

# Safe Harbor

Helping Landowners

Help

Endangered  
Species



**ENVIRONMENTAL DEFENSE**

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## Safe Harbor: Helping Landowners Help Endangered Species

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# Introducing a new concept in endangered species conservation on private lands



Conservation comes naturally to many landowners. America's farmers, ranchers, and other landowners know that if they exhaust the soil, abuse the land, or pollute the waters, their fields, pastures, streams, and woodlots will become less productive. And so, for generations, they have tried to be good stewards. They embrace conservation because it makes economic sense to them and because they love their land.

Many landowners have also worked diligently to attract wildlife to their property. Whether because they enjoy hunting, fishing, or just watching and listening, most landowners are happy to share their land with wildlife. Indeed, the chance to have interesting plants and animals close by has long been one of the real joys of land ownership.

Today, however, some of these landowners are wondering whether they should keep the welcome mat out for wildlife. It's not because they no longer enjoy wildlife, but because they fear that the presence of some animals—especially endangered species—could restrict what they can do with their land. There is an unfortunate irony to this. Most endangered species will need more and better habitats if they are to recover, and who better than America's landowners to provide those places? Yet if landowners believe that creating these habitats threatens their own future, they are not likely to do so. And who can blame them?

A lot of ideas have been put forth to address this dilemma. This handbook describes one very effective and flexible approach: "safe harbor" agreements. All sorts of landowners are taking part in these easy-to-negotiate agreements, including farmers, forest landowners, resort owners, and even residential and corporate landowners. Together, they are making hundreds of thousands of acres of privately owned land available to America's disappearing wildlife and are doing so without new government regulations. This handbook describes safe harbor agreements and the way in which they work. It aims to help you decide if a safe harbor agreement makes sense for your land. Safe harbor agreements aren't appropriate in every situation. Nor, as this handbook will explain, will they solve every problem faced by landowners whose property is home to endangered species. But they can solve some important ones and, in doing so, assure landowners that their continued stewardship won't lead to land-use restrictions.



## What is a safe harbor agreement?

The basic idea behind a safe harbor agreement is that people who do good deeds shouldn't be punished for doing them. And so, in a safe harbor agreement, a landowner commits to doing a "good deed" for endangered wildlife—usually by restoring or enhancing habitats for endangered species—and the government pledges not to "punish" the landowner for doing that good deed. This may seem like such a sensible idea that there shouldn't be any need to enter into an agreement to accomplish it. But, actually, there is.

The reason is that under federal law (Endangered Species Act), and sometimes under state law, the presence of an endangered species on a property may result in restrictions on activities undertaken on that land that may be harmful to that species. Thus if landowners were simply to restore wildlife habitats on their property, and those habitats became homes to endangered animals, they might find themselves in a predicament. A landowner might, for example, have to apply for a permit to cut the stand of trees he planted, to drain the wetland he created, or to convert the prairie he restored into productive cropland.

A safe harbor agreement avoids dilemmas like these. It assures landowners that if they do what they have agreed to do (e.g., plant the stand of trees, create the wetland, or restore the prairie), they won't incur any new restrictions on the use of the land if their actions result in endangered species taking up residence. That is, they are free to develop that land, even if endangered species have shown up there in the meantime. Note, however, that safe harbor agreements don't affect any preexisting restrictions that may apply to a property as a result of endangered species already living there. This is an important point for landowners to understand, and it is discussed in greater detail elsewhere in this handbook.

Safe harbor agreements are a relatively new conservation tool and have never been formally tested in the courts. However, since the first safe harbor agreement was developed in 1995 to protect red-cockaded woodpeckers in the Sandhills of North Carolina, the idea has been praised by many landowner and environmental groups alike. In an arena where controversy has been all too common, safe harbor agreements to protect endangered species have generated uncommon enthusiasm.

### Woodpeckers in the Sandhills of North Carolina

The license plate on Dougald S. McCormick's Nissan truck bore an eye-catching message: "I EAT RCWS." The "RCWS" part of that message referred to red-cockaded woodpeckers, an endangered species found in the longleaf pine forests of the Sandhills region of North Carolina, where McCormick's family has long owned about 5,000 acres of forestland. Like many landowners in the Sandhills, McCormick was once wary of having this rare bird on his property. But not any more. Now Dougald McCormick is one of nearly two dozen landowners in the Sandhills who have enrolled their land in the nation's first safe harbor program. By doing so, he has put out the welcome mat on his own property for this elusive bird. Satisfied that the safe harbor program protects his interests as well as those of the bird, he now says, "I want to see this succeed."

The red-cockaded woodpecker inhabits mature southern pine forests and requires periodic fire to regenerate the fire-resistant pines and to suppress the growth of hardwood trees in the understory. The woodpecker's numbers have declined dramatically throughout its range as a result of the logging of mature pine forests, the suppression of fires, and other threats. Many landowners in the Sandhills and elsewhere were concerned that by allowing their pines to mature or by utilizing fire or other means to control hardwood undergrowth, they could attract woodpeckers to their property and potentially incur land-use restrictions as a result of the birds' presence.

Yet many Sandhills area landowners were more than willing to undertake activities to improve the woodpecker's habitat were it not for this concern. For example, many landowners rake the needles shed by the longleaf pines and sell the pine straw as a landscaping mulch. In Sandhills forests, in fact, pine-straw production is often more lucrative than timber production. Managing forests for pine straw creates ideal woodpecker habitat. In addition, many golf courses in the Sandhills contain mature pine forests with relatively open understories. Both course managers and golfers value the aesthetic appeal of park-like pine forests. However, even though improving woodpecker habitat was consistent with their land-management objectives, pine-straw producers, golf course owners, and other landowners were nervous about doing anything to attract endangered species to their properties. The safe harbor program was established with these landowners in mind.

Under the Sandhills safe harbor program, landowners enter into an agreement with the local office of the Fish and Wildlife Service under which they pledge to protect habitat for any woodpeckers that may already be on their property and to restore or enhance habitat that additional woodpeckers may use. In return, the landowners are assured that they will not be subject to any new restrictions if the population of woodpeckers increases on their property. In addition, neighboring landowners are protected against additional regulations if new groups of woodpeckers are attracted to the participating landowners' property and utilize habitat on the neighboring property.

Two dozen landowners with over 19,000 acres have enrolled in the program. They include Jerry Holder, a leader in the North Carolina Pine Needle Producers Association, who earns income by raking pine straw from his own land and that of other landowners with whom he contracts. The land enrolled in the Sandhills safe harbor program supports approximately 50 family groups of woodpeckers and has enough habitat for perhaps twice that number. The landowners have enhanced red-cockaded woodpecker habitat by using prescribed burns, drilling artificial nest cavities for woodpeckers, mechanically removing hardwood undergrowth, lengthening forest rotations, and other actions.



VIREO/S. Maka

Red-cockaded woodpecker. Safe harbor programs for this species have been established in North Carolina, South Carolina, and Texas.



Safe harbor not only has been beneficial to the woodpeckers, but also has fostered better relations between the Fish and Wildlife Service and landowners. In the fall of 1996, for example, Hurricane Fran roared through the Sandhills, taking many old pines with it. One of them, on the property of a participating landowner, had a nest cavity for the woodpeckers. This landowner promptly called the Fish and Wildlife Service to request that a biologist be dispatched to drill an artificial cavity in another tree so as not to lose the woodpeckers on his property.

Those who have joined the Sandhills safe harbor program include the owners of small woodlots, horse farms, and even some of the nation's best known golf courses. According to Brad Kocher, maintenance director at the famous Pinehurst Golf and Country Club, "Everybody wins with this."

Safe harbor agreements come in two basic forms. One is an individual agreement between a landowner and the federal agency responsible for conserving the species (the agency is usually the U.S. Fish and Wildlife Service, but for some fish species is the National Marine Fisheries Service). The landowner agrees to do something beneficial for endangered species in exchange for a guarantee of being subject to no additional regulatory restrictions related to the newly restored or enhanced habitat. The other is an "umbrella" agreement. In this type of agreement, an intermediary (which can be a state fish and game agency, state or federal agricultural agency, or even a private conservation organization) develops a safe harbor program for a specific area, such as a county or group of counties. Once the Fish and Wildlife Service or the Marine Fisheries Service approves that program, the intermediary works with individual landowners to develop written agreements that are covered by the intermediary's umbrella agreement. The result for the landowners is exactly the same—they can now restore habitats for endangered species without fear of new regulations—but much of the red tape is handled by the intermediary that holds the permit.



## What can a landowner do under a safe harbor agreement?

Landowners can do many things to help endangered wildlife under safe harbor agreements. The possibilities are as varied as the species and their needs. For example, a lot of endangered species occur in habitats that are created or maintained by fires. Such animals include Kirtland's warblers in Michigan, which nest exclusively in stands of young jack pines; Karner blue butterflies in New England and the Great Lakes states, whose caterpillars feed on only lupines in sunny clearings; Plymouth red-bellied turtles in Massachusetts, which require open, sunny pond shores for successful egg-laying; and red-cockaded woodpeckers in the Southeast, which live almost exclusively in open, park-like pine forests, where hardwoods are kept at bay by frequent fires. In many of the places where these species occur today, regular prescribed burning or other actions (mechanical or chemical management of hardwoods, controlled grazing, regulated timber harvesting) that replicate the effect of fires are used to maintain and enhance the habitats. Pledging to carry out such management practices may qualify a landowner for a safe harbor agreement, as in the case of several dozen forest landowners who have enrolled their land in safe harbor programs in North and South Carolina. In other cases, landowners have agreed to forgo cutting trees on a portion of their property for a specified period of time so that the

trees can grow old and tall enough to be of value to species that depend on older forests. Thus safe harbor agreements can eliminate the incentive for “panic cutting” that has prompted some landowners to cut their woodlots sooner than they otherwise would have, just to avoid the possibility of facing harvest restrictions if endangered species showed up on their property.

Landowners can also actively restore prairies (sometimes by using livestock grazing as a management tool), riparian zones, and other lost or degraded habitats that may become suitable once again for endangered species. Returning former cropland or a tree farm to native vegetation may also provide needed habitats for rare species, as can the removal of noxious weeds and other non-native plants and animals. All these types of activities may qualify for a safe harbor agreement because, in all cases, the landowners are performing good deeds for endangered species that they are not obligated to perform under any law or regulation.

Finally, safe harbor agreements can be used to reintroduce an endangered species into areas where it formerly occurred. Texas ranchers are doing just this for the northern aplomado falcon, the rarest falcon in North America.

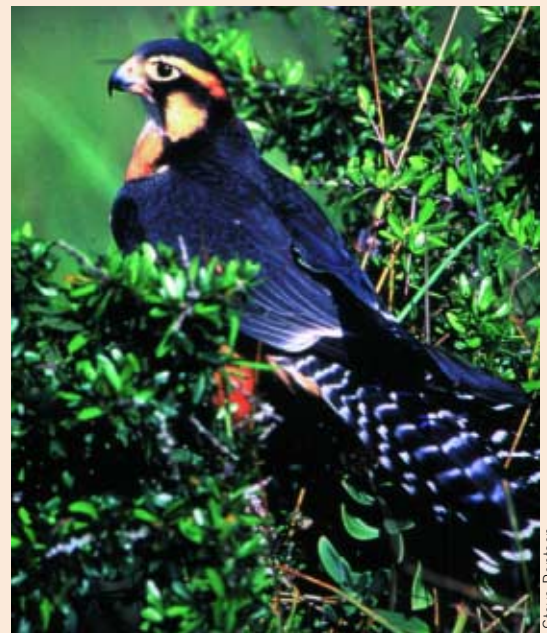
## Northern Aplomado Falcon

Safe harbor not only is a useful way to encourage private landowners to undertake land-management activities to benefit endangered species, but also can be used to reintroduce endangered species to areas where they once occurred without subjecting landowners to increased regulation. Witness the case of the rarest falcon in North America: the northern aplomado falcon.

The northern aplomado falcon once roamed the grasslands of Arizona, New Mexico, and Texas south to northern Central America. By the middle of this century, the falcon was all but gone from the United States, with the last documented nesting pair recorded in New Mexico in 1952. In 1986, the falcon was officially listed as endangered by the Fish and Wildlife Service.

The disappearance of the falcon in the United States is believed to be largely a result of the conversion of grassland savannas to agriculture and other uses. The widespread use of certain pesticides, such as DDT, also may have contributed to the falcon’s demise. In addition, the suppression of fires allowed dense brushy vegetation to overtake the open grasslands required by the falcon. Interestingly, livestock grazing maintains suitable open habitat for the northern aplomado falcon; consequently, falcons continue to live in and around cattle ranches in Mexico and Central America.

The future of the northern aplomado falcon in the United States relies in large part on a captive-breeding program established by The Peregrine Fund, a nonprofit conservation group, in the 1970s. The first captive-



Steve Berntsen

Northern Aplomado Falcon. The Peregrine Fund is re-establishing this species in southern Texas under a safe harbor agreement.

bred falcons were released on public lands in southern Texas in the 1980s. Yet early on in the program, both The Peregrine Fund and the Fish and Wildlife Service saw the need to reintroduce the birds on private ranch land, which composes the overwhelming majority of the bird's potential habitat in southern Texas. Unfortunately, ranchers were unwilling to allow such releases after the bird was added to the endangered species list for fear of becoming subject to increased land-use restrictions. Peter Jenny, a biologist with The Peregrine Fund, explains the ranchers' reluctance: "[Landowners] were scared to death that the [Endangered Species] Act would limit their land-use options. The key to unlocking it was safe harbor."

Under a recently initiated safe harbor program, northern aplomado falcons are to be released on 1.24 million acres of ranch land in southern Texas. Some of the released birds have even begun nesting in the wild. The program is administered by The Peregrine Fund so the landowners work directly with the fund's biologists. Landowners simply agree to allow the biologists access to their land and to permit the fund to construct release towers where the falcons are first acclimated and then released. In addition, Peregrine Fund biologists are granted extensive access to the release sites in order to monitor the young falcons. In return, participating landowners don't have to worry about the Endangered Species Act as it applies to the falcon. If they eventually decide to develop or alter their property in any manner they wish, the presence of the birds will not prevent them from doing so. Moreover, because northern aplomado falcons are so rare, some landowners may be able to charge birdwatchers for the privilege of viewing falcons on private ranches. And, of course, thanks to safe harbor, the northern aplomado falcon is free to once again soar over the grasslands of southern Texas.



## What can a landowner not do under a safe harbor Agreement?

**S**afe harbor agreements do not free landowners from the obligation to avoid harming those endangered species that already are present on their property. In other words, safe harbor agreements do not allow landowners whose property already supports red-cockaded woodpeckers, Karner blue butterflies, or any other endangered animal to develop or alter the existing, occupied habitat in ways that are harmful to the species (they might be able to do so under a different type of permit, but that is a subject outside the scope of this handbook). But landowners who are interested in creating new habitat for endangered species or enhancing existing habitat will not face any new regulations or restrictions under the Endangered Species Act on the habitats they create or improve. In some cases—for example, when a landowner creates a wetland—there may be requirements stemming from other laws, such as state or federal statutes that regulate the filling of wetlands, that affect the landowner's future obligations. You should inquire about this possibility before deciding to enter into a safe harbor agreement.



# When is a safe harbor agreement appropriate?



Safe harbor agreements make sense whenever landowners are interested in restoring or enhancing habitats for endangered species, but are concerned about incurring additional regulatory restrictions on the use of their land. Of course, the Fish and Wildlife Service will expect a landowner to do something that is reasonably likely to benefit the conservation of an endangered species before it approves a safe harbor agreement. A property owner cannot simply put up a birdhouse in her backyard and expect the Fish and Wildlife Service to enter into a safe harbor agreement for her entire farm or ranch. But if she makes a serious effort to create new habitats or improve existing habitats for endangered species, she should have no trouble meeting the requirements for a safe harbor agreement. Obviously, the more substantial the undertaking, the more likely it is to receive priority attention from the Fish and Wildlife Service. The Service may not have the resources to respond to every landowner's request for such an agreement and may have to choose among them.

Species that inhabit ecosystems that are created or maintained by fire are good candidates for safe harbor agreements because landowners can often use prescribed burning or mowing to create new areas for them. Species whose habitats are being destroyed by non-native weeds or feral animals are also appropriate subjects for safe harbor because landowners can restore or improve the endangered animals' habitats by pulling up the weeds or keeping the feral animals out of sensitive areas. There are many examples along these lines. The key point is that, in all cases, landowners are going out of their way to better the lives of endangered species by improving habitats. In some cases, these improvements have other benefits as well. In the Hill Country of Texas, for example, creating habitat for the endangered black-capped vireo will also provide an excellent environment for white-tailed deer, a valuable game species. And in southern Texas, restoring coastal prairie for the very rare Attwater's prairie-chicken can improve the range land for cattle.

## Attwater's Prairie-chicken

The endangered Attwater's prairie-chicken, once a common inhabitant of the coastal prairies of Louisiana and Texas, is now one of the rarest birds in the world. Although it was one of the first species added to the endangered species list in 1967, its numbers have steadily declined in the intervening 32 years. Presently, fewer than 50 remain in the wild. A more substantial population is maintained in captivity.

Like most other endangered species, the prairie-chicken is threatened by the destruction of its habitat. The conversion of native prairie to crops and other land uses, the poor management of livestock, the suppression of fires, and the invasion of alien woody plants, including Chinese tallow and McCartney rose, have resulted in the loss and degradation of the bird's preferred habitat.

Like that of many other endangered species, much of the prairie-chicken's habitat is on privately owned land. Thus for it to recover from its perilous state, it will need the cooperation of private landowners willing to restore native prairie. Thanks to a safe harbor program administered by the Sam Houston Resource Conservation and Development Area (SHRCD), the bird's future may be measurably brighter in Texas.

Under this safe harbor program, ranchers and corporate landowners are restoring native prairie along the Texas coast. Prairie restoration not only will improve habitat for the prairie-chicken, but also will provide better forage for cattle. That's right—by restoring native prairie, ranchers expect the amount and quality of forage to increase.

Thus, there is an economic reason for them to join the safe harbor program. Even so, restoration can be an expensive task and require technical expertise that not all landowners have. Therefore, SHRCD is providing landowners with technical assistance and cost-share money to help them in prairie restoration.



VIREO/Steven Holt

Attwater's Prairie-chicken. This critically endangered bird is benefiting from a safe harbor program in coastal Texas.

Since the program was initiated in 1995, 11 landowners have enrolled over 31,000 acres of land in the program. They have received more than \$100,000 of cost-share money to assist them in restoring habitat for the prairie-chicken. Yet the benefits of safe harbor for this bird and other endangered species cannot be reduced simply to the number of landowners enrolled or the acreage of

habitat protected or the amount of cost-share money distributed. Safe harbor has produced less tangible, but no less important, benefits. In particular, safe harbor has generated considerable good-will among landowners toward the conservation of endangered species. Brian Dinsmoor, who manages the Amoco Corporation's Chocolate Bayou chemical plant, is enthusiastic about his company's participation in the program: "This is a great way to enhance the environment around our plant without restricting future use of the land."

Bear in mind that not all habitats can be readily restored or enhanced, and not all endangered species will respond quickly to favorable management. It may take decades or even centuries to grow a forest suitable for northern spotted owls. And even if a landowner creates the habitat, the endangered species may not come, especially if the nearest surviving populations are far away. Thus it makes sense for landowners to discuss their plans with knowledgeable people before investing lots of time or money in restoration projects.



## How does a landowner enter into a safe harbor agreement?

If you think that a safe harbor agreement might be appropriate for your property, the first step is to determine if there are endangered wildlife species in your area and if your land contains suitable or potentially suitable habitat for such species. If you don't know, you may want to contact your state fish and game department, the nearest Natural Resources Conservation Service office, the Fish and Wildlife Service, The Nature Conservancy, or another knowledgeable organization. Consulting foresters or consulting biologists can often provide this information as well. If your land contains suitable or potentially suitable habitat for endangered species, you should learn more about the types of actions that could benefit them (again, biologists with these organizations and agencies should be able to assist you). If such activities are consistent with your land-management objectives for your property, you may want to pursue a

safe harbor agreement. The fish and game department of your state will know if an umbrella safe harbor program is already in operation in your area and whether it covers the species that may utilize your property. If there is no umbrella agreement, you should contact the Fish and Wildlife Service office in your region.

You may be reluctant to contact the Fish and Wildlife Service until you are sure that a safe harbor agreement will be in accord with your land-management objectives. If this is the case, it may be preferable to work closely with a state agency or a consultant that you know well and trust to evaluate your property before going forward with a safe harbor agreement.



## Determining the baseline

If you own land on which an endangered wildlife species lives, a safe harbor agreement could be just as useful as it is for land without such a species. It may be possible, for example, to create more habitat for that species or to improve the habitat that already exists, both of which undertakings qualify for a safe harbor agreement. The safe harbor agreement, however, must reflect the fact that an endangered species already inhabits the property. The existing populations become part of your “baseline.” A safe harbor agreement doesn’t change preexisting baseline responsibilities (in other words, it doesn’t change the responsibilities you may have toward the animals and their habitats that are already present on your property), but it does guarantee that you won’t incur any added obligations as a result of helping those endangered populations increase in number.

If you think that you may have an endangered species on your land, you may want to have an independent biologist visit your property before deciding to enter into a safe harbor agreement. If you decide to go forward with a safe harbor agreement, the Fish and Wildlife Service will want to know how much land is occupied by endangered species and the condition of that land so that these baseline conditions can be written into the agreement. For example, if you have five families of red-cockaded woodpeckers on your property and you want to create enough habitat for three more, a safe harbor agreement will allow you to eliminate the habitat for those three new families at a later date, if you choose to do so. But the safe harbor agreement will not permit you to eliminate the habitat of all eight families because five of them were already on your land before you signed the agreement and began to create more woodpecker habitat.



Jerry Holder is president of the North Carolina Pine Needle Producers Association. He has enrolled his property in a safe harbor program to benefit the endangered red-cockaded woodpecker.

Melissa McGaw/NC Wildlife Resources Commission

The baseline often is expressed in terms of the number of acres of habitat of a particular type and quality, rather than in terms of the number of individual animals on the property. Red-cockaded woodpeckers are somewhat unusual in that they tend to remain in the same locations for many years. Other species move around from year to year, or their populations rise and fall in response to the weather, the availability of food, and other factors. For these types of ani-

mals, it is a lot easier (and more sensible) to express the baseline as some quantity of existing habitat that is currently being used by an endangered species. As this brief discussion makes clear, determining a baseline can involve some fairly technical issues. Be sure to speak to employees of the Fish and Wildlife Service or other knowledgeable people about your baseline responsibilities and how they will be measured.

Identifying the species that already are on your property may be useful for several reasons. At the very least, it will clarify your existing responsibilities. Often, landowners have felt frustrated about their inability to get straightforward information about what they should or should not do on their land because of the possible presence of endangered species. With a clear baseline in a safe harbor agreement, landowners know their rights and obligations.



## Adjusting the baseline

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Sometimes endangered species disappear from an area for reasons beyond a landowner's control. A hurricane may knock down the pine trees inhabited by red-cockaded woodpeckers; a prolonged drought may eliminate an isolated population of rare butterflies living in a wet meadow; or predators, disease, or other unanticipated events may decimate a small and isolated population of endangered animals. If that happens to all or part of the baseline population of endangered species on your property, it may be possible to get the Fish and Wildlife Service to reduce your baseline responsibilities.

Assume, for example, that your land supports a baseline of five families of red-cockaded woodpeckers. If a storm knocks down all the trees inhabited by two of those families and renders the habitat unsuitable for them, the Fish and Wildlife Service will reduce your baseline responsibilities to three families. This does not affect your ability to destroy or develop at a later date the habitat you create for any *additional* woodpecker families under your safe harbor agreement. It's important, however, to discuss any baseline adjustments with the Fish and Wildlife Service long before you contemplate developing your property to avoid any misunderstandings. Indeed, it's a good idea to contact the Fish and Wildlife Service as soon as possible after the fire, flood, drought, or other natural disturbance has struck your property if you think that it has resulted in the loss of baseline habitat.

As discussed later in this handbook, under certain circumstances, you might voluntarily agree to adjust your baseline upward. Such a modification may serve as mitigation for activities carried out by you or another landowner. Indeed, it may be possible to generate income from having successfully restored or enhanced habitat for endangered species (see "Marketing safe harbor 'credits'").



# Access to the land

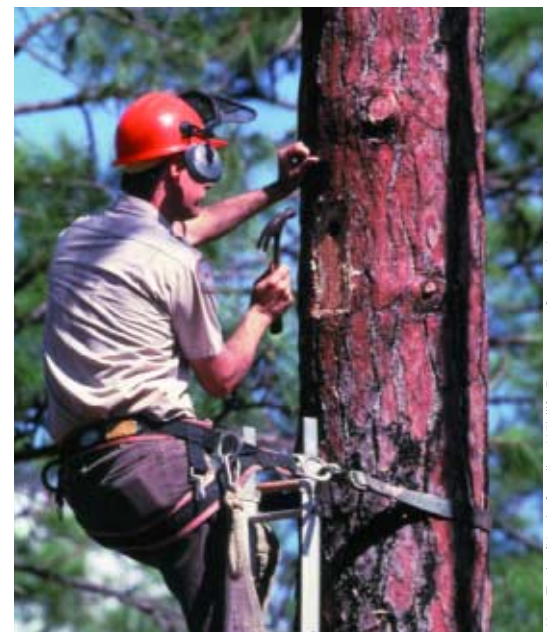


**M**ost landowners restrict access to their land in some manner. Safe harbor agreements do not require landowners to allow public access to their property for hunting, fishing, camping, hiking, birdwatching, or any other purpose. Landowners can permit as much or as little public access to their land as they please.

Safe harbor agreements do, however, necessitate that landowners allow access to their property for the limited purposes of determining the baseline, ascertaining compliance with the agreements, and perhaps capturing and relocating species at the expiration of the agreements. In order to determine the baseline, some type of survey by a qualified person is generally necessary. This baseline survey can be carried out by an employee of the Fish and Wildlife Service or by a qualified person acceptable to the service and the landowner. If an umbrella safe harbor program is in place for a particular area, baseline surveys are often done by the intermediary that holds the umbrella permit.

Many landowners are understandably reluctant to allow employees of the Fish and Wildlife Service onto their land to survey for endangered species. There are a couple of ways to handle the baseline survey if you do not want it to be conducted by the Fish and Wildlife Service. You can hire a consultant, provided that his or her expertise is acknowledged by the Fish and Wildlife Service. Or you can ask your state fish and game department to perform the survey. The important step is to discuss the issue of access with the Fish and Wildlife Service early in the process, before you spend money on a consultant. Remember that the Fish and Wildlife Service wants property owners to improve habitat for endangered species; its staff should be eager to accommodate you, although their limited time may necessitate that they give first priority to the most significant projects.

Bear in mind, too, that the baseline survey need cover only the particular species in question. It is not an invitation to the Fish and Wildlife Service, the state fish and game department, or anyone else to conduct a search for any and all endangered species on your property. You can ask the person conducting the survey to focus on only the endangered species whose habitat you intend to restore or enhance. If you want to help Karner blue butterflies, for example, the survey need address only Karner blue butterflies. The one exception to this rule is that the Fish and Wildlife Service cannot approve a safe harbor application that purports to help one endangered species by harming another. In other words, the Fish and Wildlife Service will not let you convert important habitat for bald eagles into habitat for red-cockaded woodpeckers as part of a safe harbor agreement. But this situation has not arisen in any of the safe harbor agreements that have been developed or proposed to date.



Ken Taylor/North Carolina Wildlife Resources Commission

A safe harbor agreement enables landowners to attract endangered species to their property without incurring more regulatory restrictions on the use of their land. Here, a wildlife biologist in North Carolina is inserting an artificial nesting cavity in a pine tree to attract red-cockaded woodpeckers.



Once an agreement is finalized, it will be necessary for the Fish and Wildlife Service or the intermediary (under an umbrella permit) to visit the property to make sure that the landowner has complied with the terms of the agreement. The timing, frequency, advance notice requirements, and other aspects of such visits can be individually negotiated.

Some safe harbor agreements stipulate that if landowners decide to use the habitat that has been restored or enhanced under the agreements, such that endangered species are likely to be harmed by that activity, the landowners will give advance notice of their intention to do so. They must allow the Fish and Wildlife Service or its designee to try to capture and relocate any animals in harm's way. Thus access for such rescue and relocation efforts may also be required in a safe harbor agreement.



## Confidentiality

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The willingness of landowners to enter into safe harbor agreements might depend on the baseline calculation. But many landowners won't necessarily know in advance what the survey is likely to reveal. As a result, they may reason that if the baseline turns out to be high, they would prefer to keep that information to themselves and perhaps not enter into safe harbor agreements. Is there a way for landowners to find out what their baseline responsibilities would be while keeping that information confidential? The answer is yes.

These concerns about confidentiality can be addressed to the satisfaction of most landowners. A landowner who is particularly concerned about what a baseline survey might reveal can simply hire a competent biologist to examine the property carefully in advance of the official survey. The preliminary survey should give the landowner a pretty good idea of what species reside on the land and thus what the baseline survey is likely to discover. The landowner can then decide whether to go forward.

If a landowner is considering enrolling his land under an umbrella safe harbor agreement, the agency or organization that is acting as the intermediary for that agreement may be one with which he has worked and in which he has a high degree of trust. The landowner may be able to enter into an agreement with the intermediary to keep the results of the baseline survey confidential unless he decides to participate in the umbrella agreement.

One other aspect of confidentiality requires mention. If an individual landowner enters directly into a safe harbor agreement with the Fish and Wildlife Service or the National Marine Fisheries Service, the agency is required by law to publish notice of the proposed agreement in an official government publication called the *Federal Register*. Anyone who wants to comment in writing on the proposed agreement may do so, usually within 30 days after publication. If an intermediary agency or organization wants to establish an umbrella safe harbor agreement, the agreement is subject to the same procedure: publication of a notice in the *Federal Register*, followed by an opportunity for written comment. Once an umbrella agreement is in place, however, the subsequent agreements between the intermediary and individual landowners don't have to go through this process. Records kept by federal agencies about either type of agreement are public records and are generally subject to disclosure.

# What is the duration of a safe harbor agreement?



**T**wo closely related questions pertain to the duration of a safe harbor agreement: How long is a landowner obligated to carry out or maintain the positive improvements required by a safe harbor agreement? How far into the future does the right to undo those improvements extend, notwithstanding that endangered species may have come to occupy the improved areas? There is no one fixed answer to either of these questions. The answers to both can be individually negotiated between the landowner and the Fish and Wildlife Service. The service will want to be sure that the positive actions to be undertaken by the landowner extend over a long enough period of time to be beneficial to the animals. How long that will be depends on a number of factors, including the endangered species in question, the type of habitat it requires, and the planned improvements to that habitat. Some habitat improvements, such as restoring certain types of wetlands, can be completed in a single season and will offer conservation benefits for decades; other improvements, such as prescribed burning in some habitats, must be repeated every couple of years to offer significant conservation benefits. Thus in the former case, a safe harbor agreement may obligate a landowner to restore a wetland only in the coming year, whereas in the latter case a safe harbor agreement may obligate a landowner to carry out a triennial prescribed-burning program for at least 15 years.

It is important to understand that although the landowner's obligation under a safe harbor agreement will be to undertake or maintain certain improvements for a specified period of time, her right to undo those improvements will extend over a longer period of time. This time frame is also subject to individual negotiation. Both the landowner and the government have good reasons to want the safe harbor rights to continue well into the future. No conservation benefit is served by requiring a landowner to eliminate the habitat improvements that she has made in order to protect her rights. Typically, the government will want the duration of the safe harbor assurances to last as long as the habitat improvements can reasonably be expected to offer conservation benefits to the affected species.

Because the duration of safe harbor agreements is so flexible, there is room for creativity. For example, one possibility is a continually renewing agreement. That is, an agreement could be for a certain period (say, 20 years), but each year it automatically renews for another year-thus always extending 20 years into the future- unless one party elects not to renew it. Safe harbor agreements can deal in a variety of ways with situations in which a landowner chooses to terminate his agreement prematurely. Assume, for example, that a landowner who agreed to conduct biennial prescribed burns over a specified number of years experiences a change in circumstances and wants to stop earlier. In general, the authority conferred by a safe harbor agreement for a landowner to do whatever he wishes on his land regardless of its impact on endangered species applies only if the landowner has complied with all the terms of the agreement. In some circumstances, however, an agreement may allow a landowner to terminate it early and still enjoy the full benefit of safe harbor assurances, especially if the agreement contemplates that a landowner will



Stephen Lindeman

Prescribed fires are an important management tool for restoring and maintaining habitat for certain endangered species like the red-cockaded woodpecker.

carry out specified actions over an extended period of time. Landowners should be sure they understand their obligations if the agreement is terminated prematurely.

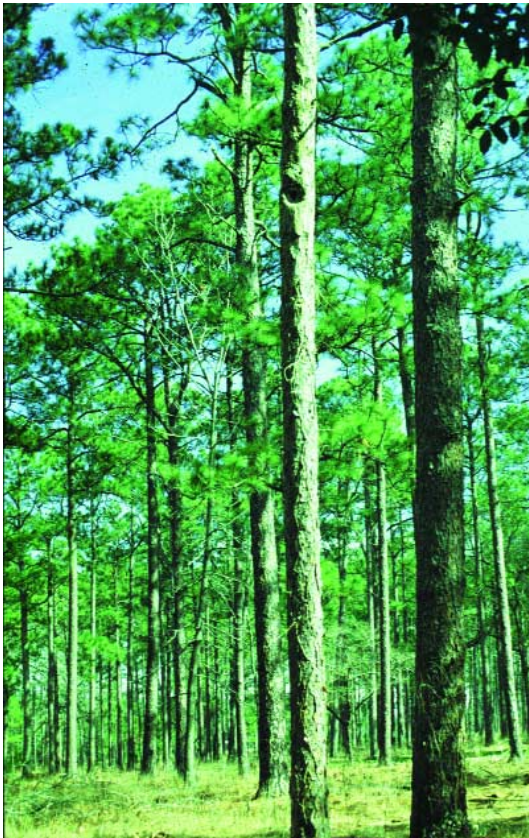


## How is a neighbor's land affected by a safe harbor agreement?

Landowners who wish to restore the habitats of endangered species on their property sometimes wonder how their actions might affect their neighbors' land. Fortunately, safe harbor agreements typically include provisions to minimize any conflicts with neighboring landowners that might result from the participating landowners' actions to improve the habitat of endangered species on their property. The terms of the agreements can vary from situation to situation, so landowners should make sure that they understand the stipulations of their particular agreements.

The Fish and Wildlife Service, for example, customarily expects landowners to protect a specified amount of forested land within a certain radius of the nest trees of each family of red-cockaded woodpeckers. What happens, therefore, if a family of woodpeckers becomes established just inside the boundary of the property of a landowner who is participating in a safe harbor program?

Does that landowner's neighbor, who may not have enrolled in the program, have to protect her forests on behalf of the woodpeckers? This question has been addressed in several safe harbor agreements thus far, and the answer is no. In those particular agreements, neighbors are not responsible for providing habitat for woodpeckers that are part of a safe harbor program on adjacent property.



Robert Bonnie

A mature longleaf pine forest in South Carolina, habitat for the red-cockaded woodpecker.

Another question concerns the movement of endangered species that are released on a parcel of land enrolled in a safe harbor agreement. If those animals move onto a neighbor's land, and the neighbor is not enrolled in the safe harbor program, is he obligated to protect them? Once again, a safe harbor agreement can be written to address this possibility. In the Southeast, for example, biologists are trying to establish new populations of red-cockaded woodpeckers by moving birds onto the properties of landowners enrolled in a safe harbor program. Each of the translocated birds is tagged with a unique combination of colored bands placed on its legs. Should any of these banded birds show up on a neighbor's property, they are recaptured and returned to the safe harbor property. Under safe harbor agreements approved thus far, if the banded birds persist in moving onto the neighbor's land, the neighbor is not obligated to provide habitat for them.

There is another way that neighbors' potential concerns can be addressed. They, too, can enter into a safe harbor agreement and thereby help conserve endangered species without incurring



new restrictions on the use of their property. If you are concerned about how your enrollment in a safe harbor program might affect your neighbors, be sure to raise this issue with the Fish and Wildlife Service. There is usually a way to work things out.



## Changing Circumstances

### What happens when the land is sold?

Safe harbor agreements are effectively transferable from owner to owner. The buyer of land enrolled in a safe harbor agreement can arrange with the Fish and Wildlife Service to take over the agreement, simply by signing a new, identical agreement with the same original baseline and management actions. This is good news for the seller, whose property does not necessarily drop in value as a result of the creation of more habitat for endangered species. It might even enhance the value of the land if the buyer is conservation-minded and wants a property that supports unusual wildlife.

If you are planning to sell your property, contact the Fish and Wildlife Service office that issued the permit to discuss how to make sure that the agreement remains in effect. In the case of an umbrella agreement, contact the agency or organization that holds the permit.

### What happens when a landowner dies?

Not only are safe harbor agreements effectively transferable from owner to owner, but the rights and duties they confer can be passed down from generation to generation. Those who inherit property that is under a safe harbor agreement will have the same rights and responsibilities as the landowner who originally enrolled the land in the safe harbor program.

## Safe harbor and other incentives programs



Landowners who participate in other conservation incentives programs may find it desirable to use safe harbor agreements in conjunction with those programs. For example, property owners who are restoring streamside forests or otherwise creating wildlife habitats using funds from the Conservation Reserve Program of the Department of Agriculture may wish to enroll their land in a safe harbor agreement in case any endangered species move into the newly restored habitats. Without such an agreement, it may be difficult to put the restored habitats back into agricultural production at a later date if they have been colonized by endangered species. The same applies to landowners enrolled in the Wetlands Reserve Program, Wildlife Habitat Incentive Program, or Partners for Wildlife Program of the Fish and Wildlife Service. Of course, there is little reason to pursue a safe harbor agreement if the types of habitats being restored are unlikely to attract endangered species. Contact the Natural Resource Conservation Service, the Fish and Wildlife Service, the state fish and game department, or an outside consultant if you are unsure whether the improvements you are planning are likely to attract endangered species.



## Marketing safe harbor “credits”

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It may even be possible to earn money by participating in a safe harbor program. Once you have signed a safe harbor agreement and completed the management actions specified in it, you have essentially received permission from the Fish and Wildlife Service to develop the habitat of an endangered species. Of course, it's habitat that you created and that wouldn't exist without your hard work. But it's habitat all the same, and you have the right to develop it. Now suppose that another landowner in your community has the same type of endangered species on her property but wants to develop her land nonetheless. Assuming that her property isn't covered by a safe harbor agreement, she has only two choices: she can forgo her plan to develop the land, or she can ask the Fish and Wildlife Service for permission to do so, notwithstanding the harm it will cause the endangered species. Under Section 10 of the Endangered Species Act, the Fish and Wildlife Service can grant her permission to develop her land, but only if she agrees to some type of mitigation for the loss of habitat. This compensation can take the form of the landowner paying you *not* to exercise your right to develop the land that you have enrolled in the safe harbor agreement. In other words, she can pay you to increase your baseline. You now become obligated to protect a larger amount of habitat for endangered species, she can develop her property, and the endangered species is none the worse off.

This scenario may seem pretty far-fetched, but, in fact, it is beginning to happen. You shouldn't count on a safe harbor agreement as a money-making proposition. But if you think that you might be willing to forgo developing the safe harbor portions of your land in exchange for money, you can advise the Fish and Wildlife Service that you would sell your safe harbor rights if the service found a suitable buyer.



## Further information about safe harbor programs

To learn more about safe harbor, visit our web site [www.environmentaldefense.org/safeharbor](http://www.environmentaldefense.org/safeharbor) which contains summaries and full text versions of Safe Harbor policies, agreements, comments and related resources—or contact the endangered species specialist in the regional office of the Fish and Wildlife Service that covers your state:

### Region One

(California, Hawaii, Idaho, Nevada, Oregon, and Washington)

Eastside Federal Complex  
911 N.E. 11th Avenue  
Portland, OR 97232-4181  
503-231-6118

### Region Two

(Arizona, New Mexico, Oklahoma, and Texas)

500 Gold Avenue, SW, Room 3018  
Albuquerque, NM 87102  
505-248-6282

### Region Three

(Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin)

One Federal Drive  
Federal Building  
Fort Snelling, MN 55111  
612-713-5300

### Region Four

(Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee)

1875 Century Boulevard  
Atlanta, GA 30345  
404-679-4000

### Region Five

(Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia)

300 Westgate Center Drive  
Hadley, MA 01035  
413-253-8200

### Region Six

(Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming)

P.O. Box 25486  
Denver Federal Center  
Denver, CO 80225  
303-236-7920

### Region Seven

(Alaska)  
1011 E. Tudor Road  
Anchorage, AK 99503  
907-786-3542

“The Safe Harbor concept can be an important tool to involve private landowners proactively in the conservation of threatened and endangered species.”

—Robert J. Fledderman, Environmental Manager, Westvaco Corporation

Safe harbor agreements are “a step in the right direction toward creating [a] ‘win-win’ scenario for species and landowners.”

—American Farm Bureau Federation

“[Safe harbor agreements are] a practical and necessary way to encourage the restoration and enhancement of habitat by private landowners.”

—Statement of fourteen of the nation’s leading conservation scientists, including E. O. Wilson, and the heads or former heads of the American Association for the Advancement of Science, the Ecological Society of America, the American Institute for Biological Sciences, and the Society for Conservation Biology

“Safe harbor agreements are an innovative and useful means of encouraging conservation of imperiled species, particularly those that require some form of affirmative management.”

—Ron Scott, Izaak Walton League of America

“The various safe harbor agreements currently in effect appear to be working well [and] landowners seem quite happy with them. . . . We think safe harbor agreements are worthy of a landowner’s consideration.”

—Jim McAdams, Chair, Property Rights & Environmental Management Committee, National Cattlemen’s Beef Association

Safe harbor agreements are “essential incentives for private landowner participation in endangered and threatened species conservation efforts.”

—International Association of Fish and Wildlife Agencies



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finding the ways that work

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