

endangered species. Under section 17.31, if the Service concluded for a given threatened species that the general prohibitions were inappropriate or inadequate, the Service committed to issuing a "special rule" under section 4(d) of the Act containing different prohibitions and exceptions tailor made for the threatened species in question. However, the Act does not make this option available to species listed as endangered.

Underlying this approach taken in 1975 was the general assumption that the majority of threatened species of fish and wildlife would require the same level of protection against takings afforded to endangered species, and that only a small number of threatened species would require specialized regulatory attention. For the anticipated small handful of threatened listings where the "one size fits all" approach to takings prohibitions would not work, additional time and effort would be spent developing a tailor made special rule. This approach with regard to the taking of threatened fish and wildlife was not extended to the protection of threatened plants because as a general matter the taking of plants is not a prohibited activity on private lands.

Currently, a total of 111 fish and wildlife species endemic to the U.S. are listed as threatened. An additional six fish and wildlife species are proposed for listing as threatened. Thus, during the past twenty years of implementing the Act, the Service has gained significant experience and insight into the management and conservation of threatened species. The Service has found in some cases that existing prohibitions have been unnecessarily restrictive or too inflexible to encourage creative conservation opportunities for threatened species. Further, the Service has found that these prohibitions may "over-regulate" certain activities which, on the whole, are otherwise insignificant for some species, and in some cases may actually generate disincentives for private landowner support for threatened species conservation. Both of these situations have led to considerable anxiety on the part of private landowners, particularly smaller landowners who believe that they have little to contribute to threatened species conservation.

With regard to small landowners and small-scale or low-impact activities, the Service now believes that it is no longer necessary, appropriate, or advisable to maintain a regulatory presumption that isolated takings associated with such activities must be strictly regulated or prohibited for the conservation of all

threatened species. For some threatened species, the opposite is true.

For example, in the case of occupied household dwellings used solely for residential purposes, the Service has found that there are few routine yard maintenance or construction activities which are likely to adversely affect threatened species in any meaningful way. Moreover, the relative habitat value of residential property is very limited in most cases. Small-scale land use disturbance activities are another category of events which are likely to generate little or no lasting effect on the likelihood of the survival and recovery of a number of threatened species, especially species which are wide ranging. The Service believes that for many threatened species, a variety of small-scale activities might technically result in an isolated incidental "taking" of a species without individually or cumulatively having a significant adverse effect upon its long-term conservation.

In light of the above considerations, the Service now proposes to amend 50 CFR 17.31 by creating a new set of presumptions which would exempt certain small landowners and categories of small-scale or negligible-impact activities from possible incidental take liability for threatened species. Upon final adoption of this amendment, the Service would automatically exempt the delineated categories of activities from the incidental taking restrictions of future threatened species listings, unless for a given proposed listing, the Service concluded that the individual or cumulative adverse effects were likely to be significant. In such a case, the Service would issue a special rule which would modify the proposed exemptions as necessary and otherwise assure that any individual or cumulative effects would be insignificant.

The Service anticipates three different scenarios for implementing the new small landowner and low-impact exemption regulation, depending on where a species is in the listing process. The three situations would involve species that are listed as threatened at some time in the future after the possible adoption of these new exemptions; species that are proposed for listing as threatened and are presently in the listing process; and species that are already listed as threatened. In the first situation, the new exemptions in 50 CFR 17.31, if ultimately adopted, would automatically apply to any species listed as threatened in the future except where the adverse effects of the exemption would be significant.

The second situation involves the Service's interim application of the proposed exemptions, pending final adoption of an amendment to 50 CFR 17.31. During this interim period, the Service will consider the application of the exemptions on a case-by-case basis for currently proposed threatened species listings, and will issue a proposed special rule to adopt those exemptions for any species where it is found to be warranted. This could result in two opposite uses of special rules for threatened species with regard to small landowner and low-impact exemptions: once the new exemptions are finalized and formally inserted into 50 CFR 17.31, a special rule would be used to "opt out of" (i.e., not to adopt) the new exemptions where necessary. Pending the final amendment of 50 CFR 17.31, however, a special rule would be needed to "opt in to" (i.e., to adopt) the proposed exemptions for a new threatened species listing. In either situation, the special rule would fully explain the circumstances and the rationale for its treatment of small landowner and small impact activities as they relate to incidental take prohibitions for the affected threatened species.

The third situation involves the 111 fish and wildlife species currently on the threatened species list. These species were placed previously on the list without specific consideration of a small landowner or low-impact exemption. The Service intends to complete within 90 days a preliminary assessment of all currently listed threatened species of fish and wildlife to assess the extent to which the new proposed exemptions could be applied. In those instances where such application is warranted, the Service would propose subsequent special rules to address currently-listed threatened species.

Section By Section Analysis

Subsection (a) *General*.—The current language of subsection (a) states that with three expressly noted exceptions, all of the prohibitions applicable to endangered species are made applicable to threatened species of fish and wildlife. The proposed rule would make a technical addition to the list of exceptions by adding a reference to "subsection (d)" which would contain the new proposed exemptions for small landowners and small-scale and negligible impacts. The net effect of this change would be to establish a new presumption for future threatened species listings that the regulatory prohibition against takings would not apply to activities conducted in