SUMMARY: This document requests comments on a petition filed by B.B.C. Inc., proposing the substitution of Channel 225C2 for Channel 225C3 at Malden, Missouri, and modification of the license for Station KMAL(FM) to specify operation on Channel 225C2. The coordinates for Channel 225C2 are 36–39–48 and 89–47–39. To accommodate the substitution at Malden, we shall also propose to substitute Channel 224A for Channel 225A at Ironton, Missouri, and modify the license for Station KYLS to specify operation on Channel 224A. The coordinates for Channel 224A are 37–34–23 and 90–41–35. We shall propose to modify the license for Station KMAL(FM) in accordance with Section 1.420(g) of the Commission's Rules and will not accept competing expressions of interest for the use of the channel or require petitioner to demonstrate the availaility of an additional equivalent class channel for use by such parties.

DATES: Comments must be filed on or before July 14, 1997, and reply comments on or before July 29, 1997.

ADDRESSES: Federal Communications Commission, Washington, DC. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: John M. Pelkey, Haley Bader & Potts P.L.C., 4350 North Fairfax Drive, Suite 900, Arlington, Virginia 22203–1633.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 97–136, adopted May 14, 1997, and released May 23, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, DC. 20037, (202) 857–3800.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–14025 Filed 5–28–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

RIN 1018–AE24

No Surprises Policy

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

ACTION: Proposed rule.

SUMMARY: This proposed rule will codify the substance of the Endangered Species Act (ESA) ''No Surprises'' policy issued by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in 1994 and included in the joint FWS and NMFS Endangered Species Habitat Conservation Planning Handbook issued in November 1996 (61 FR 63854). The No Surprises policy provides regulatory assurances to the holder of an incidental take permit issued under section 10(a) of the ESA that no additional land use restrictions or financial compensation will be required of the permit holder with respect to species adequately covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit. The proposed rule contains proposed revisions to parts 17 (FWS) and 222 (NMFS) of Title 50 of the Code of Federal Regulations necessary to implement the substance of the No Surprises policy. The proposed rule is published in response to the March 21, 1997, settlement agreement in *Spirit of the Sage* v. *Babbitt,* No. 1:96CV02503 (SS) (D. D.C.).

DATES: Comments on the proposed rule must be received by July 28, 1997.

ADDRESSES: For 50 CFR part 17, send any comments or materials concerning the proposed changes to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 452 ARLSQ, Washington, D.C., 20240 (Telephone 703/358–2171, Facsimile 703/358–1735). You may examine comments and materials received during normal business hours in room 452, Arlington Square Building, 4401 North Fairfax Drive, Arlington, Virginia. For 50 CFR part 222, send any comments to Nancy Chu, Chief, Endangered Species Division, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD, 20910 (Telephone (301/713–1401). You must make an appointment to examine these materials.

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

SUPPLEMENTARY INFORMATION: The Services firmly believe that they have had sufficient authority under the Endangered Species Act (ESA) to issue Habitat Conservation Plan (HCP) permits with No Surprises assurances and continue to believe in the validity of those permits. The Services also believe that the current process and those permits issued in the past with the No Surprises assurances are legally adequate and continue to assert the Services' authority to issue individual HCP permits with the No Surprises assurances. Nevertheless, the Services recognize the benefits of permanently codifying the No Surprises policy as a rule in 50 CFR, as well as the value of soliciting additional comments on the policy itself. Therefore, the Services believed it served their purposes to settle the *Spirit of the Sage Council* v. *Babbitt,* No. 1:96CV02503 (SS) (D. D.C.), lawsuit, which challenged the procedures under which the No Surprises policy was adopted and under which subsequent HCP permits were issued, by agreeing to submit the No Surprises Policy to further public comment and to consider public comment in drafting a final No Surprises rule.

These proposed regulations apply to the FWS and the NMFS (collectively referred to as the Services). The background information regarding the proposed rule is the same for the Services. The proposed rule is, however, presented in two parts because the Services have separate regulations for implementing the section 10 permitting

process. The first part is for the proposed changes in the FWS's regulations found at 50 CFR 17.22 and 17.32, and the second part is for the proposed changes in NMFS's regulations found at 50 CFR 222.

Background

Section 9 of the ESA generally prohibits the ''take'' of species listed under the ESA as endangered. Pursuant to the broad grant of regulatory authority over threatened species in section 4(d) of the ESA, FWS and NMFS regulations generally prohibit take of species listed as threatened. See, e.g., 50 CFR 17.31 and 17.21 (FWS). Section 3(18) of the ESA defines take to mean ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' FWS regulations (50 CFR 17.3) 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 or sheltering.''

Section 10 of the ESA as originally enacted contained provisions allowing the issuance of permits authorizing the taking of listed species under very limited circumstances for non-Federal entities. However, both the government and the development community became concerned that these permitting provisions were not sufficiently flexible to address situations in which a property owner's otherwise lawful activities might result in limited incidental take of a listed species even if the person were willing to plan their activities carefully to be consistent with the conservation of the species. As a result, Congress included in the ESA Amendments of 1982 amendments to section 10(a) to allow the FWS and NMFS to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided activities are conducted according to a conservation plan (or habitat conservation plan or HCP) designed to further the long-term conservation of the species and to avoid jeopardy to the continued existence of the species. In doing so, Congress indicated it was acting to ''address the concerns of private landowners who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking* * * '' H.R. Rep. No. 835, 97th Cong., 2d Sess. 29 (1982) (hereafter ''Conf. Report''). Congress modeled the 1982 HCP amendments after the conservation plan developed by private landowners and local governments to protect the habitat of two listed butterflies on San Bruno Mountain in San Mateo County, while allowing development activities to proceed.

> Congress recognized in enacting the section 10 HCP amendments that: significant development projects often take many years to complete and permits applicants may need long-term permits. In this situation, and in order to provide sufficient incentives for the private sector to participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project. Thus, the Secretary should have the discretion to issue section 10(a) permits that run for periods significantly longer than are commonly provided [for other types of permits]. (Conf. Report at 31).

Congress also recognized that long term HCP permits would present unique issues that would have to be addressed if the permits were to function properly to protect the interests of both the species involved and the development community. For instance, Congress realized that ''circumstances and information may change over time and that the original [habitat conservation] plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances.'' (Conf. Report at 31). More importantly, Congress recognized that non-Federal property owners seeking HCP permits would need to have economic and regulatory certainty regarding the overall cost of species mitigation over the life of the permit. As stated in the Conference Report on the 1982 ESA amendments:

> The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act. (Conf. Report at 30 and 50 FR 39681–39691 (Sept. 30, 1985)).

Congress thus allowed the Federal government to provide assurances to non-Federal property owners through the section 10 incidental take permit process. Non-Federal property owners would have economic and regulatory certainty regarding the overall cost of species mitigation, provided that the conservation plan adequately provided for the affected species in the first instance, the permittee was complying in good faith with the terms and conditions of the permit and the HCP, and that the HCP was properly functioning.

In the proposed rule to implement the ESA's incidental take permit provisions, the FWS expressly discussed Congress' statement that the section 10 permitting process should be used to address multiple species and unlisted species in exchange for regulatory assurances. (48 FR 31417 (July 8, 1983)). When the final incidental take permit rule was published in 1985, the FWS responded to comments on the consideration of unlisted species in HCPs by referring to the same statement of Congressional intent and by reiterating that HCP permittees have the option of addressing unlisted species in exchange for long-term assurances, and that additional mitigation would only be required in accordance with the terms and conditions of the original HCP (58 FR 39681, 39683 (September 30, 1985)). The No Surprises Policy issued on August 11, 1994, cites and relies upon the same statement of the Congressional intent.

After the No Surprises policy was issued, it was the subject of a public comment process when it was released as a key component of the draft *1994 Habitat Conservation Planning Handbook* (59 FR 65782, December 21, 1994). The No Surprises policy was included in slightly revised form in the final *1996 Habitat Conservation Planning Handbook* (61 FR 63854, December 2, 1996), and currently is being implemented. In addition to this opportunity for public comment on the No Surprises policy in general, the application of the policy and its assurances has been and continues to be subject to an opportunity for public comment on each proposed HCP permit under section 10(c) of the ESA. In addition, because the act of issuing a HCP permit is a Federal authorization subject to section 7(a)(2) of the ESA, the Services must consult under section 7 on each proposed HCP permit.

The regulatory and economic assurances provided to permittees through this proposed rule is limited to the HCP permitting process. Under the proposed rule, these assurances would continue to be incorporated into the section 10 HCP permit the Services issue to a permittee.

The FWS administers a variety of conservation laws that authorize the issuance of certain permits for otherwise prohibited activities. Part 13 of Title 50 of the Code of Federal Regulations consolidates the administration of various FWS permitting programs. Part 13 provides a uniform framework of general administrative conditions and procedures that govern the application, processing, and issuance of all FWS permits. In addition to Part 13, the FWS has added several more specific wildlife regulatory programs to Title 50 of the Code of Federal Regulations. For example, the FWS added Part 18 to implement the Marine Mammal Protection Act and modified and expanded Part 17 to implement the ESA. These parts contained their own specific permitting requirements in addition to the general permitting provisions of Part 13. This proposed rule would permanently codify the No Surprises policy through amendments to 50 CFR Part 17 (for FWS) and 50 CFR Part 222 (for NMFS).

Description/Overview of Proposed No Surprises Rule

The information presented below briefly describes the No Surprises policy and this proposed rule.

To address the problem of maintaining regulatory assurances and providing regulatory certainty in exchange for conservation commitments, the FWS and the NMFS jointly established a ''No Surprises'' policy for HCPs on August 11, 1994. The No Surprises policy set forth a clear commitment by the FWS and the NMFS that, to the extent consistent with the requirements of the ESA and other Federal laws, the government will honor its agreements under a negotiated and approved HCP for which the permittee is in good faith implementing the HCP's terms and conditions. The specific nature of these provisions will vary among HCPs depending upon individual habitat and species needs.

The No Surprises policy and this proposed rule provide certainty for non-Federal property owners in ESA HCP planning through the following assurances:

- In negotiating ''unforeseen circumstances'' provisions for HCPs, the Services will not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, the Services will not seek any other form of additional mitigation from an HCP permittee except under unforeseen circumstances.

This means that if unforeseen circumstances occur during the life of an HCP, the Services will not require additional lands or property interests, additional funds, or additional restrictions on lands or other natural resources released under an HCP for development or use from any permittee who, in good faith, is adequately implementing or has fully implemented their commitments under an approved HCP. Once an HCP permit has been issued and its terms are being complied with, the permittee may remain secure regarding the agreed upon cost of mitigation, because no additional mitigation land or property interests, funding, or land use restrictions will be requested by the issuing Service. The permittee would not be responsible for any other forms of additional mitigation, unrelated to the categories noted in the previous sentence, except where unforeseen circumstances exist.

The legislative history of the 1982 ESA amendments noted above in the ''Background'' section illustrates the two primary goals of the HCP program: (1) adequately minimizing and mitigating for the incidental take of listed species; and (2) providing regulatory assurances to section 10 permittees that the terms of an approved HCP will not change over time, or that necessary changes will be minimized to the maximum extent possible, and will be mutually agreed to by the applicant. How to reconcile these objectives remains one of the central challenges of the HCP program.

''Unforeseen circumstances'' has been broadly defined to include a variety of changing circumstances that may occur over the life of an ongoing HCP. However, it is important to distinguish between ''unforeseen circumstances'' and ''changed circumstances.'' ''Changed circumstances'' are not uncommon during the course of an HCP and can reasonably be anticipated and planned for (e.g., the listing of new species, modifications in the project or activity as described in the original HCP, or modifications in the HCP's monitoring program). ''Unforeseen circumstances,'' however, means changes in circumstances surrounding an HCP that were not, or could not, be anticipated by HCP participants and the Services at the time of the HCP's negotiation and development and that result in a substantial and adverse change in the status of a covered species.

With respect to anticipated and possible changed circumstances, the HCP should discuss measures developed by the applicant and the Services to meet such changes over time, possibly by incorporating adaptive management measures for covered species in the HCP. HCP planners should identify potential problems in advance and identify specific strategies or protocols in the HCP for dealing with them, so that adjustments can be made as necessary without having to amend the HCP.

The ''Unforeseen Circumstances'' section of the HCP should be more limited. This section should discuss how to deal in the future with those changes in the circumstances surrounding the HCP that cannot be anticipated by HCP negotiators. While HCP permittees will not be responsible for additional mitigation measures if unforeseen circumstances arise, other methods of responding to the needs of the affected species, such as governmental action and voluntary conservation measures by the permittee, remain available to assure the requirements of the ESA are satisfied.

Consequently, the No Surprises policy and this proposed rule also provide that:

- If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the obligation for such measures will not rest with the HCP permittee.

This means that in cases where the status of a species addressed under an HCP unexpectedly worsens, the primary obligation for implementing additional conservation measures would be borne by the Federal government, other government agencies, private conservation organizations, or other private landowners who have not yet developed an HCP.

''Adequately covered'' under an HCP for listed species refers to any species addressed in an HCP that has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For unlisted species, the term refers to any species that is addressed in an HCP *as if* it were listed pursuant to section 4 of the ESA, and is covered by HCP conditions that would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were actually listed. No Surprises assurances apply *only* to species that are ''adequately covered'' in the HCP. Species should not be included in the HCP permit if data gaps or insufficient information makes it impossible to craft conservation/mitigation measures for them. In many cases, however, data gaps can be overcome through the inclusion of adaptive management clauses in the HCP.

• If unforeseen circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation will maintain the original terms of the HCP to the maximum extent possible. Further, any such changes will be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements will not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee.

This means that if unforeseen circumstances are found to exist, the Services will consider additional mitigation measures. However, such measures must be as close as possible to the terms of the original HCP and must be limited to modifications within any Conserved Habitat area or to adjustments in lands that are already set aside by the HCP in the HCP's operating conservation program. Any such adjustments or modifications will not include requirements for additional land protection, payment of additional funds, or apply to lands otherwise available for development or use under the HCP, *unless the permittee consents to such additional measures.* ''Modifications within Conserved Habitat areas or to the HCP's operating conservation program'' means changes to plan areas explicitly designated for habitat protection or other conservation uses under the HCP, or changes that redirect or increase the intensity, range, or effectiveness of the HCP's operating program, provided that any such changes do not impose new restrictions or financial compensation on the permittee's activities. Thus, if an HCP conservation program originally included a mixture of predator depredation control and captive breeding, but subsequent research or information demonstrated that one of these was considerably more effective that the other, the Services would be able to request an adjustment in the proportionate use of these tools, provided that such an adjustment did not increase the overall costs to the HCP permittee.

The policy and this proposed rule also set out criteria for determining whether and when unforeseen circumstances arise.

• The Services will have the burden of demonstrating that such unforeseen circumstances exist using the best scientific and commercial data available. Their findings must clearly be documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

• In deciding whether any unforeseen circumstances exist which might warrant requiring additional mitigation from an HCP permittee, the Services will consider, but not be limited to, the following factors: (a) size of the current range of affected species; (b) percentage of range adversely affected by the HCP; (c) percentage of range conserved by the HCP; (d) ecological significance of that portion of the range affected by the HCP; (e) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP; (f) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (g) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

The first of these two criteria, on the burden of proof, is self-explanatory. The second identifies some factors to be considered by the Services in determining whether biologically significant unforeseen circumstances exist. Generally, the inquiry would focus on the level of biological peril to the affected species covered by the HCP and the degree to which the welfare of those species is tied to a particular HCP. For example, if a species is declining rapidly, and the HCP encompasses an ecologically insignificant portion of the species' range, then unforeseen circumstances typically would not exist because the overall effect of the HCP upon the species would be negligible or insignificant. Conversely, if a species is declining rapidly and if the HCP encompasses a majority of the species' range, then unforeseen circumstances probably would exist.

The policy and this proposed rule provide additional assurances where an HCP is designed to provide an overall net benefit to the covered species.

• The Services will not seek additional mitigation for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for the species and contained measurable criteria for the biological success of the HCP which have been or are being met.

This provision means that the Services will not attempt to impose additional mitigation measures *of any type* where the HCP meets these standards. This provision is intended to encourage HCP applicants to develop HCPs that provide an overall net benefit to affected species. However, it does not mean that an HCP must in fact have achieved a net benefit to the affected species in order for the ''no additional mitigation'' provision to apply. Rather, it will be sufficient if the HCP agreement contains a clearly articulated set of criteria for achieving a net benefit and an adequate monitoring program for measuring progress toward the net benefit goal, and the HCP has been and continues to meet the criteria.

For listed species, an overall net benefit is defined as the cumulative results of the management activities identified in an HCP that provide for an increase in a species' population and/or the enhancement, restoration or maintenance of covered species' suitable habitat within the HCP planning area, taking into account the length of the permit and the incidental taking allowed by the permit. In addition, the benefit must be sufficient to contribute to the recovery of the covered species if undertaken by other property owners similarly situated. For unlisted species, overall net benefit is defined as management activities identified in an HCP that would remove the threats to the species and eliminate the need to list the covered species, again, if undertaken on a broader scale by other property owners similarly situated.

A ''properly functioning HCP'' means any HCP whose commitments or provisions have been or are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit.

• Nothing in this policy/rule will be construed to limit or constrain the Services or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in an HCP.

This means the Services can intercede on behalf of a species at their own expense at any time and be consistent with the assurances provided the permittee under this policy and the permit. Neither is there anything in the No Surprises policy or this proposed rule that prevents the Services from requesting a permittee to *voluntarily* undertake additional mitigation on behalf of affected species, though of course the permittee is under no obligation to comply.

In fact, FWS and NMFS have a wide array of authorities and resources that can be utilized to provide additional protection for threatened or endangered species included in an HCP. In meeting their commitment under the No Surprises policy and this proposed rule (consistent with their obligations under the ESA), it is extremely unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress. In such an unlikely event, such actions would necessarily be

subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated by the Congress.

Permit-Shield Provision

In addition to proposing to codify as a rule the substance of the existing No Surprises policy, the Services propose to add a new permit-shield provision. *See* §§ 17.22(b)(6), 17.32(b)(6), and 222.22(h). The purpose of the permit-shield provision is to create a presumption that a holder of an incidental take permit is operating in compliance with sections 9 and 10 of the ESA when complying with a valid incidental take permit, regardless of changes in circumstances and regardless of whether the incidental take permit was approved under either the No Surprises policy or this proposed rule. Although the permit-shield provision and the No Surprises proposed rule (if it did not have a permit-shield component) have the same objective—reliability as an incentive for habitat conservation—they have different emphases and use different methods. No Surprises allows applicants and the Services to reach a binding agreement on the amount of habitat conservation and mitigation that will be required over the life of the permit. The permit-shield provision would act to prevent or discourage subsequent enforcement actions where the permit holder is acting in compliance with the requirements of the permit.

The permit-shield rule would limit the Services' prosecutorial discretion under section 11(e) of the ESA, 16 U.S.C. 1540(e), so as to protect the assurances given in incidental take permits regardless of changed circumstances and regardless of whether the assurances were approved under a formal No Surprises rule or policy.

Required Determinations

A major purpose of this proposed rule is to provide section 10(a)(1)(B) permittees regulatory assurances through the issuance of the permit. From the Federal government's perspective, implementation of this rule would not result in additional expenditures to the permittee that are above and beyond that already required through the section 10(a)(1)(B) permitting process. There are, however, benefits derived from HCPs for both the non-Federal entities and species covered by the HCPs. HCPs are mechanisms that allow non-Federal entities to continue with economic development, while conserving those species covered by the permit. Benefits to the covered species include conserving lands and waters that the species depends on, decreasing habitat fragmentation, removing threats to candidate, proposed, or other unlisted species, and advancing the recovery of some listed species. Non-Federal program participants are then provided regulatory assurances as a result of the applying for an incidental take permit under section 10(a)(1)(B) of the ESA for those species that are adequately covered by the permit, if the HCP is functioning properly. The Services have determined that the proposed rule would not result in significant costs of implementation to non-Federal program participants.

Information Collection/Paperwork Reduction Act

No significant effects are expected on non-Federal cooperators exercising their option to enter into the HCP planning program because there is no additional information required during the HCP development or processing phase to provide these regulatory assurances.

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

Economic Analysis

This proposed rule was not subject to review by the Office of Management and Budget under Executive Order 12866. The Services have determined that there will be no additional costs placed on the non-Federal entity associated with this proposed regulation. The No Surprises Policy was drafted in 1994, went through a public comment period as part of the draft *1994 Habitat Conservation Planning Handbook* (59 FR 65782, December 21, 1994), was included in the final *1996 Habitat Conservation Planning Handbook* (61 FR 63854, December 2, 1996), and currently is being implemented. The assurances provided to permittees through these proposed rules apply to the HCP permitting process, and the Services have determined that there will be no additional information required of non-Federal entities through the HCP permitting process to provide these assurances to the permittee.

The Assistant Secretary for the Department of Interior certified to the Chief Counsel for Advocacy of the Small Business that a review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) has revealed that this rulemaking would not have a significant effect on a substantial number of small entities, which includes businesses, organizations, or governmental jurisdictions. This proposed rule will provide non-Federal program participants regulatory assurances as a result of the applying for an incidental take permit under section 10(a)(1)(B) of the Act. No significant effects are expected on non-Federal cooperators exercising their option to enter into the HCP planning program because there will be no additional information required through the HCP process to provide these regulatory assurances. Therefore, this rule would have a minimal effect on such entities. The National Marine Fisheries Service has also reviewed this rule under the Regulatory Flexibility Act of 1980 and concurs with the above certification.

The implementation of the No Surprises policy does not require any additional data not already required by the HCP process. Regulatory assurances are provided to the permittee if the HCP is functioning properly, and if all the terms and conditions of the HCP, permit, or Implementing Agreement are all being met. The underlying economic basis of comparing the ''with and without'' the proposed rule was used to determine if there existed any potential economic effects from implementing this policy. Since the rule is being implemented with existing data, there are no incremental costs being imposed on non-federal landowners. The benefits generated by this rule are being shared by the Services (i.e., less habitat fragmentation, habitat management, and protection for covered species) and by non-federal landowners (i.e., assurances that approved HCPs will allow for future economic uses of private land without further mitigation).

There are no data to determine if there are any effects on businesses from this rule. If such effects occur they are more likely to be benefits to landowners than costs. Until specific HCPs are approved it is not possible to determine effects on commodity prices, competition or jobs. However, any economic effects are likely to be benefits. There is a positive effect expected on the environment as species habitat is protected. No effect on public health and safety is expected from this rule. Therefore, this rule most likely would not have a significant effect on a substantial number of small entities.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et. seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. No additional information will be required from a non-Federal entity though the HCP.

Civil Justice Reform

The Departments have determined that these proposed regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

National Environmental Policy Act

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

Public Comments Solicited

The Services submit this proposed rule for public comment. Particularly, comments are sought on:

(1) The applicability of the No Surprises assurance to the HCP process in general;

(2) Alternative means, if any, for providing the No Surprises assurances to property owners who apply for an HCP permit;

(3) The applicability of the No Surprises assurances to species adequately covered by a section 10(a)(1)(B) permit;

(4) The permit-shield provision; and

(5) The proposed regulatory changes to 50 CFR Parts 17 and 222.

The Services will take into consideration the comments and any additional information received by the Services by July 28, 1997, and such will be considered in the development of a final rule.

List of Subjects

50 CFR Part 17

Endangered and threatened species, Export, Import, Reporting and recordkeeping requirements, Transportation.

50 CFR Part 222

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

For the reasons set out in the preamble, the Services propose to amend title 50, chapter I, subchapter B; and to amend title 50, chapter II, subchapter C of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

Subpart C—Endangered Wildlife

1. 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.

2. New paragraphs (b)(5) and (b)(6) are added to § 17.22 to read as follows:

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

* * * * *

(b) * * *

(5) *Permit assurances.* (i) Permit assurances will apply to incidental take permits that are issued in accordance with paragraph (b)(2) of this section for those species that are adequately provided for under properly functioning conservation plans. Such assurances will apply to those permittees who in good faith have complied with the required terms and conditions of the permit and the conservation plan.

(ii) In negotiating unforeseen circumstances provisions for conservation plans, the Director will not require the commitment of additional land, property interests, or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning conservation plan. Moreover, the Director will not seek any other form of additional mitigation from a permittee except under unforeseen circumstances.

(iii) If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning conservation plan, the obligation for such measures will not rest with the permittee.

(iv) If unforeseen circumstances warrant the requirement of additional mitigation from a permittee who is in compliance with the conservation plan's obligations, such mitigation will maintain the original terms of the conservation plan to the maximum extent possible. Further, any such changes will be limited to modifications within Conserved Habitat areas, if any, or to the conservation plan's operating conservation program for the affected species. Additional mitigation requirements will not involve the payment of additional compensation or apply to parcels of land or property interests available for development or land management under the original terms of the conservation plan without the consent of the permittee.

(v) The following criteria must be used for determining whether and when unforeseen circumstances arise, where the government could request review of certain aspects of the conservation plan's program.

(A) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. The Director's findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

(B) In deciding whether any unforeseen circumstances exist which might warrant requiring additional mitigation from a permittee, the Director will consider, but not be limited to, the following factors: size of the current range of affected species; percentage of range adversely affected by the conservation plan; percentage of range conserved by the conservation plan; ecological significance of that portion of the range affected by the conservation plan; level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; whether the conservation plan was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the conservation plan; and whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(vi) The Director will not seek additional mitigation for a species from a permittee where the terms of a properly functioning conservation plan agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the conservation plan which have been or are being met.

(vii) Nothing in this rule will be construed to limit or constrain the Director or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

(6) *Effect of a permit.* Compliance with the terms of an incidental take permit constitutes compliance with the

requirements of sections 9 and 10 of the ESA with respect to the species covered by the permit regardless of changes in circumstances, policy, and regulation, unless a change in statute or court order specifically requires that assurances given in the original permit be modified or withdrawn.

* * * * *

Subpart D—Threatened Wildlife [Amended]

3. New paragraphs (b)(5) and (b)(6) are added to § 17.32 to read as follows:

§ 17.32 Permits—General.

* * * * *

(b)* * *

(5) *Permit assurances.* (i) Permit assurances will apply to incidental take permits that are issued in accordance with paragraph (b)(2) of this section for those species that are adequately provided for under properly functioning conservation plans. Such assurances will apply to those permittees who in good faith have complied with the required terms and conditions of the permit and the conservation plan.

(ii) In negotiating unforeseen circumstances provisions for conservation plans, the Director will not require the commitment of additional land, or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning conservation plan. Moreover, the Director will not seek any other form of additional mitigation from a permittee except under unforeseen circumstances.

(iii) If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning conservation plan, the obligation for such measures will not rest with the permittee.

(iv) If unforeseen circumstances warrant the requirement of additional mitigation from a permittee who is in compliance with the conservation plan's obligations, such mitigation will maintain the original terms of the conservation plan to the maximum extent possible. Further, any such changes will be limited to modifications within Conserved Habitat areas, if any, or to the conservation plan's operating conservation program for the affected species. Additional mitigation requirements will not involve the payment of additional compensation or apply to parcels of land, or property interests available for development or land management under the original terms of the conservation plan without the consent of the permittee.

(v) The following criteria must be used for determining whether and when unforeseen circumstances arise, where the government could request review of certain aspects of the conservation plan's program.

(A) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. The Director's findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

(B) In deciding whether any unforeseen circumstances exist which might warrant requiring additional mitigation from a permittee, the Director will consider, but not be limited to, the following factors: size of the current range of affected species; percentage of range adversely affected by the conservation plan; percentage of range conserved by the conservation plan; ecological significance of that portion of the range affected by the conservation plan; level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; whether the conservation plan was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the conservation plan; and whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(vi) The Director will not seek additional mitigation for a species from a permittee where the terms of a properly functioning conservation plan agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the conservation plan which have been or are being met.

(vii) Nothing in this rule will be construed to limit or constrain the Director or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

(6) *Effect of a permit.* Compliance with the terms of an incidental take permit constitutes compliance with the requirements of sections 9 and 10 of the ESA with respect to the species covered by the permit regardless of changes in circumstances, policy, and regulation, unless a change in statute or court order specifically requires that assurances given in the original permit be modified or withdrawn.

* * * * *

PART 222—[AMENDED]

Subpart C—Endangered Fish or Wildlife Permits

4. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; subpart D also issued under 16 U.S.C. 1361 *et seq.*

5. New paragraphs (g) and (h) are added to § 222.22 to read as follows:

§ 222.22 Permits for the incidental taking of endangered species.

* * * * *

(g) *Permit assurances.* (1) Permit assurances will only apply to permits for Habitat Conservation Plans that are issued in accordance with paragraph (c) of this section for those species that are adequately provided for under properly functioning conservation plans. Such assurances will apply to those permittees who in good faith have complied with the required terms and conditions of the permit and the conservation plan.

(2) In negotiating the unforeseen circumstances provisions for conservation plans, NMFS will not require the commitment of additional land, water, or financial compensation beyond the level of mitigation that was otherwise adequately provided for a species under the terms of a properly functioning conservation plan. Moreover, NMFS will not seek any other form of additional mitigation from a permittee except under extraordinary circumstances.

(3) If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning conservation plan, the obligation for such measures will not rest with the permittee.

(4) If extraordinary circumstances warrant the requirement of additional mitigation from a permittee who is in compliance with the conservation plan's obligations, such mitigation will maintain the original terms of the conservation plan to the maximum extent possible. Further, any such changes will be limited to modifications within Conserved Habitat areas or to the conservation plan's operating conservation program for the affected species. Additional mitigation requirements will not involve the payment of additional compensation or apply to parcels of land available for development or land/water management

under the original terms of the conservation plan without the consent of the permittee:

(5) The following criteria must be used for determining whether and when extraordinary circumstances arise, where the government could request review of certain aspects of the conservation plan's program.

(i) NMFS will have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. Their findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

(ii) In deciding whether any extraordinary circumstances exist which might warrant requiring additional mitigation from a permittee, NMFS will consider, but not be limited to, the following factors:

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

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

(C) Percentage of range conserved by the conservation plan;

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

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

(F) Whether the conservation plan was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the conservation plan; and

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

(6) NMFS will not seek additional mitigation for a species from a permittee where the terms of a properly functioning conservation plan agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the conservation plan which have been or are being met.

(7) Nothing in this rule will be construed to limit or constrain NMFS or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

(h) *Effect of a permit.* Compliance with the terms of an incidental take permit constitutes compliance with the requirements of section 9 and 10 the ESA with respect to the species covered by the permit regardless of changes in circumstances, policy, and regulation, unless a change in statute or court order specifically requires that assurances given in the original permit be modified or withdrawn.

Dated: May 21, 1997.

Donald J. Barry,

Acting Assistant Secretary, Fish, Wildlife, and Parks, Department of the Interior.

Dated: May 22, 1997.

Rolland A. Schmitten,

Acting Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 97–14082 Filed 5–23–97; 2:23 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 970520121–7121–01; I.D. 050997A]

RIN 0648–XX83

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Control Date

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: NMFS announces that anyone entering the commercial Atlantic bluefish (*Pomatomus saltatrix*) fishery after May 29, 1997 (control date) will not be assured of future access to the bluefish resource in Federal waters if a management regime is developed and implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) that limits the number of participants in the fishery. This announcement is intended to promote awareness of potential eligibility criteria for future access to the commercial Atlantic bluefish fishery and to discourage new entries into this fishery based on economic speculation while the Mid-Atlantic Fishery Management Council (Council) contemplates whether and how access to the bluefish fishery in Federal waters should be controlled. The potential eligibility criteria may be based on historical participation, defined as any number of trips having any documented amount of Atlantic bluefish landings. This announcement, therefore, gives the public notice that they should locate and preserve records that substantiate and verify their participation in the commercial bluefish fishery in Federal waters.

DATES: Comments must be submitted by June 30, 1997.

ADDRESSES: Comments should be directed to David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, 300 South New Street, Dover, DE 19904.

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Fishery Policy Analyst, 508–281–9104.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for Atlantic Bluefish (FMP) was developed by the Council and the Atlantic States Marine Fisheries Commission to address problems that would occur if the bluefish fishery were to expand significantly or if the bluefish resource were to decline. The FMP (55 FR 18729, May 4, 1990) noted that the stock had declined from peak abundance levels observed in the early 1980s. Relative to the future condition of the stock, the FMP cautioned that ''without production of a strong year class in 1989, the population will likely continue to decline into the 1990s.''

Bluefish was most recently assessed at the 23rd Northeast Regional Stock Assessment Workshop (SAW–23); results were published in January 1997. The stock is at a low level of abundance and is over-exploited. Current annual recreational catches of 12,000 metric tons (mt) are about 20 percent of the level of the early 1980s. Fully-recruited fishing mortality (F) rates for bluefish increased from 0.12 (10 percent exploitation) in 1988 to 0.51 (36 percent exploitation) in 1992. F in 1995 was 0.40 (29 percent exploitation), twice the level of the current overfishing reference point estimated in 1994 (F_{MSY} = 0.20; 16 percent exploitation). Spawning stock biomass (SSB) declined from 293,000 mt in 1986 to 110,000 mt in 1995, a decrease of 63 percent and an historic low. Recruitment at age 0 varied from 68 to 82 million fish during 1982–84, but has since declined substantially with the strongest recent year class recruiting in 1989 (65 million). Recruitment since 1989 has been below average and the 1993 and 1995 year classes (13 and 14 million fish respectively) are the poorest of the time series. SAW–23 advised that if recruitment continues to be poor, the decline in SSB can only be halted by restricting catches to very low levels. SAW–23 advised reducing F to 0.1 or below (≤ 8 percent exploitation) to halt the decline in SSB.

The Council intends to address whether and how to limit entry of commercial vessels or participants into this fishery in a future amendment to