

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02-2151, MM Docket No. 02-00-76, RM-9809]

Digital Television Broadcast Service; Urbana, IL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, by this document, denies a petition for reconsideration filed by WGN Continental Broadcasting of the Report and Order, which substituted DTV channel *9 for station WILL-DT assigned DTV channel *33 at Urbana, Illinois. See 65 FR 60378, October 11, 2000. With is action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418-1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order, MM Docket No. 00-76, adopted September 4, 2002, and released September 10, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY-B402, Washington, DC 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, television.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 02-23300 Filed 9-12-02; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222, 223 and 224

[Docket No. 011130288-2205-02; I.D. 092101C]

RIN 0648-AP64

Endangered and Threatened Species; Transfer of Certain Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule that allows the transfer of certain permits under the Endangered Species Act (ESA) of 1973, as amended. This final rule allows the transfer of incidental take permits and enhancement of survival permits associated with Safe Harbor Agreements with Assurances or Candidate Conservation Agreements with Assurances. Currently, if a permit holder wants to sell land or business operations covered by a permit to a new owner, the new owner would need to apply for a separate permit. Regulations pertaining to similar permits issued by the US Fish and Wildlife Service (USFWS) allow such transfers. This final rule will revise NMFS regulations to allow transfers, promoting efficiency and consistency with USFWS regulations.

DATES: Effective on October 15, 2002.

ADDRESSES: Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Margaret Lorenz or Lamont Jackson at (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Background

NMFS is responsible for implementing the ESA, 16 U.S.C. 1531-1544, with respect to most threatened and endangered marine species. NMFS' regulation at 50 CFR 222.305 prohibits the transfer of all permits issued under 50 CFR parts 222, 223, and 224. This includes permits to "take" ESA-listed species issued under section 10(a) of the ESA. On December 21, 2001, NMFS published a proposed rule that would allow the transfer of section 10 permits associated with Habitat Conservation Plans, Safe Harbor Agreements with Assurances, and Candidate Conservation Agreements with

Assurances. This final rule revises the regulation to allow the transfer of these permits if certain requirements are met.

While the restrictions imposed on permit succession and transferability are justified in some situations (e.g., scientific research permits and permits for enhancement of propagation), they are unnecessary and inappropriate for incidental take permits and enhancement permits associated with Safe Harbor Agreements with Assurances or Candidate Conservation Agreements with Assurances. These three types of permits involve substantial long-term conservation commitments, and NMFS recognizes that there may be succession or transfer in ownership during the term of the permit. NMFS and USFWS often issue permits covering the species under their respective jurisdictions to the same landowner, based on the same conservation plan. In 1999 the USFWS revised its permit transfer regulation to allow the transfer of these enhancement and incidental take permits, provided certain conditions are met. (64 FR 32706, June 17, 1999). In 2001, USFWS reconfirmed its decision to allow the transfer of these permits. (66 FR 6483, Jan. 22, 2001).

NMFS believes that a blanket prohibition on transferability of incidental take permits under ESA section 10(a)(1)(B) and enhancement permits issued for Safe Harbor Agreements with Assurances and Candidate Conservation Agreements with Assurances under section 10(a)(1)(A) is unnecessarily restrictive, given the context and purpose of these plans and agreements. This final rule removes the prohibition on transferability of incidental take and enhancement permits with respect to these named agreements. This final rule requires, however, that prior to accepting a proposed transfer of a permit, NMFS determine that the proposed transferee has given adequate written assurance to NMFS that it can and will fulfill the obligations of the conservation plan or agreement.

Description of Permits

Incidental Take Permit: NMFS issues permits under section 10(a)(1)(B) of the ESA to take listed species incidental to the carrying out of an otherwise lawful activity, provided the requirements of that section are met. One of these requirements is the submission of a conservation plan, often referred to as a Habitat Conservation Plan or HCP, to minimize and mitigate for take that will occur during the term of the permit. HCP's often involve long-term conservation commitments that obligate

a landowner or business operator for the life of the permit, which may be as long as 100 years, cover hundreds of thousands of acres, and/or require substantial capital investments.

Safe Harbor Agreements with Assurances: Under the joint USFWS/NMFS Safe Harbor policy (64 FR 32717 (June 17, 1999)), non-Federal property owners with an approved agreement may receive assurances that additional land, water, and/or natural resource use restrictions will not be imposed in exchange for their voluntary conservation actions to benefit listed species covered in the agreement. If the conservation actions will provide a net conservation benefit to the covered species and the property owner meets all the terms of the Agreement, NMFS will authorize the taking of the covered species to enable the property owner to ultimately return the enrolled property back to agreed upon conditions. These assurances will be provided in the property owner's Safe Harbor Agreement and in an associated enhancement of survival permit issued under section 10(a)(1)(A) of the ESA. While USFWS has adopted regulations to implement this policy (50 CFR 17.22(c)), NMFS has not yet done so and has entered into no Safe Harbor Agreements at this time. If NMFS were to do so, this transferability rule would apply to the permits issued with these agreements.

Candidate Conservation Agreement with Assurances: Under the joint USFWS/NMFS Candidate Conservation policy (64 FR 32726; (June 17, 1999)), non-Federal property owners who commit to implement adequate conservation measures for a candidate or proposed species, or a species likely to become candidate or proposed in the near future, will receive assurances that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed in the future. The conservation measures in the agreement, when combined with those benefits that would be achieved if it is assumed that the conservation measures would also be implemented on other necessary properties, must be sufficient to preclude or remove any need to list the species covered by the agreement. Assurances are provided in the property owner's Candidate Conservation Agreement with Assurances and, if the species becomes listed, in an associated enhancement of survival permit issued under section 10(a)(1)(A) of the ESA.

While USFWS has adopted regulations to implement this policy (50 CFR 17.22(d)), NMFS has not yet done

so and has entered into no Candidate Conservation Agreements with Assurances at this time. If NMFS were to do so, this transferability rule would apply to the permits issued with these agreements.

Rationale for Rule Change

A permittee may wish to transfer business operations or covered land, or a portion of it, during the term of the permit. Species covered by the permit's conservation measures should not be affected by a change in ownership if successive owners are qualified to hold the permit, and agree to be bound by the terms of the permit. Landowners are more likely to be willing to undertake these commitments if they know they can transfer their incidental take authorization and conservation obligations to a qualified purchaser.

In addition, in many instances both USFWS and NMFS issue permits to the same landowner or operator, based on the same conservation plan or agreement. Since 1999, USFWS and NMFS have had inconsistent regulations with regard to transferability of incidental take and enhancement permits. NMFS and USFWS strive for consistency in administration of the ESA, to promote efficiency and reduce confusion on the part of the public and the regulated community. This final rule addresses this inconsistency.

This final rule removes constraints on permit transferability to allow those who have permits associated with HCP's, Safe Harbor Agreements with Assurances, and Candidate Conservation Agreements with Assurances the flexibility to transfer permits to qualified purchasers. It allows transfer of these permits only so long as the successor or transferee owner meets the general qualifications for holding the permit and agrees to the terms of the HCP, Safe Harbor Agreement with Assurances, or Candidate Conservation Agreement with Assurances.

Overview of the Revisions to Permit Regulations

Section 222.305(a) is revised to allow transferability of permits issued under 50 CFR parts 222, 223, and 224, where NMFS determines the transferee has given adequate written assurance (e.g., signing of a contract or assumption agreement between NMFS and the new landowner) that it can and will fulfill the obligations of the permit.

This final rule does not apply to scientific research permits or enhancement of propagation permits issued under ESA section 10(a)(1)(A). It applies only to incidental take permits,

and to enhancement of survival permits issued under section 10(a)(1)(A) in association with a Safe Harbor Agreement with Assurances or a Candidate Conservation Agreement with Assurances. Permits issued by NMFS for scientific research and enhancement of propagation for ESA-listed species, including marine mammals (50 CFR 222.308, 216.41) are not transferable (50 CFR 216.35), and this final rule will not affect this restriction or the regulations at 50 CFR 216.41 and 222.308. These permits are not transferable because they require that the holder/principal investigator be qualified to conduct the research or enhancement activities described in the original application and permit. The permit is issued in reliance on the qualifications of the permit applicant and thus should not be transferable without a thorough assessment of the qualifications of another applicant. Transferability streamlines the permit process and is inappropriate for permits that are dependent upon the permittee's qualifications.

Summary of Comments in Response to the Proposed Rule

The public comment period for the proposed rule was open from December 18, 2001, through February 4, 2002. During the comment period, NMFS received comments from two parties, Environmental Defense and Northwest Environmental Defense Center. A summary of the comments and NMFS' responses to those comments follows.

Comment 1: Commenter opposes this rule change because it removes public participation from the permitting process, which violates the intent of the ESA.

Response: Issuance of a new section 10 permit is always subject to public notice and comment. If a permit is transferred from one business operator or landowner to another with no changes in the terms or duration of the conservation plan or the permit, and NMFS is satisfied that the transferee will meet the obligations in the plan, the business or land would continue to be managed under a plan that has been the subject of public comment. There will be no fundamental change to the terms of the permit or plan. If the proposed transferee wishes to change the terms of the permit or plan, NMFS would regard this as a new permit application subject to notice and comment.

Comment 2: Commenter recommends the preparation of an environmental impact statement (EIS) or an environmental assessment (EA) under the National Environmental Policy Act

(NEPA), to evaluate the environmental impacts of the permit transfer.

Response: If the business or land is simply changing hands, and the new owner agrees to the conditions of the previous plan with no additions or changes, there should be no additional environmental impacts that were not considered in the NEPA analysis that accompanied the permit application. NMFS believes transfers can be accomplished with a categorical exclusion from NEPA analysis.

Comment 3: Commenter believes the proposed rule will impact the recovery of threatened and endangered species because it will remove NMFS authority to review plans and to re-evaluate the effectiveness of the permit upon transfer.

Response: Assuming a transferee will abide by the terms of the permit and plan, there is no basis for comprehensive re-evaluation of a plan that was found to meet ESA standards at the time the permit was issued, simply because the covered business or land happens to be transferred to another owner. Moreover, all long-term permits require periodic reports to NMFS. After transfer of a permit, NMFS will retain the same authority to review compliance with permit conditions and effectiveness of conservation measures that it had with respect to the initial permittee.

Comment 4: Commenter objects to the use of a contract between NMFS and the transferee to assure that the transferee will comply with the terms of the HCP.

Response: NMFS adopted this approach from the USFWS. The contract is not the only assurance that the transferee will comply with the HCP or other agreements. The transferee will lose take authorization if it does not comply with the terms of the permit. A permit may be suspended or revoked for noncompliance (15 CFR 904.320). This provision applies to all permit holders, whether they are original permit applicants or transferees.

Comment 5: Commenter recommends that NMFS take steps to ensure that transferees understand the terms of the conservation plan and can fulfill the commitments of the HCP or agreement.

Response: NMFS will take all necessary steps to ensure that the prospective transferee understands the permit and plan obligations and has the capability to implement the plan as written. The final rule requires the proposed transferee to provide "such other information as NMFS determines is relevant to process the transfer (§ 222.305(a)(3)(iii))." NMFS will obtain all information necessary to make the determinations required in this final

rule. The final rule has been revised to require that NMFS make these determinations in writing, to assure that the basis for the determinations is documented.

Comment 6: Commenter believes the rule will have significant impacts because it will allow the transfer of permits when there is no system in place to account for the take of listed species resulting from permits already issued by NMFS.

Response: As noted in the response to Comment 3, all conservation plans require periodic reports to NMFS on implementation of the plan. NMFS reviews reports to determine, among other things, if it is likely that incidental take beyond what was anticipated at the time the permit was issued has occurred. NMFS conducts these reviews regardless of whether a permit is transferred. Transfer of a permit should have no bearing on NMFS' ability to track incidental take.

Comment 7: Commenter suggested NMFS clarify or revise the part of the proposed rule that says a permittee has to meet all of the qualifications of parts 222, 223, and 224 (as applicable) for holding a permit. Commenter notes that § 222.308(c) says only that the Assistant Administrator shall consider certain factors in making a permit determination but does not list qualifications for holding a permit.

Response: This final rule is not limited to qualifications under 50 CFR 308(c). The rule provides that the transferee must meet all the qualifications for holding a permit included in parts 222, 223, and 224. These parts set forth qualifications for holding any NOAA permit. For example, § 222.303 includes factors that may result in denial of a permit, and it incorporates by reference the issuance criteria in 15 CFR part 904. Part 904, subpart D, regarding permit sanctions and denials, enumerates bases for denial of a permit. Such bases include, for example, "[t]he commission of any offense prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder . . ." 50 CFR 904.301(a)(1). A proposed permit transferee may be found to be not qualified to hold the permit if a basis for denial of a permit exists.

Comment 8: Commenter believes the existing regulations for permits for scientific research or enhancement of propagation or survival are irrelevant to enhancement of survival permits issued with Safe Harbor Agreements with Assurances or Candidate Conservation Agreements with Assurances.

Commenter suggests that NMFS conduct a new rulemaking procedure to adopt regulations governing issuance of this subset of enhancement of survival permits. Commenter suggests that regulations address information requirements and approval criteria appropriate for these enhancement of survival permits.

Response: NMFS recognizes that current section 10(a)(1)(A) of the ESA permit regulations do not address information requirements or issuance criteria for enhancement of survival permits with Safe Harbor Agreements with Assurances or Candidate Conservation Agreements with Assurances. As noted above, NMFS has not yet adopted regulations to implement the joint policy on these types of permits, and it has not issued these types of permits. NMFS will seriously consider the commenter's suggestion. The comment does not, however, affect the adoption of this final rule. This rule pertains only to the transferability of permits, not to issuance of permits.

Comment 9: Commenter believes the Proposed Rule published in the **Federal Register** created confusion concerning which permits are transferable and which are not under the new rule.

Response: NMFS has sought to be very clear in this document which permits are transferable and which are not.

Classification

NMFS has determined that this final rule is consistent with the ESA and with other applicable laws.

National Environmental Policy Act

NOAA's Administrative Order 216-6 (May 20, 1999), allows categorical exclusions for "other categories of actions not having significant environmental impacts." Specifically, this transfer rule can be categorically excluded since this action involves "regulations and guidelines of an administrative, financial, legal, or procedural nature(6.03c3(i))." Approval of this final rule will not result in actions that individually or cumulatively have the potential to pose significant impacts on the quality of the human environment. Therefore, implementation of this final rule would be exempt from both further environmental review and requirements to prepare environmental review documents (40 CFR 1508.4).

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, at the proposed rule stage the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities, since the rule would reduce costs associated with transfers of land subject to ESA section 10 permits. No comments were received regarding the economic impacts of this rule on small entities.

Paperwork Reduction Act

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648-0230. Public reporting burden for this collection of information is estimated to average 40 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attention: NOAA Desk Officer)."

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Executive Order 13132 - Federalism

This action has been determined to have no federalism impacts, as that term is defined in Executive Order 13132.

List of Subjects*50 CFR Part 222*

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

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

50 CFR Part 224

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

Dated: September 9, 2002.

William T. Hogarth,

*Assistant Administrator for Fisheries
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 222 is amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

1. The authority citation for part 222 continues to read as follows:

Authority: Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701. Section 222.403 also issued under 16 U.S.C. 1361 *et seq.*

2. In § 222.305, paragraph (a)(1) is revised and paragraph (a)(3) is added to read as follows:

§ 222.305 Rights of succession and transfer of permits.

(a)(1) Except as otherwise provided in this section, permits issued pursuant to parts 222, 223, and 224 of this chapter are not transferable or assignable. In the event that a permit authorizes certain business activities in connection with a business or commercial enterprise, which is then subject to any subsequent lease, sale or transfer, the successor to that enterprise must obtain a permit prior to continuing the permitted activity, with the exceptions provided in paragraphs (a)(2) and (a)(3) of this section.

* * * * *

(3) Incidental take permits issued under § 222.307, and enhancement permits issued under § 222.308, as part of a Safe Harbor Agreement with Assurances or Candidate Conservation Agreement with Assurances, may be transferred in whole or in part through a joint submission by the permittee and the proposed transferee, or in the case of a deceased permittee, the deceased permittee's legal representative and the proposed transferee, provided NMFS determines in writing that:

(i) The proposed transferee meets all of the qualifications under parts 222, 223, or 224 (as applicable) for holding a permit;

(ii) The proposed transferee has provided adequate written assurances that it will provide sufficient funding for the conservation plan or other agreement or plan associated with the permit and will implement the relevant terms and conditions of the permit,

including any outstanding minimization and mitigation requirements; and

(iii) The proposed transferee has provided such other information as NMFS determines is relevant to process the transfer.

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[FR Doc. 02-23397 Filed 9-12-02; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Parts 600 and Part 660**

[Docket No. 020904208-2208-01;
I.D.082702B]

RIN 0648-AP85

Magnuson-Stevens Act Provisions; Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Groundfish Fishery Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Emergency rule to set depth-based management measures for September-December 2002; request for comments.

SUMMARY: This emergency rule sets new depth-based management measures that create a darkblotched rockfish conservation area (DBCA). The DBCA will limit the incidental catch of darkblotched rockfish, an overfished species, while allowing the limited entry trawl fishery access to healthy deepwater groundfish stocks (e.g., Dover sole, thornyhead, sablefish) and nearshore flatfish species (e.g., Dover sole (seasonally), petrale sole, arrowtooth flounder, English sole) outside the DBCA. This action is intended to allow the fisheries to access the optimum yields (OYs) of healthy groundfish stocks while protecting overfished darkblotched rockfish.

DATES: Effective September 10, 2002, through March 12, 2003. Comments must be received no later than 5 p.m. local time (l.t.) on October 15, 2002.

ADDRESSES: Send comments to D. Robert Lohn, Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way N.E., Bldg. 1, Seattle, WA 98115-0070, or fax to 206-526-6736; or Rodney McInnis, Acting Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, or fax to 562-980-4047. Comments will