DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 17

[Docket No. FWS–HQ–ES–2021–0152; FF09E41000 245 FXES111609C0000]

RIN 1018–BF99

Endangered and Threatened Wildlife and Plants; Enhancement of Survival and Incidental Take Permits

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish Wildlife Service (Service), revise the regulations concerning the issuance of enhancement of survival and incidental take permits under the Endangered Species Act of 1973, as amended. The purposes of these revisions are to: clarify the appropriate use of enhancement of survival permits and incidental take permits; clarify our authority to issue these permits for non-listed species without also including a listed species; simplify the requirements for enhancement of survival permits by combining safe harbor agreements and candidate conservation agreements with assurances into one agreement type; and incorporate portions of our five-point policies for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans into the regulations to reduce uncertainty. We also made technical and administrative revisions to the regulations. The regulatory changes are intended to reduce costs and time associated with negotiating and developing the required documents to support the applications. We anticipate that these improvements will encourage more individuals and companies to engage in these voluntary programs, thereby generating greater conservation results overall.

DATES: This final rule is effective May 13, 2024.

Information Collection Requirements: If you wish to comment on the information collection requirements in this rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after publication of this rule in the **Federal Register**. Therefore, comments should be submitted to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, (see ''Information Collection'' section below under **ADDRESSES**) by May 13, 2024.

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available on the internet at *https://www.regulations.gov* in Docket No. FWS–HQ–ES–2021–0152.

Information Collection Requirements: Written comments and suggestions on the information collection requirements should be submitted within 30 days of publication of this document to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or *Info_Coll@fws.gov* (email). Please reference OMB Control Number 1018–0094 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Bradley Shoemaker, Chief, Branch of Recovery and Conservation Planning, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone: 703–358–2307. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the ESA states that it is the policy of Congress that the Federal Government will seek to conserve endangered and threatened species and use its authorities to further the statutory purposes (16 U.S.C. 1531(c)(1)). The ESA's implementing regulations are in title 50 of the Code of Federal Regulations (CFR).

Generally, ESA section 10(a) allows the Service to issue permits. The 1982 ESA amendments restructured section 10(a) to provide a mechanism for issuance of permits to non-Federal entities to authorize take of listed species that would otherwise be prohibited under section 9. Section 10(a)(1)(A) provides for the issuance of enhancement of survival permits associated with conservation actions that are beneficial to the species. Section 10(a)(1)(B) was added to allow for the issuance of incidental take permits to authorize take that is incidental to, but not the purpose of, carrying out otherwise lawful activities.

In 1999, we promulgated regulations (at 50 CFR 17.22(c) and (d) and 50 CFR 17.32(c) and (d)) and finalized policies regarding safe harbor agreements (SHAs) and candidate conservation agreements with assurances (CCAAs) to incentivize the use of enhancement of survival permits to further species recovery and conservation (64 FR 32706, 32717, and 32726; June 17, 1999).

We published minor corrections to the SHA and CCAA regulations later in 1999 (64 FR 52676, September 30, 1999) and again in 2004 (69 FR 24084, May 3, 2004). In 2016, we revised the CCAA regulations (at §§ 17.22(d) and 17.32(d); 81 FR 95053, December 27, 2016) and policy (81 FR 95164, December 27, 2016) to simplify the net conservation benefit standard as part of the issuance criteria.

Section 10(a)(1)(B) allows for the issuance of incidental take permits provided the application meets the statutory issuance criteria (16 U.S.C. 1539(a)(2)(A)(i)–(iv)). In 1985, we promulgated regulations under section 10(a)(1)(B) (at 50 CFR 17.22(b) and 17.32(b); 50 FR 39681, September 30, 1985). In 1996 we issued guidance in the form of the Habitat Conservation Planning and Incidental Take Permitting Processing Handbook (61 FR 63854, December 2, 1996). We published an addendum to the handbook, known as the ''five-point policy,'' in 2000 (65 FR 35242, June 1, 2000), and we published a revised Habitat Conservation Planning and Incidental Take Permitting Processing Handbook in 2016 (81 FR 93702, December 21, 2016).

This final rule changes the implementing regulations for ESA section 10 related to enhancement of survival permits supported by SHAs and CCAAs (§§ 17.22(c) and (d) and 17.32(c) and (d)) and to incidental take permits supported by habitat conservation plans (§§ 17.22(b) and 17.32(b)). This rulemaking also changes relevant portions of 50 CFR part 13 (which applies to all Service permits) and part 17 (which applies to all Service permits under the ESA) to incorporate provisions that are necessary to implementing §§ 17.22 and 17.32, excluding §§ 17.22(a) and 17.32(a). This rulemaking modifies ESA section 10(a)(1)(A) and (B) regulations to

improve, clarify, and expedite the Service's administration of those provisions (again, excluding §§ 17.22(a) and 17.32(a)). This rulemaking does not affect other permits issued under the ESA, such as import or export permits.

The regulatory changes in this final rule will reduce the time it takes for applicants to prepare and develop the required documents to support applications for section 10(a) permits issued under §§ 17.22(b) and (c) and 17.32(b) and (c), thus accelerating permit issuance and conservation implementation. This goal will be accomplished by:

- clarifying the appropriate permit mechanism for authorizing take;
- simplifying our permitting options under section 10(a)(1)(A) by combining CCAAs and SHAs into one agreement type and allowing the option to return to baseline;
- providing additional flexibility under section 10(a)(1)(B) for the Service to issue permits for non-listed species only, without requiring that a listed species also be covered by the permit; and
- clarifying the requirements for complete applications under the provisions at both ESA section 10(a)(1)(A) and (B).

We expect these changes to reduce the costs and time associated with negotiating and developing the required documents to support the applications. We anticipate that these improvements will encourage more individuals and companies to engage in these voluntary programs, thereby generating greater conservation results overall.

The regulatory changes in this final rule clarify under which statutory provision it is appropriate for the Service to authorize the proposed take, either through an enhancement of survival permit (section 10(a)(1)(A)) or incidental take permit (section 10(a)(1)(B)). The statutory language in the ESA clearly reflects Congress's intent that take for scientific purposes or to enhance the propagation or survival of the affected species should be authorized under section 10(a)(1)(A) through an enhancement of survival permit. By contrast, take that is incidental to, but not the purpose of, the carrying out of otherwise lawful activities is to be authorized under section 10(a)(1)(B) through an incidental take permit. Consistent with congressional intent, when we determine under which permit authority to authorize a take, we must first consider the nature and purpose of the activities causing the take.

We clarify in the final rule that enhancement of survival permits authorize take of covered species, above the baseline condition, when the conservation actions in the associated conservation agreement are of the nature of improving the condition of the species or the amount or quality of its habitat to provide a net conservation benefit to the covered species (*e.g.,* beneficial actions that address threats to the covered species, establish new wild populations, or otherwise benefit the covered species). In contrast, incidental take permits authorize take that is incidental to otherwise lawful activities (*e.g.,* resource extraction, commercial and residential development, and energy development), and the conservation actions in the associated conservation plan are of the nature of minimizing and mitigating the impacts of the anticipated incidental take for the covered species. Maintaining this distinction between these two permit types will ensure that take is authorized under the proper statutory authority, reduce confusion for applicants, expedite the permitting process, and maximize conservation of listed and at-risk species.

This final rule clarifies that the Service may issue enhancement of survival permits and incidental take permits for non-listed species without including a listed species on the permit. Immediately upon permit issuance, the permittee will begin implementing the conservation commitments for the non-listed covered species. However, the take authorization will not go into effect until such time as the non-listed covered species is listed as either endangered or threatened, provided the permittee is complying with the permit and properly implementing the agreement or plan. This approach is consistent with both (1) enhancement of survival permits currently issued for non-listed species under 50 CFR 17.22(d) or 17.32(d) and supported by a CCAA; and (2) incidental take permits currently issued under 50 CFR 17.22(b) or 17.32(b) and supported by a conservation plan that includes both listed and non-listed species. Our approach furthers the statutory purposes of the ESA by encouraging conservation of fish and wildlife before species become depleted to the point that they require listing. This final rule simplifies the ESA section 10(a)(1)(A) regulations by covering both listed and non-listed species for enhancement of survival permits under §§ 17.22(c) and 17.32(c), and by rescinding the CCAA regulations under §§ 17.22(d) and 17.32(d) (which are incorporated into §§ 17.22(c) and 17.32(c)).

We are clarifying the language in both §§ 17.22(b) and (c) and 17.32(b) and (c) to emphasize that our authority extends to authorizing take that would otherwise be prohibited under section 9 of the ESA, rather than to authorize the applicant's proposed conservation and ongoing land management activities or the otherwise lawful activities that may result in take of a covered species. In other words, the issuance of enhancement of survival or incidental take permits does not authorize the covered activities themselves; rather, it authorizes only the take of covered species resulting from those activities. This clarification is specified in §§ 17.22(b)(1) and 17.32(b)(1) for regulations related to section 10(a)(1)(B) permits and at §§ 17.22(c)(1) and 17.32(c)(1) for regulations related to section 10(a)(1)(A) permits. We further clarify what constitutes a complete application for enhancement of survival and incidental take permits and that the Service will process an application when we have determined it to be complete.

With respect to ESA section 10(a)(1)(A), the regulatory changes in this final rule combine the SHA and CCAA into one type of conservation agreement, called a conservation benefit agreement. We use the term ''conservation benefit agreement'' or ''conservation agreement'' to describe the supporting document required for an enhancement of survival permit. This rule simplifies the process for new conservation agreements developed in support of enhancement of survival permit applications. This rule also establishes that applicants for an enhancement of survival permit have the option to return the property to baseline conditions. We define ''baseline condition'' to mean the population estimates and distribution or habitat characteristics across the enrolled property that currently sustain seasonal or permanent use by the covered species at the time a conservation agreement is executed by the Service and the property owner or by a programmatic permit holder and the property owner. Allowing applicants to choose whether to return to baseline condition provides more flexibility in the agreement and may increase participation. In addition, we clarify that the Service may issue enhancement of survival permits that authorize both incidental and purposeful take that may result from implementing beneficial actions under the conservation agreement, such as reintroducing a species to a covered property or capturing and relocating a covered species that has dispersed to an adjacent property not subject to the

agreement. After the effective date of this final rule, the Service will no longer implement the SHA and CCAA policies.

With respect to ESA section 10(a)(1)(B), the regulatory changes in this final rule incorporate aspects of the five-point policy for incidental take permits and guidance from the 2016 Habitat Conservation Planning Handbook to reduce confusion and streamline the permitting process. Clarifications include a description of the requirements for a complete incidental take permit application and revisions to the corresponding incidental take permit issuance criteria. We use the term ''habitat conservation plan'' or ''conservation plan'' to describe the supporting document required for an incidental take permit.

Nothing in these revisions to the regulations is intended to require that any previous permits issued under ESA section 10(a)(1)(A) or (B) be reevaluated when this rule is effective. For applications in process and published in the **Federal Register** prior to the effective date of this rule, applicants will not be required to meet the new regulatory requirements. However, applications for new permits, renewals, or amendments received after the date specified above in **DATES** are subject to the revisions in this final rule.

This Rulemaking Action

Part 13 of title 50 of the Code of Federal Regulations sets forth general permitting regulations that apply to all permits issued by the Service. This rule amends 50 CFR part 13 to address the specific revisions in 50 CFR 17.22 and 17.32 and clarifies how the Service administers permits under §§ 17.22 and 17.32. This final rule rescinds §§ 17.22(d) and 17.32(d); the references in part 13 to those paragraphs are removed and modified to reference the remaining paragraphs (*i.e.,* references to § 17.22(b) through (d) are changed to § 17.22(b) and (c), and references to § 17.32(b) through (d) are changed to § 17.32(b) and (c)).

Clarification of ESA Section 10(a)(1)(A) and (B)—Purpose

Section 10(a)(1)(A) of the ESA authorizes the issuance of permits, under certain terms and conditions, for any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species. In 1999, the Service further clarified in §§ 17.22(c) and (d) and 17.32(c) and (d) and the SHA and CCAA policies that conservation actions to enhance the survival of affected species would be authorized under ESA section 10(a)(1)(A) enhancement of survival permits. The permit is intended to incentivize voluntary conservation by authorizing take of covered species that may result from implementing the approved conservation agreement (formerly SHA or CCAA) and providing assurances that the Service will not in the future require an increased commitment or impose additional restrictions on the permittee's current management and use of land, water, or financial resources. As a result, a property owner may continue ongoing activities and implement beneficial conservation measures without concern that their activities may be curtailed by increasing populations or distribution of a listed species or a species that may become listed in the future. Therefore, property owners managing or improving habitat that could be used by a species that is listed or could be listed, or establishing new populations of such species, have an incentive to continue their activities without fear of being subjected to increased regulatory burdens in the future. In general, take associated with working lands (*e.g.,* agriculture and silviculture) that are managed in a sustainable fashion to improve conditions for listed and at-risk species, may be appropriate under this authority depending upon the proposed covered activities.

The authority granted under ESA section 10(a)(1)(B) allows the Service to issue permits to authorize take that would otherwise be prohibited by section 9(a)(1)(B), provided the taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Under section 10(a)(1)(B), the impacts of the take associated with the otherwise lawful activities must be minimized and mitigated to the maximum extent practicable, *i.e.,* the nature of the associated conservation plan is a mitigation plan to minimize and offset the adverse impacts to the species that are incidental to otherwise lawful activities. The purpose is to provide a means for ESA compliance when otherwise lawful activities may result in incidental take of listed species. In contrast, under section 10(a)(1)(A), the primary purpose is to incentivize voluntary conservation of listed and at-risk species.

Take Authorization for Non-Listed Species Under ESA Section 10(a)(1)(A) and (B)—Authorities and Rationale

The Service currently issues both enhancement of survival and incidental take permits that cover take of listed as well as non-listed species if they become listed in the future. These permits are issued upon the Service's approval of the application, and implementation of the conservation measures for the non-listed species begins upon issuance of the permit. If a non-listed species becomes listed, the take authorization becomes effective upon the date of listing, provided that the permittee is in full compliance with the enhancement of survival or incidental take permit. This approach is supported by the House of Representatives Report on the Endangered Species Act Amendments of 1982, which reflects that Congress contemplated that non-listed species could be covered in conservation plans. H.R. Rep No. 97–835 (Sept. 17, 1982), at 30 (''Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address *both listed and unlisted* species.'') (emphasis added).

On June 17, 1999, the Service published the CCAA Policy (64 FR 32726) and implementing regulations at 50 CFR 17.22(d) and 17.32(d) (64 FR 32706) under ESA section 10(a)(1)(A) for issuing enhancement of survival permits for non-listed species. The Service further revised this policy and the regulations in 2016 (81 FR 95053 and 95164; December 27, 2016). Since the initial policy and regulations were published, the Service has issued 69 enhancement of survival permits for non-listed species in association with a CCAA; 62 of these continue to be implemented.

Clarifying in the regulations that we can issue permits that address only non-listed species under ESA section 10(a)(1)(B) is consistent with congressional intent to provide long-term regulatory assurances and builds on the success demonstrated by the CCAA program. Recognizing our ability to authorize take of non-listed species under section 10(a)(1)(B) if they become listed under the ESA, alone or combined with listed species, will help to ensure that take is authorized under the appropriate permit authority depending upon whether it is associated with beneficial conservation actions or incidental to otherwise lawful activities. This clarification reduces confusion and eliminates debate regarding the appropriate permit authority by which take should be authorized, thereby allowing the planning efforts to be focused on the permitting mechanism that is applicable to the project purpose. We acknowledge that the 2016 Habitat Conservation Planning Handbook reflects current policy, stating that applicants must include at least one ESA-listed species in a conservation plan. We plan to update the handbook accordingly to remove this requirement.

Clarifications

Service Authority Extends To Authorizing Take, Not Authorizing the Activities

Existing language in § 17.22(b)(1) and (c)(1) and § 17.32(b)(1) and (c)(1) refers to authorizing activities that are prohibited. The ESA prohibits take of listed species, not the activities that cause take. Therefore, in this final rule we clarify that, under these authorities, the Service authorizes take and not the underlying activities themselves. This change will reduce confusion among applicants and the interested members of the public who review and provide comments on permit applications.

Expediting the Development of Conservation Agreements and Conservation Plans

One of the common concerns expressed by applicants for permits under section 10(a)(1)(A) or (B) is the amount of time and resource investment it takes to develop the necessary documents to support the applications. The application process for an enhancement of survival permit or incidental take permit is divided into three phases: (1) preapplication (project proponent or property owner decides whether to apply for a permit); (2) conservation agreement or plan development and submission of a complete application to the Service; and (3) application processing (the Service processes the complete application and makes a permit decision).

While the Service has successfully implemented measures to ensure the efficient processing of permit applications once they are deemed complete, we have not been as successful with expediting the preapplication and conservation agreement or plan development phases, despite the updated guidance provided respectively in the 2016 Habitat Conservation Planning Handbook and current SHA and CCAA regulations, policies, and guidance. This outcome may be due to several factors, such as the size and complexity of the proposed project; number of species for which take is sought; and, in some cases, challenges to the interpretation of our regulations, policies, and guidance. Resolving issues that arise during development of the conservation agreement or plan often requires the expenditure of a significant amount of time and resources by both the applicant and the Service. This situation can result in delays to the applicant's project implementation and limit the Service's ability to provide timely assistance to other applicants.

To provide clarity, reduce confusion, and save time, both for applicants and the Service, this final rule clarifies the current regulations and revises the requirements for permit applications in § 17.22(b)(1) and (c)(1) and § 17.32(b)(1) and (c)(1) by codifying portions of the 2016 Habitat Conservation Planning Handbook, five-point policy, SHA policy, and CCAA policy, as applicable. These clarifications address the requirements that an applicant must meet for the Service to: (1) determine that an application is complete, (2) publish the receipt of a complete application, (3) begin processing the application, and (4) make a permit decision consistent with section 10 of the ESA.

This final rule refines the incidental take permit issuance criteria under § 17.22(b)(2) and § 17.32(b)(2) for plans permitted under ESA section 10(a)(1)(B) to align with the statute, existing policy, and practice. These revisions, along with the revised requirements for a complete application, will lead to more efficient permit application processing and decision-making and provide a better record supporting our permit decision. The issuance criteria for conservation agreements permitted under ESA section 10(a)(1)(A) will remain unchanged, although we clarify the meaning of ''net conservation benefit'' in the definitions section at § 17.3. The revisions in this final rule related to issuance criteria in parts 13 and 17 are limited to enhancement of survival and incidental take permits issued under §§ 17.22 and 17.32, excluding §§ 17.22(a) and 17.32(a), and do not affect other permits issued under the ESA, such as import or export permits, or permits issued under other statutes.

Permit Renewal and Amendment Processes

The regulatory changes in this final rule clarify that permit renewals and amendments, or a combination thereof, are subject to the current laws and regulations. The application must be evaluated under current policies and guidance in place at the time of the decision on the renewal or amendment. For amendments to enhancement of survival or incidental take permits, the scope of the Federal decision extends only to the requested amendment, not to the previously approved permit or unchanged portions of the conservation agreement or plan. The terms of the original permit, including the take authorization and assurances, remain in effect. The proposed amendment is the only change that is considered. Providing these clarifications will reduce confusion and reassure permittees applying for renewals and amendments that the Service will not reconsider all provisions of their existing permits and conservation agreements or plans, thereby expediting development of a complete application and processing of that application.

Changes From the Proposed Rule

Based on comments we received on the proposed rule (88 FR 8380, February 9, 2023), and to provide clarifications, we include the changes described below to the proposed regulations. Other than these revisions, we are finalizing the rule as proposed:

1. In the preamble to this final rule and in 50 CFR part 13, we made editorial corrections to clarify that this rule pertains only to ESA section 10(a) permits issued under 50 CFR 17.22 and 17.32.

2. In the preamble, we made edits to further clarify and address confusion regarding the appropriate provision of ESA section 10(a) under which the Service will authorize take.

3. In § 17.3, we made the following changes:

a. Added ''across'' to the definition of ''baseline condition'' to reflect that we evaluate the baseline for the entire area to be enrolled in the agreement. We also addressed situations in which the species and habitat are already adequately managed to the benefit of the species and explained how the landowner can achieve a net conservation benefit.

b. Revised the definition of ''changed circumstances'' to add ''effects of climate change'' as an example of a changed circumstance.

c. To reduce confusion, we revised the definition of ''covered species'' by substituting the term ''at-risk'' for ''reasonable potential to be considered for listing'' and explaining what at-risk means in the definition.

d. Clarified the definition of ''net conservation benefit'' by stating the improvements in the condition must be expected to result from implementation of the conservation agreement. We also clarified that maintenance of good quality habitat and addressing future threats under the control of the property owner would qualify as meeting the net conservation benefit standard.

e. Revised the definition of ''property owner'' to reflect that owners have ''rights'' to water or other natural resources, not actual ownership of those resources and added Tribal laws and regulations ''sufficient to carry out the proposed activities, subject to applicable State and Federal laws and regulations.''

4. In §§ 17.22(b)(1)(ii) and 17.32(b)(1)(ii), to reduce confusion regarding covered species, we removed the phrase ''of the individuals to be taken.''

5. In §§ 17.22(b)(1)(viii) and 17.32(b)(1)(viii), for consistency with the five-point policy (65 FR 35242, June 1, 2000), we clarified that the appropriate scope of the effectiveness and compliance monitoring programs for incidental take permits should be commensurate with the scope and duration of the operating conservation program and proposed project impacts.

6. In §§ 17.22(b)(3) and 17.32(b)(3), we added a reference to ''§§ 17.22(b)(1)(xi) and 17.32(b)(1)(xi)'' to clarify that we have the authority to include additional permit conditions, if necessary.

7. In § 17.22(b)(5)(i)–(iii) and § 17.32(b)(5)(i)–(iii), we corrected an oversight that had omitted these sections.

8. In the regulations at §§ 17.22(c)(5) and 17.32(c)(5), we corrected a reference that had indicated that assurances extend only to neighboring landowners in § 17.22(c)(5)(ii). We corrected this reference to § 17.22(c)(5)(i) to indicate that assurances apply to all enhancement of survival permittees and participating property owners.

9. For consistency throughout §§ 17.22(c) and 17.32(c), where we used the term ''enrolled land,'' we replaced it with ''enrolled property'' where appropriate.

Summary of Comments and Responses

In our proposed rule to revise the regulations for ESA section 10(a)(1)(A) and (B) published on February 9, 2023 (88 FR 8380), we requested public comments. By the close of the public comment period on April 10, 2023, we received 71 public comments on our proposed rule. We received comments from various sources, including individual members of the public, States, Tribes, industry organizations, corporations, permittees, applicants, legal foundations and firms, and environmental organizations. In general, we received a wide range of comments, often multiple pages, that ranged from full support of the changes to general opposition. However, most commenters either expressed support and provided recommendations to further improve the regulations or expressed opposition to the proposed regulations but included suggestions to make the changes acceptable.

We reviewed all public comments prior to developing this final rule but did not incorporate or respond to comments that are not relevant to or are beyond the scope of this rulemaking action. Summaries of the substantive comments and our responses are provided below. We combined similar comments where appropriate. They are organized as comments specific to: both conservation benefit agreements and habitat conservation plans; conservation benefit agreements; habitat conservation plans; and required determinations.

Comments Regarding Conservation Benefit Agreements and Habitat Conservation Plans

Comment 1: Several commenters requested that company affiliates, associates, subsidiaries, corporate families, and assigns of an applicant be included in the definition of ''applicant'' and be covered by incidental take and enhancement of survival permits, and they requested that we explain the rationale for exclusion.

Response: These entities are excluded from the definition of ''applicant'' because we must be able to specifically identify the permittee and determine if the permittee is eligible to hold a permit under § 13.21. In addition, if the permit is issued, we must be able to specifically identify who is responsible for any permit violations that may occur.

Comment 2: Two commenters requested that we add language to recognize that an entity with the power of eminent domain is a proper applicant for an incidental take permit even where all or portions of the permit area are not owned or controlled by the entity with the power of eminent domain at the time the Service processes the permit application. In addition, one of the commenters suggested that, where the Service has concerns about an applicant's ability to implement a habitat conservation plan despite the applicant possessing the power of eminent domain, the Service may include a permit condition indicating the incidental take permit will not be effective (*i.e.,* will not authorize incidental take) unless and until requisite ownership or control of the permit area has been obtained by the applicant.

Response: This comment is outside the scope of the proposed regulation revisions, and the requested changes would not further our goals of reducing confusion and streamlining the permitting process. However, we will consider providing additional guidance on this topic in the next update to the Habitat Conservation Planning Handbook.

Comment 3: Several commenters stated they oppose the rule because it judges projects based on their implied purpose rather than their conservation outcomes. They further asserted that the subjective interpretation of ''primary purpose'' of the agreement is likely to make most projects ineligible for conservation agreements, regardless of whether the projects would benefit species conservation.

Response: We considered different ways to articulate how we intend to determine under which permit authority to authorize the requested take. The purposes of section 10(a)(1)(A) and section 10(a)(1)(B) are inherently different. The former is to issue enhancement of survival permits that authorize take associated with conservation agreements and ongoing land management activities that provide a net conservation benefit to the covered species. The latter is to issue permits that authorize take that is incidental to, but not the purpose of, carrying out otherwise lawful activities where the impacts to the covered species must be minimized and mitigated. To determine the appropriate permit authority, we intend to look at the nature and purpose of the proposed activities and the anticipated outcomes of the take. For an enhancement of survival permit, the purpose and anticipated conservation outcome of the covered activity must be to provide a benefit to the species covered by the permit, *i.e.,* to improve the condition of a species, the amount or quality of its habitat, or both. Conversely, for an incidental take permit, the purpose and anticipated outcome of the covered activity is to carry out otherwise lawful activities that are likely to result in incidental take that is harmful to the species and requires mitigation (*e.g.,* activities that convert habitat to other uses). Thus, using the primary purpose and anticipated conservation outcome of the project provides a straightforward method for applicants to determine which type of permit to pursue and is consistent with Congress's intent in creating the two different types of permits.

It is unclear what the commenter means by ''implied purpose,'' but the Service anticipates that applicants will provide sufficient information to allow us to evaluate each project's primary purpose and intended conservation outcome. We will consider the circumstances on a case-by-case basis to decide which permit type is appropriate for the project.

Comment 4: One commenter asserted there were two flaws in the proposed distinction between incidental take and enhancement of survival permits: (1) the distinction would push more projects into incidental take permits, which would have a negative effect on

endangered species conservation because of the lower conservation standard of these permits, and (2) the process for obtaining an incidental take permit is inefficient, which would result in delays for a larger number of projects if more were pushed to these permits. The commenter further asserted that the high price tag of developing habitat conservation plans, which on average is greater than $1 million, would effectively eliminate the incentive for voluntary conservation within the private sector.

Response: There are inherent differences in the conservation standards between enhancement of survival permits (requiring a net conservation benefit) and incidental take permits (requiring minimization and mitigation to the maximum extent practicable). This difference is due to the intended purpose of the authorized take under each type of permit. However, conservation for listed and non-listed species can be achieved through both conservation agreements and conservation plans. Providing a clear distinction in the regulations under which statutory provision we will authorize take is critical to the proper implementation of both voluntary conservation programs. We acknowledge that the costs of developing conservation plans can be significant, but we do not view that issue as an appropriate basis for issuing an enhancement of survival permit for a project that is not primarily aimed at conservation and involves incidental take. The regulatory revisions are also intended to create efficiencies in the negotiation and permitting processes that will benefit applicants for both permit types. We also intend to explore additional measures to improve the efficiency of the incidental take permitting process, and we will consider new policies or updates to the Habitat Conservation Planning Handbook to implement such measures.

Comment 5: One commenter suggested the Service should provide additional clarification and explanation regarding the types of activities that may be covered by an enhancement of survival permit as compared to an incidental take permit.

Response: While certain types of activities are clearly more appropriate for an incidental take permit versus an enhancement of survival permit, such as housing developments and new infrastructure development, it is not possible to list all the different types of activities that could be covered by each permit type. To determine the appropriate permit authority, we will consider, on a case-by-case basis, the applicant's purpose for seeking a permit and the anticipated conservation outcome of the activity. We intend to provide additional guidance on this topic in our respective handbooks.

Comment 6: One commenter stated that the Service goes beyond our statutory authority to require project proponents to utilize incidental take permits. The commenter stated that, where a project proponent seeks to implement voluntary conservation measures (*e.g.,* preserving habitat, implementing operational controls, or funding research) for non-listed species—species for which the take prohibition does not apply—the Service should not dictate the type of conservation agreement to use.

Response: Whether to pursue a permit is voluntary, but once applicants make that choice, our responsibility is to determine both that applicants are pursuing the appropriate permit and whether an application under the appropriate permit authority is complete. With the changes we are making to our regulations, the appropriate permit (incidental take versus enhancement of survival) does not depend on the species an applicant is seeking to include, whether a listed or non-listed species. Rather, it depends on the primary purpose and anticipated conservation outcome of the project and the proposed covered activities for which take authorization is requested.

Comment 7: Some commenters stated that it is broadly beneficial to provide more clarity about the application of enhancement of survival and incidental take permits but requested that we clarify how the primary purpose of activities will be determined and ensure that the standard does not inadvertently limit the ability of agricultural producers to seek enhancement of survival permits for their activities.

Response: The type of applicant does not dictate which type of permit is appropriate for the activity. We will consider the project information provided by potential applicants and work with them on a case-by-case basis to determine their primary purpose for requesting a permit, the anticipated conservation outcomes of their project, the activities for which they are seeking take coverage, and the associated plan or agreement. This clarification does not restrict or limit eligible applicants for enhancement of survival permits. In general, take associated with working agricultural lands that are managed in a sustainable fashion to improve conditions for listed and at-risk species may be appropriate for permitting through a conservation agreement, depending upon the proposed covered activities.

Comment 8: One commenter requested that we clarify that energy project proponents continue to have the flexibility to choose between either an enhancement of survival or incidental take permit depending on the primary purpose of the covered activity.

Response: Energy project proponents, as well as other project applicants, should seek assistance from the Service early in the preapplication and project planning phase to ensure the appropriate permit is pursued. When deciding under which permit authority to authorize take, we consider the primary purpose of the project and anticipated conservation outcomes, regardless of the identity of the applicant.

Comment 9: One commenter asserted that for some renewable energy projects an enhancement of survival permit may provide a regulatory mechanism to seek coverage while the applicant is researching, developing, or testing a novel mitigation technology or technique. The commenter further stated that the last 20 years of such advancements in renewable energy show promise, but that mitigation technology remains a nascent industry, and the Service is uniquely situated to provide a regulatory incentive for renewable energy companies to further invest in such technologies and techniques. For these reasons, the commenter recommends that we ensure sufficient flexibility in our regulations so that renewable energy development activities are not prohibited under enhancement of survival permits, especially related to listed species and the investment in minimization research and development. Some commenters recommended that the Service allow research as a mitigation option, while others objected to the recommendation, stating that it would authorize take without properly mitigating the impacts of the taking. However, commenters stated that if research is allowed as mitigation, the regulations should clarify that both the research and the informed conservation must be requirements of the associated incidental take permit and the mitigation must offset the impacts of the taking, not just inform future conservation.

Response: As stated in our mitigation policy, research that is directly linked to reducing threats or that provides a quantifiable benefit to the species may be appropriate when: (a) the major threat to a resource is something other than habitat loss, (b) the Service can reasonably expect the outcome of

research or education to offset the impacts, or (c) the proponent commits to using the results of the research to mitigate impacts. Research should be included as part of a mitigation package only when other reasonable options for mitigation have been fully exhausted. In general, energy development projects do not have a primary purpose of habitat and species conservation and should seek incidental take permits.

Comment 10: Several commenters urged us to clarify and explain what type of activities may be covered by an enhancement of survival permit as opposed to an incidental take permit. The commenters further stated that, because we intend to combine SHAs and CCAAs into a single type of conservation agreement to support the issuance of an enhancement of survival permit, we should also clarify the full scope of activities, formerly covered by a CCAA, that would be eligible for inclusion in a conservation agreement. One commenter also stated that it is unclear whether all the activities currently covered by a CCAA and associated permit would still be eligible for inclusion in a conservation agreement.

Response: Because of the extent of variability among projects, it is not possible for us to categorize all the types of activities that might be covered by an enhancement of survival permit as opposed to an incidental take permit. With the changes we are making to these regulations, it is possible that some activities affecting non-listed species that are included in existing CCAAs may in the future be found more appropriate for authorization though an incidental take permit. But, as previously stated, we would consider the purpose for applying for a permit, the anticipated conservation outcome, and covered activities to determine which permit is appropriate.

Comment 11: A commenter asserted that applicants seeking an enhancement of survival permit may propose a variety of activities for incidental take authorization. They stated that the ''primary purpose'' of the conservation agreement may not be solely to ''benefit the covered species'' but could include a variety of other purposes depending on the needs and objectives of the applicant. The commenter suggested that instead of requiring a ''primary purpose'', the objective of enhancement of survival permits should be ''providing a benefit to the covered species'' irrespective of the primary purpose of the conservation agreement. Another commenter suggested adding the language shown here in brackets: Enhancement of survival permits authorize take of covered species, above the baseline condition, when the primary purpose of the associated conservation agreement is to implement beneficial actions that address threats to the covered species, establish new wild populations, or otherwise benefit the covered species; [or where the land or water management actions covered by the conservation agreement benefit the species even though the primary purpose of those actions may not be conservation].

Response: Because both conservation agreements and plans may provide a benefit to the covered species, providing such a benefit is not a sufficient basis to distinguish between them. Rather, it is appropriate to consider the primary purpose and the anticipated conservation outcomes in the context of conservation agreements to further the statutory purpose of section 10(a)(1)(A), enhancing the propagation or survival of the species. We have clarified in the preamble that the conservation actions in the associated conservation agreement or plan will be used to determine the appropriate permitting authority. We have also clarified that take from both proposed conservation activities and ongoing land management can be authorized under enhancement of survival permits. Additionally, as discussed in response to comment 4, both conservation agreements and plans can provide conservation benefits to listed and non-listed species even though the standards under each authority are different.

Comment 12: One commenter believes that conservation agreements will primarily apply to activities designed to enhance the survival of the species and not, as some past CCAAs have allowed, to provide take protections for economic activities that could incidentally take the species. The commenter indicated that we should clarify this issue in the regulations and on the corresponding application forms.

Response: Clarifying in the regulations that a conservation plan can be developed without inclusion of a listed species will allow incidental take permits to be pursued where previously enhancement of survival permits were deemed the only option because of the former policy that incidental take permits applications must include at least one listed species. Basing the distinction between incidental take and enhancement of survival permits on the primary project purpose and anticipated conservation outcome will ensure that take is authorized under the appropriate authority. We will include additional guidance in our handbooks to further address this issue.

Comment 13: Several commenters asserted that renewable energy projects serve a conservation purpose and are vital to addressing climate change, which is causing long-term impacts on species. The commenters stated that renewable energy projects may have short-term or immediate impacts on species, but such impacts are likely offset by the long-term benefits that these projects collectively create. They further stated that, where opportunities exist to recognize these benefits, expediting permits for projects that address climate change will provide a greater incentive for implementing renewable energy projects.

Response: We acknowledge that many renewable energy projects will reduce greenhouse gas emissions and the otherwise-anticipated harmful effects of climate change on species and the environment. The regulatory changes in this rule are intended to help streamline the regulatory process for all applicants, including proponents of renewable energy projects, and decrease the time for permit approval and issuance. When reviewing a plan or agreement, we consider its duration to determine if the issuance criteria and standards can be met during that timeframe.

Comment 14: One commenter suggested that the issuance criteria (50 CFR 17.22(c)(1)) be amended to expressly require that the purpose of the proposed conservation agreement must be to provide a conservation benefit for the species through enhancing its propagation or survival.

Response: It is not necessary to add this language to § 17.22(c)(1) because the issuance criteria at §§ 17.22(c)(2)(ii) and 17.32(c)(2)(ii) already require that ''the implementation of the terms of the conservation agreement is reasonably expected to provide a net conservation benefit.''

Comment 15: Several commenters were concerned that the proposed rule appeared no longer to apply ''no surprises'' assurances to enhancement of survival permits according to current practice. They stated that we should retain the existing ''no surprises'' assurance regulations for conservation agreements and plans and apply them to incidental take and enhancement of survival permits. The commenters asserted that, while the Service states that the well-established ''no surprises'' assurances will continue to apply, the proposed regulatory revisions suggest otherwise. Several commenters pointed out that the proposal appears to inadvertently omit the existing language on ''no surprises'' assurance in § 17.22(b)(5) and (c)(5), as well as in § 17.32(b)(5) and (c)(5). The commenters

stated that, assuming that this was an inadvertent omission, we should correct the error when finalizing the rule by reinserting subparagraphs (i), (ii), and (iii) in §§ 17.22(b)(5) and 17.32(b)(5).

Response: As stated in the proposal, we intend to retain ''no surprises'' assurances for both permit types. In this final rule, for enhancement of survival permits we revised § 17.22(c)(5) and § 17.32(c)(5) so that the assurances apply to § 17.22(c)(5) and § 17.32(c)(5) in their entirety, not just to each paragraph (c)(5)(ii). Regarding incidental take permits, the proposed regulatory revisions do not alter the protections provided by the ''no surprises'' rule, but there was an inadvertent omission in §§ 17.22(b)(5) and 17.32(b)(5), which we corrected.

Comment 16: Several commenters stated that the assurances referenced in new §§ 17.22(c)(5) and 17.32(c)(5) should apply to all sections of § 17.22(c)(5), and not just paragraph (c)(5)(ii). Another commenter stated that the proposed definition of ''changed circumstances'' appears to limit the application of the current no surprises assurances to conservation plans and incidental take permits, thus leaving out conservation agreements and enhancement of survival permits.

Response: We revised the references in §§ 17.22(c)(5) and 17.32(c)(5), so that the assurances apply not just to neighboring property owners, but to all property owners who participate in a conservation agreement. Additionally, we did not intend to limit the no surprises assurances to conservation plans. Although we deleted the requirement for a changed circumstances section in a conservation agreement, these concepts are incorporated into the monitoring and adaptive management portions of the agreement.

Comment 17: Several commenters supported the proposed clarification that we authorize the incidental take and not the underlying otherwise lawful activity and land use. One commenter stated that, in the introductory language of 50 CFR 17.22, § 17.22(a)(1), and all other places in § § 17.22 and 17.32 where a ''permit for an activity'' is described, the language should be revised to ''permit for take associated with a covered activity.'' The commenter also stated that all references to an ''activity'' may need to be changed to a ''covered activity.''

Response: We did not propose any changes to §§ 17.22(a) or 17.32(a). Rather, the proposed revisions were limited to §§ 17.22(b) and (c) and 17.32(b) and (c). Therefore, we are not making any changes to §§ 17.22(a) or 17.32(a) in this final rule.

Comment 18: One commenter asserted that, if a permittee proceeds with the activities that would otherwise be unlawful under the ESA, then the Service is in effect authorizing those activities by issuing the permit and the Service's scope must analyze the impacts of the covered activities under the National Environmental Policy Act (NEPA).

Response: As we explain in the regulatory language, the permit does not authorize the covered activities themselves, and the Service does not have the authority to approve the activities. Rather, the permit authorizes take that may be associated with the activities and which would otherwise be prohibited under section 9 of the ESA. Therefore, the Federal action is the decision whether to issue a permit that authorizes take, and the appropriate scope of our analysis under NEPA includes the direct and indirect effects of the permitting decision (*i.e.,* authorizing take of the covered species) on the human environment.

Comment 19: One commenter stated that the proposed regulations indicate that the scope of authorization in section 10(a)(1) of the ESA is limited to the take of covered species, which should mean that the National Historic Preservation Act (NHPA) is not triggered, especially because the permits are for non-Federal actions. The commenter asserted, however, that the Service likely does not interpret the proposed text this way, as doing so could cause confusion. The commenter indicated that if we expect incidental take and enhancement of survival permits to be an NHPA trigger, we should not say the scope of authorization is limited to species take.

Response: Because the action of issuing a permit is a Federal undertaking as defined in 36 CFR 800.16(y), we are subject to section 106 compliance under the National Historic Preservation Act. Clarifying that the scope of our permit authorizes the take, not the activities causing the take, ensures that the area of potential effect is appropriately determined.

Comment 20: One commenter stated that the regulations should limit section 10 enhancement of survival permits to activities that actually enhance the survival or propagation of a species. The commenter shared an example where capturing the animal is necessary for its own benefit and protection and to assist its conservation in the wild. The commenter further asserted that purposeful take that is not expected to directly benefit the animal being taken should not be allowed under the regulations because that activity does not enhance the survival or propagation of the species.

Response: Any purposeful take that is authorized through an enhancement of survival permit must directly benefit the covered species and be necessary to provide for its conservation through implementation of the conservation agreement. The commenter's example is a situation where it might be appropriate for the Service to authorize purposeful take that is necessary to implement a conservation agreement.

Comment 21: One commenter asserted that the Service needs a means to track take and that we should require a standardized self-reporting duty that all parties can understand and meaningfully comply with. Another commenter suggested we develop procedures for monitoring compliance with incidental take permits and for tracking cumulative take to ensure excessive take allowances are not granted.

Response: For all incidental take and enhancement of survival permits, we require that permittees report take that occurs during their annual reporting period. We are developing mechanisms to collect this information when permittees submit their annual reports through the online ePermits system, which we will incorporate into our internal project tracking system—ECOSphere—where the data will be available to all Service biologists for use in conservation decision-making.

Comment 22: One commenter stated that the required conservation agreement elements do not include a section on take or assurances provided to property owners and the regulation does not clearly describe how these elements are incorporated into the conservation agreement and permitting process for an enhancement of survival permit. The commenter also asserted that we did not address the duration for conservation agreements and requested that we define these elements and incorporate them into the agreement or permit.

Response: The assurances for conservation agreements are included in 50 CFR 17.22(c)(5) and 17.32(c)(5). In addition, duration of agreements is included under §§ 17.22(c)(4) and 17.32(c)(4). Both assurances and the agreement duration are elements that are included in every conservation agreement.

Comment 23: One commenter stated that the proposed changes regarding the appropriate use of monitoring data in the renewal or amendment process are vague. The commenter asserted that,

while the proposed regulation emphasizes using monitoring data to evaluate the effectiveness of mitigation, in practice this has often just involved monitoring a conservation crediting site. The commenter requested, given the interest in accounting for landscape-scale effects and the recent Presidential memo on ecological connectivity, that we include language to encourage monitoring habitat occupancy near the site of habitat loss whenever possible, which could include using environmental DNA techniques. The commenter asserted that an enhancement of survival permit for the neighboring property could be used to justify monitoring and management of habitat to understand if a landscape-effect due to a nearby take has occurred.

Response: We agree that information on the species and habitat located near a plan or agreement area would be useful in an overall assessment of the status of the species, but we cannot require that a permittee monitor areas beyond those covered by a permit. In addition, using the neighboring property owner provisions of an enhancement of survival permit supported by a conservation agreement for this purpose is not appropriate as neighboring property owners are not required to monitor their property for the species.

Comment 24: One commenter stated that the Service's regulations should strengthen the monitoring obligations before and after permits are issued to ensure compliance with the ESA. The commenter further asserted that the regulations should require the Service to assess baseline conditions, including both available habitat and estimated population and distribution, and independently monitor the condition of the covered species and habitat throughout the duration of the permit.

Response: For both conservation plans and agreements, we require that baseline conditions for the covered species be determined before we approve the plan or agreement and issue the associated permit. In addition, monitoring over the duration of the conservation plan or agreement is required to determine if the mitigation or conservation measures have been implemented and whether they are effective (biological monitoring). Depending on the species, the baseline determination and monitoring may include surveys for individuals to estimate population and distribution on the enrolled property or may only include inventorying the habitat conditions. Some species are difficult to survey, and habitat may be used as a surrogate if appropriate.

Comment 25: One commenter recommended as a condition of permit issuance that we expressly require all enhancement of survival and incidental take permittees to carry out adequate monitoring commensurate with the scope of their activities. The commenter suggested that, in some cases, for small, short-term habitat conservation plans (*e.g.,* covering a residential home on a small property), this monitoring might be minimal; however, in all cases the regulations should require reporting actual take of protected species. Conversely, another commenter recommended that we not impose burdensome monitoring requirements as conditions of enhancement of survival permits, because such requirements are costly, deter participation, and ultimately do not increase species conservation.

Response: Both permit types have compliance and effectiveness monitoring requirements. These requirements are based on the covered species and the goals and objectives of the agreements and plans. The type and amount of required monitoring is commensurate with the activities covered and does not go beyond what is needed to determine whether: the plan or agreement is being properly implemented, the biological goals for the covered species are being met, and take authorization has not been exceeded.

Comment 26: One commenter noted that habitat conservation plan requirements include a monitoring component to measure the effectiveness and progress of the conservation plan in achieving its goals (to be codified at 50 CFR 17.22(b)(1)(viii)). The commenter noted, however, that the Service has not included language on the appropriate scope of any compliance monitoring for a habitat conservation plan. The commenter asserted that the original five-point policy states, ''Monitoring measures should be commensurate with the scope and duration of the project and the biological significance of its effects.'' The commenter stated that including this language into regulations will ensure that any monitoring requirements are proportionate to the project impacts. The commenter further explained that this additional language will ensure that monitoring programs under habitat conservation plans will be commensurate with the duration of the habitat conservation plan and impacts of the take.

Response: In the final rule, we added ''The scope of the monitoring program should be commensurate with the scope and duration of the conservation program and the project impacts.''

Comment 27: Several commenters stated that, for both quantification of take and monitoring purposes, the Service should continue to allow applicants to rely on surrogates (a similarly affected species of habitat or ecological conditions) and make explicit in the final rule that surrogate species are acceptable when biologically meaningful results are attainable by such a method.

Response: We currently allow the use of surrogates for monitoring purposes, depending on the species, and will continue to do so. While we are not adding language to the regulations, we discuss the appropriate use of surrogates in our handbooks.

Comment 28: One commenter stated that we should include more explicit integration of climate change considerations and recommended that we require a climate strategy section either within the goals and objectives or its own standalone section within any agreement or habitat conservation plan, with explicit links to how the impacts of climate change can be addressed through adaptive management of the agreement in question. The commenter asserted that a standalone section would allow for applicants to properly account for and integrate climate resiliency in their plans and agreements at the start. Another commenter recommended that we revise the proposed definition of ''changed circumstances'' to include climate change within the examples listed. Another commenter suggested that the adaptive management program in the conservation plan should consider mitigation focused on addressing climate impacts or other stressors affecting listed species.

Response: While it is important to consider the current and possible future effects of climate change on a species, we are not revising the regulations to include a requirement for a standalone climate change section in a plan or agreement. We provide guidance on incorporating climate change into plans and agreements in our handbooks. We note that the conservation strategy and adaptive management program in the conservation plan can include measures to address the effects of climate change to ensure the plan meets its biological goals and objectives.

Comment 29: Two commenters stated that the Service should have the authority and discretion to consider and provide mitigation and conservation credit for prior and continuing conservation measures. The commenters asserted that the regulations should clarify that the Service can consider and provide mitigation and conservation credit when a plan or agreement is

amended to add a covered species, or when a new plan or agreement incorporates and builds on prior and continuing conservation measures used in existing plans and agreements for conservation of a newly covered species on the same covered land.

Response: For enhancement of survival permits, when we evaluate the baseline in the conservation agreement, we take into consideration the current condition of the species and its habitat, either of which could be attributed to prior or ongoing conservation measures. We also review ongoing conservation when selecting the conservation measures that a property owner will implement to determine if they will need to adopt new conservation measures or amend current measures to achieve the net conservation benefit. Likewise, if an enhancement of survival permit is amended to include a new species, we will determine if any additional conservation measures are needed to provide the net conservation benefit for the new species.

For both enhancement of survival and incidental take permits, if a permittee seeks an amendment to add a new species to the permit, we must establish the environmental baseline for that species at the time of the requested amendment through our intra-Service section 7 consultation. The prior and ongoing actions, including conservation gained through implementation of the existing conservation plan or agreement, would be accounted for in the baseline. The baseline will also include the past and present impacts of all Federal, State, or other private actions in the plan or agreement area. Therefore, previous and on-going beneficial actions are considered when making our enhancement of survival and incidental take permit issuance decisions.

Comment 30: Several commenters were concerned about the definition of ''covered species,'' particularly the meaning of ''reasonable potential to be considered for listing.'' They asserted that we did not provide any information on what ''reasonable potential'' means or how it will be determined, and further asserted that we are creating an alternative approach to a listing determination that is outside the ESA.

Response: We revised the definition of ''covered species'' in this final rule, removing ''reasonable potential to be considered for listing'' and replacing it with the term ''at-risk species,'' which is defined.

Comment 31: Some commenters recommended that the Service provide language to ensure State-managed non-listed species are not included in the definition of ''covered species'' because that would subject State management of these non-listed species to unacceptable levels of uncertainty.

Response: We are not excluding State-managed species from the definition of ''covered species.'' We work closely with State agencies when developing conservation agreements and plans and will consider any concerns expressed by States during that process. Furthermore, it is the applicant's decision whether to include species not listed under the ESA, rather than later seek an amendment if the species is listed.

Comment 32: Several commenters stated that, without a listing under the ESA, direct and indirect regulation of non-listed species is beyond the legal authority of the Service. Several other commenters supported our proposal to include only non-listed species as covered species in a plan or agreement. They stated that this change may help preclude the listing of at-risk species and allow applicants to seek regulatory certainty through an incidental take permit well before a species may become listed.

Response: We clarified in the preamble that we have the authority to issue incidental take and enhancement of survival permits for non-listed species. This process provides more options for entities to voluntarily be proactive and obtain regulatory certainty, allowing them to continue their covered activities without interruption if a species becomes listed. The ESA does not prohibit take of non-listed species. Therefore, the take authorization through an incidental take or enhancement of survival permit will not go into effect until that species is listed.

Comment 33: Several commenters stated that we failed to address the most costly and burdensome requirements for incidental take and enhancement of survival permits. They asserted that the conservation agreement requirements, including (a) detailed information and defined outcomes of the conservation measures, (b) measurable biological goals and objectives of the conservation measures, (c) the baseline condition of the property to be enrolled, (d) the net conservation benefit resulting from the conservation measures, (e) detailed monitoring, and (f) the ability for the Service to include other unknown requirements for issuance, are too onerous and costly.

Response: The requirements are to ensure that we can make the necessary findings for issuance of the permit and approval of the associated agreement or plan. The biological goals and objectives must be measurable for us to determine that the conservation measures or mitigation are achieving their purpose. The monitoring requirements are necessary to determine if the conservation measures or mitigation are being properly implemented and are achieving the intended result. The purpose of a conservation agreement is to provide a net conservation benefit to the covered species, and we must have the necessary information, such as the baseline condition and monitoring information, to be able to make that determination.

Comment 34: Many commenters requested that the final rule include reasonable timeframes for application processing stating that, otherwise, the proposed streamlining of the revised regulations will not be realized. Several commenters suggested application processing and permit decision timeframes comparable to those performed under section 7 of the ESA. They further stated that, while the section 10 durations do not necessarily need to replicate those existing for section 7 consultations, communicating expected timeframes for review would help to ''generate and share products quickly.'' To realize the time and cost savings benefits envisioned, one commenter stated that implementation of this rule must be simple and straightforward for both non-Federal applicants and Service staff alike.

Response: We will develop timelines on a project-by-project basis based on coordination between the applicant and the Service early in the development of the conservation plan or agreement. We recognize an applicant's need for transparency and consistency with respect to the Service's decision-making timelines and the importance of reliable timelines in the overall development of a conservation plan or agreement. We reiterate our commitment to timely review of applications and permit decision making. We will consider whether to incorporate general timeline goals into our handbooks.

Comment 35: In addition to deadlines for application processing and permit decisions, many commenters requested the adoption of deadlines for the various stages of plan and agreement negotiation, especially for the stage related to the Service's determination on whether an application is complete. Other commenters asserted that a lack of deadlines causes the process to move too slowly.

Response: We are committed to timely review of applications and permit decision making, given our resources. We will continue to evaluate our process for determining whether an application is complete and will

consider developing timelines in our handbooks.

Comment 36: One commenter suggested that we clarify permit duration by adding a reference in the final rulemaking that states, ''including time necessary to establish or restore habitat conditions.'' Another commenter stated that the duration of permits language does not provide applicants, permittees, participants, and enrollees regulatory certainty or transparency as to the duration of a permit and stated we should incorporate regulatory text that clarifies ''permit durations'' to provide regulatory certainty and repropose the rule to provide the opportunity for informed comments.

Response: We find it is unnecessary to add the suggested language because the duration of an agreement or plan already incorporates the time needed to achieve habitat establishment or restoration as outlined in the agreement or plan. Because each plan and agreement is unique, we cannot apply a generic timeframe for permits and their associated agreement or plan in the regulations. The duration of the permit must be sufficient for the permittee to fulfill the commitments of the plan or agreement. For instance, the duration of an enhancement of survival permit must be long enough to achieve the net conservation benefit, and the timeframe for this to occur must be discussed and mutually agreed upon during the development of the conservation agreement with the property owner.

Comment 37: Several commenters recommended that we prepare guidance documents and templates for the respective permit applications and conservation agreements and plans. The commenters stated that these documents should be developed in collaboration with stakeholders, including landowners, to ensure their usefulness and applicability. Another commenter suggested we create a template with boilerplate language and an online submission platform.

Response: In 2016, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service jointly finalized the Habitat Conservation Planning and Incidental Take Permit Processing Handbook. The draft was published in the **Federal Register**, and the final document included revisions based on comments received from the public. We will update the handbook after finalizing these regulations. A draft handbook for conservation agreements will be developed and published in the **Federal Register** for public comment. While the primary purpose is to provide guidance to Service staff, the handbooks will also be publicly available for stakeholder use. We will consider templates when we develop the handbooks. We have online submission of applications through ePermits.

Comment 38: One commenter asserted that we should provide guidance that requires plans to have measurable goals for species recovery in terms of both habitat quantity and quality and species population numbers.

Response: For conservation plans, the five-point policy (65 FR 35242, June 1, 2000) and 2016 Habitat Conservation Planning Handbook include guidance on developing appropriate biological goals and objectives. We require measurable biological goals and objectives for conservation strategies, if appropriate. We also require measurable goals for conservation agreements, which are based on the covered species. However, it may not be possible to specify measurable goals for both habitat and species population numbers. For example, with species where monitoring individuals is difficult, we would use habitat as a surrogate for population numbers.

Comment 39: Several commenters asserted that we were adding new incidental take permit issuance criteria that would explicitly allow the Service to add terms and conditions beyond what an applicant has in their habitat conservation plan. The commenters stated that the requirements for additional measures usually arise at the end of the permitting process when the applicant has completed their conservation plan, delaying the issuance of the permit. The commenters further stated that the Service should remove or narrow this language and work with permittees early in the habitat conservation plan development process where additional measures may be appropriate.

Response: In general, the Service has the authority to require permit conditions not included in the conservation plan. Section 10(a)(2)(B)(v) of the ESA provides the authority to include as permit conditions any other measures that are necessary or appropriate for purposes of the plan (see section 10(a)(2)(A)(iv)). However, we did not add new incidental take permit issuance criteria through the proposed regulatory revisions. Rather, we incorporated the language from former §§ 17.22(b)(2)(ii) and 17.32(b)(2)(ii) into §§ 17.22(b)(2)(i) and 17.32 (b)(2)(i), which may have caused confusion. Additionally, while we have the statutory authority to require additional measures, we rarely exercise this authority without the consent of the applicant.

Comment 40: Several commenters supported our inclusion of a definition for ''programmatic plan'' or ''agreement'' in the regulations. Another commenter stated the Service should expand and further the programmatic approach to section 10 permits and conservation agreements and plans to address and mitigate the significant time and cost burdens for individual landowners.

Response: We utilize programmatic agreements where appropriate and where we have an entity that is willing to be the permit holder for the agreement. Because this entity must have the resources to implement the permit and associated programmatic plan or agreement, the number of programmatic agreements and plans that have been finalized has been limited.

Comment 41: One commenter stated that, although we included a definition for programmatic permitting, the proposed rule did not provide additional explanation as to the procedures that would promote and incentivize the use of programmatic permits. Another commenter suggested that we should propose regulatory text explaining how programmatic habitat conservation plans and incidental take permit processes work.

Response: Given the complexity and variability of programmatic plans and agreements, it is not feasible to include the suggested explanation in the regulations. Rather, the appropriate place to explain the development process, advantages, and other details regarding programmatic plans and agreements is in our handbooks.

Comment 42: Several commenters asserted that the regulations should include a condition that the Service must involve State wildlife agencies in the development and approval of conservation agreements and conservation plans within their respective States and concurrence on species to be covered under those agreements and plans. One commenter requested that we consult with State agencies when establishing baseline conditions for enhancement of survival permittees.

Response: While we decline to include a requirement in the regulations that we must involve State wildlife agencies in the development and approval of conservation agreements and plans, we encourage applicants to work with State wildlife agencies during development of agreements and plans. In addition, we often involve States in developing conservation agreements, particularly in discussions to determine baseline conditions and monitoring requirements to demonstrate that the

agreement achieves a net conservation benefit. Likewise, we closely coordinate with State wildlife agencies during our review of plans and agreements. Each of our handbooks contains a section dedicated to coordination with States, underscoring the importance of this collaboration.

Comment 43: Some commenters were concerned that additional take authorizations may be required by States and possibly other regulatory entities and suggested that we include a statement in 50 CFR 17.2 indicating that take authorization provided in part 17 is for ESA-related take only. The commenters also asserted that all sections in 50 CFR 17.22 and 17.32 for permits should have a paragraph on permit conditions, that includes a condition to obtain, if required, State take authorization for the State-listed species. The commenters also stated that the Service should amend 50 CFR 17.22 and 17.32 to include a requirement for permit applicants to obtain any necessary State authorizations before being federally approved. In addition, several commenters requested continued involvement in such evaluations and recommended that the Service consider including language in the rule to account for State involvement in the species and habitat evaluation processes.

Response: Because not all States have a permitting process or require permits for all species that could be covered in an enhancement of survival or incidental take permit (*e.g.,* insects), we decline to include this recommendation in the final regulations. It is common practice for the Service to recommend coordination with State wildlife agencies, Tribes, and stakeholders as applicants are developing their plans or agreements. The issuance of an incidental take or enhancement of survival permit does not absolve an applicant from obtaining other required State, Tribal, and local permits.

Comment 44: One commenter suggested that we add the following language to § 17.22(c)(6): ''Implementation of the terms of a conservation benefit agreement must be consistent with applicable State, local, or Tribal government laws and regulations.''

Response: We decline to add this language to our regulations, which is unnecessary given that applicants must certify on the application that they are operating consistent with other Federal, State, and Tribal laws. However, we added ''Tribal'' to the definition of ''property owner,'' as follows: ''sufficient to carry out the proposed activities, subject to applicable State, Tribal, and Federal laws and regulations.''

Comment 45: Several commenters assert that streamlining the process for developing conservation agreements and plans, expanding outreach capacity both within and outside of the Service to work with landowners, and providing dedicated support for the long-term implementation of these agreements by nongovernmental organizations and other third-parties are among the most significant actions that the Service could take to expand the reach of these tools and advance proactive conservation and species recovery on private land.

Response: The goal of our regulation changes is to streamline and provide more clarity on permits and their associated plans and agreements, which should increase conservation on non-Federal lands. Outreach to communities, property owners, local and State government, other Federal agencies, and Tribes is part of our work to promote and increase the use of these tools.

Comment 46: Several commenters stated that, while the final rule may help streamline procedures and encourage consistency in review and approval of permit applications, review and approvals can be delayed regardless of streamlining if there are insufficient personnel or funding to assist applicants in preparation and review of applications. The commenters did not foresee a major reduction in workload for the Service as a result of the proposed rule changes. To ensure successful implementation of a final rule, they requested that we allocate dedicated funds to facilitate and support voluntary conservation planning by supporting at least one full-time equivalent habitat conservation planning staff person across each region to support applicants and facilitate review of section 10 permit applications.

Response: We recognize the importance of having staff dedicated to support the work on these permits and associated plans and agreements, and we have staff in each of our regional offices whose primary job is to work on enhancement of survival and incidental take permit applications. In addition, we anticipate that the changes to the regulations will result in more efficiencies and shorten the time it takes for our staff to review and finalize permits, plans, and agreements.

Comment 47: Several commenters asserted that we need more staff to timely process incidental take and enhancement of survival permit applications or suggested, alternatively, that we need to be more efficient in processing permit applications, including empowering field offices to streamline planning and permitting.

Response: Currently we delegate enhancement of survival and incidental take permits that qualify for categorical exclusion under NEPA (*e.g.,* low-effect) to our field offices, thus shortening the review process for those plans and agreements. We expect the revisions to these regulations to make the process more efficient by clarifying what is needed for a complete application. We will evaluate additional ways to streamline our processes and consider incorporating those processes in our handbooks.

Comment 48: A commenter asserted that the proposed rule only codifies existing guidance—specifically, the 2016 Habitat Conservation Planning Handbook, five-point policy, SHA policy, and CCAA policy—and thus does not appear to substantively change the existing permit application process, which is currently lengthy and burdensome. The commenter states support for the Service codifying guidance and standardizing practices across applications and regions, as doing so will help resolve ambiguities and challenges arising from different interpretation of Service regulations. However, the commenter asserted that such codification, without further amendments, will not change the amount of time and resources needed to obtain a section 10 permit and will not significantly ameliorate the extent to which this investment of time and resources discourages members of the regulated community from applying for such permits.

Response: The purpose of the regulatory revisions to §§ 17.22 and 17.32 is to clarify and codify long-held policy and guidance into the regulations. We acknowledge that these revisions do not fundamentally change the section 10 permit application processes, but we conclude they will improve plan and agreement negotiations, expediting the process and addressing, at least in part, the commenter's concerns about the investment of time and resources by applicants.

Comment 49: Several commenters indicated that the section 10 permitting is a burdensome process that involves significant time and costs to draft, negotiate, and receive approval for either conservation agreements or habitat conservation plans. They asserted that, although we stated this proposal aims to clarify and simplify the process, we did not identify or provide

mechanisms and support to reduce the administrative burdens and costs that often serve as barriers to individual landowners participating in conservation agreements or plans.

Response: We conclude that the changes and the clarifications provided in this final rule will improve the process for developing plans and agreements. We received several recommendations to further improve the process that we are considering and may incorporate into our handbooks.

Comments That Apply to Enhancement of Survival Permits Supported by Conservation Agreements

Comment 50: One commenter suggested revising the definition of ''baseline'' by adding the following language at the end of the definition: ''The Service shall determine baseline condition after consulting with the landowner, using the best available science and ecological modeling practices.''

Response: Because we work closely with landowners when developing conservation agreements and use the best available science to select the most appropriate methods to determine the baseline of a property, including the suggested language in the regulations is unnecessary.

Comment 51: One commenter stated that we should clarify that take from a potential return to baseline will factor into our issuance determinations and that we will consider impacts to the overall population of the covered species in our analysis. Another commenter sought clarification to the issuance criteria at § 17.22(c)(2)(ii) and suggested adding the following language: ''When making a decision to approve a conservation benefit agreement, the Service shall include sufficient conditions to ensure that the overall population of the covered species will not be reduced if the land is ultimately returned to baseline conditions.'' The commenter asserted that this modification makes it clear that we will fully account for take from a potential return to baseline when we issue enhancement of survival permits, thereby reducing potential confusion for all parties.

Response: When we issue an enhancement of survival permit under a conservation agreement, we conduct an intra-service section 7 consultation, and part of that consultation considers the impacts of the permitted take to the overall population of the species including take from a potential return to baseline.

Comment 52: One commenter requested that we repropose the rule to include information on how ''baseline conditions'' should be determined under our new definition for ''baseline'' and to provide a cost impact analysis for this required determination.

Response: Because each species and area covered by a conservation agreement is unique, we cannot describe how baseline will be determined for each species. We use the best available scientific information to identify the appropriate method for determining baseline for a species on a property. For some species it may be possible to conduct surveys to count individuals, but for other species we may use habitat conditions as the best method to describe baseline conditions. In addition, we cannot provide a cost estimate for determining baseline because that determination will vary by species and size and location of the agreement area.

Comment 53: Two commenters requested that we revise the definition of ''baseline'' by replacing ''could'' with ''currently sustains'' to more accurately reflect existing conditions of the enrolled land. One commenter asserted that in the definition we should focus on species status and enrolled land conditions as they presently exist. The commenter further asserted that, in the definition of ''baseline,'' the addition of the word ''could'' creates uncertainty and potential disagreement on the description of the baseline, the determination of net conservation benefit above baseline, and the lawful return to baseline. The commenter stated that baseline is an empirical description of the starting condition of habitat and species range and size, and that forecasting, estimating, or debating over habitat or population characteristics is not needed to determine baseline. Another commenter stated that the baseline condition of a landowner's property should be determined using actual conditions on the ground at the time of the agreement rather than hypothetical scenarios.

Response: To clarify that baseline condition is the starting condition of the property to be enrolled in a conservation agreement, we revised the definition of ''baseline'' by changing ''could'' to ''currently sustains.''

Comment 54: Another commenter recommended that we add ''across'' to the definition of ''baseline'' to maximize participation and processing efficiency as shown here: ''Baseline condition means population estimates and distribution or habitat characteristics across the enrolled land.'' The commenter asserted that the regulations should focus on habitat conditions across the entirety of the enrolled land rather than on specific stands or tracts.

Response: The baseline for a property to be enrolled in a conservation agreement includes the species population estimates or habitat evaluation for the entire property. To ensure that this concept is clear, we added the word ''across'' to the definition of ''baseline.''

Comment 55: One commenter stated that the baseline condition should be based on the time when the permit application is deemed technically complete rather than at the time when the Service executes the document.

Response: The baseline condition is based on when surveys or habitat evaluations are completed and agreed upon by the property owner. Baseline is part of the draft agreement available for public comment when we announce receipt of the associated permit application in the **Federal Register**; therefore, the baseline should not change after public comments are received. In addition, the baseline is unlikely to change between that time and when we issue the permit and sign the agreement, because the Service rarely encounters substantial delays in processing enhancement of survival permits after publishing the notice of availability in the **Federal Register**.

Comment 56: One commenter asserted that the term ''ongoing activities'' in the definition of ''net conservation benefit'' can be misleading and recommended that we replace it with ''property management actions,'' defined as actions that are conducted as part of property operations, maintenance, modernization, or as otherwise authorized by Service consultation. The commenter also suggested the inclusion of ''otherwise authorized by Service consultation'' as a means to allow other activities that are unforeseen at the time the permit is approved but aligned with the intent of actions included in the ''property management actions'' or similar definition.

Response: We used the term ''ongoing activities'' to limit the activities that would be covered by an enhancement of survival permit. ''Property management actions'' would be too broad because, as proposed by the commenter, new activities under the term ''modernization'' could be included that would not be appropriate to be covered by the permit, such as inclusion of a new pipeline. To issue an enhancement of survival permit associated with a conservation agreement, the Service must find that the covered activities in the conservation agreement provide a

net conservation benefit to the covered species.

Comment 57: One commenter recommended that we modify the definition of ''baseline condition'' and the description in the preamble to include scenarios where habitat does not currently exist but would be established under the conditions of a conservation agreement.

Response: We find it unnecessary to revise the definition of ''baseline condition'' to include such scenarios because that term refers to the conditions on the property at the time the conservation agreement is developed, not a desired future state. A property need not have habitat for the covered species at the time the agreement is developed. The agreement would include conservation measures aimed at creating species habitat over the duration of the agreement.

Comment 58: One commenter asserted that the definition of ''baseline condition'' or guidance on its application should ensure that an applicant may establish baseline conditions using a landscape or macro framework rather than a habitat element or micro perspective.

Response: Baseline condition is established for the entire property covered by a conservation agreement. Using a landscape approach may be appropriate for some properties, but that approach would be determined on a case-by-case basis.

Comment 59: One commenter encouraged us to clarify the role of an applicant's choice to return a property to baseline condition. The commenter requested that State agencies be thoroughly consulted, particularly for non-listed species in which States retain a primary jurisdictional interest, when determining the processes by which an assessment of baseline conditions will be made, conditions monitored over the duration of a permit and agreement and beneficial conservation measures preserved after the end of the permit period and a return to baseline.

Response: The regulations allow the applicant to make this choice about returning a property to baseline. States are important partners in species conservation, and we will involve State wildlife agencies when we develop conservation agreements, including discussing how we will determine the baseline condition of a property for the covered species.

Comment 60: One commenter suggested adding a sentence to § 17.22(c)(8), ''Discontinuance of permit activity,'' to clarify that a permittee cannot return the property to baseline until the permit has expired. The commenter suggested adding the sentence: ''A permittee may not return their property to baseline condition until after the agreed upon permit duration has expired.''

Response: A property owner may return the property to baseline conditions at the end of the agreement and prior to permit expiration, if this option is identified in the conservation agreement prior to issuance of the permit. Alternatively, a property owner may choose no longer to participate in the conservation agreement and can return the property to baseline condition just prior to giving up their permit. For any listed species covered by the agreement and permit, the permit must still be in place for the property owner to return to baseline. We determine that it is unnecessary to include the suggested language in the regulations and will provide additional guidance on this concept in our handbook.

Comment 61: Several commenters stated that the newly proposed definition of ''net conservation benefit'' omits an important pathway for providing net conservation benefits through maintaining existing habitat conditions and continuing management that is beneficial to species. They asserted that we should revise the definition of ''net conservation benefit'' and related application criteria to provide for maintenance as well as improvement in baseline conditions. They further stated that we should acknowledge and incorporate the language in existing CCAA policy that includes circumstances where the species and habitat are already adequately managed when assessing whether the condition of the covered species or the amount or quality of its habitat is reasonably expected to be greater at the end of the agreement period than at the beginning.

Response: We revised the definition of net conservation benefit to make it clear that, in circumstances where a property already contains suitable habitat for the species and the conservation measures include a commitment by the property owner to maintain and manage that habitat, the property would meet the net conservation benefit requirement and could qualify for inclusion in a conservation agreement.

Comment 62: One commenter asserted that projects with long-term climate benefits should be able to meet the definition of net conservation benefit. They also stated that the definition of net conservation benefit should be drafted in a way that acknowledges that the climate change benefits of a project should be considered in the assessment and supports creative mitigation solutions to climate change.

Response: The duration of an agreement must be long enough to provide a net conservation benefit to the covered species. While some projects may provide long-term climate benefits, the projects may not provide these benefits during the timeframe of a conservation agreement. However, we could evaluate whether these types of projects provide a specific net conservation benefit to the species on a case-by-case basis.

Comment 63: One commenter asserted that the proposed definition of ''net conservation benefit'' fails to emphasize the need for improved survival of the covered species. The commenter asserted that, by focusing on improved habitat conditions, we give away assurances without getting effective conservation. Another commenter stated that the definition of net conservation benefit is not adequate and that we should clarify that the specific activity authorized must benefit the species. The commenter further stated that the definition should clarify that net conservation benefit must be sufficient to contribute to the recovery of covered species in the wild and increase the long-term survivability of such species.

Response: The definition of ''net conservation benefit'' provides for an improvement of the covered species, either through a direct benefit to individuals (*e.g.,* reintroduction) or by creating or enhancing habitat. Conservation agreements provide for effective conservation by implementing specific measures aimed to improve the status of the species; previously issued CCAAs have been shown to improve species status such that listing is not warranted.

Comment 64: Another commenter asserted that, while the proposed definition of ''net conservation benefit'' refers to the species' status, the proposed regulation considers only each covered species' existing baseline condition on the enrolled land. The commenter stated that this approach is too restrictive and that the regulations should also anticipate and encourage improvements to species' existing baseline conditions on areas impacted by covered activities, including through spillover of recovered populations onto adjacent or other lands.

Response: The net conservation benefit determination is made for the property that is enrolled in a conservation agreement based on the conservation measures that the property

owner agrees to implement and taking into consideration the ongoing activities for which we authorize take through the permit. We do not consider adjacent land or other land that is beyond the area covered by the agreement.

Comment 65: One commenter recommended that we remove the language ''the amount or quality of its habitat'' because, in many cases, benefits to habitat will reasonably be expected to improve the status of the species and, where they do not, there would be no ''net conservation benefit.''

Response: While we agree that benefits to habitat will result in improvements to the status of the species, we are retaining this language to make it clear that the net conservation benefit can be achieved through habitat creation or improvement.

Comment 66: One commenter suggested that we recommend specific conservation metrics when defining net conservation benefit and that these metrics might include changes in habitat area, habitat connectivity, and expected change in abundance, for example.

Response: While conservation agreements will include metrics to monitor and determine effectiveness of the conservation measures such as those suggested by the commenter, we did not specifically list these in the regulations. However, we will discuss metrics related to net conservation benefit further in our handbook.

Comment 67: One commenter suggested that, although a quantitative target seems unworkable given the variability of species and agreements at issue, we should include a qualitative target such as a meaningful or substantial improvement, which could be helpful while still allowing reasonable flexibility.

Response: We are not including the suggested language because it is subjective and could be open to interpretation. However, we will include more explanation on this issue in our handbook.

Comment 68: One commenter asserted that we could further clarify the definition of ''net conservation benefit'' by adding language specifically confirming that the improvement in condition must be expected to result from the specific conservation measures implemented. The commenter stated that, although it is suggested by the proposed language, further clarification is needed to tie the improvement in condition to the specific conservation measures. The commenter asserted that this tie could be accomplished by inserting the phrase ''because of the implementation of the specific conservation measures'' immediately after ''that'' the second time it appears, so that the language would read ''that, because of the implementation of the specific conservation measures, the condition of the covered species . . . .''

Response: We have revised the definition of ''net conservation benefit'' by adding the word ''conservation'' to make it clearer that the improvements to the species' status or habitat on the enrolled property is a result of implementing the agreed-to conservation measures.

Comment 69: Another commenter suggested a revision to the definition of ''net conservation benefit'' to require a showing of improvement in the condition of species already present on the relevant property, unless the nature of, or knowledge about, the species makes such a showing unreasonably difficult. They suggested the following language: ''. . . or, as appropriate for each covered species not resident on the property or each resident species for which species status is not determinable with a reasonable level of effort, the amount or quality of its habitat.''

Response: We decline to add the suggested language because it is not necessary as improvement of the species is already incorporated into the definition and is a requirement of a conservation agreement either by directly improving the population of the species or by improving the habitat of the species on the property. However, further explanation on how to determine baseline, and thus a net conservation benefit, will be included in our handbook.

Comment 70: One commenter asserted that we need to clarify how adverse impacts to covered species from ongoing land or water use activities and conservation measures will be determined. They stated that this clarification is especially important if we intend to calculate adverse impacts and then apply them as an offset to the benefits of a conservation agreement.

Response: The adverse impacts to the covered species from implementation of the conservation measures or ongoing land or water use activities would be based on the biology of the specific species. Monitoring can help to inform this impact using species surveys or habitat evaluation. Additionally, while implementation of the conservation measures could have some short-term impacts, these measures will ultimately benefit the species.

Comment 71: One commenter stated that we should indicate that net conservation benefits are determined based on all voluntary actions by the applicant that benefit the species, whether new or continued, and not just new actions to be taken under the application.

Response: When we determine whether a conservation agreement meets the net conservation benefit requirement, we look at all the beneficial actions that the property owner is taking on their property, whether they are continuing actions or implementing new measures. We decline to revise the regulations to include this clarification, but we will discuss this issue further in our handbook.

Comment 72: One commenter proposed that the neighbor requirement for applicants under § 17.22 (c)(1)(vii)) read as follows: ''A description of the enrollment process to provide neighboring property owners incidental take coverage under paragraph (c)(5)(ii) of this section with an agreement to supply proof that there has been a reasonable effort to give neighbors notice of the application, if applicable, or any other measures developed to protect the interests of neighboring property owners.'' Another commenter asserted that the proposal should be revised to guarantee this protection to neighboring landowners. The commenter stated that it could be done by changing ''may'' to ''shall'' and minimizing the burdens imposed on neighboring landowners to obtain this protection.

Response: We decline to include the suggested addition to the neighboring property provisions because neighboring property owner provisions are not a requirement of a conservation agreement. The neighboring property provision may be unnecessary in situations where the species are not very mobile or if suitable habitat is not located on the property adjacent to the enrolled property in the conservation agreement. Requiring that every agreement include neighboring property owner provisions will create unnecessary work in some cases.

Comment 73: One commenter suggested that we define neighboring property owners based on the biology of the species that the permit will cover and not just in regard to immediately adjacent neighboring property owners or a neighboring property owner's proximity to the permitholder. The comment asserted that a species-specific definition will ensure that all ''neighbors'' within a species' range will be covered.

Response: We find that it is not necessary to adopt this suggestion because, when we include neighboring property owner provisions in an

enhancement of survival permit, we already consider the biology of the species to help determine which properties would be appropriate to include. For instance, it may not be appropriate to include all neighboring property owners within the species' range because the species' dispersal capabilities may be limited and suitable habitat may not exist on all proximate properties.

Comment 74: One commenter supported the proposed changes that clarified considerations for extending incidental take coverage to neighboring property owners. The commenter noted that the proposed rule suggests enrollment procedures for adjacent landowners should be contained in the agreement and stated that the method of providing incidental take coverage to neighboring lands as written is flexible and intended to be tailored to the specific agreements and needs of adjacent property owners. Another commenter opposed the provision allowing the Service to authorize incidental take coverage for owners of properties adjacent to properties covered by the conservation agreement.

Response: Including neighboring property owner provisions is an important concept that can help to encourage more property owners to participate in a conservation agreement. Knowing that their neighbors can be covered for take that might occur as a result of the species expanding beyond the boundaries of the property enrolled in an agreement can be an incentive for enrollment, thus increasing the conservation for listed and at-risk species under the ESA.

Comment 75: One commenter stated that the Service should revise the phrase in the definition of ''property owner'' from ''owners of water or other natural resources'' to ''owners of rights to water or other natural resources.''

Response: We agree that water and other natural resources are not owned and have revised the regulation to ''owners of *rights* to water or other natural resources.''

Comment 76: Several commenters noted that we removed ''a person with a fee simple, leasehold, or'' from the definition of ''property owner'' and that we did not explain the purpose or need for this revision, or why these entities are specifically being excluded as property owners. The commenters recommended that we specifically include in the definition ''permit and lease holders of the enrolled property'' as these entities may be the property managers of such estates.

Response: We removed the specific references to a person with a ''fee simple'' or ''leasehold'' property interest to simplify the definition of ''property owner.'' The revised definition is sufficiently broad to include persons with fee simple or leasehold interests. The threshold requirement to qualify as a property owner is the legal ability to implement the agreement.

Comment 77: One commenter stated that we used the term ''enrolled land'' multiple times in the proposed rule, but we have approved CCAAs in the past that include other property interests, including water rights. The commenter suggested that we clarify that those other property interests are covered by the final regulations and requested that we consistently refer to ''property'' throughout the rule, except where a narrower scope is specifically intended.

Response: We have changed several references from ''enrolled land'' to ''enrolled property'' as appropriate in § 17.22 in paragraphs (c)(1)(iv), (v), and (viii), (c)(2)(ii), and (c)(4) and in § 17.32 in paragraphs (c)(1)(iv), (v), (viii), (c)(2)(ii), and (c)(4).

Comment 78: Many commenters supported the proposal to combine CCAAs and SHAs into one agreement type. Commenters stated that this change will simplify the permit process and will also provide applicants that had previously applied for a CCAA with the option of returning a property to baseline conditions, which under current regulations is an option available only to SHA applicants. Other commenters opposed combining CCAAs and SHAs, stating that CCAAs and SHAs should have different standards for non-listed and listed species. They asserted that the regulations as proposed will set a higher regulatory hurdle for conservation agreements for candidate species (meant to avoid a listing) by formalizing requirements that are as stringent as post-listing agreements (designed to aid in the recovery of a listed species). The commenters stated that combining the two agreements will make it more onerous, burdensome, and costly for applicants, permittees, participants, and enrollees to overcome the higher regulatory hurdles (a recovery standard) to conserve candidate species.

Response: We analyze the same factors to decide whether to list a species as we do to decide whether to downlist or delist; we do not have different standards for these determinations. Agreements for non-listed species have the same requirements as for listed species: They must provide a net conservation benefit by addressing the threats to the species on the enrolled property or otherwise improving the status of the species.

Comment 79: One commenter wanted to know if all programmatic agreements established prior to a listing automatically continue post-listing and, if so, whether property owners must enroll by a deadline, or whether enrollment continues indefinitely. The commenter also asserted that if enrollments continued post-listing, landowners would not have incentives to enroll prior to listing because they could wait until post-listing and still get the same assurances against further restrictions on land or resource use.

Response: Programmatic agreements that are established prior to a covered species becoming ESA-listed can continue to allow enrollment of new property owners under the agreement post-listing. A property owner may want to enroll prior to a species listing so that ongoing covered activities on the property can continue seamlessly should the species be listed. If a property owner waits until a species is listed, enrollment will be delayed until the application is completed.

Comment 80: One commenter stated that conservation agreements, as proposed, have the potential to reduce timeframes and resources needed to develop and implement the agreements. However, the commenter suggested that additional details regarding how agreements will be executed pre- and post-listing are needed. Further, the commenter asked for clarification about whether a conference opinion that accompanies an enhancement of survival permit supported by a conservation agreement prior to listing would be converted to a biological opinion upon listing.

Response: Conservation agreements that are developed prior to a species being listed will continue seamlessly, as outlined in the agreement, if the species is listed. For non-listed species covered by an agreement and permit, a conference opinion would be completed because permit issuance is a Federal action requiring a section 7 consultation. If the species was subsequently listed under the ESA, we would convert the conference opinion into a biological opinion.

Comment 81: One commenter stated that the proposed definition of ''goals and objectives'' is insufficient to ensure that the goals can be met and measured.

Response: Each agreement is unique; therefore, we cannot specify what specific goals and objectives need to be included. However, in general, the goals and objectives need to be measurable through monitoring and must help determine if the net conservation benefit is being achieved. Additional guidance will be included in the handbook.

Comment 82: Two commenters encouraged the Service to clarify how it will handle SHAs or CCAAs that are under development at the time this regulation is finalized. They asserted that, given the time and resources necessary to prepare these applications, SHAs and CCAAs that are in the final stages of the process should not have to restart under a new regulatory framework.

Response: We provided notice to those entities that were working on a CCAA or SHA prior to the finalization of these regulations. The CCAAs or SHAs that have already been noticed in the **Federal Register** and are in the final stages of permitting do not have to be revised provided they meet issuance criteria.

Comment 83: One commenter sought clarity on whether this regulation alters our policy on candidate conservation agreements (CCAs), which do not include an enhancement of survival permit or provide assurances.

Response: The revision to our section 10 regulations does not alter our policy on CCAs. While we do not issue permits in conjunction with CCAs, they remain an important conservation tool for non-listed species.

Comments That Apply to Incidental Take Permits Supported by a Conservation Plan

Comment 84: Many commenters expressed their support for codifying in the regulations that incidental take permits may be issued for non-listed species without listed species included on the permits. The commenters stated that the provision will provide additional flexibility to further the statutory purpose of the ESA by encouraging voluntary conservation of species before they are listed. Conversely, some commenters expressed concern that a provision to include only non-listed species in incidental take permits oversteps the Service's authority by blurring the line between State and Federal authority. Some commenters suggested that we require concurrence or approval from States before issuing such incidental take permits.

Response: Allowing for incidental take permits to be issued for non-listed species does not diminish or replace the State's authorities. Further, we will continue to encourage applicants to include State, Tribal, and other Federal partners in the development and implementation of conservation plans to ensure consistency with other authorities.

Comment 85: Several commenters were confused by the proposed language included in § 17.22(b)(1)(v)(A) where it states that the habitat conservation plan must explain the conservation measures that will be taken to minimize and mitigate the impacts of the incidental take for all covered species commensurate with the taking. They interpreted this language to mean that the requirement is to fully offset impacts to covered species, contrary to the ESA issuance criteria because of guidance provided in the 2016 Habitat Conservation Planning Handbook.

Response: The text at § 17.22(b)(1) includes a list of information that must be included in a conservation plan, consistent with the requirements of section 10(a)(2)(A) of the ESA. The commenters conflated the requirements in section 10(a)(2)(A) with the statutory issuance criteria in section 10(a)(2)(B). For a conservation plan, the revised regulations clarify that the applicant must describe the measures that the applicant will take to minimize and mitigate the impact of the taking commensurate with the taking. We use the term commensurate to mean in proportion to. The example the commenters referenced from the handbook is taken out of context. However, we will reevaluate the example used during the upcoming handbook update to reduce confusion.

Comment 86: Several commenters asserted that the rule appears to inappropriately shift conservation plan permitting development to the Service when ESA section 10 permits are entirely voluntary and led by the applicant.

Response: The decision to apply for a section 10 permit is voluntary. Once the decision is made to seek a permit, the applicant is required to comply with the statute and regulations and develop the plan or agreement consistent with policy and guidance. For incidental take permits, that includes participating in negotiations with the Service to ensure the conservation plan meets the statutory requirements of ESA section 10(a)(2)(A)(i)–(iv). The statutory text of the ESA requires a conservation plan to include ''such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.'' This language demonstrates Congress' intent to provide the Service with the authority to require that applicants include appropriate measures in a conservation plan and reflects an expectation that we will work with applicants on plan development.

Comment 87: Several commenters asserted that the application completeness standard is equivalent to determining whether the application and its supporting plan meet the statutory issuance criteria. They stated that this front-loading of the process gives the Service undue leverage in negotiating the terms and conditions of an incidental take permit and violates existing policy that the incidental take permit application process is applicant-driven. Other commenters suggested that, while the language does attempt to clarify when applications are complete, it gives the Service subjective authority to determine when an application is complete resulting in perpetual indecision for applicants.

Response: The application process is considered applicant-driven because it is the applicant's decision whether to seek a permit. Once an applicant decides to seek a permit and applies for an incidental take permit, developing a conservation plan is a prerequisite to issuance of the permit and therefore the conservation plan is an application requirement. Through the conservation plan, the applicant demonstrates to the Service how the applicant intends to meet the incidental take permit issuance criteria. For the Service to determine that the incidental take permit application is complete, the supporting conservation plan must include all the required information as set forth in ESA section 10(a)(2)(A) and the regulations in §§ 17.22(b)(1) and 17.32(b)(1) and be consistent with Service policy and guidance. The level of detail in the conservation plan must be sufficient for the Service to conduct our required analyses (*e.g.,* NEPA and ESA section 7) and to determine whether the application meets permit issuance criteria set forth in ESA section 10(a)(2)(B). The Service will not deem an application complete or begin processing the application until these requirements are met. The Service's determination that the application is complete, however, does not guarantee that we will determine that the application meets the incidental take permit issuance criteria. Additional guidance on this subject will be included in the update to the handbook.

Comment 88: Many commenters suggested that we should address the inordinate length of time required to process ESA section 10 permits, asserting that the length of time for the Service to deem an application complete is often one of the key complaints raised by applicants. The commenters further asserted that we do not clearly specify the requirements for a complete application. The commenters stated that, in practice, an application is not complete until the Service deems it so, which typically involves lengthy negotiations between

the Service and the applicant, particularly with respect to habitat conservation plans. They further stated that the requirements for a complete application, as provided in the current and proposed regulations, are not predictable. The commenters stated that the requirements for a complete application should be clearly set forth in the regulations and transparent to applicants.

Response: An incidental take permit application will not be deemed complete until we have determined that the applicant's supporting conservation plan includes all the required information as set forth in ESA section 10(a)(2)(A) and the regulations in §§ 17.22(b)(1) and 17.32(b)(1) and is consistent with current policy and guidance. In addition, the conservation plan must include a level of detail sufficient for us to conduct our required analyses (*e.g.,* NEPA and ESA section 7) and to determine whether the application meets permit issuance criteria as set forth in section 10(a)(2)(B). In addition to providing guidance in an update to the handbook, we will also consider developing a policy to outline a more formal process to determine whether an application is complete, along with a potential timeline, to provide more predictability.

Comment 89: Several commenters stated that the statute does not contain a reference to processing complete applications and does not give the Service the ability to deem applications incomplete and withhold processing them. Others asserted that the Service should instead process the application as is and formally deny the permit.

Response: An incidental take permit application and the related conservation plan must include the necessary information required by the statute and regulations. Only after that information is provided can we evaluate the application and associated conservation plan. The conservation plan must contain sufficient detail for us to determine whether the application meets the issuance criteria set forth in ESA section 10(a)(2)(B). Processing an incomplete application is inefficient and ineffective.

Comment 90: Several commenters recommended that we could incentivize participation in the incidental take permit program by addressing disincentives related to the length and expense of the process. The commenters asserted that we could adopt mechanisms to resolve key areas of dispute that frequently arise during permit negotiations and that can become very protracted and lead to significant applicant frustration. Some commenters suggested adopting dispute resolution processes similar to other Federal agencies or developing an internal elevation process through the chain-of-command within the Service to resolve disputes.

Response: We will explore options and consider developing a policy to incorporate dispute resolution into the conservation planning process.

Comment 91: Several commenters stated that we do not have the authority to add permit terms not agreed to by an incidental take permit applicant.

Response: Both the statute in section 10(a)(2)(A)(iv) and 10(a)(2)(B)(v) and the regulations in §§ 17.22(b)(1)(xi) and 17.32(b)(1)(xi) provide the Service with the authority to add terms and conditions, but this authority is rarely exercised without the consent of the applicant.

Comment 92: One commenter raised concerns that we changed the requirements for funding assurance to accounting of funding to be consistent with the handbook. The commenter also asserted that guidance provided in chapter 9 of the handbook includes impractical financial analysis requirements that were added without the opportunity for public comment.

Response: Based on lessons learned, we made this change in the regulations to clarify that funding assurances described in the conservation plan must include a detailed accounting of how the applicant intends to fund plan implementation over the permit term. Some applicants mistakenly believed that providing an assurance, which is simply a promise of funding, was sufficient. The guidance in chapter 9 of the handbook provides many examples and possible options to meet the funding assurance requirements, and the public was provided an opportunity to comment. The draft Habitat Conservation Planning Handbook was published in the **Federal Register** on June 28, 2016, and requested that public comments be received by August 29, 2016 (81 FR 41986). The final handbook was published on December 21, 2016 (81 FR 93702).

Comment 93: One commenter stated that projects federalized either through Federal funding or mechanisms similar to Federal Highway Administration delegations should be entitled to enroll in programmatic habitat conservation plans and take advantage of the streamlining opportunity those plans provide.

Response: During development of programmatic conservation plans, we encourage applicants to consider streamlining opportunities by coordinating with other Federal and State permitting agencies to participate in the plan. If this streamlined enrollment opportunity is not included in an existing programmatic plan, the permittee may amend the plan and request to amend the permit to add the activities that were not analyzed in the original programmatic plan.

Comment 94: One commenter suggested that we include in the regulations a requirement that all habitat conservation plans include a determination as to whether they contribute to species recovery under the ESA or merely avoid jeopardy.

Response: The statutory language in the permit issuance criteria in ESA section 10(a)(2)(B) states that ''the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.'' Therefore, the statute does not place the burden of recovery on applicants. Rather, the applicable standard is that our issuance of the incidental take permit cannot reduce the species' likelihood of recovery in the wild. However, in our set of findings, which is part of the permit decision process, we may consider including a statement explaining how our issuance of the permit contributes to the recovery goals for the species.

Comment 95: One commenter suggested that we define ''maximum extent practicable'' in the regulations or revise the handbook to state that what an applicant has proposed in a habitat conservation plan represents the most that the applicant can practicably accomplish and thus satisfies the maximum extent practicable criteria. Another commenter states that the maximum extent practicable standard does not require applicants to fully offset the impacts from the taking.

Response: Chapter 9.5 of the handbook provides guidance on how the maximum extent practicable standard can be met. The revised regulations do not require applicants to fully offset the impact of the taking and do not change the maximum extent practicable standard.

Comment 96: Several commenters recommended that the Service allow research as a mitigation option for incidental take permits to encourage additional participation in conservation plans. Other commenters objected to allowing research as mitigation, stating that doing so would authorize take without properly mitigating the impacts of the taking. To address this concern, these commenters recommended that, if research is allowed as mitigation, the regulations should clarify that both the research and the informed conservation must be requirements of the associated

incidental take permit and the mitigation must offset the impacts of the taking, not just inform future conservation.

Response: As stated in our mitigation policy, research that is directly linked to reducing threats or that provides a quantifiable benefit to the species may be appropriate under certain circumstances.

Comment 97: One commenter stated that a specific reference to ''climate change'' should be added to the examples provided in the definition of ''changed circumstances.''

Response: We added ''effects of climate change'' in the list of examples in the definition of ''changed circumstances.''

Comment 98: One commenter stated that the Service's proposed regulatory changes to ''unforeseen circumstances'' omits the existing regulatory requirement that the Service cannot impose, without the permittee's consent, additional conservation or mitigation measures upon an incidental take permit permittee who is properly implementing their habitat conservation plan.

Response: The revised regulations do not include revisions regarding ''changed'' or ''unforeseen circumstances.'' We inadvertently omitted retention of current §§ 17.22(b)(5)(i)–(iii) and 17.32(b)(5)(i)–(iii) in the proposed rule; this final rule corrects that error, so those paragraphs, which were missing from the proposed rule, will be retained via this final rule.

Comments on the Rulemaking Required Determinations

The following comments pertain to our analyses in the preamble to the proposed rule in the Required Determinations portion, in which we addressed several statutes and Executive orders that govern the Federal rulemaking process.

Comment 99: In regard to our determination under the Regulatory Flexibility Act (RFA), one commenter requested that we provide to the public for review and comment all the information developed throughout this process that led to our decision that the proposed regulatory revisions would not have a significant economic impact on a substantial number of small entities.

Response: The information that we used to determine that the regulations will not have a significant economic impact is outlined in the proposed rule. As set forth in that document, we determined that we were not required to conduct an RFA analysis because this rule would not significantly change the way that we currently implement the section 10 program or expand the reach of species protections.

Comment 100: One commenter expressed concern regarding statutory mandates, particularly the RFA and the National Environmental Policy Act (NEPA), asserting that we in essence exempted ourselves from compliance. The commenter stated that an RFA analysis would have demonstrated that many regulated entities cannot afford the permit application process or to sustain the performance levels required to participate in such agreements over the long term. The commenter asserted that not performing these analyses contributes to the Service's failure to comprehend the need for more affordable conservation activities that can substantially contribute to species recovery and conservation without causing financial hardship for those who participate.

Response: We complied with all regulatory requirements in promulgating this rule. Regarding the RFA, we are not required to conduct an RFA analysis because we determined that this rule will not have a significant economic effect on a substantial number of small entities. To the extent that the regulatory revisions affect the documents required to support a permit application, they clarify the requirements for those documents but do not impose additional requirements that would result in significant increased costs to small entities. In regard to NEPA, we determined that a categorical exclusion from NEPA requirements applies to this rulemaking action because, when the Service processes an application for an enhancement of survival or incidental take permit, the decision is subject to the NEPA process at that time.

In terms of creating more affordable opportunities for individuals to voluntarily participate in conservation, property owners can reduce costs by participating in a programmatic agreement instead of seeking to establish an agreement for an individual property.

Comment 101: Several commenters stated that we must complete a NEPA analysis on the proposed rule, including issuing an environmental assessment or environmental impact statement that analyzes the impacts of the proposed action and alternatives, or determining that a categorical exclusion applies to this rulemaking.

Response: As stated in the preamble to the proposed rule and also in this final rule, we have complied with NEPA by determining that the rule is covered by a categorical exclusion found at 43 CFR 46.210(i). We explained this determination in an environmental action statement that is posted in the docket for this rule.

Comment 102: In regard to our request for comments specific to the Paperwork Reduction Act, one commenter provided recommendations regarding clarifying the form titles for the application forms, specifically to revise the form titles regarding applications for amendments. The commenter was also concerned that the language for justifying an amendment is not consistent with the No Surprises Rule.

Response: The form titles will not be revised because there are not separate forms for amendments. Each form (3–200–54, 3–200–56, 3–200–59, and 3–200–60) can be used either to apply for a new permit or to amend or renew a permit as specified within Section E of each form. Additionally, we have removed the inconsistent language from our description of the forms.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 provides that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with E.O. 13563, and in particular the requirement of retrospective analysis of existing rules to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Required Determinations

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act

(SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or their designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have determined that this rule would not have a significant economic impact on a substantial number of small entities for the following reasons.

The rule revises the implementing regulations to clarify existing statutory requirements that govern the Service's processing of applications for ESA section 10(a) permits. The rule does not significantly change the way that we currently implement the section 10 program or expand the reach of species protections. To the extent that the revisions relate to the documents required to support a permit application, the revisions clarify the requirements for those documents but do not impose additional requirements that would result in significant increased costs to small entities. Even if some increased costs are associated with meeting requirements in the rule, we anticipate that those costs will be offset by the revisions that streamline and clarify the application and decision-making process, which will save applicants and permittees time and money. Therefore, no external entities, including small businesses, small organizations, or small governments, will experience significant economic impacts from this rule. Because we certify that this rule will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not required.

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

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

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the rule does not impose additional requirements on any city, county, or other local municipality.

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule does not constitute a ''taking'' of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this rule: (1) will not effectively compel a property owner to suffer a physical invasion of property; and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule substantially advances a legitimate government interest (conservation and recovery of endangered species, threatened species, and non-listed species of conservation concern) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule will have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to those entities voluntarily applying for a permit under section 10 of the ESA and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This rule clarifies the needs associated with development of the required documents to support an application for a permit under section 10 of the ESA.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior's manual at 512 DM 2, we considered the possible effects of this rule on federally recognized Indian Tribes. We will continue to collaborate/coordinate with Tribes on issues related to federally listed species and their habitats, and we will provide notification of this rule to federally recognized Tribes prior to publication. See Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

Paperwork Reduction Act of 1995 (PRA)

This rule contains existing and new information collections. All information collections require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB has reviewed and approved the information collection requirements associated with permit applications, reports, and related information collections associated with native endangered and threatened species and assigned the OMB Control Number 1018–0094 (expires 02/29/2024, and in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the submission is pending at OMB).

In accordance with the PRA and its implementing regulations at 5 CFR 1320.8(d)(1), we provided the general public and other Federal agencies with an opportunity to comment on our proposal to revise OMB Control Number 1018–0094. This input helped us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helped the public understand our information collection requirements and provide the requested data in the desired format.

As part of our continuing effort to reduce paperwork and respondent burdens, and in accordance with 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on any aspect of this proposed information collection, including:

(1) Whether or not the collection of information is necessary for the proper

performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this proposed rulemaking are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

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

All Service permit applications are tailored to a specific activity based on the requirements for specific types of permits. We collect standard identifier information for all applications for permits, such as the name of the applicant and the applicant's address, telephone numbers, if applicable, tax identification number, email address, description of activity being requested under the ESA, and, after the permit has been issued, a report (description of activity that was conducted under that permit). Standardization of general information common to the application forms makes the filing of applications easier for the public and helps to expedite our review.

The information that we collect is the minimum necessary for us to determine if the applicant/permittee meets, or continues to meet, permit issuance requirements. Respondents submit application forms periodically as needed. Submission of reports is generally on an annual basis, but for some activities (such as activities associated with sea turtles), may be on a more frequent basis, as needed (see those specific reporting forms). This information collection request includes minor modifications to the layout and content of the currently approved application forms so that they:

(a) Are easier to understand and complete,

(b) Minimize the number of completed pages the applicant must submit, and

(c) Accommodate future electronic permitting in the Service's new ePermits System.

In addition to the application forms, permit holders must submit the reports in accordance with their permits issued based on 50 CFR part 17. Some Service annual reports associated with permits are in the 3–202 series of forms, each tailored to a specific activity based on the requirements for specific types of permits. In some cases, we developed specific information collection forms to facilitate and standardize the reporting and review, and to facilitate development of electronic forms and electronic reporting and retrieval of that information.

Annual reporting of permit compliance is required in most cases under the authority of section 10(a)(1)(A) and 10(a)(1)(B) of the ESA and its implementing regulations in 50 CFR part 17. These reports allow us to evaluate the proper implementation of the conservation agreement or plan, ensure take authorization has not been exceeded, formulate further research, and develop and adjust management and recovery plans for the species.

The proposed revisions to existing and new reporting and/or recordkeeping requirements identified below require approval by OMB:

(1) *(REVISED) Application—FWS Form 3–200–54,* ''*Enhancement of Survival Permits Associated with Conservation Benefit Agreements*''—This application can be used for a single species or multiple species. Agreements may vary widely in size, scope, structure, and complexity, and in the activities they address. We revised this application form to align with the regulation revisions, which includes referencing one ''conservation benefit agreement'' instead of the two prior agreement types, adding a question asking if the applicant requests to return to baseline upon permit expiration, clarifying language regarding amendments, and adding clarifying language regarding authorized agents.

(2) *(NEW) Application Amendments—Enhancement of Survival Permits (FWS Form 3–200–54)*—Permittees may request amendments to a permit, or the Service may amend a permit for just cause upon a written finding of necessity. Amendments comprise changes to the permit authorization or conditions. This includes, but is not limited to, an increase or decrease in the estimated amount of take or changes in ownership of a project. The permittee must apply for amendments to the permit by submitting a description of the modified activity and the changed impacts. These are considered substantive amendments and incur a fee. Permittees do not require a new permit if there is a change in the legal individual or business name, or in the mailing address of the permittee. A permittee is required to notify the issuing office within 10 calendar days of such change. This provision does not authorize any change in location of the conduct of the permitted activity when approval of the location is a qualifying condition of the permit.

(3) *(NEW) Permit Transfers—Enhancement of Survival Permits*—Permits issued under these regulations may be transferred in whole or in part through a joint submission by the permittee and the proposed transferee, or in the case of a deceased permitted, the deceased permittee's legal representative and the proposed transferee. Transferring permits does not incur a fee.

(4) *(REVISED) Conservation Benefit Agreement*—As part of the application process associated with Form 3–200–54, applicants must submit a conservation benefit agreement. A conservation benefit agreement must include the following:

i. *Conservation Measures*—A complete description of the conservation measure or measures, including the location of the activity or activities to be covered by the permit and their intended outcome for the covered species.

ii. *Covered Species*—The common and scientific names of the covered

species for which the applicant will conduct conservation measures and may need authorization for take.

iii. *Goals and Objectives*—The measurable biological goals and objectives of the conservation measures in the agreement.

iv. *Enrollment Baseline*—The baseline condition of the property or area to be enrolled.

v. *Net Conservation Benefit*—A description of how the measures are reasonably expected to improve each covered species' existing baseline condition on the enrolled property and result in a net conservation benefit as defined at § 17.3.

vi. *Monitoring*—The steps the applicant will take to monitor and adaptively manage to ensure the goals and objectives of the agreement are met, the responsibilities of all parties are carried out, and the agreement will be properly implemented.

vii. *Neighboring Property Owners*—A description of the enrollment process to provide neighboring property owners take coverage under 50 CFR 17.22(c)(5)(ii) or 17.32(c)(5)(ii), if applicable.

viii. *Return to Baseline Condition*—The applicant's choice between including authorization to return enrolled property to baseline condition or forgoing that authorization. For applicants seeking authority to return to baseline condition, a description of steps that may be taken to return the property to baseline condition and measures to reduce the effects of the take to the covered species.

ix. *Additional Actions*—Any other measures that the Director may require as necessary or appropriate in order to meet the issuance criteria in 50 CFR 17.22(c)(2) or 17.32(c)(2) or to avoid conflicts with other Service conservation efforts.

(5) *(REVISED) Application—FWS Form 3–200–56, ''Incidental Take Permits Associated with Habitat Conservation Plans*''—Those who believe their otherwise-lawful activities will result in the ''incidental take'' of a listed wildlife species may choose to seek a permit. The purpose of the incidental take permit is to exempt non-Federal entities—such as States, local governments, businesses, corporations, and private landowners—from the prohibitions of section 9. The permittee also has assurances from the Service through the ''No Surprises'' regulation. We made several revisions to the application form to be consistent with the regulations, which include clarifying amendments and removing any language regarding implementing agreements.

(6) *(NEW) Application Amendments—Incidental Take (FWS Form 3–200–56)*—Amendments to a permit may be requested by the permittee, or the Service may amend a permit for just cause upon a written finding of necessity. Amendments comprise changes to the permit authorization or conditions. This includes, but is not limited to, an increase or decrease in the requested amount of take or changes in ownership of a project. The permittee must apply for amendments to the permit by submitting a description of the modified activity and the changed impacts. These changes are considered substantive and incur a fee. A permittee is not required to obtain a new permit if there is a change in the legal individual or business name, or in the mailing address of the permittee. A permittee is required to notify the issuing office within 10 calendar days of such change. This provision does not authorize any change in location of the conduct of the covered activity when approval of the location is a qualifying condition of the permit.

(7) *(NEW) Permit Transfers—Incidental Take*—Permits issued under these regulations may be transferred in whole or in part through a joint submission by the permittee and the proposed transferee, or in the case of a deceased permitted, the deceased permittee's legal representative and the proposed transferee. Transferring permits does not incur a fee.

(8) *(REVISED) Habitat Conservation Plan*—As part of the application process, applicants are also required to submit a habitat conservation plan with their completed Form 3–200–56. A habitat conservation plan must include the following:

i. *Project Description*—A complete description of the project including purpose, location, timing, and proposed covered activities.

ii. *Covered Species*—As defined in § 17.3, common and scientific names of species sought to be covered by the permit, as well as the number, age, and sex of those individuals, if known.

iii. *Goals and Objectives*—The measurable biological goals and objectives of the conservation plan.

iv. *Anticipated Take*—Expected timing, geographic distribution, type and amount of take, and the likely impact of take on the species.

v. *Conservation Program,* that explains the:

- Conservation measures that will be taken to minimize and mitigate the impacts of the incidental take for all covered species commensurate with the taking;
- Roles and responsibilities of all entities involved in implementation of the conservation plan;
- Changed circumstances and the planned responses in an adaptive management plan; and
- Procedures for dealing with unforeseen circumstances.

vi. *Conservation Timing*—The timing of mitigation relative to the incidental take of covered species.

vii. *Permit Duration*—The rationale for the requested permit duration.

viii. *Monitoring*—Monitoring of the effectiveness of the mitigation and minimization measures, progress towards achieving the biological goals and objectives, and permit compliance.

ix. *Funding Needs and Sources*—An accounting of the costs for properly implementing the conservation plan and the sources and methods of funding.

x. *Alternative Actions*—The alternative actions to the taking the applicant considered and the reasons why such alternatives are not being used.

xi. *Additional Actions*—Other measures that the Director requires as necessary or appropriate, including those necessary or appropriate to meet the issuance criteria or other statutory responsibilities of the Service.

(9) *(REVISED) Form 3–200–59, ''Recovery Permit Application Form*''—This application form is used to apply for a permit for any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species.

The data acquired from the issuance of recovery permits is valuable to the decisions that the Service and its partners make regarding land acquisition, land management, consultations under section 7 of the ESA, recovery plans, and downlisting or delisting.Data from these federally issued permits is used on a landscape level. Without recovery permits, our basic knowledge about the abundance, stability, and resiliency of populations, habitat use and requirements, geographic ranges, and diseases of federally listed species would be much more limited. Regulations at 50 CFR 13.25(a) and (b) prohibit permit transfers for this permit type.

We revised Form 3–200–59 to fix typos, incorporate references to ePermits, and update links to the Service website.

(10) *(REVISED) Form 3–200–60, Interstate Commerce Application Form*''—This application form is used to apply for an interstate commerce permit that allows for take otherwise prohibited by section 9 of the ESA. Interstate commerce permits authorize the

purchase and sale of listed species across State lines. For wildlife, the buyer obtains interstate commerce permits are obtained by the buyer; for plants, the seller obtains the permits. Regulations at 50 CFR 13.25(a) and (b) prohibit permit transfers for this permit type.

We revised Form 3–200–60 to fix typos, incorporate references to ePermits, update links to the Service website, and add information in section E (question A7) to ensure that applicants provide information necessary for the permit decision as required by regulation.

(11) *(NEW) Application Amendments (FWS Forms 3–200–59 and 3–200–60)*—The permittee may request amendments to a permit. Amendments comprise changes to the permit authorization or conditions. Amendments include, but are not limited to, an increase or decrease in the estimated amount of take, changes in species or numbers of species requested, or a change in the geographic location where take is authorized. The permittee must apply for amendments to the permit by submitting a description of the modified activity and the changed impacts. These are considered substantive amendments and incur a fee. A permittee is not required to obtain a new permit if there is a change in the legal individual or business name, or in the mailing address of the permittee. A permittee must notify the issuing office within 10 calendar days of such change. This provision does not authorize any change in location of the conduct of the permitted activity when approval of the location is a qualifying condition of the permit.

(12) *(REVISED) Form 3–2530, ''California/Nevada/Klamath Basin, OR, Recovery Permit Annual Summary Report Form''*—We propose to change the ''TE'' field to ''permit number'' on each page of the form.

We also propose to renew the existing information collection requirements identified below:

(1) *Annual Reports (Enhancement of Survival Permit Associated with Conservation Benefit Agreements)*—Annual reports associated with conservation benefit agreements are non-form requirements and are required by Federal permitting regulations under 50 CFR 13.45, unless otherwise specified in the permit. Reports contain information regarding the implementation of conservation measures and the amount of take that may have occurred during the reporting year, both of which are essential to ensuring compliance with the permit. Permittees may submit the information in any format they choose.

(2) *Notifications (Take)*—Private landowners who have an enhancement of survival permit (and accompanying conservation benefit agreement) must notify us if their land management activities incidentally take a listed or candidate species covered under their permit.

(3) *Notifications (Change in Property Owner)*—We issue enhancement of survival permits to the landowners, and their name is printed on the permit. If ownership of the property changes, this permit does not automatically transfer to the new property owner. Therefore, we ask the permittee to notify us if there is a change in property ownership so that we may work with the new property owner to determine if they want to continue the agreement and permit and then update the permit as appropriate.

(4) *Annual Reports (Habitat Conservation Plans)*—Annual reports associated with conservation plans are non-form requirements and are required by Federal permitting regulations under 50 CFR 13.45, unless otherwise specified in the permit. Reports contain information regarding the implementation of the habitat conservation plan, including carrying out the minimization and mitigation measures and the amount of take that has occurred, both of which are essential to ensuring compliance with the permit. Permittees may submit the information in any format they choose.

(5) *Annual Reports (Recovery and Interstate Commerce)*—Annual reports associated with recovery permits are non-form requirements, except for a few species where there are taxa-specific OMB-approved reporting forms. Interstate commerce permits require reports upon the receipt of wildlife. Interstate commerce's annual sales of plants also require reports. Both the recovery permits and interstate commerce permits require reporting as required by Federal permitting regulations under 50 CFR 13.45, unless otherwise specified in the permit. Recovery permit reports contain information regarding the activities conducted under the permit and the amount of take that has occurred, both of which are essential to ensuring compliance with the permit. Permittees may submit the information in any format they choose unless an OMB-approved form exists for the species for which they are reporting; otherwise, they may elect to use a taxa-specific form if is available.

(6) *Request to Revise List of Authorized Individuals*—When a new, renewed, or amended permit is issued, the list of authorized individuals (LAI) is typically at the end of a permit on Regional Office letterhead. The LAI captures those expressly authorized to perform otherwise prohibited activities on an active permit.

When a permittee requests changes to the individuals authorized on a permit, the Field Office reviews the qualifications. It then issues an updated standalone LAI with the new and current qualified individuals. Issuance of a standalone LAI is considered an administrative change to maintain an up-to-date list of those authorized for the permit's species/activities. Since there are no revisions to the previously authorized species or geographic localities on the permit itself, the action is purely a streamlining measure for the regions to manage the high volume of personnel changes without issuing an amendment or new permit.

(7) *Notification (Escape of Wildlife)*—If a recovery or interstate commerce permit authorizes activities that include keeping wildlife in captivity, for health and safety reasons, we ask the permittee to immediately notify us if any of the captive wildlife escape.

(8) *Annual Reports Associated with Native Endangered and Threatened Species Under the ESA*—We use the following annual report forms specific to particular species for activities associated with native endangered and threatened species permits under the ESA. The Service designed the forms to facilitate the electronic reporting specifically for each species. The Service will use the reported data to evaluate the success of the permitted project, formulate further research, and develop and adjust management and recovery plans for the species. The data will also inform 5-year reviews and species status assessments conducted under the ESA.

- Form 3–202–55b, ''*U.S. Fish and Wildlife Service Geographic Area: Midwestern Bat Reporting Form*'';
- Form 3–202–55c, ''*U.S. Fish and Wildlife Service Geographic Area: Southeastern Bat Reporting Form*'';
- Form 3–202–55d, ''*U.S. Fish and Wildlife Service Geographic Area: Northeastern Bat Reporting Form*'';
- Form 3–202–55e, ''*U.S. Fish and Wildlife Service Geographic Area: Plains/Rockies Bat Reporting Form*'';
- FWS Form 3–202–55f, ''*Non-Releasable Sea Turtle Annual Report*'';
- FWS Form 3–202–55g, ''*Sea Turtle Rehabilitation*'';
- Form 3–2523, ''Midwest Geographic Area: Freshwater Mussel Reporting Form'';

• Form 3–2526, ''Midwest Geographic Area: Bumble Bee Reporting Form'';
• Form 3–2530, ''California/Nevada/Klamath Basin, OR, Recovery Permit Annual Summary Report Form'';
• Form 3–2532, ''U.S. Fish and Wildlife Service Geographic Area: Alaska Bat Reporting Form'';
• Form 3–2533, ''U.S. Fish and Wildlife Service Geographic Area: Northwestern Bat Reporting Form''; and
• Form 3–2534, ''U.S. Fish and Wildlife Service Geographic Area: Western Bat Reporting Form''.

Copies of the draft forms are available to the public by submitting a request to the Service Information Collection Clearance Officer using one of the methods identified in **ADDRESSES**.

Title of Collection: Federal Fish and Wildlife Permit Applications and Reports—Native Endangered and Threatened Species; 50 CFR parts 10, 13, and 17.

OMB Control Number: 1018–0094.

Form Numbers: FWS Forms 3–200–54, 3–200–56, 3–200–59, 3–200–60, 3–202–55a through 3–202–55g, 3–2523, 3–2526, 3–2530, and 3–2532 through 3–2534.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals; private sector; and State/local/Tribal governments.

Total Estimated Number of Annual Respondents: 5,380.

Total Estimated Number of Annual Responses: 5,380.

Estimated Completion Time per Response: Varies from 30 minutes to 2,080 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 220,660.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion for applications; annually or on occasion for reports and notifications.

Total Estimated Annual Nonhour Burden Cost: $19,415,460 (primarily associated with application processing and administrative fees).

On February 9, 2023, we published in the **Federal Register** (88 FR 8380) a proposed rule (RIN 1018–BF99) that announced our intention to request OMB approval of the revisions to this collection explained above and the simultaneous renewal of OMB Control No. 1018–0094. In that proposed rule, we solicited comments for 60 days on the information collections in this submission, ending on April 10, 2023. Summaries of comments addressing the information collections contained in this rule, as well as the agency response to those comments, can be found in the *Summary of Comments and Responses* section of this rule, as well as in the information collection request submitted to OMB on the *RegInfo.gov* website. Send your written comments and suggestions on this information collection by the date indicated in **DATES** to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB/PERMA (JAO), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference OMB Control Number 1018–0094 in the subject line of your comments.

National Environmental Policy Act

We analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Department of the Interior regulations on Implementation of NEPA (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8).

We find that the categorical exclusion found at 43 CFR 46.210(i) applies to the regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement:

> Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

This exclusion applies to this rulemaking action because, when the Service processes an application for an enhancement of survival permit or incidental take permit, the decision is subject to the NEPA process at that time.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The revised regulations are not expected to affect energy supplies, distribution, or use. Therefore, this action is a not a significant energy action, and no statement of energy effects is required.

Authority

We issue this rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects

50 CFR Part 13

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

50 CFR Part 17

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

Regulation Promulgation

Accordingly, we amend parts 13 and 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 13—GENERAL PERMIT PROCEDURES

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

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

Subpart C—Permit Administration

■ 2. Amend § 13.23 by revising the section heading and paragraph (b) to read as follows:

§ 13.23 Amendments of permits.

* * * * *

(b) *Service amendment.* The Service reserves the right to amend any permit for just cause at any time during its term, upon written finding of necessity, provided that the amendment of a permit issued under § 17.22(b) or (c) of this subchapter will be consistent with the requirements of § 17.22(b)(5) or (c)(5) of this subchapter and amendment of a permit issued under § 17.32(b) or (c) of this subchapter will be consistent with the requirements of § 17.32(b)(5) or (c)(5) of this subchapter.

* * * * *

■ 3. Amend § 13.24 by revising the section heading and paragraph (c) introductory text to read as follows:

§ 13.24 Rights of succession by certain persons.

* * * * *

(c) In the case of permits issued under the regulations in this subchapter in § 17.22(b) and (c), § 17.32(b) and (c), or 50 CFR part 22, the successor's authorization under the permit is also subject to our determination that:

* * * * *

■ 4. Amend § 13.25 by revising paragraphs (b) and (c) and the introductory text of paragraph (e) to read as follows:

§ 13.25 Transfer of permits and scope of permit authorization.

* * * * *

(b) Permits issued under the regulations in this subchapter in § 17.22(b) and (c), § 17.32(b) and (c), or 50 CFR part 22 may be transferred to a successor subject to our determination that the proposed transferee:

(1) Meets all of the qualifications under this part for holding a permit;

(2) Has provided adequate written assurances of sufficient funding for the conservation measures, conservation plan, or conservation benefit agreement, and will implement the relevant terms and conditions of the permit, including any outstanding minimization and mitigation requirements; and

(3) Has provided other information that we determine is relevant to the processing of the submission.

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

* * * * *

(e) In the case of permits issued under § 17.22(b) and (c) or § 17.32(b) and (c) of this subchapter to a State, Tribal, or local government entity, a person is under the direct control of the permittee where:

* * * * *

■ 5. Amend § 13.28 by revising paragraph (a)(5) to read as follows:

§ 13.28 Permit revocation.

(a) * * *

(5) Except for permits issued under § 17.22(b) and (c) or § 17.32(b) and (c) of this subchapter, the population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.

* * * * *

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Subpart A—Introduction and General Provisions

■ 7. Amend § 17.2 by:

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f); and

■ c. Adding a new paragraph (b).

The revision and addition read as follows:

§ 17.2 Scope of regulations.

(a) The regulations of this part apply only to endangered and threatened wildlife and plants, except for § 17.22(b) and (c) and § 17.32(b) and (c), which may apply to wildlife and plant species that are not listed as endangered or threatened if they meet the definition of ''covered species.''

(b) Permits authorized under this part include:

(1) Scientific purposes or enhancement of propagation or survival permits for take associated with research, captive propagation programs, or conservation activities to enhance and recover populations of covered species; and

(2) Incidental take permits for take that is incidental to otherwise lawful activities.

* * * * *

■ 8. Amend § 17.3 by:

■ a. Revising the definition for ''Adequately covered'';

■ b. Adding in alphabetical order definitions for ''Applicant'' and ''Baseline condition'';

■ c. Revising the definition for ''Changed circumstances'';

■ d. Adding in alphabetical order definitions for ''Covered activity'', ''Covered species'', ''Net conservation benefit'', ''Permit area'', ''Permittee'', ''Plan area'', ''Programmatic permit associated with a conservation benefit agreement'', ''Programmatic permit associated with a conservation plan'', and

■ e. Revising the definition for ''Property owner''.

The revisions and additions read as follows:

§ 17.3 Definitions.

* * * * *

Adequately covered means, with respect to species listed pursuant to section 4 of the Act, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act for the species covered by the plan, and, with respect to non-listed species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act that would apply if the non-listed species covered by the plan were listed. For the Service to cover a species under a conservation plan, it must be identified as a covered species on the section 10(a)(1)(B) permit.

* * * * *

Applicant means the person(s), as defined in the Act, who is named and identified on the application and, by signing the application, assumes the responsibility for implementing the terms of an issued permit. Other parties including, without limitations, affiliates, associates, subsidiaries, corporate families, and assigns of an applicant are not applicants or permittees unless, in accordance with applicable regulations, an application or permit has been amended to include them or unless a permit has been transferred consistent with § 13.25.

* * * * *

Baseline condition means population estimates and distribution or habitat characteristics across the enrolled property that currently sustains seasonal or permanent use by the covered species at the time a conservation benefit agreement is executed by the Service and the property owner, or by a programmatic permit holder and the property owner, under §§ 17.22(c) and 17.32(c) of this part, as applicable.

* * * * *

Changed circumstances are changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by the plan's developers and the Service for which responses can be identified in a conservation plan (*e.g.,* the listing of new species, effects of climate change, or a fire or other natural catastrophic event in areas prone to those events).

* * * * *

Covered activity means an action or series of actions that causes take of a covered species and for which take is authorized by a permit under § 17.22(b) and (c) or § 17.32(b) and (c), as applicable.

Covered species means any species that are included in a conservation plan or agreement and for which take is authorized through an incidental take or enhancement of survival permit.

(1) Covered species include species listed as endangered or threatened.

(2) Covered species may include species that are proposed or candidates for listing, at-risk species, or species that have other Federal protective status. An at-risk species is a non-listed species the status of which is declining and that is at risk of becoming a candidate for listing under the Act; at-risk species may include, but are not limited to, State-listed species, species identified by States as species of greatest

conservation need, or species with State heritage ranks of G1 or G2.

(3) An incidental take or enhancement of survival permit need not include a listed species.

* * * * *

Net conservation benefit means the cumulative benefit provided through implementation of a conservation benefit agreement that is designed to improve the existing baseline condition of a covered species by reducing or eliminating threats, or otherwise improving the status of covered species, minus the adverse impacts to covered species from ongoing land or water use activities and conservation measures, so that the condition of the covered species or the amount or quality of its habitat is reasonably expected to be greater with implementation of the agreement than without it. If the Service determines that the species and habitat are already adequately managed to the benefit of the species, a net conservation benefit will be achieved if the property owner commits to continuing the species' management for a specified period of time, including addressing any likely future threats that are under the property owner's control, with the anticipation that the population will increase, habitat quality will improve, or both.

* * * * *

Permit area means the geographic area where the take permit applies. The permit area must be delineated in the permit and be included within a conservation plan or agreement.

Permittee means the named applicant who has been issued a permit and who assumes responsibility for implementing the permit. Other parties including, without limitation, affiliates, associates, subsidiaries, corporate families, and assigns of a permittee are not permittees unless the permit has been amended or transferred consistent with § 13.25.

Plan area means the geographic area where covered activities, including mitigation, described in the conservation plan associated with an incidental take permit may occur. The plan area must be identified in the conservation plan.

* * * * *

Programmatic permit associated with a conservation benefit agreement means an enhancement of survival permit issued under § 17.22(c) or § 17.32(c), with an accompanying conservation benefit agreement that allows at least one named permittee to extend the incidental take authorization to enrolled property owners who are capable of carrying out and agree to properly implement the conservation benefit agreement.

Programmatic permit associated with a conservation plan means an incidental take permit issued under § 17.22(b) or § 17.32(b), with an accompanying conservation plan that allows at least one named permittee to extend the incidental take authorization to participants who are capable of carrying out and agree to properly implement the conservation plan.

* * * * *

Property owner, with respect to conservation benefit agreements and plans outlined under § 17.22(b) and (c) and § 17.32(b) and (c), means a person or other entity with a property interest (including owners of rights to water or other natural resources) sufficient to carry out the proposed activities, subject to applicable State, Tribal, and Federal laws and regulations.

* * * * *

Subpart C—Endangered Wildlife

■ 9. Amend § 17.22 by:
■ a. Revising the section heading and paragraphs (b), (c), and (d); and
■ b. Removing paragraph (e).

The revisions read as follows:

§ 17.22 Permits for endangered species.

* * * * *

(b)(1) *Application requirements for an incidental take permit.* A person seeking authorization for incidental take that would otherwise be prohibited by § 17.21(c) submits Form 3–200–56, a processing fee (if applicable), and a conservation plan. The Service will process the application when the Director determines the application is complete. A conservation plan must include the following:

(i) *Project description.* A complete description of the project including purpose, location, timing, and proposed covered activities.

(ii) *Covered species.* As defined in § 17.3, common and scientific names of species sought to be covered by the permit, as well as the number, age, and sex, if known.

(iii) *Goals and objectives.* The measurable biological goals and objectives of the conservation plan.

(iv) *Anticipated take.* Expected timing, geographic distribution, type and amount of take, and the likely impact of take on the species.

(v) *Conservation program,* that explains the:

(A) Conservation measures that will be taken to minimize and mitigate the impacts of the incidental take for all covered species commensurate with the taking;

(B) Roles and responsibilities of all entities involved in implementation of the conservation plan;

(C) Changed circumstances and the planned responses in an adaptive management plan; and

(D) Procedures for dealing with unforeseen circumstances.

(vi) *Conservation timing.* The timing of mitigation relative to the incidental take of covered species.

(vii) *Permit duration.* The rationale for the requested permit duration.

(viii) *Monitoring.* Monitoring of the effectiveness of the mitigation and minimization measures, progress towards achieving the biological goals and objectives, and permit compliance. The scope of the monitoring program should be commensurate with the scope and duration of the conservation program and the project impacts.

(ix) *Funding needs and sources.* An accounting of the costs for properly implementing the conservation plan and the sources and methods of funding.

(x) *Alternative actions.* The alternative actions to the taking the applicant considered and the reasons why such alternatives are not being used.

(xi) *Additional actions.* Other measures that the Director requires as necessary or appropriate, including those necessary or appropriate to meet the issuance criteria or other statutory responsibilities of the Service.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (b)(1) of this section, the Director will decide whether a permit should be issued. The Director will consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4). In making a decision, the Director will consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of covered species' habitat that is involved and the degree to which covered species and their habitats are affected. The Director will issue the permit if the Director finds:

(i) The taking will be incidental to, and not the purpose of, carrying out an otherwise lawful activity.

(ii) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.

(iii) The applicant will ensure that adequate funding for the conservation plan implementation will be provided.

(iv) The applicant has provided procedures to deal with unforeseen circumstances.

(v) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

(vi) The measures and conditions, if any, required under paragraph (b)(1)(xi) of this section will be met.

(vii) The applicant has provided any other assurances the Director requires to ensure that the conservation plan will be implemented.

(3) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under the regulations in this section will contain terms and conditions that the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation plan including, but not limited to, additional conservation measures, if any, that may be required pursuant to paragraph (b)(1)(xi) of this section, specified deadlines, and monitoring and reporting requirements deemed necessary for determining whether the permittee is complying with those terms and conditions. The Director will rely upon existing reporting requirements to the maximum extent practicable.

(4) *Permit duration and effective date.* In determining the duration of a permit, the Director will consider the duration of the activities for which coverage is requested; the time necessary to fully minimize and mitigate the impacts of the taking; and uncertainties related to the impacts of the taking, success of the mitigation, and external factors that could affect the success of the conservation plan.

(i) Permits issued under this paragraph (b) become effective for listed covered species upon the date the permittee signs the incidental take permit, which must occur within 90 calendar days of issuance. For non-listed covered species, the permit's take authorization becomes effective upon the effective date of the species' listing provided the permittee signed the permit within 90 calendar days of issuance and has properly implemented the conservation plan.

(ii) The permit expires on the date indicated on the face of the permit.

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

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

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

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

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures:

(1) Are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species; and

(2) Maintain the original terms of the conservation plan to the maximum extent possible.

(3) Additional conservation and mitigation measures will not involve the commitment of additional land, water, or financial compensation, or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

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

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

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

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

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

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

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

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

(7) *Permit amendment or renewal.* Any amendment or renewal of an existing permit issued under this part is a new agency decision and is therefore subject to all current relevant laws and regulations. The application will be evaluated based on the current policies and guidance in effect at the time of the amendment or renewal decision. Evaluation of an amendment extends only to the portion(s) of the conservation plan or permit for which the amendment is requested. Amendment or renewal applications must meet issuance criteria based upon the best available commercial and scientific data at the time of the permit decision.

(8) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter. The Service will deem the permit canceled only upon a determination that such minimization and mitigation measures have been implemented. Upon surrender of the permit, no further take

by the permittee will be authorized under the terms of the surrendered permit.

(9) *Criteria for revocation.* A permit issued under this paragraph (b) may not be revoked for any reason except:

(i) The reasons set forth in § 13.28(a)(1) through (4) of this subchapter; or

(ii) If continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied.

(c)(1) *Application requirements for an enhancement of survival permit associated with conservation benefit agreements.* The applicant must submit Form 3–200–54, the processing fee (if applicable), and a conservation benefit agreement. The Service will process the application when the Director determines the application has met all statutory and regulatory requirements for a complete application. A conservation benefit agreement must include the following:

(i) *Conservation measures.* A complete description of the conservation measure or measures, including the location of the activity or activities to be covered by the permit, and their intended outcome for the covered species.

(ii) *Covered species.* The common and scientific names of the covered species for which the applicant will conduct conservation measures and may need authorization for take.

(iii) *Goals and objectives.* The measurable biological goals and objectives of the conservation measures in the agreement.

(iv) *Enrollment baseline.* The baseline condition of the property or area to be enrolled as defined in § 17.3.

(v) *Net conservation benefit.* A description of how the measures are reasonably expected to improve each covered species' existing baseline condition on the enrolled property and result in a net conservation benefit as defined at § 17.3.

(vi) *Monitoring.* The steps the applicant will take to monitor and adaptively manage to ensure the goals and objectives of the conservation benefit agreement are met, the responsibilities of all parties are carried out, and the conservation benefit agreement will be properly implemented.

(vii) *Neighboring property owners.* A description of the enrollment process to provide neighboring property owners take coverage under paragraph (c)(5)(ii) of this section, if applicable, or any other measures developed to protect the interests of neighboring property owners.

(viii) *Return to baseline condition.* The applicant's choice between including authorization to return the enrolled property to baseline condition or forgoing that authorization. For applicants seeking authority to return to baseline condition, a description of steps that may be taken to return the property to baseline condition and measures to reduce the effects of the take to the covered species.

(ix) *Additional actions.* Any other measures that the Director may require as necessary or appropriate to meet the issuance criteria in paragraph (c)(2) of this section or to avoid conflicts with other Service conservation efforts.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (c)(1) of this section, the Director will decide whether to issue a permit. The Director will consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if the Director finds:

(i) The take will be incidental to an otherwise lawful activity or purposeful if it is necessary for the implementation of the conservation benefit agreement and will be in accordance with the terms of the agreement.

(ii) The implementation of the terms of the conservation benefit agreement is reasonably expected to provide a net conservation benefit to the affected covered species on the enrolled property that is included in the permit and for each individual property within a programmatic conservation benefit agreement, based upon: condition of the species or habitat, effects of conservation measures, and anticipated impacts of any permitted take.

(iii) The direct and indirect effects of any authorized take are unlikely to appreciably reduce the likelihood of survival and recovery in the wild of any listed species.

(iv) Implementation of the terms of the conservation benefit agreement will not conflict with any ongoing conservation or recovery programs for listed species and the covered species included in the permit.

(v) The applicant has shown a capability for and commitment to implementing all terms of the conservation benefit agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (c) is subject to the following special conditions:

(i) The participating property owner must notify the Service of any transfer of property subject to a conservation benefit agreement, at least 30 calendar days prior to the transfer.

(ii) The permittee must give the Service reasonable advance notice (generally at least 30 calendar days) of when take of any covered species is expected to occur, to provide the Service an opportunity to relocate affected individuals of the species, if possible and appropriate.

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation benefit agreement.

(4) *Permit duration and effective date.* The duration of permits issued under paragraph (c) of this section must be sufficient to provide a net conservation benefit to species covered in the enhancement of survival permit on the enrolled property.

(i) In determining the duration of a permit, the Director will consider the duration of the planned activities, the uncertainties related to the impacts of the taking, and the positive and negative effects of the planned activities covered by the permit on species covered by the conservation benefit agreement.

(ii) Permits issued under this paragraph (c) become effective for listed covered species upon the date the permittee signs the enhancement of survival permit, which must be within 90 calendar days of issuance. For non-listed covered species, the take authorized through the permit becomes effective upon the effective date of the species' listing provided the permittee signed the permit within 90 calendar days of issuance and has properly implemented the conservation benefit agreement since signing the permit.

(5) *Assurances.* The assurances in paragraph (c)(5)(i) of this section apply only to enhancement of survival permits issued in accordance with paragraph (c)(2) of this section where the conservation benefit agreement is being properly implemented, apply only with respect to species covered by the permit, and are effective until the permit expires. The assurances provided in this section apply only to enhancement of survival permits issued after July 19, 1999.

(i) *Permittee and participating property owners.* The Director and the permittee may agree to revise or modify the conservation measures set forth in a conservation benefit agreement if the Director determines that those revisions or modifications do not change the Director's prior determination that the conservation benefit agreement is reasonably expected to provide a net conservation benefit to the covered

species. However, the Director may not require additional or different conservation measures to be undertaken by a permittee without the consent of the permittee.

(ii) *Neighboring property owners.* The Director may provide take coverage in the enhancement of survival permit for owners of properties adjacent to properties covered by the conservation benefit agreement through enrollment procedures contained in the agreement. The take covered and the method of providing take coverage will be tailored to the specific conservation benefit agreement and needs of adjacent property owners. One method is to have the neighboring property owner sign a certificate that applies the authorization and assurances in the permit to the neighboring property owner. The certificate must:

(A) Establish a baseline condition for the covered species on their property; and

(B) Give permission to the Service, the permittee, or a representative of either to enter the property, with reasonable notice, to capture and relocate, salvage, or implement measures to reduce anticipated take of the covered species.

(6) *Additional actions.* Nothing in this section will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity from taking additional actions, at their own expense, to protect or conserve a species included in a conservation benefit agreement.

(7) *Permit amendment or renewal.* Any amendment or renewal of an existing permit issued under this part is a new agency decision and is therefore subject to all current relevant laws and regulations. The application will be evaluated based on the current policies and guidance in effect at the time of the amendment or renewal decision. Evaluation of an amendment extends only to the portion(s) of the conservation benefit agreement or permit for which the amendment is requested. Amendment or renewal applications must meet issuance criteria based upon the best available commercial and scientific data at the time of the permit decision.

(8) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (c) remains responsible for any outstanding conservation measures required under the terms of the permit for take that occurs prior to surrender of the permit and any conservation measures required pursuant to the termination provisions of the conservation benefit agreement or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter.

(i) The permittee of a programmatic conservation benefit agreement that conveys take authorization and assurances to participants or enrollees must follow the provisions of § 13.26 of this subchapter.

(ii) The permit will be deemed canceled only upon a determination by the Service that those conservation measure(s) have been implemented and the permittee has had ample time to return the permittee's property to baseline condition, if the permit authorized take associated with return to baseline and if the permittee chooses to exercise that authorization.

(iii) Upon surrender of the permit, no further take will be authorized under the terms of the surrendered permit, and the assurances in paragraph (c)(5)(i) of this section will no longer apply.

(9) *Criteria for revocation.* The Director may not revoke a permit issued under paragraph (c) of this section except as provided in this paragraph (c)(9).

(i) The Director may revoke a permit for any reason set forth in § 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the covered activity would either:

(A) Appreciably reduce the likelihood of survival and recovery in the wild of any covered species; or

(B) Directly or indirectly alter designated critical habitat such that the value of that critical habitat is appreciably diminished for both the survival and recovery of a covered species.

(ii) Before revoking a permit for either of the reasons in paragraphs (c)(9)(i)(A) or (B) of this section, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to, extending or modifying the existing permit, capturing and relocating the species, compensating the property owner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

(d) *Objection to permit issuance.* (1) In regard to any notice of a permit application published in the **Federal Register**, any interested party that objects to the issuance of a permit, in whole or in part, may, during the comment period specified in the notice, request notification of the final action to be taken on the application. A separate written request must be made for each permit application. Such a request must specify the Service's permit application number and state the reasons why the interested party believes the applicant does not meet the issuance criteria contained in this section and § 13.21 of this subchapter, or other reasons why the permit should not be issued.

(2) If the Service decides to issue a permit despite objections received pursuant to paragraph (d)(1) of this section, the Service will, at least 10 days prior to issuance of the permit, make reasonable efforts to contact by telephone, or other expedient means, any party who has made a request pursuant to paragraph (d)(1) of this section and inform that party of the issuance of the permit. However, the Service may reduce the time period or dispense with such notice if the Service determines that time is of the essence and that delay in issuance of the permit would:

(i) Harm the specimen or population involved; or

(ii) Unduly hinder the actions authorized under the permit.

(3) The Service will notify any party filing an objection and request for notice under paragraph (d)(1) of this section of the final action taken on the application, in writing. If the Service has reduced or dispensed with the notice period referred to in paragraph (d)(2) of this section, the Service will include its reasons in such written notice.

Subpart D—Threatened Wildlife

■ 10. Amend § 17.32 by:
■ a. Revising the section heading and paragraphs (b) and (c); and
■ b. Removing paragraph (d).

The revisions read as follows:

§ 17.32 Permits for threatened species.

* * * * *

(b)(1) *Application requirements for an incidental take permit.* A person seeking authorization for incidental take that would otherwise be prohibited by § 17.31 or §§ 17.40 through 17.48 submits Form 3–200–56, a processing fee (if applicable), and a conservation plan. The Service will process the application when the Director determines the application is complete. A conservation plan must include the following:

(i) *Project description.* A complete description of the project, including purpose, location, timing, and proposed covered activities.

(ii) *Covered species.* As defined in § 17.3, common and scientific names of species sought to be covered by the permit, as well as the number, age, and sex, if known.

(iii) *Goals and objectives.* The measurable biological goals and objectives of the conservation plan.

(iv) *Anticipated take.* Expected timing, geographic distribution, type and amount of take, and the likely impact of take on the species.

(v) *Conservation program:* That explains the:

(A) Conservation measures that will be taken to minimize and mitigate the impacts of the incidental take for all covered species commensurate with the taking;

(B) Roles and responsibilities of all entities involved in implementation of the conservation plan;

(C) Changed circumstances and the planned responses in an adaptive management plan; and

(D) Procedures for dealing with unforeseen circumstances.

(vi) *Conservation timing.* The timing of mitigation relative to the incidental take of covered species.

(vii) *Permit duration.* The rationale for the requested permit duration.

(viii) *Monitoring.* Monitoring of the effectiveness of the mitigation and minimization measures, progress towards achieving the biological goals and objectives, and permit compliance. The scope of the monitoring program should be commensurate with the scope and duration of the conservation program and the project impacts.

(ix) *Funding needs and sources.* An accounting of the costs for properly implementing the conservation plan and the sources and methods of funding.

(x) *Alternative actions.* The alternative actions to the taking the applicant considered and the reasons why such alternatives are not being used.

(xi) *Additional actions.* Other measures that the Director requires as necessary or appropriate, including those necessary or appropriate to meet the issuance criteria or other statutory responsibilities of the Service.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (b)(1) of this section, the Director will decide whether a permit should be issued. The Director will consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4). In making a decision, the Director will consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of covered species' habitat that is involved and the degree to which covered species and their habitats are affected. The Director will issue the permit if the Director finds:

(i) The taking will be incidental to, and not the purpose of, carrying out an otherwise lawful activity.

(ii) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.

(iii) The applicant will ensure that adequate funding for the conservation plan implementation will be provided.

(iv) The applicant has provided procedures to deal with unforeseen circumstances.

(v) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

(vi) The measures and conditions, if any, required under paragraph (b)(1)(xi) of this section will be met.

(vii) The applicant has provided any other assurances the Director requires to ensure that the conservation plan will be implemented.

(3) *Permit conditions.* In addition to the general conditions set forth in part 13 of this subchapter, every permit issued under the regulations in this section will contain terms and conditions that the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation plan, including, but not limited to, additional conservation measures, if any, that may be required pursuant to paragraph (b)(1)(xi) of this section, specified deadlines, and monitoring and reporting requirements deemed necessary for determining whether the permittee is complying with those terms and conditions. The Director will rely upon existing reporting requirements to the maximum extent practicable.

(4) *Permit duration and effective date.* In determining the duration of a permit, the Director will consider the duration of the activities for which coverage is requested; the time necessary to fully minimize and mitigate the impacts of the taking; and uncertainties related to the impacts of the taking, success of the mitigation, and external factors that could affect the success of the conservation plan.

(i) Permits issued under this paragraph (b) become effective for listed covered species upon the date the permittee signs the incidental take permit, which must occur within 90 calendar days of issuance. For non-listed covered species, the permit's take authorization becomes effective upon the effective date of the species' listing provided the permittee signed the permit within 90 calendar days of issuance and has properly implemented the conservation plan.

(ii) The permit expires on the date indicated on the face of the permit.

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

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

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

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

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures:

(1) Are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species; and

(2) Maintain the original terms of the conservation plan to the maximum extent possible.

(3) Additional conservation and mitigation measures will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

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

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

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

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

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

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

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

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

(7) *Permit amendment or renewal.* Any amendment or renewal of an existing permit issued under this part is a new agency decision and is therefore subject to all current relevant laws and regulations. The application will be evaluated based on the current policies and guidance in effect at the time of the amendment or renewal decision. Evaluation of an amendment extends only to the portion(s) of the conservation plan or permit for which the amendment is requested. Amendment or renewal applications must meet issuance criteria based upon the best available commercial and scientific data at the time of the permit decision.

(8) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (b) remains responsible for any outstanding minimization and mitigation measures required under the terms of the permit for take that occurs prior to surrender of the permit and such minimization and mitigation measures as may be required pursuant to the termination provisions of an implementing agreement, conservation plan, or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter.

(i) The Service will deem the permit canceled only upon a determination that such minimization and mitigation measures have been implemented.

(ii) Upon surrender of the permit, no further take by the permittee will be authorized under the terms of the surrendered permit.

(9) *Criteria for revocation.* A permit issued under this paragraph (b) may not be revoked for any reason except:

(i) The reasons set forth in § 13.28(a)(1) through (4) of this subchapter; or

(ii) If continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied.

(c)(1) *Application requirements for an enhancement of survival permit associated with conservation benefit agreements.* The applicant must submit Form 3–200–54, the processing fee (if applicable), and a conservation benefit agreement. The Service will process the application when the Director determines the application has met all statutory and regulatory requirements for a complete application. A conservation benefit agreement must include the following:

(i) *Conservation measures.* A complete description of the conservation measure or measures, including the location of the activity or activities to be covered by the permit, and their intended outcome for the covered species.

(ii) *Covered species.* The common and scientific names of the covered species for which the applicant will conduct conservation measures and may need authorization for take.

(iii) *Goals and objectives.* The measurable biological goals and objectives of the conservation measures in the agreement.

(iv) *Enrollment baseline.* The baseline condition of the property or area to be enrolled as defined in § 17.3.

(v) *Net conservation benefit.* A description of how the measures are reasonably expected to improve each covered species' existing baseline condition on the enrolled property and result in a net conservation benefit as defined at § 17.3.

(vi) *Monitoring.* The steps the applicant will take to monitor and adaptively manage to ensure the goals and objectives of the conservation benefit agreement are met, the responsibilities of all parties are carried out, and the conservation benefit agreement will be properly implemented.

(vii) *Neighboring property owners.* A description of the enrollment process to provide neighboring property owners take coverage under paragraph (c)(5)(ii) of this section, if applicable, or any other measures developed to protect the interests of neighboring property owners.

(viii) *Return to baseline condition.* The applicant's choice between including authorization to return the enrolled property to baseline condition or forgoing that authorization. For applicants seeking authority to return to baseline condition, a description of steps that may be taken to return the property to baseline condition and measures to reduce the effects of the take to the covered species.

(ix) *Additional actions.* Any other measures that the Director may require as necessary or appropriate to meet the issuance criteria in paragraph (c)(2) of this section or to avoid conflicts with other Service conservation efforts.

(2) *Issuance criteria.* Upon receiving an application completed in accordance with paragraph (c)(1) of this section, the Director will decide whether to issue a permit. The Director will consider the general issuance criteria in § 13.21(b) of this subchapter, except for § 13.21(b)(4), and may issue the permit if the Director finds:

(i) The take will be incidental to an otherwise lawful activity or purposeful if it is necessary for the implementation of the conservation benefit agreement and will be in accordance with the terms of the agreement.

(ii) The implementation of the terms of the conservation benefit agreement is reasonably expected to provide a net conservation benefit to the affected covered species on the enrolled property that is included in the permit and for each individual property within a programmatic conservation benefit agreement, based upon: condition of the species or habitat, effects of conservation measures, and anticipated impacts of any permitted take.

(iii) The direct and indirect effects of any authorized take are unlikely to appreciably reduce the likelihood of survival and recovery in the wild of any listed species.

(iv) Implementation of the terms of the conservation benefit agreement will not conflict with any ongoing conservation or recovery programs for listed species and the covered species included in the permit.

(v) The applicant has shown a capability for and commitment to implementing all terms of the conservation benefit agreement.

(3) *Permit conditions.* In addition to any applicable general permit conditions set forth in part 13 of this subchapter, every permit issued under this paragraph (c) is subject to the following special conditions:

(i) The participating property owner must notify the Service of any transfer of property subject to a conservation benefit agreement, at least 30 calendar days prior to the transfer.

(ii) The permittee must give the Service reasonable advance notice (generally at least 30 calendar days) of when take of any covered species is expected to occur, to provide the Service an opportunity to relocate affected individuals of the species, if possible and appropriate.

(iii) Any additional requirements or conditions the Director deems necessary or appropriate to carry out the purposes of the permit and the conservation benefit agreement.

(4) *Permit duration and effective date.* The duration of permits issued under paragraph (c) of this section must be sufficient to provide a net conservation benefit to species covered in the enhancement of survival permit on the enrolled property.

(i) In determining the duration of a permit, the Director will consider the duration of the planned activities, the uncertainties related to the impacts of the taking, and the positive and negative effects of the planned activities covered by the permit on species covered by the conservation benefit agreement.

(ii) Permits issued under this paragraph (c) become effective for listed covered species upon the date the permittee signs the enhancement of survival permit, which must be within 90 calendar days of issuance. For non-listed covered species, the take authorized through the permit becomes effective upon the effective date of the species' listing provided the permittee signed the permit within 90 calendar days of issuance and has properly implemented the conservation benefit agreement since signing the permit.

(5) *Assurances.* The assurances in paragraph (c)(5)(i) of this section apply only to enhancement of survival permits issued in accordance with paragraph (c)(2) of this section where the conservation benefit agreement is being properly implemented, apply only with respect to species covered by the permit, and are effective until the permit expires. The assurances provided in this section apply only to enhancement of survival permits issued after July 19, 1999.

(i) *Permittee and participating property owners.* The Director and the permittee may agree to revise or modify the conservation measures set forth in a conservation benefit agreement if the Director determines that those revisions or modifications do not change the Director's prior determination that the conservation benefit agreement is reasonably expected to provide a net conservation benefit to the covered species. However, the Director may not require additional or different conservation measures to be undertaken by a permittee without the consent of the permittee.

(ii) *Neighboring property owners.* The Director may provide take coverage in the enhancement of survival permit for owners of properties adjacent to properties covered by the conservation benefit agreement through enrollment procedures contained in the agreement. The take covered and the method of providing take coverage will be tailored to the specific conservation benefit agreement and needs of adjacent property owners. One method is to have the neighboring property owner sign a certificate that applies the authorization and assurances in the permit to the neighboring property owner. The certificate must:

(A) Establish a baseline condition for the covered species on their property; and

(B) Give permission to the Service, the permittee, or a representative of either to enter the property, with reasonable notice, to capture and relocate, salvage, or implement measures to reduce anticipated take of the covered species.

(6) *Additional actions.* Nothing in this section will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity from taking additional actions, at their own expense, to protect or conserve a species included in a conservation benefit agreement.

(7) *Permit amendment or renewal.* Any amendment or renewal of an existing permit issued under this part is a new agency decision and is therefore subject to all current relevant laws and regulations. The application will be evaluated based on the current policies and guidance in effect at the time of the amendment or renewal decision. Evaluation of an amendment extends only to the portion(s) of the conservation benefit agreement or permit for the which the amendment is requested. Amendment or renewal applications must meet issuance criteria based upon the best available commercial and scientific data at the time of the permit decision.

(8) *Discontinuance of permit activity.* Notwithstanding the provisions of § 13.26 of this subchapter, a permittee under this paragraph (c) remains responsible for any outstanding conservation measures required under the terms of the permit for take that occurs prior to surrender of the permit and any conservation measures required pursuant to the termination provisions of the conservation benefit agreement or permit even after surrendering the permit to the Service pursuant to § 13.26 of this subchapter.

(i) The permittee of a programmatic conservation benefit agreement that conveys take authorization and assurances to participants or enrollees must follow the provisions of § 13.26 of this subchapter.

(ii) The permit will be deemed canceled only upon a determination by the Service that those conservation measure(s) have been implemented and the permittee has had ample time to return the permittee's property to baseline condition, if the permit authorized take associated with return to baseline and if the permittee chooses to exercise that authorization.

(iii) Upon surrender of the permit, no further take will be authorized under the terms of the surrendered permit, and the assurances in paragraph (c)(5)(i) of this section will no longer apply.

(9) *Criteria for revocation.* The Director may not revoke a permit issued under this paragraph (c) except as provided in this paragraph (c)(9).

(i) The Director may revoke a permit for any reason set forth in § 13.28(a)(1) through (4) of this subchapter. The Director may revoke a permit if continuation of the covered activity would either:

(A) Appreciably reduce the likelihood of survival and recovery in the wild of any covered species; or

(B) Directly or indirectly alter designated critical habitat such that the value of that critical habitat is appreciably diminished for both the survival and recovery of a covered species.

(ii) Before revoking a permit for either of the reasons in paragraphs (c)(9)(i)(A) or (B) of this section, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but are not limited to, extending or modifying the existing permit, capturing

and relocating the species, compensating the property owner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.

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