

Programmatic Safe Harbor Agreement  
for the  
Northern Spotted Owl

between

U.S. Fish and Wildlife Service  
Oregon Department of Forestry  
and  
USDA Natural Resources Conservation Service

July 2009

## **Summary**

This Programmatic Safe Harbor Agreement (Agreement) between the Oregon Department of Forestry (ODF), the Natural Resources Conservation Service (NRCS), and the U.S. Fish and Wildlife Service (Service) is intended to benefit the federally-listed northern spotted owl (*Strix occidentalis caurina*). It also establishes Endangered Species Act (ESA) regulatory assurances to participating private landowners that are implementing forest management activities in the state of Oregon.

The programmatic nature of the Agreement provides eligible landowners with a streamlined process for obtaining ESA regulatory assurances in conjunction with their commitment to implement the conservation measures identified in this Agreement which will benefit the spotted owl by creating, maintaining or enhancing its habitat. Without the regulatory assurances provided under the Agreement and permit, landowners may otherwise be unwilling or reluctant to engage in activities that would benefit the spotted owl on their properties. As an additional incentive, cost-share and conservation easement monies may be available to qualified landowners through NRCS's Healthy Forest Reserve Program (HFRP) when appropriated by Congress. Similar to Safe Harbor Agreements, the HFRP is also a voluntary program whose purposes include restoration and enhancement of ecosystems to promote the recovery of threatened and endangered species coincident with the retention of working forests.

Private landowners who undertake voluntary management activities that provide a net conservation benefit to spotted owls, as described in this Agreement, will receive Safe Harbor assurances. The Agreement will provide assurances to landowners that Federal regulatory obligations, with respect to spotted owls, will not increase as a result of conducting management activities designed to benefit spotted owls. These assurances will be provided by an ESA section 10(a)(1)(A) enhancement of survival permit (Permit) issued to ODF by the Service. Participating private landowners in Oregon will be covered under this Permit through a Certificate of Inclusion issued by ODF.

## **1.0 Introduction**

This Agreement was developed to facilitate the accrual of conservation benefits for the spotted owl on non-Federal lands in Oregon and address the needs of private landowners who wish to manage their forest lands in a productive, cost-effective manner. Although recovery of the spotted owl is primarily dependent on Federal forest lands being managed for this purpose, private lands can provide demographic support to spotted owl populations within federally-managed habitat blocks and facilitate dispersal of juvenile owls among habitat blocks, especially where habitat connections between blocks of Federal land do not exist on the landscape.

## **2.0 Authority and Purpose**

### **2.1 Authority**

This Agreement was developed pursuant to the Service's Safe Harbor Agreement policy (64 FR 32717) and regulations (64 FR 32706) under section 10(a)(1)(A) of the ESA. Because this Agreement and Permit are programmatic in nature, ODF will have the authority to issue Certificates of Inclusion to qualified private landowners in Oregon that elect to participate. Each enrollee's land management plan will specify the conservation measures, consistent with this Agreement, that must be carried out in order for ESA regulatory assurances to apply.

Stewardship Agreements will be the mechanism for individual landowners to enroll into the Agreement. Stewardship Agreements will be developed under the authority of Oregon Revised Statute 541.423 and Oregon Administrative Rule 629-021-0100. These Stewardship Agreements shall include a description of baseline conditions, management actions that will benefit spotted owls, and monitoring requirements that are consistent with the provisions set forth below in this Agreement. Based on a determination that a land management plan is expected to achieve a net conservation benefit for the spotted owl, a Certificate of Inclusion will be issued to the participating landowner under the Permit issued to ODF. The Certificate of Inclusion is subject to all of the terms and conditions of this Agreement and Permit.

Title V of the Healthy Forests Restoration Act of 2003 (Pub. L. 108-148) authorizes the establishment of the HFRP. NRCS published an interim final rule on the implementation of the HFRP on May 17, 2006 (71 FR 28548). The Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246) has authorized funding for each of the fiscal years 2009 through 2012 to carry out the HFRP in those states determined to be eligible for such funding by the NRCS. Oregon has been approved for funding for Fiscal Year 2009, and may be approved for funding in subsequent years, although funding is not guaranteed. Programs offered by NRCS may change through the term of this Agreement, but future programs with similar objectives and conservation practices could also be included under this Agreement.

### **2.2 Purpose**

The purpose of this Agreement between the Service, ODF, and NRCS (hereinafter referred to collectively as the Parties), and the Stewardship Agreements between ODF and private landowners, is to encourage the implementation of forest management activities that include conservation measures beneficial to spotted owls. Through this Agreement, the Parties seek to conserve and maintain spotted owls in Oregon by facilitating the development and maintenance of forest habitat features that will be used by spotted owls on enrolled properties. Landowners that commit to manage their forest land in a manner that benefits spotted owls under a Stewardship Agreement with ODF would be eligible to "opt in" to the Safe Harbor Agreement and Permit to obtain regulatory assurances. To accomplish those objectives, ODF will actively coordinate

with forest landowners in western Oregon within the known range of the spotted owl and encourage them to incorporate forest management practices that create, maintain, and/or enhance spotted owl habitat on their properties. Through the Certificate of Inclusion eligible landowners may receive regulatory assurances and incidental take authority for impacts to any spotted owls and/or their habitat above each landowner's initially established baseline responsibilities.

NRCS will work cooperatively with ODF on the development of Stewardship Agreements for landowners who intend to participate in HFRP or other financial assistance programs and who seek regulatory assurances through this Agreement.

This Agreement has the following goals:

1. To provide a net conservation benefit to spotted owls and,
2. To provide Safe Harbor Assurances to private landowners.

This Agreement has the following objectives:

1. To increase the number of spotted owls in Oregon;
2. To increase the amount of spotted owl habitat on private land in Oregon;
3. To increase the number of landowners who manage their forest land in a manner that will increase suitable spotted owl habitat;
4. To provide regulatory certainty to forest landowners who manage their forest land in a manner that will benefit spotted owls; and
5. To provide incentives to landowners to manage for older, more structurally complex forests by reducing the regulatory risk and uncertainty from spotted owls being attracted to their land.

### **3.0 Agreement**

This Agreement, effective on the date of last signature contained in Section 9.0, is between the Service, ODF and NRCS:

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Oregon Department of Forestry  
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**NRCS:** Ron Alvarado, State Conservationist  
USDA Natural Resources Conservation Service  
1201 NE Lloyd Blvd., Suite 900  
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**Service:** Paul Henson, State Supervisor  
U.S. Fish and Wildlife Service  
Oregon Fish and Wildlife Office  
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**This Agreement covers the following property:** All non-federal lands, including Tribal lands, within the State of Oregon and within the range of the spotted owl (covered lands) are eligible to be a part of this Agreement. The property of each landowner enrolled by the ODF under this Agreement is considered the “enrolled property” as defined in the Service’s Safe Harbor Policy.

**This Agreement covers the following species:** Northern Spotted Owl (*Strix occidentalis caurina*). The spotted owl, a federally-listed as threatened species, is the only species for which incidental take coverage is being provided.

**Agreement and Permit Duration:** The duration of this Agreement and Permit is 50 years. Each individual property will be assessed as to whether the individual land management plans will provide a net conservation benefit. Properties may be enrolled for as little as 10 years. The Service believes a net conservation benefit is achievable under this time frame, in particular for properties with existing habitat where management actions improve the quality of the habitat. However, we anticipate the majority of the properties are likely to be enrolled for a longer term. The 50-year Agreement term allows the flexibility for enrolling property owners over a period of decades while still allowing a net conservation benefit to be achieved by the enrollees. The enhancement of survival permit that the Service will issue ODF in association with this Agreement will have the same duration of 50 years. By mutual consent of the Parties, this Agreement and Permit may be extended to preserve and enhance the benefits to both landowners and spotted owls, provided the issuance criteria in the Service’s Safe Harbor regulations continue to be met and Service permit regulations in force at that time are followed.

### 3.1 Description of Covered Species

The northern spotted owl (spotted owl) inhabits structurally complex forests from southwest British Columbia through the Cascade Mountains and coastal ranges in Washington, Oregon, and California, as far south as Marin County. The spotted owl was listed under the ESA as threatened on June 26, 1990, because of widespread loss of suitable habitat across the spotted owl’s range and the inadequacy of existing regulatory mechanisms to conserve the spotted owl. Past habitat loss and current habitat loss are also threats to the spotted owl, even though loss of habitat due to timber harvest has been

greatly reduced on Federal lands for the past 2 decades. Many populations of spotted owls continue to decline, especially in the northern parts of the subspecies' range, even with extensive maintenance and restoration of suitable habitat in recent years. The spotted owl has become rare in British Columbia, southwestern Washington, and the northern coastal ranges of Oregon. Managing sufficient habitat for the spotted owl now and into the future is essential for its recovery. However, securing habitat alone may not recover the spotted owl. Based on recent scientific information, competition from the barred owl (*S. varia*) poses a significant and complex threat to the spotted owl that will need to be further investigated.

Scientific research and monitoring indicate that spotted owls generally rely on mature and old-growth forests because these habitats contain the structures and characteristics required for nesting, roosting, and foraging. Forested stands with high canopy closure also provide thermal cover and protection from predators. Although spotted owls can disperse through highly fragmented forested areas, the stand-level and landscape-level attributes of forests needed to facilitate successful dispersal have not been thoroughly evaluated or described.

Spotted owls are territorial and usually monogamous, forming long-term pair bonds. Home-range sizes vary geographically, generally increasing from south to north, which is likely a response to differences in habitat quality. Estimates of median size of their annual home range vary from 2,955 acres in the Oregon Cascades to 14,211 acres on the Olympic Peninsula. The Service generally uses a 0.7-mile-radius circle (984 acres) from the activity center to delineate the most heavily used area during the nesting season. Forest stand characteristics, the amount of forest fragmentation, breeding status, and time of year can influence provincial home range size.

Courtship behavior usually begins in February or March, and females typically lay eggs in late March or April. After they leave the nest in late May or June, juvenile spotted owls depend on their parents until they are able to fly and hunt on their own. Parental care continues after fledging into September. By late summer, the adults are rarely found roosting with their young and usually only visit the juveniles to feed them at night.

The composition of the spotted owl's diet varies geographically and by forest type. Generally, flying squirrels are the most prominent prey for spotted owls in Douglas-fir and western hemlock forests in Washington and Oregon, while dusky-footed wood rats are a major part of the diet in the Oregon Klamath, California Klamath, and California Coastal Provinces. Depending on location, other important prey include deer mice, tree voles, red-backed voles, gophers, snowshoe hare, bushy-tailed wood rats, birds, and insects, although these species comprise a small portion of the spotted owl diet.

### **3.2 Description of Existing Conditions**

Due to the loss of older forests across the landscape, spotted owl populations have declined throughout their historic range. The spotted owl has declined primarily due to forest harvest, alteration, fragmentation, increased intensity and frequency of forest fires,

lack of beneficial habitat management, and the effects of demographic isolation. More recently, competition from the barred owl (*S. varia*) has been recognized as potentially posing a significant and complex threat to the spotted owl. The decline on non-federal lands has resulted primarily from timber harvest, short-rotation silviculture, and fragmentation of older forest stands. Loss of habitat due to timber harvest has been greatly reduced on Federal lands for the past two decades.

Extensive research, monitoring, and management are currently directed toward habitat on Federal lands, where the majority of habitat and spotted owls currently exist. In Oregon, about 85 percent of known spotted owl activity centers occur on Federal lands and about 15 percent occur on non-federal lands. However, many occurrences on private lands likely remain unknown, and numerous reported historic occurrences on both Federal and non-federal lands might represent inactive site centers. Some site centers on Federal lands utilize adjacent non-federal lands as part of their overall home range.

Geographically and demographically isolated spotted owls in fragmented habitats that are not managed for the species' benefit have a low probability of persistence. The probability of persistence is affected not only by habitat condition and demographic uncertainty, but also by proximity and connectedness to other populations to facilitate dispersal between populations.

It is anticipated that through the involvement of non-federal landowners in this Agreement, a greater contribution to the conservation status of spotted owl populations in Oregon will be achieved. Oregon forest landowners and ODF have expressed an interest in, and support for, a mechanism that will provide long-term management flexibility and conservation benefits for spotted owls, as well as ESA regulatory assurances.

## **4.0 Agreement Implementation**

Implementation of this Agreement is initiated by the Service's issuance of an enhancement of survival permit to ODF that authorizes ODF's issuance of Certificates of Inclusion under their Permit to participating landowners that are party to a Stewardship Agreement and whose land management plan (developed in accordance with this Agreement) has been approved by ODF. Implementation and enrollment of landowners will be a joint effort between ODF and the Service. The agencies will work together in partnership to review plans and ensure that enrollment of landowners is consistent with the intent of this Agreement.

### **4.1 Enrollment Procedures**

The property of each landowner enrolled by ODF under this Agreement is considered the "enrolled property" as defined in the Service's Safe Harbor Policy. However, each property applying for enrollment must demonstrate a net conservation benefit for spotted owls. Eligible landowners will be those that have lands within the range of the spotted owl, forest conditions that have the potential to be spotted owl habitat or already is, and

planned forest management strategies that are consistent with this Agreement and will likely result in a net conservation benefit for spotted owls.

In order to enroll a property under the terms of this Agreement, ODF and the participating landowner must enter into a Stewardship Agreement, and sign a Certificate of Inclusion that transfers the terms and conditions and the ESA regulatory assurances of the Permit to the owner of the enrolled property. The Certificate of Inclusion will provide regulatory assurances to the landowner based on the baseline condition(s) of the landowner's property (See Section 4.5 below). The Stewardship Agreement will contain the specific plans on how landowners will meet the specifications for inclusion in the Safe Harbor Agreement and Permit.

The term of the Certificate of Inclusion will be no longer than the remaining term of ODF's Permit, which is 50 years. The Stewardship Agreement of a participating landowner may serve as the basis for determining the term of the Certificate of Inclusion, however, landowners and ODF may enter into Stewardship Agreements that extend beyond the term of the Certificate of Inclusion in order to maintain regulatory certainty under Oregon's Forest Practices Act. Landowners that receive funding through HFRP or other NRCS programs may have additional requirements for length of sign-up. A minimum period of 10 years is anticipated for Stewardship Agreements in order to allow enough time for a net conservation benefit to be achieved. In many cases, the duration of Stewardship Agreements will be longer to allow for the development of suitable habitat conditions.

A landowner wishing to enroll their property under this Agreement with ODF will be required to follow the steps below:

- Meet with ODF to discuss the terms and conditions of this Agreement;
- Develop a Stewardship Agreement that includes a land management plan sufficient to meet the requirements of this Safe Harbor Agreement;
- Both ODF and the landowner must sign the Stewardship Agreement for it to be valid; for projects funded through NRCS programs, NRCS may need to also sign the Stewardship Agreement, as applicable;
- Both ODF and the landowner must sign the Certificate of Inclusion.

The Parties agree to provide assistance to landowners in the enrollment process.

#### **4.1.1 Stewardship Agreements**

ORS 541.423 gives authority to ODF to enter into Stewardship Agreements with landowners who wish to voluntarily improve fish and wildlife habitat and water quality. One of the intended benefits of Stewardship Agreements is regulatory certainty for enrolled landowners.

Landowners who wish to receive Safe Harbor assurances relative to forest management activities for spotted owls will include a land management plan in their Stewardship Agreement that specifically addresses the requirements of this Agreement.

All Stewardship Agreements must include:

- a) Landowner name, contact information, property location, total acres, county;
- b) The name of the watershed in which the property is located;
- c) A map and description of the property, existing land uses, habitats and water features present;
- d) The name of any plans and programs the landowner is implementing or participating in, including a copy of any current certification or other conservation agreements. For participants who are utilizing NRCS funding, this will include a plan that meets NRCS program specific criteria;
- e) Identification of state, regional, and local conservation goals that the Stewardship Agreement is implementing; and
- f) A description of any conservation efforts for fish, wildlife, and water quality that are being used or proposed;
- g) Identification of the management plan subject to application review and subsequent audits.

Stewardship Agreements used for inclusion in this Safe Harbor Agreement must include:

- a) A description of baseline conditions for the spotted owl and its habitat (see section 4.4 for baseline discussion) based on best available information, and a description of the methods used to determine the baseline.
- b) A description of the management actions to be implemented that are likely to result in a net conservation benefit to spotted owls and the timeframe within which these benefits are likely to be achieved;
- c) A description of the activities that would be expected to return the enrolled property to baseline conditions and the extent of incidental take of the spotted owl, if any, that would likely result from such activities;
- d) A description of monitoring to be conducted, including: a schedule for monitoring the baseline conditions and any incidental take as authorized in the permit likely to occur or that has occurred as a result of management activities; and the parties responsible for conducting such monitoring activities;
- e) A procedure for notifying and transferring the Certificate of Inclusion to any successor in interest, giving the Service and ODF at least 30 days notice prior to any sale or transfer of interest in the covered lands; and
- f) The term of the Stewardship Agreement.

The term of the Stewardship Agreement should provide for a net conservation benefit to be achieved for spotted owls. For landowners with a baseline of 'zero' spotted owl habitat, the term should be sufficient for habitat to develop and be maintained for sufficient time to accrue benefits for spotted owls.

A written land management plan is required as part of the Stewardship Agreement. Plans may include confidential landowner information and are generally not subject to public disclosure. Information necessary to support the Certificate of Inclusion must be included in the Stewardship Agreement, or the landowner must voluntarily disclose their land management plan. Stewardship Agreements will be developed by the participating landowner in cooperation with ODF, along with Service participation in the process.

Stewardship Agreements require a 21-day public notice and comment period. After any comments are addressed and ODF determines the Stewardship Agreement to be adequate, ODF will proceed to finalize the Stewardship Agreement and sign a Certificate of Inclusion with the landowner. ODF will make available to the Service, upon request, records and materials in its possession relating to the implementation of the program, including newly executed Stewardship Agreements on an on-going basis.

ODF will designate an Agreement Manager and will provide: oversight of baseline property assessments of lands enrolled in the Agreement; implementation of management actions; compliance monitoring (as further described below); effectiveness (biological) monitoring; and technical assistance to the maximum extent practicable in developing and implementing these Agreements.

## **4.2 Certificate of Inclusion**

Upon execution of each Stewardship Agreement, and enrollment in the Safe Harbor Agreement, individual landowners will be given a Certificate of Inclusion (see Appendix A). The Certificate of Inclusion provides the regulatory assurance (i.e. incidental take coverage) to the participating landowner that the enrolled property can be returned to the established baseline condition at the end of the term of the Certificate of Inclusion or sooner, provided a net conservation benefit has already been achieved. The term of the Certificate of Inclusion will generally extend to the end of the Permit term in order to provide the participating landowner with sufficient time to return to their original baseline conditions while also allowing them to voluntarily extend the amount of time that the conservation benefits accrue. The Certificate of Inclusion identifies the property owner for whom incidental take is authorized, references the issued permit number that authorizes the take, and includes a concise legal description of the enrolled property. The Certificate of Inclusion provides the mechanism to commit the enrolling landowner to the terms of the Safe Harbor Agreement and Permit.

## **4.3 Conservation Strategy/Measures**

There are a variety of forest management actions that a private landowner can implement to create or improve suitable spotted owl nesting, roosting, foraging and/or dispersal habitat. The Service's 2008 final Recovery Plan for the Northern Spotted Owl (pp. 50-53) provides a description of spotted owl habitat that can guide forest management actions. Stewardship Agreements that include silvicultural practices (e.g., uneven-aged stand treatments, thinning from below, snag creation, increasing downed wood retention)

likely to achieve the characteristics of spotted owl habitat on the enrolled property, taking into account the landscape context in which the site is located, are likely to provide for a net conservation benefit to the spotted owl. The silvicultural practices utilized should result in a net increase in tree diameters and potentially increased stand diversity at the end of the Stewardship Agreement at a minimum. Management for a diversity of tree species, large snags, and multiple canopy layers should be included in the plans where feasible. Stewardship Agreements will offer important benefits to spotted owl populations and to landowners who choose among the management actions listed below. ODF and the Service will review each Stewardship Agreement to ensure that the management actions taken will be reasonably expected to provide a net conservation benefit to spotted owls.

1. Forest Management - ODF may enroll a landowner under a Certificate of Inclusion if the landowner agrees to maintain or implement a forest management strategy or plan on the enrolled property that would provide habitat for spotted owls. An eligible forest management strategy or plan would include either of the following circumstances:

- a) For enrolled properties with existing spotted owl habitat, the landowner agrees to implement or continue a forest management strategy that maintains or enhances that habitat. Examples include the use of uneven-aged silvicultural treatments, thinning from below, snag creation, increases in downed wood retention, etc. This will provide an immediate net conservation benefit.
- b) For enrolled properties that do not have suitable spotted owl habitat at the time of enrollment, the landowner agrees to implement or maintain a forest management strategy or plan that promotes the development of habitat to a condition that will, in the future, provide potentially suitable spotted owl habitat. The net conservation benefit will not be achieved until the area where the forest management strategy is implemented or maintained either becomes occupied by spotted owls or becomes potentially suitable habitat, for a sufficient time for the benefit to accrue.

2. Future Conservation Measures/Adaptive Management - There may be a time in the future when a conservation measure is identified, based on future spotted owl research, that may be determined to be critical to the recovery of the spotted owl. Enrolled landowners may voluntarily modify their conservation measures to include new conservation measures if the landowner, the Service, and ODF determine that these modifications are necessary or appropriate to achieve a greater benefit to the spotted owl and still meet the landowner's objectives.

### **4.3.1 Healthy Forest Reserve Program**

The purpose of the HFRP in Oregon is to provide additional suitable habitat for the spotted owl. The goals of the program are to:

- 1) Provide financial incentives that support the connection between spotted owl habitat, biodiversity, carbon sequestration and sustainable timber harvest;
- 2) Promote mutual benefits of spotted owl habitat and sustainable timber harvest practices;
- 3) Provide long-term protections for spotted owl habitat on forestlands in Oregon; and
- 4) Provide direct incentives to forest landowners willing to extend their harvest rotations and increase biodiversity on their land for the improvement of spotted owl habitat.

In Oregon, the HFRP offers two enrollment options:

1. A 10-year restoration agreement for which the landowner may receive 50 percent of the average cost of the approved conservation practices;
2. A permanent easement option for which landowners may receive 100 percent of the easement value of the enrolled land plus 100 percent of the average cost of the approved conservation practices. HFRP easement holders will be required to re-enroll in this Agreement when their certificate expires, or participate in another similar safe harbor-like assurance if the Agreement is no longer in existence.

It is important to note that landowners are not required to enroll under this Agreement if they wish to participate in ODF's Stewardship Agreement without specific consideration for spotted owls, or accept NRCS financial assistance other than HFRP. Participating in this Agreement is at the discretion of the landowner. However, HFRP participants will be required to work with ODF and NRCS to develop a Stewardship Agreement and to enroll under this Agreement as a condition of their participation in the program. The Stewardship Agreement and land management plan will have to meet the requirements for both the HFRP and the Safe Harbor Agreement-related ESA Permit and Certificate of Inclusion.

#### **4.4 Baseline Conditions**

The Service's Safe Harbor Policy defines "baseline conditions" as "population estimates and distribution and/or habitat characteristics and determined area of the enrolled property that sustain seasonal or permanent use by the covered species at the time the Safe Harbor Agreement is executed." ODF and the participating landowner are responsible for determining the spotted owl baseline on a proposed enrolled property as part of a land management plan by evaluating the following forest characteristics: the size of the stand, the stand age, canopy cover, tree species composition, the presence of suitable spotted owl nest trees, the proximity of the covered lands to other suitable habitat, and the proximity of the covered lands to known spotted owl activity centers or non-resident single locations. The assessment of baseline conditions should be expressed in terms of the acres of spotted owl habitat, with some description of the existing habitat characteristics (see below).

The Service will, at times, assist with the determination of baseline conditions, particularly in the early phase of implementing this Safe Harbor Agreement. This participation will ensure a coordinated approach in implementing technical aspects of the Agreement such as establishing baseline.

The first step in determining the baseline is to identify what variables or parameters will be used that can be measured and/or monitored and that will reflect upon the potential benefits to be achieved under the Agreement. For the purposes of this Agreement, the presence of spotted owls and/or the presence of forest conditions conducive to spotted owl breeding (i.e. suitable habitat) will be used to describe the baseline condition. Under this Agreement, baseline conditions will be primarily based upon acreage. A baseline of greater than zero will generally be established for acreage of enrolled properties that possesses: older trees (> 80 years old); more structurally complex, multi-layered conifer forest containing some large diameter trees (> 30 inches dbh); high amounts of canopy cover (> 60 percent); sufficient space below the canopy for spotted owls to fly; broken-topped live trees; large snags, trees with large cavities; and fallen trees (downed wood). Because of the complexity of evaluating potential spotted owl habitat conditions, baseline conditions will be established on a case-by-case basis using the above referenced forest qualities.

If no suitable spotted owl habitat is present on the landowner's enrolled acres, then the baseline will be 'zero'. ODF will seek information from existing databases or knowledgeable sources on the presence of spotted owls in the vicinity of a landowner's property to assess whether there could be any potential impacts to these spotted owls as a result of the landowner's proposed management activities (due to disturbance for example).

However, a landowner with suitable spotted owl habitat may elect to have surveys conducted on their property following established protocols if recent information is otherwise not available about the presence of spotted owls in the area. If surveys indicate no spotted owls within 1.5 miles of the enrolled lands, then the baseline will be 'zero'. In these circumstances, it is likely spotted owls would not be harmed (i.e. incidentally taken) by harvest operations within such lands.

Accurate suitable habitat assessments or spotted owl surveys are essential for determining baseline conditions. Personnel experienced in forestry and spotted owl surveying should be used to conduct baseline surveys. Baseline condition characterization, if not done with the assistance of ODF or the Service, is subject to approval by ODF and the Service and may require ODF and/or the Service to visit the property. All baseline determinations require the Service's review. Since baseline conditions will be described in all Stewardship Agreements, the Service will have the opportunity to review them while reviewing the Stewardship Agreement. However, the Service encourages early review of the baseline conditions prior to submission of the Stewardship Agreement to avoid questions or disagreements. Preliminary review of baseline conditions should reduce the likelihood of delay at that point in the approval process. If ODF and/or the Service determines that inspection of the enrolled property is necessary in order to establish the baseline conditions, ODF and/or the Service will obtain the participating landowner's permission prior to entering the property for this purpose or for any other purposes related to this Agreement.

#### **4.4.1 Maintaining Baseline Conditions**

For enrolled properties whose baseline conditions are greater than 'zero', the landowner's responsibilities are:

1. Protect all suitable spotted owl habitat for the term of the Certificate of Inclusion. Forest management activities that enhance the value of that habitat are allowed as described in the approved land management plan. However, forest management activities that are likely to cause disturbance to nesting spotted owls cannot occur on enrolled lands during the spotted owl nesting season from March 1 through September 30. Timing restrictions may be lifted to allow harvest operations after July 15 if it is determined that: (1) no spotted owls are present; (2) the owls are not nesting; (3) the nesting attempt failed; or (4) the young have fledged and are capable of sustained flight. If there is a request to conduct forest management activities within 1000 feet of an activity center from July 15 through September 30, the enrolled landowner shall notify ODF 60 days in advance of the desired starting harvest date. ODF shall determine whether or not harvesting operations can proceed based upon whether adverse impacts to nesting spotted owls will reduce the likelihood of maintaining a net conservation benefit.
2. Implementation of forest management activities described in the land management plan that are intended to enhance spotted owl habitat conditions in the long-term but may temporarily degrade suitable spotted owl habitat conditions in the short-term are allowed, but not to an extent that the affected habitat is likely to be non-functional. Spotted owl habitat must be maintained on-site and the management actions should not eliminate spotted owl use after treatment. For example, light to moderate thinning that maintains at least 40 percent canopy closure would continue to provide some habitat benefits while accelerating development of habitat complexity in the long term. The average tree sizes of stands and potential for habitat development should always increase over the term of the Stewardship Agreement, regardless of the management regime. Snag retention and

creation, and downed wood retention are encouraged as a component of the forest management plan.

3. New roads can be constructed on an enrolled property as described in the land management plan. However, no new roads can be constructed within spotted owl habitat areas from March 1 through September 30, unless adequate surveys indicate spotted owls have not nested or their nest failed, then construction can occur after July 15. If roads are to be constructed within baseline habitat, they must be needed for access to those stands whose management will result in enhancement of the baseline habitat.

4. Avoid activities that may result in disturbance and incidentally cause injury or death to spotted owls on or adjacent to the enrolled property.

#### **4.5 Providing a Net Conservation Benefit**

The primary objective of this Agreement is to encourage private landowners to undertake voluntary conservation measures that will benefit the spotted owl by creating, maintaining, or enhancing its habitat. Those conservation measures are intended to provide a net conservation benefit to the spotted owl within the State of Oregon. Some conservation benefits that are expected to result from this Agreement include:

1. Suitable habitat will be enhanced, restored, and/or created on all enrolled properties through forest management.
2. Some management actions (e.g., thinning, road building, etc.) may temporarily degrade spotted owl habitat provided those actions are intended to increase the quality of available habitat over the term of the Stewardship Agreement and Certificate of Inclusion.
3. Spotted owl populations may expand through an increased amount of available habitat and an improved distribution of habitat.
4. Forest fragmentation will decrease and habitat connectivity will increase as a result of habitat enhancement, restoration, and creation efforts.
5. Information on population productivity and demographics in Oregon may be obtained through any surveys that are conducted.
6. Landowners' concern for spotted owls on their forest lands will be reduced via the regulatory assurances provided under the Permit and Certificate of Inclusion, which should minimize the number of landowners intentionally managing their forest lands to preclude the development of suitable spotted owl habitat.

It is likely that most Stewardship Agreements resulting from this Agreement will provide more than one of the conservation benefits listed above. Each Stewardship Agreement will identify the net conservation benefits that will be achieved through the implementation of the conservation measures identified under the land management plan.

#### **4.6 Incidental Take**

The authorization for a participating landowner to incidentally take spotted owls under the Permit associated with this Agreement is contingent upon the landowner maintaining

the agreed upon baseline conditions for spotted owls and their habitat present on the enrolled property at the time the Stewardship Agreement and Certificate of Inclusion is signed. The only take authorized is incidental take of spotted owls associated with loss of above-baseline habitat. The voluntary habitat enhancement activities undertaken through this Agreement will likely increase the number of spotted owls and the total area of suitable, actively managed spotted owl nesting, roosting, and foraging habitat in Oregon. Above-baseline habitat would include newly developed habitat that did not exist at the time the landowner enrolled or habitat that existed at the time of enrollment, but was unoccupied by spotted owls. While landowners will be permitted to carry out activities that could result in the incidental take of above-baseline spotted owls and their habitat, they may choose not to do so, or not to do so for many years.

The participating landowner under a Stewardship Agreement and Certificate of Inclusion will be allowed to develop, harvest trees upon, or make any other lawful use of his/her property, even if such use results in the incidental take of spotted owls associated with above-baseline habitat, provided all of the following qualifications are met:

1. The enrolled landowner must be in compliance with the Stewardship Agreement;
2. The enrolled landowner must have maintained their spotted owl baseline as specified in the Stewardship Agreement;
3. The take is incidental to otherwise lawful activities; and
4. The landowner should provide as much advance notification to ODF as possible, but not less than 30 days in advance, prior to any planned activity which may result in the incidental taking of above-baseline spotted owls through habitat removal or disturbance. The enrolled landowner must notify ODF at least 30 days in advance, unless an emergency prohibits such advance notification in which case the notification should occur as soon as possible prior to the activity. This only applies to landowners that have successfully created new (i.e., above baseline) spotted owl habitat on their property. The report to ODF shall include information necessary to assess the level of incidental take that is anticipated from the proposed activity.

The landowner will not be responsible for loss of spotted owls or their habitat due to actions beyond their control (e.g. fire, wind, etc.).

## **4.7 Monitoring and Reporting**

**Compliance Monitoring and Reporting.** ODF will conduct compliance monitoring to determine if activities were carried out in accordance with this Agreement and the Stewardship Agreement. An annual report describing any covered activities taking place within the year of reporting shall be due no later than December 31 of each year, and shall include the following:

1. The number, locations, and total acres of enrolled properties;
2. Baseline conditions of newly enrolled properties;

3. Change in baseline conditions of any enrolled property due to a request by the landowner or a change that reflects going below established baseline conditions that was beyond the control of the landowner;
4. Current status of enrolled properties, including: (i) management actions implemented and outcomes if known; (ii) description of activities undertaken pursuant to this Agreement or related to forest management; and (iii) description of any activities that resulted in or may have resulted in incidental take of spotted owls, such as habitat modification or destruction, burning, etc.; and,
5. Expired or terminated Stewardship Agreements and Certificates of Inclusion.

ODF will contact each enrolled landowner annually to evaluate the landowner's implementation and maintenance of the conservation measures specified in the landowner's Stewardship Agreement, to identify any modifications of the conservation measures that may be necessary, and to discuss other spotted owl issues with the landowner.

At least one third of all enrolled properties will be visited annually by ODF to verify the landowner is in compliance with the Stewardship Agreement. All properties where incidental take was likely to occur will be visited to determine permit compliance. ODF shall maintain accurate records for each property enrolled in this Agreement, and shall make these records available to the Service upon request.

#### **4.7.1 Monitoring and Reporting for Individual Property Owners**

Each landowner shall submit a monitoring checklist to ODF on an annual basis for the term of their Stewardship Agreement. A template for the monitoring report shall be provided to the landowner as part of their Stewardship Agreement (Appendix B). The landowner will be required to submit a completed template to ODF annually by November 30th.

It is also important for ODF and/or the Service to make occasional field visits to make certain the Stewardship Agreement is being properly implemented, to identify any unanticipated benefits or deficiencies, and to assist enrolled landowners in developing corrective actions when necessary.

The landowner shall allow the Parties or persons designated by any Party to enter the enrolled property for the general purposes specified in State Administrative Rule OAR 629-021-0800 and Federal regulations at 50 CFR § 13.21(e)(2). Agreed upon persons designated by a Party shall be allowed to enter upon the enrolled property at reasonable hours and times.

## **4.8 Unplanned Harvests**

Emergency situations, such as natural disasters (wildfire, blowdown events, or insect infestations), or personal circumstances such as illness or death, may require harvesting. For above-baseline conditions, the enrolled landowner will notify ODF of their harvest as soon as possible and document the circumstances and actions taken in their annual report.

For emergency situations involving spotted owl nest sites/activity centers, the landowner will notify ODF before harvesting begins. ODF will consult with the Service and evaluate each case on an individual basis and will provide the landowner with direction as to how to maintain compliance with the Agreement and permit.

## **5.0 Responsibilities**

### **5.1 The Service**

The Service agrees to provide technical assistance and funding, if available, to ODF and/or enrolled landowners to assist with implementation of the Agreement and/or Stewardship Agreements. The Service will provide review and technical assistance on individual land management plans in advance of ODF's 21-day public comment period on the Stewardship Agreement.

Prior to ODF issuance of a Certificate of Inclusion, the Service will review individual land management plans and inform ODF of any issues regarding consistency with the Safe Harbor Agreement. If these issues are not resolved, the Service will advise that the issuance of the Certificate of Inclusion is not consistent with the Safe Harbor Agreement.

The Service will evaluate the monitoring results and reports submitted by ODF, and coordinate closely with ODF after permit issuance, to insure compliance with the permit's terms and conditions.

### **5.2 ODF**

ODF will be responsible for execution of this Agreement. ODF, the Service, and/or their respective agents will obtain the enrolled landowner's permission prior to entering the enrolled property for the purpose of ascertaining accuracy of the baseline conditions, compliance with the Stewardship Agreement, and for surveying spotted owls.

ODF will work with the Service in development of individual land management plans for landowners that wish to enroll under the Safe Harbor Agreement, including establishment of baseline conditions and ensuring a net conservation benefit is expected. If surveys are not planned to determine baseline, ODF will use the best available information in determining suitable habitat that will become baseline. ODF will not issue Certificates of Inclusion if it is determined that the land management plan is not consistent with the Safe Harbor Agreement.

ODF will increase the public's awareness of this Agreement through a combination of public meetings, workshops, press releases, and direct consultations with landowners.

ODF is under no affirmative obligation to enroll a landowner during a particular time period when it does not have the financial or personnel resources to do so. ODF reserves the right to enroll landowners at a later date once sufficient financial or personnel resources are available. ODF shall be responsible for meeting all of its obligations under this Agreement relating to Stewardship Agreements for enrolled landowners (e.g., providing annual report templates and monitoring of the enrolled properties). ODF also agrees to notify the Service of any inability to meet the financial provisions of this Agreement. ODF will provide the Service with monitoring reports as required by the permit and Section 4.7 of the Agreement.

### **5.3 NRCS**

NRCS will make funding available to qualified and competitively selected applicants under HFRP upon approval of Stewardship Agreements and site management plans. Funding is contingent upon annual appropriations from Congress and upon the State of Oregon being determined to be eligible to receive funding on an annual basis within any fiscal year. NRCS may also provide funding through other assistance programs under the terms of this Agreement.

NRCS will work cooperatively with ODF on the development and implementation of individual Stewardship Agreements/habitat restoration plans for those landowners who participate in NRCS programs. In the case of HFRP related agreements (restoration agreements or easements), NRCS will provide funding to ODF for enrollment of properties into the Agreement.

### **5.4 Participating Landowner**

The participating landowner is responsible for complying with all terms set forth by the Safe Harbor Agreement, Stewardship Agreement, and Certificate of Inclusion, including any requirements associated with receiving funding under the HFRP. The participating landowner will be responsible for any costs associated with baseline surveys and agreed upon management practices (however, see 5.6). The participating landowner will meet on an as-needed basis with ODF, the Service and/or NRCS to discuss any matters related to their Stewardship Agreement and Certificate of Inclusion. The parties involved will mutually agree upon the date, time, and location of these meetings.

It is the sole responsibility of the participating landowner to inform their successor(s) in interest or potential buyers about enrollment of the listed property under this Agreement. The participating landowner will be asked to provide ODF written notice, by certified letter, of a transfer of ownership within 30 days after closing. Upon transfer of the property to another owner, ODF will attempt to contact the new owner, explain the baseline responsibilities applicable to the property, and seek to interest the new owner in

signing a new Stewardship Agreement to benefit spotted owls on the property with the same commitments as the original Stewardship Agreement. Upon change of ownership, the baseline will remain the same as originally determined, unless the Service advises that a revised baseline determination is needed. The new landowner will then have the opportunity to voluntarily enter into a new Stewardship Agreement with either the same commitments as the prior one, or revised commitments to meet the needs of the new landowner.

### **5.5 Shared Responsibilities of the Parties Regarding the Agreement**

The Parties will meet on an as-needed basis to review the information contained in the monitoring reports or to discuss any matters related to this Agreement or the permit. Those meetings will provide an opportunity for resolutions of disputes regarding the implementation of this Agreement, compliance with the permit and to discuss amendments or modifications to this Agreement or the permit. The date, time, and location of these meetings will be mutually agreed upon by the Parties, as will a list of potential attendees and potential discussion topics.

This Agreement shall be implemented consistent with applicable Federal, State, local, and Tribal laws and regulations. The Parties will ensure that the terms of the Agreement will not be in conflict with any ongoing conservation or recovery programs for the covered species.

### **5.6 Shared Responsibilities of the Parties Regarding Stewardship Agreements**

The Service, ODF, and NRCS at their own discretion and with an enrolled landowner's permission, can provide technical, financial, and other assistance to the landowner in order to facilitate implementation of the conservation measures covered by a Stewardship Agreement.

### **5.7 Additional Conservation Measures**

Nothing in this Agreement will be construed to limit or constrain any Party or any other entity from taking additional actions at its own expense, or through funding provided by NRCS or another source to protect or conserve the covered species.

### **6.0 Assurances to Enrolled Landowners**

Safe Harbor assurances are assurances provided by the Service to a non-federal property owner that enters into a Safe Harbor Agreement and is issued an enhancement of survival permit for the covered species. These assurances allow the property owner to alter or modify enrolled property back to the agreed upon baseline conditions if desired, even if such alteration or modification results in the incidental take of a listed species.

Through this Agreement and its associated permit, the Service provides ODF and the enrolled landowners with these regulatory assurances. These assurances are provided by enrollment in the Agreement through each Stewardship Agreement and Certificate of Inclusion issued by ODF. These assurances are also contingent on the enrolled landowner's compliance with the specific obligations contained within the Stewardship Agreement and Certificate of Inclusion. Further, the assurances apply only if the Stewardship Agreement is being properly implemented, and only with respect to species covered by the Stewardship Agreement.

## **7.0 Agreement Management**

### **7.1 Safe Harbor Agreement Termination**

This Agreement and the associated section 10(a)(1)(A) permit will be for the duration of 50 years. However, this Agreement may be terminated by ODF by providing the Service with at least 60 days advance written notice. ODF acknowledges that terminating this Agreement will result in a corresponding termination of the permit, which will lead to a loss of the regulatory assurances and spotted owl incidental take authority provided by the permit for both ODF and any enrolled landowners. ODF further agrees to relinquish the permit to the Service as soon as possible after terminating this Agreement.

The Service will not terminate this Agreement for any reason except for those set forth in 50 CFR §13.28(a)(1) through (5) and §17.32 or, unless 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 in a timely fashion.

### **7.2 Landowner's Stewardship Agreement Termination**

The participating landowner may terminate their Stewardship Agreement with a written notice to ODF. In the case of HFRP related agreements (restoration or easements), any request for termination must be coordinated with NRCS as termination may violate the terms of the HFRP enrollment.

As provided for in Part 12 of the Service's Safe Harbor Policy (64 FR 32717), the landowner may terminate their Certificate of Inclusion for circumstances beyond the landowner's control. In such circumstances, the landowner may return the enrolled property to baseline conditions even if the management activities identified in Section 4.1.1 have not been fully implemented, provided that the landowner gives ODF the notification required by Section 4.7 above prior to carrying out any activity likely to result in the incidental taking of the covered species. If a landowner cancels a Stewardship Agreement without returning the enrolled property to the baseline conditions, and baseline conditions have increased, the above baseline conditions will be protected by the ESA's section 9 take prohibitions because the landowner's take authorization (via the Certificate of Inclusion) becomes invalid. If the landowner

terminates the Stewardship Agreement for any other reason, the Certificate of Inclusion shall immediately cease to be in effect.

ODF has the right to cancel any Stewardship Agreement where the landowner is found to be in non-compliance with the terms and conditions of their Stewardship Agreement. If any landowner with a Certificate of Inclusion is found to be in non-compliance with the Safe Harbor components of their Stewardship Agreement identified in Section 4.1.1, ODF will notify the Service and issue a written letter of non-compliance to the landowner. The landowner shall have 60 days upon receipt of the letter to rectify the non-compliance issue. If the issue is not sufficiently resolved to the satisfaction of ODF by the end of the 60-day period, ODF shall terminate the landowner's Certificate of Inclusion and all assurances granted under the Certificate of Inclusion.

If a landowner is in non-compliance with a Stewardship Agreement that is also funded through any of the NRCS financial assistance programs, NRCS will determine if additional programmatic actions need to be taken.

### **7.3 Agreement Amendments**

Any party may propose modifications to this Agreement or the Permit by providing notice to the other parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under this Agreement and permit and on the Covered Species. Minor modifications are deemed approved if all Parties are in agreement. However, the Service may give written notice that the proposed modification must be processed as a formal amendment because the Service has determined that such modifications would result in operational changes and/or greater adverse effects of incidental take not analyzed in connection with the original Agreement or that are new or significantly different from those analyzed in connection with the original Agreement.

Minor modifications to this Agreement processed pursuant to this subsection include but are not limited to the following: (a) corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning; (b) correction or updating of any maps or exhibits or to reflect previously approved amendments to the permit or modifications to this Agreement; (c) minor changes to survey, monitoring, or reporting protocols; and (d) conservation measures modified through the adaptive management provisions outlined in Section 4.4 of this Agreement.

Formal amendments may necessitate further review and analysis, including a Federal Register notice, public comment period, and other administrative compliance actions as required by the ESA and applicable laws, policies, and directives.

## **7.4 Agreement Renewal**

This Agreement can be renewed or extended at any time during the life of the Agreement with or without modification upon the approval of all Parties, and upon compliance with all existing laws and regulations as appropriate.

## **7.5 Stewardship Agreement Renewal**

An individual landowner's Stewardship Agreement can be renewed with or without modification with the approval of ODF and the consent of the participating landowner. If the renewed Stewardship Agreement will exceed the duration of this Agreement, the Certificate of Inclusion will expire at the end of this Agreement, unless both are renewed or extended.

## **7.6 Succession and Transfer**

If the landowner transfers his or her interest in the enrolled property to a non-federal party, ODF will regard the new owner as having the same rights and responsibilities with respect to the enrolled property as the landowner possessing a Stewardship Agreement and Certificate of Inclusion, if the new property owner agrees and commits in writing to become a party to a Stewardship Agreement and Certificate of Inclusion referenced in Section 4.1.1 and/or 4.1.2 above in place of the previous landowner.

## **7.7 Baseline Adjustment**

In spite of management and protection efforts, there may be circumstances, through no fault of the landowner, where the landowner's environmental baseline is reduced or ceases to exist on the enrolled property. If the environmental baseline ceases to exist on the enrolled property, the enrolled landowner will not be held accountable for the loss if it is caused by a natural event (wildfire, windstorm, landslide, e.g.) that has eliminated or rendered the habitat unsuitable.

The landowner must request a baseline reduction from ODF. The landowner must allow ODF access to the enrolled property to conduct a survey, if ODF so chooses. If ODF determines that the environmental baseline should be adjusted downward, ODF will seek the advice of the Service. The Service will have 60 days to respond to such a request. Based on the Service's advice regarding the proposal for a revised baseline, ODF may modify the Stewardship Agreement and Certificate of Inclusion to reflect the change in baseline responsibilities.

## **7.8 Remedies**

Each Party shall have all remedies otherwise available to enforce the terms of the Agreement and the permit, except that no Party shall be liable in damages for any breach of this Agreement, any performance or failure to perform an obligation under this Agreement or any other cause of action arising from this Agreement.

## **7.9 Dispute Resolution**

The Parties agree to work together in good faith to resolve any disputes, using dispute resolution procedures agreed upon by all parties.

## **8.0 Additional Measures**

### **8.1 Availability of Funds**

This Agreement is large in geographic scope and long in duration. Therefore, precise funding requirements for the Agreement are difficult to predict. Implementation of this Agreement is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any funds from the U.S. Treasury. The Parties acknowledge that the Service and NRCS will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

### **8.2 No Third-Party Beneficiaries**

This Agreement and associated Stewardship Agreements do 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 and associated Stewardship Agreements to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement and associated Stewardship Agreements. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

### **8.3 Other Federally Listed Species**

The possibility exists that other listed species may occur in the future on the enrolled property as a direct result of the management actions specified in Section 4.1.1 and 4.1.2 above. If that occurs and the landowner so requests, the Parties may agree to amend the Agreement and associated Stewardship Agreements to cover additional species and to establish appropriate baseline conditions for such other species.

According to section 9 of the ESA, landowners will be subject to restrictions against "take" of any federally-listed species not covered by the permit. The term "take" as defined by the ESA, means to harass, harm, pursue, hunt, kill, trap, capture, or collect, or to attempt to engage in any such conduct. If other federally-listed species are known to exist on the enrolling property, then ODF and the Service will consult with and assist the landowner in tailoring their management actions to avoid take and to minimize any

disturbance of these species. In the future, ODF and the Service may develop similar Safe Harbor Agreements for other listed species which landowners may choose to participate in individually or in combination

#### **8.4 Neighboring Landowners**

The Parties recognize the implications to neighboring landowners of the successful implementation of management actions on enrolled lands. Further, the Parties recognize and acknowledge that some landowners may be reluctant to initiate management actions that may have land, water, and/or natural resource use implications to neighboring landowners. The implications to neighboring landowners with non-enrolled lands will be assessed on a case-by-case basis. When the Parties believe that occupation of non-enrolled neighboring lands is likely, the Parties will make every effort to include the neighboring landowner in the Agreement through a Stewardship Agreement and Certificate of Inclusion using the procedures detailed in Section 4.1.1, thus extending the Safe Harbor assurances.

Safe Harbor policy allows the Service to use flexibility in addressing neighboring properties not covered under Safe Harbor Agreements. Safe Harbor policy also allows flexibility with regard to associated incidental take authorizations, including, but not limited to, granting of incidental take to neighboring landowners where occupation of their lands is expected as a result of a SHA. However, this does not mean that neighboring landowners fitting this scenario will be automatically given incidental take authorization if listed species occupation occurs and would require their becoming party to an Agreement with the Service.

#### **8.5 National Historic Preservation Act - Section 106**

Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. 470 *et seq.*) requires Federal agencies to take into account the effects of their undertakings on properties eligible for inclusion in the National Register of Historic Places (NRHP). An undertaking is defined as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, those requiring a Federal permit, license or approval, and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency. The Service's issuance of an enhancement of survival permit to ODF to support implementation of this Agreement is a Federal undertaking subject to section 106 of the NHPA. As such, ODF and/or the Service must consult with the State Historic Preservation Officer (SHPO) and federally recognized Native American Tribes, consider their comments on the potential impacts to historic properties resulting from the undertaking, and endeavor to incorporate their comments into project planning.

As part of NHPA compliance, the Service will define the Area of Potential Effects (APE) associated with the proposed undertaking (i.e., issuance of the enhancement of survival permit to ODF). The APE is the geographic area or areas within which an undertaking

may directly or indirectly cause changes in the character or use of historic properties. The Service's determination regarding the APE and finding of effect is subject to comment from the SHPO and federally recognized tribes.

Enrolled lands on which management activities are to occur and where incidental take is anticipated are the APEs for this Agreement. This definition of the APE is based on the fact that, before enrolling in a Stewardship Agreement, landowners can conduct any type of ground-disturbing activity outside of any potential environmental baseline associated with spotted owls. Activities within existing spotted owl habitat are significantly restricted due to the protections afforded listed species by the ESA. Therefore, any environmental baseline responsibilities identified at the time of signing the Stewardship Agreement are the only areas in which adverse effects to historic properties, such as archaeological sites, could increase as a result of implementation of the Agreement. Any archaeological surveys conducted for NHPA compliance will be restricted to the area inside the APE, unless the enrolled landowner consents in writing to ODF or the Service to expand the survey boundaries.

ODF will utilize the following processes to determine the enrolling landowner's responsibilities relative to NHPA:

1. Enrolling landowners with no environmental baseline responsibilities on their property at the time of enrollment in a Stewardship Agreement will have no responsibility relative to NHPA, because there is no APE (i.e., no baseline spotted owls). Therefore, no archaeological surveys or further consultation between ODF and the Service will be required.
2. Enrolling landowners, whose environmental baseline responsibilities are known to not contain sites that are eligible or potentially eligible for the NRHP based on archaeological survey work conducted prior to or concurrent with the enrollment in the Stewardship Agreement, will have no responsibility relative to NHPA, because there will be no adverse effects to NRHP eligible properties. The enrolling landowner shall provide ODF and/or the Service proper documentation of the finding of the archaeological survey. Consequently, no archaeological surveys or further consultation between ODF and/or the Service will be required. The enrolling landowner could undertake any management actions within the APE, including those that result in ground disturbance, provided that all other obligations in this Agreement and the enrolling landowner's Stewardship Agreement have been satisfied.
3. In cases where previous archaeological survey work has not been conducted within the APE or where enrolling landowners are incapable or unwilling to conduct the archaeological survey work necessary to determine the presence of historic properties, enrolling landowners who agree in the Stewardship Agreement to avoid ground-disturbing activities within spotted owl habitat will have no responsibility relative to NHPA, because there will be no likely effects on historic properties even if they were present within the APE. Therefore, no archaeological surveys or further consultation between ODF and/or the Service would be required until and unless

ground disturbing activities were planned in the APE. The voluntary limitation on ground-disturbing activities by the landowner would only apply to baseline responsibilities. The following activities shall not be considered ground-disturbing relative to activities in the APE:

- a. Forest site preparation (such as planting of seedlings) that involves soil disturbance, if such soil disturbance is limited to the area of disturbance by previous planting.
  - b. Timber harvest operations (such as cutting, skidding, yarding) in areas that have been logged within that past 50 years.
  - c. Removal of trees by manual felling, mowing, use of herbicides, manual uprooting with hand tools, and prescribed burning when hand constructed fire breaks are used to contain the fire and there is no excavation or plowing of new fire lines that penetrate deeper than four inches below the current soil surface.
  - d. Timber harvest when removal of logs does not result in soil disturbance below four inches of the current soil surface.
  - e. Maintenance of existing roads, such as grading, cleaning ditches, repairing, brushing, or replacing culverts, guards, and gates, within a spotted owl habitat if the maintenance occurs within the existing road profile (i.e., in the same location and maintaining the same width).
  - f. Other activities which are non-ground disturbing, such as pest control, or any other activity in which soil disturbance is limited to the area within four inches of the soil surface.
4. Enrolling landowners whose activities identified in the Stewardship Agreement will include unavoidable ground-disturbing activities within the APE must determine, with the assistance of the SHPO, ODF, and the Service, whether the APE has been surveyed for historic properties and whether sites eligible, potentially eligible, or are on the NRHP are known to exist within the APE. The initial step in this determination will be a query by ODF of the SHPO archaeological sites files to determine whether archaeological surveys of the APE have been conducted and, if so, whether or not any NRHP potentially eligible or eligible sites are located within the APE. If no archaeological surveys have been conducted within the APE, ODF and/or the Service shall determine whether archaeological surveys are necessary (i.e., in some cases surveys may not be necessary due to the location of the APE on a landform that is unsuitable for historic properties) and, if surveys are necessary, discuss the survey requirements and other options (e.g., avoidance or protection) available with the enrolling landowner. Any necessary archaeological surveys must be conducted prior to implementation of the landowner's ground-disturbing activities.

All historic properties identified during surveys of the APE that are determined to be potentially eligible or eligible for the NRHP will be protected from ground-disturbing activities by the enrolled landowner pending an evaluation of the landowner's activities by ODF and/or the Service relative to NHPA. The enrolled landowner will submit to ODF and/or the Service a document or letter that outlines the landowner's planned activities within the APE, including the specific measures and/or silvicultural practices

that would be conducted. This document will be used in the evaluation conducted by ODF and/or the Service to make a determination of effect concerning the planned activities to the relevant historic property, which will include the identification of proposed measures to avoid or minimize adverse effects to the historic property. The determination of effect would then be sent to the SHPO for comment. ODF and/or the Service will consult with the SHPO on their determination of effect, and, if either receives concurrence from the SHPO, ODF and/or the Service will provide the enrolled landowner and/or their agent with recommendations to minimize adverse effects to the historic property within the APE.

## 9.0 Authorizing Signatures

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Safe Harbor Agreement to be in effect as of the date that the Service issues the permit referred to in Section 2.1 above

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State Forester  
Oregon Department of Forestry

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Date

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State Conservationist  
Natural Resources Conservation Service

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Date

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State Supervisor  
U.S. Fish and Wildlife Service

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Date

**Appendix A. Safe Harbor Agreement Landowner Certificate of Inclusion Template**

**CERTIFICATE OF INCLUSION**

This certifies that the property described as follows [**(description of property enrolled under Safe Harbor permit)**] owned by [**Cooperator's name**], is included within the scope of Permit No. [**(permit number)**], issued by the U.S. Fish and Wildlife Service to the Oregon Department of Forestry, on [**(date)**], and expiring on [**(date)**] under the authority of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1539(a)(1)(A). Such Permit authorizes activities, consistent with the Safe Harbor Agreement, by participating landowners (Cooperators) which is expected to provide habitat for northern spotted owls or otherwise restore natural habitat occupied by the species. Pursuant to that Permit and this Certificate of Inclusion, the holder of this Certificate is authorized to engage in any otherwise lawful activity that is consistent with the Agreement on the above described property which may result in the incidental taking of northern spotted owls. Management activities are subject to the terms and conditions of said Permit and the terms and conditions of the Safe Harbor Agreement entered into pursuant thereto by the Service, the Oregon Department of Forestry, and the USDA Natural Resources Conservation Service on [**(date)**], that becomes binding upon [**Cooperator's name**], on the date and signature herein.

\_\_\_\_\_  
Name of Permittee

\_\_\_\_\_  
Date

\_\_\_\_\_  
Participating Landowner

\_\_\_\_\_  
Date

**Appendix B. Landowner Monitoring Checklist.**

1. Were surveys conducted for spotted owls? If so, summarize results.
  
2. Did you conduct any forest management activities or forest operations? If so, review the check-list below and report regarding activities that applied to you.

In Baseline Habitats

<b>Forest Management Activities</b>	<b>Quantity</b>	<b>Notes</b>
Thinning ( <i>acres</i> )		
Snag Creation ( <i>number</i> )		
Downed Log Creation ( <i>number</i> )		
Group selection harvest ( <i>acres treated, size of openings</i> )		
Single tree selection harvest ( <i>acres</i> )		
Road De-commission ( <i>miles</i> )		
Planting, release, retention of mast-producing trees ( <i>list treatment type—number treated</i> )		
Other—list and describe any other forest management activities that occurred		

Safe Harbor Landowner Annual Monitoring Checklist

In Non-baseline Habitats

Activity	Quantity	Notes
Thinning (acres)		
Snag Creation (number)		
Downed Log Creation (number)		
Group selection harvest (acres treated, size of openings)		
Single tree selection harvest (acres)		
Road De-commission ( <i>miles</i> )		
Planting, release, retention of mast-producing trees ( <i>list treatment type—number treated</i> )		
Retention of clumps or scattered live trees in clearcut harvests		
Retention of wide, well-stocked stream buffers in or adjacent to clearcuts		
Other—list and describe any other forest management activities that occurred		