

(iii) The carrier's aggregate minutes of facilities-based or private-line resale switched telephone traffic for service billed in the United States for any foreign country are greater than 2.5 percent of the total of such minutes of international traffic for that country for all U.S. carriers published in the Commission's most recent § 43.61 annual report of international telecommunications traffic; or

(iv) The carrier's aggregate minutes of facilities-based or private-line resale switched telephone traffic for service billed outside the United States for any foreign country are greater than 2.5 percent of the total of such minutes of international traffic for that country for all U.S. carriers published in the Commission's most recent § 43.61 annual report of international telecommunications traffic.

(2) Except as provided in this paragraph, the quarterly reports required by paragraph (b)(1) of this section shall be filed in the same format as, and in conformance with, the filing procedures for the annual reports required by paragraph (a) of this section.

(i) Carriers filing quarterly reports shall include in those reports only their provision of switched, facilities-based telephone service and switched, private-line resale telephone service.

(ii) The quarterly reports required by paragraph (b)(1) of this section shall be filed with the Commission no later than April 30 for the prior January through March quarter; no later than July 31 for the prior April through June quarter; no later than October 31 for the prior July through September quarter; and no later than January 31 for the prior October through December period.

(c) *Quarterly Traffic Reports for resale carriers.* Each common carrier engaged in the resale of international switched services that is affiliated with a foreign carrier that has sufficient market power on the foreign end of an international route to affect competition adversely in the U.S. market and that collects settlement payments from U.S. carriers shall file a quarterly version of the report required in paragraph (a) of this section for its switched resale services on the dominant route within 90 days from the end of each calendar quarter. Commercial Mobile Radio Service (CMRS) carriers, as defined in § 20.9 of this chapter, are not required to file reports pursuant to this paragraph.

(d) *Circuit status reports.* Each facilities-based carrier engaged in providing international telecommunications service between the area comprising the continental United States, Alaska, Hawaii, and off-shore U.S. points and any country or point

outside that area shall file a circuit status report with the Commission not later than May 1, each year showing the status of its circuits used to provide international services as of December 31, of the preceding calendar year.

(e) *Filing manual.* The information required under this section shall be furnished in conformance with the instructions and reporting requirements prepared under the direction of the Chief, International Bureau, prepared and published as a filing manual.

(f) *Definitions.* (1) Two entities are *affiliated* with each other if one of them, or any entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one. Also, a U.S. carrier is *affiliated* with two or more foreign carriers if the foreign carriers, or entities that control them, together directly or indirectly own more than 25 percent of the capital stock of, or control, the U.S. carrier and those foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of international basic telecommunications services in the United States.

(2) *Facilities-based carrier* means a carrier that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in the U.S. end of an international facility, regardless of whether the underlying facility is a common carrier or non-common carrier submarine cable or a satellite system.

(3) *Foreign carrier* is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1, which includes entities authorized to engage in the provision of domestic telecommunications services if such carriers have the ability to originate or terminate telecommunications services to or from points outside their country.

#### § 43.82 [Removed]

6. Remove § 43.82.

### PART 63—EXTENSION OF LINES, NEW LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

7. The authority citation for part 63 continues to read as follows:

**Authority:** Sections 1, 4(i), 4(j), 10, 11, 201, 205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201, 205, 214, 218, 403, and 571, unless otherwise noted.

#### § 63.23 [Amended]

8. Section 63.23 is amended by removing paragraph (e) and redesignating paragraph (f) as paragraph (e).

[FR Doc. 04-10837 Filed 5-24-04; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AT64

#### Endangered Species Act Incidental Take Permit Revocation Regulations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to amend part 17 of title 50 of the Code of Federal Regulations (CFR) to add regulations that describe circumstances in which the Service may revoke incidental take permits issued under the authority of the Endangered Species Act (ESA). On December 11, 2003, the U.S. District Court for the District of Columbia in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.), invalidated 50 CFR 17.22(b)(8) and 17.32(b)(8), the regulations addressing Service authority to revoke incidental take permits under certain circumstances. The court ruled that we had adopted these regulations without adequately complying with the public notice and comment procedures required by the Administrative Procedure Act (APA) and remanded the regulations to us for further proceedings consistent with the APA. In the Rules and Regulations section of today's **Federal Register** is a final rule withdrawing the permit revocations regulations in 50 CFR 17 vacated by the court order. In this document, we are requesting public comments on our proposal to reestablish the permit revocation regulations vacated by the court.

**DATES:** Comments must be received by July 26, 2004.

**ADDRESSES:** You may submit comments, identified by RIN number 1018-AT64, by any of the following methods: (1)

Mail or hand delivery to the Chief, Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; (2) FAX: 703/358-2229; (3) E-mail: [prr@fws.gov](mailto:prr@fws.gov); or (4) through the Federal eRulemaking Portal: <http://www.regulations.gov>. All submissions must include the identification number RIN 1018-AT64. The complete file for this proposed rule, including public comments, is available, by appointment, during normal business hours at the same address. You may call 703/358-2171 to make an appointment to view the files.

**FOR FURTHER INFORMATION CONTACT:** Rick Sayers, Chief, Branch of Consultation and Habitat Conservation Planning, at the above address (Telephone 703/358-2171, Facsimile 703/358-1735).

**SUPPLEMENTARY INFORMATION:** This notice of proposed rulemaking applies to the U.S. Fish and Wildlife Service only. Therefore, the use of the terms "Service" and "we" in this notice refers exclusively to the U.S. Fish and Wildlife Service.

This proposed rule applies only to 50 CFR 17.22(b) and 17.32(b), which pertain to incidental take permits. Regulations in 50 CFR 17.22(c) and 17.32(c) that pertain to Safe Harbor Agreements (SHAs) and in 50 CFR 17.22(d) and 17.32(d) that pertain to Candidate Conservation Agreements with Assurances (CCAAs) are not affected by this proposed rule.

## Background

### *Promulgation of the "Permit Revocation Rule"*

The Service administers a variety of conservation laws that authorize the issuance of permits for otherwise prohibited activities. In 1974, we published 50 CFR part 13 to consolidate the administration of various permitting programs. Part 13 established a uniform framework of general administrative conditions and procedures that would govern the application, processing, and issuance of all Service permits. We intended the general part 13 permitting provisions to be in addition to, and not in lieu of, other more specific permitting requirements of Federal wildlife laws.

We subsequently added many wildlife regulatory programs to title 50 of the CFR. For example, we added part 18 in 1974 to implement the Marine Mammal Protection Act; modified and expanded part 17 in 1975 to implement the Endangered Species Act of 1973; and added part 23 in 1977 to implement the Convention on International Trade in Endangered Species of Wild Fauna and

Flora (CITES). The regulations in these parts contain their own specific permitting requirements that supplement the general permitting provisions of part 13.

With respect to the ESA, the combination of the general permitting provisions in part 13 and the specific permitting provisions in part 17 has worked well in most instances. However, the Service has found that, in some areas of permitting policy under the Act, the "one size fits all" approach of part 13 has been inappropriately constraining and narrow. These areas include specifically the Habitat Conservation Planning, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances programs. Incidental take permitting under section 10(a)(1)(B) of the ESA is one such area.

On June 12, 1997 (62 FR 32189), we published proposed revisions to our general permitting regulations in 50 CFR part 13 to identify, among other things, the situations in which the permit provisions in part 13 would not apply to individual incidental take permits. On June 17, 1999 (64 FR 32706), we published a final set of regulations that included two provisions that relate to revocation of incidental take permits. The first provides that the general revocation standard in 50 CFR 13.28(a)(5) will not apply to several types of ESA permits, including incidental take permits. The second provision, hereafter referred to as the Permit Revocation Rule, described circumstances under which incidental take permits could be revoked. On September 30, 1999 (64 FR 52676), we published a correction to the regulations promulgated in our June 17, 1999 (64 FR 32706), final rule; however, the correction was not associated with permit revocation.

The Permit Revocation Rule, which was codified at 50 CFR 17.22(b)(8) (endangered species) and 17.32(b)(8) (threatened species), provided that an incidental take permit "may not be revoked \* \* \* 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." The criterion in section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild" is one of the statutory criteria that incidental take permit applicants must meet in order to obtain a permit. The criterion is substantively identical to the definition of "jeopardize the continued existence of" in the joint Department of the

Interior/Department of Commerce regulations implementing section 7 of the ESA (50 CFR 402.02). In essence, the Permit Revocation Rule authorizes the Service to revoke an incidental take permit if continuation of the permitted activity would jeopardize the continued existence of a listed species and the jeopardy situation is not remedied in a timely fashion.

On February 11, 2000 (65 FR 6916), we published a request for additional public comment on several specific regulatory changes included in the June 17, 1999 (64 FR 32706), final rule, including the Permit Revocation Rule. Based on our review of the comments we received in response to the February 11, 2000, request for comments, we published a notice on January 22, 2001 (66 FR 6483), that affirmed the provisions of the June 17, 1999 (64 FR 32706), final rule, including the Permit Revocation Rule.

### *The "No Surprises" Rule Litigation and the Order To Vacate the Permit Revocation Rule*

On February 23, 1998 (63 FR 8859), the Service and the National Marine Fisheries Service jointly promulgated the so-called No Surprises Rule, which provides certainty to holders of incidental take permits by placing limits on the agencies' ability to require additional mitigation after an incidental take permit has been issued. The No Surprises Rule is codified by the Service at 50 CFR 17.22(b)(5) (endangered species) and 17.32(b)(5) (threatened species) and by the National Marine Fisheries Service at 50 CFR 222.307(g). For both agencies, the No Surprises Rule was added to pre-existing regulations pertaining to incidental take permits.

In July 1998, a group of environmental plaintiffs challenged the No Surprises Rule in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.). After the Service promulgated the Permit Revocation Rule on June 17, 1999 (64 FR 32706), the government referred to that rule in its briefs in the No Surprises Rule case to demonstrate that the agencies retained the ability to revoke incidental take permits notwithstanding the assurances in the No Surprises Rule. The plaintiffs subsequently amended their complaint to challenge the Permit Revocation Rule.

On December 11, 2003, the court ruled that the public notice and comment procedures followed by the Service when promulgating the Permit Revocation Rule were in violation of the APA. The court vacated and remanded the Permit Revocation Rule to the Service for further consideration consistent with section 553 of the APA.

The court did not rule on the validity of the No Surprises Rule, but found that the Permit Revocation Rule is relevant to the court's review of the No Surprises Rule. The court, therefore, ordered the Service to consider the No Surprises Rule together with the Permit Revocation Rule in any new rulemaking proceedings concerning revocation of incidental take permits containing No Surprises assurances.

We are taking two rulemaking actions in response to the court order. First, in the Rules and Regulations section of today's **Federal Register** is a final rule withdrawing the permit revocation regulations, 50 CFR 17.22(b)(8) and 17.32(b)(8), vacated by the court order. Second, in this notice we request public comments on our proposal to reestablish the permit revocation regulations the court vacated.

### Summary of Previously Received Comments

The following are comments we previously received on the Permit Revocation Rule; we will address these and other relevant issues in our final decision regarding this proposal. We received numerous comments on the provisions addressing permit revocation. The comments ranged widely, but generally fell into two categories: The agency did not go far enough with the revocation provision and the agency went too far with the revocation provision. With respect to comments that the revocation provision did not go far enough, many of the commenters stated that they did not see any reason why the old provision in § 13.28(a) should be replaced with a standard they viewed as less protective. These commenters also stated that the revocation provision should have mandatory language like the word "shall" to indicate that revocation is not discretionary. Many commenters questioned why the Service should have to step in at public expense to remedy jeopardy situations before a permit can be revoked. Some questioned what the standard "in a timely fashion" means. One commenter suggested that the revocation provision should also contain a reference to adverse modification of critical habitat, while another commenter recommended that the word "jeopardy" be used instead of "appreciable reduction in the likelihood of survival and recovery" because the commenter viewed "jeopardy" to be a higher standard.

With respect to comments expressing concern that the Service has gone too far, a number of commenters stated that the revocation provision undermined the No Surprises Rule. These

commenters strongly opposed any further expansion of the revocation provision and suggested further expansion would be contrary to congressional intent. A number of commenters requested that the Service reaffirm the principles of No Surprises and noted that revocation should be "an action of last resort." Another commenter requested that we limit revocation to instances where the permittee is not in compliance with the permit or, at a minimum, add to the revocation provision a statement to indicate that the burden is on the agency to establish that the conditions for revocation exist.

### Request for Public Comments

This notice seeks public comment on our proposal to reestablish the Permit Revocation Rule as originally promulgated in June 1999. We specifically invite public comment on the following issues:

1. The proposal to reestablish the Permit Revocation Rule. This rule would allow the Service to revoke an incidental take permit as a last resort in the unexpected and unlikely situation in which continuation of the permitted activities would likely jeopardize the continued existence of a species covered by the permit and the Service is not able to remedy the situation through other means in a timely fashion.

2. The interrelationship of the Permit Revocation Rule and the No Surprises Rule, including whether the revocation standard in the Permit Revocation Rule is appropriate in light of the regulatory assurances contained in the No Surprises Rule.

3. Whether the revocation standard in 50 CFR 13.28(a)(5) or some other revocation standard would be more appropriate for incidental take permits with No Surprises assurances.

### Required Determinations

#### *Executive Order 12866*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more (but shorter) sections?

(5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the rule?

(6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240.

### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant proposed rule because it may raise novel legal or policy issues, and was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below.

(a) This proposed rule will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) This proposed rule is not expected to create inconsistencies with other agencies' actions. These regulations would amend potentially conflicting permitting regulations established for a voluntary program, Habitat Conservation Planning, for non-Federal property owners and would not create inconsistencies with the actions of non-Federal agencies.

(c) This regulation is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review. The proposed rule is a direct response to a previous legal challenge.

### *Regulatory Flexibility Act*

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

economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, we certified to the Small Business Administration that these regulations would not have a significant economic impact on a substantial number of small entities. The proposed changes clarify the circumstances under which an incidental take permit issued under the authority of section 10(a)(1)(B) of the Endangered Species Act might be subject to revocation. As of February 29, 2004, the Service has issued 327 incidental take permits, and none have required revocation. As identified in the preamble, the specific circumstances under which the proposed regulations would provide for revocation are expected to be extraordinarily rare.

#### *Small Business Regulatory Enforcement Fairness Act*

This regulation will not be a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

(a) This regulation would not produce an annual economic effect of \$100 million.

(b) This regulation would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) This regulation would not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. No

additional information will be required from a non-Federal entity solely as a result of the proposed rule. These regulations implement a voluntary program; no incremental costs are being imposed on non-Federal landowners.

(b) These regulations will not produce a Federal mandate of \$100 million or greater in any year; that is, this rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

#### *Takings*

In accordance with Executive Order 12630, these regulations do not have significant takings implications concerning taking of private property by the Federal Government. These regulations pertain to a voluntary program that does not require individuals to participate unless they volunteer to do so. Therefore, these regulations have no impact on personal property rights.

#### *Federalism*

These regulations will not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, in accordance with Executive Order 13132, the Service has determined that this rule does not have sufficient federalism implications to warrant a Federalism Assessment.

#### *Civil Justice Reform*

In accordance with Executive Order 12988, the Department of the Interior has determined that this proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Order.

#### *Paperwork Reduction Act*

This rule would not impose any new requirements for collection of information associated with incidental take permits other than those already approved for incidental take permits under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

#### *National Environmental Policy Act*

The Department of the Interior has determined that the issuance of the proposed rule is categorically excluded

under the Department's NEPA procedures in 516 DM 2, Appendix 1.10.

#### *Government-to-Government Relationship With Indian Tribes*

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); E.O. 13175; and the Department of the Interior's Manual at 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to-Government basis. However, these regulations pertain to voluntary agreements, Habitat Conservation Plans, in which Tribes and individuals are not required to participate unless they volunteer to do so. Therefore, these regulations may have effects on Tribal resources and Native American Tribes, but solely at their discretion, should those Tribes or individuals choose to participate in the voluntary program.

#### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### **Proposed Regulation Promulgation**

For the reasons set out in the preamble, we propose to amend title 50, chapter I, subchapter B of the Code of Federal Regulations, as set forth below.

#### **PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.22 by adding a new paragraph (b)(8) to read as follows:

**§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.**

\* \* \* \* \*

(b) \* \* \*

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter 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.

\* \* \* \* \*

3. Amend § 17.32 by adding a new paragraph (b)(8) to read as follows:

**§ 17.32 Permits—general.**

\* \* \* \* \*

(b) \* \* \*

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter 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.

\* \* \* \* \*

Dated: April 12, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 04-11741 Filed 5-24-04; 8:45 am]

**BILLING CODE 4310-55-P**