Billing Code 4310–55

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R9–ES–2011–0099]

[FF09E40000 145 FXES11150900000]

RIN 1018–AY29

Policy Regarding Voluntary Prelisting Conservation Actions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Announcement of draft policy and solicitation of public comment.

SUMMARY: We, the U.S Fish and Wildlife Service, announce a draft policy on crediting voluntary conservation actions taken for species prior to their listing under the Endangered Species Act. The proposed policy seeks to give landowners, government agencies, and others incentives to carry out voluntary conservation actions for nonlisted species by allowing the benefits to the species from a voluntary conservation action undertaken prior to listing under the

Act to be used—either by the person who undertook such action or by a third party—to mitigate or to serve as a compensatory measure for the detrimental effects of another action undertaken after listing. This policy will help us further our efforts to protect native species and conserve the ecosystems on which they depend.

DATES: **General Comments**: We will accept comments from all interested parties until [Insert date 60 days after date of FEDERAL REGISTER publication]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

Comments on the Information Collections Aspects of this Proposal: Comments on the information collection aspects of the proposed policy will be considered if received by [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES:

General Comments: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. In the Search box enter the Docket number for the proposed policy, which is FWS–R9–ES–2011–0099. You may enter a comment by clicking on ‘‘Comment Now!’’. Please ensure that you have found the correct document before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0099; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, PDM–2042; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see **Request for Information** below for more information).

Comments on the Information Collection Aspects of this Proposal: Send comments specific to the information collection aspects of this proposed policy to Desk Officer for the Department of the Interior at OMB--OIRA at (202) 395-5806 (fax) or OIRA_Submission@omb.eop.gov (email). Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 2042-PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or hope_grey@fws.gov (email).

FOR FURTHER INFORMATION CONTACT: Jim Serfis, U.S. Fish and Wildlife Service, Branch of Communication and Candidate Conservation, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358–2171; facsimile 703/358–1735.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (Service or FWS) is charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.) (Act); the goal of the Act is to provide a means to conserve the ecosystems upon which listed species depend and a program for listed species conservation. Through its Candidate Conservation program, the Service encourages the public to take conservation actions for species prior to them being listed under the Act. Doing so may result in precluding the need to list a species, may result in listing a

species as threatened instead of endangered, or, if a species becomes listed, may provide the basis for its recovery and eventual removal from the protections of the Act. As explained below, the proposed policy provides incentives to the public to implement these prelisting conservation actions.

Recognizing that species benefit from focused conservation actions taken to address threats to their survival, the Service encourages landowners to conserve candidate and other at-risk species by stabilizing and increasing populations so that the species may not need listing. In March 2012, the Service published in the **Federal Register** an advance notice of proposed rulemaking inviting the public to identify potential changes to our regulations under the Act (77 FR 15354, March 15, 2012). Our goal was to create additional incentives and improve or expand existing ones for landowners and others to invest in early voluntary conservation actions to benefit species that may become listed as threatened or endangered species. Because we received a request from the Association of Fish and Wildlife Agencies to extend the comment period, we published a notice in the **Federal Register** extending the comment period an additional 60 days (77 FR 28347, May 14, 2012).

The comments and recommendations in the 95 responses the Service received in response to the advance notice of proposed rulemaking supported the tenet that, if the need to list a species under the Act can be avoided, everyone, including the species, benefits. The responses also underscored the need for incentives for individuals and agencies, both Federal and State, to invest in conservation actions for species prior to listing. The comments and recommendations made by the individuals, organizations, and agencies covered an array of issues such as the need for guidance on developing crediting programs, updating the Service's mitigation policy, the need for conservation strategies to guide candidate conservation agreements, streamlining the

conservation agreement process, and improving conservation banking. The comments are available at http://www.regulations.gov in Docket No. FWS–R9–ES–2011–0099.

The proposed policy described herein is based on recommendations generated by the advance notice of proposed rulemaking. The Service will address other recommendations through additional regulations, policies, or guidance.

Introduction: Incentivizing voluntary conservation action prior to listing. The proposed policy has two stated purposes, as set forth in section 1. The first, and more general of these, is to incentivize voluntary conservation actions on behalf of species before they reach the point at which they need to be listed as threatened or endangered under the Act. Such voluntary conservation actions, if carried out at a sufficient scale, could contribute to precluding the need to list the species. The proposed policy seeks to reward those who voluntarily undertake to help the species when they have no legal obligation to do so. As described in more detail later, the reward is that the benefits to the species from a voluntary conservation action undertaken prior to listing can be used—either by the person who undertook that action or by a third party—to mitigate or be a compensatory measure for the detrimental effects of another action undertaken after listing. In this policy, the credit earned by undertaking a prelisting conservation action can be transferred to a third party if the prelisting conservation action and the credit are for the same species and within the same State.

Clarifying existing regulations at 50 CFR 402.14(g)(8). A second, more narrow, purpose of the proposed policy is to clarify a provision that has been in the regulations that implement section 7 of the Act since 1986, but that received little explanation then or thereafter. That provision, set forth in 50 CFR 402.14(g)(8), states that the Service "will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any

actions taken prior to the initiation of consultation" during the course of consultation under section 7(a)(2) of the Act or "early consultation" under section 7(a)(3). The proposed policy makes clear that beneficial actions "taken prior to the initiation of consultation" include actions taken prior to listing, provided they meet the policy's definition of a "voluntary prelisting action." In addition to clarifying that prelisting beneficial actions are among the actions to be given "appropriate consideration," the policy also clarifies how the Service will give appropriate consideration to those beneficial actions that are subject to the policy. Specifically, in the course of section 7 consultations, the Service will consider the beneficial effects of a voluntary prelisting conservation action to be included as part of the environmental baseline for the agency action if requested by the action agency or, in the case of an agency action involving a permit applicant, by such applicant.

The policy also makes clear that the Service will evaluate the conservation value of a prelisting conservation action based on its inclusion and priority in a conservation strategy for the species. A conservation strategy is a foundational document that should guide all conservation efforts for at-risk nonlisted species, including Federal, State, Tribal, and private conservation actions. A strategy can be authored by any one of these entities, but ideally it will be created as a joint effort. Coordinated efforts will likely result in better conservation outcomes for the species and efficiencies in implementing and monitoring conservation actions. From the Service's perspective, the primary goal of the strategy is to provide the necessary information to guide management of a species so that it does not need the protections of the Act.

How voluntary prelisting conservation actions are to be treated. Section 2 of the policy sets forth in general terms how the Service will treat voluntary prelisting conservation actions. Two possibilities are described. First, such an action can be treated as a mitigation or a

compensatory measure to offset the impacts of the incidental taking of a listed species for which a permit is sought under Section 10(a)(1)(B) of the Act. Alternatively, where a proposed action that detrimentally affects a listed species is authorized, funded, or carried out by a Federal agency, the voluntary prelisting conservation action can be treated as a compensatory measure for the proposed action. Section 7 of the Act, unlike Section 10(a)(1)(B), does not explicitly require that detrimental impacts be mitigated, but it is long-established practice under section 7 that Federal agencies or their permit applicants can incorporate mitigating measures into their proposed projects so as to reduce their overall impact. The proposed policy makes clear that voluntary prelisting conservation measures can be used in this manner.

Section 2 of the proposed policy also establishes that a voluntary prelisting conservation action undertaken by anyone, including a Federal agency, can be treated as described in the policy if the action is undertaken in a State that chooses to participate. Thus, unlike some other incentive-based policies (e.g., the Safe Harbor Agreements policy (64 FR 32717, June 17, 1999) and the Candidate Conservation Agreements with Assurances (CCAA) policy (64 FR 32726, June 17, 1999)) that apply only to non-Federal property owners, the proposed policy applies to anyone or any entity who wants to take advantage of it and who undertakes the prelisting conservation action in a participating State.

Defining voluntary prelisting conservation actions. Section 3 of the proposed policy defines "voluntary prelisting conservation actions." The definition has three key components. First, the action has to be undertaken before the species it is intended to benefit is listed under the Act. An action can be undertaken at any time prior to listing, including after the species has been proposed for listing. Once a species is listed, however, no new voluntary *prelisting* conservation actions can occur for the species, but ongoing actions initiated prior to listing would continue.

The policy also specifies that actions taken prior to the policy being finalized will not be considered. Second, the action must be truly voluntary, one that is not required by the Act or by any other Federal, State, or local regulatory mechanism.

Acknowledging the jurisdiction of the States over nonlisted species, the last component requires the action be undertaken as part of a State-administered program. In short, the proposed policy contemplates the active engagement of the States in designing and implementing a program to encourage voluntary prelisting conservation actions, as further described in section 4 of the proposed policy. The policy also makes it clear that States can use Federal funds in accordance with Section 6 of the Act to measure, monitor, and provide oversight to ensure the successful implementation and maintenance of the voluntary pre-listing conservation actions as they relate to candidate species. The States may contract with a third party to fulfill the measuring, monitoring, and oversight obligations that are necessary to ensure the successful implementation and maintenance of the voluntary prelisting conservation actions.

Relationship to CCAAs and similar agreements. Although CCAAs and voluntary prelisting conservation actions covered by the proposed policy serve the same purpose, conservation of nonlisted species before they become listed, they employ different mechanisms, have different approval requirements, and have other important differences.

First, CCAAs and voluntary prelisting conservation actions employ different mechanisms for achieving a conservation benefit to the species. A CCAA is intended to provide a property owner (non-Federal) with an assurance that, if the species covered by the CCAA is later listed as threatened or endangered, no new restrictions or conservation obligations will be imposed on the property owner for that species. In contrast, the purpose of the proposed policy's treatment of a voluntary prelisting conservation action is to give a property owner (Federal or non-Federal) the

opportunity to have that action serve as mitigation or a compensatory measure for the detrimental impact of an action undertaken after the species is listed as endangered or threatened.

Second, CCAAs are subject to more exacting approval requirements. To qualify for a CCAA, a non-Federal property owner must commit to carry out conservation measures that, assuming other necessary property owners were to carry out commensurate conservation measures, would be sufficient to preclude the need to list a species. In contrast, to be treated as a voluntary prelisting conservation action under the proposed policy, an action need only be beneficial to a particular species; the policy requires no specific magnitude of benefit.

While it is possible for a voluntary prelisting conservation action to satisfy the requirements of both the CCAA policy and this proposed policy, the action cannot be treated under both policies: Using a conservation action as mitigation or a compensatory measure against a future detrimental action is inconsistent with the intent of the CCAA policy to secure durable conservation commitments that would constitute a particular property owner's necessary contributions to precluding the need to list a species.

Role of the States. The role of the States under the proposed policy, should they choose to participate, is addressed in greater detail in section 4. This section of the proposed policy aims to ensure the primacy of the States in conserving species before they are listed, while ensuring an effective partnership with the Service so that voluntary prelisting conservation actions will be recognized by the Service in the event that the species is later listed. An important role of the States is to ensure that voluntary prelisting conservation actions are effectively implemented and maintained. The primary tracking and oversight is to be done by the States who will then annually provide information on the conservation actions to the Service. In short, to avail themselves of the postlisting opportunity provided by the proposed policy, persons planning to

undertake voluntary prelisting conservation actions must do so within the framework of a State- or multi-State-approved program; the most recent version of a State Wildlife Action Plan or other State conservation strategies should provide useful guidance as to both the type and the location of conservation actions that would be most beneficial for particular species.

Some States may have their own laws or regulatory authorities (separate from the Act) under which they can impose mitigation requirements for certain activities. If that is the case, and a person who undertakes a voluntary prelisting conservation action is allowed by the State to treat the benefits of that action as fulfilling the mitigation requirements of State law, the individual cannot subsequently use the same action as mitigation for a separate activity carried out after listing. That is, if used prior to listing to meet the mitigation requirements of State law, the benefits of prelisting conservation actions cannot be used again as mitigation for separate actions carried out later. Use of prelisting conservation to meet State mitigation requirements should be reflected in the register maintained by a State so as to prevent such double counting.

Role of the Fish and Wildlife Service. The role of the Service is addressed in section 5 of the proposed policy. This section explains that the Service will assist the State(s), as needed, in tracking the implementation and maintenance of the prelisting conservation actions. While States have the primary role in managing species that are not listed under the Act, they may not have the necessary resources to fully track the prelisting conservation actions. Consequently, the Service will assist the States, as needed, to help achieve the mutual goal of conserving species before they need to be listed under the Act. Additionally, the Service will coordinate between the State(s) and other Federal agencies to help develop conservation actions and assist in tracking the implementation and maintenance of those actions.

Quantifying beneficial and detrimental impacts. Providing credit for an effort to mitigate or serve as a compensatory measure for the impacts of a detrimental action on a species (or any other resource) requires measuring both the detrimental impact and the offsetting benefit to be secured through a mitigation action or compensatory measure. Section 6 of the proposed policy provides that, in evaluating the impacts of both detrimental actions and beneficial actions, the Service will use the same criteria, standards, and metrics to quantify the former as it uses to quantify the latter. However, over time, new scientific information may indicate that the metric may need revision or a new metric should be used. The Service will work with the landowner to decide if the metric needs to be changed. In cases where failure to utilize a new or revised metric would appreciably reduce the likelihood of survival and recovery of the affected species in the wild, the Service will require a new or improved metric as appropriate and will alert the landowner. The proposed policy does not itself specify what those uniform criteria, standards, or metrics should be or even how they should be developed. Instead, those will need to be developed separately and are likely to vary from species to species or situation to situation. However, the benefit of a voluntary prelisting conservation action for which credit is given must be greater than the detriment from the action for which the credit is used, that is, the benefit from the prelisting action, combined with the detriment from a later action, must result in a positive assistance to the recovery of the species. This would be achieved by setting aside a specific percentage of the credits to gain a positive assistance to the recovery of the species. The specific percentage will depend on the species and the nature of the actions. In addition, a voluntary prelisting conservation action can be supplemented with an additional postlisting conservation action so that the combined benefit of prelisting and postlisting conservation actions is greater than the detriment from the postlisting detrimental actions.

Preferential use of voluntary prelisting conservation actions to offset the impacts of post-listing activities. Since the purpose of the proposed policy is to incentivize voluntary prelisting conservation actions by allowing the benefits of such actions to serve as mitigation or a compensatory measure for the detriments of postlisting actions, that purpose would clearly be undercut if the Service were routinely to require some other form of mitigation or compensatory measure for actions that it consults on or authorizes after listing. Put differently, those who invest in prelisting conservation actions under the proposed policy are likely to want a reasonable assurance that, when the Service evaluates the mitigation or compensatory measure needs for postlisting activities, we will give consideration to those already-established mitigation or compensatory measures. This scenario does not require that in all cases the Service must use prelisting conservation actions as mitigation or a compensatory measure for post-listing detrimental actions. Where there is a mitigation or compensatory measure alternative that clearly produces a better, or more certain, environmental outcome, the Service can require or encourage its use. Likewise, if the proponent of a postlisting action can achieve a commensurate environmental outcome with less effort, cost, and time expended, the proposed policy allows such proponent the flexibility to make that choice.

Effect of using voluntary prelisting conservation actions to offset the impact of post-listing activities. As previously noted, section 4 of the proposed policy makes clear that, if a State treats the benefits of a prelisting conservation action as meeting State mitigation requirements for actions carried out prior to listing, the use of those benefits precludes their later reuse. In a parallel fashion, section 7 of the proposed policy provides that, after listing, once the Service allows the benefits of a prelisting conservation action to serve as mitigation or a

compensatory measure for the impacts of a postlisting action, those same benefits may not be used again to offset the impacts of other later postlisting actions.

Proposed Policy Regarding Voluntary Prelisting Conservation Actions

Section 1. Purpose: The purpose of this policy is to incentivize voluntary conservation efforts on behalf of species before they are listed as endangered or threatened species under the Endangered Species Act ("Act"), and to clarify the manner in which the Service "will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation" under section 7(a)(2) or 7(a)(3) of the Act, as provided in 50 CFR 402.14(g)(8).

Section 2. Treatment of Voluntary Prelisting Conservation Actions. If requested to do so by the person or Federal, State, Tribe, or local government agency that undertakes a qualifying voluntary prelisting conservation action, or by a third party to whom the credits have been transferred, the Service will treat the action as (1) a measure to minimize and mitigate the impact of the taking of an endangered or threatened species pursuant to section 10(a)(1)(B) of the Act, or (2) an intended compensatory measure of a proposed Federal agency action subject to the consultation requirements of section 7(a)(2) or 7(a)(3) of the Act. Specifically, in the course of section 7 consultations, the Service will consider the beneficial effects of voluntary prelisting conservation actions to be included as part of the environmental baseline for the action under consideration if requested by the action agency or, in the case of an agency action involving a permit application, by such applicant. The Service's determination of the effects of the action

being considered under these two sections of the Act will reflect the conservation value of the voluntary prelisting action based on priority actions identified in a conservation strategy for the species. The credits earned by undertaking a prelisting conservation action may be transferred to a third party but must be used for the same species and within the same State where the credit was earned.

Section 3. Definition of Voluntary Prelisting Conservation Actions. As used in this policy, the term "voluntary prelisting conservation action" refers to any conservation measure undertaken to benefit a nonlisted species of plant or wildlife as described below, including but not limited to, the acquisition or transfer of ownership of land or water or interests therein for conservation purposes; the restraint or relinquishment of the lawful use of a particular resource negatively affecting such species; the establishment, restoration, enhancement, or commitment to continue management of habitat for such species; and the cooperation either in the introduction of such species into a portion of its historical range where it is absent or in the augmentation of such species in an area where it occurs. The benefit of the voluntary prelisting conservation action for which credit is given must be greater than the detriment of the action for which the credit is used, that is the benefit from the prelisting action combined with the detriment of a the postlisting action must result in positive assistance to the recovery of the species. In addition, a voluntary prelisting conservation action can be supplemented with an additional postlisting conservation action so that the combined benefit of prelisting and postlisting conservation actions is greater than the detriment from the postlisting detrimental action.

A voluntary prelisting conservation action must be:

(1) Beneficial to a species that is, or may become, a candidate or proposed for listing as threatened or endangered,

(2) Started prior to the final listing of the benefitted species as an endangered or threatened species under the Act, and after the date this policy is finalized. The actions may be part of an already established conservation program, plan, or strategy or be included in such a program, plan, or strategy that has been developed after the date this policy is finalized.

(3) Not required by any Federal, State, or local law, regulation, permit, or other regulatory mechanism.

(4) Undertaken as part of a State- or multi-State-administered program, including the most recent version of a State Wildlife Action Plan or other State conservation strategy that is intended to encourage voluntary conservation measures for the species.

Section 6 funds may be used to measure, monitor, and oversee the implementation of the pre-listing conservation actions as they relate to candidate species.

Section 4. Role of the States. A State choosing to participate in the voluntary prelisting conservation actions crediting system established by the proposed policy must maintain a register of all voluntary prelisting conservation actions undertaken pursuant to a State or multi-State-administered program as described above and for which the property owners have requested treatment under the proposed policy, and must record any transfer to a third party of the mitigation or compensatory measure rights associated with such actions. The State will provide appropriate oversight to ensure the effective implementation and maintenance of

voluntary prelisting conservation actions and provide a mechanism to notify the Service of each voluntary prelisting conservation action. Such actions could be based on or found in the most recent version of its State Wildlife Action Plans or other State conservation strategy for the species and could be performed by a third party, including a Federal agency. If a State- or multi-State-administered program allows voluntary prelisting conservation actions to serve as mitigation or a compensatory measure for the environmental impacts of activities regulated by the State and undertaken prior to the listing of a species as an endangered or threatened species, the State will reflect the use of such voluntary prelisting conservation actions for such purposes in its register, and, to the extent so used, such voluntary prelisting conservation actions will no longer be available for treatment as provided in this policy.

Section 5. Role of the Fish and Wildlife Service. The Service, when requested, will assist the State, to the extent its resources allow, with the measuring, monitoring, and oversight functions described in section 4. The Service will coordinate between the State and other Federal agencies to help develop conservation actions and oversee implementation of actions taken by other Federal agencies to ensure effectiveness and maintenance of those actions. The Service will review any voluntary prelisting conservation program for consistency with this policy and the other mitigation policies and guidelines established by the Service.

Section 6. Evaluating the Impacts of Voluntary Prelisting Conservation Actions. In treating any voluntary prelisting conservation action as a measure to minimize and mitigate the impact of the taking of any endangered or threatened species pursuant to Section 10(a)(1)(B) of the Act, or as an intended part of any proposed Federal action subject to the consultation

requirements of section 7(a)(2) or 7(a)(3) of the Act, the Service will evaluate the beneficial impacts of such action according to the same criteria, standards, and metrics that it uses to evaluate the beneficial impacts of other mitigating or compensatory measures and the detrimental impacts of activities that give rise to mitigating or compensatory measures. However, over time, new scientific information may indicate that the metric may need revision or a new metric should be used. The Service will work with the landowner to advise them of the need for a change. In cases where failure to utilize a new or revised metric would appreciably reduce the likelihood of survival and recovery of the affected species in the wild, the Service will require a new or improved metric as appropriate and will alert the landowner. Species-specific metrics will be developed to facilitate the evaluation of the prelisting conservation actions and the detrimental actions. The benefit of a voluntary prelisting conservation action for which credit is given must be greater than the detriment from the action for which the credit is used, that is, the benefit from the prelisting action, combined with the detriment from a later action, must result in a positive assistance to the recovery of the species. The positive assistance to the recovery of the species will be achieved by setting aside a specific percentage of the credits. The specific percentage will depend on the species and the nature of the actions.

Section 7. Effect of Treating a Voluntary Prelisting Conservation Action as a Mitigating or Compensatory Measure. To the extent that a voluntary prelisting conservation action is treated by the Service as a measure to minimize or mitigate any future impact of the taking of an endangered or threatened species pursuant to section 10(a)(1)(B) of the Act, or as an intended compensatory measure of a Federal agency action subject to the consultation requirements of section 7(a)(2) or 7(a)(3) of the Act, such action may not be used again.

Request for Information

We intend that a final policy will consider information and recommendations from all interested parties. We, therefore, solicit comments, information, and recommendations from governmental agencies, Indian Tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed above in **DATES** will be considered prior to the approval of a final document.

In addition to more general comments and information, we ask that you comment on the following specific aspects of the policy:

1) The policy requires an overall positive assistance to the species; how should we define this benefit?
2) The policy requires that a prelisting conservation action be part of a State plan. What approach should we take if there is no State plan for the species?
3) For those species for which the State does not have the authority or jurisdiction, should we revise the policy to allow prelisting conservation actions for these species to receive credit? If so, how would these prelisting conservation actions be tracked and monitored?
4) How should we quantify the value of the voluntary prelisting conservation actions and credits?
5) Based on the species and the nature of the actions, how should we determine the percentage set aside?
6) The policy allows for the transfer of credits. How could we develop an uncomplicated trading system mechanism?

If you submit information via http://www.regulations.gov, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on http://www.regulations.gov.

Required Determinations

As mentioned above, we intend to apply this policy, when finalized, in considering prelisting voluntary conservation efforts. Below we discuss compliance with several Executive Orders and statutes as they pertain to this draft policy.

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 will review all significant rules. OIRA has determined that this policy is not a significant rule.

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

emphasizes further that our regulatory system 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 policy in a manner consistent with these requirements.

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

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

This draft policy sets forth the Service's policy regarding the consideration of voluntary prelisting conservation actions through Section 7 of the Act should a species be listed. A full description of the action, why it is being considered, and the legal basis for this action are set forth earlier in this document. The policy will provide an incentive to Federal, State, or local government agencies, Indian Tribes, nongovernmental organizations, or private individuals to take voluntary conservation actions for species before they are listed under the Act.

The Service, States, local government agencies, Indian Tribes, nongovernmental organizations, or private landowners are the entities that are affected by this draft policy.

However, the effect is very limited; if they so choose, each entity would only need to report, to the State, limited information on any voluntary conservation action they took and wished to receive credit under this policy. Therefore, for the reasons described above, this draft policy would not have a significant economic impact on a substantial number of small entities.

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 draft policy 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 policy would not impose a cost of $100 million or more in any given year on local or State governments or private entities. As explained above, small governments could potentially be affected because the draft policy could place additional requirements on any city, county, or other local municipalities. However, the requirement, which is to collect minimal information on any prelisting conservation actions they voluntarily choose to implement and report to their State wildlife agency, would only result in a minimal effect.

(b) This draft policy would 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, it is not a "significant regulatory action"' under the Unfunded Mandates Reform Act. This policy could impose only minimal obligations on local or tribal governments and as well as on State governments if they choose to participate. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630, this draft policy would not have significant takings implications. This draft policy would not pertain to "taking" of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this draft policy (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This draft policy would substantially advance a legitimate government interest (establish a policy through which the Service would consider voluntary prelisting conservation actions through Section 7 of the Act should a species become listed) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this draft policy does not have significant Federalism effects and a Federalism assessment is not required. This draft policy pertains only to the Service's treatment of voluntary prelisting conservation actions should the species become listed under the Act, and would 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. A State that chooses to participate under the policy must monitor prelisting conservation actions. Since States have an existing mechanism to conduct the monitoring for other purposes, the proposed policy does not create a new requirement.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), this draft policy would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The establishment of a policy for the Service to consider voluntary prelisting conservation actions in the context of Section 7 of the Act should the species be listed should not significantly affect or burden the judicial system.

Paperwork Reduction Act of 1995

This proposed policy contains a collection of information that we have submitted to OMB for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

OMB Control No.: 1018-NEW.

Title: Voluntary Prelisting Conservation Actions.

Service Form Number(s): None.

Description of Respondents: Individuals; businesses and organizations; and State, tribal and local governments.

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

Frequency of Collection: Ongoing for recordkeeping and annually for reporting.

ACTIVITY	NUMBER OF RESPONDENTS	NUMBER OF RESPONSES	COMPLETION TIME PER RESPONSE	TOTAL ANNUAL BURDEN HOURS
Report Information to States				
Individuals	20	20	15 minutes	5
Private Sector	280	280	15 minutes	70
Government	100	100	15 minutes	25
States Collect and Report Information to the Service	10	10	20 hours	200

Totals	410	410		300

We will collect the following information:

- Description of the prelisting conservation action being taken.
- Location of the action (does not include a specific address).
- Name of the entity taking the action and their contact information (email address only).
- Frequency of the action (ongoing for X years, or one-time implementation) and an indication if the action is included in a State Wildlife Action Plan.
- Any transfer to a third party of the mitigation or compensatory measure rights.

We estimate that 10 States will choose to participate. Each State will collect information from landowners, businesses and organizations, and tribal and local governments that wish to receive credit for voluntary prelisting conservation actions. States may collect this information via an Access database, Excel spreadsheet, or other database of their choosing and submit the information to the Fish and Wildlife Service (via email) annually. We will use this information to calculate the amount of credits that the entity taking the conservation action will receive. We will keep track of the credits and notify the entity of how much credit they have earned. The entity can then use these credits to mitigate or offset the detrimental effects of other actions they take after the species is listed (assuming it is listed).

As part of our continuing efforts to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of the reporting burden associated with this proposed information collection. We specifically invite comments concerning:

- Whether or not the collection of information is necessary for the proper implementation of the proposed Prelisting Conservation Actions policy, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

If you wish to comment on the information collection requirements of this proposed policy, send your comments directly to OMB (see detailed instructions under the heading Comments on the Information Collection Aspects of this Proposal in the ADDRESSES section). Please identify your comments with 1018–AY29. Please provide a copy of your comments to the Service Information Collection Clearance Officer (see detailed instructions under the heading Comments on the Information Collection Aspects of this Proposal in the ADDRESSES section).

National Environmental Policy Act (NEPA)

We have analyzed the proposed policy in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46).

We have determined that the proposed policy is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are "of an

administrative, financial, legal, technical, or procedural nature." This action does not trigger an extraordinary circumstance, as outlined in 43 CFR 46.215, applicable to the categorical exclusion. Therefore, the proposed policy does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have preliminarily determined that there are no potential adverse effects of issuing this draft policy. Our intent with the draft policy is to provide a consistent approach to the consideration of voluntary prelisting conservation actions, including those taken on Tribal lands. We will continue to work with Tribes as we finalize this draft policy.

Energy Supply, Distribution, or Use

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The draft policy, if made final, is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Clarity of the Draft Policy

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:

a. Be logically organized;

b. Use the active voice to address readers directly;

c. Use clear language rather than jargon;

d. Be divided into short sections and sentences; and

e. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise this draft policy, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

Authors

The primary authors of the draft policy are staff members of the Ecological Services Program, Branch of Communications and Candidate Conservation, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, VA 22203.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.).

Dated: 5/8/2014

Signed: Stephen Guertin

Acting Director, U.S. Fish and Wildlife Service

~~Policy Regarding Voluntary Prelisting Conservation Actions~~