

both incidental take associated with management activities and incidental take associated with returning the property to baseline conditions. The second point that requires clarity is the requirement that the applicant describe future land use and water management activities that would result in incidental take. This requirement has been mistakenly interpreted by some as an intent by us to limit future private property use. This is not the intent of the regulations, so we propose to revise this provision to require the applicant to describe how incidental take may occur (*i.e.*, through management activities and/or return to baseline), but to eliminate any need to describe future land use or water management activities that will take place after the term of the agreement and permit.

The following proposed revision applies to Safe Harbor Agreement regulations only. The issuance criteria in the regulations at §§ 17.22(c)(2)(ii) and 17.32(c)(2)(ii) provide that the Director may issue a permit if he or she finds that the Agreement “will” provide a net conservation benefit to the covered species. This may be read to suggest that the Director must determine with complete certainty that a net conservation benefit will occur before a permit can be issued. This unrealistic standard is not the intent of either the Safe Harbor Policy or the existing rule. As indicated in the background statement to the Final Safe Harbor Policy, the net conservation benefits “should be reasonably expected to occur during the Agreement.” 64 FR 32731 (“Revisions to the Draft Policy”). Although the Policy states in Part 4 that the Director must find that there will be a net conservation benefit, it indicates that this finding is to describe the “*expected* net conservation benefits.” Similarly, the net conservation benefits requirements in Part 5(3) of the Policy require Safe Harbor Agreements to identify the actions to be “undertaken to accomplish the *expected* net conservation benefits” and the time frames within which “the *anticipated* net conservation benefits” will be achieved. The Policy thus requires that the Director must reasonably expect that a Safe Harbor Agreement will meet the net conservation benefit standard before a permit can be issued. We accordingly propose to clarify the regulations by revising the issuance criteria to state that the Director may issue the permit if the Director finds that the Safe Harbor Agreement “is reasonably expected to provide a net conservation benefit” to the covered species.

The current Safe Harbor and Candidate Conservation Agreements

with Assurances regulations, at §§ 17.22(c)(3)(ii) and 17.32(c)(3)(ii) and §§ 17.22(d)(3)(ii) and 17.32(d)(3)(ii) respectively, require a property owner to notify us at least 30 days in advance, but preferably as far in advance as possible, of when he or she expects to incidentally take any species covered under the permit. Notification provides us with an opportunity to relocate affected individuals of the species if possible and appropriate, or to implement other conservation options that may be available to us, and with the consent of the landowner. The notification requirement is often a desirable feature of a Safe Harbor Agreement or a Candidate Conservation Agreement with Assurances. For example, in the Safe Harbor Agreement with Environmental Defense, the Cooperator agrees to notify Environmental Defense and the Fish and Wildlife Service local office not less than 60 days prior to any activity that will take the property back to baseline conditions to allow us to rescue any black-capped vireos or golden-cheeked warblers, if possible and appropriate. However, prior notice before engaging in activities that result in take is not always appropriate based on the biology of the species or the covered activities. For example, some species may not be easily captured or may not be able to survive if transplanted to another site, such as larvae or eggs of certain smaller species of butterfly. Thus, we would not be able to rescue the individuals prior to the authorized incidental taking and advanced notice of incidental taking in order to rescue the butterflies may not be appropriate. Emergency situations would not be appropriate for advanced notification as well. For example, if habitat within a Safe Harbor Agreement for the red-cockaded woodpecker were infested by pine beetle, the trees must be harvested quickly to halt the infestation. In this situation, a 60-day advanced notice would be inappropriate and shortened notice may not be sufficient time to properly capture the red-cockaded woodpeckers. Advanced notification is appropriate when such notification allows for sufficient time to ameliorate the immediate effect of the property returning to baseline conditions. The policy states “If appropriate, incorporate a notification requirement to provide the Services or appropriate State agencies with reasonable opportunity to rescue individuals of a covered species * * *.” Both the Service and the property owner will determine if the Safe Harbor Agreement will include an advanced notification requirement. Therefore,

instead of requiring notification from the permittee, we propose to revise the regulations to state that, “when appropriate,” notification of at least 30 days is to be given in advance of when the permittee expects to incidentally take any listed species covered under the permit.

The existing Safe Harbor regulations state that “If additional conservation and mitigation measures are deemed necessary, the Director may require additional measures of the permittee, but only if such measures are limited to modifications within conserved habitat areas, if any * * *” (§§ 17.22(c)(5)(ii) and 17.32(c)(5)(ii)). We propose to remove the references to additional mitigation measures and to “conserved habitat areas.” Unlike the requirements for Habitat Conservation Plan permits issued under 10(a)(1)(B), there are no mitigation requirements in the Safe Harbor Policy. Therefore, it is not necessary or appropriate to authorize the imposition of “additional” mitigation measures. Also, it is confusing to reference “conserved habitat areas,” because there are no “conserved habitat areas” as defined by our regulations (50 CFR 17.3) in Safe Harbor Agreements. In addition, because these are voluntary agreements, establishing authority to require a landowner to carry out other measures that were not previously agreed to by the landowner is inappropriate.

Similarly, the Candidate Conservation Agreements with Assurances Policy does not have mitigation requirements, and does not refer to “conserved habitat areas,” as defined by our regulations (50 CFR 17.3). Therefore, we propose to delete the word “mitigation” and the phrase “conserved habitat areas” from the implementing regulations at §§ 17.22(d)(5)(i), (ii), and (iii)(B) and 17.32(d)(5)(i), (ii), and (iii)(B).

Existing regulations at §§ 17.22(c)(7) and 17.32(c)(7) and §§ 17.22(d)(7) and 17.32(d)(7) authorize us to revoke a permit issued in association with a Safe Harbor Agreement or Candidate Conservation Agreement with Assurances if we determine that “continuation of the permitted activity would be inconsistent with the criterion set forth in § 17.22(c)(2)(iii) and the inconsistency has not been remedied in a timely fashion.” Because we are concerned that this authority may create a disincentive to landowners considering development of a Safe Harbor Agreement or Candidate Conservation Agreement with Assurances, we propose to replace this provision with a statement that the Director may revoke a permit if continuation of the permitted activity