ing facters shall be used to value deferred annuities pursuant to § 2610.6:

$k_1 = 1.06$
$k_2 = 1.0475$
$k_3 = 1.035$
$n_1 = 8$
$n_2 = 10$

(Secs. 4002(b)(3), 4041(b), 4044, 4062(b)(1)(A), Pub. L. 93-406, 88 Stat. 1004, 1020, 1025-27, 1029 (29 U.S.C. 1302(b)(3), 1341(b), 1344, 1362(b)(1)(A)).)

Issued at Washington, D.C., on this 21st day of January, 1977.

MATTHEW M. LIND,
Acting Executive Director, Pension Benefit Guaranty Corp.

NOTE: Issued on the date set forth above, pursuant to a resolution of the Board of Directors authorizing the Executive Director to issue same.

HENRY ROSE,
Secretary, Pension Benefit Guaranty Corp.

[FR Doc.77-2583 Filed 1-25-77;8:45 am]

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

[33 CFR Part 207]

CAPE FEAR RIVER, NORTH CAROLINA

Proposed Navigation Regulation

Notice is hereby given that pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1) the regulations set forth below in tentative form are proposed by the Secretary of the Army (acting through the Chief of Engineers) to govern the use, administration and navigation of the three locks on the Cape Fear River, North Carolina. This proposal would establish a schedule of operation for the three locks and dams operated by the Corps of Engineers of navigational purposes.

The locks are currently available for navigation 24 hours a day, every day of the year. In view of declining use of the river for navigation and the small number of vessel lockages, combined with the increasing cost of operation and maintenance, continuous operation is uneconomical. It is apparent that the cost of making the locks available on a continuous basis far outweighs the benefits of accommodating the very few vessels currently using the locks. The proposed schedules would reduce the cost of operation by about 50 percent.

Prior to the adoption of the proposed regulations, consideration will be given to any comments, suggestions or objections thereto which are submitted in writing to the Office of the Chief of Engineers, Forrestal Building, Washington, D.C. 20314, Attention: DAEN-CWO-N on or before February 20, 1977.

§ 207.161 Cape Fear River, Navigation Locks, Between 29 and 94 River Miles North of Wilmington, North Carolina; Use, Administration and Navigation.

(a) The owner of or agency controlling the locks shall be required to open the navigation locks upon demand for passage of vessels during the following hours and periods:

Lock and dam No. 1, Lock and dam No. 2, Wm. O. Huske lock and dam

Apr. 1 through Oct. 31.	Monday through Friday.	7 a.m. to 11 a.m., 12 noon to 4 p.m.
	Saturday and Sunday.	7 a.m. to 9 a.m., 6 p.m. to 8 p.m.
Nov. 1 through Mar. 31.	Monday through Friday.	8 a.m. to 11 a.m., 12 noon to 5 p.m.

In addition, lockages will be provided during other hours if prior requests are made 48 hours in advance to the District Engineer, U.S. Army Engineer District, Wilmington, North Carolina.

(b) The owner of or agency controlling the locks shall place signs, of such size and description as may be designated by the District Engineer, U.S. Army Engineer District, Wilmington, North Carolina, at the locks indicating the nature of the regulations of this section.

(40 Stat. 266 (33 U.S.C. 1).)

Dated: January 13, 1977.

MARVIN W. REES,
Colonel, Corps of Engineers, Executive Director of Civil Works.

[FR Doc.77-2480 Filed 1-25-77;8:45 am]

[33 CFR Part 207]

SAN FRANCISCO BAY, SAN PABLO BAY, CARQUINEZ STRAIT, SUISUN BAY, SAN JOAQUIN RIVER, AND CONNECTING WATERS, CALIF.

Proposed Navigation Regulation

Notice is hereby given that pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1) the regulations set forth in tentative form below are proposed by the Secretary of the Army (acting through the Chief of Engineers) to amend 33 CFR 207.640. We propose to amend only paragraphs (j) and (n) by changing the descriptive titles, changing the designated command having authority over the restricted areas, and redefining the limits of the restricted area in paragraph (n). These changes are proposed in accordance with a request by the Commanding Officer, Naval Weapons Station, Concord, California, to revise the limits of the restricted area off Port Chicago to include the Seal Islands East Lighter Mooring and to make editorial changes outlined above.

Prior to the adoption of the proposed regulations consideration will be given to any comments, suggestions or objections thereto which are submitted in writing to the Office of the Chief of Engineers, Forrestal Building, Washington, D.C. 20314, Attention: DAEN-CWO-N on or before February 25, 1977.

§ 207.640 San Francisco Bay, San Pablo Bay, Carquinez Strait, Suisun Bay, San Joaquin River, and connecting waters, California.

* * * * *

(j) San Francisco Bay in vicinity of the NSC Fuel Department, Point Molate; restricted area.

(1) * * *

(2) *The regulations.* Vessels not operating under supervision of the local military or naval authority or public vessels of the United States shall not enter this area except by specific permission of the Commanding Officer, Naval Supply Center, Oakland.

* * * * *

(n) Suisun Bay at Naval Weapons Station, Concord; restricted area—

(1) *The area.* Beginning at a point on the shore and on the easterly side of the mouth of a small slough (known as Hastings Slough) bearing 189°, 2,412 yards from Tripon at Preston Point on Roe Island; thence 340°30', 400 yards, to the shore line of the westerly of the two Seal Islands; thence 60°30', 940 yards; thence 75°, 1,650 yards; thence 102°, 1,850 yards; thence 99°, 1,880 yards; thence 180°, 435 yards, to the shore line; thence following the high water shore line in a general westerly direction to the point of beginning.

(2) *The regulations.* Vessels and other craft not operating under the authority of the local military or naval authority shall not enter, lie to, anchor, or moor in this area except by specific permission of the Commanding Officer, Naval Weapons Stations, Concord.

* * * * *

(33 U.S.C. 1.)

Dated: January 14, 1977.

MARVIN W. REES,
Colonel, Corps of Engineers, Executive Director of Civil Works.

[FR Doc.77-2481 Filed 1-25-77;8:45 am]

ENVIRONMENTAL PROTECTION AGENCY

[FRL 639-1]

[40 CFR Part 60]

STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Sewage Sludge Incinerators

Subpart 0 sets forth standards of performance for new, modified, and reconstructed sewage sludge incinerators in sewage treatment plants. The standards limit emissions of particulate matter to 0.65 g/kg dry sludge input (1.30 lb/ton dry sludge input) and visible emissions to 20 percent opacity. The State of Alaska recently requested EPA to revise § 60.150 of the regulation. The basis of the request is that incinerators which are small enough to meet the needs of small communities in Alaska and also comply with the particulate matter standard are not available, and the disposal of sewage sludge in landfills is not a viable option because of permafrost and other factors resulting in landfill problems (shallow and soft landfills). The proposed amendment would exempt incinerators with a capacity of less than 140 kg/hr (300 lb/hr) dry sludge provided that disposal by land application or sanitary landfill are shown to be infeasible because of freezing conditions.

BACKGROUND

The standards of performance for sewage sludge incinerators were promulgated March 8, 1974 (39 FR 9308), under section 111 of the Clean Air Act. Section 111 directs the Administrator to establish standards of performance for new stationary sources which reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated. The best system of emission reduction for sewage sludge incinerators (multiple hearth and fluid bed reactor type incinerators) was determined to be low energy venturi scrubbers.

At the time the standards were promulgated EPA was developing a standard for murcury emissions from sewage sludge incinerators and guidelines for municipal sludge management. The standard limiting mercury emissions was promulgated under section 112 (Hazardous Air Pollutants) of the Clean Air Act on October 14, 1975 (40 FR 48302), and the proposed guideline was issued for public comment on June 3, 1976, under the title "Technical Bulletin on Municipal Sludge Management: Environmental Factors."

Incineration is just one of several methods available for sludge disposal. The standards, which limit emissions of mercury and particulate matter, insure that adequate emission control systems are employed when incineration is used as the method of sludge disposal. Incineration is only a volume reduction method. After incineration, the ash, either dry or in scrubber water, remains to be disposed of to the land. Ash disposal must be designed to protect ground water, to prevent dust, and to insure no erosion to surface waters.

INVESTIGATION

In investigating Alaska's request, EPA contacted the vendors of sewage sludge incinerators and found that multiple hearth or fluid bed reactor type incinerators which can achieve the particulate matter standard are not commercially available below a size capacity of 140 kg/hr (300 lb/hr). This means that incineration would not be a disposal option where units smaller than 140 kg/hr are needed. Since the unique problems in parts of Alaska also prevent disposal by land application or sanitary landfill, sludge disposal cannot be accomplished in an environmentally acceptable mnaner under existing regulations. EPA concluded that a revision to the standards of performance for sludge incinerators is appropriate.

In developing a revision to the standard to accommodate the unique problems in parts of Alaska, EPA intends that the proposed exemption not create an incentive to utilize small incinerators which would not be covered under the standard. To avoid this situation the proposed exemption applies only where an owner or operator can demonstrate to the satisfaction of the Administrator that land application and sanitary landfills are not feasible disposal methods for the sewage sludge. The size exemption is based on the capacity of the waste water treatment plant rather than the incinerator in order to prevent constructing multiple small incinerators rather than larger units which would be subject to the standard.

The proposed amendment of § 60.150 would not affect applicable national mercury emission standards under § 61.50 which currently regulates mercury emissions from all sludge incinerators. These standards are not subject to the exemption because control of mercury emissions can be achieved by ordinances or statutes which prevent mercury-bearing material from being introduced into the municipal waste treatment system.

PUBLIC PARTICIPATION

Interested persons may participate in this proposed rulemaking by submitting written comments (in triplicate) to the Emission Standards and Engineering Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention: Mr. Don R. Goodwin. Comments on all aspects of the proposed revision are welcome. All relevant comments received not later than March 15, 1977 will be considered. Comments received will be available for public inspection and copying at the EPA Public Information Reference Unit, Room 2922 (EPA Library), 401 M Street, S.W., Washington, D.C. 20460.

AUTHORITY: Sections 111, 114, and 301(a) of the Clean Air Act, as amended by sec. 4(a) of Pub. L. 91-604, 84 Stat. 1678 and by sec. 15(c)(2) of Pub. L. 91-604, 84 Stat. 1713 [42 U.S.C. 1857c-6, 1857c-9 and 1857g(a)].

Dated: January 14, 1977.

RUSSELL E. TRAIN,
Administrator.

In 40 CFR Part 60, it is proposed to amend Subpart 0, by revising § 60.150 as follows:

§ 60.150 Applicability and designation of affected facility.

(a) The affected facility to which the provisions of this subpart apply is each incinerator which combusts the sludge produced by municipal sewage treatment plants except as provided under paragraph (b) of this section.

(b) The owner or operator of a sewage sludge incinerator may apply to the Administrator for an exemption to the requirements of this subpart for any sewage sludge incinerator that is in a municipal waste treatment plant having a dry sludge capacity below 140 kg/hr (300 lb/hr). The Administrator will grant an exemption provided the owner or operator demonstrates to the Administrator's satisfaction that it is not feasible to dispose of the sludge by land application or in a sanitary landfill because of freezing conditions. For the purpose of determining the capacity of a municipal waste treatment plant under this paragraph, the dry sludge capacity of the municipal waste treatment plant or the dry sludge capacity of the sewage sludge incinerator, whichever is greater, is used.

[FR Doc.77-2384 Filed 1-25-77;8:45 am]

LEGAL SERVICES CORPORATION

[45 CFR Part 1606]

FINANCIAL ASSISTANCE

Procedures Governing Applications for and Denial of Refunding

The Legal Services Corporation was established pursuant to the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378, 42 U.S.C. 2996-2996*l* ("the Act"). Section 1011 of the Act, 42 U.S.C. 2996j, provides that the Corporation shall prescribe procedures to insure that, among other things, applications for refunding are not denied unless the grantee, contractor, or person or entity receiving financial assistance has been afforded reasonable notice and an opportunity for a timely, full, and fair hearing.

Pursuant to section 1008(e) of the Act, the Corporation hereby affords notice and publishes for comment the following proposed regulation concerning procedures governing applications for and denial of refunding. Public comment will be received by the Corporation at its headquarters offices, Suite 700, 733 15th Street, NW., Washington, D.C. 20005 on or before February 25, 1977. Comments must be in writing and may be accompanied by a memorandum or brief in support thereof. Comments received may be seen at the above offices during business hours Monday through Friday.

Final regulations will be issued by the Corporation after review and consideration of public comments received pursuant to this notice.

COMMENT

To insure that the provision of legal assistance to eligible clients would not be disrupted unnecessarily, Congress provided, in section 1011 of the Act, that a recipient's application for refunding should not be denied unless the recipient had been afforded reasonable notice and opportunity for a timely, full, and fair hearing.

The current draft was prepared after consideration of 48 written comments received in response to the publication of a proposed temporary regulation on March 12, 1976 (now in effect) and a proposed final draft on April 30, 1976, as well as lengthy analyses submitted by NLADA and PAG, and proposed drafts prepared by those organizations.

It seems a fair conclusion that section 1011 of the Act calls for procedures less elaborate than those of the Administrative Procedure Act,[1] but broadly comparable to the due process requirements applied to termination of governmental

[1] Had full APA procedures been intended, the Act could simply have adopted them as it did 5 U.S.C. 552 in section 1005(g).

financial benefits, licenses, or employment. This conclusion precludes summary procedures or any provision that is unfair, but does not compel the Corporation to imitate courtroom procedures. Most refunding decisions require the exercise of discretion and policy judgments, issues that are better settled by discussion than by adversarial confrontation. Rarely will refunding hearings be adjudicative in the conventional sense. Nor is it the purpose of the hearing to review or to challenge a decision after it has been made; the purpose is to provide an opportunity for meaningful involvement of a recipient before a final decision is reached, thereby insuring that the Corporation will not act hastily, or on mistaken grounds, or without receipt of all information and viewpoints entitled to consideration.

The major issues raised in the comments received by the Corporation should be considered by the Board.

1. GROUNDS FOR DENIAL OF REFUNDING

The requirements of section 1011 are procedural, and nothing in the Act requires the Corporation to issue a regulation stating all the grounds and criteria that may be applied in the future in considering applications for refunding. The Committee decided that it is desirable to do so, however, and that the grounds enumerated in § 1606.4 are adequate to cover all contingencies likely to occur.

This draft corrects a flaw that comments identified in the earlier one, which failed to provide a hearing on the question whether a generally applicable law or policy was being applied correctly in a particular case.

2. PRESIDING OFFICER

Section 1606.7(a)(1) states that the presiding officer "may be an officer or employee of the Corporation who has not previously been concerned with the investigation or consideration of the application for refunding, or may be a person recruited or retained from outside the Corporation who is familiar with the provision of legal services to the poor and supportive of the purposes of the Act."

Many comments urged the use of an administrative law judge or another person not employed by the Corporation in every case. The request seems misfounded.

Assuming that the presiding officer was not involved in the preliminary determination or the investigation that led to it, there cannot be a serious question about the propriety or validity of designating a Corporation official to preside at the hearing. In "The National Paralegal Institute v. The Legal Services Corporation," Civ. No. 76-1260, (August 12, 1976) the Court held that the provision of the Corporation's temporary regulations authorizing a Corporation employee to act as presiding officer satisfied the requirements of section 1011. The decision was clearly supported by Supreme Court decisions defining constitutional requirements for an impartial tribunal.[2]

The Corporation's regulation is consistent with the one adopted by ACTION, that is also required by statute to provide a full and fair hearing before terminating funding, 42 U.S.C. 5052. It provides that the presiding officer shall be the responsible ACTION official, or at the discretion of the responsible ACTION official, an independent hearing examiner designated pursuant to the Administrative Procedure Act. 45 CFR 1206.1-7(b)(1). The ACTION regulations were published in the FEDERAL REGISTER on January 16, 1974, seven months before passage of the Legal Services Corporation Act, with its provision containing identical language. There is no reason to believe that the Congress intended to impose heavier requirements on the Corporation than on ACTION.[3]

The current draft authorizes appointment of a presiding officer who is not employed by the Corporation. It may be expected that an outsider will most frequently be appointed when a recipient is charged with violating the Act or failing to provide high quality assistance, and the burden of proof is upon the Corporation as provided by § 1606.11. But when the issues presented require judgments about the effective use of Corporation resources, decisions should be made by a person familiar with the overall development of Corporation policy.

3. OBLIGATIONS OF THE CORPORATION

The temporary regulation places the burden of proof in every case upon the recipient. Section 1606.11 of the current draft imposes upon the Corporation the obligation of proving, by a preponderance of the evidence, any disputed fact relied upon as a ground for denying refunding. On issues of policy, the Corporation has the obligation of showing that there is a substantial basis for denying refunding.

The Committee believes there is no legal requirement for the Corporation to assume these obligations, but concluded that it would be wise policy for it to do so.

The other changes from the published draft were minor or technical in nature.

[2] Thus, a parole revocation hearing, or one for the revocation of probation, may be conducted before an in-house presiding officer so long as he was not directly involved in the antecedent investigation. "Morrissey v. Brewer," 408 U.S. 471 (1972); "Gagnon v. Scarpelli," 413 U.S. 788 (1973). A board of physicians may first investigate and then itself bear a license suspension. "Withrow v. Larkin," 421 U.S. 35 (1975). A board composed of senior prison officials may decide a disciplinary case. "Wolff v. McDonnell," 418 U.S. 539 (1974). A "neutral investigative officer", reviewed by the hospital superintendent, can determine whether a mental patient should be transferred to the maximum security unit. "Jones v. Robinson," 440 F.2d 249 (CADC, 1971). A school may be denied eligibility for educating nonimmigrant alien students if the due process hearing is conducted before an official who did not participate in the investigation. "Blackwell College of Business v. Attorney General", 454 F.2d 928 (CADC, 1971).

[3] See also 45 CFR 1067.1-7, and 45 CFR 1303.3-1, implementing 42 U.S.C. 2944(e) (OEO), and 42 U.S.C. 2928(h)(3) (Headstart), respectively.

PART 1606—PROCEDURES GOVERNING APPLICATIONS FOR AND DENIAL OF REFUNDING

AUTHORITY: Secs. 1006(b)(1), (3), 1007(a)(1), 1007(a)(3), 1007(a)(9), 1007(d), 1008(e), 1011 (42 U.S.C. 2996e(b)(1) and (3), 2996f(a)(1), 2996f(a)(3), 2996f(a)(9), 2996(d), 2996g(e), 2996j.

§ 1606.1 Purpose.

By affording a recipient the opportunity for a timely, full, and fair hearing that will promote informed deliberation by the Corporation when there is reason to believe an application for refunding should be denied, this part seeks to avoid unnecessary disruption in the delivery of legal assistance to eligible clients.

§ 1606.2 Definitions.

(a) "Denial of refunding" means a decision that, after expiration of its current grant or contract, a recipient—

(1) Will not be provided with financial assistance; or

(2) Will have its annual level of financial support reduced to an extent that is not required by a reduction in the Corporation appropriation that is apportioned among all recipients of the same class, and is either more than 10 percent or more than $20,000 below the recipient's annual level of financial assistance under its current grant or contract; or

(3) Will be provided with financial assistance subject to a new condition or restriction that is not generally applicable to all recipients of the same class, and that would significantly reduce the ability of a recipient to maintain its current level of legal assitance to eligible clients.

(b) "Director of a recipient" means the person who has overall day-to-day responsibility for management of operations by the recipient.

(c) "President", as used in this part, means the President (or acting President) of the Corporation, and not his designee.

(d) "Presiding Officer" means the President, or a person designated by the President to recommend a final decision that an application for refunding should be granted or denied.

§ 1606.3 Application for refunding.

At least 120 days before expiration of its current grant or contract, a recipient that desires refunding shall file an application therefor with the Corporation in conformity with directions that, from time to time, may be issued by the Corporation.

§ 1606.4 Grounds for denial of refunding.

An application for refunding may be denied when:

(a) Denial is required by law; or

(b) Denial is required by a Corporation policy that is generally applicable to all recipients of the same class; or

(c) There has been substantial failure by a recipient to comply with a provision of law, or a rule, regulation, or guideline issued by the Corporation, or a term or condition of a current or prior grant from or contract with the Corporation or a predecessor agency. In the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

(d) There has been substantial failure by a recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the Act, or a rule, regulation or guideline issued by the Corporation. In the absence of unusual circumstances, refunding shall not be denied for this cause unless the Corporation has given the recipient notice of such failure and an opportunity to take effective corrective action.

(e) Denial will implement a provision of the Act, or a Corporation policy, rule, regulation or guideline regarding economical or effective use of resources.

§ 1606.5 Preliminary determination.

(a) When there is reason to believe an application for refunding should be denied, the Corporation shall serve a written preliminary determination upon the recipient, which shall state the grounds for proposed denial, and shall identify, with reasonable specificity, any facts or documents relied upon as justification for denial.

(b) The preliminary determination shall advise the recipient that it may, within ten days of receipt of the preliminary determination, make written request for

(1) A hearing under this part, or

(2) An informal conference under § 1606.6 with a subsequent right as there provided to request a hearing.

(c) The preliminary determination shall also advise the recipient of its right to request interim or termination funding, as the case may be, under § 1606.18 or §1606.19.

§ 1606.6 Informal conference.

On timely request by the recipient, the Corporation employee who made the preliminary determination shall conduct an informal conference with the recipient at a time and place designated by the employee. The parties thereto shall exchange views, seek to narrow the issues, and explore the possibilities of settlement or compromise. At the conclusion of the conference, which may be adjourned for deliberation or consultation, the Corporation employee may, in writing, modify, withdraw, or affirm the preliminary determination. The recipient may, within five days thereafter, make written request for a hearing under § 1606.9 through § 1606.15.

§ 1606.7 Initiation of proceedings.

Within ten days of a request for a hearing made under § 1606.5(b) or § 1606.6, the Corporation shall notify a recipient in writing of

(a) The name of the presiding officer, and of the attorney who will represent the Corporation;

(b) The date, time and place scheduled for a prehearing conference, if any should be requested or ordered; and

(c) The date, time and place scheduled for the hearing.

§ 1606.8 Presiding Officer.

(a) The presiding officer may be an officer or employee of the Corporation who has not previously been concerned with the investigation or consideration of the application for refunding, or may be a person who is not an employee of the Corporation, who is familiar with the provision of legal services to the poor and supportive of the purposes of the Act.

(b) After designation, the presiding officer shall not consult with or receive communications from the employee who made the preliminary determination or from those representing the Corporation on any of the factual issues in the hearing except in the presence of, or with copies to, the recipient.

§ 1606.9 Prehearing conference.

(a) A prehearing conference may be ordered by the presiding officer, and shall be ordered if requested by either the recipient or the Corporation. The matters to be considered at the conference shall include:

(1) Proposals to define and narrow the issues;

(2) Efforts to stipulate the facts, in whole or in part;

(3) The probable number, identity, and order of presentation of exhibits and witnesses;

(4) On the agreement of the parties, the possibility of presenting the case on written submission or oral argument;

(5) The desirability of advance submission of some or all of the direct testimony in writing;

(6) Any necessary variation in the date, time and place of the hearing; and

(7) Such other matters as may be appropriate.

(b) In advance of the prehearing conference, the presiding officer may require a party to submit a written statement discussing any matter described in paragraph (a) of this section. After the prehearing conference, the presiding officer may establish the procedures, consistent with this part, to be followed at the hearing.

(c) The presiding officer may, at the prehearing conference or at any subsequent appropriate time prior to completion of the hearing, require the Corporation or the recipient, on sufficient notice, to produce a relevant document in its possession, to make a report not unduly burdensome to prepare, or to produce a person in its employ to testify, if any might offer a relevant and substantial addition to the accuracy or completeness of the record. With the consent of the presiding officer, a party may make a written submission before the hearing.

§ 1606.10 Conduct of hearing.

(a) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 45 days after the notice required by § 1606.7, and, whenever practical, shall be held at a place convenient to the recipient and the community it serves. A hearing affecting more than one community or recipient shall be held in a single centrally located place unless the presiding officer determines that an additional hearing place is required.

(b) The presiding officer shall preside, conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full disclosure of the facts and issues is made. The hearing shall be open to the public unless, for good cause and in the interests of justice, the presiding officer shall determine otherwise.

(c) The presiding officer may allow any interested person or organization to participate in the hearing if such participation will not broaden the issues unduly or cause delay, and will aid in proper determination of the issues.

(1) A person or organization wishing to participate in a hearing shall request permission from the presiding officer, stating the reason for the request, and the nature of the evidence or argument to be offered; and shall notify the Corporation and the recipient of its request.

(2) The presiding officer shall notify the Corporation, the recipient, and the person or organization requesting participation whether the request has been granted, and in case of denial shall include a brief statement of the reasons therefor.

(3) The presiding officer may limit the scope or form of participation authorized under this paragraph.

(d) The Corporation and the receipent each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any document submitted by another party, and submit rebuttal evidence.

(e) If a party fails, without good cause, to produce a person or document required under § 1606.9(c), the presiding officer may make an adverse finding on the fact or issue with respect to which production was required.

(f) Technical rules of evidence shall not apply. The presiding officer shall make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(g) Official notice may be taken of published policies, rules, regulations, guidelines and instructions of the Corporation, of any matter of which judicial notice may be taken in a federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(h) A record or summary of the hearing shall be made in a manner determined by the presiding officer, and shall be made available to a party upon payment of its cost.

§ 1606.11 **Obligations of the Corporation.**

At a hearing under § 1606.10:

(a) The Corporation shall have the obligation of proving, by a preponderance of the evidence, the existence of any disputed fact relied upon as justification for denial of refunding on a ground described in paragraph (c) or (d) of § 1606.4; and

(b) On all other issues, the Corporation shall have the obligation of establishing a substantial basis for denying the application for refunding.

§ 1606.12 **Briefs and argument.**

(a) Within ten days after the close of the hearing, each party may, and upon request of the presiding officer, shall, submit to the presiding officer, with service upon all other parties, proposed findings of fact and argument on matters of law or policy.

(b) The presiding officer may direct or permit oral argument at the close of the hearing or after submission of briefs.

§ 1606.13 **Recommended decision.**

(a) As soon as practicable after the hearing, and normally within twenty days after its conclusion, the presiding officer shall issue a written recommended decision

(1) Granting the application for refunding, subject to any modification or condition that may be deemed necessary on the basis of information adduced at the hearing; or

(2) Denying the application for refunding.

(b) The recommended decision shall contain findings of the significant and relevants facts and shall state the reasons for the decision. Findings of fact shall be based solely on the evidence adduced at the hearing or on matters of which official notice was taken.

§ 1606.14 **Final decision.**

(a) If neither the Corporation nor the recipient requests review by the President, a recommended decision shall become final ten days after receipt by a recipient.

(b) The recipient or the Corporation may seek review by the President of a recommended decision. A request shall be made in writing within ten days after receipt by the party of the recommended decision, and shall state in detail the reasons for seeking review.

(c) Within thirty days after receipt of a request for review of a recommended decision, the President may adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1606.13(b).

(d) If the presiding officer is the President, within thirty days after the conclusion of a hearing, a final decision that conforms to the requirements of § 1606.13 shall be issued.

(e) A decision by the President shall become final upon receipt by a recipient.

§ 1606.15 **Time extension and waiver.**

(a) Any period of time provided in these rules may, upon good cause shown and determined, be extended (1) By the person making the preliminary determination, prior to the time the presiding officer is designated; (2) By the presiding officer, prior to the issuance of a recommended decision; or (3) By the President at any time.

(b) Requests for extensions of time shall be considered in light of the overall objective that the procedures prescribed by this part ordinarily shall be concluded within 90 days of the preliminary determination.

(c) Any other provision of these rules may be waived or modified (1) By the presiding officer, if other than the President, with the assent of the recipient and of counsel for the Corporation, or (2) By the President upon good cause shown and determined.

§ 1606.16 **Right to Counsel.**

At a hearing under § 1606.10, the Corporation and the recipient each shall be entitled to be represented by counsel, or by another person. The attorney designated may be an employee, or may be outside counsel retained for the purpose, who may be compensated at the reasonable and customary rate for an attorney practicing in the vicinity of the attorney retained. Unless prior written approval is received from the Corporation, such fees shall not exceed the daily equivalent of the rate of level V of the Executive Schedule specified in section 5316 of Title 5, United States Code.

§ 1606.17 **Reimbursement.**

If an application for refunding is granted after a Preliminary Determination has been issued under § 1606.5, a recipient, at the discretion of the President, may receive reimbursement by the Corporation, in whole or in part, for reasonable and actual expenses that were required in connection with proceedings under this part.

§ 1606.18 **Interim funding.**

Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to refunding. If the Corporation fails to take final action upon an application for refunding prior to the expiration of the term of a recipient's current grant or contract, the Corporation shall provide the recipient with interim funding necessary to maintain its current level of legal assistance activities under the Act until

(a) The application for refunding has been approved and funds pursuant thereto received, or

(b) A final decision denying the application has been made.

§ 1606.19 **Termination funding.**

After a final decision to deny refunding, and without regard to whether a hearing has occurred, the Corporation may authorize temporary funding if necessary to enable a recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibility to its present clients.

§ 1606.2 **Notice.**

A notice required to be sent to a recipient under this part shall be sent to the director of the recipient, and may be sent to the chairperson of its governing body.

THOMAS EHRLICH,
President,
Legal Services Corporation.

[FR Doc.77-2576 Filed 1-25-77;8:45 am]

[45 CFR Part 1621]

CLIENT GRIEVANCE PROCEDURE

Proposed Rulemaking

The Legal Services Corporation was established pursuant to the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 378, 42 U.S.C. 2996-2996*l* ("the Act"). Section 1006(b)(1), 42 U.S.C. 2996e(b)(1), provides that the Corporation shall have authority to insure compliance of the Act.

Pursuant to section 1008(e) of the Act, the Corporation hereby affords notice and publishes for comment the following proposed regulations concerning client grievance procedures. Public comment will be received by the Corporation at its headquarters offices, Suite 700, 733 15th Street, NW., Washington, D.C. 20005 on or before February 25, 1977. Comments must be in writing and may be accompanied by a memorandum or brief in support thereof. Comments received may be seen at the above offices during business hours Monday through Friday.

Final regulations will be issued by the Corporation after review and consideration of public comments received pursuant to this notice.

COMMENT

A person who is denied legal assitance by a recipient, or who is dissatisfied with the assistance rendered, is unable to obtain legal assistance from another source. And, although a client does not pay a fee, adequate recourse should be available when the client believes that the services provided by a recipient do not meet the high standards of effectiveness required by the Act. Further, the fact that a recipient carries on its activities with funds from a public source imposes an additional responsibility beyond those imposed on every lawyer by the Code of Professional Responsibility. An effective client grievance procedure is an appropriate means of insuring the accountability of a recipient to its clients.

The proposed regulation requires the establishment by the governing body of a recipient of a grievance committee with authority to consider compliants that have not been resolved by staff action. The Code of Professional Responsibility does not prevent a committee containing nonlawyers from inquiring into a lawyer's conduct of a case when the committee is acting at the request of the client. Ethical prohibitions against interference with the professional judgment of a lawyer are designed to insure that the lawyer will be directly responsible to the client, and not subject to interference or control by an intermediary. See ABA Formal Opinions 237 and 294. Inquiry by a grievance committee acting at the request of the client is consistent with these opinions.

If a client expresses dissatisfaction with any aspect of the assistance provided by a recipient, it would be appropriate for the recipient to inform the client of the existence of a local group, such as the National Clients Council or the National Welfare Rights Organization, that may be able to counsel the client about the subject of the complaint.

PART 1621—CLIENT GRIEVANCE PROCEDURE

Sec.
1621.1 Purpose.
1621.2 Governing Body Grievance Committee.
1621.3 Procedures.

AUTHORITY: Sec. 1006(b)(1) (42 U.S.C. 2996e(b)(1)).

§ 1621.1 Purpose.

By providing an effective remedy for a client who believes that legal assistance has been denied improperly, or who is dissatisfied with the assistance provided, this part seeks to insure that every recipient will be accountable to its clients and will provide the high quality legal assistance required by the Act.

§ 1621.2 Governing Body Grievance Committee.

The governing body of a recipient shall establish a grievance committee, composed of lawyer and client representatives in the same proportion in which they are on the governing body.

§ 1621.3 Procedures.

(a) A recipient shall establish effective procedures for determining the validity of a complaint that assistance has been improperly denied or ineffectively rendered. The procedures adopted shall be subject to approval by the Corporation.

(b) The procedures shall include:

(1) Adequate notice to clients of how to make a complaint;

(2) Provision of assistance to a client who requests help in presenting a complaint; and

(3) An opportunity for a complainant to appear before the grievance committee established by the govrening body if the director of the recipient is unable to resolve the matter.

(c) A record of every complaint and its disposition shall be preserved for review by the Corporation.

THOMAS EHRLICH,
President,
Legal Services Corporation.

[FR Doc.77-2577 Filed 1-25-77;8:45 am]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[50 CFR Part 17]

ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Proposed Provisions for Interagency Corporation

Proposed regulations to assist the Federal agencies in complying with section 7 of the Endangered Species Act of 1973.

The Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, and the Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, hereby jointly issue substantively identical proposed rulemakings that would establish rules and procedures for interagency cooperation pursuant to section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1543 (hereinafter cited as Act). The U.S. Fish and Wildlife Service (hereinafter cited in this preamble as FWS) regulations would be established in Part 17 of Chapter I of Title 50, Code of Federal Regulations, while the National Marine Fisheries Service (hereinafter cited in this preamble as NMFS) regulations (published elsewhere in this issue, see FR Doc 77-2382, published in the proposed rules section of this issue under the Department of Commerce) would be established in Parts 217 and 223 of Chapter II of Title 50, Code of Federal Regulations. The NMFS regulations in Parts 217 and 223 are only for those species under the jurisdictional responsibilities of the Secretary of Commerce (endangered species are identified in 50 CFR 222.23(a) and threatened species are identified in 50 CFR 227.4). The FWS regulations in Part 17 would apply to all other endangered and threatened species.

BACKGROUND

The Act became effective on December 28, 1973. Recognizing that all Federal agencies must cooperate to conserve and protect endangered and threatened species and their habitat, section 7 of the Act states:

INTERAGENCY COOPERATION

Section 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessar to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

By internal memorandum of October 16, 1974, the Secretary of the Interior further defined Interior's responsibilities under section 7 and established the lead role of the FWS within the Department of the Interior.

In a joint letter to all Federal agencies on December 3, 1974, the Secretaries of the Interior and Commerce pointed out the responsibilities of the agencies under section 7 and asked for their cooperation in implementing the Act. The letter of December 3 also clarified the responsibilities of the FWS and the NMFS as lead agencies for the two Departments in implementation of the Act.

On April 22, 1975, the Director of the FWS and the Director of the NMFS published a joint notice in the FEDERAL REGISTER (40 FR 17764-17765) describing how "critical habitat" would be determined for endangered and threatened species pursuant to section 7 of the Act.

On May 29, 1975, the FWS and NMFS convened a conference for affected Federal agencies to discuss the Act and its implications for the activities and programs of the agencies. At this meeting, the Federal agencies requested that guidelines be developed to assist them in meeting their responsibilities under section 7.

In response to that request, the FWS and NMFS convened an Ad Hoc Interagency Committee of representatives from 11 Federal agencies to advise the two Services in developing the necessary guidelines.

An April 22, 1976, "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the FWS and NMFS. These guidelines are an interim measure to furnish a broad and flexible framework within which Federal agencies may prepare internal procedures to fulfill their responsibilities under section 7. However, as stated in the guidelines, they are "a starting point for the development and promulgation of regulations."

At the request of the Office of Management and Budget, copies of the guidelines were again transmitted to the Federal agencies on May 20, 1976, and comments due by August 1, 1976, were solicited for a "quality of life" review. As of

September 28, 1976, 40 comments had been received from Federal agencies. Although 8 comments expressed unequivocal support for the guidelines and 3 comments were opposed, the remaining 29 did not express general support or opposition, limiting themselves to comments on particular language, organization, or approach. Seven of the 29 simply stated they had no comment at that time.

The guidelines were subsequently revised by the FWS and NMFS for publication as a proposed rulemaking incorporating various comments of the Federal agencies. At the request of the Office of Management and Budget, the Director of the FWS, on behalf of the FWS and of the NMFS, forwarded this draft proposed rulemaking to the affected Federal agencies on November 11, 1976, requesting comments not later than December 1, 1976. As of January 5, 1977, 4 Federal agencies had commented. The draft regulations were then revised for this proposed rulemaking, incorporating many of the Federal agency comments.

DISCUSSION OF THE COMMENTS OF THE FEDERAL AGENCIES

Many of the comments of the Federal agencies on both the guidelines and draft regulations were clearly appropriate, have been incorporated into the proposed regulations, and need not be discussed here. However, several comments, whether adopted or not, merit discussion because of their importance and generality.

First, nearly one-third of the Federal agencies commenting indicated that use of the consultation process should be discretionary with the agency, although the Council on Environmental Quality took the opposite position. The position taken in the proposed rulemaking affirms the ultimate responsibility of each individual agency to decide whether or not it is in compliance with the Act. The proposal establishes a fixed procedure of consultation because the FWS and NMFS believe they cannot responsibly fulfill their obligations under section 7 unless there is a rational and uniform procedure for the provision of biological advice to agencies considering actions within the borders of section 7.

Second, nearly one-third of the Federal agencies commenting expressed in one form or another that set time frames are necessary for the consultation process. The FWS and NMFS acknowledge these agencies' concern that the process not be protracted. They have adopted a 60-day limit for threshold examinations and a 60-day limit for all consultation following receipt of information adequate for a biological opinion, except where special difficulty is incurred in obtaining necessary data. The FWS and NMFS do not expect that consultation will normally be protracted and anticipate that many requests for consultation will be dispatched summarily after a threshold examination. Nonetheless, the FWS and NMFS would be abdicating their responsibilities under section 7 if they were to commit themselves without exception to a time frame that in some cases would render inadequate biological advice. Therefore, the proposal leaves to agreement of the affected agency and the FWS or NMFS the time frame for completion of consultation on especially difficult actions.

Third, about one-fourth of the Federal agencies commenting stressed the need for habitat maps or published geographic coordinates for listed species, and the FWS and NMFS concur. The FWS is now working to satisfy the need, and has already designated critical habitat. This deficiency is not a valid reason for withholding implementation of the proposal, however, because the requirements of section 7 apply to Federal agencies even in the absence of a rulemaking such as that proposed, and it is to the Federal agency's advantage to have whatever biological advice and assistance the FWS and NMFS have to offer. The intended proposal simply establishes uniform procedures whereby Federal agencies can obtain the best available biological opinion as to the effect of an action on endangered or threatened species.

Fourth, about one-quarter of the Federal agencies commenting, including the Council on Environmental Quality, suggested that the consultation process should be linked to established procedures for interagency review of environmental impact statements. The FWS and NMFS expressly support this suggestion in the proposal and encourage it as a means to reduce paperwork.

Fifth, 4 of the Federal agencies expressed the opinion that the preparation and usual intragency review of environmental impact statements satisfy the consultation requirements of section 7. The Council on Environmental Quality did not support this position, but stated that an environmental impact statement should be prepared if an activity or program would jeopardize a species or potentially destroy its critical habitat. Although the FWS and the NMFS encourage consolidation of section 7 consultation and impact statement review, they will only be able to fulfill their obligations under section 7 if agencies that so consolidate will comply with the procedures stated in this proposal and will state the biological opinions of the FWS and NMFS pursuant to section 7 in final environmental impact statements, assessments, or other documents.

Sixth, 4 of the Federal agencies commenting indicated that advanced projects should be exempted from the requirements of section 7. Neither FWS nor NMFS intends that section 7 bring about the waste that can occur if an advanced project is halted. The proposed regulations would clearly limit application of section 7 to cases where Federal involvement or control remains and in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat. That the proposal would not exempt advanced projects where such Federal involvement or control remains simply reflects the belief of the FWS and the NMFS that their role under section 7 is limited to providing biological advice and assistance, not in determining if a project may continue. The affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with section 7. It seems reasonable that such an agency should seek the advice of the FWS or of the NMFS as to the effect the action will have upon the species in question, so that the agency may weigh the biological effect among other factors in reaching a decision.

Seventh, 3 of the Federal agencies commenting stressed that critical habitat should be the minimum habitat required by the Act or that the meaning of "modification" of such habitat in section 7 should be strictly qualified. The intended proposal incorporates both of these suggestions. Critical habitat is defined as habitat "the loss of which would appreciably decrease the likelihood of survival and recovery of a listed species or a distinct segment of its population." Modification is incorporated in the phrase "destruction or adverse modification," and then defined to be an alteration that appreciably diminishes the value of that habitat for a listed species.

Eighth, 3 of the Federal agencies commenting expressed the opinion that section 7 has no extraterritorial application, and a fourth agency stated that critical habitat should not be determined extraterritorially. However, the Council on Environmental Quality strongly supported extraterritorial application of section 7, and questioned whether it was appropriate to preclude determination of critical habitat in foreign countries. The proposal adopts the position that critical habitat may not be determined in foreign countries. However, the requirement that Federal agency actions not jeopardize the continued existence of listed species is taken to be applicable to listed species wherever occurring. This position adopts the recommendations of the Interior Department Solicitor's Office and the General Counsel's Office of the National Oceanic and Atmospheric Administration on the issue.

Ninth, 4 of the Federal agencies commenting stated that non-Federal entities should be able to consult with the FWS or the NMFS on behalf of the Federal agency. In response, the regulations for proposal have been revised to clarify that the affected Federal agency may obtain technical assistance from any source. However, the proposed regulations emphasize that the Federal agency must take full responsibility for the initiation, carrying out, and completion of consultation, and may not delegate it.

Tenth, several Federal agencies, both formally and informally, have inquired as to the assistance the FWS and the NMFS will provide in consultation. The proposed regulations have been revised to spell this out as clearly as possible. In general, the FWS and the NMFS take responsibility for review of information provided to them by the affected agency, and they will advise agencies on the kind of information needed and may perform on-site inspections. However, the FWS and the NMFS cannot commit themselves to fund or to carry out the basic study necessary for decision.

All comments of the Federal agencies have been considered in developing the proposed regulations and are maintained in the Office of the Associate Director for Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

DESCRIPTION OF THE PROPOSAL

The purpose of this proposal is to establish joint rules and procedures for interagency cooperation pursuant to section 7 of the Act. Although these proposed regulations are codified for the FWS in Chapter I of Title 50 of the Code of Federal Regulations, the NMFS is publishing substantively identical proposed regulations codified in Chapter II of the same Title.

This joint proposal is summarized below, with cites to NMFS codification in parentheses:

1. Section 17.3 (§ 217.12) is amended by adding key terms used in section 7 and in this proposal.

2. The following sections of Subpart I—Interagency Cooperation (Part 223—Endangered and Threatened Fish or Wildlife—Interagency Cooperation) are added:

(A) A § 17.91 (§ 223.1) is added on the scope of section 7 of the Act. This section affirms the responsibilities of the Federal agencies under section 7 by directing them to carry out conservation programs for listed species, and requiring them to insure that their actions do not jeopardize the continued existence of listed species or result in destruction or modification of critical habitat. The sections affirms that the prohibition against actions causing jeopardy applies extraterritorially.

(B) Section 17.92 (§ 223.2) describes the application of section 7 to previously initiated Federal agency actions.

(C) Section 17.93 (Subpart B—Consultation) sets forth procedures that the Federal agencies should follow in meeting the consultation and assistance requirements of section 7.

(1) The consultation process is to be initiated by Federal agencies after review and identification of actions that may affect listed species. If such review indicates no effect on listed species, consultation is not required unless requested by the FWS or NMFS. If a Federal agency identifies any action that may affect listed species, that agency should initiate consultation by written request to the appropriate FWS or NMFS official, with a copy to the Secretary of State if foreign countries or the high seas are involved. Additionally, consultation can be requested by either the FWS or NMFS should it become aware of a Federal action that may affect listed species and that has not received the benefit of section 7 consultation. Informal consultation at the field level between the FWS or NMFS and the Federal agencies can be initiated, but is not a substitute for the formal consultation process contained in this proposal. Federal agencies may obtain assistance from any source so long as they retain full responsibility for consultation.

(2) Consultation and assistance can take place in several forms.

(a) Consultation may be consolidated with interagency review under the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and other appropriate statutes. However, such consolidation does not relieve the Federal agencies of complying with the consultation procedures contained in this proposal.

(b) Consultation may be carried out through one Federal agency when several Federal agencies are involved in a common activity or program, and the FWS or NMFS concurs in the arrangement.

(3) It is the responsibility of the affected Federal agencies to obtain the biological data necessary to evaluate the effect of an action. The FWS or NMFS will assist to the extent feasible when requested, but will not fund the basic study.

(4) Upon receipt of a written request for consultation from a Federal agency, the FWS or NMFS will conduct a threshold examination. A threshold examination is a preliminary assessment by the FWS or NMFS to ascertain if an action will adversely affect listed species or their habitat.

(a) If, in either Director's opinion, the Federal action will promote the conservation of listed species or their habitat, the Federal agency will be notified within 60 days of initiation, and further consultation will not be required unless additional consultation will benefit the listed species.

(b) If an action is not specifically for the conservation of listed species and the threshold examination reveals that listed species or their habitat will not be adversely affected, the Federal agency will be notified within 60 days of initiation, and further consultation will not be required.

(c) If the Federal action may adversely affect listed species or their habitat, the agency will be so notified in writing within 60 days of initiation, and a final biological opinion will be rendered within 60 days after receipt of information adequate for a biological opinion, unless special circumstances require that a longer period be negotiated.

(5) The consultation process is complete only when the FWS or NMFS has rendered a written biological opinion on the effect of the Federal action on listed species or their habitat. Such opinions and any recommendations will be accompanied by supporting facts and documentation. Upon receipt of the biological opinions and recommendations from the FWS or NMFS, it will then be the responsibility of the Federal agency to determine whether and how to proceed in light of its section 7 obligations.

(6) Consultation should be reinitiated on a Federal action if the Federal agency or FWS or NMFS obtains significant information not previously considered, if the Federal action is significantly modified, or if a new species is listed that is affected by the action.

(D) Section 17.94 (Subpart C—Determination of Critical Habitat) sets forth procedures for determining critical habitat and states criteria the FWS or NMFS will consider in making such determinations.

PUBLIC COMMENTS SOLICITED

The Director of the FWS, on behalf of the FWS and NMFS, hereby solicits written comments and suggestions from the public at large, concerned Governmental agencies, the scientific community, industry, private interests, and any other interested persons. It is hoped that such comments will expose any potential problems so that our final rules will be clear, equitable, and effective.

The final promulgation of these regulations will take into consideration the comments received. Such comments or other additional information may lead the FWS and NMFS to adopt final regulations that differ from this proposal.

SUBMITTAL OF WRITTEN COMMENTS

Interested persons may participate in this rulemaking by submitting written comments to the Director (FWS/LE), U.S. Fish and Wildlife Service, P.O. Box 19183, Washington, D.C. 20036. All relevant comments received on or before March 28, 1977 will be considered. The FWS, on behalf of both the FWS and NMFS, will attempt to acknowledge receipt of all comments, but may not respond substantively.

Comments received will be available for public inspection during normal business hours (7:45 a.m. to 4:15 p.m.) at the Office of the Associate Director for Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior, 18th and C Streets, NW, Washington, D.C. 20240.

This notice of proposed rulemaking is issued under the authority of the Endangered Species Act of 1973, 16 U.S.C. 1531-1543.

Dated: January 19, 1977.

NATHANIEL P. REED,
Assistant Secretary,
Fish and Wildlife and Parks.

ROBERT W. SCHONING,
Director,
National Marine Fisheries Service.

Accordingly, it is hereby proposed to amend Part 17, Subchapter B, Chapter I of Title 50, Code of Federal Regulations, as follows:

1. Add to the definitions of § 17.3, maintaining alphabetical order, the following:

§ 17.3 Definitions.

* * * * *

"Activities and programs" means all actions of any kind authorized, funded, or carried out by Federal agencies, in whole or in part, examples of which include, but are not limited to: (1) actions intended to conserve listed species or their habitat; (2) the promulgation of regulations; (3) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (4) actions directly or indirectly causing modifications to the land, water, or air.

* * * * *

"Critical habitat" means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) or any constituent thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

"Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include, but are not limited to those diminishing the requirements for survival and recovery listed in § 17.94(b). There may be many types of activities which could be carried out in critical habitat without causing such diminution.

* * * * *

"Federal agency" means each authority of the Government of the United States except for the Congress, the courts of the United States, the Governments of the territories or possessions of the United States, or the Government of the District of Columbia.

* * * * *

"Jeopardize the continued existence of" means to engage in an activity or program which reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild. The level of reduction necessary to constitute "jeopardy" would be expected to vary among listed species.

"Listed species" means any species of fish, wildlife, or plant which is designated as endangered or threatened pursuant to the Act.

* * * * *

"Recovery" means improvement in the status of listed species to the point at which listing is no longer required.

2. Add §§ 17.91 through 17.94 of Subpart I, to read as follows:

Subpart I—Interagency Cooperation

§ 17.91 **Scope.**

This subpart interprets and implements section 7 of the Act. Section 7 (16 U.S.C. 1536) applies to all listed species of fish, wildlife, or plants and imposes three burdens upon the Federal agencies. First, it directs them to utilize their authorities to carry out conservation programs for listed species. Such affirmative conservation programs must comply with any applicable permit requirements of 50 CFR Part 17 for listed species. Second, it requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, and in foreign countries will not jeopardize the continued existence of a listed species. And third, section 7 directs all Federal agencies to insure that their activities and programs do not result in the destruction or modification of critical habitat. Although the Fish and Wildlife Service and the National Marine Fisheries Service share responsibilities for the Act, the regulations in this subpart apply only to listed species under the jurisdiction of the Fish and Wildlife Service. A Federal agency can determine which Service to initiate consultation with by scanning the list of species under the jurisdiction of the National Marine Fisheries Service located at 50 CFR 222.23(a) and 227.4. If the Federal agency's activity or program may affect a listed species which is cited in 50 CFR 222.23(a) or 227.4, then the agency should initiate consultation with the National Marine Fisheries Service. If the listed species is not cited in 50 CFR 222.23(a) or 227.4, the Federal agency should initiate consultation with the Fish and Wildlife Service.

§ 17.92 **Applicability to previously initiated actions.**

Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat.

§ 17.93 **Consultation.**

(a) *Initiation.* (1) It is the responsibility of each agency to review its activities or programs and to identify any such activities or programs that may affect listed species or their habitat. Reviewing agencies may obtain advice from the Service, but this is supplemental to and not a substitute for the formal consultation process set forth in this Subpart. Where a Federal agency funds or authorizes an activity or program to be carried out by a non-Federal entity, the Federal agency should initiate the consultation process and not the non-Federal entity.

(2) If a Federal agency decides that its activities or programs will not affect listed species or their habit the consultation requirements of section 7 will not apply unless requested by the Service.

(3) When a Federal agency identifies activities or programs that may affect listed species or their habitat, the agency should convey a written request for consultation to the Regional Director for the Region where the activity or program is or will be carried out or to the Regional Director for the Region where the Federal agency is situated if more than one Region is involved, or to the Director if foreign countries or the high seas are involved. In addition, if foreign countries or the high seas are involved, a copy of the request for consultation should be forwarded to the Secretary of State c/o the Director, Office of Environmental Affairs.

(4) In addition, the Director or Regional Director will request initiation of consultation if he identifies any activity or program of a Federal agency that has not received prior consultation and that may affect listed species or their habitat.

(5) Informal consultation may be initiated at the field level between the Service and the Federal agencies or their authorized representatives. Such informal consultation is supplemental to and not a substitute for the formal consultation process set forth in this Subpart.

(b) *Form.* (1) Consultation under section 7 may be consolidated with interagency cooperation required by other statutes, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) or the National Environmental Policy Act (42 U.S.C. 4321 et seq.). The satisfaction of the requirements of these other statutes, however, does not of itself relieve a Federal agency of its obligation to comply with the consultation procedures set forth in this Subpart.

(2) When particular progams or activities involve more than one Federal agency, these agencies may, with concurrence of the Director, fulfill their consultation responsibilities through a single agency.

(c) *Assistance from the Service.* It is the primary responsibility of each Federal agency requesting consultation to conduct appropriate studies and to provide the biological information necessary for adequate review of the effect an activity or program has upon listed species or their habitat. To the extent it is able, the Service will upon request provide relevant available data and reports, personnel, and recommendations for additional studies or surveys, but the Service will not fund any such additional studies or surveys.

(d) *Assistance from other sources.* Federal agencies may seek assistance from any source to obtain the biological information necessary for review of the effect an activity or program has upon listed species or their habitat. Such assistance may include, but is not limited to that obtained by contract or required by regulations of the Federal agency. However, responsibility for compliance with the procedures of this Section remains with the Federal agency and cannot be delegated by it.

(e) *Threshold examination.* Upon receipt of a request for consultation, the Director or Regional Director will conduct a threshold examination of the activity or program under review. A threshold examination may include a review of available information or an on-site inspection of the area.

(1) If an activity or program under review will, in the opinion of the Director, promote the conservation of listed

species, the appropriate Federal agency shall be notified in writing within 60 days after consultation is initiated, and additional section 7 consultation shall be unnecessary unless it would further benefit the listed species. The Service, to the extent feasible, will assist in carrying out such programs if requested by the Federal agency. The Federal agency should be aware that in addition to satisfaction of section 7 requirements, a permit may be required for activities otherwise prohibited by section 9 of the Act (16 U.S.C. § 1538).

(2) If an identified activity or program is not specifically for the conservation of listed species, but the Director or Regional Director concludes from the threshold examination that in no likelihood will the activity or program jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the appropriate Federal agency shall be notified in writing within 60 days of initiation and further section 7 consultation shall be unnecessary.

(f) *Further consultation.* If an identified activity or program is not specifically for the conservation of listed species, and the Director or Regional Director concludes as a result of the threshold examination that the activity or program may jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the Federal agency will be so notified in writing within 60 days of initiation. The Federal agency, with assistance as feasible from the Service and other sources of expertise, shall then initiate biological surveys or studies to determine how the activity or program may affect listed species or their critical habitat. Within 60 days of receipt of adequate information and documentation, unless special circumstances require negotiation of a longer period, the Service will end consultation by issuing a biological opinion.

(g) *Biological opinions.* (1) If the Director or Regional Director concludes that an activity or program under review is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat, he will so notify the Federal agency in writing.

(2) If the Director or Regional Director concludes that an activity or program under review is likely to jeopardize the continued existence of a listed species or result in the destruction or modification of critical habitat, he will so notify the Federal agency in writing and may recommend any changes that in his opinion will eliminate these effects of the activities or programs.

(3) Biological opinions issued pursuant to paragraphs (g) (1) and (2) will be accompanied by a statement of the facts and documentation on which they are based.

(4) Upon receipt and consideration of the final biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned, in light of its section 7 obligations. Where the consultation process has been consolidated with interagency cooperation required by other statutes, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) or the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the final biological opinion and recommendations of the Service should be stated in the documents required by those statutes.

(h) *Reinitiation.* Consultation shall be reinitiated by the Service or by the Federal agency:

(1) If new information reveals impacts of an activity or program that may hinder the survival and recovery of listed species;

(2) If the activity or program is modified in a manner that may hinder the survival and recovery of listed species; or

(3) If a new species is listed that may be affected by the activity or program.

§ 17.94 Determination of critical habitat.

(a) *Procedure.* Whenever deemed necessary and appropriate, the Director shall determine critical habitat for a listed species. After exchange of biological information, as appropriate, with the affected States and Federal agencies with jurisdiction over the lands or waters under consideration, the Director shall publish proposed rulemakings in the FEDERAL REGISTER. Comments of the scientific community and other interested persons will also be considered in promulgating final rulemaking.

(b) *Criteria.* The Director will consider the physiological, behavioral, ecological, and evolutionary requirements for the survival and recovery of listed species in determining what areas or parts of habitat (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of the species) are critical. These requirements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and generally,

(5) Ecosystems that are protected from disturbances and are representative of the geographical distribution of listed species.

(c) *Emergency determination.* Paragraphs (a) and (b) notwithstanding, the Director may make an emergency determination of critical habitat if he finds that an impending action poses a significant risk to the well-being of a listed species by the destruction or adverse modification of its habitat. Emergency determinations will be published in the FEDERAL REGISTER and will remain in effect for no more than 120 days.

[FR Doc.77-2383 Filed 1-25-77;8:45 am]

Fish and Wildlife Service

[50 CFR Part 26]

BACK BAY NATIONAL WILDLIFE REFUGE, VIRGINIA

Public Entry and Use

The Department of the Interior is considering issuance of regulations to govern public access, use, and recreation on the Back Bay National Wildlife Refuge. Prior regulations were published in the FEDERAL REGISTER, 41 FR 22361-22364, June 3, 1976 and 41 FR 31537-31539, July 29, 1976.

The policy of the Department of the Interior is, whenever practical, to afford the public an opportunity to participate in the rule-making process. Accordingly, interested persons may submit written comments, suggestions or objections regarding the proposed revision to the Regional Director, U.S. Fish and Wildlife Service, One Gateway Center, Suite 700, Newton Corner, Massachusetts 02158, by February 25, 1977.

PROPOSED REGULATIONS

These regulations are proposed under the authority of Section 4 of 80 Stat. 927, 16 U.S.C. 668dd: 76 Stat. 654, 16 U.S.C. 460k-3: and 65 Stat. 186, 16 U.S.C. 715s. Accordingly it is proposed that the 1976 special regulations governing public access, use and recreation be revised as set forth below:

§ 26.34 Special regulations concerning public access, use and recreation for individual wildlife refuge areas.

VIRGINIA

BACK BAY NATIONAL WILDLIFE REFUGE

(a) General Use. (1) Entry on foot or by motor vehicle on designated travel routes in public use areas is permitted for the purpose of nature study, sightseeing, wildlife observation, photography, hiking, surf fishing, surfing, swimming, and bicycling during daylight hours.

(2) Swimming and surfing are permitted only on that portion of the beach lying between the north boundary of the refuge and the dune crossing at field headquarters. No lifeguards are provided. Swimming and surfing will be at the visitor's own risk.

(3) The parking lot at the field headquarters is reserved for persons engaged in surf fishing and nature study. Surf fishing is permitted in accordance with applicable State regulations.

(4) Open fires are not permitted. Portable grills with a contained fuel supply are permitted on the beach north of the field headquarters.

(5) Pets on a leash not exceeding 10 feet in length are permitted on refuge public use areas.

(6) Bicycles and registered motor vehicles are permitted on the paved refuge access road and on the parking area at field headquarters. All other types of motorized vehicles are prohibited except as specifically authorized pursuant to these regulations.

(b) Access Permits. (1) Access to and travel along the ocean portion of the refuge by motorized vehicles may be allowed between the dune crossing entrance at the field headquarters and the south boundary of the refuge only after a permit has been issued by the refuge manager or his designated representative.

(2) Permits may be issued for such period of time as appears justifiable to the refuge manager, taking into account the need for and duration of access required by the applicant. In no case will the permit remain in effect beyond December 31 of the year in which it is granted. Permits may be renewed upon the submittal of a proper application.

(3) Permits must be permanently displayed at all times while on refuge property in such a manner as to be readily visible on any motor vehicle. Permits shall be nontransferable. No more than one vehicle owned by the permit holder shall be registered with the refuge manager for use in accordance with these regulations. That vehicle shall be operated on the refuge beach only by the permit holder or a member of his immediate family and household.

(4) Permits may be issued as follows: (i) Residential. (A) To persons now residing on, owning, or leasing land with permanent habitable dwelling, south of the refuge in the False Cape State Park acquisition area, Virginia.

(B) To permanent, full-time residents who can furnish proof of residency prior to December 31, 1975 on the Outer Banks from the refuge boundary south to and including the village of Corolla, North Carolina, as long as they remain permanent, full-time residents. Residence is defined as the dwelling in which the permit applicant lives year round on a full-time basis.

The burden of proof of showing that the prospective permittee meets these criteria shall be on the prospective permittee by presentation of appropriate documentation. Such permitted vehicles shall be restricted to two round trips per day. Travel is restricted to the designated route of travel between the hours of 5 a.m. to 11 p.m. The refuge manager may make exceptions to access restrictions for qualified permittees who have demonstrated, to the satisfaction of the refuge manager, a need for access relating to health or livelihood.

(ii) Non-residential: (A) To full-time commercial fishermen who have verified their dependence for a livelihood since on or before 1972 upon ingress, egress or crossing refuge land. Not more than three (3) special use permits for commercial fishing on the refuge will be in force at one time. Selection of refuge fishing permits will be determined by a lottery when the number of qualified applicants, as described above, exceeds the number of permits available. Commercial fishermen: a commercial fisherman shall be described as one who performs the act of harvesting finfish by gill net or haul seine in the Atlantic Ocean, and who has owned and operated a commercial fishing business since on or before 1972.

(B) For a school bus transporting resident students to and from the False Cape area during the school term.

(C) For service vehicles on business calls during the hours of 8 a.m. to 5 p.m., Monday through Friday, upon written verification of a request from a resident as described in (b)(4)(i) above. Service vehicles. Any vehicle owned or operated by or on behalf of an individual, partnership, or corporation engaged entirely in the business of furnishing construction, maintenance, or repair services, including but not limited to building, plumbing, septic tanks, installation or repair of household appliances, carpentry, painting, lansdcaping, garbage collection, and delivery services.

(D) For public utility vehicles on official business calls upon written verification of a request from a resident as described in (b)(4)(i) above. Public utility vehicles: Any vehicles owned or operated by a public utility company enfranchised to supply Outer Banks residents with electricity or telephone service.

(6) Excluded from the restrictions of these regulations are any military, fire, emergency, or law enforcement vehicle when used for emergency purposes and official use by an employee, agent, or designated representative of the Federal, State, or local government in the course of his official duties.

(7) In an emergency, the refuge manager may suspend, for such period or periods as he shall deem advisable, any or all of the foregoing restrictions on vehicular travel, and he may announce such suspension by whatever means are available. In the event of high winds and waves, storms, adverse weather conditions or high tides, the refuge manager may close all or any portion of the refuge to vehicular travel for such period as he shall deem advisable in the interest of public safety, or may adjust the periods of access otherwise prescribed pursuant to (b)(4)(i) above.

(8) (i) The refuge manager may prescribe restrictions as to the types of vehicles to be permitted to ensure public safety and adherence to all applicable rules and regulations.

(ii) All vehicles registered with the refuge manager must be equipped with four-wheel drive or oversand tires and carry, at all times on the refuge beach a shovel, jack, tow rope or chain, board or similar support for the jack, low-pressure tire gauge and spare tire.

(9) Violators of these special regulations and all other regulations pertaining to the Back Bay National Wildlife Refuge will be subject to legal action as prescribed by 50 CFR 28.31, including mandatory revocation by the refuge manager of such permits for the duration of the permit period.

(10) all permits issued under (b)(4)(i) will be terminated in the event that alternate access is provided during the permit period.

(11) The provisions of this special regulation are effective through December 31, 1977. They supplement the regulations which govern recreation on wildlife refuge areas generally, which are set forth in Title 50.

The refuge, comprising approximately 4,600 acres, is delineated on a map available from the Refuge Manager, Back Bay National Wildlife Refuge, Pembroke Office Park, Pembroke No. 2 Building Suite 218, Virginia Beach, Virginia 23462, and from the Regional Director, U.S. Fish and Wildlife Service, One Gateway Center, Suite 700, Newton Corner, Massachusetts 02158.

WILLIAM C. ASHE,
Acting Regional Director,
U.S. Fish and Wildlife Service.

JANUARY 13, 1977.

[FR Doc.77-2400 Filed 1-25-77;8:45 am]

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[50 CFR Parts 217 and 223]

ENDANGERED AND THREATENED FISH OR WILDLIFE

Interagency Cooperation

Proposed regulations to assist the Federal agencies in complying with section 7 of the Endangered Species Act of 1973.

The Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, hereby jointly issue substantively identical proposed rulemaking that would establish rules and procedures for interagency cooperation pursuant to section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1543. The National Marine Fisheries Service regulations would be established in Parts 217 and 223 of Chapter II of Title 50, Code of Federal Regulations, while the Interior Department regulations (published elsewhere in this issue, see FR Doc. 77-2383, published in the proposed rules section of this issue under the Department of Interior) would be established in Part 17 of Chapter I of Title 50, Code of Federal Regulations.

Parts 217 and 223 are only for those species under the jurisdictional responsibilities of the Secretary of Commerce (endangered species are identified in 50 CFR 222.23(a) and threatened species are identified in 50 CFR 227.4). The FWS regulations in Part 17 would apply to all other endangered and threatened species.

For background information, discussion of comments received from Federal agencies, a description of the joint proposal, and solicitation and submittal of public comments, see FR Doc. 77-2383, supra.

This notice of proposed rulemaking is issued under the authority of the Endangered Species Act of 1973.

Dated: January 19, 1977.

ROBERT W. SCHONING,
Director, National Marine Fisheries Service.

NATHANIEL P. REED,
Assistant Secretary, Fish and Wildlife and Parks.