

DRAFT SAFE HARBOR AGREEMENT
THE NATURE CONSERVANCY – EASTERN NEW YORK CHAPTER
JUNE 2007

1. INTRODUCTION

This Safe Harbor Agreement (Agreement) is entered into between The Nature Conservancy (“TNC”), the U.S. Department of the Interior, Fish and Wildlife Service (“Service”), and the New York State Department of Environmental Conservation (“State”), hereinafter collectively called the “Parties.” The purpose of this Agreement is to promote the conservation of the Karner blue butterfly (*Lycaeides melissa samuelis*) and the frosted elfin butterfly (*Callophrys irus*) through the restoration, creation, enhancement, and management of their habitat on non-Federal land in eastern New York. This Agreement follows the Service’s Safe Harbor Agreement policies (64 Fed. Reg. 32717) and regulations (50 C.F.R. §17.22)(c)), both of which implement section 10(a)(1)(A) of the Endangered Species Act (ESA), and the State’s endangered species law, NYCLS-ECL § 11-0535, and regulations, 6 NYCRR § 182.4.

2. LIST OF COVERED SPECIES

- A. For the purposes of New York law, the terms “covered species” or “butterflies” under this Agreement covers the following species - the Karner blue butterfly, a New York State listed endangered species, and the frosted elfin, a New York State listed threatened species.
- B. For the purposes of Federal law, the terms “covered species” or “butterflies” under this Agreement only apply to the Karner blue butterfly, listed as “endangered” under the ESA. The frosted elfin is not currently protected under the ESA, but the Service acknowledges that this Agreement may provide incidental conservation benefit to this species because it is found within the same habitat as the Karner blue butterfly. Should the frosted elfin become listed under the ESA in the future, TNC may request an amendment to this Agreement and its Federal permit to cover the frosted elfin, including the baseline conditions originally established under any Cooperative Agreements pursuant to Parts 3 & 4, herein.
- C. The terms “covered species” and “butterflies” under Subsections 2.A and 2.B include all life forms including eggs, larvae, pupae, and adults.

3. DESCRIPTION OF ENROLLED LANDS

We are focusing this program in one of the priority recovery action areas within New York State as discussed in the Karner Blue Butterfly Recovery Plan (Service 2003), the Glacial Lake Albany Recovery Unit, which includes portions of Albany, Schenectady, Saratoga, and Warren Counties. The properties subject to this Agreement consist of those non-Federal lands located within this Recovery Unit whose owners execute a written, binding contract with TNC in the form of a cooperative agreement, an example of which is attached hereto as Appendix A. Such

properties are referred to herein as the “enrolled properties.” The enrolled properties are to be more precisely identified through maps included with such Cooperative Agreements and will be further identified through photographs and legal descriptions included with such Cooperative Agreements. Current and recent land use practices on the enrolled properties are likely to be varied and may include agricultural and silvicultural uses as well as residential, commercial, and industrial development. Habitat conditions and present uses on the enrolled property are also likely to be varied and will be described in the Cooperative Agreements. Such Cooperative Agreements shall be effective upon the signing thereof by the non-Federal landowner and TNC, and by the written concurrence therein by the State.

4. BASELINE DETERMINATION

For each enrolled property, the Cooperative Agreement will specify the baseline conditions applicable to that property. Baseline conditions shall be determined in the following manner. A survey of the proposed enrolled property shall be completed by TNC or their designated representatives, in accordance with procedures specified in Appendix B, not more than one year prior to the signing of the Cooperative Agreement. If the survey finds no covered species on the property, there shall be no baseline responsibilities applicable to the property. If the survey finds a covered species on the property, the baseline responsibilities with respect to the species found shall be to avoid any action that reduces the amount of occupied habitat below that which was present at the time of the survey. Results of baseline surveys shall be appended to all Cooperative Agreements.

5. MANAGEMENT ACTIVITIES

Each Cooperative Agreement shall specify the management activities to be carried out on the enrolled property to which it applies. Such management activities shall be consistent with recommendations of the Karner Blue Butterfly Recovery Plan - Appendix G (Service 2003) (see Appendix C) and may include other activities as may be agreed upon by TNC, the Service, and the State. Management activities to create, restore, or maintain habitat for the covered species may include control of woody, shrubby, or invasive plants through mowing, manual or mechanical cutting, application of herbicides, or other means; planting native vegetation as nectar or larval food sources; use of prescribed burning to establish and maintain desired habitat conditions; and other appropriate measures. The Service and State anticipate that implementation of these management activities is reasonably expected to provide a net conservation benefit for the Karner blue butterfly and frosted elfin.

6. OTHER RESPONSIBILITIES OF THE PARTIES

A. In addition to entering into Cooperative Agreements with willing non-Federal landowners, as described above, TNC agrees to:

1. Inform the Service and the State by electronic or ground mail within 5 business days of any notification received from a cooperating non-Federal landowner of the landowner’s intent to make a change in land use likely to eliminate or reduce the amount of occupied habitat on the enrolled property, and cooperate with such agencies in the event that they

choose to capture and/or relocate potentially affected individuals in response to such notification.

2. Monitor implementation of management activities specified in Cooperative Agreements and carry out annual surveys according to procedures specified in Appendix B on all enrolled properties to assess significant changes of abundance of the covered species thereon.
3. Report to the Service and the State, by telephone at the time of the discovery or as soon thereafter as practicable, the discovery by TNC of any unauthorized destruction of occupied habitat, or dead or injured specimens of the covered species observed on enrolled properties (other than specimens obviously affected by such natural causes as predators or parasites) and, if requested by the Service or the State, take such actions as requested to document the discovery.
4. Provide the Service and the State with an annual report, due on or before March 1 of each year this Agreement is in effect, that describes progress in implementing specified management activities, the results of annual surveys, and any compliance issues with regard to Cooperative Agreements.
5. Inform the Service and the State within 5 days of TNC's receipt of such knowledge, of a landowner's intent to transfer his/her enrolled property.
6. Communicate to a cooperating non-Federal landowner any request by the Service or the State to visit an enrolled property for the purpose of evaluating the suitability of the property for butterfly translocations to or from it, or for the purpose of evaluating the effectiveness of the management activities carried out on such property, and to cooperate with the Service and the State in scheduling such visit.
7. Ensure that those involved with surveying or monitoring covered species are appropriately trained and qualified in identification of the butterflies and their habitat characteristics and proper techniques for conducting surveys.

B. In consideration of the foregoing, the Service agrees to:

1. Upon execution of the Agreement and satisfaction of all other applicable legal requirements, issue to TNC a permit in accordance with ESA section 10(a)(1)(A), and valid for a period of 50 years, authorizing take of the covered species as a result of implementing management activities specified in a Cooperative Agreement, or as a result of other lawful activities on enrolled properties after the management activities specified in such Cooperative Agreement have been initiated, provided that such taking shall not reduce the amount of occupied habitat present on the enrolled property below the baseline amount as referenced in Part 4 above.
2. Provide to TNC and to enrolled landowners, technical assistance to the maximum extent practicable, when requested, and provide information on Federal funding programs.

C. In consideration of the foregoing, the State agrees to:

1. Upon execution of the Agreement and satisfaction of all other applicable legal requirements, issue to TNC a permit in accordance with section 182.4 of Title 6 of the New York Code of Rules and Regulations, and valid for a period of 50 years, authorizing take of the covered species as a result of implementing management activities specified in a Cooperative Agreement, or as a result of other lawful activities on enrolled properties after the management activities specified in such Cooperative Agreement have been initiated, provided that such taking shall not reduce the amount of occupied habitat present on the enrolled property below the baseline amount as referenced in Part 4 above.
2. Provide to TNC and to non-Federal landowners who enter into Cooperative Agreements, technical assistance, to the maximum extent practicable, when requested; and provide information on State funding programs.

7. AGREEMENT AND PERMIT DURATION

The Agreement becomes effective upon issuance by the Service and the State of the permits described in Part 6 hereof, and will be in effect for 50 years. The Service and State permits will have a term of 50 years. Individual Cooperative Agreement terms may vary.

8. ASSURANCES

A. Provided that such take is consistent with maintaining the baseline conditions identified in Part 4 hereof, the permits referenced in Part 6 shall authorize TNC and any non-Federal landowners with whom it enters into Cooperative Agreements as provided herein, to take the covered species incidental to otherwise lawful activities in the following circumstances:

1. Implementing management activities identified in Part 5 hereof.
2. Making any lawful use of the enrolled property after management activities identified in Part 5 have been initiated.

B. The Parties shall be subject to the assurances provided for in 50 C.F.R. §§ 17.22(c)(5 & 6), which are hereby incorporated into this Agreement.

9. MODIFICATIONS

A. Modification of the Agreement. Any party may propose amendments to this Agreement, as provided in 50 C.F.R. §13.23, by providing written notice to, and obtaining the written concurrence of, the other Parties. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will use their best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon the other Parties' written concurrence.

B. Termination of the Cooperative Agreement. As provided for in Part 12 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717), a landowner who has entered into a Cooperative Agreement with TNC as provided herein may terminate that Cooperative Agreement for circumstances beyond his or her control. In such circumstances, the landowner may return the enrolled property to baseline conditions even if management activities identified in Part 5 have not been fully implemented, provided that the non-Federal landowners give TNC the notification required by the Cooperative Agreement prior to carrying out any activity likely to result in the taking of the covered species. If the landowner terminates the Cooperative Agreement for any other reason, the permit referenced in Part 6.B.1 above shall immediately cease to be in effect as to that landowner's enrolled property.

C. Permit Suspension or Revocation. The Service or the State may suspend or revoke the permits referred to in Parts 6.B.1 and 6.C.1, respectively, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. The Service may also, after pursuing all appropriate options to avoid permit revocation, may revoke the permit if continuation of permitted activities would likely jeopardize the continued existence of the covered species (50 C.F.R. § 13.28(a)).

D. Baseline Adjustment. The baseline conditions for any enrolled property may, by mutual written agreement of the Parties and the enrolled landowner, be adjusted if, during the term of the Cooperative Agreement and for reasons beyond the control of the non-Federal landowner, the quantity of occupied habitat is reduced from what it was at the time the Cooperative Agreement was negotiated.

10. OTHER MEASURES

A. Remedies. Each party shall have all remedies otherwise available to enforce the terms of the Agreement and the permits.

B. Dispute Resolution. The Parties agree to work together in good faith to resolve any disputes, and may elect to use dispute resolution procedures agreed upon by all Parties.

C. Succession and Transfer. As provided in 50 C.F.R. §13.25(c), if an enrolled landowner who has entered into a Cooperative Agreement with TNC as provided herein transfers his or her interest in the enrolled property to another non-Federal entity, the Service and the State will regard the new owner as having the same rights and responsibilities with respect to the enrolled property as the original owner, if the new owner agrees in writing to become a party to the original Cooperative Agreement.

D. Availability of Funds. Nothing in this Agreement will be construed by the Parties to require the Service to expend in any one fiscal year any sum in excess of appropriations made by Congress, for the purposes of this Agreement for that fiscal year, or as involving the United States in any contract or other obligation for the further expenditure of money in excess of such appropriations.

E. No Third-Party Beneficiaries. This Agreement does not create any new right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

F. Public Laws. Nothing herein contained shall be deemed to be inconsistent with or contrary to the purpose or intent of any Act of Congress establishing, affecting, or relating to the Agreement.

G. Direct Benefit Clause. No member of, Delegate to, or Resident Commissioner in Congress shall be admitted to any share or part of this Agreement or to any benefit to arise therefrom, unless the share or part or benefit is for the general benefit of a corporation or company.

H. Other Listed Species, Candidate Species, and Species of Concern. The possibility exists that other listed, proposed, or candidate species, or species of concern may occur in the future on the enrolled property as a direct result of management actions specified in Part 5 above. If that occurs and the non-Federal landowner so requests, the Parties may agree to amend the Cooperative Agreement and associated permits to cover additional species and to establish appropriate baseline conditions for such other species.

I. Notices and Reports. Any notices and reports, including monitoring and annual reports, required by this Agreement shall be delivered to the persons listed below, as appropriate:

The Nature Conservancy
Director – Eastern New York Chapter
Anthony Wilkinson
195 New Karner Road, Suite 201
Albany, NY 12205

U.S. Fish and Wildlife Service
David Stilwell, Field Supervisor
New York Field Office
3817 Luker Road
Cortland, NY 13045

New York State Department of Environmental Conservation
Peter Nye
Endangered Species Unit Leader
625 Broadway, 5th Floor
Albany, NY 12233-4754

J. References Cited.

U.S. Fish and Wildlife Service. 2003. Final Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). U.S. Fish and Wildlife Service, Fort Snelling, Minnesota. 273 pp.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the date that the Service and the State issue the permits referred to in Parts 6.B.1 and 6.C.1, above.

The Nature Conservancy

Date

Regional Director
U.S. Fish and Wildlife Service

Date

Director
Division of Fish, Wildlife and Marine Resources
New York State Dept. of Environmental Conservation

Date