Controlled Substances Act (21 U.S.C. 801 *et seq.*). Enclosed with this letter was a document which listed the factors which the Act requires the Secretary to consider and the summarized considerations of the Secretary in recommending control for ketamine. The letter of the Acting Assistant Secretary is set forth below:.

March 18, 1981.

Mr. Peter B. Bensinger,
Administrator, Drug Enforcement Administration, 1405 Eye Street, NW., Washington, D.C.

Dear Mr. Bensinger: Pursuant to Section 201(b) of the Controlled Substances Act 21 U.S.C. 811(b), this letter is notification that the Food and Drug Administration has reviewed the medical and scientific data regarding ketamine, a drug with hallucinogenic effects.

The Food and Drug Administration has reviewed the relevant data on ketamine HCl pursuant to Section 201 of the Controlled Substances Act, 21 U.S.C. 811(c), and recommends that ketamine HCl be placed under Schedule III control as soon as practicable.

I concur with this recommendation. A summary of the basis for this recommendation is enclosed.

Sincerely yours,

Charles Miller,
Acting Assistant Secretary for Health.

Enclosure.

Relying on the scientific and medical evaluation and recommendation of the Acting Assistant Secretary for Health and based on his independent evaluation in accordance with the provisions of 21 U.S.C. 811(c), the Administrator of the Drug Enforcement Administration, pursuant to the provisions of 21 U.S.C. 811(a), finds that:

(1) Ketamine has a potential for abuse less than the drugs or other substances in Schedules I and II;

(2) Ketamine has a currently accepted medical use in treatment in the United States; and

(3) Abuse of ketamine may lead to moderate or low physical dependence or high psychological dependence.

The Administrator also finds that while the misuse of ketamine or salts thereof can result in amnesia, excitement, bizarre behavior, hallucinations and delirium, the substance is used in human and veterinary medicine to produce a state of surgical anesthesia. Therefore, for the purpose of this proposed rule, ketamine is classified as a depressant.

Under the authority vested in the Attorney General by Section 201(a) of the Act (21 U.S.C. 811(a)), and delegated to the Administrator of the Drug Enforcement Administration by Department of Justice regulations (28 CFR 0.100), the Administrator hereby proposes that 21 CFR 1308.13(c)(5)–(12) be revised to read as follows:

§ 1308.13 Schedule III.

* * * * *

(c) * * *

(5)	Glutethimide	2550
(6)	Ketamine or any salt thereof	7285
(7)	Lysergic acid	7300
(8)	Lysergic acid amide	7310
(9)	Methyprylon	2575
(10)	Sulfondiethylmethane	2600
(11)	Sulfonethylmethane	2605
(12)	Sulfonmethane	2610

* * * * *

Interested persons are invited to submit their comments, objections or requests for hearing in writing with regard to this proposal. Requests for hearing should state with particularity the issues concerning which the person desires to be heard. All correspondence regarding this matter should be submitted in quintuplicate to the Administrator, Drug Enforcement Administration, 1405 I Street, NW., Washington, D.C. 20537, Attention: DEA Federal Register Representative.

In the event that comments, objections or requests for hearing raise one or more issues which the Administrator finds warrant a hearing, the Administrator shall order a public hearing by notice in the **Federal Register**, summarizing the issues to be heard and setting the time for the hearing which will not be less than 30 days after the date of the notice.

If no objections presenting grounds for a hearing on this proposal are received within the time limitation, or interested parties waive or are deemed to waive their opportunity for a hearing or to participate in a hearing, the Administrator, after giving consideration to written comments and objections, will issue his final order pursuant to 21 CFR 1308.48 without a hearing.

Commercial products which contain ketamine are used in hospitals and veterinary clinics. This rule, if finalized, will cause such establishment to handle products which contain ketamine in a manner identical to that already used in relation to other Schedule III substances. Pursuant to 5 U.S.C. 605(b), the Administrator certifies that the placement of ketamine into Schedule III of the Controlled Substances Act will not have a significant impact upon small business or other entities whose interests must be considered under the Regulatory Flexibility Act (Pub. L. 96–354).

In accordance with the provisions of 21 U.S.C. 811(a), this proposal to place ketamine and salts thereof into Schedule III, is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557, and as such, have been exempted from the consultation requirements of Executive Order 12291 (46 FR 13193).

Dated: May 26, 1981.

Peter B. Bensinger,
Administrator, Drug Enforcement Administration.

[FR Doc. 81-16399 Filed 6-1-81; 8:45 am]
BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 530

Employment of Homeworkers in Certain Industries; Extension of Comment Period

AGENCY: Wage and Hour Division, ESA, Labor.

ACTION: Proposed Rule; extension of comment period.

SUMMARY: This document extends the period for filing written comments regarding the removal of Part 530 of Title 29 of the Code of Federal Regulations (29 CFR Part 530) which concerns the employment of homeworkers in certain industries. This action is taken in order to provide interested parties with additional time to submit their comments.

DATE: Comments must be received on or before July 4, 1981.

ADDRESS: Send written comments in duplicate to Henry T. White, Jr., Deputy Administrator, Wage and Hour Division, Employment Standards Administration, Room S-3502, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Assistant Administrator of Fair Labor Standards, Wage and Hour Division, Department of Labor, Washington D.C., (202) 523–8353. This is not a toll free number.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 5, 1981 (46 FR 25108) the Department of Labor published a notice of proposed rulemaking concerning the employment of homeworkers. Interested parties were requested to submit comments on or before June 4, 1981.

Because of the interest in this matter, the Department believes that it is desirable to grant an extension of the comment period for interested parties.

Therefore, the comment period for submitting information concerning the employment of homeworkers under the Fair Labor Standards Act is extended to July 4, 1981.

Signed at Washington, D.C. this 27th day of May 1981.

Robert B. Collyer,

Deputy Under Secretary, Employment Standards Administration.

[FR Doc. 81-16340 Filed 6-1-81; 8:45 am]

BILLING CODE 4510-27-M

DEPARTMENT OF DEFENSE

Defense Investigative Service

32 CFR Part 298a

[DIS Regulation 28-4]

Defense Investigative Service; Privacy Act Rules

AGENCY: Defense Investigative Service, DOD

ACTION: Notice of proposed rule making.

SUMMARY: This document sets forth proposed amendments to the Defense Investigative Service Privacy Act Rules. These changes generally update the rules by making technical changes and clarify certain information concerning redesignation of offices.

DATES: Comments must be received on or before July 2, 1981.

ADDRESS: Any public comments, including written data, views or arguments concerning the amendments should be addressed to Chief, Office of Information and Legal Affairs, Defense Investigative Service, 1900 Half Street, SW, Washington, D.C. 20324.

FOR FURTHER INFORMATION CONTACT: Dale L. Hartig, Chief, Office of Information and Legal Affairs, Defense Investigative Service, 1900 Half Street, SW, Washington, DC 20324. Telephone (202) 693-1740.

SUPPLEMENTARY INFORMATION: The Defense Investigative Service rules as required by the "Privacy Act of 1974," Title 5, United States Code, Section 552a (Pub. L. 93-579; 88 Stat. 1897, et seq.) are set forth in the Code of Federal Regulations (CFR) at Title 32, Part 298a.

Accordingly it is proposed to amend Title 32 CFR Part 298a as indicated:

§ 298a.1 [Amended]

1. Section 298a.1 is amended by removing the words "Assistant for Information" and insert "Office of Information and Legal Affairs" in Subsection 298a.1(b).

§ 298a.2 [Amended]

2. Section 298a.2 is amended by removing the entry "Availability to the Public of DOD Information, dated 14 February 1974" and insert "DOD Freedom of Information Program" in Subsection 32 CFR 298a.2(d).

3. Section 298a.3 is revised to read as follows:

§ 298a.3 Definitions.

(a) All terms used in this part which are defined in 5 U.S.C. 552a shall have the same meaning herein.

(b) As used in this part, the term "agency" means the Defense Investigative Service.

4. Section 298a.4 is amended by revising paragraphs (b), (c), and (d) as follows:

§ 298a.4 Information and procedures for requesting notification.

* * * * *

(b) *DIS Record Systems:* Following is a list of DIS records systems pertaining to individuals. These systems are described in detail in the DOD input to the **Federal Register.**

Authorizing DIS Records Systems

Pertaining to Individuals

Number and Title

DIS 1-01—Privacy and Freedom of Information Request Record Records
DIS 1-02—Personnel Locator System
DIS 2-01—Inspector General Complaints
DIS 4-01—Civilian Employee Personnel Records
DIS 4-02—Optional Personnel Management Records (OPMR)
DIS 4-04—Civilian Applicant Records
DIS 4-05—Military Personnel Management Information System
DIS 4-06—Civilian Personnel Management Information System
DIS 4-07—Adverse Actions, Grievance Files and Administrative Appeals
DIS 4-08—Equal Employment Opportunity Compaints
DIS 4-09—Merit Promotion Plan Records
DIS 4-10—Incentive Awards
DIS 5-01—Investigative Files System
DIS 5-02—The Defense Central Index of Investigations (DCII)
DIS 5-03—National Agency Check Case Control System (NCCS)
DIS 5-04—Defense Case Control System (DCCS)
DIS 5-05—Subject and Reference Locator Records
DIS 5-06—Special Investigations Unit Investigative Files
DIS 6-01—Defense Investigative Service Personnel Security Files
DIS 6-02—Special Compartmented Intelligence (SCI) Access File
DIS 7-01—Enrollment, Registration and Course Completion
DIS 7-02—Guest/Instructor Identification Records
DIS 8-01—Industrial Personnel Security Clearance File

(c) *Categories of individuals in DIS record systems:* (1) If an individual has ever been investigated by DIS, the investigative case file should be a record in either system DIS 5-01 or 5-06. An index to such files should be in DIS 5-02.

(2) If an individual has ever made a formal request to DIS under the Freedom of Information Act or the Privacy Act of 1974, a record pertaining to that request under the name of the requester, or subject matter, will be in system DIS 1-01.

(3) If an individual is or has ever been a member of DIS, i.e., a civilian employee or appointee, or a military assignee, then he may be a subject of any of the 23 record systems depending on his activities, with the following exceptions:

(i) Civilian personnel will not be subjects of DIS 4-05.

(ii) Military personnel will not be subjects of systems DIS 4-06, 07, 08, or 09.

(4) Individuals who have been applicants for employment with DIS, or nominees for assignment to DIS, but who have not completed their DIS affiliation, may be subjects in systems DIS 4-02, 4-04, 5-01, 5-02, or 6-01.

(5) Any individual who is a subject, victim or cross-referenced personally in an investigation by an investigative element of any DOD component, may be referenced in the Defense Central Index of Investigations, system DIS 5-02, in an index to the location, file number, and custodian of the case record.

(6) Individuals who have ever presented a complaint to or have been connected with a DIS Inspector General inquiry may be subjects of records in system DIS 2-01.

(7) If an individual has ever attended the Defense Industrial Security Institute, he should be subject of a record in DIS 7-01.

(8) If an individual has ever been a guest speaker or instructor at the Defense Industrial Security Institute, he should be the subject of a record in DIS 7-02.

(9) If an individual is an employee or major stockholder of a government contractor or other DoD-affiliated company or agency and has been issued, now possesses or has been processed for a security clearance, he may be subject to a record in DIS 8-01.

(d) *Procedures:* The following procedures should be followed to determine if an individual is a subject of records maintained by DIS, and to request notification and access.

(1) Individuals should submit inquiries in person or by mail to the Office of

Information and Legal Affairs, 1900 Half St. SW., Washington, DC 20325. Inquiries by personal appearance should be made Monday through Friday from 8:30 to 11:30 a.m. and 1:00 to 4:00 p.m. The information requested in section 298a.5 must be provided if records are to be accurately identified. Telephonic requests for records will not be honored. In a case where the system of records is not specified in the request, only systems that would reasonably contain records of the individual will be checked, as described in Section 298a.4b.

(2) Only the Director, the Chief, Office of Information and Legal Affairs, or the Director for Investigations may authorize exemptions to notification of individuals in accordance with Section 298a.14.

5. Section 298a.5 is amended by revising paragraphs (b) (1) and (2) and (c) as follows:

§ 298a.5 Requirements for identification.

* * * * *

(b) *Identification.* * * *

(1) Where reply by mail is requested, a mailing address is required, and a telephone number is recommended to expedite certain matters. For military requesters residing in the United States, home address or P.O. Box number is preferred in lieu of duty assignment address.

(2) Signatures must be notarized on requests received by mail. Exceptions may be made when the requester is well known to releasing officials. For requests made in person, a photo identification card, such as miiitary ID, driver's license or building pass, must be presented.

* * * * *

(c) A DIS Form 30 (Request for Notification of/Access to Personal Records) will be provided to any individual inquiring about records pertaining to himself whose mailed request was not notarized. This form is also available at the Office of Information and Legal Affairs, Washington, DC for those who make their requests in person.

6. Section 298a.6 is amended by revising paragraph (b)(1) as follows and by changing the phrase "the Assistant for Information" to "Information and Legal Affairs" in paragraph (b)(7).

§ 298a.6 Access by subject individuals.

* * * * *

(b) *Manner of access.* * * *

(1) Requests by mail or in person for access to DIS records should be made to the Offices specified in the record systems notices published in the **Federal Register** by the Department of Defense or to the Office of Information and Legal Affairs, 1900 Half St. SW., Washington, DC 20324.

* * * * *

§ 298a.7 [Amended]

7. Section 298a.7 is amended by removing paragraphs (b), (c) and (d).

§ 298a.8 [Amended]

8. In § 298a.8, the following changes are made:

a. Paragraph (a) is amended by changing "the Assistant for Information, Defense Investigative Service (Record Amendment Request—D0020), Washington, DC 20314" to "the Office of Information and Legal Affairs, 1900 Half St. SW., Washington, DC 20324".

b. Paragraph (c) is removed.

9. In § 298a.9, make the following changes: a. Paragraph (a), introductory text, and paragraph (b) are revised as follows:

§ 298a.9 DIS review of request for amendment.

(a) *General:* Upon receipt from any individual of a request to amend a record pertaining to himself and maintained by the DIS, the Office of Information and Legal Affairs will handle the request as follows:

* * * * *

(b) *DIS Determination to Approve or Deny:* Determination to approve or deny and request to amend a record or portion thereof may necessitate additional investigation or inquiry be made to verify assertions of individuals requesting amendment. Coordination will be made with the Director for Investigations and the Director of the Personnel Investigations Center in such instances.

b. Paragraph (a)(3)(ii) is amended by removing the words "(Record Amendment Denial Review), D0030, Washington, DC 20314" and inserting the words "1900 Half Street SW., Washington, DC 20324".

§ 298a.10 [Amended]

10. Section 298a.10 is amended by removing the words "Assistant for" and inserting the words "Office of Information and" in paragraphs (a), introductory text, (a)(4)(iii), and (b).

§ 298a.11 [Amended]

11. Section 298a.11 is amended by removing the last sentence in the introductory text to paragraph (b).

12. Section 298a.12 is revised as follows:

§ 298a.12 Fees.

Individuals may request copies for retention of any documents to which they are granted access in DIS records pertaining to them. Requestors will not be charged for the first copy of any records provided; however, duplicate copies will require a charge to cover costs of reproduction. Such charges will be computed in accordance with DoD Directive 5400.11.

§ 298a.14 [Amended]

13. Section 298a.14(a) is amended by removing the entire second sentence beginning with the words, "They may be" and ending with "Director of Personnel." and inserting "They may be exercised only by the Director, DIS and the Chief of the Office of Information and Legal Affairs."

14. Section 298a.15 is amended by revising paragraphs (b) and (j); by removing and reserving paragraph (c); and by removing paragraph (g)(3):

§ 298a.15 DIS implementation policies.

* * * * *

(b) Privacy Act rules application: Any request which cites the neither Act, concerning personal record information in a system of records, by the individual to whom such information pertains, for access, amendment, correction, accounting of disclosures, etc., will be governed by the Privacy Act of 1974, DoD Directive 5400.11 and these rules exclusively. Requests for like information which cite only the Freedom of Information Act will be governed by the Freedom of Information Act and DoD Regulation 5400.7R. Any denial or exemption of all or part of a record from notification, access, disclosure, amendment or other provision, will also be processed under these rules, unless court order or other competent authority directs otherwise.

* * * * *

(j) *Ownership of DIS investigative records.* Personnel security investigative reports shall not be retained by DoD recipient organizations. Such reports are considered to be the property of the investigating organization and are on loan to the recipient organization for the purpose for which requested. All copies of such reports shall be destroyed within 120 days after the completion of the final personnel security determination and the completion of all personnel action necessary to implement the determination. Reports that are required for longer periods may be retained only

with the specific written approval of the investigative organization.

M. S. Healy,

OSD Federal Register Liaison Officer, Washington, Headquarters Services, Department of Defense.

May 26, 1981.

[FR Doc. 81-16360 Filed 6-1-81; 8:45 am]

BILLING CODE 3810-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-5-FRL-1842-2]

Availability of Implementation Plan Revisions for Nonattainment Areas in the State of Ohio

AGENCY: Environmental Protection Agency.

ACTION: Notice of Receipt and Availability.

SUMMARY: This notice announces receipt of and availability for public review of documents submitted by the State of Ohio. The State provided these documents to satisfy the approval conditions specified in the October 31, 1980, **Federal Register** for its carbon monoxide and ozone State Implementation Plan (SIP). EPA's proposed rulemaking action on these documents will be published in a subsequent **Federal Register.**

DATES: See Supplementary Information

ADDRESSES: The documents may be examined during normal business hours at the following offices:

U.S. Environmental Protection Agency, Region V, Air Programs Branch, 230 South Dearborn Street, Chicago, Illinois 60604

Ohio Environmental Protection Agency, 361 East Broad Street, Columbus, Ohio 43216

Written comments should be sent to:

Gary Gulezian, Chief, Regulatory Analysis Section, Air Programs Branch, U.S. EPA, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

It is requested that you submit three copies along with the original of any comment.

FOR FURTHER INFORMATION CONTACT: Richard J. Clarizio, Regulatory Analysis Section, Air Programs Branch, USEPA, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6029.

SUPPLEMENTARY INFORMATION: In the October 31, 1980, **Federal Register** (45 FR 72122) EPA conditionally approved specific poritions of the Ohio carbon monoxide and ozone State Implementation Plan (SIP). In that **Federal Register**, EPA stated that, for full approval, the State needed to correct certain portions of the SIP. The State agreed to correct those portions on a schedule developed by it and proposed for approval in the October 31, 1980, **Federal Register** (45 FR 72215). The purpose of today's notice is to announce receipt and availability for public review of the following:

1. Youngstown General Policy Board resolution of approval and commitment to implement the transportation measures identified in the SIP for Youngstown—submitted November 20, 1980.
2. Information in reference to the 240,000-gallon per year throughput exemption for gasoline dispensing facilities regulated by OAC rule 3745-21-09(R)(3)(a)—submitted November 17, 1980, February 12 and March 27, 1981. (The March 27, 1981, letter indicated that the State will subsequently submit further information to satisfy this approval condition).
3. Schedules which delineate the dates on which additional point source and additional transportation systems management strategies will be developed and implemented for the Cleveland area—submitted November 24, 1980.
4. Carbon Monoxide study conducted for the Steubenville area—submitted February 12, 1981.
5. Revised OAC rule 3745-21-09(M)(2) for waste water separators—submitted February 12, 1981.
6. Carbon Monoxide hotspot attainment demonstration for the Dayton area—submitted February 24, 1981.

In addition to these items required by EPA's October 31, 1980, final rulemaking, the State of Ohio, on February 12, 1981, submitted revisions to OAC rules 3745-21-01, 04, 09 and 10. Ohio also submitted, on February 12, 1981, its State Implementation Plan for lead.

EPA is currently reviewing the above mentioned submittals. At the completion of its review, EPA will publish a notice in the **Federal Register** proposing rulemaking action on these submittals. All interested persons are advised that these submittals are available for review at the locations listed above. The proposed rulemaking notice previously mentioned will announce the last day for public comment. The public comment period will extend for 30 days from the date of publication of the notice of proposed rulemaking in the **Federal Register** (August 3, 1981).

Under Executive Order 12291 (Order), EPA must judge whether an action is a "major rule" and, therefore, subject to the requirements of a regulatory impact analysis. Today's action is not a major rule since it merely announces receipt and availability of the documents submitted by the State of Ohio. Any rulemaking action on these documents will be detailed in a separate **Federal Register** notice.

Dated: May 18, 1981.

Valdas V. Adamkus,

Acting Regional Administrator.

[FR Doc. 81-16420 Filed 6-1-81; 8:45 am]

BILLING CODE 6560-38-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR—Part 73

[BC Docket No. 81-331; RM-3726]

FM Broadcast Station Kailua-Kona, Hawaii; Changes in Table of Assignments

AGENCY: Federal Communication Commission.

ACTION: Proposed rule.

SUMMARY: This action proposes to assign FM Channel 228A to Kailua-Kona, Hawaii, in response to a petition filed by Norman E. and Sally A. Garrison. The assignment would provide Kailua-Kona with a first local aural service.

DATES: Comments must be filed on or before July 10, 1981, and reply comments on or before July 30, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Mark N. Lipp, Broadcast Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION:

Adopted: May 11, 1981.

Released: May 19, 1981.

By the Chief, Policy and Rules Division.

In the Matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations; (Kailua-Kona, Hawaii); BC Docket No. 81-331 RM-3726.

1. *Petitioner, Proposal, Comments:*

(a) A petition for rule making [1] was filed by Norman E. and Sally A. Garrison ("petitioners"), proposing the assignment of FM Channel 228A to Kailua-Kona, Hawaii, as that community's first FM facility. Additionally, we have received comments from the R.N. Groves Company, Inc. ("Groves"), in response to this proposal. Groves also expresses an interest in an FM allocation to Kailua-Kona, Hawaii, but argues that a Class C channel should be assigned

[1] Public Notice of this petition was given on August 13, 1980, Report No. 1244.

instead.[2] It indicates that it intends to seek a Class C allocation, which it believes could better serve the area with the use of directional coverage to the north and south. However, because it did not specify a particular channel with a mileage separation chart and a preclusion study, we have not proposed a Class C assignment. In addition, since Kailua-Kona is a small community, the need for a wide coverage area Class C channel should be demonstrated by a showing of the extent of unserved and underserved areas that would receive service. See *Roanoke Rapids, N.C.* [3] and *Anamosa, Iowa.* [4] Groves should submit this information as a counterproposal to be filed by the deadline specified herein for receipt of comments so that due consideration can be given.

(b) Channel 228A could be assigned to Kailua-Kona in compliance with the minimum distance separation requirements.

(c) Petitioners state that they will apply for the channel, if assigned.

2. *Demographic Data:*

(a) *Location:* Kailua-Kona is located on the west coast of the Island of Hawaii, approximately 280 kilometers (173 miles) southeast of Honolulu, Hawaii.

(b) *Population:* Kailua-Kona—365; North Kona Division—4,832; Island of Hawaii—63,468.[5]

(c) *Local Aural Broadcast Service:* None.

3. *Economic Considerations:* Petitioners state that Kailua-Kona shows trends of increasing population. They assert that Kailua-Kona is the focal point for tourism, the area's principal industry on the Kona Coast. Kona has been chosen as the site for an ocean thermal energy conversion research project, and a major seacoast test facility is being constructed there for research and development of energy technologies, according to petitioners.

4. In view of the apparent need for a first FM service to Kailua-Kona, the Commission proposes to amend the FM Table of Assignments, § 73.202(b) of the Rules, as follows:

City	Channel No.	
	Present	Proposed
Kailua-Kona, Hawaii		228A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. *NOTE:* A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before July 10, 1981, and reply comments on or before July 30, 1981.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM table of Assignments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Mark N. Lipp, Broadcast Bureau, (202) 632-7792. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission or oral presentation required by the Commission.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Henry L. Baumann,

Chief, Policy and Rules Division, Broadcast Bureau.

Appendix

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Section 0.281(b)(6) of the Commission's Rules, it is proposed to amend the FM Table of Assignments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed assignment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is assigned, and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may led the Commission to assign a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificte of service. (See Section 1.420 (a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street NW., Washington, D.C.

[FR Doc. 81-16343 Filed 6-1-81; 8:45 am]

BILLING CODE 6712-01-M

[2] Groves requested that a Class B channel should be assigned to Kailua-Kona. However, Hawaii is zoned for Class C assignments (Section 73.205(c)) and we have considered this request as one seeking a Class C channel.

[3] 9 F.C.C. 2d 672 (1967).

[4] 46 F.C.C. 2d 520 (1974).

[5] Population figures are taken from the 1970 U.S. Census.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm"

AGENCY: Fish and Wildlife Service, Interior Department.

ACTION: Proposed rule.

SUMMARY: This proposed rule is a redefinition of the Service regulations defining "harm" under Section 9 of the Endangered Species Act, 50 CFR 17.3. "Harm" would be redefined to mean an act or omission which injures or kills an endangered or threatened species of wildlife rather than the broader present interpretation which can be read to include significant environmental modification or degradation without further proof of actual injury or death to a listed species. This redefinition is proposed to eliminate the confusion that commentators and courts have had with the present definition.

DATE: Comments on this proposed rule must be submitted on or before August 3, 1981.

ADDRESSES: Interested persons or organizations are requested to submit comments to the Director (OES), United States Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Comments and materials relating to this rule are available for public inspection by appointment during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species (703/235-2771).

SUPPLEMENTARY INFORMATION: This Fish and Wildlife Service and the Office of the Solicitor recently completed a review of the Fish and Wildlife Service definition of "harm" in its regulations under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* That review was prompted by the confusion which the courts and commentators seem to have had with the definition the few times they have dealt with it, and by the uniform opinion of legal commentators that the present definition goes beyond intent of Congress. Bean, *The Evolution of National Wildlife Law*, 395–97 (1977); Note, *Endangered Species Act: Constitutional Tension and Regulatory Discord*, 4 Colum. J. Envt'l L. 97,100 n. 19 (1977); Note, *Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 Envt'l L. 29, 38–41 (1974); Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 Stan. L. Rev. 1247, 1251 n. 31 (1976).

Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, makes it illegal to "take" an endangered species of fish or wildlife. That term is defined as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

16 U.S.C. 1531(19). Fish and Wildlife Service Regulations define "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."
>
> 50 CFR 17.3.

This definition contains a significant ambiguity. If the words "such effects" are read to refer to the phrase "significantly disrupt essential behavioral patterns," then any significant environmental modification or degradation that disrupts essential behavioral patterns will fall under the definition of harm, regardless of whether an actual killing or injuring of a listed species of wildlife is demonstrated. Under such an interpretation, a showing of habitat modification alone would be sufficient to invoke the criminal penalties of Section 9.

In an opinion dated April 17, 1981, the Solicitor's Office concluded that such a result is inconsistent with the intent of Congress.

The Service notes that although the definition of "harm" has been the subject of a number of privately initiated civil environmental actions, in none of those lawsuits was the underlying validity of the present definition reviewed or briefed. The Service also notes that there has never been a prosecution initiated by the Fish and Wildlife Service under the present definition and the redefinition is not expected to have any significant effect on future enforcement actions or strategy.

Therefore, in light of the April 17, 1981 Solicitor's Office opinion, the Service believes that it is appropriate to redefine "harm" under the Endangered Species Act.

Appendix

Although it will not appear in the Code of Federal Regulations, a copy of the opinion of the Solicitor's Office is attached as an Appendix solely for purposes of public information.

National Environmental Policy Act

A draft environmental assessment has been prepared in conjunction with this proposal. It is on file in the Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia, and may be examined by appointment during regular business hours. A determination will be made at the time of final rulemaking as to whether this is a major Federal Action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C).

Primary Author

This proposal was written by David C. Cannon, Jr., Office of the Solicitor, Department of the Interior, Washington, D.C. 20240. (202/343-2172).

Note.—The Department of the Interior has determined that this is not a major rule and does not require preparation of a regulatory analysis under Executive Order 12291.

The Department has also determined that the rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. These determinations are discussed in more detail in a Determination of Effects which has been prepared by the U.S. Fish and Wildlife Service.

Proposal of Regulation

§ 17.3 [Amended]

Accordingly, it is hereby proposed to amend 50 CFR 17.3 by removing the existing definition of "harm" and inserting the following:

* * * * *

"Harm" in the definition of "take" in the Act means an act or omission which injures or kills wildlife.

Dated: May 11, 1981.

* * * * *

C. F. Layton,

Acting Deputy Assistant Secretary, Fish and Wildlife and Parks.

April 17, 1981.

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Fish and Wildlife Service Regulations Defining "Harm" under Section 9 of the Endangered Species Act

This memorandum examines the statutory authority underlying the definition of "harm" contained in FWS regulations implementing Section 9 of the Endangered Species Act, 16 U.S.C. 1538. We conclude that the present definition exceeds the scope of authority conferred by Section 9. We recommend that the Service's definition of "harm" be clarified so that only those habitat modifications that

actually injure or kill wildlife are subject to Section 9 criminal penalties.

Discussion

Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, makes it illegal to "take" an endangered species of fish or wildlife. That term is defined as follows:

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

16 U.S.C. 1532(1). Fish and Wildlife Service Regulations define "harm" as follows:

"Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of "harm."*

50 C.F.R. 17.3 (emphasis added).

This definition contains a significant ambiguity. If the words "such effects" are read to refer to the phrase "significantly disrupt essential behavorial patterns," then any signficant environmental modification or degradation that disrupts essential behavioral patterns will fall under the definition of harm, regardless of whether an actual killing or injuring of wildlife is demonstrated. Under such an interpretation a showing of habitat modification *alone* would be sufficient to invoke the criminal penalties of Section 9. As discussed below, such a result is inconsistent with the intent of Congress.[1]

A. The Endangered Species Act

ESA concerns itself with two major causes of species decline: (1) the commercial and sport taking of individual animals, and (2) the destruction or degradation of species' habitats. The Act creates a bifurcated system for dealing with these distinct problems. Section 7, 16 U.S.C. 1536, requires federal agencies to insure that actions taken are not likely "to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . ." Further, Section 5 authorizes land acquisitions as an additional means for preserving the habitat of listed species. 16 U.S.C. § 1534. Together, these two sections were designed to address the threatened destruction of habitat for listed species. Section 9, on the other hand, prohibits all action that constitute an actual taking of an endangered species of fish or wildlife. 16 U.S.C. 1538.

The Act's definition of "take" contains a list of actions that illustrate the intended scope of the term: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempts to engage in any such conduct. With the possible exception of "harm," these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis*, where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Goldsmith v. U.S.* 42 F.2d 133 (2d (Cir. 1948). Applying this principle to the present construction problem, the term "harm" should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife.

Also applicable here is the rule that provisions of a statute should not be construed in a manner that renders other provisions of the statute superfluous. If the Service's definition of "harm" is interpreted to prevent habitat modifications, without a further finding of actual injury to a listed species, Section 9 could be violated in most instances in which Section 7 consultation is called for. That is, it would be counterproductive for a federal agency to initiate Section 7 consultation over a proposed private action that would significantly modify a listed species habitat, if such private activity were already proscribed under Section 9. Such a construction would render Section 7 largely unnecessary. *See* Bean *supra* n. 1 at 397.

B. Legislative History

The legislative history reinforces the distinction between the taking prohibition of Section 9 and the habitat protection provisions of Section 7. Representative Sullivan, whose committe reported the House bill, stated:

For the most part, the principal threat to animals stems from the destruction of their *habitat*. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most [of] whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

Another hazard to endangered species arises from those who would capture or kill them, for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so. (emphasis added)

119 Cong. Rec. H8–18 (daily ed. Sept. 18, 1973).

The fact that Congress considered the problems of takings and habitat modifications separately does not, of course, preclude the possibility of overlap between the two regulatory schemes. Indeed, Congress seemed to anticipate such overlap when it made the following statement, taken from the House Report:

"Take" is defined broadly. It includes *harassment*, whether intentional or not. This would allow for example, the Secretary to regulate or prohibit the activities of bird-watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young. (emphasis added)

On its face this statement implies that an action such as habitat modifications which do not result in the actual injuring or killing of wildlife may nonetheless constitute a taking ("where the effects of these activities *might* disturb birds . . ."). We think it noteworthy, however, that the statement is limited to acts of harassment. "Harass" is defined at 50 C.F.R. 17.3 as follows:

"Harass" in the definition of "take" in the Act means *an intentional or negligent act or omission* which creates *the likelihood of injury to wildlife* by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. (emphasis added)

Under this definition two elements must be shown before a finding of harassment can be made: (1) likelihood of injury to wildlife, and (2) some degree of fault, either intentional or negligent. Because the definition contains an element of fault, it will not result in criminal liability for habitat modifications unless it is shown that the defendant knew or reasonably should have known that his actions would be likely to injure wildlife. Thus a private landowner who wishes to develop land that serves as habitat for an endangered species may do so if reasonable measures are taken to avoid injury to wildlife. The same is not true, however, of the definition of "harm." That definition adopts a strict liability standard which would impose criminal penalties on habitat modifications generally regardless of fault. Thus under the definition of "harm" a private landowner may be criminally liable for significant habitat modifications regardless of the reasonableness of his efforts to mitigate harm to individual wildlife.

An early version of the bill that became ESA specifically included "destruction, modification, or curtailment of habitat or range" within the definition of "take" but this was deleted from the final act. S. 1983. 93d Cong., 1st Sess. § 3(6)(A)(1973). Such deletions generally militate against a conclusion that Congress intended a result that it expressly declined to enact. *See Gulf Oil Corp. v Copp Paving Co.*, 419 U.S. 186 (1974). Accordingly, the Service's definition of "harm" should be clarified so that only those habitat modifications that result in the actual killing or injuring of wildlife will be subject to Section 9 criminal penalties.

D. Case Law

The limited case law interpreting the definition of "harm" indicates judicial confusion over the proper scope of the term. The Supreme Court mentioned the definition of "harm" in *TVA v. Hill*, 437 U.S. 153 (1978),

[1] Each of the four published articles that has considered the subject concludes that the Service's definition is overbroad. Bean, *The Evolution of National Wildlife Law* 395–97 (1977); Note, *Endangered Species Act: Constitutional Tension and Regulatory Discord*, 4 Colum. J. Envt'l L. 97, 100 n. 19 (1977); Note, *Endangered Species Act of 1973: Preservation or Pandemonium? 5 Envt'l L. 29, 38–41 (1974)*; Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 Stan. L. Rev. 1247, 1251 n. 31 (1976).

but did not clarify its meaning. It said in regard to the Tellico Dam situation, "[w]e do not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." 437 U.S. at 184 n. 30. We interpret the court's statement only to apply to the situation where an action would both degrade habitat and kill individual fish.[3] Such an interpretation is consistent with the approach adopted in this memoradum.

Only two cases have thus far interpreted the concept of "harm". In *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976), the Sierra Club sought to enjoin construction of a proposed dam alleging, *inter alia*, a violation of Section 9 of the Endangered Species Act. In a brief discussion, of limited, if any, assistance on the habitat mofification question, the court rejected plaintiffs' taking allegation, noting that a violation of Section 9 "rests upon the asserted ground that the erection of the dam is a 'clear attempt to harass or harm' the Indiana bat." 534 F.2d at 1304. The court's statement would seem to imply that a showing of specific intent to harass or harm is necessary to prove a taking, a postion inconsistent with the strict liability prohibitions established by Sections 9 and 11 and the present regulatory definition. Significantly, however, *Froehlke* was decided prior to promulgation of the "harm" definition, 44 Fed. Reg. 44415 (September 26, 1975), and the court therefore lacked the benefit of an agency interpretation.[4]

[3] The Supreme Court in *TVA v. Hill* recited the findings of the district court that construction of Tellico Dam "would make it highly probable that snail darter eggs would smother . . . " and that "[the snail darter's] primary source of food, snails, would probably not survive." 437 U.S. at 165 N. 16. We assume that the Supreme Court expected the destruction of the species' primary food source to result in the killing of individual fish.

[4] The district court opinion in *Froehlke* was issued on March 19, 1975. The briefs in the court of appeals case were submitted to the court on September 10, 1975. Two weeks after the briefs were submitted to the court of appeals, the Fish and Wildlife Service issued its endangered species regulations defining the concept of harm. 44 Fed. Reg. 44415 (September 26, 1975).

The second case interpreting the definition of "harm" is *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, No. 79-4636 (9th Cir. Feb. 9, 1981). This case did, on its face, direct its attention to habitat mofification. In *Palila*, Section 9 was invoked by the Sierra Club to prevent the State of Hawaii's wildlife agency from allowing feral goats and sheep to roam in the critical habitat of the Palila, an endangered bird species. The plaintiffs alleged that because the state had allowed the destruction of forest vegetation which provides the Palila's food, shelter and nest sites, a taking had occurred even though no killing or injuring of individual Palilas was demonstrated. The district court interpreted the Service's definition as follows:

"Take" is defined in the Act to include "harm" which in turn is defined in regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" *which actually injures or kills wildlife.* (emphasis added)

471 F. Supp. at 995.[5] In a brief opinion, the Ninth Circuit Court of Appeals affirmed the district court's decision in *Palila*. The court's discussion of the taking issue demonstrates fundamental confusion over the distinction between habitat modifications and takings. On the basis of the FWS definition of harm, the Ninth Circuit concluded that a taking had occurred. Slip op. at 287. The court's discussion of its finding strongly suggests that it confused the taking prohibition of Section 9 with the habitat modification provisions of Section 7. The court rested its conclusion on the fact that "it was shown that the Palila was endangered by the activity." *Id.* Citing *TVA* v. *Hill, supra*, the court noted its belief that its conclusion was consistent with the Act's legislative history which showed "that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat." *Id.*

As the result of the FWS overly broad definition of "harm", the Ninth Circuit decision in *Palila* erroneously supports the view that habitat modifications alone may constitute "harm." The implications of such a decision are far-reaching. The discussion set forth above indicates that the present definition of "harm," as interpreted by the Court of Appeals in *Palila*, exceeds the statutory authority conferred by Section 9 of the Act. Accordingly, we recommend that the Service clarify its definition to prevent the result reached in *Palila*.

Conclusion

In view of the foregoing discussion, we recommend that the Service's definition of "harm" at 50 CFR 17.3 be modified to read as follows:

"Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife.

J. Roy Spradley, Jr.

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[5] On its face this interpretation is in accord with the approach taken in this memorandum. The difficulty with *Palila* is that the standard was misapplied to the facts of the case. The district court, in a footnote, acknowledged that available estimates showed the Palila population to have actually increased since the onset of the state's grazing program, yet speculated that those estimates may have been "deceptively high" and went on to conclude that a taking had occurred. 471 F. Supp. at 988 n. 2. Accordingly, the district court's recital of the proper rule notwithstanding, *Palila* can be read as holding that habitat modification alone may constitute "harm." Furthermore, the issue of whether the Service's definition of "harm" exceeds statutory authority was neither briefed by the parties nor addressed by the court in *Palila*. Under the rule of *Webster v. Fall*, 266 U.S. 507, 511 (1925), questions not brought to a court's attention "are not to be considered as having been so decided as to constitute precedents".