DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13, 17, and 402

[Docket No. FWS-R9-ES-2011-0099]

[FXES11150900000A2123]

RIN 1018–AY29

Endangered and Threatened Wildlife and Plants; Expanding Incentives for Voluntary Conservation Actions under the Endangered Species Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are considering proposals to amend the regulations that implement parts of the Endangered Species Act. By this notice, we are inviting public comment to help us identify potential changes to our regulations that would create incentives for landowners and others to take voluntary conservation actions to benefit species that may be likely to become threatened or

endangered species. In particular, we seek comment on whether and how the Service can assure those who take such voluntary actions that the benefits of such voluntary conservation actions will be recognized as offsetting the adverse effects of activities carried out after listing by that landowner or others. This practice sometimes referred to as "advance mitigation" or "pre-listing mitigation," is intended to encourage early conservation efforts that could reduce or eliminate the need to list species as endangered or threatened.

DATES: We will consider comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Enter Keyword or ID box, enter FWS–R9–ES–2011–0099, which is the docket number for this notice. You may submit a comment by clicking on "Submit a Comment."

By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R9–ES–2011–0099; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** below for more details).

FOR FURTHER INFORMATION CONTACT: Jim Serfis, Chief, Office of Communications and Candidate Conservation, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203 (telephone 703–358–2171). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We are considering whether and how we could revise our regulations to create incentives for landowners and others to take voluntary conservation actions to benefit species that may be likely to become threatened or endangered species, including revisions that could recognize the benefits of such conservation actions as offsetting the adverse effects of actions carried out after listing by that landowner or others. We request comments, information, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, private landowners, or any other interested parties to help us formulate any proposed regulation.

You may submit your comments and materials concerning this notice by one of the methods listed in **ADDRESSES**. We will not accept comments sent by e-mail or fax or to an address not listed in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including your personal identifying information—will be posted on the Web site. If you submit a hard copy comment 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 comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Background

On January 18, 2011, President Obama issued Executive Order 13563, which called for improvements in the nation's regulatory system to promote predictability and reduce uncertainty and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. Pursuant to the Executive Order, the Department of the Interior published notices on February 25, 2011, and July 11, 2011, asking the public for suggestions as it prepared a plan for retrospective regulatory review. Representatives from State government, non-governmental groups and industries ranging from residential construction to wind energy, and to electric utilities recommended that the Department of

the Interior update ESA regulations. Subsequently, the Department of the Interior published its final Plan for Retrospective Regulatory Review. That Plan identified a number of areas where changes in the ESA regulations could improve conservation effectiveness, reduce administrative burdens, create clarity and consistency for affected interests, and encourage partnerships, innovation, and cooperation. To achieve these goals, the Plan identified a need to clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners.

Currently, landowner agreements that provide regulatory assurances under the ESA take three principal forms: Habitat Conservation Plans (HCPs), Safe Harbor Agreements (SHAs), and Candidate Conservation Agreements with Assurances (CCAAs). Habitat Conservation Plans, which are required in order to secure a permit to take listed wildlife species incidental to otherwise lawful activities, set forth measures to be taken to mitigate the impacts of such authorized taking. Although HCPs must always cover one or more listed wildlife species, they may also cover unlisted species. Safe Harbor Agreements are voluntary agreements under which a property owner agrees to carry out conservation measures to benefit listed species without incurring any new or additional regulatory liability as a result of their voluntary action. Candidate Conservation Agreements with Assurances are voluntary agreements under which a property owner agrees to implement conservation measures for candidate or other unlisted species. In exchange, the Service issues an enhancement of survival permit that becomes active when the species covered by the CCAA is listed and allows a prescribed level of incidental take by the landowner for the duration of the agreement. While

CCAAs enable a landowner to secure assurances as to what their post-listing responsibilities will be in advance of listing, these agreements do not explicitly address whether and how pre-listing conservation measures might serve as mitigation for post-listing activities that could negatively affect species, such as land clearing, construction activities, or water diversion.

Related to these efforts, at present, Service policy pertaining to conservation banking allows landowners or others to earn credits that can be used to offset the negative impacts of proposed actions on listed species. Under that policy, a credit represents a standardized way of quantifying the impact of beneficial actions on the well being of a particular listed species. Credits can be used to offset the negative effects of detrimental actions, with the magnitude of those negative effects quantified in the same manner. We seek any ideas to improve these forms of landowner agreements.

It is possible that voluntary conservation actions for unlisted species might lead to a determination that a particular species does not need to be listed. If the need to list a species under the ESA can be avoided, everyone benefits. The species benefit from early action to address threats to their survival. Landowners and other regulated interests avoid the imposition of potentially costly restrictions on their activities. The Service avoids the need to dedicate scarce conservation dollars to additional species. The States maintain their primary management authority over non-listed species, ensuring that local authorities respond to local problems with input from their residents.

Although everyone benefits from avoiding the need to list a species, there are often inadequate incentives for many people to undertake conservation action for species prior to listing. Voluntary conservation actions undertaken by one or a few persons are unlikely to be sufficient to affect the need to list the species. Thus, those who do undertake such actions in the hope that doing so will avert the need to list the species are often disappointed or frustrated by the fact that listing nevertheless occurs. Moreover, such voluntary actions prior to listing may actually result in those persons being subject to greater restrictions after listing than they would have been had they done nothing at all (because, for example, their voluntary actions make the species more numerous or more widespread on their property than it otherwise would have been). Avoiding the potential for voluntary conservation actions to result in such unintended restrictions is a key purpose of a CCAA. Through a CCAA, the Service provides the assurance that if the conditions of the agreement are met, the landowner will not be asked to do more, commit more resources, or be subject to further land use restrictions than agreed upon if the species is listed. However, the development of such Agreements has often been time-consuming and difficult. Accordingly, the Service seeks suggestions to reduce the time and difficulty associated with CCAAs so as to further the goals of greater efficiency and flexibility in ESA regulatory programs.

We also give advance notice of our intent to propose a rule to encourage landowners and other potentially regulated interests to fund or carry out voluntary conservation actions beneficial to candidate and other at-risk species by providing a new type of assurance that, in the event the species is listed, the benefits of appropriate

voluntary conservation actions will be recognized as offsetting the adverse effects of activities carried out by that landowner or others after listing.

Once a species is listed as endangered or threatened, actions that adversely affect it may need permits under section 10 of the ESA or approval under the interagency consultation provisions of section 7 of the ESA. For actions reviewed under the interagency consultation provisions of section 7, measures that offset the adverse effects of those actions may be incorporated into and made a part of the proposed action as a way of reducing its net effects and meeting the approval standards of section 7.

Although existing regulations at 50 CFR 402.14(g)(8) require the Service to consider certain beneficial actions taken "prior to the initiation of consultation," there is no clear mechanism for acknowledging the benefits to a species of actions voluntarily taken by a landowner or other person prior to its listing, or for recognizing those benefits as mitigation or other requirements needed to secure approval for an action carried out after listing.

An exception to the foregoing is any HCP that covers both listed and unlisted species, as many large-scale HCPs do. These plans, and the permits issued in association with them, acknowledge or verify the conservation commitments contained in the plans as fulfilling the requirements of the ESA with respect to all covered species even when required conservation actions are carried out before some covered species are actually listed, and the development activities for which they serve as mitigation may be carried

out after the species is listed. Implicitly, at least, these plans are accepted as mitigation for actions undertaken after some covered species are listed. Thus, there is precedent for the conceptual idea examined here, but no clear mechanism for accomplishing mitigation prior to listing outside the context of multispecies HCPs.

We request suggestions and input from the public on how best to establish clear mechanisms to encourage landowners and other potentially regulated interests to fund or carry out voluntary conservation actions beneficial to candidate and other at-risk species by providing assurances that, in the event the species is listed, the benefits of appropriate voluntary conservation actions will be recognized as offsetting the adverse effects of activities carried out after listing by that landowner or others. In addition to the requests above, we specifically request input from the public on the following questions:

1) How can the Service allow for the recognition of conservation credits for voluntary action taken in advance of listing in a manner that is efficient, readily understood, and faster? How can this be accomplished in an expeditious manner?
2) Should credits recognized for voluntary conservation actions taken prior to listing be available for use solely by the person who created them or should they be transferable to third parties?
3) If voluntary conservation actions undertaken prior to listing generate conservation credits that can be used to offset impacts of post-listing activities, should they be based solely on the beneficial actions of the person undertaking them, or should they be based on the net impacts of both beneficial and detrimental actions?
5) What role should the States play in recognizing and overseeing the development of credits from voluntary conservation actions taken for species not yet listed?
6) How can or should the Service specify in advance of listing the manner in which it will quantify the value of voluntarily undertaken conservation actions?

7) How the Service's conservation banking policy could be revised to allow for the use of conservation credits accrued from voluntary actions taken prior to listing?
8) What changes, if any, are needed to the following regulations, policies and guidance (The handbooks and policy are available at http://www.fws.gov/endangered/esa-library/index.html.) to clarify mechanisms by which the Service can give "credit" for beneficial actions for unlisted species:
    a. 50 CFR part 13
    b. 50 CFR part 17
    c. 50 CFR part 402
    d. The Service's section 7 Handbook
    e. The Service's HCP Handbook
    f. The Service's Conservation Banking Policy
9) How could the Service use pilot projects to demonstrate that the ESA can provide landowners with credits and regulatory assurances for actions intended to benefit candidate species? Are there existing situations where such pilot projects could facilitate conservation for candidate species?
10) How can a landowner use such voluntary "prelisting mitigation" activities to satisfy requirements arising from any future section 7 consultation (such as "conservation measures", "reasonable and prudent measure" or "reasonable and prudent alternatives)?

In considering these and other potential changes to the ESA's implementing regulations, we intend to be guided by the following objectives:

- To improve the effectiveness of the ESA at conserving endangered, threatened, and candidate species;
- To eliminate unnecessary process requirements and to make as efficient as possible the remaining process requirements;
- To improve the clarity of, and eliminate the inconsistencies among, our regulations;

- To engage the States, conservation organizations, and private landowners more effectively as conservation partners;
- To encourage greater experimentation and creativity in the implementation of the Act; and
- To reduce the frequency and intensity of conflicts as much as possible.

Accordingly, we invite recommendations for changes to our regulations or policy that would further these objectives.

Authority

This notice is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: March 6, 2012

Signed: Daniel M. Ashe

Director, Fish and Wildlife Service

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