governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(ii) An Indian tribe or authorized tribal organization, or Alaska Native village or organization; and

(iii) A rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a State or political subdivision of a State.

* * * * *

(22) *State:* Any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

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(26) *United States:* The 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

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Dated: April 27, 2004.

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–9985 Filed 4–30–04; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 17

RIN 1018–AI85

Safe Harbor Agreements and Candidate Conservation Agreements With Assurances; Revisions to the Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), revise our regulations pertaining to enhancement of survival permits issued under the Endangered Species Act. The purpose of these revisions is to improve the current implementing regulations for permits associated with Safe Harbor Agreements (SHAs) and Candidate Conservation Agreements with Assurances (CCAAs). These revisions will make Safe Harbor Agreements and Candidate Conservation Agreements with Assurances easier to understand and implement.

DATES: This final rule is effective June 2, 2004.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours, at the Division of Conservation and Classification, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Chris Nolin, Chief, Division of Conservation and Classification, Fish and Wildlife Service, at the above address, telephone 703/358–2171, or facsimile 703/358–1735.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*) was established to provide a means to conserve the ecosystems upon which endangered and threatened species depend, to provide a program for the conservation of these endangered and threatened species, and to take the appropriate steps that are necessary to bring any endangered or threatened species to the point where measures provided for under the Act are no longer necessary. Section 10(a)(1)(A) of the Act authorizes us to issue permits for otherwise prohibited activities in order to enhance the propagation or survival of the affected species. Section 10(d) requires that such permits be applied for in good faith and, if granted, will not operate to the disadvantage of endangered species, and will be consistent with the purposes of the Act.

On June 17, 1999, we issued two policies and published revisions of our regulations to add two categories of permits to enhance the propagation or survival of listed, proposed, candidate, and other at-risk species. One category, called ''permits for the enhancement of survival through Safe Harbor Agreements,'' is detailed at §§ 17.22(c) and 17.32(c) (for endangered and threatened species, respectively), and in the Safe Harbor Policy (64 FR 32717). The other category, called ''permits for the enhancement of survival through Candidate Conservation Agreements with Assurances,'' is detailed at §§ 17.22(d) and 17.32(d) (for endangered and threatened species, respectively), and in the Candidate Conservation Agreements with Assurances Policy (64 FR 32726).

The Safe Harbor policy and associated regulations are intended to facilitate the conservation of listed species through a collaborative approach with non-Federal property owners. The policy and regulations are designed to create incentives for non-Federal property owners to implement voluntary conservation measures for certain listed species by providing certainty with regard to possible future restrictions should the covered species later become more numerous as a result of the actions taken by the non-Federal cooperator. Non-Federal property owners, who through a Safe Harbor Agreement commit to implement voluntary conservation measures for a listed species, will receive assurances that no additional future regulatory restrictions will be imposed. When the property owner meets the issuance criteria of the regulations we will issue an enhancement of survival permit under section (10)(a)(1)(A) of the Act, authorizing incidental taking of the covered species at a level that enables the property owner to return the property back to population levels or habitat conditions agreed upon as baseline. Before issuing such a permit, we must make a written finding that all covered species in the SHA will receive a net conservation benefit from management actions taken pursuant to the agreement.

Candidate Conservation Agreements with Assurances are voluntary agreements between us and non-Federal property owners to benefit proposed species, candidate species, and species likely to become candidates in the near future. Under a CCAA, non-Federal property owners commit to implement mutually agreed upon conservation measures which, when combined with benefits that would be achieved if it is assumed that those conservation measures were to be implemented on other necessary properties, would preclude the need to list the covered species. In return for the cooperator's proactive management, we provide an enhancement of survival permit under section 10(a)(1)(A) of the Act, which, if the species were to become listed, would authorize take of individuals or the modification of habitat conditions to the levels specified in the CCAA.

The objective of these revisions to the regulations pertaining to SHAs and CCAAs is to: (1) Rectify inconsistencies between the policies and their respective implementing regulations; (2) correct drafting errors in the regulations overlooked when the regulations were published in 1999; and (3) clarify ambiguities in the regulations to eliminate confusion. Our proposed rule, which was published in the **Federal Register** (68 FR 53320) on September 10, 2003, included a request for public comments. The closing date for the comment period was November 10, 2003.

Summary of Comments and Recommendations

In response to our request for comments on the proposed revisions to the regulations, we received letters from 22 entities. Thirteen were generally in support of our proposed regulation changes, while nine expressed concerns over certain parts of the changes. We reviewed all comments received and have incorporated accepted suggestions or clarifications into the final regulations. Because most of these letters included similar comments, we grouped the comments according to issues. Following is a summary of the relevant comments and our responses.

Transfer of Permits

Issue 1: Several commenters agreed with our revision to 50 CFR13.25(c) that authorizes permits to be transferred provided that the new owner agrees to become a party to the original agreement and permits. Some commenters also noted that this change provides more incentive to landowners to enter into SHAs and CCAAs as entering into an SHA or CCAA should not be a detriment to selling one's property. One commenter stated that we should maintain discretion to allow permit transfer, but not be obligated to do so. This commenter specifically noted that it may be preferable for us to negotiate a new Safe Harbor permit with a potentially higher baseline condition with the new owner than it would be to allow the new owner to return the property to baseline conditions established under the prior owner.

Response 1: While we acknowledge that circumstances may occur that are beyond the control of the landowner and that may warrant consideration of a new baseline, we will not make renegotiation of the baseline a requirement when a permit is transferred to a new owner. Since these agreements are totally voluntary and a new owner does not have to agree to become a party to the existing SHA, there is no advantage to making renegotiation of the baseline a requirement when transferring permits. Including such a requirement may be a disincentive to property owners who are initially entering into an SHA as well as to potential new owners of a property covered under an existing agreement.

If a new owner does not agree to become a party to the existing SHA, they would be in violation of the take provisions of section 9 of the Act (and associated regulations) if they return the property to baseline without an appropriate authorization/permit from us. Thus, just as there is an incentive for the original property owner to enter in an SHA, this same incentive exists for a new property owner to participate in and accept the transfer of an existing agreement.

Definition of Property Owner

Issue 2: We proposed to revise 50 CFR 17.22(c)(1), 17.22(d)(1), 17.32(c)(1), and 17.32(d)(1) to define applicants as property owners, including anyone with a fee-simple, leasehold, or other property interest sufficient to carry out the proposed management activities. One commenter stated that, by defining an applicant in terms of property ownership, our proposal creates confusion and is overly restrictive. The commenter points out that, in other sections of the regulations (*e.g.*, permit application requirements at 50 CFR 17.32(c)(1)(i) and issuance criteria at 50 CFR 17.32(c)(2)), we refer to the ''applicant'' and do not make any mention that the applicant must be a ''property owner.'' The commenter suggests that we should consistently use the term ''applicant'' rather than attempting to broaden property interests to cover the myriad of possibilities beyond fee simple ownership. The commenter believes that the requirements for CCAAs do not necessitate that an ''applicant'' also be a ''property owner'; the critical standard is whether an ''applicant'' can demonstrate the ability to meet the issuance criteria. Other commenters agreed with our proposed revision but some also noted that we should clarify the regulations further by specifically indicating that these agreements can take place only on non-Federal land consistent with the SHA and CCAA policies. Two commenters objected to any revision broadening the availability of SHAs or CCAAs for use on leased Federal/State lands or rights of way. Another commenter suggested that we further elaborate in the regulatory language to indicate that ''property owner'' includes owners of easements, water rights, and rights under long-term licenses.

Response 2: The purpose of the proposed revision related to this issue was to clarify which types of property owners could qualify for an enhancement of survival permit for an SHA or CCAA and receive the assurances granted under these types of permits, as the SHA and CCAA policies refer to property owners in several different ways. The proposed regulation was not intended to limit certain types of entities or property owners from being permit holders, but simply to state that persons/entities who have a fee simple, leasehold, or other property interest that is sufficient to carry out the proposed management activities subject to State law qualify as property owners and may receive the assurances under an enhancement of survival permit. The important consideration is not the type of property ownership, but whether it gives the person/entity the power and authority to carry out the management activities and other provisions of the SHA or CCAA.

We did not intend to broaden the availability of the assurances provided under these permits to make them include activities by non-Federal property owners that are conducted on Federal lands. Such activities are subject to regulation by the responsible Federal agency. Federal agencies are not eligible for the assurances provided under SHAs or CCAAs as they have an affirmative responsibility for species conservation under section 7(a)(1) of the Act, and authorization for incidental take involving Federal land is covered under the provisions of section 7(a)(2) of the Act and implementing regulations. Only non-Federal property owners conducting activities on non-Federal land may receive the assurances under an enhancement of survival permit for an SHA or CCAA (see 50 CFR 17.22(c)(5)(i), 17.22(d)(5), 17.32(c)(5)(i), and 17.32(d)(5)). This limitation in assurances to only non-Federal property owners is also clearly stated in the 1999 SHA policy, where we defined ''enrolled property'' to mean ''all private or non-Federal property, waters, or natural resources to which the assurances in a Safe Harbor Agreement apply and on which incidental taking is authorized under the enhancement of survival permit.''

Under some circumstances, a State, tribal, or local agency, or other entity, may be able to work more promptly, effectively, and efficiently with individual property owners toward conservation of listed, candidate, or other at-risk species. In these cases, under the SHA and CCAA policies, we can enter into an ''umbrella'' or programmatic agreement with the appropriate agency or other entity. The agreement and associated enhancement of survival permit would specify the assurances and take allowances that could be distributed by the participating agency or other entity to the eligible individual non-Federal property owners, usually through a Certificate of Inclusion. In these situations, the assurances and take allowances in the permit apply only to the individual non-Federal property owners who choose to be included. In some cases, which we anticipate will occur only very infrequently, we may issue the

enhancement of survival permit to a part of our agency (*e.g.*, a Species Recovery Coordinator), who in turn issues Certificates of Inclusion to the non-Federal property owners. Again, it is only the non-Federal property owners who receive the assurances for the specified allowable take.

Based on the confusion created by our proposal to use the term property owner, we will not make this proposed revision. Instead, we will continue to use the term ''applicant'' in 50 CFR 17.22(c)(1), 17.22(d)(1), 17.32(c)(1), and 17.32(d)(1). The term ''non-Federal property owner'' is defined in the both the SHA and CCAA policies, but those definitions do not make it clear that persons who have a leasehold or other property interest that is sufficient to carry out the proposed management activities subject to State law qualify as non-Federal property owners. Therefore, in this final rule we are adding a definition of ''property owner'' to 50 CFR 17.3 to clarify this issue.

Issue 3: One commenter stated that the proposed revision will allow individuals who hold temporary or limited property interest to enter into agreements on properties that they do not own. The commenter believed this may be problematic and suggested we clarify our view on this or not make the proposed change.

Response 3: The proposed revision would not change what type of property owner can receive an SHA or CCAA enhancement of survival permit. Persons/entities that have a lease on a property that they do not own have always been able to apply for and receive a permit for an SHA or CCAA provided they meet the issuance criteria. While the length of time a person holds a lease on a property and the terms of the lease will be considered when we issue these types of permits and can have an influence on the conservation benefit to the species, we are not establishing thresholds on these timeframes; each application will be evaluated on a case-by-case basis. Depending on the nature of the SHA or CCAA, we believe that entities with less-than-permanent interests in property or less-than-complete interests in property could meet the requirement that the applicant must have ''shown capability for and commitment to implementing all of the terms of the SHA or CCAA.''

Acknowledgement of Two Categories of Take (Safe Harbor Agreements Only)

Issue 4: We proposed to revise 50 CFR 17.22(c)(1)(ii) and 17.32(c)(1)(ii) to acknowledge that there are two broad categories of incidental take that may occur under an SHA. One commenter believed the proposed revisions require the property owner to submit more information to obtain a permit than was previously required since they would now have to indicate how take will occur as a result of both management and a return to baseline. The commenter believed this will increase the cost of obtaining a permit and, therefore, be less likely to occur. Other commenters agreed with the proposed change to the regulations, stating that it was appropriate that we amend these provisions.

Response 4: We disagree with the commenter who believes that this change in the regulations requires the property owner to submit more information than was previously required. Information regarding how incidental take is likely to occur, both as a result of management activities and as a result of the return to baseline, has always been required in order to issue an enhancement of survival permit associated with an SHA, as we need this information to analyze the benefits and potential adverse effects of implementing the SHA. We acknowledge that, in some cases, management activities that a landowner undertakes may result in incidental take of the species, and such activities should be described in the SHA. The revision of the regulation is making this information requirement more obvious to an applicant who uses the regulations as a guide in applying for this type of permit.

Description of Future Land Use (Safe Harbor Agreements Only)

Issue 5: Several commenters agreed with our proposed change at 50 CFR 17.22(c)(1(ii) and 17.32(c)(1)(ii) to clarify the information being requested about future activities in relation to incidental take, as they believed this provision may have led to decreased use of SHAs in the past. Two commenters agreed with the revision. One of these commenters also stated that the existing language—which requires a ''description of the land use or water management activity for which the applicant requests incidental take authorization''—also should be retained, and noted that this information is crucial to our evaluation of the proposed agreement and plan.

Response 5: The original regulations at 50 CFR 17.22(c)(1)(ii) and 17.32(c)(1)(ii), pertaining to application requirements for permits for enhancement of survival through SHAs, specified that the application include ''A description of the land use or water management activity for which the applicant requests incidental take authorization.'' This requirement has been mistakenly interpreted by some as an intent by us to limit use of private property after the term of the agreement and permit. This is not the intent of the regulations; we neither wish, nor have the authority, to limit such future use of property by a landowner. Therefore, we proposed to revise this provision to require the applicant to describe how incidental take may occur (*i.e.* through management activities and/or return to baseline), and to make it clearer that we are not requiring a description of future land use or water management activities that will take place after the term of the agreement and permit. We believe that our revision requires the appropriate information for evaluating the permit application and the SHA.

Issue 6: One commenter suggested that we should announce that we are eliminating the requirement to describe future land uses from the SHA policy as well as the regulations in order to achieve consistency between the regulations and the policy.

Response 6: We agree with the commenter that it would be helpful to amend the SHA policy to be consistent with these regulations. In order to amend the policy, we must publish a proposed policy amendment in the **Federal Register** and make that available for at least a 30-day comment period. Following the close of the comment period, we would analyze any comments and publish a final policy. As our budget allows, we will seek to go through this process to make this change in the SHA policy in the future.

Net Conservation Benefit (Safe Harbor Agreements Only)

Issue 7: Several commenters agreed with the proposed change at 50 CFR 17.22(c)(2)(ii) and 17.32(c)(2)(ii) to include the language ''reasonably expected'' with regard to net conservation benefits. Some commenters stated that the current standard is unreasonable in requiring a certain finding of future events. Two commenters stated that, since nature can be complex and unpredictable, the change in language from ''will provide a net conservation benefit'' to ''is reasonably expected to provide a net conservation benefit'' is reasonable. One commenter believes that this language change will increase the likelihood that a landowner will enter into a conservation agreement.

Response 7: We agree with the commenters who are in favor of the proposed revision. We suggested this revision to address confusion regarding the word ''will'' in the issuance criteria,

which could have been interpreted as suggesting that we must determine with complete certainty that a net conservation benefit will occur before a permit can be issued. This unrealistic standard was not the intent of the Safe Harbor Policy or the regulation.

Notification Requirement

Issue 8: Our proposed regulation included replacing the requirement that a property owner notify us at least 30 days in advance of when he or she expects to incidentally take any species covered under a permit, with a requirement that the property owner notify us in advance of any incidental take ''when appropriate.'' One commenter stated that the ''when appropriate'' language makes the regulation largely meaningless by leaving the decision to notify us entirely up to the discretion of the permittee. This commenter suggested we change the language to read, ''The permittee is required to notify FWS at least 30 days before engaging in an activity that could result in the take of a listed species, unless FWS agrees to an activity with shorter notification or immediate action.'' Another commenter agreed with our proposed change as long as we have the authority to evaluate situations on a case-by-case basis so that emergency situations remain the exception and not the rule. Other commenters agreed with our proposed change, stating that it provides the flexibility that both we and the permit applicants need to negotiate a notification requirement that makes sense for each specific agreement. Two commenters did not agree that the mandatory 30-day advance notice requirement in the original regulation was an undue burden or a significant disincentive for landowners who are considering applying for either SHAs or CCAAs. One commenter also stated that, even if a species cannot be captured and relocated, it is both prudent and appropriate that we always be aware in advance of the impending incidental take of species covered under the permit or return of the property to baseline conditions. Another commenter suggested that if we make the proposed change, strict guidelines clearly defining the circumstances under which advance notification would not be required must be either incorporated into the regulations or into individual SHAs and CCAAs. Still another commenter believed the public should be informed 90 days before any ''killing'' is to take place, that any permittee should give us 120 days' notice of when the permittee expects to ''take/kill'' wildlife, and the general public must be given full facts on this ''killing.''

Response 8: The purpose of the proposed revision regarding notification was to provide flexibility for determining when a notification requirement would be appropriate. For some species and some SHAs, notification prior to take may not be necessary, while for other species and SHAs notification more than 30 days prior to take may be appropriate. By adding the term ''when appropriate,'' the Service and applicants can determine what will work best for their individual SHA. When the notification timing is decided, it will be clearly described in the SHA and the associated permit. In addition, each permit holder is required to report to the Service, usually annually, on the activities associated with his or her SHA. This report would include a description of any take that had occurred since the last report. Therefore, the Service would still know that the take associated with bringing that property back to baseline had occurred.

We disagree with the commenter who suggested that the public should be informed prior to the occurrence of any take associated with a permit. A notification of the receipt of each proposed SHA must be published in the **Federal Register** and a public comment period, usually 30 to 60 days, is required. During this time, the public has an opportunity to read and provide comments on the terms of the SHA, and such terms include a description for how take may occur (for initial and ongoing management activities) and when it will likely occur (when the conditions of the permit have been met).

Mitigation and Conserved Habitat Areas

Issue 9: Several commenters believed that the proposed revisions at 17.22(c)(5)(ii) and 17.32(c)(5)(ii) to remove references to additional mitigation measures and to ''conserved habitat areas'' make SHAs completely subject to the discretion of the permittee, and that the original language was more than sufficient to set reasonable limitations on requirements for additional conservation measures. These commenters stated that the proposed change does not allow us to require additional conservation measures without the consent of the permittee, even if such additional measures are found to be necessary to avoid harming the affected endangered or threatened species. Several other commenters agreed with our proposed changes, stating that removing references to the terms ''mitigation'' and ''conserved habitat areas'' made sense, since there are no mitigation requirements or conserved habitat areas in either the SHA or CCAA policies.

Response 9: The intent of this change was solely to match the regulations for SHAs and CCAAs with the respective policies, in order to eliminate confusion. Neither policy has any mitigation requirements or makes any references to the term ''conserved habitat areas;'' these terms are used in conjunction with Habitat Conservation Plans (see 50 CFR 17.22(b)). As we stated in our proposed rule, establishing authority to require a landowner to carry out other measures that were not previously agreed to by the property owner is not appropriate for SHAs and CCAAs.

Other Conservation Measures

Issue 10: One commenter believed the proposed changes at 50 CFR 17.22(c)(5)(ii), 17.22(d)(5)(ii), 17.32(c)(5)(ii), and 17.32(d)(5)(ii) would undermine the basic concept of adaptive management in that, while a variety of changing circumstances can and must be reasonably foreseen, the specific responses to those changing circumstances that will be most appropriate may not be foreseeable. The commenter believes the Service should not provide regulatory assurances because we are dealing with the uncertainties of a necessarily changing biological world, and it is only reasonable to assume that some changes might occur. Another commenter stated that a conservation agreement should not be entered into if the landowner will be allowed to knowingly degrade the habitat they have agreed to protect. This commenter stated further that we should not expose ourselves to potential pressure from landowners who have knowingly and willingly degraded habitat and then expect us to modify the conservation agreement to allow for the new, degraded condition. Other commenters supported the proposed change, stating that as SHAs are voluntary agreements, it is inconsistent for one party to reserve the right to change the terms of the agreement unilaterally and to require the other party to adhere to unilaterally changed terms.

Response 10: We do not believe that the proposed changes undermine the concept of adaptive management. We actively promote this concept, recognizing the value of incorporating adaptive management into conservation agreements in dealing with changing situations and new information. Under SHAs, landowners agree to manage their lands to provide a net conservation

benefit to listed species and cannot degrade the habitat below the biologically-based baseline. Likewise, under CCAAs, landowners agree to manage their lands to remove threats to at-risk species. Also, because these agreements are voluntary, and sought by landowners who are willing to provide habitat, we do not believe landowners will willingly degrade habitat in order to modify the conservation agreement to allow for the new, degraded condition. We agree that we cannot reserve the right to change the terms of the agreement unilaterally while requiring the permittee to implement the changed terms.

Revocation

Issue 11: Several commenters believed the changes to the revocation language (at 50 CFR 17.22(c)(7), 17.22(d)(7), 17.32(c)(7), and 17.32(d)(7)) would severely limit our ability to revoke a permit even when the continuation of the permitted activity would appreciably reduce the likelihood of survival and recovery of the species in the wild. These commenters believe that the proposed revision pertaining to the option of compensating a property owner to forgo an activity could result in a need for us to obtain large amounts of funding, and that this would be unreasonable and could lead to situations where permittees profit by proposing activities that would harm the species for the purpose of being paid by the Service not to engage in the activity. Other commenters thought the option of public compensation for imperiled species was highly inappropriate since they are a public trust resource. Two commenters also noted that the option of relocating the species undermines the purpose of SHAs and CCAAs, which is to secure habitat for imperiled species. Another commenter objected to the proposed change, in part, because the commenter believed we are applying the revocation standard for Habitat Conservation Plans to SHAs, which are totally voluntary agreements. This commenter believed that permits for an SHAs should not be revoked for any reason except as provided for under 50 CFR 13.28(a)(1) through (4) or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 50 CFR 17.22(c)(2)(iii) and the inconsistency has not been remedied in a timely fashion. The commenter also suggested that a permit should not be revoked for this last reason unless the permittee has declined an offer from us to purchase their property (or an interest) at fair market value or has refused our request to relocate individual animals from their property in order to avoid the inconsistency (with 50 CFR 17.22(c)(2)(iii)).

Response 11: We disagree that our proposed revocation language would severely limit our ability to revoke a permit even when the continuation of the permitted activity would appreciably reduce the likelihood of the survival and recovery of the species in the wild. The regulations authorize the Service to revoke a properly implemented SHA or CCAA enhancement of survival permit when such conditions exist. We believe that our proposed change provides an array of options to pursue in order to avoid permit revocation, but does not inappropriately limit our ability to revoke a permit in the highly unlikely event that such an action is necessary.

We disagree with those commenters who believe that the proposed changes to the revocation language would result in some applicants knowingly proposing certain activities that they actually do not intend to implement, in order to potentially profit from being paid to not engage in such activities later. Applicants enter into SHAs and CCAAs in good faith and we work diligently with them to design and then implement agreements that will have the intended outcomes. Should a lapse in permit compliance occur, we want to retain our flexibility to work with the permit holder to rapidly be back in compliance, in order to continue activities that are benefiting the covered species. However, in the highly unlikely event that this should not be possible, we are obligated to do whatever is necessary for the continued survival of the species. While we acknowledge that potentially having to purchase properties or conservation easements may be costly, we do not anticipate this need arising frequently, if at all, particularly in light of other available options for avoiding revocation of a permit.

With regard to the commenters who believe that potentially relocating species undermines the purpose of SHAs and CCAAs, we disagree with their premise that the purpose of these agreements is to secure habitat for imperiled species. While the outcome of these agreements may be to secure habitat, that is not their specific purpose. The purpose of an SHA is to provide the expectation of a ''net conservation benefit'' that will aid in a species'' recovery, either directly or indirectly, as described in the SHA policy and associated regulations. The purpose of a CCAA is to contribute to precluding the need to list the species. If relocation of individuals of a species covered under a SHA or CCAA is deemed appropriate, such an action would not undermine those agreements or the purpose of SHAs or CCAAs.

Our proposed revision of the regulation pertaining to revocation of permits associated with SHAs and CCAAs was designed to address concerns that the regulation, as adopted in 1999, may be a disincentive to landowners considering development of such agreements. The proposed change is consistent with our goal of encouraging non-Federal property owners to engage in SHAs and CCAAs. We disagree that it would be appropriate to limit the options to pursue, as suggested by one commenter, to include only the purchase of a permittee's property (or interest) at fair market value, or the relocation of individual animals from the property. Rather, we believe it is in the best interest of a permittee, as well as being in the public interest, to have a broader range of options available for the Service and the permittee to pursue, as identified in the proposed rule. The revised text provides further clarity and assurance to landowners of the very strong commitment on the part of the Service to pursue, with the consent of the permittee, all relevant and appropriate options to avoid permit revocation.

Issue 12: One commenter stated that use of the portion of our proposed regulatory language on revocation that relies on the definition of destruction or adverse modification of critical habitat will invite legal challenges since this definition was invalidated by the 5th Circuit Court of Appeals in *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001).

Response 12: Based on the statutory authority provided under section 7(a)(2) of the Act, the Director may revoke a permit if continuation of the permitted activity would either be likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

Issue 13: One commenter stated that it was appropriate for us to clearly include language in the regulations indicating that we would exhaust our alternatives before revoking a permit, particularly given the truly voluntary nature of SHAs and CCAAs. However, the commenter cautioned that it is extremely important that the time used in taking alternate actions not further imperil an endangered species. Another commenter supported our proposed revocation language and believed that, by indicating we would pursue all

appropriate options to avoid permit revocation, the incentive for potential applicants to enter into SHAs and CCAAs would increase.

Response 13: We agree with these commenters and we try to deal with these issues in a time-sensitive manner. Also, see our response to issue 11.

Issue 14: A commenter stated that we do not offer any legal basis or meaningful explanation for the proposed revision of the revocation language other than the current revocation text ''may create disincentives to landowners considering the development of a [SHA or CCAA].'' The commenter believes including authority to revoke a permit if we find that the continued permitted activity would ''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'' may exceed our authority. The commenter further noted that the Service has by regulation already asserted the ''jeopardy'' standard as a basis for revocation. The commenter noted that they cannot, however, support the continued extension of the current regulation (which asserts the ''jeopardy'' standard) to reach future direct or indirect alteration of critical habitat by landowners operating under SHAs and CCAAs in the absence of a clear legal basis.

Response 14: The revocation provisions of both the 1999 regulations and the revised regulations are based on the legal premise that the Service may revoke a permit if continuation of the activities authorized by the permit would violate the substantive standards of section 7(a)(2) of the Act, which include both the ''jeopardy'' and ''critical habitat'' standards. Our issuance of an enhancement of survival permit in association with an SHA or a CCAA is a Federal action that is subject to an intra-Service consultation under section 7(a)(2) of the Act. The 1999 revocation provisions indicated that the Service may revoke a permit if continuation of the permitted activity becomes inconsistent with the no jeopardy issuance criterion. The revised regulation clarifies that the Service has the authority to revoke a permit that violates either the no jeopardy standard or the adverse modification of critical habitat standard in section 7 of the Act. The language in the revised revocation provisions is taken directly from the definitions of ''jeopardize the continued existence of'' and ''destruction or adverse modification'' in the Service's section 7 regulations (50 CFR 402.02).

Relationship to No Surprises

Issue 15: One commenter stated that we should postpone finalizing this rulemaking based on the recent court ruling in *Spirit of the Sage Council* v. *Norton* on the ''no surprises rule'' and ''permit revocation rule.'' The commenter noted that the ruling vacated the ''permit revocation rule'' and remanded both rules to the Service for further consideration.

Response 15: The Spirit of the Sage Council v. *Norton* ruling deals only with the no surprises rule and permit revocation language for HCPs (see 50 CFR 17.22 and 17.32(b)(8)). The ruling does not apply to regulations for SHAs or CCAAs and thus, we see no need to postpone this rulemaking as a result of the ruling.

Other Issues

Issue 16: One commenter, while agreeing with the proposed regulation changes, stated that we did not address the issue of neighboring property owner vulnerability. This commenter stated that, while a participating property owner may enjoy greater certainty that their habitat conservation work will not be ''punished'' under the Act, the property owner may opt not to participate in an SHA for fear of placing their neighbors in ''ESA jeopardy.''

Response 16: We agree that the fear of increasing a neighboring property owner's potential liability under section 9 of the Act may be a disincentive for some property owners to enter into an SHA. The SHA policy offers flexibility when dealing with neighboring landowners to address this concern. Our work with property owners on an SHA includes working with them in relation to contacting neighboring landowners to see if they also are willing to voluntarily enter into an agreement. Also, designing a programmatic agreement that can cover multiple landowners, each of which may be covered through issuance of a certificate of inclusion, is one of the ways we may help resolve the concern raised by the commenter. Consequently, we do not believe that the regulations need to be revised to more directly address neighboring property owners.

Issue 17: A commenter stated that, while they support many of the proposed revisions, they have concerns over the existence of sufficient resources for us to adequately implement SHAs and CCAAs. The commenter believes the largest impediment to widespread utilization of the SHA and CCAA programs is the inherent uncertainty about the amount of time and cost of the permit application process and urges us to devote the resources necessary to fully implement the proposed revisions.

Response 17: We believe SHAs and CCAAs are very important tools that help to conserve listed and at-risk species. We will continue to seek funding for these programs in a manner that recognizes our need to balance funding for our work on SHAs and CCAAs with the other work we do as part of our Endangered Species program, such as listing, consultations, and recovery work.

Issue 18: One commenter recommended that we revise our regulations to provide more certainty with respect to the procedures we use to process SHA and CCAA applications and complete the issuance of the permits. To encourage more voluntary agreements, the commenter suggested we include a time limit of 90 days for our review of applications. The commenter also suggested that we include language that would require us to provide a copy of the proposed permit to the applicant for review prior to final issuance. The commenter believed this would allow for correction of factual data and of inconsistencies between the permit and agreement and, thus, increase the efficiency of the permit process.

Response 18: We disagree that our regulations need to be changed in the manner suggested by the commenter. We work diligently to process these agreements and their associated permits as expeditiously as possible. For a variety of reasons, some agreements take longer to develop and review than others. For example, an umbrella or programmatic SHA or CCAA that involves more than one species will usually take longer to develop and review than an agreement that involves a single landowner and a single species. We do agree with the commenter that providing the applicant with a copy of the proposed permit for review prior to final issuance helps to increase the efficiency of the permitting process, and in fact we do routinely develop and share the permit terms and conditions, along with other documents, with the applicant throughout the agreement development process.

Issue 19: One commenter urged that we use the biologically based baseline for judging whether to revise an SHA, and not use the ''jeopardy'' test.

Response 19: We disagree with the commenter that we should not use a ''jeopardy test.'' We use both a biologically based baseline and a ''jeopardy'' analysis in developing an SHA with an applicant. A baseline, expressed in numbers of individuals of the species and/or acres of occupied

habitat, is determined for each species enrolled under the applicant's SHA. If the applicant wants to add another species sometime in the future, a baseline is also established for that species. If something beyond the applicant's control happens to change the baseline (*e.g.*, a hurricane knocking down nest trees for the red-cockaded woodpecker), then a change in the baseline may be necessary.

Our issuance of an SHA permit is a Federal action that requires an intra-Service consultation under section 7 of the Act. Specifically, section 7(a)(2) of the ESA requires us to ''insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species.* * *'' The jeopardy analysis is based on a ''biological baseline'' of the species as a whole, not just the individual or populations of the species to be enrolled under the SHA. Therefore, we believe that no changes are necessary in the way we evaluate SHAs using a jeopardy analysis.

Issue 20: One commenter stated that any changes to programs affecting listed species should not be made unless the changes substantially outweigh all detriments to the species.

Response 20: We must ensure that any proposed SHAs and CCAAs will meet the issuance criteria before we can issue the permit. One of the issuance criteria for SHAs is to ensure that the proposed activities will be likely to result in a net conservation benefit for the species. What constitutes a net conservation benefit will vary depending upon the species and the proposed activities. However, it generally means that any potential negative impact to the species is outweighed by the benefits of the activities. The Service and applicant may agree to amend an existing agreement or permit for several reasons. When the amendment involves the species and or property enrolled, those changes must still meet the ''net conservation benefit'' standard.

Issue 21: One commenter believed that we should not utilize our limited resources to enter into CCAAs (or CCAs) because it is doubtful they could benefit the species biologically because the conservation needs of the species would be too speculative, unlike that for listed species, which are more fully understood.

Response 21: We disagree with the commenter. Candidate species are those species for which we have sufficient information on file relative to status and threats to support issuance of proposed listing rules; therefore, in general, the conservation needs of these species are no more speculative than for listed species. We do agree that for some species at-risk, we may not fully understand the biology of the species, but through CCAAs that incorporate adaptive management principles, we may gain additional information on the conservation needs of the species, while at the same time protecting habitat or reducing threats. We believe that, by spending part of our Endangered Species Program budget on the conservation of such species, we may be able to preclude the need to list them under the Act. By precluding or removing the need to list a species through early conservation efforts we increase the likelihood that simpler, more cost-effective conservation options will still be available and that conservation will ultimately be successful, and at the same time, property owners have a much greater opportunity to maintain land use and development flexibility.

Issue 22: One commenter was concerned that some of the proposed revisions would result in the permitting of activities that operate to the disadvantage of endangered and threatened species, as well as candidate and proposed species, and would not be consistent or in compliance with the purpose of the Endangered Species Act.

Response 22: We will not issue enhancement of survival permits that are not consistent or in compliance with the purposes of the Act. Before we can issue a permit, we must determine that the applicant meets the issuance criteria. For SHAs, the agreement must provide the expectation of a net conservation benefit to the species. For CCAAs, the agreement must contain conservation measures that provide benefits, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove the need to list the species. Also, under section 7 of the Act, we must ensure that the conservation measures included in any agreement with assurances are not likely to jeopardize any listed or proposed species or result in result in the destruction or adverse modification of designated or proposed critical habitats for such species. Thus, we are operating in compliance with the purposes of the Act.

Issue 23: One commenter was concerned about a perceived inconsistency between the proposed revisions and the CCAA policy. The commenter believes the CCAA policy does not require an applicant to remove the threats to a covered species. Rather we must find that the conservation benefits of the measures implemented within a covered area, when combined with those benefits if conservation measures were also implemented elsewhere within the range of a covered species, would cumulatively preclude or remove the need to list. The commenter asked us to clarify this inconsistency in order to avoid confusion. The commenter notes that (1) a considerable amount of time, money and resources are necessary to develop plans that satisfy regulatory standards, (2) this commitment of time and resources can be a disincentive to participation in conservation planning by non-Federal parties, and (3) clarifying this regulation to expedite the processing of conservation plans and permit applications will therefore benefit the applicant, the Service, and species alike.

Response 23: We do not believe there is an inconsistency with the CCAA policy. The CCAA policy does not require that an applicant's actions remove the threats to a covered species throughout its range. Rather, the policy states: ''While the Services realize that the actions of a single property owner usually will not preclude or remove any need to list a species, they also realize the collective effect of the actions of many property owners may be to preclude or remove any need to list.'' As called for in the CCAA policy and associated regulations, the CCAA should clearly describe how the proposed conservation measures would reduce or eliminate the threats to the covered species on the enrolled property. The types of conservation measures specified in the CCAA will depend upon the types, amounts, and condition of habitats existing on and off the enrolled property, the threats to the covered species that are being addressed, and the degree of imperilment of the covered species. In many cases, implementing only one CCAA for a species will not preclude the need to list the species, but a number of CCAAs in combination may achieve this goal.

Summary of Changes From the Proposed Rule

We have revised the proposed regulation by adding a definition of ''property owner'' to § 17.3. We have withdrawn the proposal to amend the first sentence of the following sections: §§ 17.22(c)(1), 17.22(d)(1), 17.32(c)(1), and 17.32(d)(1) that relates to the application requirements; we will

continue to use the term ''applicant'' in these sections.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal or policy issues. This rule was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below.

(a) This rule will not have an annual economic effect of $100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Because most of this rule deals with revisions that clarify rather than substantially alter our current regulations, we do not anticipate that this rule will cause any significant economic changes, either positive or negative. We have concluded that this rule will have some beneficial economic effect because we are rectifying inconsistencies and drafting errors; we believe these changes will increase efficiency by making Safe Harbor Agreements and Candidate Conservation Agreements with Assurances easier to undertake and implement. The effect would be minimal because of the small number of permits anticipated to be issued.

(b) This rule is not expected to create inconsistencies with other agencies' actions. Although the Safe Harbor and Candidate Conservation Agreements with Assurances policies are joint policies with the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries), the implementing regulations subject to this rule apply to the Fish and Wildlife Service exclusively. NOAA Fisheries has not adopted similar regulations to the Fish and Wildlife Service regarding these policies.

(c) This rule is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule raises novel legal or policy issues and, as a result, this rule has undergone OMB review. If this regulation can help facilitate wider adoption of the Safe Harbor Agreement and Candidate Conservation Agreements with Assurances programs, it could help increase private conservation efforts on behalf of listed and unlisted species, which is a key component of successful implementation of the Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our determination.

We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act (RFA). The rule does not establish any new application or implementation burdens. Submitting applications for enhancement of survival permits under the Act is voluntary, and participation in activities that enhance the survival or propagation of species is also voluntary on the part of the applicant. We expect that any impacts of this rule would be beneficial because they clarify the regulatory requirements for obtaining enhancement of survival permits under the Act. Therefore, we do not expect these changes to affect a substantial number of small entities. To date, we have issued 22 Safe Harbor Agreement permits and 5 Candidate Conservation Agreements with Assurances permits, for an average of approximately five Safe Harbor Agreement permits and one Candidate Conservation Agreement with Assurances permit per year. We expect to issue approximately the same number of enhancement of survival permits per year. Given the low number of enhancement of survival permits expected to be issued, and the fact that this rule provides clarifications rather than substantial changes to the regulations, we certify that this rule will not have a significant economic impact on a substantial number of small businesses, organizations, or governments pursuant to the RFA.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

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

(a) This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. We expect that this rule will not result in any significant additional expenditures.

(b) This rule will not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; as a result, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This rule imposes no obligations on State, local, or tribal governments.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule has no provision that would take private property rights. Participation in this permitting program is strictly voluntary.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from and coordinated development of this rule with appropriate resource agencies throughout the United States.

Civil Justice Reform

In accordance with Executive Order 12988, this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The purpose of this rule is to address inconsistencies in and clarify the current regulations.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, this rule does not directly affect Tribal resources. The effect of this rule on Native American Tribes would be determined on a case-

by-case basis through individual evaluations of permit applications. Under Secretarial Order 3206, we will, at a minimum, share with the entity that developed the permit application any information provided by the Tribes, through the public comment period or formal submissions, and advocate the incorporation of conservation measures that will restore or enhance Tribal trust resources. After consultation with applicable Tribes and the entity that developed the permit application, and after careful consideration of the Tribes' concerns, we must clearly state the rationale for the recommended final decision and explain how the decision relates to our trust responsibility. Accordingly:

(a) We will consult with affected Tribes during individual evaluations of permit applications.

(b) We will treat Tribes on a government-to-government basis during individual evaluations of permit applications.

(c) We will consider Tribal views during individual evaluations of permit applications.

(d) We will consult with the appropriate bureaus and offices of the Department about the identified effects of this rule on Tribes during individual evaluations of permit applications.

Paperwork Reduction Act

This rule does not impose any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned OMB clearance number 1018–0094. This rule revises current regulations for programs permitted under 50 CFR 17.22 (c) and (d), and 17.32 (c) and (d). Our current application approval number, 1018–0094, which expires July 31, 2004, already accommodates this clarification and the changes associated with this final rule. Therefore, no change in the approved application forms is needed. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA) and the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)). This rule does not constitute a major Federal action significantly affecting the quality of the human environment. We have determined that this rule is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1, and 516 DM 6, Appendix 1.

Section 7 Consultation

Although these revisions to the regulations will make enhancement of survival permits associated with Safe Harbor Agreements and Candidate Conservation Agreements with Assurances easier to obtain, understand, and implement, it will not change the issuance standards or the manner in which the Service makes its issuance determinations. In addition, the Service will continue to consult, under Section 7(a)(2), or confer, under Section 7(a)(4), as appropriate, on the issuance of each individual permit. During consultation or conference, the potential risks to listed or proposed species and designated or proposed critical habitat areas will be evaluated. Therefore, we have determined that the present action of revising existing regulations for section 10(a)(1)(A) permits will not affect listed or proposed species or designated or proposed critical habitat.

List of Subjects

50 CFR Part 13

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

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

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

PART 13—[AMENDED]

■ 1. The authority citation for part 13 is revised to read as follows:

Authority: 16 U.S.C. 668(a), 704, 712, 742j-l, 1374(g), 1382, 1538(d), 1539, 1540(f), 3374, 4901–4916; 18 U.S.C. 42; 19 U.S.C. 1202; 31 U.S.C. 9701.

■ 2. Amend § 13.25 by revising paragraph (b) introductory text, redesignating paragraphs (c) and (d) as paragraphs (d) and (e), and adding a new paragraph (c) as set forth below:

§ 13.25 Transfer of permits and scope of permit authorization.

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

* * * * *

(c) In the case of the transfer of lands subject to an agreement and permit issued under § 17.22(c) or (d) or § 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.

* * * * *

PART 17—[AMENDED]

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

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

■ 4. Amend § 17.3 as set forth below by:

■ a. Revising the definitions of ''Changed circumstances'' and ''Unforeseen circumstances''; and

■ b.Adding in alphabetical order a definition for ''Property owner''; to read as follows:

§ 17.3 Definitions.

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).

* * * * *

Property owner with respect to agreements outlined under §§ 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.

* * * * *

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.

* * * * *

■ 5. Amend § 17.22 by revising paragraphs (c)(1)(ii), (c)(2)(ii), (c)(3)(ii),

(c)(5)(ii), (c)(7), (d)(3)(ii), (d)(5)(i)–(ii), (d)(5)(iii)(B), and (d)(7) to read as follows:

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

* * * * *

(c)(1) * * *

(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; and

* * * * *

(2) * * *

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

* * * * *

(3) * * *

(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

* * * * *

(5) * * *

(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.

* * * * *

(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 § 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.

* * * * *

(d) * * *

(3) * * *

(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

* * * * *

(5) * * *

(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) * * *

(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.

* * * * *

(7) *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 § 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.

* * * * *

■ 6. Amend § 17.32 by revising paragraphs (c)(1)(ii), (c)(2)(ii), (c)(3)(ii), (c)(5)(ii), (c)(7), (d)(3)(ii), (d)(5)(i)–(ii), (d)(5)(iii)(B), and (d)(7) to read as follows:

§ 17.32 Permits—general.

* * * * *

(c)(1) * * *

(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;

* * * * *

(2) * * *

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

* * * * *

(3) * * *

(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

* * * * *

(5) * * *

(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.

* * * * *

(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 § 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.

* * * * *

(d) * * *

(3) * * *

(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

* * * * *

(5) * * *

(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) * * *

(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.

* * * * *

(7) *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 § 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.

* * * * *

Dated: April 12, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–9982 Filed 4–30–04; 8:45 am]

BILLING CODE 4310–55–P