

Proposed Policy Regarding Voluntary Prelisting Conservation Actions

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

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

a third party but must be used for the same species and within the same State where the credit was earned.

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

A voluntary prelisting conservation action must be:

- (1) Beneficial to a species that is, or may become, a candidate or proposed for listing as threatened or endangered,
- (2) Started prior to the final listing of the benefitted species as an endangered or threatened species under the Act, and after the date this policy is finalized.

The actions may be part of an already established conservation program, plan, or strategy or be included in such a program, plan, or strategy that has been developed after the date this policy is finalized.

- (3) Not required by any Federal, State, or local law, regulation, permit, or other regulatory mechanism.
- (4) Undertaken as part of a State- or multi-State-administered program, including the most recent version of a State Wildlife Action Plan or other State conservation strategy that is intended to encourage voluntary conservation measures for the species.

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

Section 4. Role of the States. A State choosing to participate in the voluntary prelisting conservation actions crediting system established by the proposed policy must maintain a register of all voluntary prelisting conservation actions undertaken pursuant to a State or multi-State-administered program as described above and for which the property owners have requested treatment under the proposed policy, and must record any transfer to a third party of the mitigation or compensatory measure rights associated with such actions. The State will provide appropriate oversight to ensure the effective implementation and maintenance of voluntary prelisting conservation actions and provide a mechanism to notify the Service of each voluntary prelisting conservation action. Such actions could be based on or found in the most recent version of its State Wildlife Action Plans or other State conservation strategy for the species and could be performed by a third party, including a Federal agency. If a State- or multi-

State-administered program allows voluntary prelisting conservation actions to serve as mitigation or a compensatory measure for the environmental impacts of activities regulated by the State and undertaken prior to the listing of a species as an endangered or threatened species, the State will reflect the use of such voluntary prelisting conservation actions for such purposes in its register, and, to the extent so used, such voluntary prelisting conservation actions will no longer be available for treatment as provided in this policy.

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

Section 6. Evaluating the Impacts of Voluntary Prelisting Conservation Actions. In treating any voluntary prelisting conservation action as a measure to minimize and mitigate the impact of the taking of any endangered or threatened species pursuant to Section 10(a)(1)(B) of the Act, or as an intended part of any proposed Federal action subject to the consultation requirements of section 7(a)(2) or 7(a)(3) of the Act, the Service will evaluate the beneficial impacts of such action according to the same criteria, standards, and metrics that it uses to evaluate the beneficial impacts of other mitigating or compensatory measures and the detrimental impacts of activities that give rise to mitigating or compensatory measures. However, over time,

new scientific information may indicate that the metric may need revision or a new metric should be used. The Service will work with the landowner to advise them of the need for a change. In cases where failure to utilize a new or revised metric would appreciably reduce the likelihood of survival and recovery of the affected species in the wild, the Service will require a new or improved metric as appropriate and will alert the landowner. Species-specific metrics will be developed to facilitate the evaluation of the prelisting conservation actions and the detrimental actions. The benefit of a voluntary prelisting conservation action for which credit is given must be greater than the detriment from the action for which the credit is used, that is, the benefit from the prelisting action, combined with the detriment from a later action, must result in a positive assistance to the recovery of the species. The positive assistance to the recovery of the species will be achieved by setting aside a specific percentage of the credits. The specific percentage will depend on the species and the nature of the actions.

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