Second, the federal part 71 permitting program became effective in Alaska on July 31, 1996. 61 FR 34202 (July 1, 1996), *codified* at 40 CFR part 71. Under this federal permitting program, some title V sources are required to submit permit applications and permit fees to EPA by January 31, 1997. *See* 40 CFR 71.5(a) and 71.9(f)(3). EPA understands, however, that sources have not been preparing applications for the federal part 71 program, but have instead been anticipating that the State title V program would be approved prior to the first application submittal deadline of the federal part 71 program. Delaying the effective date of EPA's approval of the Alaska title V program could put sources at risk of having to file applications and pay fees under both the State part 70 and federal part 71 permitting programs. Moreover, the State has advised EPA that sources have delayed filing permit renewal applications under the current State operating permit program in anticipation of the imminent approval of the State's title V program. Such sources will be at risk of being in violation of current State law if interim approval of Alaska's title V program is delayed.

Although it is in the public's interest to make EPA's interim approval of Alaska's title V program effective on the date of publication, EPA must ensure that this action will not have any prejudicial effects upon the regulated community. *Rowell* v. *Andrus*, 631 F.2d 699, 702–703 (10th Cir. 1980). For example, EPA must ensure that the regulated community has sufficient notice of this rulemaking and ample opportunity to comment. EPA believes that all interested parties have had sufficient notice of this rulemaking and ample opportunity to comment. The State has advised EPA that it has contacted each of the parties that commented on the proposal and none object to having this rulemaking effective on the date of publication. The regulated community has worked closely with the State in the development of the State's title V program over the past several years. The State regulations that form the basis of the State's title V program were subject to notice and comment at the State level. EPA's proposed action on the State's title V program was also subject to 30 days public comment. Finally, under Alaska law, the State's operating permit regulations do not become effective until 30 days after the effective date of EPA approval. Because the program itself does not become effective as a matter of State law for 30 days, it can also have no effect as a matter of Federal law until that time. Therefore, the purpose of the 30-day effective date under the Administrative Procedures Act is met since sources will have 30 days notice prior to the Alaska title V program becoming effective as a matter of both State and federal law.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: November 22, 1996.

Chuck Clarke,

*Regional Administrator.*

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

## PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by adding the entry for Alaska in alphabetical order to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Alaska

(a) Alaska Department of Environmental Conservation: submitted on May 31, 1995, as supplemented by submittals on August 16, 1995, February 6, 1996, February 27, 1996, July 5, 1996, August 2, 1996, and October 17, 1996; interim approval effective on December 5, 1996; interim approval expires December 7, 1998.

(b) (Reserved)

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[FR Doc. 96–30865 Filed 12–4–96; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of final guidance.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) announces final guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act (Act) during fiscal year (FY) 1997. Highest priority will be processing emergency listing rules for any species determined to face a significant risk to its well being. Second priority will be processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority will be processing new proposals to add species to the lists and processing administrative findings on petitions to add species to the lists that are filed under section 4 of the Act. Processing of proposed or final designations of critical habitat and processing of proposed or final delistings and reclassifications from endangered to threatened status will be accorded lowest priority. Effective April 1, 1997, the Service will implement a more balanced listing program nationwide, which means that during the second half of FY 1997 the remaining listing appropriation will be apportioned among the processing of any emergency listing rules, the issuance of final listing determinations, the preparation of proposed listing rules for candidate species, and the processing of listing petitions. However, the lower priority accorded to rulemaking and petition processing activities for critical habitat designations and delisting (or downlisting) actions will be maintained throughout FY 1997.

**DATES:** The guidance described in this notice is effective December 5, 1996 and will remain in effect until September 30, 1997 unless modified by subsequent notice in the Federal Register.

**ADDRESSES:** Questions regarding this guidance should be addressed to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Mailstop ARLSQ–452, Washington, D.C., 20240.

**FOR FURTHER INFORMATION CONTACT:** E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 703–358–2171 (see **ADDRESSES** section).

**SUPPLEMENTARY INFORMATION:**

Background

The Service adopted guidelines on September 21, 1983 (48 FR 43098–43105) that govern the assignment of priorities to species under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The Service adopted those guidelines to establish a rational system for allocating available appropriations to the highest priority species when adding species to the lists of endangered or threatened wildlife

and plants or reclassifying threatened species to endangered status. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies (or equivalently, distinct population segments of vertebrates). However, this system does not provide for prioritization among different listing actions such as preliminary determinations, final listings, etc.

The enactment of P.L. 104–6 in April, 1995 rescinded $1.5 million from the Service's budget for carrying out listing activities through the remainder of fiscal year 1995. Public Law 104–6 prohibited the expenditure of the remaining appropriated funds for final determinations to list species or designate critical habitat which, in effect, placed a moratorium on those activities.

From October 1, 1995, through April 26, 1996, funding for the Service's endangered species programs, including listing of endangered and threatened species, was provided through a series of continuing resolutions, each of which maintained in force the moratorium against issuing final listings or critical habitat designations. The continuing resolutions also severely reduced or eliminated the funding available for the Service's listing program. Consequently, the Service reassigned listing program personnel to other duties. The net effect of the moratorium and reductions in funding was that the Service's listing program was essentially shut down.

The moratorium on final listings and the budget constraints remained in effect until April 26, 1996, when President Clinton approved the Omnibus Budget Reconciliation Act of 1996 and exercised the authority that Act gave him to waive the moratorium. At that time, the Service had accrued a backlog of proposed listings for 243 species. Moreover, although the moratorium imposed by Public Law 104–6 did not specifically extend to petition processing or the development of new proposed listings, the extremely limited funding available to the Service for listing activities generally precluded these actions from October 1, 1995 through April 26, 1996. The Service continued to receive new petitions and accrued a backlog of petitions requiring issuance of either 90-day or 12-month findings for 57 species.

In anticipation of receiving a listing appropriation for the remainder of FY 1996, the Service issued and requested comment on interim listing priority guidance on March 11, 1996 (61 FR 9651). On May 16, 1996, the Service addressed all public comments received on the interim guidance and published final listing priority guidance for fiscal year 1996 activities (61 FR 24722). This guidance was extended (61 FR 48962; September 17, 1996) until the Service prepared the final guidance described herein.

When the moratorium was lifted and funds were appropriated for the administration of a listing program, the Service faced the considerable task of allocating the available resources to the significant backlog of listing activities. Since April 26, 1996, the Service focused its resources on processing existing proposals and issued final determinations for rules listing 89 species.[1] This level of performance is noteworthy considering the time needed to restart the listing program from a total shutdown and the need to consider factual developments related to proposed listing packages (e.g., changes in known distribution, status, or threats) that took place during the year-long moratorium. Despite the progress made in FY 1996, there is still a backlog of 151 proposed listings.

In addition to making final determinations on pending proposed rules, the Service also needs to make expeditious progress on determining the conservation status of the 184[2] species designated by the Service as candidates for listing in the most recent Candidate Notice of Review (61 FR 7596; February 28, 1996; see 16 U.S.C. 1533(b)(3)(B)(iii)(II)). The Service remains subject to various lawsuits that could result in court orders requiring it to process a variety of actions under section 4 of the Act.

On September 17, 1996, the Service published a notice in the Federal Register (61 FR 48962) announcing proposed listing priority guidance for FY 1997 and soliciting public comment on the proposed guidance. Since publication of that notice, the Department of the Interior has received its FY 1997 appropriation by way of the 1997 Omnibus Appropriations Act, Public Law 104–208. Public Law 104–208 appropriated $5 million for the endangered species listing activity. This appropriation is substantially less than the $7.483 million requested by the President.

The continuing (though reduced) backlog and the funding shortfall underscore the need to maintain program-wide biologically sound priorities to guide the allocation of limited resources. Absent such priorities, existing and threatened litigation could overwhelm the limited resources the Service received in FY 1997.

For example, in *Fund for Animals* v. *Babbitt,* Civ. No. 92–800 (SS) (D.D.C.), the District Court is considering plaintiff's motion to enforce the December 15, 1992 Settlement Agreement in that case and the Service's motion to modify that Agreement.

Resolution of the conservation status of the remaining 85 settlement species would require, for each species, publication of either a proposed listing rule or a notice stating reasons why listing is not warranted. The Agreement does not require final decisions on listings. Therefore, full compliance with the Agreement will not bring the full protection of the Act to any species, but rather would only somewhat advance the process toward listing.

Up to the time the funding for the listing program became severely constrained, the Service was on track to achieve full compliance with this Agreement. The Service had published, during the period covered by the Agreement, proposed listing rules for 359 candidate species.

Despite this progress, the Service is now left with the following dilemma. If it were to continue to spend scarce appropriated funds to move candidate species forward to the proposed listing stage in order to comply with the Settlement Agreement, it would deplete the entire $5 million listing appropriation available in FY 1997. Processing of proposed listing rules requires the investment of considerable time and resources. It involves substantial research, status review, coordination with State and local governments and other interested parties, and conducting public hearings and peer review. Furthermore, while only 41 of the 85 settlement agreement species have listing priority assignments of 1, 2, or 3, most of the 99 candidate species that are *not* subject to the terms of the Agreement have high listing priority number assignments (64 non-settlement, candidate species have priority numbers of 1, 2 or 3), the Service would, in order to be consistent with the 1983 listing priority guidelines, have to process all 184 candidate species (85 settlement, 99 non-settlement) if ordered to comply fully with the terms of the Settlement Agreement during FY 1997.

[1] The Service also withdrew the proposed rule to list the Barton Springs salamander and proposed listings for two plants, *Dudleya blochmanieae* ssp. *brevifolia* and *Corethrogyne filaginifolia* var. *linifolia.*

[2] Since publication of the last Candidate Notice of Review, the Service has added the U.S. population of the short-tailed albatross (*Diomedea albetrus*) and the Alabama sturgeon (*Scaphirhynchus suttkusi*) to the list of candidate species.

The Service's entire FY 1997 listing budget is insufficient to comply with the *Fund for Animals* Settlement Agreement. If it attempted to comply, it would devote no resources to making final listing decisions on the remaining 151 proposed species, the vast majority of which face high-magnitude threats. Though so close to receiving the full protection of the Act, these species would move no closer to that goal while all the Service's efforts would be bent toward deciding whether to move candidate species closer to proposed listing, where they receive some limited procedural protection (the Section 7 conference requirement, see 16 U.S.C. 1536(a)(4)), but not the full substantive and procedural protection afforded by final listing.

This course of action would also enlarge the backlog of proposed species awaiting final action to about 330. Meanwhile, the administrative records on many of the 151 other species pending final decision could require, due to the additional delay in the decision-making process, further public notice and comment proceedings in fiscal year 1998 because the scientific data they contain may no longer be current.

In short, enforcement of the *Fund for Animals* Settlement Agreement in FY 1997 would delay for at least one year the issuance of final listing rules and, in fiscal year 1998, would make the process of issuing final listing rules for the aging backlog of proposed species more time and labor intensive. Such action would entirely frustrate the objective of waiving the final listing moratorium in April, 1996. Further proceedings in District Court are expected. The Service is hopeful that the Court's final order will effect modifications to the Settlement Agreement that are consistent with biologically based priorities.

Given the large backlogs of proposed species pending final action, candidate species awaiting proposal, and petitions, it is extremely important for the Service to focus its efforts on actions that will provide the greatest conservation benefits to imperiled species in the most expeditious manner. In order to focus conservation benefits on those species in greatest need of the Act's protections, the Service believes that processing the outstanding proposed listings should receive higher priority than other actions authorized by section 4 such as new proposed listings, petition findings, and critical habitat determinations.

It has been long-standing Service policy that the order in which species should be processed for listing is based primarily on the immediacy and magnitude of the threats they face. The Service will continue to base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines. These decisions will be implemented by the Regional Office designated with lead responsibility for the particular species.

The Service allocates its listing appropriation among its seven Regional Offices based primarily on the number of proposed and candidate species for which the Region has lead responsibility. The objective is to ensure that those areas of the country with the largest percentage of known imperiled biota will receive a correspondingly high level of listing resources. The Service's experience in administering the Act for the past two decades has shown, however, that it needs to maintain at least a minimal listing program in each Region in order to respond to emergencies and to retain a level of expertise that permits the overall program to function effectively over the longer term. In the past, when faced with seriously uneven workloads, the Service has experimented with reassigning workload from a heavily burdened Region to less-burdened Regions. This approach has proven to be very inefficient because the expertise developed by a biologist who works on a listing package will be useful for recovery planning and other activities and that expertise should be concentrated in the geographic area inhabited by the species. In addition, biologists in a Region are familiar with other species in that Region that interact with the species proposed for listing, and that knowledge may be useful in processing a final decision. For these reasons, the Service has found it unwise simply to reassign part of one Region's workload to personnel in another Region.

Because the Service must maintain a listing program in each Region, Regions with few outstanding proposed listings may be able to process Tier 3 actions (such as new proposed listings or petition findings), while Regions with many outstanding proposed listings will use most of their allocated funds on Tier 2 actions. For instance, workload variations will mean that the Great Lakes Region (Region 3), which only has two proposed species, could begin work on some Tier 3 actions under the final guidance described in this notice while the Pacific Region (Region 1), which still has 111 proposed species, will be primarily processing final decisions on proposed listings in FY 1997.

Since the number of pending proposed species is expected to be reduced to a manageable range of 90–110 taxa by April 1, 1997, the Service believes that a balanced listing program should be implemented nationwide on that date. Under a balanced listing program, the categories of listing activities covered by Tiers 1, 2, and 3 of this guidance will be treated as having the same relative priority. On April 1, 1997, all remaining listing appropriations for FY 1997 will be apportioned among the processing of any emergency listings, the issuance of final listing determinations, the preparation of proposed listing rules, and the processing of listing petitions. The 1983 listing priority guidelines will set the relative priority for the allocation of listing resources within each of these categories of listing activities.

## Analysis of Public Comments

On September 17, 1996, the Service published a notice in the Federal Register (61 FR 48962) announcing proposed listing priority guidance for FY 1997 and solicited public comment on the proposed guidance. While the Department's FY 1997 appropriation provides the expected $5 million for the endangered species listing program, it differs from the assumptions upon which the proposed listing priority guidance was based in that it does not ''earmark'' funds for use in delisting or reclassifying endangered species to threatened status. In soliciting public comment, the Service specifically requested input as to, ''how it ought to prioritize such activities if no earmark emerges from the appropriations process'' (61 FR 48964; September 17, 1996). The Service received four letters of comment on the proposed guidance and an analysis of these comments follows.

Three of the four letters of comment were generally opposed to the proposed listing priority guidance. A summary of the issues raised, and the Service's response, follows.

*Commenters' Issue 1*—Under the proposed policy, there would be no enforceable deadlines. The Service cannot disregard the Act's mandated time frames and requirements to prioritize listing activities on the basis of biological need for the sake of administrative convenience gained by completing the listing process for outstanding proposed listings to the exclusion of all other listing actions.

*Service Response*—The listing priority guidance is the Service's attempt to implement the provisions of section 4 in a manner that best supports the purposes of the Act and maximizes conservation benefits within the constraints imposed by appropriations

limitations. The Service recognizes the implementation of such guidance as an extraordinary measure and emphasizes that the guidance will only remain in effect through September 30, 1997. Furthermore, effective April 1, 1997, the Service will implement a more balanced listing program that apportions all remaining listing funds among the processing of any emergency rules, the issuance of final listing determinations, the preparation of proposed listing rules, and the processing of listing petitions. Moreover, many of the Service's Regions will be operating in Tier 3 upon implementation of this final guidance.

As the Service has previously described, Congress has not appropriated sufficient funds to allow the Service to process all of its responsibilities under section 4 in a timely manner. This problem was then exacerbated by the imposition of the moratorium on final listings, which prevented the Service from issuing final listing decisions from April 1995 through April 1996, resulting in even more proposed listings that were in excess of the statutory deadline for making final decisions. On top of that, the backlog of overdue petition findings increased.

The Service acknowledges its responsibility to base listing decisions solely on the basis of the best available scientific and commercial information and does not believe that the proposed guidance in any way refutes that responsibility. What the proposed guidance would do is allow the Service to give highest priority to extending the full legal protections of the Act to species that have already been proposed for listing rather than expending scarce resources on issuing new proposed listings, an action that only provides minimal procedural protections (via the section 7 conference provisions) for the species involved, while adding to an already large backlog of proposed species. The Service believes that the listing priority guidance will maximize the conservation benefits from the limited listing appropriation and help the Service return soon to implementing its section 4 responsibilities across the board. The Service also emphasizes that this listing priority guidance will be effective on a temporary basis and it intends to return to a more normal administration of section 4 by the start of fiscal year 1998.

*Commenters' Issue 2*—The Service should not expend limited listing funds on withdrawal notices, delistings, or reclassifications of endangered species to threatened status.

*Service Response*—In the absence of a Congressional earmark for delistings and reclassifications, the Service generally agrees with this comment insofar as it addresses delistings and reclassifications. It has decided to assign these actions (including review of petitions seeking such actions) to the lowest priority tier under the final guidance described below.

The Service does not agree that it makes little sense to process withdrawal notices on proposed listings if that course of action is found to be appropriate based on a review of the proposed listing that was conducted in accordance with the listing priority guidance. The resolution of regulatory uncertainty that comes with a withdrawal notice, the fact that publication of the notice is a relatively small component of the total cost invested in the decision, and the fact that a withdrawal under section 4(b)(6)(A)(I)(IV) eliminates the legal liability under the time frames of section 4(b)(6)(A), all justify the placement of this activity within Tier 2.

*Commenters' Issue 3*—The listing priority for processing final decisions on proposed species with low listing priority assignments should not be elevated above the priority for species with higher listing priorities that have not yet been proposed for listing.

*Service Response*—More than two-thirds of the 151 proposed species pending final decisions face high magnitude threats. Most of the 41 proposed species that do not face high magnitude threats are included in multi-species listing packages that also include species facing high magnitude threats. Addressing lower priority proposed species as part of a multi-species listing approach provides a cost-effective means of addressing many species in one listing rule. The Service believes that it should continue using this approach even though it may mean that final listing decisions will be prepared for some species with listing priorities that are lower than some candidate species awaiting proposed listing. These facts show that the Service is not subverting the existing priority system. Furthermore, this course of action is responsive to the Act's direction that proposed listings be resolved in a timely fashion. Also, focusing attention on proposed species ahead of candidate species which face no statutory deadlines for final decisions is consistent with the concerns raised in Issue 1 above.

*Commenters' Issue 4*—The Service should place highest emphasis on listing species with high national importance and stop listing subspecies.

*Service Response*—Assuming threats of equal magnitude and immediacy, the 1983 listing priority guidelines provide higher listing priority for a full species than for a subspecies. However, by virtue of the Act's definition of species, the Service must consider listing subspecies of plants and animals where appropriate.

*Commenters' Issue 5*—Claims that designation of critical habitat provides only limited conservation benefits beyond a final listing are contradicted by the Act and real-life practice.

*Service Response*—The Service remains firm in its belief that designation of critical habitat generally provides limited additional conservation benefits beyond those provided by the consultation provisions of section 7 and the prohibitions of section 9.

*Commenters' Issue 6*—Purported lack of funds does not support the proposed listing priority policy because the courts have made clear that funding limitations do not excuse the Service from complying with mandatory duties to comply with the deadlines of the Act.

*Service Response*—The Service recognizes that it sometimes does not meet the timing constraints imposed by the Act (see Responding to Litigation section below). However, due to the circumstances described in detail in this notice and other notices on this topic, the number of pending listing actions that are out of compliance with the Act's deadlines are so numerous that it is literally impossible for the Service to address them all immediately. Therefore, the Service has instituted this guidance to provide a reasonable means for prioritizing actions. By such actions as this notice and explanation of the priority guidance, the Service hopes to promote public and judicial understanding of the bind in which the Service finds itself and the reasonableness of its approach.

Some courts have acknowledged the Service's predicament and granted relief accordingly. In a July 23, 1996 order entered by the U.S. District Court for the Eastern District of California in *Sierra Club* v. *Babbitt et al.* (Civ. No. S–95–299 EJG/GGH), Judge Garcia agreed to defer to the Service's listing priority guidance, finding that,

> Given that it would be ''impossible,'' *see Alabama Power, supra,* for defendants to discharge their § 1533 (6)(A) obligation as to all pending species within this fiscal year, the court finds that defendants' prioritization scheme, predicated upon biological need, is reasonable in light of the Endangered Species Act's purpose. Sporadic and disorganized judicial interference with defendants' priorities would result in a game of musical

chairs plainly disruptive to a thoughtful and reasoned allocation of defendants' limited resources.

Such decisions recognize that the Service did not receive sufficient funding in fiscal years 1996 or 1997 to allow it to comply with all mandated time frames under section 4 of the Act was legally prohibited from expending funds to accomplish certain of those activities for over a year, and as a result generated a rational system for setting priorities that is most consistent with the purposes of the Act and makes most efficient use of limited funding as the Service manages its way out of a significant listing backlog.

*Commenters' Issue 7*—The Service should not ''usurp'' public priority by relegating the petition process to Tier 3 or denying priority on the basis of litigation status.

*Service Response*—The Act does establish priorities for the various section 4 responsibilities and the Service does not consider the petition process to be inherently of a higher priority than other section 4 activities. However, the Service does recognize the value of the petition process and the Service's decision to assign processing of petition findings to Tier 3 is not made lightly. As mentioned previously, the Service expects each Regional Office to begin processing petition findings no later than April 1, 1997 and some of the Regional listing programs will begin processing petitions upon implementation of this guidance. Processing of petition findings is, however, a preliminary step in the listing process and, during the current period of fiscal constraint, should be accorded lower priority in favor of taking final actions on the proposed listings. This course of action would remove a litigation liability and either implement the full protections of the Act for imperiled species or resolve pending regulatory uncertainty for species found not to warrant listing.

The Service remains firm in its belief that litigation status should not be a criterion for assigning priority under this guidance. To the extent that the courts do not defer to this listing priority guidance, the Service is prepared to comply with any court order to process a section 4 listing action subject to any appeals that may be taken as determined on a case-by-case basis, to seek to overturn such a court order. The fact that the Service acknowledges its duty to comply with court orders should not, however, be interpreted to mean that it regards any court order as consistent with this guidance, without regard to how disruptive it may be to the Service's effort to make the most biologically sound use of its resources.

## Final Listing Priority Guidance for Fiscal Year 1997

To address in the longer term the biological, budgetary, and administrative issues noted above, and in response to public comments received, the Service adopts the following revised listing priority guidance. As with the guidance issued May 16, 1996, this guidance supplements, but does not replace, the 1983 listing priority guidelines, which are silent on the matter of prioritizing among different types of listing activities.

As noted above, the Department of the Interior's FY 1997 appropriation provides $5 million for the Service's endangered species listing program.

The $5,000,000 available in the listing budget for all listing activities will fall far short of the resources needed to eliminate the backlog of proposed species and complete all listing actions required by the Act in FY 1997. Therefore, some form of prioritization is still necessary, and the Service will implement the following listing priority guidance in FY 1997. However, effective April 1, 1997 the Service will undertake activities in three of the four tiers. Activities assigned to Tier 4 as described below will remain a low priority until all other listing backlogs (candidate species, proposed listings, and petition findings) have been exhausted.

The following sections describe a multi-tiered approach that assigns relative priorities, on a descending basis, to listing actions to be carried out under section 4 of the Act. The 1983 listing priority guidelines will continue to be used to set priority among actions within tiers. The Service emphasizes that this guidance will be effective until September 30, 1997 unless extended or canceled by future notice, except that, effective April 1, 1997, the Service will concurrently undertake all of the activities presently included in Tiers 1, 2, and 3. The assignment of critical habitat designations and delistings or reclassifications to Tier 4 is expected to continue for the duration of FY 1997 and processing of these activities in FY 1997 should not be expected. Even though a more balanced program will be in place as of April 1, 1997, the FY 1997 listing appropriation is insufficient to support high-priority listing, candidate assessment, and petition processing activities unless critical habitat and delisting/downlisting activities are maintained as low-priority activities. The Service must focus its section 4 program on addressing proposed species, candidate species, and petition processing during the second half of FY 1997. A single critical habitat designation could consume up to ten percent of the total listing appropriation, thereby disrupting the Service's biologically based priorities.

Completion of emergency listings for species facing a significant risk to their well-being remains the Service's highest priority (Tier 1). Processing final decisions on pending proposed listings is assigned to Tier 2. Third priority is to resolve the conservation status of species identified as candidates and processing 90-day or 12-month administrative findings on petitions to list or reclassify species from threatened to endangered status. Preparation of proposed or final critical habitat designations, and preparation of proposed or final delistings and reclassifications are assigned lowest priority (Tier 4).

### Tier 1—Emergency Listing Actions

The Service will immediately process emergency listings for any species of fish, wildlife, or plant that faces a significant risk to its well-being under the emergency listing provisions of section 4(b)(7) of the Act. This would include preparing a proposed rule to list the species. The Service will conduct a preliminary review of every petition that it receives to list a species or change a threatened species to endangered status in order to determine whether an emergency situation exists. If the initial screening indicates an emergency situation, the action will be elevated to Tier 1. If the initial screening does not indicate that emergency listing is necessary, processing of the petition will be assigned to Tier 3 below.

### Tier 2—Processing Final Decisions on Proposed Listings

The vast majority of the unresolved proposed species face high-magnitude threats. The Service believes that focusing efforts on making final decisions relative to these proposed species would best comport with the overall purpose of the Act by providing maximum conservation benefits to those species that are in greatest need of the Act's protections. As proposed listings are reviewed and processed, they will be completed through publication of either a final listing or a notice withdrawing the proposed listing. While completion of a withdrawal notice may appear inconsistent with the thrust of the guidance, once a determination not to make a final listing has been made, publishing the notice withdrawing the proposed listing takes minimal time and

appropriations, and it is more cost effective and efficient to bring closure to the proposed listing, as compared to postponing action and taking it up at some later time.

Setting Priorities Within Tier 2

Most of the outstanding proposed listings deal with species that face high-magnitude threats, such that additional guidance is needed to clarify the relative priorities within Tier 2. Proposed rules dealing with taxa believed to face imminent, high-magnitude threats have the highest priority within Tier 2.

Proposed listings that cover multiple species facing high-magnitude threats have priority over single-species proposed rules unless the Service has reason to believe that the single-species proposal should be processed to avoid possible extinction.

Due to unresolved questions or the possible staleness of the scientific information in the administrative record, the Service may determine that additional public comment or hearings are necessary before issuing a final decision for Tier 2 actions. Proposed listings for species facing high-magnitude threats that can be quickly completed (based on factors such as few public comments to address or final decisions that are nearly complete) have higher priority than proposed rules for species with equivalent listing priorities that still require extensive work to complete.

Given species with equivalent listing priorities and the factors previously discussed being equal, proposed listings with the oldest dates of issue will be processed first.

Tier 3—Resolving the Conservation Status of Candidate Species and Processing Administrative Findings on Petitions to Add Species to the Lists or Reclassify Threatened Species to Endangered Status

As of this date, the Service has determined that 184 species warrant issuance of proposed listings. The Act directs the Service to make ''expeditious progress'' in adding new species to the lists. Issuance of new proposed listings is the first formal step in the regulatory process for listing a species. It provides some procedural protection in that all Federal agencies must ''confer'' with the Service on any actions that are likely to jeopardize the continued existence of proposed species.

Administrative findings for listing petitions that are not assigned to Tier 1 after initial screening will also be processed as a Tier 3 priority. As the Regional offices near completion of their pending Tier 1 and 2 actions, they will be expected to begin processing Tier 3 actions. Each Region should begin processing Tier 3 actions once all Tier 2 determinations are underway and near completion and then Tier 4 actions once Tier 3 actions are underway and near completion.

Setting Priorities Within Tier 3

The 1983 listing priority guidelines and the basic principle that species in greatest need of protection should be processed first are the primary bases for establishing priorities within Tier 3. Highest priority within Tier 3 will be processing of new proposed listings for species facing imminent, high-magnitude threats. If the initial screening of a petition suggests that the species probably faces imminent and high magnitude threats, processing that action will be accorded high priority.

Tier 4—Processing Critical Habitat Determinations and Processing Delistings or Reclassifications.

Designation of critical habitat consumes large amounts of the Service's listing appropriation and generally provides only limited conservation benefits beyond those achieved when a species is listed as endangered or threatened. Because the protection that flows from critical habitat designation applies only to Federal actions, it is rare for designation of critical habitat to provide additional protection beyond the ''jeopardy'' prohibition of section 7, which also applies to Federal actions. It is essential during this period of limited listing funds to maximize the conservation benefit of listing appropriations. The Service believes that the small amount of additional protection that may be gained by designating critical habitat for species already on the lists is greatly outweighed by the benefits of applying those same dollars to putting more species on the lists, where they would gain the protections included in sections 7 and 9. The Service has decided, in other words, to place higher priority on addressing imperiled species that presently have no or very limited protection under the Act, rather than devoting limited resources to the expensive process of designating critical habitat for species already protected by the Act.

Since the final appropriations law did not include dedicated funding for delistings or reclassifications of endangered species to threatened species, the Service does not believe that it would be consistent with the intent of this listing priority guidance to afford these activities high priority at this time. Processing reclassifications and delistings can provide regulatory relief and the Service regrets that such activities must be accorded Tier 4 priority due to the limited appropriations provided by Congress.

Addressing Matters In Litigation

Using this guidance and the 1983 listing priority guidelines, the Service will assess the status and the relative priority of all section 4 petition and rulemaking activities that are the subject of active litigation. The Service, through the Department of the Interior's Office of the Solicitor, will then notify the Justice Department of its priority determinations and request that appropriate relief be sought from each district court to allow those species with the highest biological priority to be addressed first. As noted in the guidance issued May 16, 1996, when the Service undertakes one listing activity, it inevitably foregoes another, and in some cases courts have ordered the Service to complete activities that are simply not, in the Service's expert judgment, among the highest biological priorities. However, to the extent that these efforts to uphold the Service's listing priority guidance and the 1983 listing priority guidelines do not receive deference in the courts, the Service will need to comply with court orders despite any conservation disruption that may result subject to any appeals that may be undertaken on a case-by-case basis. The fact that the Service acknowledges its duty to comply with court orders should not, however, be interpreted to mean that it acquiesces in the idea that all such court orders are consistent with this guidance without regard to how disruptive they may be to the Service's effort to make the most biologically sound use of its resources.

The Service will not elevate the priority of proposed listings for species under active litigation. To do so would let litigants, rather than expert biological judgments, set listing priorities. The Regional Office with responsibility for processing such packages will be responsible for determining the relative priority of such cases based upon this proposed guidance and the 1983 listing priority guidelines, and for furnishing supporting documentation that can be submitted to the relevant court to indicate where such species rank in the overall priority scheme.

National Environmental Policy Act

The Service does not consider the implementation of this guidance to be a major Federal action significantly affecting the quality of the human environment for purposes of the

National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*).

Further, the Department of the Interior's Departmental Manual (DM) categorically excludes from consideration under NEPA, ''Policies, directives, regulations, and guidelines of an administrative, financial, legal, technical or procedural nature or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case.'' This guidance clearly qualifies as an administrative matter under this exclusion. The Service also believes that the exceptions to categorical exclusions (516 DM 2, Appendix 2) would not be applicable to such a decision, especially in light of the absence of environmental effects for such action.

Authority

The authority for this notice is the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Dated: November 26, 1996.

John G. Rogers,

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 96–30946 Filed 12–4–96; 8:45 am]

**BILLING CODE 4310–55–P**

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## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of final decision.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) has decided to discontinue the practice of maintaining a list of species regarded as ''category-2 candidates.'' Future lists of species that are candidates for listing under the Endangered Species Act (Act) will be restricted to those species for which the Service has on file sufficient information to support issuance of a proposed listing rule. A variety of other lists describe ''species of concern'' or ''species in decline'' and the Service believes that these lists are more appropriate for use in land management planning and natural resource conservation efforts that extend beyond the mandates of the Act. The Service is committed to working closely with the State natural resource and natural heritage agencies, Territories and Tribes, other Federal agencies, and other interested parties to cooperatively identify new species that should be regarded as candidates for protection under the Act. The Service will continue to contract for, solicit, and accept information on the biological status and threats facing individual species on a continuing basis.

**ADDRESSES:** The complete record pertaining to this matter is available for inspection, by appointment, during normal business hours at the Division of Endangered Species, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 452, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service (telephone: 703/358–2171; facsimile: 703/358–1735) (see **ADDRESSES** section).

**SUPPLEMENTARY INFORMATION:**

Background

On February 28, 1996, the Service published a revised candidate notice of review in the Federal Register (61 FR 7596) that announced changes to the way the Service identifies species that are candidates for listing under the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*). The Service noted its intention to discontinue maintaining a list of species that were previously identified as ''Category-2 candidates.'' Category-2 candidates were species for which the Service had information indicating that protection under the Act may be warranted but for which it lacked sufficient information on status and threats to determine if elevation to ''category-1 candidate'' status was warranted.

In addition to soliciting biological information on taxa that are candidates for listing under the Act, the Service also solicited public comments of a general nature when it announced the revisions to the candidate identification process in the February 28, 1996, notice (61 FR 7596). The candidate notice specified no closing date for comments of either a general or a species-specific nature. On September 17, 1996, the Service published in the Federal Register (61 FR 48875) a notice announcing that it would consider all public comments on the matter of discontinuing the practice of identifying category-2 candidate species that were received on or before October 17, 1996. In the September 17, 1996, notice (61 FR 48875), the Service stated that it would publish a subsequent notice in the Federal Register addressing comments received and indicating a final decision on this issue and how the Service intends to identify species that are under consideration for possible addition to the list of endangered or threatened species.

As solicited in the Service's February 28, 1996, candidate notice (61 FR 7596), comments and information relating to the biological status and threats of particular taxa that are, or should be, regarded as candidates for protection under the Act may be submitted at any time to the Regional Director of the Region identified as having lead responsibility. Biological status and threat information for species that do not have a designated lead Region should be submitted to the Division of Endangered Species, Washington, D.C. (see **ADDRESSES** section).

When the Service first started publishing comprehensive lists of candidates and potential candidates, no comparable list existed because few organizations were tracking species of concern. Now, a number of agencies and organizations track species that may be declining, including State natural resource agencies and Natural Heritage Programs, Federal land-management agencies, the Biological Resources Division of the U.S. Geological Survey (USGS), professional societies, and conservation organizations. The added attention and wider range of focus means that there is vastly superior information available on species of concern than was maintained in the Service's list of category-2 species. Duplicative effort to maintain lists is not the best use of limited endangered species funding.

The quality of the information supporting the former category-2 list varied considerably, ranging from extremely limited or old data to fairly comprehensive assessments. It is the intent of the Service to work with all interested parties and to use scientifically credible sources of peer-reviewed information, when available, to identify new candidate species.

The need for a species of concern list extends beyond implementation of the Endangered Species Act. Using the old category-2 list as a ''species of concern'' list was inappropriate; it is widely believed that sensitive, rare, and declining species are more inclusive than those found in the old category-2 list. Many Divisions of the Fish and Wildlife Service, such as Migratory Birds, Refuges, Endangered Species, Habitat Conservation, Environmental Contaminants, and Fish and Wildlife Management Assistance will continue to work with partners to identify and protect species of concern.

The result of such collaboration should be a far more comprehensive and