Energy Efficiency Improvement and Recovered Material Utilization Report
U.S. Department of Energy

SPONSOR REPORTING FORM

DOE FORM CS 189-S

SPONSOR _____ SIC _____ REPORTING YEAR _____ PAGE _____ OF _____

SECTION C: RECOVERED MATERIALS UTILIZATION

Part 5

A. Current Use of Recovered Materials

1. Enter the manufacturing operation performed for the SIC and year indicated above. _____

2. What was the unit of production in this operation? _____

3. What was the amount of production in this operation? _____

4. How much virgin material was used in this operation? _____

	(a)	(b)	(c)
5. What recovered materials were used in this operation?			
6. How much of each recovered material was prompt industrial scrap?			
7. How much of each recovered material was obsolete scrap?			

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Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Conditional Approval of the Texas Proposed Permanent Regulatory Program

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

Conditional Approval of the Permanent Program; Submission from the State of Texas Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final Rule; Conditional Approval of the Texas Proposed Permanent Regulatory Program.

SUMMARY: On July 20, 1979, the State of Texas submitted to the Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). The purpose of the submission is to demonstrate the State's intent and the capability to administer and enforce the provisions of "SMCRA" and permanent regulatory program regulations, 30 CFR Chapter VII. After opportunity for public comment and thorough review of the program submission, the Secretary of the Interior has determined that the Texas program meets the minimum requirements of SMCRA and the Federal permanent program regulations, except for minor deficiencies discussed below under "Supplementary Information". Accordingly, the Secretary of the Interior has conditionally approved the Texas program. A new Part 943 is being added to Title 30 of the Code of Federal Regulations to reflect this conditional approval.

EFFECTIVE DATE: This conditional approval is effective February 16, 1980 and will terminate on June 15, 1980 unless the deficiencies identified in 30 CFR 943.11, adopted below, have been corrected before that date.

FOR FURTHER INFORMATION CONTACT: Mr. Carl C. Close, Assistant Director, State and Federal Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, Telephone (202) 343–4225.

ADDRESSES: Copies of the Texas program and the administrative record on the Texas program, including the letter from the Texas Railroad Commission agreeing to correct the deficiency which resulted in the conditional approval, are available for public inspection and copying during business hours at:

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Suite 125, 1121 East SW Loop 323, Tyler, Texas 75703.

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Shank Office Building, 1419 3rd Street, Floresville, Texas 78114.

The Office of Surface Mining Reclamation and Enforcement, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106, Telephone (816) 374–3920.

Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, Telephone (202) 343–4728.

SUPPLEMENTARY INFORMATION:

General Background on the Permanent Program

The environmental protection provisions of SMCRA are being enacted in two phases—the initial program and the permanent program—in accordance with Sections 501–503 of SMCRA. 30 U.S.C. 1251–1253. The initial program has been in effect since December 13, 1977, when the Secretary of the Interior promulgated interim program rules, 30 CFR Parts 710–725 and 795, 42 FR 62639.

The permanent program will become effective in each State upon the approval of a State program by the Secretary of the Interior or implementation of a Federal program within the State. If a State program is approved, the State will be the primary regulator of activities subject to SMCRA, rather than the Federal government.

The Federal rules for the permanent program, including procedures for States to follow in submitting State programs, and minimum standards and procedures the State programs must include to be eligible for approval, are found in 30 CFR Parts 700–707 and 730–865. Part 705 was published October 20, 1977 (42 FR 56064). Parts 795 and 865 (originally Part 860) were published December 13, 1977 (42 FR 62639). The other permanent program regulations were published at 44 FR 15385–15393 (March 13, 1979). Corrections were published at 44 FR 15485 (March 14, 1979), 44 FR 49673–49687 (August 24, 1979), 44 FR 53507–53509 (September 14, 1979) and 44 FR 66195 (November 19, 1979). Amendments to the rules have been published at 44 FR 60969 (October 22, 1979), as corrected at 44 FR 75143 (December 19, 1979), at 44 FR 75302 (December 19, 1979), 44 FR 77440–77447 (December 31, 1979) and 45 FR 2626–2629 (January 11, 1980). Portions of these rules have been suspended, pending further rulemaking. See 44 FR 67942 (November 27, 1979), 44 FR 77447–77454 (December 31, 1979) and 44 FR 77454–77455 (December 31, 1979).

General Background on State Program Approval Process

Any State wishing to assume primary jurisdiction for the regulation of coal mining under SMCRA may submit a program for consideration. The Secretary of the Interior has the responsibility to approve or disapprove the submission.

The Federal rules governing State program submissions are found at 30 CFR Parts 730–732. After review of the submission by OSM and other agnecies, opportunity for the State to make additions or modifications to the program, and opportunity for public comment, the Secretary may either approve the program unconditionally, approve it conditioned upon minor deficiencies being corrected in accordance with a timetable set by the Secretary, or disapprove the program in whole or in part. If the program is disapproved, the State may submit a revision of the program to correct the items which needed change to meet the requirement of SMCRA and the applicable Federal regulations. If this revised program is also disapproved, the SMCRA requires the Secretary of the Interior to establish a Federal program in that State. The State may again request approval to assume primary jurisdiction after the Federal program is implemented.

The Secretary, in reviewing State programs, is complying with the provisions of Section 503 of SMCRA, 30 U.S.C. 1253, and 30 CFR 732.15. With respect to the Texas program, the Secretary has used as criteria the Federal rules as corrected, amended, and suspended in the Federal Register notices cited above under "General Background on the Permanent Program."

State programs must contain provisions which regulate coal mining in accordance with the requirements of the Federal Surface Mining Act and consistent with the Secretary's regulations. The requirements under SMCRA and 30 CFR Chapter VII for special bituminous coal mines in Wyoming and anthracite mines in Pennsylvania are inapplicable in Texas.

With respect to suspended regulations, the following standards are being applied in reviewing State program submissions:

1. A State program need not contain provisions to implement a suspended regulation and no State program will be disapproved for failure to contain a suspended regulation.

2. A State program must be able to implement all provisions in the Surface Mining Act which are part of the regulation of coal mining during the

permanent program, including those provisions of the Surface Mining Act upon which the suspended regulations were based.

3. A State program may not contain any provision which is inconsistent with a provision of the Surface Mining Act. A State program may not include provisions implementing a suspended regulation if that regulation was suspended because it was inconsistent with the Surface Mining Act. There were two such suspensions, relating to 30 CFR 805.13(d) and 808.12(c). Although the Texas submission contained both these provisions, they have been repealed by operation of the provision on page I–44 of the Texas submission, which automatically repeals provisions of the Texas program which correspond to sections of the Federal rules which may be deleted.

4. Subject to public comment and agency analysis in the context of a particular State program, it would appear that any other suspended provisions, if included in a State program, could probably be characterized as more stringent than the Secretary's remaining rules. Accordingly, its inclusion in the State program could not ordinarily be grounds for disapproval under Section 503 of the Surface Mining Act, 30 U.S.C. 1253. Alternatively, a State may delete or suspend its corresponding regulation so long as standard 2 was met.

5. Upon promulgation of new regulations to replace those which have been suspended, the Secretary will afford States which do not have approved programs a reasonable opportunity to amend their programs, as appropriate. In general, we expect that the provisions of 30 CFR 732.17 will govern this process for States with approved programs.

To codify decisions on State programs, Federal programs, and other matters affecting individual States, OSM has established a new Subchapter T of 30 CFR Chapter VII. Subchapter T will consist of Parts 900 through 950. Provisions relating to Texas will be found in 30 CFR Part 943.

Background on the Texas Program Submission

On July 20, 1979, OSM received a proposed regulatory program from the State of Texas. The program was submitted by the Texas Railroad Commission, the agency which will be the primary regulatory authority under the Texas permanent program. Notice of receipt of the submission initiating the program review was published in the July 27, 1979, **Federal Register** (44 FR 44281–44283) and in newspapers of general circulation within the State. The announcement noted information for public participation in the initial phase of the review process, relating to the Regional Director's determination of whether the submission was complete.

On September 5, 1979 a public review meeting on the program and its completeness was held by the Regional Director in Austin, Texas. September 5, 1979 was also the close of the public comment period on completeness, which had begun July 27, 1979.

On September 17, 1979, the Regional Director published notice in the **Federal Register** announcing that he had determined the program to be incomplete (44 FR 53813). The notice specified that the submission was missing a section-by-section comparison of SMCRA and the Federal regulations with the Texas regulations, as required by 30 CFR 731.14(c).

On November 13, 1979, the Texas Railroad Commission submitted an amended program submission containing the missing section-by-section comparison, in addition to a number of substantive and non-substantive modifications.

On November 20, 1979, the Regional Director published notice in the **Federal Register** (44 FR 66764–66766) and in newspapers of general circulation within the State that the amended Texas submission was complete. The notice set forth procedures for the public hearing and comment period on the substance of the Texas program.

On December 19 and 20, 1979, a public hearing on the Texas submission was held in Austin, Texas, by the Regional Director.

On December 20, 1979, the Texas Railroad Commission submitted a four page document, proposing for discussion (but not adopting) certain amendments to its regulations, and amending the program submission. The proposed regulation changes, which appear on page one and the first six lines of page two of the document, did not constitute changes to the program, and are not part of the program being approved today. The program changes, beginning on the seventh line of the second page of the document and continuing to the end of the document, are part of the program being approved today.

On December 21, 1979, the Regional Director published notice in the **Federal Register** extending until December 28, 1979, the public comment period on the Texas program, to enable the public to review and comment on matters discussed at the public hearing on December 20 and 21, 1979 (44 FR 75733–75734). The amendments submitted by the Texas Railroad Commission on December 20, 1979, were discussed and distributed at the public hearing.

On December 31, 1979, the Texas Railroad Commission submitted new information to the Regional Director in response to certain of the public comments received during the re-opened comment period.

On January 7, 1980, the Regional Director submitted to the Director of OSM, his recommendation that the Texas program be conditionally approved, together with copies of the transcript of the public meeting and the public hearing, written presentations, exhibits, copies of all public comments received, and other documents comprising the administrative record.

On January 17, 1980, the Director published a notice in the **Federal Register** re-opening the public comment period until January 22, 1980, to allow the public to review and comment upon the new information submitted by the Texas Railroad Commission on December 31, 1979. (45 FR 3398.)

On January 25, 1980, the Director recommended to the Secretary that the Texas program be conditionally approved.

On January 28, 1980, the Administrator of the Environmental Protection Agency transmitted his written concurrence on the Texas program.

On February 1, 1980, the OSM published in the **Federal Register** a notice of the availability of the views on the Texas program submitted by the Administrator of the Environmental Protection Agency, the Secretary of Agriculture through the Soil Conservation Service, the U.S. Forest Service, the Fish and Wildlife Service, the Heritage Conservation and Recreation Service, the U.S. Bureau of Mines, the U.S. Geological Survey and the Advisory Council on Historic Preservation.

Secretary's Findings

1. In accordance with Section 503(a) of SMCRA, the Secretary finds that Texas has, subject to the exception in finding 4(k) below, the capability to carry out the provisions of SMCRA and to meet its purposes in the following ways:

(a) The Texas Surface Coal Mining and Reclamation Act (Texas SCMRA), the regulations adopted thereunder, and the Administrative Procedures and Texas Register Act, provide for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands in Texas in accordance with SMCRA;

(b) The Texas SCMRA provides sanctions for violations of Texas laws, regulations or conditions of permits

concerning surface coal mining and reclamation operations, and these sanctions meet the requirements of SMCRA, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the Texas Railroad Commission or its inspectors;

(c) The Texas Railroad Commission has sufficient administrative and technical personnel, and sufficient funds to enable Texas to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA;

(d) Texas law provides for the effective implementation, maintenance, and enforcement of a permit system that meets the requirements of SMCRA for the regulation of surface coal mining and reclamation operations on non-Indian and non-Federal lands within Texas;

(e) Texas has established a process for the designation of areas as unsuitable for surface coal mining in accordance with Section 522 of SMCRA;

(f) Texas has established for the purpose of avoiding duplication, a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with other Federal and State permit processes applicable to the proposed operations;

(g) Texas has fully enacted regulations consistent with regulations issued pursuant to SMCRA, subject to the exception discussed below in finding 4(k);

2. As required by Section 503(b)(1)–(3) of SMCRA, 30 U.S.C. 1253(b)(1)–(3), and 30 CFR 732.11–732.13, the Secretary has, through OSM:

(a) Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed Texas program;

(b) Obtained and disclosed the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of the Texas program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*); and

(c) Held a public review meeting in Austin, Texas, on September 5, 1979, to discuss the Texas program submission and its completeness and held a public hearing in Austin, Texas, on December 19 and 20, 1979 on the substance of the Texas program submission;

3. In accordance with Section 503(b)(4) of SMCRA, 30 U.S.C. 1253(b)(4), the Secretary finds that the State of Texas has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards of SMCRA and 30 CFR Chapter VII.

4. In accordance with 30 CFR 732.15, the Secretary finds, on the basis of information in the Texas program submission, including the side-by-side comparison of the Texas law and regulations with SMCRA and 30 CFR Chapter VII, public comments, testimony and written presentations at the public hearings, and other relevant information, that:

(a) The Texas program provides for Texas to carry out the provisions and meet the purposes of SMCRA and 30 CFR Chapter VII, and that Texas has not proposed any alternative approaches to the requirements of 30 CFR Chapter VII pursuant to 30 CFR 731.13;

(b) The Texas Railroad Commission has the authority under Texas laws and regulations to implement, administer, and enforce all applicable requirements consistent with 30 CFR Chapter VII, Subchapter K, and the Texas program includes provisions to do so. The Texas law and regulations on performance standards are consistent with SMCRA and 30 CFR Chapter VII, Subchapter K. Special performance standards for concurrent surface and underground mining, mountaintop removal and operations on steep slopes are not included in the Texas law or regulations. These performance standards are not applicable to Texas because these types of mining are not now conducted and are not expected to be conducted in Texas. Texas has stated, on page I–44 of its program submission, that it will not issue permits for these types of mining without first adopting and having approved appropriate regulatory provisions;

(c) The Texas Railroad Commission has the authority under Texas laws and regulations and the Texas program includes provisions to implement, administer and enforce a permit system consistent with 30 CFR Chapter VII, Subchapter G. The Texas program includes no detailed requirements for concurrent surface and underground mining, mountaintop removal and operations on steep slopes. These permit requirements are not applicable to Texas because these types of mining are not now conducted and are not expected to be conducted in Texas. Texas has stated, on page I–44 of its program submission, that it will not issue permits for these types of mining without first adopting and having approved appropriate regulatory provisions. Section 11 of the Texas SCMRA provides the authority for Texas to prohibit surface coal mining and reclamation operations without a permit issued by the Texas Railroad Commission;

(d) Section 27 of the Texas SCMRA and Part 776 of the Texas regulations provide the Texas Railroad Commission with the authority to regulate coal exploration consistent with 30 CFR Parts 776 and 815 and to prohibit coal exploration that does not comply with 30 CFR Parts 776 and 815, and the Texas program includes provisions to do so;

(e) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to require that persons extracting coal incidental to government-financed construction maintain information on site consistent with 30 CFR Part 707. The provisions of 30 CFR Part 707 are incorporated within Part 707 of the Texas regulations;

(f) The Texas Railroad Commission has the authority, under Section 29 of the Texas SCMRA and in Part 840 of the Texas regulations, and the Texas program includes provisions to enter, inspect, and monitor all coal exploration and surface coal mining and reclamation operations on non-Indian and non-Federal land within Texas.

(g) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to implement, administer, and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with 30 CFR Chapter VII, Subchapter J. The performance bond and liability insurance provisions of Sections 507(f), 509, 510, and 519 of SMCRA and 30 CFR Chapter VII, Subchapter J are incorporated in Sections 24, 25, and 26 of the Texas SCMRA and in Subchapter J of the Texas regulations. The informal conference provided in 30 CFR 807.11(e) has been replaced by a more formal public hearing subject to the Administrative Procedures and Texas Register Act (APTRA). The informal conference provided for in Section 519(g) of SMCRA is at the discretion of the regulatory authority and, accordingly, is not necessarily available in each case. Accordingly, the public hearing, even though it is formal rather than informal, assures more opportunity for citizen participation than is required under the Federal Act because it is a hearing which is available as a matter of right, not at the discretion of the

regulatory authority. (See Section .312(e) of the Texas regulations.)

(h) The Texas Railroad Commission has the authority, under Section 30 of the Texas SCMRA, and the Texas program includes provisions to provide for civil and criminal sanctions for violation of Texas law, regulations and conditions of permits and exploration approvals including civil and criminal penalties in accordance with Section 518 of SMCRA and consistent with 30 CFR Part 845, including the same or similar procedural requirements. Section 30 of the Texas SCMRA requires that the interest rate paid by Texas on money to be returned to operators is to be calculated at the prevailing United States Department of the Treasury rate rather than the prevailing Department of Treasury rate or 6 percent, whichever is greater, as provided in Section 518(c) of SMCRA. This difference and its counterpart in Part 845 of the Texas regulations are acceptable because they only potentially decrease amounts being returned to operators and they do not lessen the amounts to be paid by operators for violations. The civil penalty provisions of 30 CFR Part 845 are contained in Part 845 of the Texas regulations. The Texas regulations do not contain the procedural requirement of 30 CFR 845.19(a) that the fact of the violation may not be contested, if it has been decided in a formal review. However, this is merely a procedural requirement, not a substantive one. This difference is acceptable because the Texas procedures for imposing civil penalties are, in general, similar to the Federal provisions, and the difference neither impairs Texas authority to impose civil and criminal sanctions for violations nor lessens the stringency of those sanctions. The criteria for evaluating procedural aspects of a State program's penalty provisions are that they must be the same as, or similar to, those at the Federal level. See 30 CFR 840.13 and Section 518(i) of SMCRA, 30 U.S.C. 1268(i);

(i) The Texas Railroad Commission has the authority under Texas laws, and the Texas program contains provisions, to issue, modify, terminate and enforce notices of violation, cessation orders and show-cause orders in accordance with Section 521 of SMCRA and with 30 CFR Chapter VII, Subchapter L, including the same or similar procedural requirements. The enforcement authorities in Section 521 of SMCRA are contained in Section 32 of the Texas SCMRA. The applicable provisions of 30 CFR Chapter VII, Subchapter L are contained in Parts 840 and 843 of the Texas regulations with two exceptions. The first exception is the omission of § 843.17, "Failure to give notice and lack of information." This difference is acceptable because Texas does not need to rely on prior information to have the authority to conduct an inspection and take enforcement actions. The authority to conduct inspections and to take enforcement actions contained in Sections 29 and 32 of the Texas SCMRA is not restricted. Accordingly, these potential grounds for vacating a notice under the Federal scheme would not constitute legally sufficient grounds under the Texas program, so no provision is required declaring these grounds insufficient. The second exception is that review of notices of violation and cessation orders are subject to the Administrative Procedures and Texas Register Act (APTRA) rather than a counterpart of 43 CFR Part 4. This difference is acceptable because the APTRA, in conjunction with the General Rules of Procedure of the Texas Railroad Commission, provides all the essential rights and protections contained in 43 CFR Part 4;

(j) The Texas Railroad Commission has the authority, under Section 33 of the Texas SCMRA and in Subchapter F of the Texas regulations and the Texas program contains provisions to designate areas as unsuitable for surface coal mining consistent with 30 CFR Chapter VII, Subchapter F;

(k) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide for public participation in the development and revision of Texas regulations and the Texas program consistent with the public participation requirements of SMCRA and 30 CFR Chapter VII. Texas also has the authority to provide for public participation in the enforcement of its laws and regulations, with one exception. The Texas program does not provide for award of costs in accordance with 43 CFR 4.1290, *et seq.* This issue is discussed further in paragraph 44 under "Disposition of Comments," below. The Texas program does adequately provide for public participation in the permitting process, in requesting and conducting inspections, and in review of enforcement orders. The program also provides for citizen suits corresponding to Section 520 of SMCRA.

(l) The Texas Railroad Commission has the authority under Texas laws and the Texas program includes provisions to monitor, review, and enforce the prohibition against indirect or direct financial interests in coal mining operations by employees of the Texas Railroad Commission consistent with 30 CFR Part 705. The prohibitions against financial interests in coal mining operations are contained in Section 29(f) of the Texas Surface Coal Mining and Reclamation Act. These provisions of 30 CFR Part 705 are incorporated in Part 705 of the Texas Regulations.

(m) The Texas Railroad Commission has the authority under Texas laws to require the training, examination, and certification of persons engaged in, or responsible for blasting and the use of explosives in accordance with Section 719 of SMCRA.

Texas has no regulations on the training, examination, and certification of persons engaged in blasting because 30 CFR 732.15(b)(12) does not require a State to implement regulations governing certification and training of persons engaged in blasting until six months after Federal regulations for these provisions have been promulgated. The Federal regulations have not been promulgated at this time;

(n) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide small operator assistance consistent with 30 CFR Part 795. The small operator assistance provisions are contained in Section 19 of the Texas SCMRA and in Part 795 of the Texas regulations.

(o) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to provide protection of employees of the Texas Railroad Commission in accordance with the protection afforded Federal employees under Section 704 of SMCRA. Although Texas has not enacted a law equivalent to Section 704, the program submission indicates that the Texas Railroad Commission will, as a condition of each permit for surface coal mining issued under an approved State program, include the following:

> Any person who shall, except as permitted by law, willfully resist, prevent, impede, or interfere with the Commission or any of its agents in the performance of duties pursuant to the 'Surface Coal Mining and Reclamation Act' shall be subject to a fine of not more than $10,000 or by imprisonment for not more than one year, or both!

This language specifically ties in Section 30 (e) and (g) of the Texas Act, which provide criminal penalties for violation of a permit condition. These penalties are as severe as those provided in Section 704 of SMCRA. This scheme will provide protection to State employees comparable to that provided Federal employees by Section 704 of SMCRA, except that persons who are not employees of a permittee will not be subject to criminal penalties. The

Secretary does not believe that any material risk exists of interference with government employees from "wildcatters" or others, in light of the information on the nature of the Texas lignite industry in the program submission and the absence of any public comments on this issue. The Secretary is able to approve this element of Texas program in light of this permit term requirement.

(p) Texas has the authority under its laws and the Texas program contains provisions to provide for administrative and judicial review of State program actions in accordance with Sections 525 and 526 of SMCRA and 30 CFR Chapter VII, Subchapter L. The review provisions of Section 525 of SMCRA are contained in Section 32(c) of the Texas SCMRA except that Section 32(c)(1) provides that hearings shall be subject to APTRA rather than 5 U.S.C. 554. The APTRA, in conjunction with General Rules of Procedure of the Texas Railroad Commission, provides all the essential rights and protections contained in 5 U.S.C. 554;

(q) The Texas Railroad Commission has the authority under Texas laws and the Texas program contains provisions to cooperate and coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII. The provisions for cooperation, coordination, and provision of documents are contained in Section .672 of the Texas regulations;

(r) The Texas Surface Coal Mining Act and regulations adopted thereunder, and the Administrative Procedure and Texas Register Act, Art. 6252–13(a), Vernon's Annotated Texas Civil Statutes, the State Water Administration Water Code Section 26.0001–.268 and regulations adopted thereunder, the Texas Clean Air Act, Art. 4477–5, Vernon's Annotated Texas Civil Statutes, as amended, and regulations adopted thereunder, the General Procedures of the Texas Railroad Commission and the other laws and regulations of Texas do not contain provisions which would interfere with or preclude implementation of the provisions of SMCRA and 30 CFR Chapter VII. Accordingly, there are no Texas laws inconsistent with SMCRA that are being set aside in this approval;

(s) The Texas Railroad Commission and other agencies having a role in the program have sufficient legal, technical, and administrative personnel and sufficient funds to implement, administer, and enforce the provisions of the program, the requirements of 30 CFR 732.15(b), and other applicable State and Federal laws.

Disposition of Comments

The comments received on the Texas program during the public comment periods raised the issues listed below, which were considered in the Secretary's evaluation of the Texas program as indicated.

1. The Texas Agricultural Experiment Station said that the soil series descriptions of the National Cooperative Soil Survey should not be used for on-site soil descriptions because of the general nature of these descriptions.

Texas regulations specify that soil series descriptions may be used only with the approval of the Commission. The Secretary believes that the use of existing soil series descriptions should not be categorically denied because there may be those situations where site-specific soil surveys would not be necessary. In those cases, the Commission needs the flexibility to accept soil series descriptions.

2. The Texas Agricultural Experiment Station also suggested that the definition of topsoil should be expanded to include "other materials as approved and recommended by a certified professional soil scientist."

The Texas regulations allow for other materials to be used as topsoil or subsoil under the appropriate conditions, the suggested change in the definition is not necessary.

3. The Texas Agricultural Experiment Station said that the tolerance value of 0.1 for moist bulk density in reclaimed soils is unreasonable.

The Federal performance standard on moist bulk density has been suspended. Accordingly, Texas may retain its regulation on moist bulk density or may amend its program to delete the standard. If the Secretary promulgates a new performance standard on moist bulk density, then Texas may be required to amend its program.

4. The Texas Agricultural Experiment Station also offered a more comprehensive definition of the term "soil survey."

The Texas definition is identical to the Federal definition for the portion of the definition that the commenter suggests should be changed. Therefore, the Secretary believes that changing the definition is not necessary for Texas to meet the requirements for approval of a State program.

5. A commenter said that it was impractical to use a rigid depth in defining topsoil to be removed in thin topsoil situations. (See .335(c) of the Texas regulations). As an alternative, the commenter suggested that the determination of topsoil quality and thickness to be removed, segregated and redistributed should be made by a certified professional soil scientist on a site-specific basis.

The Texas regulations are identical to the Federal regulations and do not prohibit site-specific determinations. The Texas Railroad Commission has the authority to approve variations on topsoil removal, segregation and redistribution on a site-specific basis. (See .334, .335, .336, .337, and .338 of the Texas regulations).

6. The Soil Conservation Service (SCS) commented that consideration should be given to requiring additional soil resource information in the form of a description of the chemical and physical properties of the soil.

The Texas regulations are identical to the Federal regulations with regard to soil resource information requirements. The Secretary believes that the regulations will provide the regulatory authority with sufficient information to evaluate the soil resource when the applicant plans to segregate and replace the topsoil. Section .134 of the Texas regulations requires that the applicant provide chemical, physical, and other information if the applicant proposes to use overburden material as a substitute for topsoil. The Secretary believes this additional information is sufficient for the Commission in determining if the applicant's request to use substitute soil material should be approved.

7. Several commenters noted that soil testing should be carried out in a qualified laboratory under the direction or supervision of a certified professional soil scientist and that judgments concerning soils, soil substitutes, and soil fertility analyses should be made by a certified professional soil scientist.

The Secretary believes that if the surveys are prepared according to the procedures and standards of the National Cooperative Soil Survey and in accordance with procedures set forth in USDA Handbook 436 (Soil Taxonomy) and 18 (Soil Survey Manual), then uniformity and high standards will be achieved. Texas regulation .335(e) requires that laboratories conducting soil analyses must be approved by the Commission. The Secretary assumes that the Commission will require reasonable professional standards of these laboratories.

8. One commenter indicated that the Texas submission does not adequately address means of protecting water tables and aquifers and of enforcing the protection that exists.

The Secretary believes that the detailed performance standards on protecting surface and groundwater in Parts 816 and 817 and the inspection and enforcement provisions of Parts 840 and

843 accomplish the results sought by the commenter.

9. EPA suggested that the Texas program should indicate how Texas will handle water quality and effluent limitations soon to be promulgated by EPA (Best Available Technology Economically Achievable (BAT) regulations). Since these regulations have not yet been promulgated by EPA, Texas need not address this issue at this time.

10. Two commenters believed that the effluent limitation for total suspended solids was too stringent for Texas streams, and one commenter suggested that the allowable total suspended solids levels should be raised to between 300–500 mg/l.

The proposed limitations are identical to those already established by U.S. EPA, OSM regulations, and the Texas Water Resources Commission. The Texas Railroad Commission adopted the standard based upon Section 23(b)(10)(B)(i) of the Texas Surface Coal Mining and Reclamation Act which states in part, ". . . but in no event shall contributions be in excess of requirements set by applicable State or Federal law." The Texas Railroad Commission could not set any less stringent standards than those already set.

11. A commenter stated that no mention is made in the Texas program submission of National Pollutant Discharge Elimination System (NPDES) compliance review and enforcement.

Texas does not have jurisdiction over NPDES. However, the Commission is required to enforce the effluent standards in the Texas regulations at Section .340 which are the same as the NPDES effluent limitations. This is consistent with and at least as stringent as SMCRA.

12. A commenter suggested that the regulations should provide for the quantification of emissions from mining operations, particularly fugitive dust particulates, and that this quantification should be done in a consistent manner. The commenter also requested that the emissions information should be made accessible to the Prevention of Significant Deterioration (PSD) program.

To avoid conflict with the Clean Air Act program for prevention of significant deterioration and protection of nonattainment areas, the Secretary has decided not to require separate demonstrations of compliance with these Clean Air programs beyond the requirement of Section 508(a)(9) of the Act. The Texas regulations are the same as the Federal regulations. EPA has concurred in the Texas program's air quality provisions.

13. The Texas Agricultural Experiment Station expressed concern that there is a conflict in the interpretations of how introduced grass species affect the land use of an area in defining prime farmland and in determining the period of liability for bonding.

The Secretary believes there is no conflict; even though Bermuda grass requires periodic maintenance, such maintenance is not considered to be augmented by seeding, fertilizing, irrigation, or other work that would result in re-starting the period of liability as required in Section .036(b) of the Texas regulations.

14. Several commenters, including SCS, expressed concern about the definition of prime farmland at Section 3 (15) of the Texas Act and Section .008 of the regulations, and the alternative to separate soil horizon removal and stockpiling spelled out at Section .623 of the regulations. The general concern is that the Texas provisions do not provide the same degree of protection for prime farmlands as do the Federal Act and regulations. It is the Secretary's view that the Texas provisions contain precisely the same protections as the Federal provisions. The expanded language of the Texas provisions reflects OSM's interpretation of the Federal regulations on the specific matters addressed in the Texas language. This language has been previously accepted by OSM in the context of the settlement of a lawsuit brought by the State of Texas (*State of Texas* v. *Andrus*, U.S.D.C., Western District of Texas, Case #78–CA–35). None of the commenters offered evidence or arguments showing that prime farmland will not be protected by the Texas program in a manner consistent with SMCRA and the Federal regulations. Therefore, no change is required for these provisions to comply with the criteria for State program approval.

15. The SCS commented that the alternative soil handling regulations provide no assurance that the productivity of prime farmland will be restored after mining.

A typographical error in the draft of the Texas regulations that the SCS reviewed greatly distorted the intended meaning of this section. That error has been corrected in the final version, and the Secretary believes that Section .623 now provides adequate assurance that the productivity of prime farmland will be restored after mining.

16. One commenter pointed out that prime farmland is a term referring to the quality of the soil resource, that prime farmland is a land used term, and that soil surveys map prime farmland soils, not prime farmland.

SMCRA requires that the regulations promulgated by OSM and Texas adopt the definition of prime farmland established by the Secretary of Agriculture in 4 CFR Part 657. The definition as prescribed by the Secretary of Agriculture established the relationship between prime farmlands and prime farmland soils and the Texas regulations adopt and use that relationship.

17. One commenter suggested that the state plan should specify the method of reclamation to be used to protect prime farmland, with organic topsoil on top.

The Secretary believes the Texas regulations are adequate because they require a reconstructed soil of equal or greater productive capacity than exists on surrounding prime farmland. For example, Texas regulation .624(e) requires that the A horizon be replaced as the final soil layer unless other materials are specifically approved.

18. One commenter was concerned that the Texas program submission inhibited field employees from carrying out their enforcement requirements.

The Secretary believes that the Texas Act, regulations, and narrative are consistent and clear that the authorized representatives of the Texas Railroad Commission have the authority and are required to take enforcement actions when a violation is observed. See Section 32 of the Texas Act, Section .680 of the regulations, and the narrative for 731.14(g)(5) on page VII–25 of the program submission.

19. One commenter requested that the Texas program specifically state that cost to the operator is not a consideration in the imposition of affirmative obligations. The commenter accurately pointed out that costs are not a consideration at the Federal level. (Also see the preamble to the Secretary's Permanent Program Rules at 44 FR 15301, March 13, 1979.)

The Secretary agrees with the commenter that cost may not be a consideration in imposing affirmative obligations. However, nothing in the Texas program submission gives any reason to believe that the Commission intends to consider costs in imposing affirmative obligations and therefore the Secretary understands that costs will not be considered.

20. The League of Women Voters of Texas suggested that the Soil Conservation Service (SCS) should approve the reclamation plans before the permit is granted. However, the Texas program submission provides for consultation with Federal, State, and local agencies. Review and consultation

procedures with the Secretary of Agriculture are in Section .395 and .560 of the Texas regulations. This meets the requirements of SMCRA and 30 CFR Title VII for involvement of SCS in permit application review.

21. The U.S. Fish and Wildlife Service commented that the Texas program should describe the process the Commission will use to consult with other agencies on permit review and approval. More specifically, the commenter wanted to be consulted prior to the application process to determine the level of fish and wildlife information that will be required.

Texas regulation .133(c) provides that the State and Federal agencies having responsibilities for fish and wildlife or their habitats will be consulted in determining the level of fish and wildlife information that is required. Additionally, Texas regulation .215 requires the Commission to consult with State and Federal fish and wildlife agencies in determining the adequacy of fish and wildlife information as part of the permit review process. Accordingly, the Texas program meets the minimum requirements for coordination with the Fish and Wildlife Service, as found in SMCRA and 30 CFR Chapter VII, the criteria by which the Secretary is evaluating the program.

22. One commenter suggested that the State official responsible for the Land and Water Conservation Fund should be identified in the Texas regulations. The Texas regulations, Section .207(c) (1) and (2), provide that Federal, State, and local government agencies, including agencies responsible for historic preservation and public recreation, will be notified of the filing of permit applications. Identification of particular officials is not required under the Federal rules, and accordingly will not be a condition of the Secretary's approval.

23. The SCS commented that where the SCS is the USDA agency to be contacted, USDA should be written as USDA, Soil Conservation Service.

The Texas regulations are identical to the Federal regulations in regard to the terminology used. The Secretary believes that the role of the SCS in making prime farmland determinations is clear and a change in wording is not necessary.

24. Two commenters suggested that experimental practices supported by government, State or university groups should not have to comply with permitting requirements of paragraph (b), Section .200.

Texas has followed the OSM regulations with regard to permitting experimental practices. Furthermore, the change that is suggested could result in a less enforceable requirement. Thus, the Secretary believes that the Texas program with regard to permitting experimental practices is acceptable.

25. One commenter suggested that sand, silt, and clay mineralogy be included as part of the Geologic Description required by .173 of the Texas regulations.

The Texas regulations equal the requirements of 779.14 of the Federal regulations. The Secretary believes that Texas cannot be required to adopt regulations that are more stringent than the Federal regulations.

26. A commenter stated that the 30-day period for other agencies to review permit applications is inadequate.

The 30-day period for permit review is imposed by Texas regulation on all State agencies and is applicable to interagency coordination in virtually all programs, not just Surface Mining. The Texas program requests, but does not require, Federal agencies to review and respond within the same time period.

The Secretary believes that, although the permit applications will contain very detailed technical information, an agency that is responsible for reviewing part of a permit application will be able to review the portion of the application that is within its area of responsibility within 30 days.

27. A commenter requested that the language of Sections .226(a)(1) and .226(e) be clarified regarding when a change to a permit area would require a new permit, rather than merely a revision to a permit.

The Secretary will not require such a change, because Texas has, as required by 30 CFR 788.12, provided in Section .226(a)(1) guidelines on which to base decisions concerning what changes are significant departures. The Secretary believes that the guidelines identified are adequate to guide the Commission's decisions on this matter.

28. One commenter suggested that the State should address Federal lands coordination.

The Secretary believes that the Texas program does not need to address Federal lands coordination at this time because Texas has not sought a cooperative agreement. If Texas wishes to assume jurisdiction for regulation of surface coal mining on Federal lands in Texas, a cooperative agreement may be prepared and the issue of coordination would more properly be addressed in that event.

29. The U.S. Forest Service requested that it be added to the list on Page 107 of the Texas program submission to ensure notification when National Forest land in the State of Texas is affected.

Texas has not made provisions for a Federal lands program in its present State program submission. Texas will not process an application for surface coal mining on Federal land within a National Forest boundary but will forward the application to the Regional Director of the Office of Surface Mining for processing. (See Texas program .072(c) Page 30.) Upon receipt of an application for operations on National Forest system lands, the Regional Director of OSM will follow the procedure established in 30 CFR 741.20 and transmit a copy of the complete application to the Chief, U.S. Forest Service, for review, consent, and approval by the Secretary of Agriculture. This procedure will ensure the notification that the U.S. Forest Service has requested.

30. One commenter suggested, without providing any specific rationale, that 30 CFR 771.15 and 771.17 (the latter erroneously identified as § 771.16 by commenter) be included in the Texas program. These sections concern continuing operations under Federal or State permits.

These sections are only applicable if a Federal program is implemented in Texas, and in that case, the Federal regulations would apply. Therefore, these sections are not required in the Texas regulations.

31. U.S. EPA, Region VI, felt that a Memorandum of Understanding (MOU) should be developed to cover the Underground Injection Control Program pursuant to the Safe Drinking Water Act.

Since the Underground Injection Control Program has not been implemented, the Secretary feels it premature to require such an MOU.

32. The U.S. EPA, Region VI, stated that apparently the State cannot deny a surface mining permit on the basis of Clean Air Act related requirements. This is a misreading of the Texas law and regulations. See Sections .143 (Air Pollution Control Plan), .379 (Air Resources Protection), and .216 (Criteria for Permit Approval or Denial). This commenter also notes that the Texas Railroad Commission does not have the authority to litigate and set fines outside of those administratively applied by the Commission itself, specifically that the Commission does not have the authority to take as stringent an enforcement action as the EPA under the Clean Air Act. The Texas program does contain enforcement powers at least as stringent as SMCRA for air quality violations, and this is the only requirement for program approval on this particular issue. Whether the State of Texas has otherwise complied with the Clean Air

Act is beyond the scope of this approval and is not an appropriate matter for consideration. The U.S. EPA has concurred in the Texas program's provisions relating to the Clean Air Act and regulations issued under it.

33. U.S. EPA, Region VI, noting that the proposed Texas program does not require operators to comply with the Hazardous Waste Regulations proposed under the Resource Conservation and Recovery Act (RCRA), suggested that the Texas program should consider the requirements of that Act and make provisions to incorporate the applicable U.S. EPA regulations when they become effective. Since the RCRA regulations are not yet effective and there has been no agreement between EPA and the Department of the Interior on procedures for handling RCRA issues, it would be premature to expect Texas to provide for these matters. It is possible that Texas may have to revise its program at some future time to incorporate RCRA considerations.

34. The Advisory Council on Historic Preservation sought additional information to determine the extent that the proposed regulatory program is in compliance with Section 106 of the National Historic Preservation Act (NHPA). Information needed concerns the requirements of NHPA for written comments from the State Historic Preservation Officer (SHPO) and an independent determination by OSM's Regional Director as to the likelihood that the State program will adversely affect properties included in, or eligible for inclusion in, the National Register of Historic Places.

The Texas regulations provide for the coordination and consultation with SHPO in Sections .072, .074, and .083 of the Texas regulations. If the State of Texas includes in its regulations language suggested by the commenter, the coordination process would be presented in more detail. The Texas regulations, as presented in the submission, are in compliance with SMCRA. Adoption of the suggested language by the State of Texas is not required at this time. However, once the Secretary promulgates new rules to replace regulations concerning historic preservation suspended November 27, 1979 (44 FR 67942), Texas will have an opportunity to amend its program to be consistent with these new rules.

35. The Advisory Council also suggested additional language for the State of Texas to consider including in its proposed regulatory program. The language was suggested as a means for Texas to comply with the intent of Section 106 of the National Historic Preservation Act (NHPA). The proposed language would: (1) Provide for a system for consulting with State and Federal agencies having responsibility for the protection or management of historic, cultural, and archeological resources; (2) provide for coordination of review of permits with the applicable requirements of NHPA; and (3) provide procedures and criteria for identifying and protecting properties under the provisions of NHPA.

The Texas program has adopted the language of 30 CFR 761.12(f) in Sections .072, .074, and .083 of the Texas regulations, and has established a procedure for coordination and consultation with State and Federal agencies that could directly or indirectly affect the permit process. See the narrative for § 731.14(g)(9)(10)(11) for a discussion of that procedure.

The Texas program contains provisions to meet the intent of SMCRA and NHPA. The language proposed by the commenter is considerably more detailed and could be adopted by the State of Texas if it so chooses. The language proposed is more stringent and, therefore, the Secretary believes it cannot be required in the Texas program.

36. A commenter stated that the Texas program should specify the priority in which the processing of the applications will be handled so that early in the process, areas unsuitable for surface mining will be reviewed and applications infringing thereon will be eliminated during the review process.

The Texas program specifies a process to review applications that includes a check within the first 30 days for lands unsuitable for surface mining. This process is described on pages VII–1 through VII–4 of the Texas program submission. This process meets the requirements of SMCRA and 30 CFR Chapter VII.

37. A commenter suggested that Texas regulation .075(a) should be clarified by adding after the phrase "if the Commission determines that reclamation is not technologically and economically feasible", the words "under the Act and this Chapter." The commenter thought this addition would clarify the source of the criteria for the evaluation of feasibility.

Section 33(b) of the Texas Act clearly states that no mining will occur where "reclamation pursuant to the requirements of this Act is not technologically and economically feasible." Based on this, it is clear that the requirements of the Act are the source of the criteria for the evaluation of feasibility.

38. U.S. EPA, Region VI, wanted the narrative about reporting systems to include Discharge Monitoring Reports and other reviews associated with the National Pollutant Discharge Elimination System (NPDES) permit enforcement.

Discharge Monitoring Reports and other reviews done as part of the NPDES permit enforcement are not within the jurisdiction of the Commission, and the State of Texas does not administer NPDES requirements. Accordingly, the requested additions to the narrative are inapplicable in Texas and unrelated to SMCRA requirements.

39. The EPA, Region VI, also suggested that the narrative about inspecting and monitoring should identify activities associated with an NPDES compliance inspection.

The Commission does not have and will not have authority to enforce the NPDES program unless that authority is granted by the EPA. The details of NPDES compliance inspections would be specified in any future agreement between EPA and Texas that grants NPDES authority to Texas.

40. A commenter objected that Texas has substituted a formal public hearing for the informal hearing provided in 30 CFR 786.14 on permit applications. The commenter's concern is that the more formal procedure will discourage public participation because many persons are reluctant to enter into formal hearings without a lawyer. Although Section .211(a) of the Texas regulations does provide that any adversely affected person may request a formal hearing on a permit application, paragraph (b) of that section provides that any affected person may request informal consideration of objections in accordance with Section 13 of the Administrative Procedure and Texas Register Act. In view of these provisions, the Secretary believes that the proposed Texas program provides ample opportunity for public participation in this phase of the permitting process.

41. The National Wildlife Federation stated that the Texas program msut be revised to provide for judicial review of rulemaking in accordance with Section 526 of SMCRA, with its provision for challenging regulations. It is the Secretary's view that the State's obligation to afford judicial review of its actions, including rulemaking, is contained solely in Section 526(e) of the Act, which simply provides that State agency action shall be subject to judicial review in accordance with State law. Judicial review of rulemaking in Texas is governed by the APTRA. The State is not required to adopt the standards and

procedures for review of Federal rulemaking contained in Section 526.

42. The National Wildlife Federation argued that the Texas program should be revised to provide for formal administrative review of agency decisions that are not required by the Texas SCMRA to be determined by formal adjudication under APTRA. Such a provision would correspond to 43 CFR 4.1280 and 4.1281. The Secretary believes that the procedures for appeal set forth in 43 CFR 4.1280, *et seq.*, are not required in a State program. Section 4.1281 provides that a person adversely affected by a written decision of the Director or his delegate may appeal to the Board of Surface Mining and Reclamation Appeals only *where the decision itself specifically grants such right of appeal.* In other words, this "right" is completely dependent upon the discretion of the Director. It is, in fact, not a right of appeal, but simply an administrative mechanism providing the Director with discretion to authorize an appeal to the Board when that is desirable as a matter of administrative policy. SMCRA does not require a State to provide a similar system.

43. The National Wildlife Federation also stated that prior to program approval, Texas should be required to affirm its intention that its statutory provisions regarding awards of costs and expenses in court proceedings are subject to the same interpretation as the counterpart Federal provision. The commenter believes this is necessary to ensure that the Texas provisions, Section 31(e) and 32(c)(5), will be interpreted to mean that costs and expenses may be assessed against citizens only where it is established that the citizen brought or pursued the litigation in bad faith or solely to harass or embarrass the defendant.

Since Texas has adopted statutory authority identical to SMCRA on these points, the Texas program satisfies the requirements of SMCRA. Texas cannot be required to revise its program because of the possibility that a State court will interpret Sections 31(e) and 32(c)(5) in a manner inconsistent with SMCRA and Federal case law. The National Wildlife Federation has provided no basis on which to expect Texas courts to make a different interpretation of the language than Federal Courts. The Secretary's approval presumes that a State court will look to and follow the intent of Congress where, as here, its State legislature has enacted statutory provisions pursuant to the mandate of, and identical to, Federal statutes. Therefore, the Secretary believes that this aspect of the proposed Texas program complies with the requirements of SMCRA.

44. The National Wildlife Federation also pointed out that Texas has no statutory or regulatory provision corresponding to 43 CFR 4.1290 regarding the award of costs and expenses, including attorneys fees, in administrative proceedings. Although Texas has enacted the basic authority for the award of costs and expenses, this commenter believes that SMCRA and the Secretary's regulations require that the State program include the regulations which detail such matters as who may file, contents of a petition, and who may receive an award. The commenter cites 44 FR 15297 which states in part, "The Office believes that a State program must meet the following minimum criteria with respect to citizen participation: * * * (3) It must authorize award of costs and expenses in administrative and judicial proceedings provided under Section 520(d) and (f) and 525(e) of the Act *and 43 CFR Part 4."* (emphasis added). In light of this specific language, the Secretary believes that a State program must include provisions similar to 43 CFR 4.1290. Texas has agreed to adopt provisions implementing these requirements by June 15, 1980. The approval of the Texas program is conditioned on such provisions being adopted.

45. The National Wildife Federation stated that the Texas submission does not provide as liberal standards for citizen intervention in administrative proceedings as the Federal regulations and that, therefore, citizens have less access to the State administrative proceedings. Neither the Texas Surface Coal Mining and Reclamation Act (TSCMRA) nor the Administrative Procedure and Texas Register Act (APTRA) contains a provision dealing specifically with rights of intervention in administrative proceedings. However, the program submission does include, at Chapter VII, page 32, the relevant provisions of the General Procedural Rules of the Texas Railroad Commission. Paragraph 10(d), chapter VII, page 35, states that any person or agency interested in any proceeding before the Commission may appear formally before the Commission by simply filing a notice with the Commission five days before the hearing date, and may present any relevant and proper testimony and evidence bearing upon the issues involved in the particular proceeding. Contrary to the National Wildlife Federation contention in its comment dated January 21, 1980, this intervention provision appears to be at least as liberal as that contained in 43 CFR Part 4.

46. The National Wildlife Federation stated that the discovery provisions beginning at 43 CFR 4.1130 should be included in the Texas program. The Secretary agrees that liberal discovery provisions are essential to meaningful citizen participation in the administrative process. Section 14(a) of the APTRA essentially says that the Commission may allow broad discovery upon motion of any party. The commenter objects that under this provision, all discovery is subject to the apparently unlimited discretion of the Commission, and this discretion could be exercised to deny citizens effective access to the administrative process, contrary to the Secretary's regulations. See 44 FR 15297. The Secretary's approval of this provision is based on the understanding that the Commission will exercise its discretion in this regard in a manner consistent with SMCRA and the Secretary's regulations. If events prove otherwise, the Secretary's authority could be used to correct the problem.

47. The Mine Safety and Health Administration (MSHA) commented on the narrative for § 731.14(g)(13) pertaining to the content of a course for use in training, examining, and certifying blasters on safety procedures.

These comments pertain to a part of the Texas program that is not required until six months after the Federal regulations on training, examining, and certifying blasters are promulgated. (See § 732.15(b)(12)). The narrative provided is used by the Commission only as a guideline for inspectors and does not impose training or safety requirements on operators. Upon adoption of the Federal regulations, the Texas provisions will again be reviewed by the Secretary, and any necessary changes can be required at that time.

48. MSHA also suggested some changes in the outline of the Proposed Training Criteria.

The Secretary notes, initially, that MSHA commented, "We do not find any conflicting requirements in the proposed Texas State program that might present hazards to miners." Texas Admin. Record Control No. TX–53 and TX–108.) The Secretary believes that the training outline is not now essential. Training criteria will need to be developed after regulations on blaster training and certification are promulgated.

49. The Environmental Policy Institute noted that although 30 CFR 764.17(a) and Section .081 of the Texas regulations pertaining to hearing requirements for "unsuitability

provisions" are identical, the section-by-section comparison states that the APTRA is applicable to such hearings. Since the APTRA is in some respects inconsistent with Section .081, the commenter was concerned that this would lead to confusion and ambiguity. The Secretary believes the section-by-section language (Chapter III, page 178) means simply that where the APTRA is not inconsistent with Section .081, the APTRA applies. This is not inconsistent with SMCRA.

50. One commenter stated that the absence from the Texas Surface Coal Mining and Reclamation Act of a provision comparable to Section 514(d) of SMCRA makes the Texas program inconsistent with SMCRA. Section 514(d) provides that the Secretary or State regulatory authority may grant temporary relief under certain conditions when a hearing is requested on a permit application decision. Although Texas has not included a provision corresponding to Section 514(d) in its Act, the State regulation, Section .222, does include the exact language of that section.

51. Another commenter suggested that Section 682(d) of the Texas regulations be revised to spell out what is "appropriate notice" of a show-cause hearing, similar to 30 CFR 843.13(d). The program submission spells out in Chapter VII, page 31, the specifics of appropriate notice. Those specifics are consistent with, and even go beyond, the Federal notice provision.

52. A commenter said that there is no administrative adjudicatory body within the Texas Railroad Commission which is independent of the Commission's regulatory functions. This commenter argues that an independent adjudicator is required by 30 CFR 732.15(b)(15), which refers to Section 525 of SMCRA, which in turn refers to the Federal APA (5 U.S.C. 554), which allegedly contains the actual requirement. It is the Secretary's view that the APA does not require the degree of independence urged by the commenter and that the administrative adjudicatory system proposed in the Texas program complies with the requirements of the APA. All the essential rights and protections of the APA are contained in the Texas system, and interested citizens are provided an opportunity for a fair and impartial hearing. The National Wildlife Federation, in its comment dated January 21, 1980, felt that persons who had participated in development of general policy positions should not participate in particular proceedings in which the policy might be applicable. The Secretary does not believe that either SMCRA or the APA requires all administrative reviewers to be free of contacts with general decisions made by the regulatory authority and which might be applicable in the case. Accordingly, the Texas program is acceptable on this point.

53. A commenter states that Section 14 of the APTRA explicitly allows *ex parte* contact between decision makers and the enforcement arm of the agency at any stage of adjudication, except where an employee of the agency participated in a hearing on a case. The commenter believes this to be inconsistent with the Administrative Procedure Act (5 U.S.C. 554) and therefore, unacceptable in a State program. The Secretary has been assured by the Commission that it interprets Section 17 to preclude *ex parte* contacts between decision makers and hearing examiners, as well as between either decision makers or examiners and any person in any way involved in any hearing, including persons such as technical staff or inspectors. (See letter from J. Randel Hill to Raymond L. Lowrie, December 31, 1979.) With this assurance, the Secretary believes the Texas program is acceptable in this regard. In its comments upon the letter from J. Randel Hill dated December 31, 1979, the National Wildlife Federation asserted, without basis, that examiners should have no contact whatsoever with any employee of the regulatory authority, whether or not the employee had any contact with the matter being decided. The Secretary believes this is not required under the law, and should not be made a condition of approval of a State program, since it might unnecessarily restrict examiners, without providing any additional protection against improper influence on decisions.

54. The U.S. Fish and Wildlife Service recommended that the Texas Railroad Commission make greater use of the expertise of other agencies through cooperative agreements, personnel transfers or other appropriate measures rather than relying on interagency permit review alone.

The Secretary believes that the Texas Railroad Commission has sufficient technical staff to implement the provisions of the permanent program. The Secretary also believes that the provisions the Commission has made for inter-agency review are adequate.

55. The U.S. Environmental Protection Agency, Region VI, suggested that all executed agreements and Memorandums of Understanding (MOUs) relative to the permanent program, and in particular the MOU between the Commission and the Texas Department of Water Resources, should be included in the Texas program submission.

The amended Texas program submission contains a copy of the transfer of jurisdiction for the regulation of surface coal mining on State-owned lands from the General Land Office to the Texas Railroad Commission. (See page VI–10). An MOU between the Texas Department of Water Resources and the Commission regarding coordination of water quality-related regulation of surface coal mining and reclamation activities is on pages VI–2 through VI–10.

56. One commenter wondered what the role of the General Land Office was in administering the Texas State regulatory program.

A letter dated August 21, 1979, from the General Land Office of the Texas Railroad Commission (See page VI–1 of the Texas program) transferred jurisdiction over coal surface mining on State-owned lands to the Commission. The narrative for § 731.14(e) of the program submission indicates that the General Land Office, Mining Division, will continue to serve in an advisory capacity to the Texas Railroad Commission on issues relevant to mining.

57. The Texas Chapter of the Sierra Club commented that the Texas Railroad Commission had not met its obligation to provide meaningful public participation in the development of the State program. The Secretary finds this allegation not to be supported in the record. In Attachment S to the program submission, the Railroad Commission showed how the public had been informed of the pending program development by means of newspaper announcements. On May 1, 1979, the official State Register carried notice of a June 7, 1979 hearing to be held on the program by the Railroad Commission. (See Attachment T to the Texas submission.) A copy of the transcript of the hearing was submitted as Attachment V to the program submission. The Secretary finds that Texas adequately involved the public in development of its program.

Conditional Approval

As indicated above under Secretary's Finding 4(k), there was only one minor deficiency which the Secretary requires be corrected. In all other respects, the Texas program meets the criteria for approval. The deficiency is an absence of regulatory provisions providing for recovery of costs and expenses, including attorneys fees, in accordance with 43 CFR 4.1290–4.1296. Given the

nature of this deficiency and its magnitude in relation to all the other public participation provisions of the Texas program, the Secretary of the Interior has determined this to be a minor deficiency. Accordingly, the program is eligible for conditional approval under 30 CFR 732.13(i), because:

1. The deficiency is of such a size and nature as to render no part of the Texas program incomplete since all other aspects of public participation in the program meet the requirements of SMCRA and 30 CFR Chapter VII and this deficiency, which will be promptly corrected, will not directly affect environmental performance at coal mines;

2. Texas has initiated and is actively proceeding with steps to correct the deficiencies; and

3. Texas has agreed, by letter dated January 28, 1980, to correct the deficiency by June 15, 1980.

Accordingly, the Secretary is conditionally approving the Texas program. This approval shall terminate if regulations correcting the deficiency are not enacted by June 15, 1980.

This conditional approval is effective February 16, 1980. Beginning on that date, the Texas Railroad Commission shall be deemed the regulatory authority in Texas, and all Texas surface coal mining and reclamation operations and all coal exploration in Texas shall be subject to the permanent regulatory program. See 44 FR 77440 (December 31, 1979), in which the Department of Interior adopted rules making the permanent program applicable in a State on the date a State program is approved.

On non-Federal and non-Indian lands in Texas, the permanent regulatory program consists of the State program approved by the Secretary.

There are no coal-bearing Indian lands in Texas.

On Federal lands, the permanent regulatory program consists of the Federal rules made applicable under 30 CFR Chapter VII, Subchapter D—Parts 740–743. In addition, in accordance with Section 523(a) of SMCRA, 30 U.S.C. 1273(a), the Federal lands program in Texas shall include the requirements of the approved Texas permanent regulatory program.

The Secretary's approval of the Texas program relates at this time only to the permanent regulatory program under Title V of SMCRA. The approval does not constitute approval of any provisions related to implementation of Title IV under SMCRA, the abandoned mine lands reclamation program. In accordance with 30 CFR Part 884, Texas may submit a State Reclamation Plan now that its permanent program has been approved. At the time of such a submission, all provisions relating to abandoned mined lands reclamation will be reviewed by officials of the Department of the Interior.

The approval of the Texas program is effective February 16, 1980, in accordance with a stipulation entered between the Secretary and plaintiffs in *In re: Permanent Surface Mining Regulation* (D.D.C., Civ. Act. No. 79–1144). This stipulation afforded the plaintiffs 30 days notice and an opportunity to challenge before the District Court in the District of Columbia, the Secretary's approval. Hereafter, it is expected that State program approvals for other States will be effective on the date of the **Federal Register** notice announcing the approval, in accordance with 30 CFR 732.13(h).

Additional Findings

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this conditional approval.

The Secretary has determined that this document is not a significant rule under E.O. 12044 or 43 CFR Part 14, and no regulatory analysis is being prepared on this conditional approval.

Dated: February 7, 1980.

Cecil D. Andrus,

Secretary of the Interior.

A new Part, 30 CFR Part 943 is adopted to read as follows:

PART 943—TEXAS

Sec

Authority: 30 U.S.C. 1253.

§ 943.1 Scope.

This part contains all rules applicable only within Texas which have been adopted under the Surface Mining Control and Reclamation Act of 1977.

§§ 943.2—943.9 [Reserved]

§ 943.10 State Program Approval.

The Texas State program, as submitted July 20, 1979 and amended November 13, 1979 and December 20, 1979 is approved, effective February 16, 1980. Copies of the approved program are available at:

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Suite 125, 1121 East SW Loop 323, Tyler, Texas 75703;

Texas Railroad Commission, Surface Mining and Reclamation Division, Field Office, Shank Office Building, 1419 3rd Street, Floresville, Texas 78114;

The Office of Surface Mining Reclamation and Enforcement, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106, telephone (816) 374–3920; and

Office of Surface Mining, Room 135, Interior South Building, 1951 Constitution Avenue, Washington, D.C. 20240, telephone (202) 343–4728.

§ 943.11 Conditions of State Program Approval.

The approval of the State program is subject to the following condition:

The approval found in § 943.10 will terminate on June 15, 1980, unless Texas submits to the Secretary, by that date, copies of fully implemented regulations containing provisions which are the same or similar to those in 43 CFR 4.1290–4.1296, relating to the award of costs, including attorneys fees, in administrative proceedings.

[FR Doc. 80-6115 Filed 2-26-80; 8:45 am]

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federal register

Wednesday
February 27, 1980

Part IV

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric Administration

Rules for Listing Endangered and Threatened Species and Designating Critical Habitat

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 17, 402, and 424

Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Services issue final rules for revising and maintaining the Lists of Endangered and Threatened Wildlife and Plants and for determining listed species' Critical Habitats. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of species contained on the lists are also adopted. These final rules implement the listing requirements of section 4 of the Endangered Species Act of 1973, as amended.

DATES: This rule becomes effective March 28, 1980; the amendments to §§ 17.11 and 17.12 will become effective upon republication of the lists of species, but not sooner than March 28, 1980, nor later than June 1, 1980.

ADDRESS: Interested persons or organizations having questions concerning this action may address them to the Director (OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235–2771).

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, establishes a comprehensive program to conserve Endangered and Threatened species of fish and wildlife and plants. Section 4 of the Act, 16 U.S.C. 1533, sets forth procedures for listing species, designating their critical habitat, and maintaining the Lists of Endangered and Threatened Wildlife and Plants. The Act also authorizes the Departments of the Interior and Commerce to issue rules to carry out its purposes.

The section 4 requirements as originally enacted in 1973 were straightforward and did not require comprehensive implementing rules. As a result, the Services have previously implemented only limited portions of section 4. These rules are presently found at 50 CFR 17.11, 17.12, 17.13 and 402.05.

Congress enacted the Endangered Species Act Amendments of 1978 on November 10, 1978. Public Law 95–632, 92 Stat. 3751. These Amendments significantly modified the procedural requirements both for listing species and designating their Critical Habitat. The Services determined that comprehensive implementing regulations should be promulgated to insure full compliance with the section 4 requirements and to aid the public in understanding the rulemaking process, pursuant to which Endangered and Threatened species are protected.

Accordingly, on August 15, 1979, the Services proposed rules to implement the section 4 listing and Critical Habitat requirements. *See* 44 FR 47862–47868. In general, that document proposed how the Services would proceed in revising and maintaining the Lists of Endangered and Threatened Wildlife and Plants, designating Critical Habitat, reviewing petitions to revise the lists, and conducting periodic reviews of species.

Subsequent to the publication of the proposed rules, Congress enacted the Endangered Species Act Amendments of 1979. *See* Pub. L. 96–159. The Amendments to section 4 were generally modest. To the extent practicable, these changes have been incorporated into these final rules. However, in certain instances complete incorporation was impossible. For instance, the new amendments require that guidelines be developed on a number of points after public comment. (See 1979 Amendments, section 3[h]). These guidelines are being prepared and will be published in draft form in the near future.

The Services today issue comprehensive final rules interpreting and implementing the general requirements of section 4 of the Act. The final rules for the most part adopt the approach suggested in the proposal. Significant modifications are described below in the section-by-section analysis of the comments.

The Services are in the process of reorganizing Title 50, Chapter IV of the Code of Federal Regulations for the purposes of clarity. To begin implementing this policy, the rules proposed at Part 405 are being published in Part 424 of Title 50. The table below is provided to cross-reference the proposed and final sections to avoid confusion.

Final section	Proposed section
424.01	405.01
424.02	405.02
424.10	405.10
424.11(a)	405.11(a)
424.11(b)	405.11(b)
424.11(c)	405.11(c)
424.11(d)	405.11(a)
424.12(a)	405.12(a)
424.12(b)	405.12(b)
424.12(c)	405.12(c)
424.12(d)	405.12(d)
424.12(e)	405.12(e)
424.12(f)	405.12(f)
424.12(g)	N/A
424.12(h)	N/A
424.13	405.13
424.14	405.14
424.15	405.15(a)
424.16(a)	405.15(b)
424.16(b)	405.15(c)(1)–(5)
424.17(a)	N/A
424.17(b)	405.15(c)(1) and 405.15(c)(6)
424.18(a)	405.15(c)(6)(iii)(D)
424.18(b)	405.16(a)
424.18(c)	405.16(b)
424.18(d)	405.16(c)
424.18(e)	405.16(d)
424.19	405.17
424.20	405.18

Summary of Comments Received

The Services received 72 letters commenting on the August 15 proposal. The sources of these comments were as follows: one Member of Congress, 10 Federal agency offices, 22 State Governors or agencies, and 39 citizens, private firms, and interest groups. Significant issues discussed in the comments are summarized below in section order.

§ *17.11—Endangered and Threatened Wildlife*

One comment argued that the Services have no authority to list a species as Endangered or Threatened because of its similarity of appearance to a listed species or because it constitutes a captive population of otherwise protected species. The Services have clear authority to treat as Endangered or Threatened any species that is similar in appearance to a listed species. *See* section 4(e) of the Act and 50 CFR § 17.50 *et seq.* The Services also have authority to list and regulate Endangered or Threatened species held in captivity. *See Cayman Turtle Farm v. Andrus*, 478 F. Supp. 125 (D.D.C. 1979), and relevant statutory authority and legislative history cited therein. Further, subsequent to the promulgation of the proposed rules, the Fish and Wildlife Service adopted final rules (44 FR 54002–54008) for the protection of captive species and withdrew those relating to captive self-sustaining populations. This modification is reflected in the final rule.

Another comment suggested that Critical Habitat areas should be clearly delineated, and suggested that the map constitute the definition of the area's boundaries. The Services agree that Critical Habitat areas must be clearly defined, and intend to provide precise boundary information in rulemakings. *See* § 424.12(d). The Services will also include Critical Habitat maps that portray the Critical Habitat areas as precisely as possible. The description of the area will prevail over the area denoted by the map in the case of conflict.

Several commenters suggested that names used in listing be either those with widest currency for the species involved or those approved by appropriate professional societies. Scientific names used in the lists will be those most widely accepted by specialists in that group of taxa. In making this determination, the Services will rely to the extent practicable on the *International Code of Zoological Nomenclature* and the *International Code of Botanical Nomenclature.*

To avoid ambiguity in cases in which more than one name is commonly used for a taxon, synonyms will be provided. Such synonyms are expressed in parentheses with the name itself preceeded by an equal (=) sign.

One comment indicated that updating the "historic range" column of the table should occur only after a full rulemaking was completed. This information is not required by the Act (*See* section 4(c)(1)) and is intended only as an aid to interested persons. Therefore, the Services believe it unnecessary to engage in rulemaking to make the minor, technical changes contemplated.

§ *17.94—Critical Habitats*

One comment questioned the notion of "constituent elements" included in this section. The term is used to clarify that a Critical Habitat determination may impact only those activities that affect those aspects of the Critical Habitat essential to the conservation of the species. A partial listing of some of the primary constituent elements is found in § 424.12.

§ *424.02 Definitions*

The Services received a number of comments on the proposed definitions, as well as suggestions for defining additional terms.

"Conservation"

Several comments suggested that "conservation" be defined. This term is an essential one in interpreting both the Act and implementing rules and has been defined in this rule in the manner set out in the Act. *See* section 3(3), 16 U.S.C. 1532(3).

"Critical Habitat"

Two comments suggested that criteria be developed to identify areas "essential for the conservation of the species," a phrase taken from the definition. Although the precise biological factors essential for the conservation of a species will vary considerably from case to case, the Service has proposed the general biological requirements it will review in making this determination. *See* 44 FR 47864 and § 424.12(b) of these rules. Specific comments on these criteria are summarized below.

A number of comments expressed concern over the perceived possibility that Critical Habitat could be designated in an unwarranted manner for areas outside the geographical area occupied by the species at the time of listing. Several suggested that precise criteria should be developed to insure that these areas truly constitute Critical Habitat. This suggestion has not been accepted. The definition of "Critical Habitat" includes specific language directing the manner in which the Services will proceed in designating Critical Habitat areas outside the present range of species, and further criteria are unnecessary. The Services will closely scrutinize any area outside the geographical area occupied by a species before designating it Critical Habitat. Areas outside the geographical range of a species will be designated Critical Habitat only if necessary to ensure the conservation of the species. *See* § 424.12(e).

One comment suggested that the language contained in sections 3(5) (B) and (C) of the Act, 16 USC 1532(5) (B) and (C), should be included in the definition of "Critical Habitat" adopted in the final rule. Paragraph B authorizes the Services to designate Critical Habitat for species for which no Critical Habitat has been determined previously. Although the Services believe the rules as proposed would authorize designation of Critical Habitat for listed species, it has adopted this suggestion to avoid any ambiguity. Since the provision constitutes guidance on the application of the definition rather than a part of the definition itself, the operative language appears at § 424.12(g). The Services reject the suggestion that the definition specifically state that Critical Habitat shall not include the entire geographical area which can be occupied by the species "except in those circumstances determined by the Secretary." This provision is of sufficient clarity to permit proper administration of the Act without including it in these rules.

One comment suggested that reference to "special management considerations or protection" in the definition improperly emphasized management procedures over physical and biological features essential to the conservation of the species. Neither the Act nor the legislative history indicate that reading to be the correct one; both place strong emphasis on physical and biological features. As a result, the Services have made no modification in the definition.

One comment suggested that the definition should specify that a species be listed before Critical Habitat can be designated. The Act clearly provides that Critical Habitat shall be designated, to the maximum extent prudent, at the time the species is listed. *See* section 4(a) of the Act, 16 USC 1533(a). For this reason, the comment is rejected.

"Endangered Species"

Three comments pointed out that the proposed definition does not include the limitation on insect pests set out in the Act. *See* Section 3(6) of the Act, 16 USC 1532(6). The Services adopt this suggestion and include the appropriate statutory language in the definition of "species".

A number of groups commented on the "significant portion of its range" phrase of both this definition and that of "Threatened species"; all suggested further articulation of the term. One suggested that "range" be defined as that area normally inhabited by the species 30 years prior to the proposal as determined by a consensus of experts qualified in the study of that species. This suggestion is rejected. Not only is there no basis for arbitrarily establishing a 30-year base line to make such determinations, but the proposed requirement to reach a consensus of experts makes this suggestion administratively infeasible.

Another commenter suggested consideration of the number of individuals, their degree of productivity, and the geographical arrangement of populations in making this determination. The Services recognize a species should not be subject to the protection of the Act because a small proportion of individuals of the species are in danger of extirpation. However, what constitutes a significant portion of a species' range varies greatly from species to species. In light of this broad diversity and the guidance of both the Act and the legislative history, the Services find it inadvisable to establish new criteria as suggested. The Services will continue to consider this issue,

however, and will propose criteria at a later date, if warranted.

One comment suggested that the definition be limited to species formally listed by the Director. This suggestion has not been accepted since the regulations provide procedures pursuant to which a species is to be listed; the term indicates those species that may be listed under the Act.

One comment indicated that the proposed definitions of "Endangered species" and "Threatened species" were too nebulous and had been used in the past to list fish and wildlife for political rather than scientific reasons. The Services believe that the language is consistent with and specific enough to provide guidance in administering the Act, and reject the latter assertion.

"Public Meeting" and "Public Hearing"

A number of comments suggested that "public meeting" and "public hearing" be defined to clarify the distinction between the two. This suggestion has been accepted. A public meeting is a gathering to permit an informal *exchange* of information on a regulatory proposal rather than an informal presentation by the Services of all the evidence that supports the proposed rule. A public hearing provides the public a forum to comment in a more formal manner on a Critical Habitat proposal and, if appropriate, the accompanying listing proposal, since those comments will be transcribed by a reporter. *See* H. Rept. 95–1804, 95th Cong. 2d Sess. 27(1978), H. Rept. 96–697, 96th Cong. 2d Sess. 10–11 (1979).

"Special Management Considerations and Protection"

Most comments received on this definition were directed at one of two points. First, several comments suggested that the definition should focus on physical and biological features of the Critical Habitat rather than conservation of the species. Second, a few comments focused on the level of need for the special management considerations and protection.

The Services have accepted those comments on the first point, since that approach comports more closely with the language of the Act. The Services have also retained the conservation component of this definition since protection of physical or biological features is of utility only insofar as it aids in achieving the legislative policy of conserving listed species.

Comments on the second point were more diverse: suggestions ranged from requiring that special management considerations or protection be essential to that they be solely of aid to the species. Examination of the legislative history of the Critical Habitat definition provides little guidance on the meaning of this term, and the Services have turned to the expressed purpose of the Act to interpret it. The Services believe the policy of the Act is best satisfied if the term is interpreted as encompassing all methods or procedures useful in protecting physical or biological features for the conservation of the species. That formulation authorizes the Services to designate Critical Habitat even when existing management and protective schemes offer some level of protection to the species.

A few comments suggested that methods and procedures encompassed by the definition be limited to those which are "feasible" or "most effective". The Services intend to consider reasonable management options, and do not believe that addition of these words would clarify the definition.

One comment questioned the authority of the Services to define the term since there is no statutory definition. The Services, as the agencies designated to enforce the Act, have authority to interpret the Act within the constraints set out by Congress, as recognized in the Endangered Species Act. Interpretation of this term will aid both the public in understanding agency actions and the Services in administering the Act.

"Species"

A number of comments pointed out that the proposed language could be read to exclude fish or wildlife or plant species. Some suggested that the problem be rectified by using the word "includes" rather than "means" in the manner set out in the statutory definition; others that "species" be inserted after "means". The Services have clarified the scope of the definition by changing "means" to "includes". This formulation also authorizes the Services to list taxa at levels higher than species. However, the Services will list those taxa only if all component species are individually Endangered or Threatened. *See* § 424.11(a).

One comment suggested that the proposed "fish *and* wildlife" language be changed to "fish *or* wildlife", a term defined by the Act. This comment has been accepted. The commenter also suggested that the distinct population concept would be clarified if the term "subspecies" were deleted from the proposed language. The Services have also accepted this comment.

The Services rejected as unnecessary those comments suggesting that the definition mention invertebrates as well as vertebrates, require successful interbreeding to constitute a species, or specify that the distinct population concept be linked to the term "significant portion of its range" contained in the "Endangered species" definition. The present language of the final rule and the relevant legislative history indicate the scope of the definition on these points.

Two comments suggested that the proposed definition was not precise enough from a biological point of view but offered no suggested changes. The Services believe that the definition in this final rule adequately meets both legal and scientific requirements.

Other Comments

A few comments recommended that other terms be defined—"special rule", "federal agency," "irresolvable conflict," "permit or license applicant", or "state agency". Many of these terms are not used in the rules and are therefore not defined; the meaning of the others is sufficiently clear as not to require further definition. The Services have defined "plant" and "fish and wildlife" as suggested in the manner set out in the Act.

One comment noted that the Act's provisions speak in terms of actions of the appropriate Secretary rather than the respective Directors, and suggested that reference in the rules to the Director be changed to the Secretary. The Services believe that reference to the Director makes the rules clearer, since in both agencies appropriate authority has been delegated to that officer. The delegation has been undertaken pursuant to the Secretaries' authority, including 5 U.S.C. 302.

§ *424.10—General*

One comment suggested that the criteria for listing and delisting a species should be the same. This is the intent of the Services. Delisting procedures have been included in the final rule. *See* § 424.11(d).

§ *424.11—Factors for Listing, Reclassifying, or Removing Species*

§ *424.11(a).* Several comments either questioned the methods by which the Services would arrive at taxonomic distinctions, or suggested that the rules require the Services to consult appropriate professional societies in evaluating the taxonomic status of candidate species. The substance of this suggestion has been adopted. In deciding which of alternative taxonomic interpretations to accept, the Director will rely on the professional judgment available both within the Service and the scientific community and from the most recent taxonomic studies available

pertaining to the subject species. However, no criteria other than these very general ones can be established for acceptance of taxonomic treatments. As a matter of practice, the Services review current taxonomic literature in considering the appropriateness of present and proposed listings. Although professional societies maintain lists of accepted taxa for some taxonomic groups, this is not true for all groups. The Services will rely on generally accepted lists of taxa when they are available.

One comment questioned the Services' authority to list taxa of higher rank than species. There has been some confusion regarding the Services' use of the term "taxon", particularly regarding taxa of higher rank than species. It is not the Services' intent that such taxa be listed as Endangered or Threatened except on a finding that all known species included in the taxon of higher rank qualify individually for such listing. This position is consistent with the rules in their final form.

Another comment suggested that the Services be required to consult with all State and private wildlife agencies in determining a species' eligibility for listing. Before proposing a species for listing, the Services routinely seek information from many authorities on the species involved. As a matter of policy this practice will continue. However, difficulties involved in determining which States and private wildlife agencies might be appropriate and contacting them makes the proposal administratively infeasible.

§ *424.11(b).* One comment suggested that this subsection should be modified since it took a more mandatory position toward listing a species than required by the Act. This comment has not been accepted since the Act does mandate that all legitimately Endangered or Threatened species be listed.

One comment suggested that the information supporting a listing action be required to be "adequate" and that any deficiencies in supporting information be pointed out at the time of listing. The Services will base listing actions on the best scientific and commercial data available to the Director at the time of listing, which is "adequate" under the Act. Occasionally this may mean that some information regarding the life history and biology of a species is lacking at the time that it is listed, when such information is not necessary to establish that the species is Endangered or Threatened. Deficiencies in the supporting data base are inferable from the preamble of the proposed rule and this portion of the comment is thus rejected.

One comment pointed out that a number of the factors set out in subsection 424.11(b) were not identical to those contained in the Act and suggested that the proposed rules be modified accordingly. This suggestion has been rejected. The Services have not interpreted the statutory language in the manner set out in the final rules. For instance, the factor referring to the "inadequacy of regulatory mechanisms" requires the Services to make a finding which can be interpreted as suggesting that local, State, Federal or international protective schemes are improperly administered. The final rules clarify that, in determining whether regulatory mechanisms are "adequate," the Services will examine whether or not existing mechanisms prevent the decline of the species or the degradation of its habitat. Similarly, the Services have interpreted the biologically uncertain term "overutilization" of section 4(a) to mean utilization that has detrimentally affected the species. In both cases, it should be recognized that the statutory factors are open-ended. *See* Section 4(a)(1)(5) of the Act, 16 U.S.C. 1533(a)(1)(5). Further, the Services must still find the species to be "Endangered" or "Threatened" as those terms are defined by statute and in these rules.

A number of comments suggested that disease or predation not be considered a reason to list a species unless it seriously depletes a species' numbers or affects its productivity, or that only "detrimental" destruction of habitat or range be considered. These comments have been rejected. The touchstone for listing species is whether they are "Endangered" or "Threatened". Restricting the scope of the factors leading to that status could result in the anomalous situation of preventing the Director from listing an otherwise eligible Endangered or Threatened species.

Several commenters questioned the wisdom of attempting to save species in danger of extinction from natural causes. The Act does not differentiate between natural and other causes of Endangered or Threatened status. Further, in practical terms, it is usually not possible to distinguish natural from other factors operating on the species.

§ *424.11(c).* A large number of commenters interpreted the proposed language as absolutely mandating the listing of all species protected by international agreements. For this reason, some suggested deletion of the proposed section and one suggested that language be adopted indicating listings under international agreements should not in and of themselves constitute sole justification for listing species under the Act.

The Services did not intend the provision to *require* listing under the Act, and believe the proposed language has been misunderstood. The Services will independently examine whether the requirements for listing a species under the Endangered Species Act have been met. The language of this subsection has been clarified in the final rule.

Many comments were directed at the weight the Services should give international agreement listings in listing species under the Act. A number indicated that listings under these agreements, particularly on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), had occurred for reasons other than scientific ones. Others suggested that CITES listings often included higher taxa and covered specific species ranges possibly inappropriate to an Endangered Species Act listing. For these reasons, they suggested the proposed provision be deleted or modified to provide that international agreement listings should not constitute substantial evidence for listing a species under the Act.

The Services agree that the scientific and commercial data relied upon by the signatory nations in protecting a species under international agreement varies from case to case. For instance, as a general rule, CITES listings made prior to the adoption of the Berne Criteria in 1976 have less supporting evidence than those occurring after that time. On the other hand, the fact that several nations have determined that international protection is necessary to conserve a species constitutes evidence that a species should be protected under the Act, although the weight of the evidence is unclear without examining the facts on a case-by-case basis. As a result, the Services included language in the preamble to the proposed rule to this effect. Similar language has been adopted in the final rule for purposes of clarity.

Another comment suggested that listing under the Act was unnecessary if a species was listed under an international agreement, since its protection was already mandated by law. The Services disagree with this view; protections afforded by international agreements are not identical with those provided by the Act.

A number of comments interpreted the proposed section as contradictory to the procedural and substantive requirements for listing species found in section 4 of the Act. This is not the Services' intent; all procedural and

substantive requirements of the Act must be complied with prior to listing a species. The Services also do not view this section as inconsistent with the requirements of section 4(a) as suggested by two comments, since listing on an international agreement indicates that one or more of these factors may have contributed to the decline of the species.

A final commenter suggested that the Services had exceeded the authority provided by section 4(b)(3) of the Act, 16 U.S.C. 1533(b)(3) since the proposed language was broader than the language appearing there. Although the language of the final rule is broader than that of the Act, it implements a number of sections and is well within the legal authority of the Services to adopt rules implementing the Act.

§ *424.11(d).* The Services have also adopted a provision articulating the manner in which they will proceed in deleting a species from the lists. This provision clarifies what was implicit in the proposed rule. The Services will evaluate on the basis of the best scientific and commercial data available to them whether the species is Endangered or Threatened. A species may be deleted if the Services determine that (1) it is extinct, (2) it has recovered to a point above that at which it would be listed as Threatened, or (3) the original data were in error.

§ 424.12—Criteria for Designating Critical Habitat

§ *424.12(a).* One comment suggested that subsection 424.12(a) be modified to clarify that Critical Habitat determinations are to be made by regulation at the same time a species is proposed for listing. This suggestion has not been accepted since the language conforms with that of section 4(a) of the Act, and requires contemporary designation of Critical Habitat when appropriate through the rulemaking process.

One commenter suggested that this section be modified to clarify that the Services could designate Critical Habitat within foreign countries. The Services have not accepted this comment since they have interpreted the Critical Habitat portion of section 7(b) as applicable only to areas under United States jurisdiction and the high seas. The Services do believe, however, that the "jeopardy" component of section 7(a) is applicable to the actions of United States federal agencies in foreign nations.

One comment suggested that the subsection be changed to clarify that Critical Habitat need be designated only when a species is listed and not when it is reclassified from Threatened to Endangered. This reading conforms with the language of the Act and has been accepted.

A number of general comments were received on the factors proposed for determining when the designation of Critical Habitat is not prudent. One comment suggested the factors should be extremely narrow since the designation of Critical Habitat brings into play the additional public notice requirements imposed by the Act and rules; another comment indicated that the factors should be broadened to permit the Services not to designate Critical Habitat when the action would not clearly benefit the species; and still another comment suggested the deletion of the factor of lack of benefit to the species.

The Services believe that interpretation of the "maximum extent prudent" language should be guided by the broad purpose of the Act to conserve Endangered and Threatened species. *See* Sections 2 (b) and (c) of the Act, 16 U.S.C. 1532. The legislative history of section 4(a) makes clear that Critical Habitat should be designated when in the "best interest of the species to do so." H. Rept. No. 95–1625, 95th Cong. 2d Sess. 16 (1978). The rules have thus been written to require the Services to designate Critical Habitat at the time of listing when that action would benefit the species. The Services believe that in most cases Critical Habitat designation will benefit the species; however, when that course would not benefit the species, the Services will not designate Critical Habitat.

The Services have adopted the suggestion that the proposed language be modified to clarify that the factors set out do not consititute the sole grounds for a determination that designating Critical Habitat would not be prudent. This change is advisable because circumstances that may make Critical Habitat designation inappropriate are varied and difficult to foresee, and the enumerated factors might be interpreted as foreclosing a determination of lack of prudence in some cases when it was justified.

Comments expressing conflicting points of view were also received on subsection 424.12(a)(1). One comment suggested that the language restricting the factor to species in need of immediate listing be broadened; another suggested that the factor is unnecessary because of the emergency listing provisions of the Act and regulations. The Services have deleted this provision because of the recently liberalized emergency listing rules. The Services also note that to the extent the species is not benefited by Critical Habitat designation, that action need not be taken.

One commenter suggested that the criteria for determining whether a Critical Habitat determination is not prudent should be addressed separately for plants and animals. The Services believe that tailoring these procedures to individual taxonomic groups is unnecessary and would cause confusion.

§ *424.12(b).* One commenter contended that it made little sense to specify physiological, behavioral, ecological and evolutionary requirements essential to the conservation of a species because such requirements were either responsive to external stimuli or undefinable as components of a Critical Habitat. The Services disagree that such requirements are either extrinsic or undefinable. These factors have been considered in previous Critical Habitat designations and have proven a useful administrative tool.

Several commenters suggested alternate wording for § 424.12(b) which would make it follow more closely the statutory definition of Critical Habitat. This subsection has been reworded to follow the statutory language more closely than did the proposal.

Two comments were received that questioned the appropriateness of the "special management considerations and protection" language in this subsection. This provision is taken from the definition of "Critical Habitat" found in the Act. *See* section 3(5) of the Act, 16 U.S.C. 1533(5). Further discussion of this provision appears above. See § 424.02.

One commenter suggested that § 424.12(b)(1), which describes requirements essential for the conservation of listed species as including "space for individual and population growth * * *", be applied only to determinations of Critical Habitat for stable populations. This suggestion has been rejected. Population growth is an essential component of the recovery of many listed species and is in keeping with the conservation policy of the Act.

One commenter suggested that § 424.12(b)(5) be entirely deleted because it is implicit in the definition of Critical Habitat. This comment is rejected. The Services believe that the material contained in the subject paragraph represents a useful clarification of the requirements for Critical Habitat.

One commenter suggested that the reference to "disturbances" in § 424.12(b)(5) be replaced by "destruction or adverse modification of constitutent elements." This latter

phrase, which appears in § 17.94(a), relates specifically to the responsibility of Federal agencies under section 7 of the Act with regard to Critical Habitats. "Disturbance," as used in § 424.12(b)(5), is intended to be broader.

One commenter suggested that the words "and ecological" be inserted in § 424.12(b) after "geographical". The Services accept this suggestion as a useful clarification in specifying Critical Habitat.

One commenter suggested alternate wording of this paragraph to make more explicit the list of constituent elements that should accompany the description of a Critical Habitat. The Services have substantially adopted the suggested alternate wording because it will produce added clarity.

One commenter suggested that protection from disturbances should not necessarily be an absolute requirement in considering areas for Critical Habitat designation and that emphasis should be placed on designating habitats protected from those disturbances that might be adverse or detrimental to the species in question. In considering protection from disturbance as one of these factors it should be understood that only those disturbances effecting the value of the habitat for the species under consideration will be taken into account. The Services consider this to be sufficiently clear, and no alteration of the proposed language is necessary.

§ *424.12(c).* One commenter argued that the Director's consideration of the ecomonic impacts of designating Critical Habitat is too narrowly confined to the impacts on property owners involved and that additional detail on all types of impacts should be provided. The Services did not adopt this comment, since the rule as written does not limit the economic impacts to only those which may affect the property owners; instead it covers significant economic impacts generally, which include regional and other impacts. Since the rules comprehensively include all economic and other impacts for consideration, the detailed application of this standard to particular factors is better left to a case-by-case analysis rather than placed in these general rules.

One comment suggested that the consideration given to economic effects is too broad, and could reduce the protection afforded listed species. The commenter noted that under the proposed rule, there could be a "step-by-step exclusion of a species' habitat from Critical Habitat" due to economic considerations which could reduce the Critical Habitat to the point at which the species is on the verge of extinction. The comment basically suggests that the rules should make explicit that the cumulative effects of incremental losses of Critical Habitat should be considered. The balancing approach in the present rules contains elements of such a consideration, since the less habitat there comes to be for any species, the more biologically important the remaining habitat becomes. The more biologically important a habitat portion is, the greater the degree of economic impact necessary to require exclusion of that habitat portion. However, the commenter is correct that decrease in Critical Habitat area size may result from the economic impact consideration; this result is a consequence of the present law, section 4(b)(4) of the Act, 16 U.S.C. 1533(b)(4).

One commenter argued that too broad a reach is given to the economic impact analysis requirement. The comment states: "since the duty imposed by section 7(a) to avoid jeopardizing the survival of listed species is independent of the duty to avoid destruction of critical habitat, an extensive and detailed economic analysis under section 4(b)(4) would neither be necessary nor of much consequence." The comment's suggestion would unreasonably limit the scope of an economic impact analysis to the point at which it is, as the commenter admits, inconsequential. The legislative history of this section is to the contrary, and indicates that Congress believed it was creating a substantive and important change in the Act which could significantly affect the scope of the requirement to designate Critical Habitat. The rules therefore indicate that all economic or other relevant impacts of section 7(a) involved in the designation of an area as Critical Habitat should be considered.

One comment proposed that only presently available information be considered in an economic analysis. Although an economic impact analysis can often be done by analyzing currently available information, occasionally raw data may have to be collected or processed to form meaningful information which the Services can consider. Therefore, this comment was not adopted.

One comment proposed that in the consideration of economic effects of a proposed Critical Habitat, that only "significant effects" on "major activities" planned or underway in the area should be considered. The Services believe a rule of reasonableness is to be applied in identifying activities which may be affected by Critical Habitat designation. In order to adversely affect a Critical Habitat area, an activity must significantly affect the area in a detrimental manner. In order to be potentially affected by Critical Habitat designation, an activity must also be a Federal action, or have Federal involvements. The Services have clarified the regulation to reflect this rule of reasonableness.

A commenter requested a clarification of whether areas into which listed species are transported or introduced can become Critical Habitat. As indicated in the preamble to the proposed regulations (44 FR 47862) the Services are considering a regulatory mechanism to provide flexible management for reintroduced populations of listed species. The Services have not yet determined the appropriate method for achieving that end.

One commenter suggested that this subsection be expanded to provide examples of the types of impacts, in addition to those of an economic nature, that would be considered in analyzing the effects of a Critical Habitat designation. In amending the Act to provide for analysis of the possible impacts of Critical Habitat designations, Congress specifically referred to economic impacts. Other types of impact, which may take many forms, will depend upon the specific circumstances surrounding a Critical Habitat designation, and are to a considerable extent unpredictable at this time. As a result, the Services have not adopted rule language on these other impacts. However, the Services intend to consider all identifiable relevant impacts on a case-by-case basis.

One commenter suggested that Critical Habitat designations be based only on biological considerations, and that economic factors should only be used in subsequent management decisions. The Act requires that economic factors be considered in the delineation of Critical Habitat. *See* section 4(b)(4); 16 U.S.C. 1533(b)(4).

§ *424.12(d).* Several commenters indicated that the proposed rule was not sufficiently clear in setting out the method by which Critical Habitat boundaries would be described, or that references to ephemeral features should be completely prohibited in describing Critical Habitat. The Services agree, and the final rule has been revised to clarify the method of description of Critical Habitat and prevent the use of ephemeral features in such descriptions. *See also* the discussion at § 17.94 above.

§ *424.12(e).* Many commenters objected to the possibility that an inclusive area might be designated as Critical Habitat when several suitable habitats are located in close proximity.

The allowance for the designation of an inclusive area as Critical Habitat is intended only to alleviate the potential problem of an unnecessarily complicated description of Critical Habitat that would result if a number of very local and disjunct habitats were to be designated individually. The Services intend to use this authority only in cases where suitable habitat areas are extremely close together.

§ *424.12(f).* This subsection implements the statutory requirement for designating as Critical Habitat an area outside the geographic range of the species. *See* the discussion at § 424.02 above.

§ *424.13. Sources of information and relevant data.* One commenter suggested that there be a specification that data reviewed consist of the best scientific and commercial data available. The Services will review the available data and make their determinations on proposed and final rules on the basis of the best scientific and commercial data available to them.

One commenter recommended that formal procedures for notification and a review and comment period be instituted in consideration of data supporting possible revisions of the lists. This recommendation is rejected. The Services believe that formal agency notification and review and comment properly follow the publication of a notice of review or proposed rule in the **Federal Register** as part of the normal rulemaking process. To require another round of notices and proposed rulemaking would provide only marginal benefits, as the Department of the Interior has determined in its rules implementing Executive Order 12044. *See* 43 CFR Part 14.

The Services have also implemented the requirement imposed by the Endangered Species Act Amendments of 1979 to conduct a review of the status of a species before proposing it for listing. The Services interpret this provision as requiring the preparation of a brief summary of information available on the status of the species. The status review will include as appropriate, a summary of major studies on the species and the views of experts on this group of taxa.

§ *424.14. Petitions.*

§ *424.14(a).* Several comments requested that the special procedures under the Act for reviewing a petition to list, reclassify or delist a species be applied to petitions requesting the Services to take other actions described in § 424.10, such as to designate or delete Critical Habitat. These special procedures require publication in the **Federal Register** of a notice when the director has found that substantial evidence supports the petition, and publication of a status review on the species involved within 90 days of receipt of the petition.

The Services have not accepted these suggestions. Section 4(c)(2) of the Act clearly states that the special procedures described above are applicable only for petitions to review the status of "any listed or unlisted species proposed to be removed from or added to either list". Furthermore, the 1978 amendments to the Endangered Species Act imposed comprehensive procedures for Critical Habitat rulemakings that provide for extensive public participation and are particularly suited for Critical habitat determinations. The Services also note that the petition procedures imposed by section 4(c)(2) of the Act, such as a status review of the species, are not particularly appropriate in Critical Habitat cases.

One comment suggested that a periodic listing of petitions received be published in the **Federal Register** for informational purposes. Since a notice must be published in the **Federal Register** whenever a petition has met the requirements of the Act and these rules, the Services consider a periodic listing to be unnecessary.

One commenter recommended that the scope of organizations from which petitions might be received be broadened. The Services desire to receive petitions from any interested person, group, or organization, as indicated in the original proposal.

One commenter recommended that the Services collect their own data before responding to petitions. The Services' duty with respect to processing petitions must be interpreted in a manner reflecting the short time frame (90 days) in which they are statutorily required to act. The Services will review published studies, reports, and other sources of information on the species when examining the petition, but the Services cannot conduct field studies in most cases because of the statutory deadline. The comment is therefore rejected.

§ *424.14(b).* One commenter suggested that petitions be reviewed to determine whether they were politically motivated or fabricated. The Services do not consider an examination of petitioners motivation to be appropriate in reviewing petitions. Review by the Services is primarily concerned with a petition's presentation of biological information. A petition found to be based on fabricated information would be denied as not presenting substantial evidence. This circumstance is adequately covered in the rules and no change has been made.

One commenter requested that the rule make clear whether the petitioner is responsible for providing data sufficient to form a basis for actions taken by the Services, or whether this responsibility lies elsewhere. The principal responsibility of a petitioner is to present substantial evidence relating to the status of the species. This may be less than that required to propose or finalize a listing. The Services intend to gather information from as many sources as are available before proposing an action, and bear the primary responsibility for gathering sufficient information on which to base such actions. The Services believe that this is clearly expressed in the rule.

Two commenters suggested that petitions requesting that species be removed from the lists should not be required to contain extensive background data regarding the species. The Services must make the same decision in the case of either listing or delisting—whether the species is Endangered or Threatened. The petition requirements are written consistent with this scheme.

One commenter suggested that this section presented an "impossible goal" for many species since in some cases past and present numbers and distribution of a species are unknown. The Services recognize that precise past and present numbers and distribution may not be available for many species, but are primarily concerned that whatever information is available be presented in a petition, even if such information is imprecise. It must be recognized that the Services are required to take action based on the best scientific and commercial data available at a given time and the rules are written to aid the Services in meeting this requirement.

A number of comments addressed the substantial evidence standard of § 424.14(b). One suggested that a significant evidence standard be adopted rather than a substantial evidence standard. This comment has been rejected since section 4(c)(2) of the Act, 16 U.S.C. 1533(c)(2), specifically imposes a substantial evidence standard.

One comment questioned the legal authority for the definition of "substantial evidence", and suggested that it be moved to the definitions section. The definition has been provided to clarify what evidence is needed to support a petition for purposes of the rules and section 4(c)(2) of the Act. The standard adopted is drawn from judicial decisions which

have interpreted the substantial evidence standard of the Administrative Procedure Act. The definition is not placed in the general definition section of these rules because it is a specific definition used only in this paragraph and is inapplicable to other uses of the term in the rules and in the Act.

Several comments addressed specific parts of the proposed definition. The word "quantum" was deemed inappropriate and has been changed to "amount" in the final rules; the "reasonable person" language has been retained since it constitutes an important component of the standard as interpreted by court decisions.

§ *424.14(c).* Two comments suggested that the rules establish a time limit for the Director to determine whether petitions include substantial evidence. The Services have adopted the suggestion; the final rules provide that the Services will make the substantial evidence determination within 90 days.

One comment suggested that there was an unclear distinction between the evidence considered sufficient to warrant the acceptance of a petition and that required as the basis of a proposed listing. The Services disagree with this view; a petition is complete if it presents substantial evidence, a proposed listing requires a preliminary determination by the Services that the species is either Endangered or Threatened.

Several comments recommended the rules require that a **Federal Register** notice that a petition is under review either lead to a proposed rule within a specified time or be withdrawn. Both the Act and these rules require the Services to conduct and publish a review of the status of a species that is the subject of the petition within 90 days. No other time limits are necessary. The information needed to propose a rule may require some time to obtain, particularly if further field research must be completed.

One commenter suggested that the Services be required to consult with State agencies before publication of a notice that a petition had been accepted. Given the short statutory time for dealing with petitions, a further requirement to this effect is impracticable. However, as a discretionary matter the Services may consult with State conservation agencies in some cases.

Two comments inquired whether the publication of a status review, required by this section, is equivalent to the publication of a notice of review. The status review for petitions imposed by the Act is not the same as a notice of review. The latter is a discretionary administrative tool for requesting further information.

§ *424.14(d).* One commenter recommended that the Services be required to inform a petitioner whose petition is denied of the reason for denial. This recommendation is in keeping with the intentions of the Services and has been adopted in the final rule.

One comment requested that a procedure be established so that a petitioner could administratively appeal from a denial of a petition by the Director. The comment suggests that the most appropriate body to carry out these responsibilities would be an outside technical panel. Establishing an elaborate administrative appeal system would be expensive and unnecessary in light of the infrequency of problems in this regard in the past. The Services, however, will consider informal requests to review the denial of a petition.

One comment suggested that a specific time limit be established for the disposition of petitions relating to Critical Habitat. This suggestion has been rejected since the requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and respective Departmental regulations require that such petitions be processed in a timely and appropriate departmental regulation.

Section 424.15—Notice of Review. One comment suggested that the language of proposed § 405.15(a) be deleted because it would permit further consideration of petitions which are not supported by substantial evidence in a manner inconsistent with § 424.14. This comment has not been accepted. The notice of review provision is intended to be used primarily in cases other than petitions (which have their own specific procedures in § 425.14). This procedure provides the Services with a flexible management tool to gather necessary information, and also provides an added opportunity for public involvement before a formal proposed rulemaking. The Services believe this process is in keeping with the public involvement emphasis of the Act and Executive Order 12044.

Another comment suggested that private landowners should also be contacted in any notice of review. The Services have carefully considered this comment, but believe that such extensive notification procedures are not warranted at this early and tentative stage in the decision process. Often the tentative and broad nature of a notice of review would mean that no specific area involving the species could even be identified. Contacting local governments is required once Critical Habitat is proposed, and the Services believe this is the best time to do so. The Services also note that State Governors are free to contact State or local groups for their comments, whenever the Governors feel such action is appropriate.

One commenter recommended that the Services avoid lengthy periods of review for species under consideration as Endangered or Threatened but for which a proposed rule has not been published. The Services in all cases attempt to deal with species reviews in an expeditious manner. The requirement that the Services act only when they believe a species is Endangered or Threatened requires careful evaluation of data not always readily available. To impose a regulatory requirement on the length of reviews is unwise since the data readily available varies greatly from species to species.

One comment contended that this section provided insufficient detail regarding the procedures that would be followed in conducting a review of an action under consideration. This comment is rejected. Extensive procedures for gathering information and consulting interested private organizations and governmental entities are included in the rules. Further requirements along these lines are unnecessary.

One comment suggested that a period be set for receipt of comments solicited by a notice of intent or review to generate additional economic or other information. The Services have rejected this comment. The length of the comment period will vary from case to case, and this preliminary stage of the rulemaking process makes designation of a specific time undesirable. The desirability of maintaining broad flexibility at this stage of the rulemaking is reflected in the Interior Department regulations on rulemaking. *See* 43 CFR Part 14, implementing Executive Order 12044.

The Services have adopted the suggestion that the notice of review portion of this rule be made a separate section for clarity.

§ *424.16 Proposed Rules—General*

One comment suggested that notification procedures for proposed rules involving Critical Habitat should be applicable to proposed rules which do not designate Critical Habitat. The Services have not accepted this comment. Congress has carefully formulated different procedures for proposed rules involving Critical Habitat, procedures that are particularly useful to questions that may arise in that context. The Services do not believe that they should make such a significant

departure from the carefully formulated congressional scheme.

§ *424.16(b)(1) Content of Proposed Rule*

One comment suggested that a proposed rule be required to include a citation of appropriate information sources used in preparing the rule. The final rules have been revised to include this requirement.

Several commenters suggested that both supporting and contradictory data be summarized in a proposed rule. The Services agree with the comment, but believe modification of the final rule is unnecessary. The Services intend that proposed listings will contain a summary of all data on which they are based, including that which is contradictory.

The section has been modified slightly to bring it into conformance with the Act. As the final rule indicates, some points must be included in listing and Critical Habitat rulemaking, others for all Endangered Species Act rulemaking.

Section 424.16(b)(2). Several comments suggested that the public comment period on proposed rules be lengthened from 45 to 90 days. A number of comments pointed out that State Governors are afforded 90 days to comment, and the public should be given equal time to submit comments. Although Governors are authorized 90 days to comment on rules relating to resident species of fish and wildlife, section 4(b)(1)(C) of the Act authorizes this period to be shortened by agreement between the Service and the Governor. Because the Act itself establishes no specific comment period, the general provisions of the Administrative Procedure Act (APA) apply. Section 553 of the APA provides that the comment period is to remain open for a minimum of 30 days unless good cause is shown. The Services believe that this standard should be applied for proposed rules not listing species or designating Critical Habitat. For rules listing species or designating Critical Habitat, the Services believe a 60-day minimum standard should apply. The rule has been changed to reflect this view.

Section 424.16(b)(3). One commenter suggested that notifications to foreign countries be made specifically to the management authorities of such countries. In foreign species listings, notifications are made by the Services through the auspices of the Department of State by normal diplomatic channels. The Services consider it inappropriate to set forth the manner in which this notification should be made.

Several commenters suggested that more specific requirements be incorporated in this subsection for the notification of State and Federal agencies, interest groups and private individuals of proposed actions. The Services intend to disseminate notices of proposals as widely as is practical and appropriate in individual cases. The manner in which this process will be carried out varies with the situation and further standards are therefore unnecessary.

Section 424.16(b)(5). One comment suggested that the time within which one must request a public meeting or hearing should run from the date of newspaper notice rather than from publication in the **Federal Register**. This comment has not been accepted since section 4(f)(2)(B)(iv) (I) and (II) of the Act specifically provide that this period is to run from **Federal Register** publication.

§ *424.17 Proposed Rules—Additional Procedures for Critical Habitat*

For clarity the Services have adopted a separate section for the additional Critical Habitat requirements in the final rules.

One comment argued that an adjudicatory hearing must be provided upon request for proposed rules designating Critical Habitat. The Services disagree with this view. Although the Act in some cases calls for public hearings for proposed rules designating Critical Habitat, it does not specify that the hearing be "on the record after opportunity for an agency hearing". *See United States v. Florida East Coast Ry,* 410 U.S. 224 (1973) and *United States v. Allegheny-Ludlum Steel,* 406 U.S. 742 (1972). The Services also note that proposed Critical Habitat rules are prospective legislative type rules of general application rather than "quasi-judicial" proceedings to determine the specific rights of particular individuals or entities. The legislative history of the Act also makes clear that adjudicatory hearings are not required, since the Conference Report for the 1978 Amendments specifically provides that "the committee does not intend that either the meetings or hearings be full adversarial proceedings with all the inherent expenses to the parties and delays in carrying out a final regulation." *See* H. Rept. 95–1804, 95th Cong. 2d Sess. 27 (1978). *See also* H. Rept. 96–697, 96th Cong. 1st Sess. 10–11(1979).

A number of comments were received on the proposed timing of public meetings and the manner in which they are to be requested. One comment suggested that the public meeting and hearing be held on the same day. Another suggested that the public hearing should be held after the public meeting, since the meeting would provide the public with an opportunity to become fully informed about the proposal. The same comment objected to the proposed procedure of requiring an interested person to request a public hearing within 15 days of the public meeting.

In recent amendments to the Endangered Species Act, Congress has made clear that interested persons are to be afforded 15 days after the public meeting to request a public hearing. *See* section 4(f)(2)(B)(iv)(II). This provision has been implemented in the final rules. The legislative history of the amendments also indicates that Congress intends the public hearing to occur after the public meeting.

The Services retain discretion to conduct a public hearing even if one is not requested. This authority is specifically recognized in the final rules. In the exercise of this authority, the Service may in appropriate cases set a time and place for the public hearing at the same time the proposed rule is published in the **Federal Register**. The effect of this action would be to minimize the added expense of publication and to speed up the rulemaking process.

Another comment suggested that public meetings be held early in the comment period. The Services generally agree that the public meeting should occur early in rulemaking process, but the need for providing adequate notice of its time and location will necessarily result in some delay. For reasons expressed above, the Service also finds it undesirable to require an extended comment period.

One comment suggested that the section be changed to clarify that a public meeting on a Critical Habitat proposal could occur within or adjacent to the area determined as Critical Habitat. The language of the proposed rule is consistent with that of the Act, and has been retained. The Services interpret this provision, however, as authorizing them to conduct the meeting in close proximity to, but outside the Critical Habitat area, when adequate facilities are unavailable therein.

Another comment suggested that the Service establish procedures to ensure that an adequate administrative record is developed for rules. These rules contain numerous provisions implementing requirements intended by Congress to ensure that the Services make fully informed decisions. The Services will continue to compile complete administrative records on which they will base their judgments.

and further procedures are therefore unnecessary.

One comment suggested that Critical Habitat rule summaries be published in all general circulation newspapers in the area of the proposed Critical Habitat. This comment has not been accepted. Recent amendments to the Act specifically provide that publication should occur "in a newspaper of general circulation within or adjacent to such habitat". The Services also believe that benefits from the suggested approach are minimal and are outweighed by the high costs and administrative difficulties that would result if this approach were adopted.

The final rules provide that the Services must send the draft impact analysis to local governments along with the complete text of the proposed and NEPA documents. The intent of this provision is to provide local governments with all relevant data as quickly as possible in the rulemaking process.

Several comments objected to the language contained in the proposal which provides that "any accidental failure to provide actual notice to all such local governments will not invalidate any critical habitat determination." This language has been retained since it is identical to that found in the Act. *See* section 4(f)(2)(B) of the Act.

One comment questioned whether the "environmental document" referred to in this section was an environmental assessment or impact statement. The intent of the final rules is that any document prepared to carry out NEPA responsibilities will be sent to the appropriate local governments.

One comment suggested that the draft impact analysis should be prepared after the public meeting. The Services disagree with this view. Preparation of a draft impact analysis must occur early in the rulemaking process to ensure its timely availability to interested parties and its timely completion, as well as to aid the Director in reaching his decision to publish a proposed rule. For these reasons, the final rules indicate that the draft analysis will be completed prior to publication of the proposed rule.

Another comment suggested that a public hearing should be held after an impact analysis has been made public. As indicated above, a draft analysis will be completed and available to the public prior to any public hearing. The Services do not believe that the regulations should require that a final impact analysis be completed prior to a public hearing, since valuable information obtained at that time should be reflected in the final document. The Service will, however, complete a final analysis prior to the publication of a final rule.

One comment suggested that a notice of review be a mandatory step in gathering information concerning possible impacts of a Critical Habitat designation. This comment has been rejected, since the process set out in the rules insures sufficient public input. As noted above, the notice of review is a flexible management tool that should be used only when circumstances warrant. *See* 43 CFR Part 14.

One comment questioned the apparent reliance of the Services on other Federal agencies for information concerning economic and other impacts associated with designating Critical Habitat. The Services will rely on Federal agencies for this type of information, since those agencies are in the best position to know what future Federal activities may be affected by a Critical Habitat designation. The section has been changed, however, to clarify that relevant information will be gathered from appropriate Federal agencies and, to the extent practicable, other knowledgeable entities.

Another commenter requested that the required draft impact analysis should be published with the proposed rule. The Services have carefully considered this comment, but reject it at this time. Information from the draft will be used in the proposed rule itself, and it appears unnecessary to duplicate this information. The Services also note that the procedure adopted parallels the procedures taken for environmental documents prepared with a listing. Impact analyses are also available on request and will be provided to the Governors, local governments, and appropriate Federal agencies at the time of notification.

One commenter argued that the Services consider more than dollar benefits when designating Critical Habitat. The Services intend to do so in the manner the Act requires, and believe that the final rules express that intent.

§ *424.18—Final Rules*

One comment argued that formal rulemaking was required in certain circumstances and that the procedures for final rules set out in this section were inadequate. As the above discussion on public hearings indicates, rulemaking under the Endangered Species Act is informal rulemaking under the Administrative Procedure Act. Modification of the type suggested is therefore unnecessary as a legal matter, and the associated administrative expense and delay also militate against such procedures from a policy perspective.

One commenter suggested that a final rule be adopted only upon a finding that benefits deriving from its promulgation would outweigh benefits maintained if no action were taken, and in the event the rule were not adopted, the proposal upon which it was based would be withdrawn. The focus of a final rulemaking to list or delist a species is whether or not it is Endangered or Threatened. *See* section 4(a) of the Act. The Services also believe that the present statutory requirement to withdraw a proposal after two years adequately satisfies the intent of the commenter.

One comment suggested that "new information" should be clarified to include information that did not exist at the time of withdrawal or which had not been fully evaluated by the Service prior to withdrawal. The Services reject this comment; determinations of whether sufficient new information is available will vary considerable from case to case.

One commenter suggested that the two year deadline for finalization of a rule listing a species be applied to rules specifying Critical Habitat. The Services have retained the language of the proposed rules since it comports with that of the Act. The Services note, however, that in most cases Critical Habitat will be designated at the same time a species is listed.

One comment suggested that a final rule should become effective immediately upon its publication due to the threats facing Endangered and Threatened species. The Services have retained the proposed language consistent with section 553(d) of the Administrative Procedure Act 5 U.S.C. 553(d), which provide an effective date 30 days after publication of the final rule unless good cause is found and published with the rule. However, the Service will waive the 30-day period for good cause when warranted.

§ *424.19—Emergency Rules*

One comment suggested that the emergency rules section cover plants as well as fish and wildlife. At the time the proposed rules were promulgated, the Endangered Species Act authorized the use of emergency rules only for fish and wildlife. Recent (December, 1979) amendments to the Act have expanded this authority to include plants, and the final rules reflect this change.

In a similar vein, a comment suggested that the 120 days effective date for emergency rules was too short in light of the numerous requirements for proposing and finalizing rules, and should thus be deleted. This too, had been a statutory limitation. The recent

amendments have lengthened this period to 240 days, and the final rules reflect this change.

One Federal agency suggested that the Services should require prior notification of Federal action agencies before promulgating an emergency rule. The Services will make every effort to inform affected Federal agencies before issuing emergency rules. Additional procedural requirements could defeat the purpose of the emergency provisions of the Act and have therefore been rejected.

§ *424.20—Periodic Review*

Several commenters suggested that the reviews of listed species now required at five-year intervals be conducted more frequently, or that reviews be permitted at any time after listing. While the present rule requires reviews of listed species at *least* every five years in order to comply with provisions of the Endangered Species Act Amendments of 1978, more frequent reviews will be undertaken whenever warranted by new information regarding the status of a listed species. This point is clarified in the final rule.

One commenter recommended that this section require the Director to take action to remove a species from the lists or change its status if the review indicates that such change is warranted. The Services believe that the final rule makes clear the Directors' obligations to take action in those cases in which a review uncovers sufficient evidence supporting removal of a species from the lists or change in its status.

Two commenters requested that reviews required at five year intervals consider not only changes in the listing status of species, but also in any Critical Habitats of such species. This section implements section 4(c)(4) of the Act, which specifically addresses review of species for considering appropriate changes in listing status. However, if information indicating that a Critical Habitat area or boundary should be changed arises during the conduct of such a review, the Services will take appropriate action.

This rule is issued under the authority contained in the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*; Stat. 844, as amended). The primary authors of this final rule are John J. Fay and Jay M. Sheppard, Office of Endangered Species, U.S. Fish and Wildlife Service (703/235–1975), and Charles Kaiser and Byron Swift, Office of the Solicitor, U.S. Department of the Interior (202/343–2172).

Note.—The Department of the Interior, as the lead agency in development of these rules, has determined that this document is not a significant action and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Regulations Promulgation

Accordingly, Parts 17 and 402 are amended and a new Part 424 added to Title 50 of the Code of Federal Regulations as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. Amend §§ 17.11 and 17.12 to read as follows (exclusive of the actual lists of wildlife and plants):

§ 17.11 Endangered and threatened wildlife.

(a) The list in this section contains the names of all species of wildlife which have been determined by the Director to be Endangered or Threatened. It also contains the names of species of wildlife treated as Endangered or Threatened because they are sufficiently similar in appearance to Endangered or Threatened species (see § 17.50 *et seq.*).

(b) The columns entitled "Common Name", "Scientific Name", and "Vertebrate Population where Endangered or Threatened" define the species of wildlife within the meaning of the Act. Thus, differently classified geographic populations of the same vertebrate subspecies or species shall be identified by their differing geographic boundaries, even though the other two columns are identical. The term "Entire" means that all populations throughout the present range of a vertebrate species are listed. Although common names are included, they cannot be relied upon for identification of any specimen, since they may vary greatly in local usage. The Director shall use the most recently accepted scientific name. In cases in which confusion might arise, a synonym will be provided in parentheses. The Services shall rely to the extent practicable on the *International Code of Zoological Nomenclature.*

(c) In the "Status" column the following symbols are used: "E" for Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) For informational purposes only, the "Historic Range" indicates the general known distribution of the species or subspecies as reported in the scientific literature. This column does not imply any limitation on the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the species, wherever found. When the list is updated annually any change in the range will be added.

(e) For informational purposes only, a footnote to the **Federal Register** publication(s) originally listing a species is provided under the column "When Listed." Footnote numbers to §§ 17.11 and 17.12 are in the same numerical sequence, since plants and animals may be listed in the same **Federal Register** document. That document includes a statement indicating the basis for the listing.

(f) The "Special Rules" and "Critical Habitat" columns provide a cross-reference to other sections in Part 17 or Parts 222, 226 or 227. The term "N/A" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or Critical Habitat for that particular species. However, all other appropriate rules in Part 17 and Parts 217–227 and 402 still apply to that species. In addition, there may be other rules in this Title 50 that relate to such wildlife, e.g., port-of-entry requirements. It is not intended that the references in the "Special Rules" column list all the regulations of the two Services which might apply to the species or to the regulations of other Federal agencies or State or local governments.

(g) The listing of a particular taxonomic group includes all lower taxonomic groups. For example, the genus *Hylobates* [gibbons] is listed as Endangered for China, India, and SE Asia, consequently all species, subspecies, and populations of that genus are to be considered as Endangered. The species *Haliaeetus leucocephalus* [Bald Eagle] is listed as Threatened and the "Vertebrate Population where Endangered or Threatened" was defined in 1978 (43 FR 6230–6233) as "USA (WA, OR, MN, WI, MI)"; thus all individuals of the Bald Eagle found in those five States are considered listed as Threatened for the purposes of the Act.

(h) The "List of Endangered and Threatened Wildlife" is provided below:

List of Endangered and Threatened Wildlife (§ 17.11)

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						

§ 17.12 Endangered and threatened plants.

(a) The list in this section contains all species of plants which are determined by the Director to be Endangered or Threatened. It also contains species of plants treated as Endangered or Threatened because they are similar in appearance to an Endangered or Threatened species (see § 17.50 *et seq.*)

(b) The columns entitled "Scientific Name" and "Common Name" define a species of plant within the meaning of the Act. Although common names are usually included, they cannot be relied upon for identification of any specimen, since they may vary greatly with local usage. The Director will use the most recently accepted scientific name. In cases in which confusion might arise, a synonym will be provided in parentheses. The Services shall rely to the extent practical on the *International Code of Botanical Nomenclature.*

(c) In the "Status" column the following symbols are used: "E" for Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) For informational purposes only the "Historic Range" indicates the general known distribution of the species as reported in the scientific literature. This column does not imply any limitation of the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the species, wherever found. When the list is updated annually, any change in the range will be added.

(e) For informational purposes only, a footnote to the **Federal Register** publication which originally listed the species is provided under the column "When Listed." Footnote numbers to § 17.12 and § 17.11 are in same numerical sequence since plants and animals may be listed in the **Federal Register** document. That document includes a statement indicating the basis for listing.

(f) The "Special Rules" and "Critical Habitat" columns provide a cross-reference to other sections in this Part 17 or Parts 222 or 227. The term "N/A" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or Critical Habitat for that particular species. However, all other appropriate rules in this Part 17 still apply to that species. In addition, there may be other rules in this Title that relate to such plants, e.g., port-of-entry requirements. It is not intended that the references in the "Special Rules" column list all the regulations of the two Services which might apply to the plants in question or to the regulations of other Federal agencies or State or local governments.

(g) The listing of a particular taxonomic group includes all its lower taxonomic units [see § 17.11(g) for examples].

(h) The "List of Endangered and Threatened Plants" is provided below:

List of Endangered and Threatened Plants (§ 17.12)

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					

§ 17.13 [Deleted]

2. Delete the text and references in the table of sections for § 17.13 at 50 CFR and reserve this section for future rules.

3. Add a new § 17.94 to 50 CFR Part 17, including list of sections, as follows:

§ 17.94 Critical habitats.

(a) The areas listed in § 17.95 (fish and wildlife) and § 17.96 (plants) and referred to in the lists at §§ 17.11 and 17.12 have been determined by the Director to be Critical Habitat. All Federal agencies must insure that any action authorized, funded, or carried out by them is not likely to result in the destruction or adverse modification of the constituent elements essential to the conservation of the listed species within these defined Critical Habitats. (See Part 402 for rules concerning this prohibition; see also Part 424 for rules concerning the determination of Critical Habitat).

(b) The map provided by the Director does not, unless otherwise indicated, constitute the definition of the boundaries of a Critical Habitat. Such maps are provided for reference purposes to guide Federal agencies and other interested parties in locating the general boundaries of the Critical Habitat. Critical Habitats are described by reference to surveyable landmarks found on standard topographic maps of the area and to the States and county(ies) within which all or part of the Critical Habitat is located. Unless otherwise indicated within the Critical Habitat description, the State and county(ies) names are provided for informational purposes only.

(c) Critical Habitat management focuses only on the biological or physical constituent elements within the defined area of Critical Habitat that are essential to the conservation of the species. Those major constituent elements that are known to require special management considerations or protection will be listed with the description of the Critical Habitat.

(d) The sequence of species within each list of Critical Habitats in §§ 17.95 and 17.96 will follow the sequences in the lists of Endangered and Threatened wildlife (§ 17.11) and plants (§ 17.12). Multiple entries for each species will be alphabetic by State.

§§ 17.95 and 17.96 [Amended]

4. Amend §§ 17.95 and 17.96 by deleting the introductory paragraphs before paragraph (a). Further amend both sections by rearranging all species in the sequence followed in the Lists of Endangered and Threatened Wildlife (§ 17.11) and Plants (§ 17.12). This amendment does not contain the republication of these lists or Critical Habitats (§§ 17.95 and 17.96). Future republications and the annual revision of title 50 will reflect this resequencing of the Critical Habitats.

PART 402—INTERAGENCY COOPERATION

§ 402.05 [Deleted]

5. Delete § 402.05 entirely.

6. Add a new Part 424 as follows:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

Subpart A—General Provisions

Sec.

Subpart B—Revision of the Lists

Authority: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Subpart A—General Provisions

§ 424.01 Scope and purpose.

(a) This Part 424 provides rules for revising the Lists of Endangered and Threatened Wildlife and Plants and, where appropriate designating their Critical Habitats. Criteria for determining species to be Endangered or Threatened and for designating Critical Habitats are provided. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of species contained in the lists are also established.

(b) The purpose of this rule is to interpret and implement those portions of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 *et. seq.*), that pertain to the listing of species and the determination of Critical Habitats.

§ 424.02 Definitions.

(a) The definitions of terms in 50 CFR § 402.02 shall apply to this Part 424, except as otherwise stated.

(b) "Conservation," "conserve," and "conserving" mean to use and the use of all methods and procedures which are necessary to bring any Endangered species or Threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(c) "Critical Habitat" means (1) 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 (i) essential to the conservation of the species and (ii) which may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Director that such areas are essential for the conservation of the species.

(d) "Director" means the Director of the U.S. Fish and Wildlife Service, Department of Interior, or the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Department of Commerce, as appropriate.

(e) "Endangered species" means a species which is in danger of extinction throughout all or a significant portion of its range.

(f) "List" or "lists" means the lists of Endangered or Threatened wildlife and plants found at 50 CFR 17.11 or 17.12.

(g) "Plant" means any member of the plant kingdom, including seeds, roots, and other parts thereof.

(h) "Public hearing" means an informal hearing to provide the public with the opportunity to give their comments on a proposal to designate Critical Habitat and, if appropriate, the accompanying proposal to list a species.

(i) "Public meeting" means an informal meeting between Service representatives and the public that permits an exchange of information on a proposed rule.

(j) "Special management considerations or protection" means any methods or procedures useful in protecting physical and biological features for the conservation of listed species.

(k) "Species" includes any species or subspecies of fish or wildlife or plant, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. Excluded are those species of the Class Insecta determined by the Director to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

(l) "Threatened species" means any species which is likely to become an Endangered species within the foreseeable future throughout all or a significant portion of its range.

(m) "Wildlife" or "fish and wildlife" means any member of the Animal Kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod or other invertebrate and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Subpart B—Revision of the Lists

§ 424.10 General.

The Director may add a species to the lists or designate Critical Habitat, delete a species or Critical Habitat, change the listed status of a species, change the boundary of an area designated as Critical Habitat, or adopt or modify special rules (see 50 CFR 17.40–17.48 and Parts 222 and 227) applicable for an Endangered or Threatened species only in accordance with the procedures of this Part.

§ 424.11 Factors for listing, reclassifying, or removing species.

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in § 424.02 is eligible for listing under the Act. A taxon of higher rank than species will be listed only if all component species are individually Endangered or Threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Director shall rely on standard taxonomic distinctions and the biological expertise of the Service and the scientific community concerned with that group of taxa.

(b) A species shall be listed if the Director determines on the basis of the best scientific and commercial data available to him after conducting a review of the species' status that the species is Endangered or Threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Utilization for commerical, sporting, scientific, or educational purposes at levels that detrimentally affect it;

(3) Disease or predation;

(4) Absence of regulatory mechanisms adequate to prevent the decline of a species or degradation of its habitat; and

(5) Other natural or manmade factors affecting its continued existence.

(c) The fact that a species of fish, wildlife, or plant is protected by the

Convention on International Trade in Endangered Species of Wild Fauna and Flora or similar international agreement on such species may constitute evidence that the species is Endangered or Threatened. The weight of the evidence will vary depending on the international agreement in question and the criteria pursuant to which the species was listed under the agreement. The Director shall give full consideration to any species protected by such an international agreement to determine whether the species is Endangered or Threatened.

(d) The factors for removing a species from the list are those in paragraph (b) of this section. The data to support such removal must be the best scientific and commercial data available to the Director to substantiate that the species is neither Endangered nor Threatened for one or more of the following reasons:

(1) *Extinction.* Unless each individual of the listed species was previously identified and located, a sufficient period of time must be allowed before delisting to clearly insure that the species is in fact extinct.

(2) *Recovery of the species.* The principal goal of the Services is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted if the evidence shows that it is no longer Endangered or Threatened.

(3) *Original data for classification in error.* Subsequent investigations may produce data that show that the best scientific or commercial data available at the time that the species was listed were in error.

§ 424.12 Criteria for designating Critical Habitat.

(a) Critical Habitat shall be specified to the maximum extent prudent at the time a species is proposed for addition to the list. If the Director determines that the designation of Critical Habitat is not prudent, he will state the reasons for such determination in the proposed and final rules listing a species. Conditions under which a designation of Critical Habitat is not prudent include, but are not limited to, the following:

(1) When the species is threatened by taking or other human activity and identification of Critical Habitat can be expected to increase the degree of such threat to the species, or

(2) When such designation of Critical Habitat would not be beneficial to the species.

(b) The Director shall consider in determining what areas are Critical Habitat those physiological, behavioral, ecological, and evolutionary requirements essential to the conservation of the species and which may require special management considerations or protection. 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, rearing of offspring, germination, or seed dispersal; and generally,

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of listed species.

When considering the designation of Critical Habitat, the Director shall focus on the biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the Critical Habitat description. Primary constituent elements which may be identified include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host animal or plant, pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) The Director shall identify the significant activities which would both affect an area considered for designation as Critical Habitat and be likely to be affected by the designation, and shall consider the reasonably probable economic and other impacts of the designation upon such activities. The Director may exclude any such area from the Critical Habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the Critical Habitat. The Director shall not exclude any such area if he determines, based on the best scientific and commercial data available, that the failure to designate that area as Critical Habitat will result in the extinction of the species.

(d) Each Critical Habitat will be defined by specific prescribed limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State, county(ies), or other local governmental units within which all or part of the Critical Habitat is located. Unless otherwise indicated within the Critical Habitat descriptions, the names of the State and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used.

(e) When several suitable habitats are located in close proximity to one another, an inclusive area may be designated as Critical Habitat. Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated Critical Habitat.

(f) The Director shall designate as Critical Habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

(g) Critical Habitat may be established for those species previously listed as Threatened or Endangered for which no Critical Habitat has been previously established.

(h) Additional Critical Habitat may be added and existing ones may be modified or eliminated, as new data become available to the Director.

§ 424.13 Sources of information and relevant data.

When considering any revision of the lists, the Director shall consult as appropriate with the affected States, interested persons and organizations, other affected Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data reviewed by the Director may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from persons expert on the subject, and comments from interested parti s. Prior to proposing a rule to list or remove a species, the Director shall conduct a review of the status of the species.

§ 424.14 Petitions.

(a) Any interested person may submit a petition to the Director to review the status of any species with a view to taking one of the actions described in § 424.10. Such petitions must be in writing, contain the date submitted, and the name, signature, address, telephone number, and the association, institution, or business, if any, represented by the petitioner. The Director shall acknowledge in writing receipt of the petition within 30 days.

(b) The Director shall determine whether substantial evidence has been presented in support of the measure recommended by a petitioner. "Substantial evidence" is that amount of evidence that would lead a reasonable

person to conclude that the measure proposed in the petition is warranted. In making this determination the Director shall consider whether the petition:

(1) Clearly indicates the administrative measure recommended, the scientific and any common name of the species involved, and if appropriate, the precise area recommended as Critical Habitat;

(2) Contains detailed narrative justification for the recommended measure, describing, based on available information, the past and present numbers and distribution of the involved species, the particular threats confronting the species, and the features and importance of any recommended Critical Habitat;

(3) Indicates any beneficial or adverse effect on the species of designating Critical Habitat;

(4) Provides information on the status of the species over a significant portion of its range; and

(5) Is accompanied by appropriate supporting documentation such as a list of bibliographic references, reprints of pertinent publications, copies of written reports or letters from authorities, and maps, as appropriate.

(c) If the Director finds that substantial evidence has not been presented, the petition shall be denied and the petitioner shall be so notified and advised of the reasons for denial within 90 days. If the petitioner proposes to list, delist, or change the status of a species and the Director finds that substantial evidence has been presented in such petition, the Director shall:

(1) Promptly publish a notice in the **Federal Register** announcing such determination, (2) conduct and publish in the **Federal Register** a status review of the species that is the subject of the petition within 90 days of receipt of the petition and (3) indicate at the time the status review is published how the Service intends to proceed with respect to the listing, delisting, or reclassifying of the species.

(d) If the petition relates only to Critical Habitat or a special rule for the conservation of a species, the Director will promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and respective departmental regulations and take appropriate action.

§ 424.15 Notices of review.

If the Director finds that one of the actions described in § 424.10 may be warranted, but that the available evidence is not sufficiently definitive to justify proposing the action, he may publish a notice of review in the **Federal Register.** The notice of review will describe the measure under consideration, briefly explain the reasons for considering the action, and solicit comments and additional information on the action under consideration. At the time of publication of the notice, notification in writing shall be sent to the Governors of any affected States and the governments of any foreign countries in which the subject species normally occurs. If a Critical Habitat area is involved in the review, notification will also be sent in writing to any Federal agencies and local governments with jurisdiction over lands or waters under consideration and to all general local governments within or adjacent to the potential Critical Habitat.

§ 424.16 Proposed rules—general.

(a) Based on the initial review conducted pursuant to § 424.14(c), § 424.15, § 424.20, or on other information that the Service has obtained, the Director may propose revising the lists as described in § 424.10.

(b) *Procedures.* (1) *Content of proposed rule.* A proposed rule promulgated to carry out the purposes of the Act will be published in the **Federal Register.** These proposals will include the complete text of the proposed rule, a summary of the data on which the proposal is based (including, when appropriate, citation of pertinent information sources), and the relationship of such data to the proposed rule. Rules proposing the listing, delisting or reclassifying of a species or the designation of Critical Habitat will also include a summary of factors affecting the species and a description of the anticipated effects of the rulemaking if finalized in proposed form.

(2) *Period for public comments.* At least 60 days will be allowed for public comment following publication in the **Federal Register** of a rule proposing the listing, reclassifying, or removal of a species. Except as provided under § 424.17(b)(2), all other proposed rules will be subject to a comment period of at least 30 days following the publication in the **Federal Register.**

(3) *Notification of and comment by governors of affected states and governments of foreign countires.* For proposed rules to list, delist or reclassify a species the Director shall give notice of any proposed rule in writing through the Department of State to the governments of any foreign countries in which the subject species normally occurs or whose citizens harvest such species from the high seas. With respect to resident species of fish and wildlife the Director shall give notice of any proposed rule in writing to the Governors of the States in which the subject species normally occurs. The Governor(s) so contacted will be allowed 90 days after notification to submit comments and recommendations on the proposed rule except to the extent that such period is shortened by agreement between the Director and Govenor(s) concerned.

(4) *Offer for publication.* For rules proposing the listing, delisting or reclassifying of species or designating Critical Habitat the Director shall offer the substance of the **Federal Register** notice proposing the rule for publication in appropriate journals or newsletters of the scientific community.

(5) *Public meetings on proposals not involving Critical Habitat.* If the rule proposes to list, delist or change the status of a species and does not specify Critical Habitat, the Director shall promptly hold a public meeting on the proposed rule within or adjacent to the area in which the species is located, if a request for such a meeting is made in writing by any person to the Director within 45 days after the date of publication of the proposal in the **Federal Register.** The specific locations and times of such meetings will be determined by the Director and published in the **Federal Register.**

§ 424.17 Proposed rules—additional procedures for Critical Habitat.

(a) In addition to the general procedures for proposed rules in § 424.16, there are additional requirements for proposals involving Critical Habitat.

(b) *Procedures.* (1) *Additional content of proposed rule.* The proposed rule will contain a map of the proposed Critical Habitat and will, to the maximum extent practicable, be accompanied by a brief description of those activities (whether public or private) that might occur in the area and in the opinion of the Director, may adversely modify such habitat or may be affected by designating the area as Critical Habitat.

(2) *Period for public comments.* At least 60 days will be allowed for public comment following publication in the **Federal Register** of a proposal involving Critical Habitat.

(3) *Public meetings or hearings.* If a proposed rule includes Critical Habitat, the Director shall hold a public meeting on the proposal within the area in which such Critical Habitat is located in each State. The specific locations and times of such meetings shall be determined by the director and published in the **Federal Register.** A public hearing shall be held after the public meeting in each State in

which such habitat is proposed, if requested in writing no later than 15 days after a scheduled public meeting. Requests for a public hearing must be addressed to the Director. A public hearing will be held promptly but not sooner than 15 days after notice of the hearing is given unless good cause is shown. The Director may conduct a public hearing on his own motion.

(4) *Other notifications and notices.* When the proposed rule involves Critical Habitat, the Director shall: (i) notify in writing any Federal agencies with jurisdiction over lands included in the area under consideration; (ii) publish a summary of the proposed rule (including a source of further information and a map of the Critical Habitat) in a newspaper of general circulation within or adjacent to such habitat within 30 days of the date of the proposal; and (iii) give actual notice of the proposed rule (including its complete text), draft National Environmental Policy Act documents, and impact analyses prepared on the proposed rule to all general local governments located within or adjacent to the proposed Critical Habitat within 30 days of the date of the proposal. However, any accidental failure to provide actual notice pursuant to paragraph (b)(4)(iii)(c) of this section to all such local governments will not invalidate any Critical Habitat determination.

(5) *Consideration of economic and other impacts.* (i) Upon determining that the proposal of a particular area as Critical Habitat is appropriate for biological reasons, the Director shall gather economic and other information on impacts associated with the Critical Habitat designation on significant activities in the area, contacting appropriate Federal agencies, States, and other knowledgeable entities.

(ii) The Service may publish a notice of intent or review in the **Federal Register** prior to proposal of a rule in order to receive additional economic or other relevant information from the public concerning the area that may be affected by the Critical Habitat designation (see § 424.15).

(iii) The Service shall prepare a draft impact analysis which will consider the beneficial or detrimental economic and other impacts of the Critical Habitat designation. This draft impact analysis is available to the public at the time the proposed rule is published in the **Federal Register.**

§ 424.18 Final rules.

(a) Prior to the time of a final rulemaking involving Critical Habitat in the proposal, the Service shall prepare a final impact analysis based upon information contained in the draft impact analysis and that received during the comment period, including information provided at public meetings and hearings. The final impact analysis will analyze and discuss both the beneficial and deterimental economic and other relevant impacts of possible Critical Habitat configurations on significant activities in the area. This analysis will form the basis for the Director's decision as to whether or not to exclude any area from the Critical Habitat. The Director may exclude an area from Critical Habitat upon determining that the benefits of excluding such an area from the Critical Habitat outweigh the benefits of specifying the area as part of the Critical Habitat. However, an area may not be excluded from Critical Habitat if the best scientific and commercial data available, show that the failure to designate that area as Critical Habitat will result in the extinction of the species.

(b) After consideration of public comments and the available data, the Director shall either publish a final rule or publish a notice of withdrawal of the proposal in the **Federal Register.**

(c) *Contents of the final rule.* A final rule promulgated to carry out the purposes of the Act will be published in the **Federal Register.** These proposals will include the complete text of the rule, a summary of the comments and recommendations received on the proposal (including any applicable public hearings), summaries of the data on which the rule is based and the relationship of such data to the final rule, and a description of the anticipated effects of the rulemaking. Final rules that list, delist or reclassify a species or designate Critical Habitat shall also provide a summary of factors effecting the species. A rule involving a Critical Habitat area will also contain a description of the boundaries of such area and a map of any designated Critical Habitat, and will, to the maximum extent practicable, be accompanied by a brief description of those kinds of activities (whether public or private) that might occur in the area and which, in the opinion of the Director, may adversely modify such habitat or be impacted by designation of the area as Critical Habitat.

(d) *Two-year limitation of proposal.* A final regulation adding a species to the lists shall be published in the **Federal Register** not later than two years after the date such rule was proposed. If a final rule is not adopted within this two-year period, the Director shall withdraw the proposed rule and will publish notice of such withdrawal in the **Federal Register** not later than 30 days after the end of such period. The Director shall not propose a regulation adding to the list any species for which a proposed regulation has been withdrawn under this section unless he determines that sufficient new information is available to warrant the proposal of a rule. Notwithstanding the above provision, the Director may withdraw a proposal voluntarily upon a determination that available information and data do not support the proposal.

(e) *Effective date of the final rule.* Final rules shall become effective not less than 30 days after their publication in the **Federal Register** except as otherwise provided for good cause found and published with the rule. A final rule shall become effective no sooner than 60 days after all of the following have occurred: (1) the last public meeting or hearing on the proposal, (2) general notice of the proposal was published in the **Federal Register,** and (3) notice was given to the general local governments and a summary published in a newspaper of local circulation, if Critical Habitat was part of the proposal.

§ 424.19 Emergency rules.

Sections 424.16, 424.17, and 424.18 notwithstanding, the Director may by regulation take any action described in § 424.10 if such a measure is warranted by the development of a significant risk to the well being of a species of fish or wildlife or plant. Such rules shall, at the discretion of the Director, be effective immediately on publication in the **Federal Register.** No such action that applies to resident species will be taken until the Director has notified the Governor of the State(s) within which such species is then known to occur. At the time of publication in the **Federal Register** of the emergency rule, the Director shall give detailed reasons why the rule is necessary. An emergency rule shall cease to have force and effect after 240 days unless the procedures described in §§424.16, 424.17 (where appropriate), and 424.18 have been complied with during that period. If at any time after issuing an emergency regulation the Director determines, on the basis of the best scientific and commercial data available to him, that substantial evidence does not exist to warrant such regulations, he shall withdraw it.

§ 424.20 Periodic review.

At least once every five years the Director shall conduct a review of each listed species to determine whether it should be removed from the list, be

changed from an Endangered to a Threatened status, or be changed from a Threatened to an Endangered status. Announcement of which species are under active review will be published in **Federal Register.** Notwithstanding this section's provisions, the Director may review any species at any time based upon a petition (see § 424.14) or other data available to the Service.

Dated: January 30, 1980.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

Jack W. Gehrinjer,

Acting Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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