cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute (see section I. of this document), it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This minor action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive Order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act (5 U.S.C. 801 et *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 460, 461 and 463

Environmental protection, Air pollution control, Intergovernmental relations.

Authority: This rule is issued under the authority of sections 101, 110, 112, and 301 of the CAA, as amended (42 U.S.C. 7401, 7410, 7412, and 7601).

Dated: April 3, 2000.

William W. Rice,

Acting Regional Administrator, Region 7.

[FR Doc. 00–9663 Filed 4–17–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 00–8; RM–9788]

Radio Broadcasting Services; Spencer and Webster, MA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of Montachusett Broadcasting, Inc. this document reallots Channel 255A from Spencer to Webster, Massachusetts, and modifies the license of Station WORC–FM to specify Webster as the community of license. *See* 65 FR 4491, published January 27, 2000. The reference coordinates for Channel 255A at Webster, Massachusetts, are 42–02–10 and 71–59–23. With this action, the proceeding is terminated.

EFFECTIVE DATE: May 16, 2000.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MM Docket No. 00–8, adopted March 22, 2000, and released March 31, 2000. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Massachusetts, is amended by removing Spencer and Channel 255A.

3. Section 73.202(b), the Table of FM Allotments under Massachusetts, is amended by adding Webster and Channel 255A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00–9615 Filed 4–17–00; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE51

Endangered and Threatened Wildlife and Plants; Final Rule To List as Endangered the O'ahu 'Elepaio From the Hawaiian Islands and Determination of Whether Designation of Critical Habitat Is Prudent

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine the O'ahu 'elepaio (*Chasiempis sandwichensis ibidis*) to be an endangered species under the Endangered Species Act of 1973, as amended (Act). This bird is endemic to the island of O'ahu, Hawaiian Islands, where it was formerly found in all forested areas on the island. The O'ahu 'elepaio is currently found in greatly reduced numbers and is restricted to seven isolated populations occurring primarily in mid-elevation forests in portions of the Ko'olau and Wai'anae Mountains. The O'ahu 'elepaio is

threatened primarily by disease, including avian pox virus and malaria, and predation by nonindigenous mammals. Other known threats include storms with heavy rainfall and high winds that destroy nests; habitat degradation and loss, including habitat fragmentation due primarily to human impacts; and destruction of foraging habitat by feral pigs (VanderWerf 1993).

In light of new biological information provided during the public comment period, we have reanalyzed our original determination that designation of critical habitat was not prudent for this species. In summary, we find the O'ahu 'elepaio may benefit from the designation of critical habitat by indicating new areas for consultation under section 7 of the Act, and by providing educational benefits. Thus, we have determined that the designation of critical habitat is prudent for this species.

EFFECTIVE DATE: This rule takes effect on May 18, 2000.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Pacific Islands Ecoregion, 300 Ala Moana Boulevard, Room 3–122, Box 50088, Honolulu, Hawai'i 96850.

FOR FURTHER INFORMATION CONTACT: Karen W. Rosa, Assistant Field Supervisor-Endangered Species, Pacific Islands Ecoregion, at the above address (telephone 808/541–3441, FAX 808/541–3470).

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian archipelago consists of eight main islands and the shoals and atolls of the northwest Hawaiian Islands. The islands were formed sequentially by basaltic lava that emerged from a crustal hot spot located near the southeast coast of the island of Hawai'i (Stearns 1985).

The second oldest main island, O'ahu, is 2.5 million to 3.5 million years old and is heavily weathered. O'ahu has two principal mountain ranges, the Ko'olau and Wai'anae Mountains. The Ko'olau Mountains extend 60 kilometers (km) (37 miles (mi)) from southeast to northwest along the eastern half of the island. The windward (northeast) slope of these mountains is characterized by steep cliffs and short ridges less than 6 km (4 mi) long. Leeward ridges as long as 18 km (11 mi) parallel each other to the southwest and west, alternating with steep-sided stream valleys. The peak elevation in the Ko'olau Mountains occurs at Pu'u Konahua Nui (955 meters (m); 3,100 feet (ft)). The Wai'anae Mountains run from southeast to northwest in a 32-km (20-mi) arc along the western coast of O'ahu. The leeward (western) cliffs of the Wai'anae Mountains are steep; both windward and leeward ridges are less than 5 km (3 mi) in length. The peak elevation occurs at Mt. Ka'ala (1,230 m; 4,000 ft).

Currently, approximately 36 percent (134,300 ac) of O'ahu is forested (Buck *et al.* 1988). Of these forested lands, approximately 49 percent is considered native (dominated by koa (*Acacia koa*) and ohia (*Metrosideros* spp.) forests) with the remainder (51 percent) dominated by introduced species, e.g., common guava (*Psidium guajava*), strawberry guava (*P. cattleianum*), Java plum (*Eugenia cumini*), mango (*Mangifera indica*), and several species of *Eucalyptus* (Buck *et al.* 1988).

The O'ahu elepaio is a member of the monarch flycatcher family, Monarchidae (American Ornithologists' Union 1997), and is most likely related to the genus *Monarcha* (Mayr 1943, Conant 1977). The ancestors that gave rise to 'elepaio were probably of Melanesian origin with colonization of Hawai'i occurring through Polynesia or Micronesia (Baker 1951).

A physical description of the O'ahu 'elepaio is provided by VanderWerf (1998b). O'ahu 'elepaio have a blunt, medium-length bill that is mostly black and a long tail, which is often held up at an angle. Body length is about 15 centimeters (cm) (6 inches (in)) long, and weight varies between 11 and 15 grams (0.4 and 0.5 ounces). Males are usually 10 percent larger than females. Adults have a dark brown crown and back, and white underparts with the upper breast streaked very lightly with brown. The eyebrow and forehead are rufous, lores (area between a bird's eye and the base of the bill) are white, and the auricular (the feathers covering the opening of a bird's ear) is mostly black, forming a contrasting pattern. Distinctive field marks of adults are the white wing bars, rump, and tail-tips. Males are usually more black on the throat than females, especially the chin; however, this difference is not always detectable, and some overlap occurs. Immature birds are rufous on the head, back, upper breast, and wing bars.

The 'elepaio from the island of O'ahu has been recognized as a distinct taxonomic entity since Stejneger first described it as *Chasiempis ibidis* in 1887. Wilson (1891) described the bird as *C. gayi,* but, as pointed out by Olson (1989), the epithet *ibidis* has priority over *gayi*. Various taxonomic treatments of the Hawaiian 'elepaio have described from one to six species and up to five subspecies (Sclater 1885, Stejneger 1887, Wilson and Evans 1890–1899, Wilson 1891, Rothschild 1892–1900, Henshaw 1902, Perkins 1903, MacCaughey 1919, Bryan and Greenway 1944, Pratt 1979 and 1980, Olson 1989, Olson and James 1991). The taxonomy used in this rule follows Pyle (1992) and recognizes only a single species of 'elepaio in Hawai'i (Chasiempis sandwichensis) with three subspecies, each of which is endemic to a different island. The three island-specific subspecies are the Kau'ai 'elepaio (*C. s. sclateri* Ridgeway 1882), O'ahu 'elepaio (*C. s. ibidis* Stejneger 1887), and Hawai'i 'elepaio (*C. s. sandwichensis* Gmelin 1789). These subspecies differ considerably in plumage coloration and somewhat in vocalizations, but are quite similar in ecology and behavior (Conant 1977, Pratt 1980, VanderWerf 1998b).

Based upon the geographic variation among the three subspecies of 'elepaio, species status might be appropriate for each subspecies (Conant *et al.* 1998). Systematic investigation of genetic, morphological, and vocal variation of each subspecies has begun and will help identify whether each taxon should be considered a distinct species (VanderWerf 1998b).

Comments by early naturalists indicate that the O'ahu 'elepaio was once widespread in forested areas throughout O'ahu at all elevations. Perkins (1903) remarked that ''the universal distribution over the islands they severally inhabit, from the lowest bounds to the uppermost edge of continuous forest, as well as their extreme abundance and obtrusive familiarity, has caused them to be noticed by many persons who have seen no other native bird.'' Bryan (1905) noted that the 'elepaio ''remains the most abundant Hawaiian species on the mountainside all the way from the sea to well up into the higher elevations,'' while MacCaughey (1919) said ''the altitudinal range * * * on * * * O'ahu is approximately from 800 ft to the highest summits.''

The earliest described historical range, however, was likely to have been somewhat modified by habitat destruction. MacCaughey (1919) noted, ''[o]riginally, when the forests covered much more of the lowlands than at present, and extended down to the strand in many districts, the 'elepaio was abundant at the lower levels * * *'' Despite their descriptions of reduced range, naturalists were optimistic about the 'elepaio's chances for survival. Henshaw (1902) wrote ''* * * it is probable that when most of the Hawaiian birds are extinct the 'elepaio will long continue to maintain itself in scarcely diminished numbers.'' MacCaughey (1919) wrote, ''[t]he one

indigenous forest bird that appears to successfully withstand the devastating influences of 'civilization' is the Hawaiian Flycatcher or 'elepaio.'' Munro (1944) was similarly optimistic about the 'elepaio, reporting that ''[i]t is holding its own well in the O'ahu forests from which so many of the native birds have long disappeared.''

Early observations indicate that the O'ahu 'elepaio was widely distributed and extremely abundant. Rothschild (1893) called the 'elepaio ''one of the commonest, if not the commonest, of all the small native birds on O'ahu.'' Similarly, Seale (1900) said the 'elepaio was ''the commonest native land bird to be found on the island.'' MacCaughey (1919) stated it was ''the most abundant representative of the native woodland avifauna,'' and ''abundant in all parts of its range.'' However, Bryan (1905) found it to be ''much more frequently met within the Wai'anae mountains than in the Ko'olau range back of Honolulu,'' which may indicate that the species' optimum habitat is dry, rather than wet, forest.

Based on the above range descriptions, the O'ahu 'elepaio was historically very general in its habitat requirements, and occupied all types of forest at most elevations. Several authors noted that 'elepaio reached their greatest abundance in valleys at middle elevations. For example, Seale (1900) said that ''its usual haunt is the densely wooded canons at an elevation of from 800 to 1,300 feet.'' MacCaughey (1919) observed that the 'elepaio is ''a bird of the humid and mesophytic forests,'' and said it ''is most plentiful in the protected wooded ravines and on the valley slopes.''

The generalized habitat requirements of the O'ahu 'elepaio are also shown by its ability to forage for arthropods and nest in a variety of different plant species, including nonnative species. Perkins (1903) believed that ''to the changes wrought by civilization they are less susceptible than any other bird, and they may be seen feeding and even nesting in dense thickets of the introduced guava, or amongst masses of the prickly lantana, as contentedly as amongst the native vegetation.'' Conant (1977) studied a population that existed in a forest of entirely introduced plant species. The species shows extremely versatile foraging behavior and uses all available plant species and all heights in forests of native plant species (Conant 1981, VanderWerf 1993 and 1994). 'elepaio use all available substrates for foraging, including the ground and fallen logs, vertical trunks, branches, twigs, leaves, and the air (VanderWerf 1998b). The proportion of the substrates used for foraging depends upon the habitat. For example, in dense forests, 'elepaio use the ground more, and, in open forests, they use the air and leaves more (VanderWerf 1994).

O'ahu 'elepaio occur primarily in mesic mixed-species forests with a tall canopy and well-developed understory (VanderWerf *et al.* 1997; VanderWerf 1998b). The O'ahu 'elepaio appears to be most common in valleys and on slopes between 200 m (656 ft) and 800 m (2,625 ft) elevation (VanderWerf 1998b). Valleys may support more 'elepaio than ridges or slopes because they contain taller forest and are, therefore, more humid and protected from desiccating winds and large temperature fluctuations (VanderWerf *et al.* 1997). The species is less numerous in drier forests and on ridges (VanderWerf 1998b). O'ahu 'elepaio are not found in very wet, stunted forest on high windswept ridges and summits, in very dry scrubby forest, in forests that lack a subcanopy, or in monotypic forests (Shallenberger and Vaughn 1978; VanderWerf 1998b). 'Elepaio occur between 200 m (656 ft) and 500 m (1,641 ft) in the Ko'olau Mountain range and between 550 m (1,805 ft) and 850 m (2,789 ft) in the Wai'anae Mountain range (VanderWerf 1998b). O'ahu 'elepaio will also occur as low as 90 m (295 ft) elevation in the southern Ko'olau Mountains (VanderWerf *et al.* 1997).

The distribution and abundance of O'ahu 'elepaio do not appear to be related to the amount of native vegetation or species composition, but apparently to forest structure (VanderWerf *et al.* 1997). During an intensive bird survey of the central Ko'olau Mountains on O'ahu in 1978, Shallenberger and Vaughn (1978) found the greatest abundance of 'elepaio in alien forests, particularly areas with kukui (*Aleurites moluccana*) and guava trees, and in mixed alien-native forest. The occurrence of 'elepaio was lower in forests of entirely native species, primarily ohia and koa. The lesser abundance in native forest found by Shallenberger and Vaughn (1978) is unlikely to be a sampling artifact since the greatest effort was made in areas of native forest. The lesser abundance is likely due to a preference for certain elevations and diverse forest structure, rather than particular plant species. Also, more recent surveys conducted in the southern Ko'olau Mountains (VanderWerf *et al.* 1997) indicate that forest structure and density are more important components of O'ahu 'elepaio habitat than plant species composition. O'ahu 'elepaio were found to be most abundant in valleys between 200 m (656 ft) and 400 m (1,312 ft) elevation, with mesic forest that contained a tall canopy and well-developed understory. 'Elepaio were found in shorter, drier forests on slopes and ridges, but were less common in this type of habitat and were not found in areas where there was no understory. Many of the plant species found at the study site were introduced species that sometimes dominated the overstory and understory. Of 70 locations sampled, 49 percent of the locations had overstories that were composed entirely of introduced species, while 50 percent had a mixture of native and introduced species. Only 1 percent had an overstory that was mostly composed of native vegetation. Within the understory, 44 percent of sites comprised only introduced species, 56 percent had a mixture of native and introduced species, and none had only native species. Native plants that are common throughout the current range of the O'ahu 'elepaio include koa, papala kepau (*Pisonia umbellifera*), mamaki (*Pipturus albidus*), and lama (*Diospyros sandwicensis*) (VanderWerf *et al.* 1997). Introduced plants that are common where 'elepaio occur include kukui, common guava, strawberry guava, mango, ti (*Cordyline terminalis*), and Christmasberry (*Schinus terebinthifolius*) (VanderWerf *et al.* 1997).

Conant (1995) identified 598 separate observations of O'ahu 'elepaio dating from 1883 to 1995. Many of these sightings occurred in the same location, but over a period of years. By consolidating observations made at the same location, researcher could identify 83 site-specific locations where 'elepaio had been seen. Sixty-nine of these sites (84 percent) have been revisited between 1990 and 1995. Of these revisited sites, only 31 (45 percent) still have 'elepaio present. In 1995, the 31 extant sites were thought to be distributed among only 6 isolated populations in the southern Ko'olau Mountains and the central Wai'anae Mountains. Further analysis of both these data and the writings of early naturalists indicates that the 'elepaio originally inhabited 75 percent of O'ahu's land mass. By 1960, only 30 percent of the original habitat was still occupied. Fifteen years later, in 1975, the distribution had declined to 14 percent of the original distribution. The O'ahu 'elepaio currently occupies an area of 4,700 ha (11,600 ac). This amount represents approximately 4 percent of its original range.

While a collapse of the O'ahu 'elepaio's range has clearly occurred, decline in population density in the remaining populations has been more

difficult to determine. Williams (1987) examined the decline of O'ahu 'elepaio using Christmas Bird Counts from 1944 to 1985. Using standardized data (one census per year with number of birds per hour of observation), Williams documents a clear downward trend in 'elepaio observations. The data show a sharp decline in O'ahu 'elepaio observations beginning in the late 1950s and continuing through the 1960s, when observations were one or fewer birds per observer hour, dropping to less than 0.5 birds per party hour after 1974.

In a 1992 report on Hawai'i forest bird conservation assessment and management, Ellis *et al.* (1992) estimated the O'ahu 'elepaio population at 200 to 500 birds. This report further stated that two subpopulations of O'ahu 'elepaio existed, one in the Wai'anae Mountains and the other in the Ko'olau Mountains. A systematic range-wide count of O'ahu 'elepaio was conducted from 1995 to 1998. Currently, the O'ahu 'elepaio population is estimated at 1,500 birds (VanderWerf 1999). Island-wide surveys are nearly complete, and the possibility that any large populations of O'ahu 'elepaio have been overlooked is unlikely (VanderWerf 1997). There are seven geographically isolated populations: three in the Ko'olau Mountains and four in the Wai'anae Mountains (VanderWerf 1997). Ellis *et al.* (1992) estimated that 20 percent of the population occurred in the Wai'anae Mountains and 80 percent in the Ko'olau Mountains. According to the 1997 estimate, 59 percent of the population occurs in the Wai'anae Mountains and 41 percent in the Ko'olau Mountains.

The present populations of O'ahu 'elepaio occur on lands owned by Federal, State, and private parties. Analyses of major land ownership patterns identify 69 percent of the current range in privately held lands, 18 percent is federally owned or leased, and 13 percent occurs in State-owned areas. Ownership patterns vary among the seven populations. Five populations have between 66 and 99 percent private ownership within their ranges, one population occurs on land primarily owned by the State, and one population occurs on Federal land. Ninety-nine percent of the current O'ahu 'elepaio range occurs within State-designated Conservation Districts. This designation offers varying degrees of protection and may permit human activities that may be detrimental to the 'elepaio. Sixteen percent of the land designated as a Conservation District occurs in a subzone designated by the State as Protective. This subzone includes State Natural Area Reserves and The Nature Conservancy of Hawai'i's Honouliuli Preserve and aims to protect valuable resources such as wildlife sanctuaries.

Previous Federal Action

We were petitioned by Mr. Vaughn Sherwood on March 22, 1994, to list the O'ahu 'elepaio as an endangered or threatened species with critical habitat. The November 15, 1994, Animal Notice of Review (59 FR 58991) classified the O'ahu 'elepaio (*Chasiempis sandwichensis gayi*) as a category 1 candidate. Category 1 candidates were those species for which we had sufficient data in our possession to support a listing proposal. On June 12, 1995 (60 FR 30827), we published a 90-day petition finding stating that the petition presented substantial information that listing may be warranted. In the February 28, 1996 (61 FR 7596), and September 19, 1997 (62 FR 49398), notices, we discontinued category designations and the O'ahu 'elepaio was listed as a candidate species. Candidate species are those for which we have on file sufficient information on biological vulnerability and threats to support proposals to list as threatened or endangered. On October 6, 1998 (63 FR 53623), we published the proposed rule to list the O'ahu 'elepaio as an endangered species. Because *C. s. gayi* is a synonym of *C. s. ibidis,* the proposed rule constituted the final 12-month finding for the petitioned action.

The processing of this final rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of this final rule is a Priority 2 action.

Summary of Comments and Recommendations

In the October 6, 1998, proposed rule and associated notifications, we requested all interested parties to submit factual reports or information that might contribute to the development of a final rule. The public comment period closed on December 7, 1998 (63 FR 53623). We contacted appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties and requested them to comment. We also published newspaper notices in the Honolulu Star-Bulletin and Honolulu Advertiser on October 26, 1998, inviting general public comment.

In response to the open comment period, we received 15 comments on the proposed rule. Three Federal agencies provided comments, two supporting listing and one neither supporting nor opposing the proposal. Four Hawai'i State agencies provided comments, one supporting the proposal and three neutral. One Honolulu County agency commented that the agency supports the listing. The proposal was supported by five individuals and one conservation organization and opposed by one nonprofit legal foundation. Relevant information provided by these commenters has been incorporated into this rule.

Written opposition to listing of the O'ahu 'elepaio was based on our supposed lack of jurisdiction to enact the proposed rule and beliefs that the rule should be withdrawn because of a presumption that no connection exists between regulation of this bird and a substantial effect on ''interstate commerce.'' The Federal Government has the authority under the Commerce Clause of the U.S. Constitution to protect this species, for reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *National Association of Homebuilders* v. *Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied,* 1185 S. Ct. 2340 (1998). That case involved a challenge to application of Endangered Species Act prohibitions to protect the listed Delhi Sands flower-loving fly. As with the O'ahu 'elepaio , the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the Endangered Species Act's prohibition against taking of endangered species to this fly was a proper exercise of Commerce Clause power to regulate: (1) Use of channels of interstate commerce; and (2) activities substantially affecting interstate commerce, because it prevented loss of biodiversity and destructive interstate competition. Judge Henderson upheld protection of the fly because doing so prevents harm to the ecosystem upon which interstate commerce depends, and because doing so regulates commercial development that is part of interstate commerce.

The Federal Government also has authority under the Property Clause of the Constitution to protect this species.

The O'ahu'elepaio occurs on Federal land on the U.S. Army's Makua Military Reservation and Schofield Barracks Military Reservation. If this species were to become extinct, the diversity of wildlife on the Makua and Schofield Barracks Military Reservations would be diminished. The courts have long recognized Federal authority under the Property Clause to protect Federal resources in such circumstances. See, e.g., *Kleppe* v. *New Mexico,* 429 U.S. 873 (1976); *United States* v. *Alford,* 274 U.S. 264 (1927); *Camfield* v. *United States,* 167 U.S. 518 (1897); *United States* v. *Lindsey,* 595 F.2d 5 (9th Cir. 1979). Therefore, our application of the Act to the O'ahu 'elepaio (*Chasiempis sandwichensis ibidis*), a bird endemic to the island of O'ahu in the Hawaiian Islands, is constitutional.

We solicited the expert opinions of four qualified and independent specialists regarding pertinent scientific and/or commercial data and assumptions relating to the taxonomy, demography, and supportive biological and ecological information for the O'ahu 'elepaio. We received written comments from two of these experts and incorporated their comments into the final rule.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, we have determined that the O'ahu 'elepaio should be classified as an endangered species. Section 4 of the Act and regulations (50 CFR part 424) issued to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to the O'ahu 'elepaio (*Chasiempis sandwichensis ibidis*) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range.

Historical habitat loss due to factors discussed below has undoubtedly reduced the range of O'ahu 'elepaio. Although 'elepaio appear to be generalized in habitat use and can adapt to a variety of plant species, this species may be sensitive to severe changes in forest structure, such as clearing of the understory or creation of monospecific, even-aged plantations. Feral pigs may pose another threat by destroying ground cover, which provides foraging habitat for 'elepaio. The spread of certain alien plants, such as the velvet tree (*Miconia calvescens*), dramatically alters forest structure and/or diversity and poses a potential threat to the survival of O'ahu 'elepaio.

Alteration of forested areas, including changes in forest composition and forest structure and resulting habitat loss, has impacted the O'ahu 'elepaio. Early Hawaiians significantly altered the native vegetation of O'ahu, particularly in valleys used for taro cultivation. In uncultivated areas, trees were cut for firewood and construction, and fire was used to encourage the growth of grasses used for thatch (Kirch 1982). Destruction of the low-elevation forest resulted in the extinctions of numerous birds and land snails on O'ahu (Olson and James 1982, Kirch 1982). After European contact in 1778, habitat loss accelerated and began to occur at higher elevations. The sandalwood trade, which played a key role for O'ahu, required firewood, and completely eliminated native forests in the vicinity of Honolulu (Cuddihy and Stone 1990). From 1840 to about 1920, vast areas of low-and mid-elevation forest in Hawai'i were cleared for sugarcane cultivation. By the 1970s, more than 100,000 ha (274,000 acres) were under sugarcane cultivation. In contrast to early Hawaiian cultivation that was largely concentrated in mesic valleys and plains, sugarcane cultivation displaced native forest in dry leeward areas, and wide ridges and slopes such as the Leilehua Plateau between the Ko'olau and Wai'anae Mountains on O'ahu. Between 1900 and 1950, pineapple cultivation on O'ahu also resulted in a significant loss of native forests (Cuddihy and Stone 1990). Some of the areas cleared of native forest have either been replanted with exotic trees or regrown in alien vegetation. According to some estimates, approximately 36 percent of the land area on O'ahu is now covered by forest, but only about 49 percent of these forested areas is considered native vegetation (Buck *et al.* 1988).

O'ahu is the population center of the Hawaiian Islands, with about 40 percent of the State's population residing in Honolulu alone. The fastest growing areas on O'ahu, however, are suburban areas and new city development (such as creation of so-called ''second cities'' outside the city limits of Honolulu). Development can have significant impacts on O'ahu 'elepaio habitat through modification of forest structure and diversity. Although 99 percent of lands within the 'elepaio's range are within State-designated Conservation Districts, designation as such only offers varying degrees of protection and may allow activities, such as construction of individual houses, forestry-related activities, hunting, and recreational uses, that may be detrimental to the 'elepaio. Other types of development can also eliminate habitat. A portion of the H–3 freeway completed in 1997 runs through Halawa Valley, which supports a relatively large population of O'ahu 'elepaio (VanderWerf 1997). The effect of the freeway upon this population is unknown as no monitoring has occurred. Also, amenities such as golf courses may displace native and nonnative forests used by the O'ahu 'elepaio.

Military activities and related impacts on federally owned and leased lands may also affect the O'ahu 'elepaio. O'ahu 'elepaio currently occupy the upper slopes of Makua Valley in and adjacent to the U.S. Army's Makua Military Reservation. The lower section of Makua Valley is used as a live firing range, and the facility has a history of ordnance-induced fires (Hawai'i Heritage Program-The Nature Conservancy of Hawai'i (HHP-TNCH) 1994a). Prescribed burning occasionally results in large fires that, along with construction of firebreaks, destroys 'elepaio habitat and potentially threatens the birds. A large part of the 'elepaio range in the eastern Wai'anae Mountains occurs on the West Range of Schofield Barracks Military Reservation, where live firing also occurs and ordnance-induced fires can pose a significant threat to O'ahu 'elepaio habitat (Hawai'i Heritage Program, 1994b).

Miconia calvescens (velvet tree) is a recently naturalized species native to tropical America. This species has become invasive on islands of Hawai'i, Maui, O'ahu, and Kau'ai. Velvet tree is potentially the most invasive and damaging weed of rainforests of Pacific islands (Medeiros *et al.* 1997). This plant has the potential to greatly disrupt forest canopy and understory structure and significantly alter biological diversity. In moist conditions, this plant grows rapidly up to 15 m (49 ft) tall. This shade-tolerant tree produces abundant seed that is effectively dispersed by birds and accumulates in a large, persistent seed bank, and develops monospecific stands that eliminate understory plant species by shading and crowding (Medeiros *et al.* 1997). In Tahiti, it has become a dominant plant species in habitats similar to those of Hawai'i (Almeda 1990, Cuddihy and Stone 1990). Medeiros *et al.* (1997) state that velvet tree now dominates the forest in 65 percent of the island of Tahiti through the establishment of large, monospecific stands. This plant is now naturalized on

O'ahu at three locations in the southeastern Ko'olau Mountain range, including Manoa Valley (Medeiros *et al.* 1997), where one population of O'ahu 'elepaio is located.

Pigs (*Sus scrofa*) were introduced to Hawai'i by the Polynesian ancestors of Hawaiians, and later by western immigrants. The Polynesian strain of pig was comparatively small, and seems to have had a minimal impact on the native forests. The European strain of pig escaped domestication and invaded primarily wet and mesic forests on Kau'ai, O'ahu, Moloka'i, Maui, and Hawai'i. These pigs are large animals that threaten the continued existence of native plants and animals within these forest habitats. While foraging, pigs root and trample the forest floor. Given that O'ahu 'elepaio rely on diverse groundcover for foraging, the disturbance caused by pigs could have a major impact on the species. In a study conducted at the Hakalau Forest National Wildlife Refuge on the island of Hawai'i, researchers found that areas where the ground cover had been destroyed by feral pigs were used less frequently by the Hawai'i Island subspecies of 'elepaio for foraging (VanderWerf 1994). Expecting the same results on O'ahu is reasonable.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Overutilization is not known to threaten the O'ahu 'elepaio.

C. Disease and predation

Disease and predation are considered the primary threats responsible for the severe decline of the O'ahu 'elepaio in the last few decades. Disease is believed the primary reason for reduced adult survival, and nest predation by introduced mammals, mainly black rats (*Rattus rattus*), is the primary reason for low reproductive success (VanderWerf 1998a).

Avian malaria (*Plasmodium relictum*) and poxvirus (*Avipox* virus sp.) are two documented serious disease threats to O'ahu 'elepaio, as well as all native Hawaiian forest birds (VanderWerf 1998b). Malaria and pox are transmitted by the night-biting mosquito, *Culex quinquefasciatus,* which uses wallows created by feral pigs as breeding grounds. Avian pox can also be spread through physical contact with infected birds or surfaces (VanderWerf 1998b). Avian pox causes lesions on the feet, legs, and bill. Five populations of O'ahu 'elepaio sampled for disease had birds with pox-like lesions (VanderWerf 1998b). *Culex* mosquitos, and thus malaria and pox, are more abundant at lower elevations. Although larvae do not develop well at colder temperatures, mountain elevations on O'ahu are not high enough to preclude mosquitos; therefore, diseases may be more prevalent on this island (VanderWerf 1998b). According to VanderWerf (1998b), 70 percent of O'ahu 'elepaio within low-elevation valleys have pox-like lesions. Although its effects on the O'ahu 'elepaio remain unknown, malaria may also be an important factor for the species' decline (VanderWerf 1998a).

Avian pox is known to increase adult mortality and reduce reproductive success of O'ahu 'elepaio (VanderWerf 1997, 1998a, and 1998b). O'ahu 'elepaio with pox-like lesions are thought to be seriously affected by poxvirus and have lower survival than either healthy 'elepaio or those with healed pox sores (VanderWerf 1998a). Birds with pox likely become more vulnerable to predation or exposure due to the virus weakening the bird (VanderWerf 1998b). Survival rates of birds with healed pox sores were compared with those of apparently healthy birds, and researchers found that if 'elepaio can survive the initial infection, their future survival is not adversely affected (VanderWerf 1998a). Poxvirus also affects reproductive success. Pairs having at least one individual actively infected with pox produced fewer fledglings than healthy pairs or those consisting of at least one individual with healed pox lesions (VanderWerf 1998a).

Because disease, which in many cases is difficult to control, is a factor in the decline of the O'ahu 'elepaio , the existence and survival of genetically resistant individuals is essential to the survival of this taxon. If captive propagation is necessary for the recovery of this species, capture of disease-resistant birds may improve the success of a captive propagation program and increase the survival of birds released into the wild.

A potential factor contributing to the spread of avian disease is the expansion of the range of introduced birds. Introduced birds may act as a reservoir for diseases such as avian pox. Thus, expansion of the range of introduced birds infected with avian pox into the range of O'ahu 'elepaio is likely to have occurred and contributed to the decline of O'ahu 'elepaio. Another potential factor contributing to the spread of avian disease is feral cats (*Felis catus*). Cats may be considered a significant carrier and/or vector of disease. For example, cats are known hosts of the parasite *Taxoplasma gondii,* which is known to be fatal to some native Hawaiian birds (e.g., Hawaiian crow (*Corvus hawaiiensis*)) (Wallace 1973). Stray cats on O'ahu are known to carry *Taxoplasma* antibodies (Wallace 1973), however how this parasite affects O'ahu 'elepaio is unknown.

The Hawaiian short-eared owl, or pueo (*Asio flammeus*), is the natural predator of O'ahu 'elepaio, but given the limited number of pueo left on O'ahu, the pueo has very little impact on the O'ahu 'elepaio. The main predator of O'ahu 'elepaio nests is believed to be the black rat (VanderWerf 1998a). Predation of O'ahu 'elepaio nests by black rats has lowered reproductive success and increased mortality of female O'ahu 'elepaio (VanderWerf 1998a). Reproductive success of 'elepaio, measured by the number of fledglings per pair, is higher in areas where rats were removed, compared to an area where rats were not removed (VanderWerf 1998a). Other known nonnative predators include barn owls (*Tyto alba*), feral cats, small Indian mongoose (*Herpestes auropunctatus*), Polynesian rats (*Rattus exulans*), and Norway rats (*Rattus norwegicus*) (VanderWerf 1998b). Research indicates that removal of predators (*e.g.,* rats, cats, and mongooses) from O'ahu 'elepaio territories may increase the survival of female 'elepaio. Available results indicate that survival of males was similar in areas where rat removal was conducted and where it was not conducted. For those same areas, female 'elepaio survival appeared slightly higher in areas where rats were removed. However, sample sizes were not large enough, and more data are needed to verify these results (VanderWerf 1998a). Although male and female 'elepaio share incubation responsibilities of the eggs during the day, only females incubate at night (VanderWerf 1998b). Thus, females are more vulnerable than males to predation on nests by rats, which are primarily nocturnal (VanderWerf 1998a).

Introduction of alien animals into Hawai'i is a major continual threat to all native flora and fauna. Predation associated with alien introductions could significantly and negatively affect the remaining populations of O'ahu 'elepaio. The threat of the accidental introduction of the brown tree snake (*Boiga irregularis*) from Guam, Saipan, or the Solomon Islands is of particular concern. The brown tree snake is an aggressive predator of birds that has caused a significant decline in avifauna on Pacific islands where this snake has become established. In December 1994, a live brown tree snake was found in a Schofield Barracks warehouse on the island of O'ahu. This snake was

associated with a shipment of U.S. Army materials from Tinian via Guam.

D. The Inadequacy of Existing Regulatory Mechanisms

Currently, the O'ahu 'elepaio is protected under State (Hawai'i Revised Statutes (HRS), Sect. 13–124–3A) and Federal laws (Migratory Bird Treaty Act of 1918, 16 U.S.C. 703–712, 40 Stat. 755, as amended). These laws protect the taxon from capture and collection (without appropriate permits) of individuals, nests, and eggs, but do not afford protection to the habitat of this species.

E. Other Natural or Manmade Factors Affecting its Continued Existence

Storms with heavy rain and strong winds have been known to contribute to mortality of O'ahu 'elepaio eggs and nestlings. On O'ahu, 'elepaio nests, especially those high in trees, and their contents have been destroyed by March storms (VanderWerf 1998b). Prolonged heavy rain can also cause adults to abandon the nests; small fledglings are vulnerable to extended periods of intense rain (VanderWerf 1998b). For example, overall reproductive success in 1998 was lower than the previous year due to inclement weather experienced in late March and early April, when many nests contained eggs or small nestlings (VanderWerf 1998a). Several nests failed because they were blown out of the trees by winds in excess of 40 miles per hour (VanderWerf 1998a).

Naturally occurring events, such as hurricanes, may affect the continued existence of the O'ahu 'elepaio. Because the subspecies now exists only as seven small isolated populations, rather than one large, continuous, interbreeding population, a population decline could be exacerbated by random genetic, environmental, and demographic events. Small population size can reduce reproductive rates, increase rates of inbreeding and inbreeding depression (the expression of deleterious recessive genes occurring in the population), and facilitate the loss of future plasticity or evolutionary potential. Loss of genetic variability through genetic drift reduces the ability of small populations to cope with ecological and environmental stresses such as habitat modification and alien species.

If populations continue to decline and become extremely small, demographic events take on greater significance. For example, if weather events (*e.g.,* El Nino episodes) cause reproductive failure for one or more years, and are followed by a period of high predation, a small population has less resiliency and is vulnerable to extirpation. Hurricanes may cause large or total population loss through direct mortality, habitat destruction or modification, and dispersal of invasive alien plants. Although birds in the Hawaiian Islands have long endured hurricanes, major hurricanes in concert with low population numbers and other factors could severely affect the survival of O'ahu 'elepaio.

Another potential factor contributing to the decline of the O'ahu 'elepaio may be the competition for food or space with introduced birds such as the Japanese white-eye (*Zosterops japonicus*), white-rumped shama (*Copsychus malabaricus*), and the red-vented and red-whiskered bulbuls (*Pycnonotus cafer* and *P. jocosus*) (VanderWerf *et al.* 1997; VanderWerf 1998). Although the extent of competition has not been carefully studied, limited anecdotal and circumstantial evidence indicate that competition occurs with any alien bird species (VanderWerf *et al.* 1997; VanderWerf 1998).

The Japanese white-eye, introduced to Hawai'i in the 1930s, has expanded its range into remote areas within the last 2 decades. This species is probably the most abundant bird in Hawai'i (Pratt *et al.* 1987). Scott *et al.* (1986) demonstrated that distribution of the Japanese white-eye was negatively correlated with the distributions of native birds, including 'elepaio. 'elepaio have frequently been known to chase Japanese white-eyes from the area surrounding their nest (Conant 1977). Additionally, the red-vented bulbul was introduced to O'ahu in 1965 and greatly increased in numbers after 1970 (Williams 1987). This species is now extremely abundant in forested habitats. While primarily a fruit-eater, red-vented bulbuls take insect prey (Sheila Conant, pers. comm., 1995) and, as a particularly aggressive species, are known to chase other birds (Berger 1981).

In summary, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list the O'ahu 'elepaio as endangered. The most recent estimates indicate that 1,500 O'ahu 'elepaio remain, occurring in 7 small and geographically isolated populations (VanderWerf 1998 and 1999). This bird is primarily threatened by disease, including avian pox-virus and malaria, and predation by nonindigenous mammals. Other known threats include storms with high winds that destroy nests and their contents; habitat degradation and loss, including habitat fragmentation due primarily to human impacts; and destruction of foraging habitat by feral pigs. Potential threats include the introduction and spread of alien species, such as the brown tree snake, and alien plants that alter the structure and diversity of forested areas and competition with introduced birds. Small total population size, limited distribution, and population fragmentation make this taxon particularly vulnerable to reduced reproductive vigor and the effects of naturally occurring events. Because the O'ahu 'elepaio is in danger of extinction throughout all or a significant portion of its range, it fits the definition of endangered as defined in the Act. Therefore, the determination of endangered status for the O'ahu 'elepaio is appropriate.

Critical Habitat

Critical habitat is defined in section 3, paragraph (5)(A) of the Act as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection; and specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Critical habitat designation, by definition, directly affects only Federal agency actions through consultation under section 7(a)(2) of the Act. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) the species is threatened by

taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species.

In the proposed rule, we indicated that designation of critical habitat for this species was not prudent because we believed a critical habitat designation would not provide any additional benefit beyond that provided through listing as endangered.

In this final rule, however, we find that designation of critical habitat is prudent for the O'ahu 'elepaio (*Chasiempis sandwichensis ibidis*). In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior*, 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawai'i* v. *Babbitt,* 2 F. Supp. 2d 1280 (D. Hawai'i 1998)). Based on the standards applied in those judicial opinions, we believe that the designation of critical habitat for this species would be prudent.

In the absence of a finding that critical habitat would increase threats to a species, if any benefits would result from critical habitat designation, then a prudent finding is warranted. In the case of this species, some benefits may result from designation of critical habitat. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, in some instances section 7 consultation might be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. Designating critical habitat may also provide some educational or informational benefits. Therefore, we find that critical habitat is prudent for the O'ahu 'elepaio.

However, we cannot propose critical habitat designations for this subspecies at this time. Our Hawaiian field office, which would have the lead for such a proposal, is in the process of complying with the court order in *Conservation Council for Hawai'i* v. *Babbitt,* CIV NO. 97–00098 ACK (D. Haw. Mar. 9 and Aug. 10, 1998). In that case, the United States District Court for the District of Hawai'i remanded to the Service its ''not prudent'' findings on critical habitat designation for 245 species of Hawaiian plants. The court ordered us not only to reconsider these findings, but also to designate critical habitat for any species for which we determine on remand that critical habitat designation is prudent. Proposed designations or nondesignations for 100 species are to be published by November 30, 2000. Proposed designations or nondesignations for the remaining 145 species are to be published by April 30, 2002. Final designations or nondesignations are to be published within 1 year of each proposal. Compliance with this court order is a huge undertaking involving critical habitat determinations for over one-fifth of all species that have ever been listed under the Endangered Species Act, and over one-third of all listed plant species. In addition, we have agreed to include in this effort critical habitat designations for an additional 10 plants that are the subject of another lawsuit. See *Conservation Council for Hawai'i* v. *Babbitt,* CIV. NO. 99–00283 HG. We cannot develop proposed critical habitat designations for the Oahu elepaio without significant disruption of the field office's intensive efforts to comply with the *Conservation Council for Hawai'i* v. *Babbitt* remand.

To attempt to do so could also affect the listing program Region-wide. Administratively, the Service is divided into seven geographic regions. This subspecies is under the jurisdiction of Region 1, which includes California, Oregon, Washington, Idaho, Nevada, Hawaii, and other Pacific Islands. About one-half of all listed species occur in Region 1. Region 1 receives by far the largest share of listing funds of any Service region because it has the heaviest listing workload. Region 1 must also expend its listing resources to comply with existing court orders or settlement agreements. In fact, in the last fiscal year, all of the Region's funding allocation for critical habitat actions was expended to comply with court orders. If we were to immediately prepare proposed critical habitat designations for this subspecies notwithstanding the court order pertaining to 245 Hawaiian plant species, efforts to provide protection to many other species that are not yet listed would be delayed. While we believe some benefits may result from designating critical habitat for this subspecies, these benefits are significantly fewer in comparison to the benefits of listing a species under the Endangered Species Act because, as discussed above, the primary regulatory effect of critical habitat is limited to the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat.

As explained in detail in the Final Listing Priority Guidance for FY2000 (64 FR 57114), our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. Deferral of a proposal to designate critical habitat for the Oahu elepaio will allow us to concentrate our limited resources on higher priority critical habitat and other listing actions, while allowing us to put in place protections needed for the conservation of the Oahu elepaio without further delay. Therefore, given the current workload in Region 1 and, particularly, the Hawaiian field office, we expect that we will be unable to develop a proposal to designate critical habitat for the Oahu elepaio until FY2004.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages public awareness and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. Funding may be available through section 6 of the Act for the State to conduct recovery activities. The protection required of Federal agencies and the prohibitions against certain activities involving listed animals are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing

this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us, under section 7(a)(2) of the Act.

Federal agency actions that may require conference and/or consultation as described in the preceding paragraph include military activities, such as military training and troop movements, taking place on federally owned or leased lands; the involvement of the Army Corps of Engineers in projects subject to section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, such as the construction of roads and bridges and dredging projects; U.S. Environmental Protection Agency-authorized discharges under the National Pollutant Discharge Elimination System; U.S. Department of Agriculture/Natural Resources Conservation Service projects; U.S. Department of Housing and Urban Development projects; and other activities with a possible Federal nexus, such as golf course and firebreak construction.

Several of the remaining populations of this bird are located on State land utilized for military training, particularly by the U.S. Army. In the Wai‘anae Mountains, those populations are found in the following areas: Pahole to Makaha, including both leeward and windward sides, and Schofield to Palehua, on the windward side. In the Ko‘olau Mountains, only a fraction of the area occupied by one ‘elepaio population (Aiea ridge south to the Kahauiki Stream) is under military control. Therefore, section 7 consultation will be required before any military activities that may impact the O‘ahu ‘elepaio , such as military training and troop movements, may take place.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.21 for endangered species, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate or foreign commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in the course of otherwise lawful activities. Requests for copies of the regulations regarding listed wildlife and inquiries about permits and prohibitions may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 Northeast 11th Avenue, Portland, Oregon 97232–4181 (telephone 503–231–6241; facsimile 503–231–6243).

As published in the **Federal Register** on July 1, 1994, (59 FR 34272), our policy is to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not be likely to constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. Likely activities that we believe could potentially result in a violation of section 9 of the Act include, but are not limited to, the following: road or firebreak construction, military troop training, or other activities that disturb the normal behavior (*e.g.,* breeding, nesting, feeding) of O‘ahu ‘elepaio or damage habitat used by the species. Activities that we believe would not likely result in a violation of section 9 of the Act include, but are not limited to, nondestructive activities in areas occupied by O‘ahu ‘elepaio, such as hiking, collecting plants for cultural usage (*e.g.,* hula halau), and hunting game animals. Activities that occur under a valid incidental take permit or in accordance with a section 7 consultation would not violate section 9.

Questions regarding whether specific activities will constitute a violation of section 9 of the Act should be directed to the Manager of the Pacific Islands Ecoregion (see **ADDRESSES** section).

By giving the O‘ahu ‘elepaio Federal protection under the Act, the State of Hawai‘i Endangered Species Act (HRS, Sect. 195D–4(a)) is automatically invoked, prohibiting taking and encouraging conservation by State government agencies. Hawai‘i's Endangered Species law states, ''Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the Act shall be deemed to be an endangered species under the provisions of this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the Act shall be deemed to be a threatened species under the provisions of this chapter.'' Further, the State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species (HRS, Sect. 195D–5(c)). Funds for these activities could be made available under section 6 of the Act (State Cooperative Agreements). Thus, the Federal protection afforded to the O‘ahu ‘elepaio by listing as an endangered species will be reinforced and supplemented by protection under State law.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Required Determinations

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018–0094. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. For additional information concerning permit and associated requirements for endangered species, see 50 CFR 17.22.

References Cited

A complete list of all references cited herein is available upon request from the Pacific Islands Ecoregion (see **ADDRESSES** section).

Author

The primary author of this final rule is Leila Gibson, U.S. Fish and Wildlife Service (see **ADDRESSES** section). Recent data regarding the O'ahu 'elepaio were provided by Eric VanderWerf of the University of Hawai'i.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.11(h) is amended by adding the following, in alphabetical order under BIRDS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
BIRDS							
*	*	*	*	*	*	*	
'Elepaio, O'ahu	Chasiempis sandwichensis ibidis.	U.S.A. (HI)	Entire	E		NA	NA
*	*	*	*	*	*	*	

Dated: April 5, 2000.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

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