of sufficient design and duration to provide a net conservation benefit to all covered listed species.

Conservation benefits from Safe Harbor Agreements may include reduction of habitat fragmentation rates; the maintenance, restoration or enhancement of habitats; increase in habitat connectivity; maintenance or increase of population numbers or distribution; reduction of the effects of catastrophic events; establishment of buffers for protected areas; and establishment of areas to test and develop new and innovative conservation strategies. The Services believe a ''net conservation benefit'' test is necessary to justify the issuance of an enhancement of survival permit under section 10(a)(1)(A) of the Act. The contribution to the recovery of listed species by Safe Harbor Agreements must be evaluated carefully, since realized benefits from these agreements will be affected by the duration of the Agreement.

The Services believe that there are many listed species that will benefit from management actions carried out for the duration of Safe Harbor Agreements even if there is a return to baseline conditions. Returning the habitat or population numbers to the baseline conditions must be possible without negating the net conservation benefit provided by the Agreement. If this net conservation benefit standard cannot be met, then the Services will not enter into the Agreement. For example, where the Services reasonably anticipate that a proposed Agreement would only redistribute the existing population of a listed species or attract a species away from a habitat that enjoys long-term protection to a habitat without such protection, the Services would not enter into the Agreement. Aquatic, riverine, and/or riparian species may present an additional challenge in reaching a net conservation benefit since returning to the baseline conditions could have a serious negative effect and would negate or outweigh the benefits achieved through the Agreement. In these cases, if a net conservation benefit cannot be achieved, and still allow for the return to the baseline conditions, the Services will not enter into a Safe Harbor Agreement.

Part 5. Standards for and Development of a Safe Harbor Agreement and Permit Issuance Under Section 10(a)(1)(A) of the Act

A property owner may obtain a permit to incidentally take a listed species of fish and wildlife above the agreed upon baseline conditions of the Safe Harbor Agreement, if the Agreement satisfies the following requirements:

The Agreement must—

(1) Specify the species and/or habitats and identify the enrolled property covered by the Agreement;

(2) Describe the agreed upon baseline conditions for each of the covered species within the enrolled property;

(3) Identify management actions that would accomplish the expected net conservation benefits to the species and the agreed upon timeframes for these management actions to remain in effect in order to achieve the anticipated net conservation benefits;

(4) Describe the anticipated results of the management actions and any incidental take associated with the management actions;

(5) Incorporate a notification requirement, where appropriate and feasible, to provide either Service, or Services jointly, or appropriate State agencies with a reasonable opportunity to rescue individual specimens of a covered species before any authorized incidental taking occurs;

(6) Describe the nature of the expected incidental take upon termination of the Agreement (i.e., back to baseline conditions);

(7) Satisfy other requirements of section 10 of the Act; and

(8) Identify the responsible parties that will monitor maintenance of baseline conditions, implementation of terms and conditions of the Agreement, and any incidental take as authorized in the permit.

Issuance of a Safe Harbor permit by the Services is subject to consultation under the intra-Service consultation provisions of section 7 of the Act.

Part 6. Baseline Conditions

Either Service, or the Services jointly, the property owner, and any other cooperator(s) must accurately describe the baseline conditions for the property and species covered by the Safe Harbor Agreement to ensure that the Agreement will not reduce current protection for covered species that presently may use the enrolled property, or result in additional restrictions for such species beyond the baseline conditions. The baseline conditions must reflect the known biological and habitat characteristics that are necessary to support existing levels of use of the property by species covered in the Agreement. However, in light of circumstances beyond the control of the property owner (e.g., loss of nest trees due to storm damage), the parties to the Agreement may revise the baseline conditions to reflect the new circumstances and may develop a new baseline upon which all parties agree.

(A) Determining the Baseline Conditions

This Policy requires a full description of baseline conditions for any species covered in an Agreement (see Part 5 above). Either Service or the Services jointly, or appropriate State or Tribal agencies, with the concurrence of the participating property owner, will describe the baseline conditions for the enrolled property in terms appropriate for the covered species such as: number and location of individual animals, if available or determinable; necessary habitat characteristics that support the species covered by the Agreement; and other appropriate attributes. On-site inspections, maps, aerial photographs, remote sensing, or other similar means can help determine baseline conditions. To the extent determinable, the parties to the Agreement must identify and agree on the level of occupation (permanent or seasonal) by covered species on the enrolled property. For species that are extremely difficult to survey and quantify, an estimate or an indirect measure (e.g., number of suitable acres of habitat needed to sustain a member of the species) is acceptable. Either Service or the Services jointly, will develop the estimate following a protocol agreed upon by all parties to the Agreement. Baseline conditions are then set, based upon the agreed upon measurements or estimates. Either Service or the Services jointly, the property owner or the property owner and any other appropriate agency or government acting in cooperation with either Service or the Services jointly, may determine the baseline conditions. When either Service does not directly determine the baseline conditions, they must review and concur with the determination before entering into an Agreement. Formulation of baseline conditions can incorporate information provided by the property owner, any other appropriate agency, or species experts, as appropriate.

(B) Plants

The Act's ''take'' prohibitions generally do not apply to listed plant species on private property. Therefore, the incidental take assurances provided in this policy are usually not necessary for listed plant species. However, the Services strongly encourage and often enter into Agreements with non-Federal property owners to restore and enhance habitats for listed plants.

Either Service or the Services jointly, must review the effects of their own actions (e.g., issuance of a permit) on listed plants, even when those plants are found on private property under section 7 of the Act. In approving an enhancement of survival permit and entering into a Safe Harbor Agreement, either Service or the Services jointly, must also confirm under section 7 that the Agreement will not ''jeopardize the continued existence'' of listed plants. In the interest of conserving listed plants and complying with their responsibilities under section 7, either Service or the Services jointly, may negotiate with the property owner to voluntarily assist the Services in restoring or enhancing listed plant habitats present within the enrolled property.

(C) Future Section 7 Considerations and Assurances

Before entering into a Safe Harbor Agreement, the either Service or the Services jointly, must conduct an intra-Service section 7 review. During that process, either Service or the Services jointly, must determine that future property use changes within the enrolled property and incidental take consistent with the established baseline conditions will neither jeopardize listed species of fish and wildlife or plants, nor destroy or adversely modify critical habitat at the time of signing the Agreement. If a future Federal nexus to the enrolled property prompts the need for a section 7 review and take of the listed species above the baseline conditions is likely, either Service or the Services jointly, will issue a non-jeopardy biological opinion and incidental take statement to the Federal action agency. As required by section 7 and its implementing regulations, either Service or the Services jointly, will also provide the Federal agency with reasonable and prudent measures that are necessary or appropriate to minimize the effects of the action. Those measures will only require implementation of the same terms and conditions provided to the participating landowner in his/her Safe Harbor Agreement and associated 10(a)(1)(a) permit. This approach is warranted and consistent with section 7 consultation procedures because the effects of any incidental take consistent with the established baseline conditions would have been previously considered during the Services' intra-agency section 7 review for the proposed Agreement.

Part 7. Assurances to Property Owners

A property owner who enters an Agreement and wishes to return enrolled property to the baseline conditions would need to show that the agreed upon baseline conditions were maintained and that activities identified in the Agreement as necessary to achieve the net conservation benefit were carried out for the duration of the agreement. If the property owner carried out the management actions and complied with the permit and the

Agreement conditions, the property owner would be authorized to utilize his/her property in a manner which returns the enrolled property to baseline conditions.

Part 8. Occupation by Non-Covered or Newly Listed Species

After an Agreement is signed and an enhancement of survival permit is issued, a species not addressed in the Agreement may occupy enrolled property. If either Service or the Services jointly, conclude that the species is present as a direct result of the property owner's conservation actions taken under the Agreement, either Service or the Services, will:

(1) At the request of the property owner, amend the Agreement to reflect the changed circumstances and revise the baseline condition description, as appropriate; and

(2) Review and revise the permit, as applicable, to address the presence of additional listed species on enrolled property.

Assurances in the permit may not necessarily be extended to a non-covered species if the species was specifically excluded from the original Agreement as a result of the participating property owner's request, or its presence is a result of activities not directly attributable to the property owner. In these cases, enhancement or maintenance actions that are specific to the non-covered species under consideration must be developed, and baseline conditions determined that will provide a net conservation benefit to that species.

Any substantial change to a Safe Harbor Agreement or a revision to an enhancement of survival permit because of non-covered species would be subject to the same review process (i.e., section 7 of the Act or public review) as the original Safe Harbor agreement and enhancement of survival permit.

Part 9. National Environmental Policy Act Compliance

The National Environmental Policy Act of 1969 (NEPA), as amended, and the regulations of the Council on Environmental Quality (CEQ) require all Federal agencies to examine the environmental impact of their actions, to analyze a full range of alternatives, and to utilize public participation in the planning and implementation of their actions. The purpose of the NEPA process is to help Federal agencies make better decisions and to ensure that those decisions are based on an understanding of environmental consequences. Federal agencies can satisfy NEPA requirements by either a Categorical Exclusion, Environmental Assessment (EA), or Environmental Impact Statement (EIS), depending on the effects of their proposed action.

Either Service or the Services jointly, will review each permit action for other significant environmental, economic, social, historical or cultural impact, or for significant controversy (516 DM 2, Appendix 2 for FWS and NOAA's Environmental Review Procedures and NOAA Administrative Order Series 216–6). If either Service or the Services jointly, expect that significant impact could occur, the issuance of a permit would require preparation of an EA or EIS. General guidance on when the Services exclude an action categorically and when and how to prepare an EA or EIS is found in the FWS's Administrative Manual (30 AM 3) and NOAA Administrative Order Series 216–6. If a Safe Harbor Agreement/permit is not expected to individually or cumulatively have a significant impact on the quality of the human environment, then the Agreement/permit may be categorically excluded.

Part 10. Transfer of Ownership

If a property owner who is party to a Safe Harbor Agreement transfers ownership of the enrolled property, either Service or the Services, will regard the new owner as having the same rights and obligations with respect to the enrolled property as the original property owner if the new property owner agrees to become a party to the original Agreement. Actions taken by the new participating property owner that result in the incidental take of species covered by the Agreement would be authorized if the new property owner maintains the baseline conditions. The new property owner, however, would neither incur responsibilities under the Agreement nor receive any assurances relative to section 9 restrictions from the Agreement unless the new property owner becomes a party to the Agreement.

A Safe Harbor Agreement must commit the participating property owner to notify the Services of any transfer of ownership at the time of the transfer of any property subject to the Agreement. This will allow the Services to contact the new property owner to explain the prior Safe Harbor Agreement and to determine whether the new property owner would like to continue the original Agreement or enter a new Agreement. When a new property owner continues an existing Safe Harbor Agreement, either Service or the Services jointly, will honor the baseline conditions for the enrolled property under consideration.

Part 11. Property Owner Discretion

Nothing in this policy prevents a participating property owner from implementing management actions not described in the Agreement, so long as such actions maintain the baseline conditions. Either Service or the Services jointly, will provide technical advice, to the maximum extent practicable, to the property owner when requested.

Part 12. Discretion of All Parties

Nothing in this policy compels any party to enter a Safe Harbor Agreement at any time. Entering a Safe Harbor Agreement is voluntary and presumes that the Agreement will serve the interests of all affected parties. Unless specifically noted, an Agreement does not otherwise create or waive any legal rights of any party to the Agreement.

Part 13. Scope of Policy

This policy applies to all federally-listed species of fish and wildlife administered by either Service or the Services jointly, as provided in the Act and its implementing regulations.

Required Determinations

A major purpose of this proposed policy is the facilitation of voluntary cooperative programs for the proactive management of non-Federal lands and waters for the benefit of listed species. From the Federal Government's perspective, implementation of this policy would result in minor expenditures (e.g., providing technical assistance in the development of site-specific management plans). The benefits derived from such management actions on non-Federal lands and waters would significantly advance the recovery of listed species. Non-Federal program participants would be provided regulatory certainty as a result of their voluntary management actions. In some cases, such participants may incur minor expenditures to carry out some management actions on their lands or involving their water. The Services have determined that the proposed policy would not result in significant costs of implementation to the Federal Government or to non-Federal program participants.

The Director of the Fish and Wildlife Service certified to the Chief Counsel for Advocacy of the Small Business Administration that a review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) has revealed that this policy would not have a significant effect on a substantial number of small

entities, which includes businesses, organizations, or governmental jurisdictions. Because of the completely voluntary nature of the Safe Harbor program, no significant effects are expected on non-Federal cooperators exercising their option to enter into a Safe Harbor Agreement. Therefore, this policy would have minimal effect on such entities.

This policy has been determined to be not significant for purposes of Executive Order 12866. Therefore, it was not subject to review by the Office of Management and Budget.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et seq.*, that this proposed policy will not impose a cost of $100 million or more in any given year on local or State governments or private entities. The Departments have determined that these proposed policy meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

The Services have examined this proposed policy under the Paperwork Reduction Act of 1995 and found it to contain no requests for additional information or increase in the collection requirement other than those already approved under the Paperwork Reduction Act of 1995 for incidental take permits with OMB approval #1018–0022 which expires July 31, 1997. The Service requested renewal of the OMB approval and in accordance with 5 CFR 1320 will not continue to collect the information, if the approval has expired, until OMB approval has been obtained.

The Department has determined that the issuance of the proposed policy is categorically excluded under the Department of Interior's NEPA procedures in 516 DM 2, Appendix 1.10. NMFS concurs with the Department of Interior's determination that the issuance of the proposed policy qualifies for a categorical exclusion and falls within the categorical exclusion criteria in NOAA 216–3 Administrative Order, Environmental Review Procedure.

Public Comments Solicited

The Services request comments on their Draft Safe Harbor Policy. Particularly sought are comments on the procedures or methods for enhancing the utility of the Safe Harbor Policy in carrying out the purposes of the Act.

The Services also are interested in the views of interested parties on the appropriateness of linking ''Safe Harbor'' Agreements to incidental take permits issued under section 10(a)(1)(B) of the Act. In certain situations, HCP permittees might be willing to conduct activities that would enhance listed species populations above their mitigation obligations under an incidental take permit or HCP. The Services are interested in ideas, comments, and suggestions on this concept. The Services also are requesting ideas, comments or suggestions on how to delineate the baseline conditions for a Safe Harbor Agreement that is linked to an HCP incidental take permit. After consideration of all comments received on this question, the Services will decide whether it is appropriate to utilize Safe Harbor Agreements in connection with HCPs.

If the Services decide that it is appropriate to provide these assurances to incidental take permittees, the Services will publish a proposed policy on how best to provide such assurances.

In addition, situations may arise where a property owner may want to recover or conserve numerous species, both listed and unlisted on their property, and may want to enter into both a Safe Harbor Agreement and a Candidate Conservation Agreement. The Services are also seeking comments, and are interested in ideas and suggestions on the ways to streamline and combine these processes when developing these two types of agreements with the same property owner.

The Services will take into consideration the comments and any additional information received by the Services by August 11, 1997. To ease review and consideration of submitted comments, the Services prefer that reviewers organize their comments by part (e.g., Part 1. Purpose, Part 2. Definitions, and linking Safe Harbor Agreements with HCP permits).

Dated: May 27, 1997.

John G. Rogers,

Acting Director, Fish and Wildlife Service.

Dated: June 2, 1997.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Announcement of Draft Policy for Candidate Conservation Agreements

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Announcement of draft policy; request for public comments.

SUMMARY: The Fish and Wildlife Service and the National Marine Fisheries Service (Services) announce a joint Draft Policy for Candidate Conservation Agreements (Agreements) under the Endangered Species Act of 1973, as amended (Act). This policy would provide incentives for private and other non-Federal property owners, and State and local land managing agencies, to restore, enhance, or maintain habitats for proposed, candidate and certain other unlisted species. Candidate Conservation Agreements would be developed by participating property owners or State or local land managing agencies to remove the need to list the covered species as threatened or endangered under the Act. The Services will coordinate closely with the appropriate State agencies and any affected Native American Tribal governments before entering into Candidate Conservation Agreements with property owners to conserve covered species.

Under this policy, either Service, or the Services jointly, would provide participating property owners and State and local land managing agencies with technical assistance in the development of Candidate Conservation Agreements and would provide assurances that, if covered species are eventually listed, the property owners or agencies would not be required to do more than those actions agreed to in the Candidate Conservation Agreement. If a species is listed, incidental take authorization would be provided to allow the property owner or agency to implement management activities that may result in take of individuals or modification of habitat consistent with those levels agreed upon and specified in the Agreement.

Published concurrently in this **Federal Register** are the Fish and Wildlife Service's (FWS) proposed regulations necessary to implement this policy. The Services seek public comment on this proposed draft policy.