

§ 410 Subpart E Cooperation with the States

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Section 410.401 Scope and Applicability

This section describes and implements the actions the Secretary will take to cooperate with states in carrying out Section 6 of the Act. The state agency in each of the affected states, or the representative of the state agency is authorized to participate in a meaningful and timely manner as a [co-equal party] [partner] [involve in the deliberative process] ****in the development and implementation of every aspect of the Act while the Secretary retains final decisionmaking authority.

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Section 6(a) of the Act provides that the Secretary shall cooperate to the maximum extent practicable with the states. Pursuant to this directive, Cooperative Agreements may contain any provisions involving the sharing of Endangered Species Act functions which are consistent with the requirements of the Act or any other Federal law. States, may request and be given the lead role in almost every aspect of the Act, including, but not limited to, Section 4, Section 7, and Section 10 of the Act. All such shared responsibilities must be consistent with the requirements for an approved program, pursuant to Section 410.402 and 410.404 and ultimate authority for such functions rest with the Secretary as required by the Act.

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Section 410.402 Full Authorities Cooperative Agreements.

(a) Under section 6(c) of the Act, the Secretary may sign a Full Authorities Cooperative Agreement with a state that has established and that maintains an adequate and active program for the conservation of endangered and threatened species.

(b) In order for a state program to be deemed an adequate and active program, the Secretary must find and reconfirm pursuant to 410.405 on an annual basis, that:

- (1) Authority resides in the state agency to conserve resident species of fish and wildlife or plants determined by the state agency or the Secretary to be endangered or threatened;
- (2) The state agency has established an acceptable conservation program, consistent with the purposes and policies of the act, for all resident species of fish and wildlife or plants in the state which are deemed by the Secretary to be endangered or threatened; and has furnished a copy of such program together with all pertinent details, information, and data requested to the Secretary;
- (3) The state agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife or plants;

(4) The state agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation or resident endangered or threatened species; and

(5) Provisions are made for public participation in designating resident species of fish and wildlife or plants as endangered or threatened.

****Need to add criteria****

Section 410.403 State Regulation of Taking Under Full Authorities Cooperative Agreements

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(a) Pursuant to section 6(g)(2) of the Endangered Species Act, a State which is a party to a Full Authorities Cooperative Agreement may regulate the taking of any resident endangered species or threatened species, except:

(1) If there is language to the contrary within the Agreement; or

(2) The species is listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law.

****MMPA—legal question, can States assume take authority under MMPA***

(b) The Secretary may approve a Full Authorities Cooperative Agreement in which:

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(1) The Secretary regulates all taking of resident endangered or threatened species; or

(2) The state regulates taking for some but not all of resident endangered or threatened species; or

(3) The state regulates s all taking of resident endangered or threatened species.

(c) In making a determination as to what authority to provide to a state under a Full Authorities Cooperative Agreement, for migratory species, the Secretary shall notify all other states in which the species is resident.

(d) Notwithstanding the terms of any cooperative agreement entered into under the Act, ultimate authority to enforce all provisions of the Act and any regulations and permits thereto, must be retained by the Secretary or any other Federal official with statutory responsibility for enforcing provisions of the Act. ****Check language****

Section 410.404 Limited Authorities Cooperative Agreement

(a) Under section 6(c)(1)(E)(i-ii) with regard to fish and wildlife, and 6(c)(2)(D)(i-ii) with regard to plants, the Secretary may enter into Limited Authorities Cooperative Agreements with states.

(b) In order for the Secretary to enter into a Limited Authorities Cooperative Agreement, the Secretary must find and reconfirm on an annual basis:

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(1) For resident species of fish and wildlife, the requirements set forth in paragraphs 410.402(b)(3)-(5) of this Subpart are met;

(2) For plants, the requirements in section 410.402(b)(3) are met; and

(3) Plans are included under which immediate attention will be given to those resident species of fish and wildlife or plants which are determined by the Secretary or the state agency to be endangered or threatened and which the Secretary and the state agency agree are most urgently in need of conservation programs.

(c) The Secretary, and the state agencies shall agree on which species are most urgently in need of a conservation program, taking into consideration the State Wildlife Action Plans.

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(d) The Secretary shall notify all other states affected by a state's authorization of a Limited Authorities Agreement.

e) A Limited Authorities Cooperative Agreement entered into with a State cannot include the ability of the state to regulate take of any resident endangered or threatened species. Or other provisions of the Act. *****

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410.405 Annual Reconfirmation of State Programs

(a) In conducting the annual review and reconfirmation that a state program is adequate and active for the conservation of endangered species and threatened species, the state shall submit to the Secretary for consideration any pertinent changes that have occurred in a state's laws, species lists, rules, regulations, and programs. The Secretary will consider the information submitted by the State in addition to any pertinent information that is available prior to the annual reconfirmation.

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(b) For purposes of the reconfirmation process, the state's program shall be presumed to have remained adequate and active, unless there is substantive evidence demonstrating that the state no longer meets the required threshold for an adequate and active program for the conservation of endangered species and threatened species.

410.406 Allocation of Funds

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(a) The Secretary shall at least annually allocate funds, appropriated for the purpose of carrying out Section 6, to various states which have entered into Cooperative Agreements with the Secretary under section 6(c) of the Act, based on consideration of

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- (1) The international commitments of the United States to protect endangered or threatened species;
- (2) The readiness of a state to proceed with a conservation program consistent with the objectives and purposes of the Act;
- (3) The number of endangered and threatened species within a state;
- (4) The potential for restoring endangered and threatened species within a state;
- (5) The relative urgency to initiate a program to restore and protect an endangered or threatened species in terms of survival of the species;
- (6) The importance of monitoring the status of candidate species within a state to prevent a significant risk to the well being of any such species; and

(7) The importance of monitoring the status of recovered species within a state to ensure that such species do not return to the point at which the measures provided pursuant to the Act are again necessary.

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(8) State Wildlife Action Plans, as applicable.

(b) These allocated funds may be utilized by the states for the establishment and operation of state species conservation offices pursuant to a cooperative agreement under this section.

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410.407 Financial Assistance.

(a) Subsequent to the establishment of a Cooperative Agreement pursuant to 410.402 or 410.404 the Secretary, subject to the availability of Federal funds, is authorized to provide financial assistance to the states in the development and implementation of acceptable projects for the conservation of endangered and threatened species. Financial assistance under such agreements shall be contingent upon the continued existence of the Cooperative Agreement described in 410.402 or 410.404.

(b) Such financial assistance shall be made available in a manner prescribed by the Secretary.

(c) To meet the requirements of the Act, the Application for Federal Assistance shall certify that the state agency submitting the project is committed to its execution and that

has been reviewed by the appropriate state officials and is in compliance with other requirements of the Office of Management and Budget Circular No. A-95.

(d) Funds allocated to a state are available for obligation during the fiscal year for which they are allocated and until the close of the succeeding fiscal year. If funds obligated to a state are not spent by the state at the end of the succeeding year, the Secretary may extend the period the state has for expending those funds or may reallocate those funds to other programs under section 6.

(e) Federal payments under the Act must not exceed 75 percent of the program costs as stated in the agreement; except, the Federal share may be increased to 90 percent when two or more states having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such states, enter jointly into an agreement with the Secretary.

(f) Payments must be made only to the state office or official designated by the state agency and authorized under the laws of the state to receive public funds of the state.

(g) The state must certify that it will comply with all applicable Federal laws, regulations, and requirements as they relate to the application, acceptance, and use of Federal funds for projects under the Act in accordance with Office of Management and Budget Circular A-102.

(h) Any difference of opinion about the substantiality of a proposed project or appraised value of land to be acquired will be considered by qualified representatives of the Secretary and the state holding the agreement, but a final determination in the event of continued disagreement rests with the Secretary.

410.02 Definitions

In addition to the definitions contained in the Act and Parts 10 and 222 of this subchapter, the following definitions are applicable to this Part:

“Act” means the Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531 et seq.

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Deleted: (d) The Project Agreement will follow approval of the Application for Federal Assistance by the Secretary. The mutual obligations by the cooperating agencies will be shown in this agreement executed between the state and the Secretary. An agreement shall cover the financing proposed in one project segment and the work items described in the documents supporting it.¶

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(e) The form and content for both the Application for Federal Assistance and the Project Agreement are provided in the Federal Aid Manual.¶

Deleted: For the purpose of this section, obligation of allocated funds occurs when a Project Agreement is signed by the Secretary, or his authorized representative, attesting to his approval.¶

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(2) The state share of program costs may be in the form of cash or in ... [2]

Comment [RS1]: REPLACE SHALL with MUST

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“Adequately covered” means:

(1) with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA or the requirements for an agreement under Subpart G or H, and the permit or the agreement specifically identifies the species; or

(2) with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA or Subpart G or H that would otherwise apply if the unlisted species covered by the plan were actually listed.

“Applicant” means, with respect to permits or agreements pursuant to section 10 of the Act or Subpart F, G, or H of this Part, any property owner with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities on non-federal land, or any Federal, state, tribal, local, or other entity proposing to hold and administer such a permit under which proposed management activities will be carried out by non-federal property owners on non-federal land, subject to applicable state law.

“Baseline,” for purposes of Safe Harbor Agreements, means a baseline of biological and physical conditions, agreed upon by the Secretary and the applicant, for each species covered by the agreement on land and water subject to the agreement.

“Bred in captivity” or “captive-bred” refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

“Candidate Conservation Agreements with Assurances” means an agreement issued pursuant to the Candidate Conservation Agreement with Assurances policy issued by the Services and contained in 64 Federal Register 32726 (June 17, 1999).

“Captivity” means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

“Changed circumstances” means changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that can reasonably be anticipated by plan or agreement developers and the Service and that can be planned

for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

“Conservation” of recovery or critical habitat includes protection, maintenance, restoration, enhancement, and creation of that habitat.

“Conservation plan” means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as “habitat conservation plans” or “HCPs.”

“Conserve,” “conserving” and “conservation mean to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. Conservation is a process which contributes to improving the status of the species. Individual actions still may be considered conservation actions even though they do not result in the species being no longer in need of the protections of the Act.

“Conserved habitat areas” means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

“Endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range (other than a species of the Class Insecta as determined by the Secretary to constitute a pest whose protection under the provisions of The Endangered Species Act of 1973 would present an overwhelming and overriding risk to man).

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“Enhance the propagation or survival,” when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(1) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(2) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the

propagation or survival of the captive population at the location from which the wildlife would be removed; and

(3) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

“Fish or wildlife.” Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

“Full Authorities Cooperative Agreement” is one entered into pursuant to section 6(c) of the Act and that satisfies the requirements in section 6(c)(1)(A) B (E) or 6(c)(2)(A-D).

“Harass” in the definition of “take” in the Act means a persistent intentional or negligent act or acts causing individuals to abandon normal behavioral patterns such as breeding, feeding, or sheltering, resulting in significant adverse effects on the survival, recruitment, or reproductive output of the affected individuals. This definition, when applied to captive wildlife, does not include generally accepted:

(1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act;

(2) Breeding procedures; or

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

“Harm” in the definition of “take” in the Act means an act that causes injury to an individual member of a species of fish or wildlife. Such act may include significant habitat modification or degradation.

“Incidental taking” means any taking prohibited by section 9 of the Act or by regulation promulgated pursuant to section 4(d) of the Act, if such taking is incidental to, and not the purpose of, the carrying out of an activity.

“Limited Authorities Cooperative Agreement” is one entered into pursuant to section 6(c) of the Act that does not satisfy the requirements in section 6(c)(1)(A) - (E) but satisfies the requirements in section 6(c)(1)(E)(i) and (ii) or 6(c)(2)(D)(i) and (ii).

“Net conservation benefit” means, with respect to species covered by permits and agreements issued for Safe Harbor Agreements pursuant to Subpart G or the Candidate Conservation Agreements with Assurances to Subpart H, the cumulative benefits of the management activities identified in an Agreement that are sufficient to

contribute to the recovery of covered endangered or threatened species or, in the case of covered proposed or candidate species, are sufficient to remove or contribute to reducing threats that could be a basis for listing such species as endangered or threatened, taking into account the length of the Agreement and any offsetting adverse effects attributable to the incidental taking allowed by an enhancement of survival permit issued in association with the Agreement. For species covered under Safe Harbor Agreements, the determination of a net conservation benefit includes consideration of incidental take that brings land or water to the baseline.

“Operating conservation program” means those conservation management activities which are expressly agreed upon and described in a conservation plan or its implementing agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

“Plant” means any member of the plant kingdom, including seeds, roots, and other parts thereof.

Comment [RS2]: FWS Team could not find any application of definition of “plan”

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“Program”, for purposes of Subpart E, means a state-developed set of goals, objectives, strategies, actions, and funding necessary to be taken to promote the conservation of resident endangered or threatened species. Such a program may be wholly contained within a state’s Wildlife Action Plan, developed pursuant to the requirements for State Wildlife Grant funding under, (P.L. 107-63, 115 Stat. 414); or may be evidenced within other state legislation, regulations, planning, and policy documents.

“Properly implemented conservation plan” means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

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“Property owner” with respect to permits and agreements described in Subparts F, G and H, means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities.

“Recovery habitat” means occupied or unoccupied habitat capable of furthering species recovery goals identified in Recovery Plans. Recovery habitat can be described by its physical or biological features, or by maps. The identified features or areas shall include a description of their contribution to the species’ conservation.

“Recovery plan” means a document that describes the management actions and objective and measurable criteria that when met, either in whole or in part to such a degree that the species is no longer threatened or endangered.

“Regulate Take” means procedures a state will utilize to manage the taking of threatened and endangered species under the terms of a Full Authorities Cooperative Agreement.

“Resident species.” For purposes of the Endangered Species Act of 1973, a species is resident in a state if any individual exists in the wild in that state during any part of its life, regardless of whether it also exists in another state during any part of its life.

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“Safe Harbor Agreement” means an agreement under the Safe Harbor Agreements policy issued by the Services in 64 Federal Register 32717 (June 17, 1999).

“Secretary” means the Secretary of the Interior or the Secretary of Commerce acting through the Director of the Fish and Wildlife Service or the Assistant Administrator of the National Marine Fisheries Service.

“Species.” This term includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

“State.” Means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Commonwealth of the Northern Marianas Islands.

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“State agency.” The state agency or agencies, or other governmental entity or entities which are responsible for the management and conservation of fish or wildlife resources within a state.

Comment [MSOffice3]: check the trust status of pacific islands

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“Unforeseen circumstances” means changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that could not reasonably have been anticipated by plan or agreement developers and the Service at the time of the conservation plan's or agreement's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

“Threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, as determined by the Secretary.

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The payment of the Federal share of costs incurred in the conduct of activities included under a Project Agreement shall be in accordance with Treasury Circular 1075.

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(2) The state share of program costs may be in the form of cash or in-kind contributions, including real property, subject to standards established by the Secretary as provided in Office of Management and Budget Circular A-102.

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(3) Payments, including such preliminary costs and expenses as may be incurred in connection with projects, shall not be made unless all documents that may be necessary or required in the administration of this Act shall_[RS1] have first been submitted to and approved by the Secretary. Payments shall be made for expenditures reported and certified by the state agencies.

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(4) Vouchers and forms provided by the Secretary and certified as therein prescribed, showing amounts expended and the amount of Federal funds claimed to be due on account thereof, shall be submitted to the Secretary by the state agency.

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() Papers and documents required by the Act or by regulations in this part shall be deemed submitted to the Secretary from the date of receipt by the relevant office of the Services.

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() The state may use its own regulations in obtaining services providing that they adhere to Federal laws and the requirements provided by Office of Management and Budget Circular A-102. The state is the responsible authority without recourse to the Secretary regarding settlement of contractual issues.

(l) Supervision of each project by the state shall include adequate and continuous inspection. The project will be subject to periodic Federal inspection.

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(m) In the event that the state elects to receive funding pursuant to its Wildlife Action Plan, the Cooperative Agreement will be an attachment to the Plan. No Application for Federal Assistance will be required since the documentation will be incorporated in the Plan. However, the continued existence of the Plan, and Federal financing thereunder, will be contingent upon the continued existence of a Cooperative Agreement under either 410.402 or 410.404.

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(n) The state is required to conduct an audit at least every two years in accordance with the provisions of Attachment P of OMB Circular A-102. Failure

to conduct audits as required may result in withholding of grant payments or such other sanctions as the Secretary may deem appropriate.