

<i>NATIONAL MARINE FISHERIES SERVICE POLICY 02-106</i> Effective on: July 19, 1999	
To be reviewed on: October 1, 2023	
Protected Resources Management	
Safe Harbor Policy	
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I. Introduction

This policy provides incentives for private and other non-Federal property owners to restore, enhance, or maintain habitats for listed species. Because many endangered and threatened species occur exclusively, or to a large extent, on non-Federally owned property, the involvement of non-Federal property owners in the conservation and recovery of listed species is critical to the eventual success of these efforts.

II. Objective

Under the policy, the Services will provide participating property owners with technical assistance to develop Safe Harbor Agreements (Agreements) that manage habitat for listed species, and provide assurances that additional land, water, and/or natural resource use restrictions will not be imposed as a result of their voluntary conservation actions to benefit covered species.

III. Authorities and Responsibilities


The attached Federal Register Notice is NMFS' official policy. That Notice should be cited when referencing this policy.

IV. Measuring Effectiveness

This policy will be reviewed in accordance with the NMFS Policy Directives System procedures.

V. References

Announcement of Final Safe Harbor Policy (64 FR 32717; June 17, 1999)

Signed  _____ 9/26/2018
Chris Oliver Date
Assistant Administrator for Fisheries

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****Announcement of Final Safe Harbor Policy**

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

ACTION: Announcement of final policy.

SUMMARY: The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (jointly referred to as the "Services") announce a final Safe Harbor policy under the Endangered Species Act of 1973, as amended (Act). This policy provides incentives for private and other non-Federal property owners to restore, enhance, or maintain habitats for listed species. Because many endangered and threatened species occur exclusively, or to a large extent, on non-Federally owned property, the involvement of non-Federal property owners in the conservation and recovery of listed species is critical to the eventual success of these efforts. Under the policy, the Services will provide participating property owners with technical assistance to develop Safe Harbor Agreements (Agreements) that manage habitat for listed species, and provide assurances that additional land, water, and/or natural resource use restrictions will not be imposed as a result of their voluntary conservation actions to benefit covered species. When the property owner meets all the terms of the Agreement, the Services will authorize incidental taking of the covered species at a level that enables the property owner ultimately to return the enrolled property back to agreed upon baseline conditions. The Services will closely coordinate with the appropriate State agencies and any affected Native American Tribal governments before entering into Agreements. The Services considered and evaluated all the comments received on the draft policy in developing this final policy. Additionally, the FWS is publishing elsewhere in this issue of the **Federal Register** a final rule that contains the necessary regulatory changes to implement this policy.

DATES: This policy is effective July 19, 1999.

ADDRESSES: To obtain copies of the final Safe Harbor policy contact the Chief,

Division of Endangered Species, Fish and Wildlife Service, 452 ARLSQ, Washington, D.C. 20240 (Telephone 703/358-2171, Facsimile 703/358-1735); or Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD, 20910 (Telephone 301/713-1401, Facsimile 301/713-0376).

FOR FURTHER INFORMATION CONTACT: Richard Hannan, Acting Chief, Division of Endangered Species, Fish and Wildlife Service (Telephone (703)358-2171) or Margaret Lorenz, Policy Coordinator, Endangered Species Division, National Marine Fisheries Service (Telephone (301) 713-1401).

SUPPLEMENTARY INFORMATION:**Background**

On June 12, 1997, the Services issued a draft policy (62 FR 32178), and the FWS issued proposed regulations to implement the policy (62 FR 32189). With this policy, the Services intended to facilitate the conservation of listed species through a collaborative approach with non-Federal citizens, States, local governments, Tribes, businesses, organizations, and other non-Federal property owners which are stakeholders in the conservation of these species. With the proposed policy and the related regulations, the Services intended to create incentives for non-Federal property owners to implement conservation measures for certain listed species by providing certainty with regard to possible future land, water, or resource use restrictions should the covered species later become more numerous as a result of the property owners actions. Non-Federal property owners, who through a Safe Harbor Agreement commit to implement voluntary conservation measures for a listed species will receive assurances from the Services that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the covered species become more numerous as a result of the property owners' actions.

Much of the nation's current and potential fish and wildlife habitat is on property owned by private citizens, States, municipalities, 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): recovery of threatened and endangered species. The 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. The "Safe Harbor" approach provides an avenue to garner the non-Federal landowners' support for species conservation on non-Federal lands.

Many property owners are willing to voluntarily manage their property to benefit listed fish and wildlife, provided these beneficial actions do not result in new restrictions being placed on the future use of their property. Beneficial management includes actions to enhance, restore, or maintain habitat (e.g., restoring habitat through prescribed burning, restoring hydrological conditions) so that it is suitable for listed species. Because such proactive management actions cannot be mandated or required by the Act, failure to conduct these 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 that additional land, water, and/or natural resource use restrictions may result if listed species colonize their property or increase in numbers or distribution due to their conservation efforts. Their concern centers on the applicability of the Act's section 9 "take" prohibitions if listed species occupy their property, as a result of their conservation-oriented property management actions. Landowners whose properties support endangered or threatened species as a result of their positive, voluntary conservation efforts might violate section 9 of the Act if they significantly develop, modify, or manage those properties in a way that subsequently causes incidental take of those 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, as promulgated by the FWS (50 CFR 17.3), and proposed by NMFS (63 FR 24148) 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."

This final Safe Harbor policy encourages property owners to voluntarily conserve threatened and endangered species without the risk of

further restrictions pursuant to section 9 of the Act. 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 an evaluation of other provisions of the Act, the Services have determined that the section 10(a)(1)(A) "enhancement of survival" permit provisions provide the best mechanism to carry out a permanent Safe Harbor policy that provides the necessary assurances to participating property owners, while also providing conservation benefits to the covered species. For landowners who are participants in other Federal programs (e.g., Farm Bill or Partners for Fish and Wildlife programs), FWS is in the process of developing an appropriate process to provide assurances on a programmatic basis to the landowners as long as a net conservation benefit is achieved for listed species covered by the Agreements. Assurances already provided by FWS under sections 7 or 10(a)(1)(B) would still be valid, and revision of those Agreements is unnecessary. Finalizing this policy provides national consistency in the development of Safe Harbor Agreements (Agreements) and links the policy to an expanded "enhancement of survival" permit program through section 10(a)(1)(A) of the Act.

FWS has also published final regulations to implement this policy in today's **Federal Register**. This final policy and final rule provides the FWS procedures to implement the Safe Harbor policy. NMFS will develop and propose regulatory changes to implement this policy at a later date. These regulations will govern the issuance of "enhancement of survival" permits under section 10(a)(1)(A) of the Act to provide the assurances to participating landowners through Safe Harbor Agreements.

Summary of the Draft Policy

The draft Safe Harbor policy (62 FR 32178) encouraged non-Federal landowners to maintain or enhance existing endangered species habitat, to restore listed species' habitats, or to manage their lands in a manner that benefits listed species that would be covered by an agreement. In return, the Services would provide assurances that future activities would *not* be subject to the Act's restrictions beyond those restrictions applicable to the property at the time of enrollment in the program. The draft policy recognized that many

non-Federal landowners are interested in restoring, enhancing, and/or maintaining natural habitats on their lands, thus potentially benefiting listed species. However, non-Federal landowners' willingness may be hindered by a fear that the Services will enforce section 9 due to their beneficial actions, their lands are colonized by listed species, or listed species' numbers increase.

The draft policy contained provisions protecting any listed species covered by an Agreement and occupying a landowner's property at the time of enrollment in the program by including them in the baseline conditions. If species were included in the baseline conditions, an "incidental take" would not be allowed. However, if the numbers or range of those covered species increases because of voluntary conservation measures conducted in accordance with a Safe Harbor Agreement, the landowner would be authorized to incidentally "take" those individuals above the baseline without penalty. These arrangements would be formalized through a streamlined permitting process and an Agreement or similar instrument between the landowner and the Services. The draft policy also considered a streamlined process where the Services would issue a blanket permit to an appropriate agency or organization that would in turn issue "Certificates of Inclusion" or "Participation Certificates" to landowners. The ultimate goal of the draft policy was to encourage non-Federal landowners to voluntarily implement beneficial management actions for those listed species that occur on their lands or would be attracted as a result of the beneficial management actions.

Summary of Comments Received

The Services received more than 70 comment letters on the draft policy from a wide variety of entities, including Federal, State and County agencies, industry, conservation groups, coalitions, and private individuals. The Services considered all relevant information and recommendations received during the public comment period. Some of the commenters addressed issues that were applicable to the implementing regulations as well as the draft policy. Both the final policy and regulations have been amended, where appropriate.

The following is a summary of the comments on the draft policy and the Services' responses.

Issue 1. Many commenters expressed concern regarding the appropriateness of the Services entering into Safe Harbor

Agreements and suggested that the Services provide guidance on how to determine whether a Safe Harbor Agreement is appropriate and under what circumstances the Services would enter into such Agreements.

Response 1. The Services agree that Safe Harbor Agreements may not be appropriate for all types of species in all situations. If a property owner is taking a listed species and needs an immediate "incidental take" authorization, application for and 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 also are not appropriate in situations that do not meet the net conservation benefit standards of this policy. The Services will determine on a case-by-case basis whether or not a particular proposed Agreement actually meets the standards of the Safe Harbor policy and its implementing regulations and whether a Safe Harbor Agreement would be an appropriate means of enhancing the survival of the species covered by an agreement. For example, translocating individuals from a habitat preserved in perpetuity to a site with zero baseline condition may not achieve a net conservation benefit for the species. This is because the habitat the species is using could be altered or destroyed, which would put the species at risk. Each Agreement will have an appropriate public review and comment period, and after considering all available information, the Services will determine if the permit can be issued.

Issue 2. Commenters stated that the concept of baseline and how baseline conditions will be determined needs to be clarified. Some commenters also provided recommendations on how to determine baseline conditions.

Response 2. The Services acknowledge that the concept of baseline determination needs further clarification, and because of its crucial importance to the overall implementation and success of this policy, the discussion of this concept is expanded. The Services also further clarify how baseline conditions should be determined, the intent of the Services in determining baseline conditions, and the implications of these determinations. The intent of the Services in determining baseline conditions is to ensure that the protection provided to covered listed species is not eroded below current levels. The intent is to provide participating landowners with a clear understanding of their assured rights to return enrolled lands to conditions existing prior to the Agreement (i.e.,

baseline conditions) and what expectations exist for all participants in terms of performance under the Agreement.

Issue 3. Numerous commenters raised concerns regarding the determination of baseline conditions based on the number of individuals of a listed species occupying or using the enrolled lands. These concerns are based on the fact that population numbers of a species in the wild often fluctuate naturally (e.g., between years and between seasons). If, for example, the baseline was established as the number of individual animals present during a period of naturally high abundance, a participating landowner could be interpreted to be in non-compliance with the Agreement if they returned the enrolled lands to baseline when population numbers were naturally low, when in fact the available habitat area remained unchanged and the landowner took no action that violated the Agreement.

Response 3. The Services intend to provide flexibility during implementation of the policy by providing that baseline conditions will be mutually agreed upon by the participating landowner and the Services, and will be determined by using either population numbers of listed species or occupied habitat acreage, or both. The known or expected seasonal or natural variation of population numbers should be described in the Agreement and will help form the baseline determination of the enrolled lands. Similarly, if occupied habitat is used to determine baseline, the quality, acreage, and characteristics of the habitat sustaining individuals of the covered species within the enrolled lands will be described and evaluated. The policy has been amended to address these concerns and to further clarify the section discussing baseline.

Issue 4. A number of commenters expressed concern regarding the land, water, and/or natural resource use that the enrolled lands would be returned to after the Agreement expires.

Commenters were concerned whether such use would be compatible with maintaining the baseline conditions.

Response 4. Landowners who have complied with the terms of the Agreements and wish to use their lands in a manner different from their original use certainly retain the right to do so without any additional restrictions under the Act as long as the baseline is maintained. However, if the proposed use of the enrolled lands would result in incidental take of the species and is inconsistent with maintaining the

baseline conditions, then separate authorization for such take would be required and is not covered by the Safe Harbor Agreement. In other words, the same land, water, and/or natural resource use restrictions that applied to the property prior to the Safe Harbor Agreement would still apply and the landowner would have to obtain the appropriate incidental take authorization under the appropriate provisions of the Act. If the baseline conditions were zero, based on the existence of unoccupied habitat, and these habitat areas became occupied as a result of the activities undertaken under the Agreement, no further authorization would be required. However, the Services would work with the landowner to relocate the species, if appropriate, before any habitat modification back to the baseline occurs, or extend the Agreement if the landowner so desires.

Issue 5. Numerous commenters supported the "net conservation benefit" standard in the policy. Commenters had significantly different interpretations of the meaning of "net conservation benefit," however, and many requested further clarification of the concept.

Response 5. This crucial and fundamental principle of the Safe Harbor policy caused confusion and a number of different interpretations. Therefore, this section of the policy has been revised to clarify the Services' intent and the "net conservation benefit" concept. These net conservation benefits may result from reducing 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.

Issue 6. Several commenters requested clarification on how the Agreements can be terminated and what were the rights and responsibilities of the participating landowner.

Response 6. The length of Safe Harbor Agreements must be of sufficient duration to reasonably allow enough time to achieve the expected "net conservation benefit" for the listed species covered by the Safe Harbor Agreement. For example, if restoring suitable habitat for a species normally takes five years of active management, and the proposed Agreement is limited to providing suitable habitat for only three years, it would not be appropriate to enter into this Agreement. However, since these Agreements are voluntary, the Services recognize and respect the

landowners' right to request early termination of their Agreements. The final Safe Harbor policy provides a mechanism to allow landowners to terminate their voluntary Agreements before the expiration date. The Services expect the number of landowners requesting early termination to be minimal based on the FWS's experience with the Partners for Fish and Wildlife Program.

Issue 7. Many commenters expressed concern that the proposed process for developing Agreements and issuing the necessary permit to provide the Safe Harbor assurances would be too cumbersome. Some commenters also suggested the Services should consider a "blanket," "master," or "programmatic" permitting process to further streamline the development of Safe Harbor Agreements.

Response 7. The process established in the draft Safe Harbor policy and implementing regulations was basically intended to address situations where a single landowner approaches the Services and is willing to conduct beneficial management actions on behalf of listed species, but is concerned regarding potential future section 9 limitations that could result from these voluntary actions. The draft Safe Harbor policy did not explicitly discuss the potential for using "blanket," "master," or "programmatic" permits to provide assurances to landowners interested in managing habitat for listed species on their property. However, the FWS has used a section 10(a)(1)(B) "programmatic" permit very successfully in the last few years. Clarifying language has been added to the final Safe Harbor policy and implementing regulations to allow for the possibility of using "programmatic" permits whenever appropriate. For example, the development of Statewide Safe Harbor programs, where a State agency or an appropriate entity acts as a permit holder and has the authority to include individual landowners through the issuance of "Certificates of Inclusion" or "Participation Certificates," provides the perfect circumstance for the use of "programmatic" Safe Harbor Agreements and associated enhancement of survival permits. In the final policy, the Services recognize that significant conservation benefits on a landscape scale can be provided through these "programmatic" Safe Harbor Agreements and associated permits.

Issue 8. Several commenters expressed concern about the effects actions taken on enrolled lands may

have on neighboring non-enrolled lands and expressed the need for clarification.

Response 8. The Services recognize the implications to neighboring landowners of the successful implementation of management actions on enrolled lands. Further, the Services recognize and acknowledge that some landowners may be reluctant to initiate management actions that may have land, water, and/or natural resource use implications to neighboring landowners. The implications to neighboring landowners with non-enrolled lands will be assessed on a case-by-case basis. For example, when the Services believe that occupation of non-enrolled neighboring lands is likely, the Services will make every effort to include the neighboring landowner as a signatory party to the Agreement and to be included in the Safe Harbor Agreement and associated permit, thus extending the Safe Harbor assurances. For example, neighboring landowners of aplomado falcon (*Falco femoralis*) release sites in Texas were included in the permit for the Safe Harbor Agreement, in case that, as a result of the cooperators' actions, falcons inhabit their lands.

Issue 9. A number of commenters requested further clarification of the applicability of future section 7 consultations for Federal actions affecting the enrolled properties.

Response 9. Section 7 would continue to apply to Federal actions affecting the enrolled properties. However, if a participating landowner subsequently proposed an activity that required Federal approval (e.g., CWA section 404 permit) within the enrolled lands and such activity would not alter the status of the covered listed species below the original baseline conditions, as long as the activity does not diminish the baseline conditions, it is not likely that the species will be jeopardized. The "no-jeopardy" conclusion would be reached because the affected individuals of the species covered by the Agreement would be the same authorized to be taken under the Safe Harbor Agreement which the Services would already have found were "takes" that would not result in jeopardy under the issued section 10(a)(1)(A) permit. Furthermore, it will be the policy of the Services to include in the Biological Opinion "reasonable and prudent measures" necessary to minimize the expected incidental take which are identical to the terms and conditions included in the Safe Harbor Agreement and associated enhancement of survival permit issued to the participating landowner. Some commenters expressed concern regarding proposed

Federal actions within the enrolled lands that are not initiated by the participating landowner (e.g., highway construction through condemnation of enrolled lands). Under these circumstances, normal section 7 compliance and procedures would apply and the necessary alternatives or measures to comply with section 7 may not be the same as those included in the Safe Harbor Agreement, regardless of whether take of covered species moves them below baseline.

Issue 10. Many commenters expressed concerns regarding the confidentiality of the information generated as a result of entering into these Agreements and the standards that this information will be subjected to before making decisions. Most commenters requested a commitment from the Services to keep all information regarding the development of Safe Harbor Agreements confidential.

Response 10. The Services recognize the landowners' concerns regarding privacy related to management actions they plan to implement on their lands and their desires to guard information regarding occupancy of listed species on their lands. However, the Act and its implementing regulations require an open and public process whenever permits are issued. Furthermore, the Services' implementation guidance and policy are to encourage an open process. Information used to make determinations for section 10 (a)(1)(A) permit issuance must be available for public review and comment. The Services are committed to ensuring an open and public approach to the implementation of this program.

Issue 11. A number of commenters felt that the draft policy should address how enrolled lands will be counted toward achieving recovery and the appropriateness of counting individuals covered under Safe Harbor Agreements toward recovery goals.

Response 11. Before entering into any Safe Harbor Agreement, the Services 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 contribute, directly or indirectly, to the recovery of the covered species, but this contribution toward recovery may be of varying duration and not permanent in nature, and the Services will not rely on these benefits by themselves as the basis to delist any species. Cumulatively, conservation benefits from Safe Harbor Agreements are likely to contribute to the recovery of a species over time by providing incentives to improve habitat or increase population numbers; reduce

the effects of catastrophic events; provide buffers for protected areas; and establish areas for testing and developing new and innovative conservation strategies. Nevertheless, it would not be prudent to base delisting decisions solely on conservation benefits provided through Safe Harbor Agreements because of the ultimate right of a participating landowner to return their property to its original baseline condition.

Issue 12. Many commenters requested clarification and expressed concerns regarding the appropriateness of including unlisted species in these Agreements.

Response 12. Concurrently with this policy, the Services are publishing in the **Federal Register** of June 17, 1999, the final policy on Candidate Conservation Agreements with Assurances, which provides the opportunity to take action on behalf of declining species before listing becomes necessary. The Services acknowledge that situations may arise where a property owner may want to conserve numerous species, both listed and unlisted, on their property, and may want to enter into both a Safe Harbor and Candidate Conservation Agreement. The Services are considering methods to streamline and combine these two processes.

Issue 13. Many commenters stated that there was a need for monitoring standards and that the Services must ensure monitoring of Agreements.

Response 13. The Services recognize the need to develop and implement appropriate monitoring programs for the Safe Harbor Agreement to ensure that the "net conservation benefits" are being achieved. The monitoring of the implementation of the Safe Harbor Agreement will be part of the process to learn about the effectiveness of various conservation techniques and to ensure that the status of the species is not reduced below the original baseline condition. The scale and complexity of the Agreement may determine what additional monitoring is needed. However, monitoring standards are more appropriately generated in implementation guidance, which the Services are committed to developing in the near future with public review and comment. However, it is appropriate to include in the Safe Harbor policy certain guiding principles on the issue of monitoring and to provide general interim guidelines and the conceptual basis for the development of monitoring provisions.

Issue 14. Several commenters suggested that tax and financial incentives should be offered as part of

the regulatory assurances included in the draft policy.

Response 14. The Services agree that tax incentives or financial payments would also be effective in furthering voluntary actions by non-Federal landowners and would help defray the costs of implementing some of the necessary management activities. However, the Services do not have the authority to provide tax incentives without an express authorization from Congress. The Services' Ten Point-Plan for the fair implementation of the Act included a recommendation to Congress on these types of incentives as a way to garner additional support for voluntary management actions to benefit listed species. In addition, in fiscal year 1999, the FWS will initiate a pilot grant program to help provide some limited funding to participating landowners for the implementation of management activities under the auspices of signed Safe Harbor Agreements.

Issue 15. A few commenters requested further clarification regarding the need for National Environmental Policy Act (NEPA) compliance in terms of implementing the Safe Harbor program.

Response 15. The Services agree that NEPA compliance is necessary for the implementation of the Safe Harbor program. However, the Services expect that Safe Harbor Agreements/permits will provide benefits to covered listed species and their habitats and would have minor or no effects on other environmental values or resources. Because these permits can result in incidental take of individuals and/or habitats that would not exist but for these Agreements, and because current baseline conditions will be maintained under these Agreements, the Services expect that activities conducted within the Safe Harbor program would qualify for a categorical exclusion. Regardless of NEPA public review provisions, the Act's regulations to implement Safe Harbor Agreements and permits impose specific public review and comment requirements. For large-scale agreements that may encompass an entire State or a significant portion of the covered listed species' range, the Services are committed to preparing the necessary NEPA documentation.

Issue 16. A number of commenters inquired about the status of the necessary implementing regulations for the National Marine Fisheries Service.

Response 16. NMFS expects to amend its section 10(a)(1)(A) regulations to accommodate Safe Harbor Agreements in the next few months. Currently, NMFS does not have any approved Safe Harbor agreements and none are under consideration. However, we welcome

inquiries on possible Agreements which would further the protection of listed species under NMFS' jurisdiction. The lack of revised 10(a)(1)(A) regulations should not discourage landowners from seeking an agreement with NMFS.

Issue 17. A number of commenters inquired about the interrelation, if any, between the Safe Harbor program and other Federal habitat restoration efforts and programs (e.g., Farm Bill related programs).

Response 17. The Services recognize that it would be beneficial if other Federal wildlife habitat restoration and/or enhancement programs also were able to provide Safe Harbor type assurances. Currently, the Services are exploring streamlined processes to provide Safe Harbor type assurances to non-Federal participants of these programs, some of which are implemented by other agencies of the Federal government (e.g., Farm Bill programs run by the Natural Resources Conservation Service). The Services are exploring potential possibilities to provide these Safe Harbor type assurances to the private landowners that participate in the Federal programs as long as the affirmative conservation mandates of Federal agencies are met.

Issue 18. Several commenters requested further clarification as to the duration of the assurances provided under the Safe Harbor program.

Response 18. In general, the assurances provided under the Safe Harbor program "run with the land" as long as the permit is effective and as long as the participating landowner is implementing the agreed upon terms of the Agreement and permit. The Services intend that the assurances will continue even after the "net conservation benefit" standard has been achieved, thus encouraging the landowner to maintain the benefits of the management actions and refrain from returning the land to baseline conditions at the end of the Agreement. If subsequent owners of the land are willing to sign a new Agreement, continue necessary management actions, and maintain the baseline once the net conservation benefit has been achieved, the assurances will continue. A permit that "runs with the land" provides the participating landowner (or subsequent landowner) with the option of not immediately returning his or her property back to its original baseline conditions. Clarifying language has been included in the final policy.

However, the Services are prepared as a last resort to revoke a permit implementing a Safe Harbor Agreement where continuation of the permitted activity would be likely to result in

jeopardy to a species covered by the permit, although the Services would first have to exercise all possible means to remedy such a situation prior to taking such a step.

Revisions to the Draft Policy

The following represents a summary of the revisions to the proposed policy as a result of the consideration of the public comments.

- (1) The Services clarified how baseline should be determined and the implications of these determinations.
- (2) The Services clarified the "net conservation benefit" language to indicate that the benefits should be reasonably expected to occur during the Agreement.
- (3) The final Safe Harbor policy provides a mechanism to allow landowners to terminate their voluntary Agreements before the expiration date.
- (4) The final Safe Harbor policy and implementing regulations establishes specific public review periods.
- (5) The Services have clarified in the final policy how Safe Harbor Agreements are to be treated in determining the recovery of a listed species covered by such Agreements.
- (6) The Services included in the final policy general interim guidelines regarding monitoring provisions for Safe Harbor Agreements.
- (7) The Services clarified how they will address neighboring property owners to non-Federal property owners who receive Safe Harbor assurances.

Final Safe Harbor Policy

Part 1. What Is the Purpose of the Policy?

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 often willing to be partners in the conservation and recovery of listed fish, wildlife, and plant species and their habitats. However, they often may be reluctant to undertake proactive activities that increase the likelihood of use of their properties by endangered and threatened species due to their fear of future additional property-use restrictions. Safe Harbor Agreements are a means of providing incentives to property owners to restore, enhance, or maintain habitats and/or populations of listed species that result in a net conservation benefit to these species. Although such Agreements may not permanently conserve or recover such populations or their habitats, they

nevertheless offer important short-term, mid-term, and, in some cases, long-term net conservation benefits. These net conservation benefits may result from reducing fragmentation of habitats, 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 this 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, even if these efforts attract listed species onto enrolled properties 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 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. Approved Safe Harbor Agreements will be covered under a new category of "enhancement of survival" permits issued under section 10(a)(1)(A) of the Act.

Safe Harbor Agreements may be initiated by property owners, or the Services may take the initiative on their own or in concert with other Federal or State agencies to encourage property owners to voluntarily enter into Safe Harbor Agreements for a given area, particularly when many non-Federal parcels of property are involved. The Services will work with the participating landowner to develop an "enhancement of survival" permit application and the Safe Harbor Agreement. The Services will assist landowners in identifying actions that the landowners will voluntarily undertake or forego to provide a net conservation benefit to the listed species to be covered by the Agreement.

Development of an "enhancement of survival" section 10(a)(1)(A) permit application and an adequate Safe Harbor Agreement are intricately linked. All parties to the Agreement will coordinate the development of the Agreement to ensure that the measures included in

the Agreement and permit are consistent.

The Services recognize that Safe Harbor Agreements are not appropriate under all circumstances. In particular, where the land or water is occupied by a listed species and the property owner seeks immediate "incidental take" authorization, application for and development of a Habitat Conservation Plan (HCP) and issuance of an incidental take permit under section 10(a)(1)(B) is the appropriate tool. Also, an Agreement is not appropriate in situations that do not meet the net conservation benefit standards of this policy. For example, if the Services can 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 has provided long-term protection to a habitat without such protection, the Services would not enter into an Agreement. Also, if a species is so depleted or its habitat so degraded that considerable improvement over baseline conditions is necessary to result in a net conservation benefit, an Agreement may not be appropriate. For certain aquatic, riverine, and/or riparian species it may be too difficult to reach a net conservation benefit since returning to the baseline conditions could have serious negative effects that would negate or outweigh the benefits achieved through the Agreement.

Availability of resources will also be a governing factor for the Services. While the Services expect the interest in Safe Harbor Agreements and the demand for technical assistance to property owners to increase, Safe Harbor Agreements are developed by FWS using limited funds appropriated for recovery activities. Therefore, the Services will focus on potential Agreements that provide the greatest contribution to the recovery of multiple listed species. Another 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 develop information on species' conservation requirements that have not been adequately documented in the scientific literature.

Part 2. What Definitions Apply to This Policy?

The following definitions apply for the purposes of this policy.

"Baseline conditions" means population estimates and distribution and/or habitat characteristics and determined area of the enrolled property that sustain seasonal or permanent use by the covered species at the time the

Safe Harbor Agreement is executed between the Services and the property owner.

"Covered species" means a species of fish or wildlife that is the subject of a Safe Harbor Agreement. Covered species are limited to species that are Federally listed as endangered or threatened and are included in the Safe Harbor Agreement and accompanying enhancement of survival permit.

"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, 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.

"Management activities" are voluntary conservation actions to be undertaken by a property owner that the Services believe will benefit the covered species.

"Net conservation benefit" means the cumulative benefits of the management activities identified in a Safe Harbor 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 any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species.

"Non-Federal property owner" includes, but is not limited to, private individuals, organizations, businesses, State, local, and Tribal governments, and other non-Federal entities who own the enrolled property. Federal agencies can be involved in the development of Safe Harbor Agreements, but will not receive the same assurances provided through these Agreements as non-Federal property owners.

"Safe Harbor Agreement" means an Agreement signed by the Services and a property owner and any other cooperator, such as the holder of a "programmatic" permit, if appropriate, that (a) sets forth specific management activities that the private or non-Federal property owner will voluntarily undertake or forego 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 by the Services to a non-Federal property owner in the Agreement and authorized in the enhancement of survival permit for covered species. These assurances allow the property owner to alter or modify enrolled property, even if such alteration or modification results in the incidental take of a listed species to such an extent that it returned the species back to the originally agreed upon baseline conditions. Such assurances may apply to whole parcels or portions of the owner’s property as designated in the Agreement. These assurances depend on the property owner complying with obligations in the Agreement and in the enhancement of survival permit.

Part 3. How Is the Cooperation and Coordination With the States and Tribes Described in the Policy?

Coordination with the appropriate State agencies and any affected Tribal governments is important to the success of Safe Harbor Agreements. Coordination allows the special local knowledge of all affected entities to be considered in the development of the Agreements. The Services will work closely 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 that has a treaty right to any fish or wildlife resources covered by a Safe Harbor Agreement.

Part 4. What Is Species Net Conservation Benefit From Safe Harbor Agreements?

Before entering into any Safe Harbor Agreement, the Services must make a written finding that all covered species will receive a net conservation benefit from management actions undertaken pursuant to the Agreement. The finding must clearly describe the expected net conservation benefits and how the Services reached that conclusion. Net conservation benefits must contribute, directly or indirectly, to the recovery of the covered species. This contribution toward recovery will vary and may not be permanent. The Services will not rely solely on these benefits as the basis to delist any species. A Safe Harbor Agreement does not have to provide permanent conservation for enrolled

property; however, Agreements must be sufficient to provide a net conservation benefit to all covered listed species, thereby contributing to the recovery of such species over time.

Conservation benefits from Safe Harbor Agreements include, but are not limited to, 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, among other things.

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

A non-Federal property owner may obtain an enhancement of survival permit under section 10 (a)(1)(A) of the Act to incidentally take a covered species 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 covered, including the habitat conditions, and identify the enrolled property covered by the Agreement;
- (2) Include a full description of the agreed upon baseline conditions for each of the covered species within the enrolled property;
- (3) Identify management actions that would be undertaken to accomplish the expected net conservation benefits to the species, where and when the benefits would be achieved, and the agreed upon time frames these management actions will remain in effect to achieve the anticipated net conservation benefits;

(4) Describe any incidental take associated with the management actions during the term of the Agreement;

(5) If appropriate, incorporate a notification requirement to provide the Services or appropriate State agencies with a reasonable opportunity to rescue individuals of a covered species before any authorized incidental taking occurs;

(6) Describe what activities would be expected to return the enrolled property to baseline conditions and the extent of incidental take that would likely result from such activities;

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

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

The Services will consult under section 7 of the Act on proposed issuance of the enhancement of survival permit.

Part 6. What Are Baseline Conditions?

The Services, the property owner, and any other cooperator(s) must accurately describe the baseline conditions of the property and species covered by the Safe Harbor Agreement. The baseline conditions must reflect the known biological and habitat characteristics that support existing levels of use of the property by species covered in the Agreement. However, for 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) *How do you Determine Baseline Conditions?* This policy requires a full description of baseline conditions for any species covered in an Agreement (see Part 5 above). The Services, or appropriate cooperators, 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 determinable, existing habitat areas or characteristics that support the species covered at the time of 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 degree to which the enrolled property is inhabited, permanently or seasonally, by the covered species. When either Service does not directly determine the baseline conditions, they must review and concur with the determination before entering into an Agreement, and, if necessary, conduct on-site visits. Formulation of baseline conditions can incorporate information provided by the

agree that a listed species that was not in the original Agreement should be included, then addenda to the Agreement and permit are necessary. If it is appropriate to add species to the Agreement, the Services must determine enhancement or maintenance actions that are specific to the newly covered species, baseline conditions, and a net conservation benefit to that species.

Any change to a Safe Harbor Agreement or amendment to a section 10 (a)(1)(A) permit to include a non-covered species would be subject to the same review process (e.g., section 7 and NEPA review) and issuance criteria (standards) as the original Safe Harbor Agreement and permit.

Part 9. Is Monitoring Required?

The Services will ensure that adequate monitoring is included in each Safe Harbor Agreement/permit. The Services are committed to providing as much technical assistance as possible in the development of acceptable monitoring programs. In addition, the public will have an opportunity to review the monitoring plan during the public comment period on the issuance of the permit. Monitoring programs must be agreed upon before finalization of the Agreements and issuance of the permits. The monitoring component of these Agreements ensure that the participating landowner is implementing the provisions of these Agreements. Additionally, these monitoring programs will provide valuable program implementation information for the Services to evaluate the overall program and ensure its continued evolution toward a more effective and efficient program. Larger scale or complex Safe Harbor Agreements will require more in depth and thorough monitoring programs.

Part 10. How Does the Services Comply With National Environmental Policy Act?

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 use 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.

The Services will review each Safe Harbor Agreement and associated permit action for any significant environmental, economic, social, historical, or cultural impact, or for significant controversy (516 Departmental Manual 2, Appendix 2 for FWS and NOAA's Environmental Review Procedures and NOAA Administrative Order Series 216-6). If the Services conclude that a significant impact could occur, the issuance of a permit would require preparation of an EA or EIS, although the Services believe that the need for an EIS will be rare. 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 and associated permit are not expected to individually or cumulatively have a significant impact on the quality of the human environment or other natural resources, the Agreement/permit may be categorically excluded. The Services are committed to develop NEPA documentation for complex or large scale (e.g., statewide) Safe Harbor Agreement/permits to ensure effective environmental review of such significant actions.

Part 11. Can Agreements Be Transferred?

If a property owner who is party to a Safe Harbor Agreement transfers ownership of the enrolled property to a non-Federal entity, 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 and enhancement of survival permit. Actions taken by the new participating property owner that result in the incidental take of species covered by the Agreement would be authorized, so long as the new property owner complies with the management actions identified in the Agreement and maintains the baseline conditions. However, the new property owner would not be responsible for any provisions of the Agreement and would not receive any assurances relative to section 9 restrictions, unless the new owner agrees to become party to the Agreement and permit.

All Safe Harbor Agreements will commit the participating property owner to notify the Services before any transfer of ownership 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 agrees to continue the original Agreement or desires to enter a new Agreement. If the new property owner agrees to continue an existing Safe Harbor Agreement, the Services will honor the original baseline conditions for the enrolled property under consideration.

Part 12. Do Property Owners Retain Their Discretion?

Nothing in this policy prevents a participating property owner from implementing management actions not described in the Agreement as long as such actions maintain the original baseline conditions and do not affect the beneficial actions set forth in the Agreement. The Services will provide technical advice, to the maximum extent practicable, to the property owner, when requested. Additionally, a participating landowner that, for circumstances out of the landowner's control, needs to terminate the voluntary management actions that he or she agreed upon under the Safe Harbor Agreement, can terminate the Agreement prior to its expiration date and return the land to baseline conditions even if the expected "net conservation benefits" have not been realized. For example, if, due to unanticipated circumstances, the participating landowner needs to generate income to deal with a family emergency, the landowner has the option of terminating the Agreement with the Services to use his or her land, water, and/or natural resources to deal with the emergency.

Part 13. What Is the Discretion of All Parties?

Nothing in this policy compels any party to enter into a Safe Harbor Agreement. Entering a Safe Harbor Agreement is purely voluntary for non-Federal entities and the Services, and presumes that the Agreement will serve the interests of all affected parties. An Agreement does not otherwise create or waive any legal rights of any party to the Agreement.

Part 14. How Do the Services Manage Neighboring Landowners?

The potential effects and/or implications of a Safe Harbor Agreement on neighboring properties may be an important consideration in deciding whether to enter into a Safe Harbor Agreement. In some cases, actions carried out voluntarily by a landowner under a Safe Harbor Agreement may

result in listed species occupying adjacent properties.

The Services will use the maximum flexibility allowed under the Act in addressing neighboring properties under Safe Harbor Agreements and associated take authorizations, including, but not limited to, granting of incidental take authority to the owners of neighboring lands, where occupation of neighboring lands is expected as a result of the Agreement. Neighboring landowners would only be required to agree to such conditions as would be necessary to ensure that the Agreement does not circumvent those obligations or requirements, if any, under section 9 of the Act that were applicable at the time the Agreement was signed. Implications to neighboring landowners with non-enrolled lands will be determined on a case-by-case-basis, and the Services will make every effort to include them as a signatory party to the Agreement and enhancement of survival permit when the occupation of their lands by covered species is expected. For neighbors to receive the Safe Harbor Assurances, they would sign an Agreement with the following requirements: (1) Allow an assessment/establishment of the baseline on their properties with concurrence by all parties, (2) notify the Services prior to significantly modifying the habitat, and (3) allow the Services access to capture and translocate individuals of the covered species on their property that would be expected to be adversely affected by those habitat modifications. To facilitate neighboring landowner's participation, the Services will encourage them to become signatory parties to these Agreements, where appropriate.

Part 15. Will There Be Public Review?

The Services will encourage property owners to involve the public in the development of an Agreement. However, public participation must be agreed to by the property owner. The Services will make every Safe Harbor Agreement available for public review and comment as part of the evaluation process for issuance of the associated enhancement of survival permit. This comment period will generally be 30 days; with the comment period for large or programmatic Agreements 60 days.

Part 16. What Is the Scope of the Policy?

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

Dated: March 22, 1999.

Jamie Rappaport Clark,
Director, U.S. Fish and Wildlife Service.

Dated June 10, 1999.

Penelope D. Dalton,
Assistant Administrator of Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

Announcement of Final Policy for Candidate Conservation Agreements with Assurances

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

ACTION: Announcement of final policy.

SUMMARY: The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (jointly the Services) announce a joint final Policy for Candidate Conservation Agreements (Agreements) with Assurances under the Endangered Species Act of 1973, as amended (Act). This policy offers assurances as an incentive for non-Federal property owners to implement conservation measures for species that are proposed for listing under the Act as threatened or endangered, species that are candidates for listing, and species that are likely to become candidates or proposed in the near future. Published concurrently in this **Federal Register** are the FWS's regulations necessary to implement this policy.

DATES: This policy is effective July 19, 1999.

ADDRESSES: Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Washington, D.C. 20240 (Telephone 703/358-2171, Facsimile 703/358-1735); or Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910 (Telephone 301/713-1401, Facsimile 301/713-0376).

FOR FURTHER INFORMATION CONTACT: Richard Hannan, Acting Chief, Division of Endangered Species, U.S. Fish and Wildlife Service (Telephone 703/358-2171) or Marta Nammack, Endangered Species Division, National Marine

Fisheries Service (Telephone 301/713-1401).

SUPPLEMENTARY INFORMATION:

Background

On June 12, 1997, the Services issued a draft policy (62 FR 32183), and the FWS issued proposed regulations to implement the policy (62 FR 32189). This policy is intended to facilitate the conservation of proposed and candidate species, and species likely to become candidates in the near future by giving citizens, States, local governments, Tribes, businesses, organizations, and other non-Federal property owners incentives to implement conservation measures for declining species by providing certainty with regard to land, water, or resource use restrictions that might be imposed should the species later become listed as threatened or endangered under the Act. Under the policy, non-Federal property owners, who enter into a Candidate Conservation Agreement with assurances that commit them to implement voluntary conservation measures for proposed or candidate species, or species likely to become candidates or proposed in the near future, will receive assurances from the Services that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed in the future.

Much of the land containing the nation's existing and potential fish and wildlife habitat is owned by private citizens, States, local governments, Native American Tribal governments, businesses, organizations, and other non-Federal entities. The future of many declining species is dependent, wholly or in part, on conservation efforts on these non-Federal lands. Such conservation efforts are most effective and efficient when initiated early. Early conservation efforts for proposed and candidate species, and species likely to become candidates or proposed in the near future can, in some cases, preclude or remove any need to list these species as threatened or endangered under the Act.

By precluding or removing any need to list a species through early conservation efforts, property owners can maintain land use and development flexibility. In addition, initiating or expanding conservation efforts before a species and its habitat are critically imperiled increases the likelihood that simpler, more cost-effective conservation options will still be available and that conservation will ultimately be successful.