(i) Minimum stocking levels and planting arrangements shall be specified by the Office on the basis of local and regional conditions and after consultation with the State agencies responsible for the administration of forestry and wildlife programs.

(ii) Trees and shrubs that will be used in determining the success of stocking and the adequacy of plant arrangement shall have utility for the approved postmining land use. At the time of bond release, such trees and shrubs shall be healthy, and at least eighty percent (80%) shall have been in place for at least three growing seasons. No trees and shrubs in place for less than two growing seasons shall be counted in determining stocking adequacy.

(iii) Vegetative ground cover shall not be less than that required to achieve the approved postmining land use.

(4) Bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded.

(5) Distribution of woody plants within the permit area shall be consistent with the post-mining land use.

(6) Sampling techniques for measuring woody plant stocking and ground cover shall be in accordance with techniques approved by the Office. Actual crop yields shall be used to determine production.

(f) *Roads.* In lieu of the requirements of § 817.150(c) of this chapter, roads shall be designed and constructed or reconstructed in compliance with the following standards in order to control subsequent erosion and disturbance of the hydrologic balance.

(1) *Primary Roads.*

(i) Except for existing roads and where lesser grades are necessary to control site-specific conditions, the overall grade shall not exceed lv:10h (10 percent), the maximum pitch grade shall not exceed lv:6.5h (15 percent), and there shall be not more than three hundred (300) feet of pitch grade exceeding ten (10) percent within any consecutive one thousand (1,000) feet of primary roads. In no case shall there be any pitch grade over fifteen (15) percent.

(ii) Culvert spacing shall not exceed one thousand (1,000) feet on grades of zero (0) to three (3) percent, eight hundred (800) feet on grades of three (3) to six (6) percent, and five hundred (500) feet on grades of six (6) to ten (10) percent, and three hundred (300) feet on grades of ten (10) percent or greater. Culverts shall be installed at closer intervals than the maximum in this part if required by the Office as appropriate for the erosive properties of the soil or to accommodate flow from small intersecting drainages. Culverts may be constructed at greater intervals than the maximum indicated in this part if approved by the Office upon a finding that greater spacing will not increase erosion.

(iii) Culverts shall be covered by compacted fill to a minimum depth of one foot.

(2) *Ancillary Roads.* (i) Field design methods may be utilized for ancillary roads.

(ii) Where lesser grades are necesary to control site-specific condition, overall grade shall not exceed lv:10h (10 percent). Pitch grade shall not exceed 1v:5h (20 percent). There shall not be more than one thousand (1,000) consecutive feet of maximum pitch grade.

(iii) Ancillary roads may meander so as to avoid large growths of vegetation and other natural obstructions.

(iv) Compaction on road embankments shall be only to the exten necessary to control erosion and maintain the road.

(v) Temporary culverts and bridges shall be sized to safely pass the one (1) year, six (6) hour precipitation event.

§ 942.819 Special performance standards—Auger mining.

Part 819 of this chapter, Special Permanent Program Performance Standards—Auger Mining, shall apply to any person who conducts surface coal mining operations which include auger mining.

§ 942.823 Special performance standards—Operations on prime farmland.

Part 823 of this chapter, Special Permanent Program Performance Standards—Operations on Prime Farmland, shall apply to any person who conducts surface coal mining operations on prime farmland.

§ 942.824 Special performance standards—Mountaintop removal.

Part 824 of this chapter, Special Permanent Program Performance Standards—Mountaintop Removal, shall apply to any person who conducts surface coal mining and reclamation operations constituting mountaintop removal.

§ 942.827 Special performance standards—Coal preparation plants not located within the permit area of a mine.

Part 827 of this chapter, Permanent Program Performance Standards—Coal Preparation Plants Not Located Within the Permit Area of a Mine, shall apply to any person who conducts surface coal mining and reclamation operations which include the operation of a coal preparation plant not located within the permit area of a mine.

§ 942.828 Special performance standards—In situ processing.

Part 828 of this chapter, Special Permanent Program Performance Standards—In Situ Processing, shall apply to any person who conducts surface coal mining and reclamation operations which include the in situ processing of coal.

§ 942.842 Federal inspections.

Part 842 of this chapter, Federal Inspections, shall apply to all exploration and surface coal mining and reclamation operations.

§ 942.843 Federal enforcement.

Part 843 of this chapter, Federal Enforcement, shall apply regarding enforcement action on coal exploration and surface coal mining and reclamation operations.

§ 942.845 Civil penalties.

Part 845 of this chapter, Civil Penalties, shall apply to the assessment of civil penalties for violations on coal exploration and surface coal mining and reclamation operations.

§ 942.855 Certification of blasters.

Part 855 of this chapter, Certification of Blasters, shall apply to any person who conducts coal exploration or surface coal mining and reclamation operations.

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Monday
October 1, 1984

Part VI

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 424

Listing Endangered and Threatened Species and Designating Critical Habitat; Amended Procedures To Comply With the 1982 Amendments to the Endangered Species Act; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

Listing Endangered and Threatened Species and Designating Critical Habitat; Amended Procedures To Comply With the 1982 Amendments to the Endangered Species Act

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

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) amend Part 424 of Title 50 of the U.S. Code of Federal Regulations in order to comply with changes made in the Endangered Species Act of 1973 (Act) by the Endangered Species Act Amendments of 1982 (Amendments). Part 424 is amended to alter the procedures followed by the Services in determining whether species are endangered or threatened and in designating or revising critical habitat. Changes are made in the treatment of petitions from the public, mandatory time limits for various actions, standards under which determinations are made, and other procedural matters.

EFFECTIVE DATE: This rule takes effect on October 31, 1984.

ADDRESS: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Office of Endangered Species, U.S. Fish and Wildlife Service, 1000 North Glebe Road, Arlington, Virginia.

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), or Dr. Charles Karnella, Office of Protected Species and Habitat Conservation, National Marine Fisheries Service, Washington, D.C. 20235 (202/634–7471).

SUPPLEMENTARY INFORMATION: The Services first adopted regulations governing the listing, delisting, and reclassification of species, and the designation and revision of critical habitat, on February 27, 1980 (45 FR 13022). These regulations are codified at 50 CFR Part 424. The Endangered Species Act Amendments of 1982 became law on October 13, 1982, making several changes in the required procedures to be followed under the Act.

In order to implement the changes of the Amendments, the Services proposed to amend 50 CFR Part 424 on August 8, 1983 (48 FR 36062). Comments were invited at that time from all interested parties, and the comment period on the proposal closed on October 7, 1983.

The present final rule essentially adopts the proposal of August 8, 1983. Some minor changes have been made in response to comments, as discussed below in the Summary of Comments and Recommendations. Some minor editorial changes have been made for the sake of clarity.

In addition the terms "endangered," "threatened," and "critical habitat" are not routinely capitalized in the final rule. This change from past practice is adopted to conform more closely with conventional English usage.

Changes made by the Amendments were designed to ensure that decisions in every phase of the listing process are based *solely* on biological considerations, and to prohibit considerations of economic or other nonbiological factors from affecting decisions regarding endangered or threatened status. The legislative history accompanying the Amendments makes it clear that, although economic considerations are relevant for the designation of critical habitat, such considerations should not be taken into account in deciding whether to list a given species. The listing process has been streamlined by reducing the time periods for adopting rules, by consolidating public meeting and hearing requirements, and by providing for the separation of critical habitat designations from the listing process when appropriate.

After receiving a petition to list, delist, or reclassify a species, the Secretary must now act "to the maximum extent practicable" within a 90-day period to publish a finding that the petition does or does not present substantial information indicating that the petitioned action may be warranted. The requirement to make such a finding within 90 days may be waived only if the devotion of staff resources to petition responses would interfere with actions needed to list other species in greater need of protection. Decisions to take one action rather than another must be made in conjunction with a scientifically-based priority system (such a system is embodied in U.S. Fish and Wildlife Service guidelines published September 21, 1983, 48 FR 43098).

Within 12 months of receiving a petition that presents "substantial scientific or commercial information," the Secretary must publish a proposed rule, determine that the petitioned action is not warranted, or determine that the action is warranted but that other listing, delisting, or reclassification actions preclude the preparation of a proposal. In any case, a notice of such findings must be published in the **Federal Register.** If a negative finding is made with regard to a petition, the finding is subject to judicial review.

The Amendments also provide that the 12-month time period may be extended only if the Secretary can demonstrate expeditious progress on other listings, delistings, and reclassifications. Any petition so extended is treated as if resubmitted, and an additional year is allowed for the required action. The justification for failure to propose an otherwise warranted petitioned species is subject to judicial review. Petitions to list, delist, or reclassify species that were pending at the time of passage of the Amendments are also covered by these new provisions.

Petitions to revise critical habitat, or to designate critical habitat concurrently with a listing, are not required to present economic information relevant to the proposed revision or designation. They will be treated in the same manner as other petitions except that the Services need not propose a revision supported by a petition containing substantial scientific information within 12 months of receipt. Rather, they must publish notice of an intended course of action.

Final action on listing, delisting, or critical habitat proposals now must be taken within 1 year of publication of the proposed rule, instead of 2 years as was previously allowed. A 6-month extension is permissible only if there exists substantial disagreement among specialists regarding the sufficiency or accuracy of the required biological data. This 6-month extension is not permissible to allow additional time to conduct economic or other analyses relating to critical habitat designations.

The Amendments restate the general requirement of concurrent listing and critical habitat designation for a given species but authorize listing without the latter in certain circumstances. If a critical habitat designation is found "not prudent," the listing can become final at any time during the 1-year (or 18-month) period. When scientific and commercial information indicates that prompt listing of the species is essential to its conservation, but the analysis necessary to designate critical habitat has not been completed, the listing must be made final within the 1-year (or 18-month) period without designating critical habitat; the critical habitat segment of the proposal then would be completed and made final separately.

When critical habitat has been deemed "not determinable" within the 1-year (or 18-month) period, the initial 1-year period may be extended by not more than 1 additional year. At the end of the additional year, or earlier, critical habitat must be determined to "the maximum extent prudent." Revisions may be made as new information becomes available.

Finally, the Amendments require that if the Secretary adopts a rule over the objection of a State conservation agency or fails to take an action petitioned by such an agency, a written justification must be provided to the agency.

Summary of Comments and Recommendations

The Services received comments from the following individuals and organizations: the American Association of Port Authorities (AAPA); the Edison Electric Institute (EEI); the National Wildlife Federation (NWF); the Sierra Club, Hawaii Chapter (HSC); the Western Timber Association (WTA); the Wildlife Legislation Fund of America (WLFA); the Alabama Power Company (APC); Chevron U.S.A., Inc. (CUS); Conoco Inc., North American Production (CNAP); Middle South Services, Inc. (MSS); Texas Utility Services, Inc. (supporting the comments of EEI); the U.S. Department of Agriculture, Forest Service (USDA); the Office of the Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics (DOD); the Department of Energy; the Office of Federal Activities of the U.S. Environmental Protection Agency (EPA); the Office of Environment and Energy, Department of Housing and Urban Development; the Office of Food and Natural Resources, Department of State (DS); Dr. Mark K. Johnson, of the School of Forestry and Wildlife Management, Louisiana State University; Mr. Richard W. Klukas, Wind Cave National Park; Dr. Lovett E. Williams; the Colorado River Water Conservation District (CRWCD); the Michigan State Department of Natural Resources; the Department of Environmental Resources of the Commonwealth of Pennsylvania; and the Office of Planning and Budget, State of Utah. Joint comments were submitted by the Environmental Defense Fund, Defenders of Wildlife, the Center for Environmental Education, the Humane Society of the United States, the Natural Resources Defense Council, the Friends of the Sea Otter, and the National Audubon Society (EDF).

Many comments expressed general approval of the proposal. Comments of a general nature are addressed below. More specific recommendations and responses follow, organized by the sections of the proposed rule to which they refer.

CUS, noting the Amendments' intention to expedite decisions on listings and delistings, encouraged the Services to avoid using the full time allotted to issue rules, and to especially avoid extensions of listing deadlines. The Services agree with the rationale presented in this comment, that both the species involved and industry project planning are best served by expeditious determinations of species' status. The Services intend listings and delistings to be processed as quickly as possible, consistent with the need to consider carefully all information in formulating rules. It is intended that the provisions for extending deadlines, contained in both the Act and the present procedural rules, will be invoked rarely and only in cases of real need to do so.

EDF expressed concern that determinations regarding the substantiality of petitions not be made according to the listing priority system previously published by the U.S. Fish and Wildlife Service (48 FR 43098, September 21, 1983). The Services regret any impression that may have been given in the preamble to the proposed listing regulations that determinations of substantiality of petitions would follow that priority system. Although considerations of priority may preclude prompt actions in response to petitions, it is not intended that they will affect the substantive finding that must be made regarding substantiality or the later finding that a petitioned action is or is not warranted.

EDF also recommended that a declaration be made that, "species the subject of 'pending proposals' previously withdrawn may be reproposed without regard to when the biological information was developed." The Services consider that this position is clear both in the amended Act and in the proposed regulations. Species withdrawn for purely administrative reasons under the 2-year limit on proposals, which is no longer contained in the Act, may be reproposed whenever information is available to support such a proposal.

Comments expressed contrary opinions with regard to the timing of critical habitat designations. Three (Dr. Gilbert, Mr. Klukas, WTA) held that delaying designation of critical habitat until after the listing of a species would likely benefit the species by expediting listing, while three others (AAPA, CRWCD, HSC) recommended that such designation regularly be concurrent with listing. The Services appreciate the concerns of those who believe that definition and designation of critical habitat in most cases slows the listing process. Although Congress, in passing the Amendments, clearly expressed the intention that the economic considerations connected to critical habitat designation not delay listing, other elements of the designation process clearly slow the pace of listing species. The Services also are aware of the concern that, if critical habitat is not designated concurrently with the listing of a species, potential conflicts may not be identified early enough to be satisfactorily resolved, or important areas of habitat may be inadvertently destroyed. It should be noted, however, that the Services may notify affected organizations and individuals of the habitat needs of species without going through the formal designation of critical habitat.

In making decisions regarding the timing and advisability of critical habitat designations, the Services will apply the requirements of the Act in a reasonable fashion. Legislative history makes clear that Congress intended designation of critical habitat to be beneficial to the conservation of species. Experience has shown, nevertheless, that precise identification of habitat of vulnerable species carries inherent risks of vandalism and taking. In some cases, these risks can be controlled through vigorous enforcement of Section 9 of the Act. In other cases, because of enforcement difficulties, or because no violation of Section 9 may be involved (as in taking of plants on non-Federal land or the destruction of plants even on Federal land without their reduction to possession), designation of critical habitat may have a net adverse effect on a species. It is this net effect, taking into account potential risks and benefits of a particular designation, that will guide the Services in decisions regarding the prudence of a particular designation. The timing of critical habitat designation is explicitly mandated in the Act, along with the possibility of deferring action for a limited time after listing a species when critical habitat is judged not to be determinable concurrently with listing. The latter deferral of designation can allow listings to go forward in a timely manner and critical habitat to be designated later. The Services believe that these provisions of the Act are accurately reflected in the proposed and final listing regulations.

HSC recommended that provisions be made to include as part of the critical habitat "* * * those portions of the historic range of an endangered species which are still suitable for the species but, because of one or more perturbations to it, no longer occurs there but almost certainly could if such perturbations were removed or adequately ameliorated." The Services note that the Act and the listing regulations allow designation of areas outside the known range of a species when such areas are essential to the species' conservation. These provisions adequately allow for critical habitat designations in unoccupied portions of a species' historic range.

CRWCD recommended that, "* * * where a species listing proposal is known to conflict with a water (or other) resources development project, the agencies should consult closely with the affected entity." The Services agree that early contact and sharing of information with affected entities is desirable and is in the best interests of candidate species as well as sound project planning.

Subpart A—General provisions

Section 424.02 Definitions.

(b) *"Candidate"*—Several commenters (CUS, EDF, NWF, USDA) requested clarification of this term, particularly to differentiate between a candidate species being considered for listing and a species that has already been proposed to be listed. The definition has been altered in the final rule to make this point clear. As stated in the proposed rule, this term is included and defined to reflect the Fish and Wildlife Service's current practice of issuing consolidated notices of review, in which such species are identified.

(c) *"Conservation, conserve, and conserving"*—NWF recommended that this definition be altered to conform to that proposed to be placed at 50 CFR 402.2 (48 FR 29998, June 29, 1983). The Services believe that the two definitions are essentially equivalent and, inasmuch as that proposed at § 424.02 precisely follows the definition contained in the Act, this version is adopted here.

(d) *"Critical habitat"*—CNAP recommended that this definition be altered to require that a positive showing be made (presumably that an area designated is essential to a species' conservation) if critical habitat extends beyond the area actually occupied by a species, and that multiple-use management of critical habitat be provided for. The Services consider both recommendations to fall outside the scope appropriate for a definition. The former is adequately addressed in § 424.12(e). The latter recommendation is consistent with the provisions of the Act and policies of the Services. No limitation, express or implied, on multiple use of areas designated as critical habitat is contained in the Act or has been imposed by the Services, so long as such multiple use is consistent with section 7(a)(2) of the Act.

(e) *"Endangered species"*—CNAP indicated that, to be endangered, a species must be in danger of extinction throughout all or a significant portion of its range, and expressed concern over the, "* * * unjustified listing of subgroups or subspecies by location of a plentiful species (e.g., Tennessee River tributary 'snail darter' and 'Houstonian [sic] toad')." The Services note that both the snail darter (*Percina tanasi*) and the Houston toad (*Bufo houstonensis*) are recognized as full species and listed throughout their ranges. The Services further note that the Act explicitly allows for the listing of infraspecific taxa and, in the case of vertebrate species, populations as well. Thus, any change in this definition that would exclude such entities would be in conflict with the clear provisions of the Act.

(g) *"Plant"*—NWF recommended that this definition be altered to make it conform more closely to the definition of "wildlife" or "fish and wildlife" at § 424.02(n). The Services accept this recommendation for the sake of clarity and uniformity. The definition has been altered in the final rule. This is not viewed as a substantive change, inasmuch as the Services have always interpreted the two definitions as being comparable in scope.

(i) *"Secretary"*—CNAP questioned the appropriateness of having an authorized representative empowered to serve in the place of the Secretary in all cases. The representative referred to is an individual with clearly delegated authority from the Secretary to undertake the actions covered by this rule. Nothing in the Act hinders such a delegation. At present, these authorities have been delegated to the Assistant Secretary of the Interior for Fish and Wildlife and Parks, and the Assistant Administrator for Fisheries, National Marine Fisheries Service, Department of Commerce.

(k) *"Species"*—Dr. Williams suggested that the Services consider defining this term so that it does not use the term "subspecies," because of the lack of consensus among biologists as to its precise meaning and significance, and because of the likelihood that it would be misinterpreted by individuals lacking an adequate background in biology. The Services appreciate the possible uncertainty that could arise if the term "subspecies" were not interpreted carefully. However, the Act specifically includes this term within its definition of "species," so that its exclusion from the regulatory definition would not be warranted. The Services are confident that they have access to sufficient biological expertise to ensure that the definition of "species" will be interpreted in a manner consistent with accepted biological principles.

Several additional terms were suggested by NWF for inclusion and definition in this section. These were "maximum extent practicable," "promptly," "proposed species," and "substantial information." The Services believe that the first two of these are not used in the regulations in any specialized sense that differs from their common meanings, and that regulatory definition is unnecessary. "Proposed species" was recommended for inclusion solely to draw a distinction between it and "candidate." Inasmuch as this distinction is made in the altered definition of "candidate" finally adopted, the inclusion and definition of a new term is not necessary. The term "substantial information" has specific applicability to findings necessary with regard to petitions. Because of this specific and narrow applicability, it has been defined in § 424.14(b). Inclusion of this definition in § 424.02 is unnecessary and could be misleading.

Subpart B—Revision of the lists

Section 424.10 General.

EDF recommended that this section be broadened to extend the new petition procedures to petitions to designate experimental populations or to treat species as if listed because of similarity of appearance. The Services believe that Congress clearly expressed its intent with regard to the scope of the amended petition provisions, and applied different requirements to each class of petitions covered by the Act. Inasmuch as no provision was made to subject either experimental populations or similarity-of-appearance cases to specific listing procedures under the Act, the Services consider it appropriate to treat such petitions, if received, only under the relevant provisions of the Administrative Procedure Act (5 U.S.C. 553), as opposed to subsections 4 (a) and (b) of the Endangered Species Act.

Section 424.11 Factors for listing, delisting, or reclassifying species.

CNAP responded to this section that, "We do not agree that Congress in using the phrase 'solely on the basis of the best scientific data available to him' (ESA, section 4(b)) ever intended that every scarce creature or plant should be protected at all costs!" The Services note that the listing provisions of the Act, and the regulations intended to implement them, address the identification by the Secretary of species that qualify for the Act's protection. Insofar as these provisions consider the status of a species, Congress has clearly indicated its intention that any costs of eventual protection not be considered as part of the identification and listing process. The exemption procedures in section 7 of the Act are intended to effect any balancing of the costs involved against the value of protecting a species. These provisions of section 7, however, are completely independent of the identification and listing of species that are unlikely to survive without protection under the Act.

Dr. Williams questioned the possibility, allowed in § 424.11(a), of listing taxonomic groups of rank higher than species, noting that, "Taxa above the species level are not biological entities—they are merely components in somebody's classification scheme that reflects their beliefs concerning evolutionary affinities." The Services wish to clarify the intention, stated in the proposed and final regulation, that taxonomic groups at a rank higher than species will be listed only if all their constituent species individually meet the terms of the Act for listing. Listing of the taxon of higher rank then serves as a "short-hand" means of listing all its constituent species.

APC recommended that § 424.11(b) be altered to conform more closely to the wording of section 4(b)(1)(A) of the Act, by adding the material proposed to be located at § 424.11(f) and deleting the phrase "* * * without reference to possible economic or other impacts of such determination." The Services believe that no substantial change would result from adoption of such a recommendation, and that the rule as proposed more clearly expresses both the provisions of the Act and the instructive language of the Conference Report on the Amendments than would the recommended alternative.

CRWCD indicated concern that "* * * too little emphasis may have been given in the past to the quality and validity of the biological information used by agencies in the listing process." They noted the provision of § 424.11(b) requiring that the Services formulate listings based on the best available scientific and commercial information and recommended that listing decisions not be made on, "* * * shaky scientific foundations or biased analyses." The Services agree that listing decisions should not be made on the basis of faulty or inconclusive information, and affirm their intention to comply fully with relevant provisions of the Act and these regulations. It is their intention to base all listing decisions on the best information available to them when such decisions are made.

EPA recommended that language be added to the preamble of the final rule to clarify why a more precise definition of time is not included in § 424.11(d), which describes the period of time necessary to establish that a listed species has become extinct. The comment expressed understanding that this length of time might vary among the species concerned, in that some species are more cryptic than others. The Services agree and note that survey techniques appropriate to a given species in determining whether it has become extinct will require varying lengths of time to carry out. The Services intend to base delistings due to extinction upon conclusive evidence appropriate for the species in question.

EPA also recommended that § 424.11(d)(2) be altered to make it follow more closely the language of section 4(b)(1)(A) of the Act. This recommendation is accepted, and the final rule is so altered.

Section 424.12 Criteria for designating critical habitat.

CNAP expressed the opinion that, "* * * there must be a positive showing of need before a critical habitat larger than that currently occupied by the species to be protected can be designated." The Services agree that any designation of critical habitat must be based on a finding that such designated area contains features that are essential in order to conserve the species concerned. This finding of need will be a part of all designations of critical habitat, whether or not they extend beyond a species' currently-occupied range.

EEI supported the Services' intention to protect species from "* * * harm that might result if critical habitat were publicized." Nevertheless, the Institute recommended that private parties contemplating development or other activities be provided with information as to whether "non-designated critical habitat" could be affected. The Services note that the term "critical habitat" is not properly applied to an area that has not been formally designated as such by regulation. However, the Services intend to inform private parties of the habitat needs of listed species whenever a potential conflict is identified between contemplated development and the species' conservation, regardless of whether critical habitat has been designated for such species.

EPA recommended that criteria and examples of cases be provided in which it would not be prudent to designate critical habitat because designation would not be beneficial to the species concerned. The Services believe that such decisions must be made on a case-by-case basis. Because of the variations in circumstances, it is not possible to formulate strict criteria according to which decisions regarding the prudence of a critical habitat designation might be made. Nevertheless, it is possible to note some general considerations that may contribute to such decisions. As noted above in response to more general comments, the Services will examine the balance between risk to a species that might be a consequence of designating its critical habitat and benefits that the species might derive from such designation. The risks may be immediate and obvious, such as the taking of a species that has demonstrated commercial value, or more speculative, such as vandalism to a species' habitat as a consequence of wide public notification of its precise boundaries. Experience has also shown that listing of a species may stimulate commercial demand that could not have been predicted beforehand, and that designation of critical habitat may generate public antagonism that could lead to vandalism. Such possibilities will be considered in determining whether a particular designation of critical habitat is prudent. To the extent possible, the Services will attempt to undertake only those regulatory actions of net benefit to the conservation of species and their habitats. In those cases in which the possible adverse consequences would outweigh the benefits of designation of critical habitat, the Services may forego such designation as matter of prudence.

Dr. Williams suggested that designation of critical habitat not be considered determinable, "When habitat requirements are superfluous to the recovery requirements of the species." He noted that this would be appropriate in cases of species affected by such threats as pesticides, exotic animals, or hunting. The Services believe that such classes of threats are often related to habitat in the broad sense, noting that the presence of a pesticide is an element of the habitat occupied by a species. In any event, such considerations are more properly addressed in determining whether designation is prudent, rather than whether critical habitat is determinable. In cases in which critical habitat designation would not be of benefit to a species, the Services believe that sufficient discretion exists under the Act and § 424.12(a)(1) to forego designation on grounds of prudence.

AAPA recommended deletion of proposed § 424.12(a)(2)(ii), because they failed to, "* * * see how a species can be determined to be endangered if its biological needs are not sufficiently well-known to allow identification of its critical habitat needs." The Services believe that it is possible to determine that a species is endangered or threatened, on the basis of its known and documented decline or evidence of threats to it, without knowing what precise habitat resources the species requires for survival and recovery. This is one reason for which the "determinable" standard was inserted by the Amendments and is reflected, with explanation, in the proposed and final regulations.

EEI recommended that § 424.12(e) be modified to allow designations of critical habitat outside the present geographical range of a species only when such designation is required to prevent the species' extinction. The Services believe that such a change would be inconsistent with the Act's purpose of conserving and recovering species as well as the definitions of critical habitat contained in the Act and these regulations, both of which allow designation of critical habitat beyond a species' known range when such designation is essential for the species' conservation. The Services also disagree with EEI's further statement in this regard that extensions beyond a species' present range are unlikely to occur without artificial assistance, and that such additions to critical habitat are more properly considered under those portions of the Act and proposed regulations treating experimental populations. Designations of critical habitat outside current range are normally undertaken when essential to a species' conservation and to provide for natural range expansion into adjacent suitable habitat or to assure proper management of resources. Neither of these cases is appropriately addressed under provisions governing the establishment of experimental populations.

APC recommended that provisions regarding analysis of impacts of critical habitat designation, proposed to be located at § 424.19, be relocated to § 424.12(c). The Services consider this inadvisable inasmuch as § 424.12 deals with both proposed and final rules to designate critical habitat. Current procedures call for the consideration of economic impacts only after publication of a proposed rule, so that placement of the relevant provisions in § 424.12 would be inappropriate. The final version of § 424.19 has been altered to reflect the proper timing of analyses of critical habitat designations. Reference to the economic considerations for final rules has been included in § 424.12.

EDF recommended that the Services, "* * * not foreclose the authority to designate critical habitat in foreign countries," as proposed in § 424.12(h). The Services believe that the clear instruction of the House Committee on Merchant Marine and Fisheries, contained in its report on the Amendments and implicitly accepted by the Committee of Conference, must control any consideration of designating critical habitat in foreign countries. The House report noted with approval an opinion of the Office of the Solicitor, Department of the Interior, that the Act does not contain authority to designate critical habitat in areas outside U.S. jurisdiction. Given this clear instruction in the legislative history of the Amendments and the original 1973 Act, the Services perceive no discretion to interpret the Act otherwise, and have retained § 424.12(h) in the final rule in order to clarify their position in this regard.

Section 424.13 Sources of information and relevant data.

NWF commented that the statement in the proposal that, "[T]he last sentence of this section would be deleted because a similar provision is proposed to be added to § 424.11(d)," was misleading and incorrect. The Services agree; the reference should have been to § 424.11(c). Inasmuch as this error was part of the section-by-section analysis, rather than the text of the proposed rule, no change in the final rule is necessary. The Services regret any misunderstanding that might have arisen.

EPA recommended that this section be revised to require that the Secretary consult with individuals, agencies, or sovereign nations whenever a specific interest in a species is known to exist on the part of such entities, rather than requiring such contacts only "as appropriate." The Services note that this provision was originally included in § 424.13 to reflect a former provision of section 4(b)(1) of the Act. Although the relevant portion of the Act was removed by the Amendments, the Services have retained the provision for consultation with affected parties. In the absence of any legislated requirement in the amended Act, however, the Services consider it inappropriate to make this provision any more stringent than it was in the proposed version.

Dr. Johnson suggested that the phrase, "if available" be inserted at the beginning of the second sentence of § 424.13, so that the Secretary may review only those data that are available. Inasmuch as a substantive review can only address information that is in hand, the Services believe this qualification to be unnecessary.

CNAP expressed the opinion that "interested parties" must specifically include any person affected by the proposed designation. The Services agree that such persons should be consulted in formulating any proposed change in the lists, and intend to do so. Inclusion of such a statement in the regulations, however, would imply that *only* such persons are to be consulted, and thus would tend to limit the scope of interested parties that might be consulted. The Services believe that such implied limitation would be inadvisable.

Section 424.14 Petitions.

NWF questioned the basis for applying different standards to petitions dealing with critical habitat than those applied to petitions regarding a species' listing. Section 4(b)(3) of the Act explicitly prescribes the different standards to be applied to such petitions; the Services follow the clear language of the Act in this case.

Dr. Johnson suggested that § 424.14(a) be altered to require that a petition contain substantial scientific or commercial information. The Services note that the paragraph in question is intended to identify those elements that must be included in a document for it to be considered a petition. Inasmuch as the Act requires that petitions be evaluated to determine whether they contain such substantial information, it would be contradictory to require such information in order for a document to be considered to be a petition.

NWF requested that a provision be added to this section to require the Secretary, when making a negative finding under § 424.14(b)(1), to so notify the petitioner in writing and explain any deficiencies of information in the petition, so that it could be corrected and resubmitted. Although the Services will notify petitioners of findings and point out the basis on which negative findings are made, it may not be possible in all cases to furnish a petitioner with specific points of information that might be added to a petition in order for it to provide substantial information. The finding rests not on any artificial compliance with the general guidance of § 424.14(b)(2)(i)–(v), but upon a reasoned evaluation of the information presented and a judgment of whether or not it is sufficient to warrant a review of a species' status. As an example, a petition that failed to adequately establish the existence of a threat to a species recommended for listing could be judged not to have presented substantial information, but it would not necessarily be possible for the Services to detail the precise kinds of information that would be sufficient to document such threat. Because of the speculative nature of any such explanation, the Services do not consider it advisable to establish it as a requirement.

NWF also objected to § 424.14(b)(2)(i)–(v) as proposed, holding that the considerations presented would not always be germane or necessary to the evaluation of a petition. NWF therefore advocated inclusion of an additional paragraph stating that, "Items (b)(2)(i–v), while usually necessary for petition evaluation, shall not be required to demonstrate substantial information." The Services agree in principle with this comment, but do not believe the rule as proposed is unclear on this point. The paragraphs in question are intended only to provide a general guide to the kinds of information the Services believe are necessary to evaluate a petition. They do not establish strict requirements that must be met in order for a petition to be considered substantial, so that a specific qualification of the sort advocated by NWF would be unnecessary.

APC recommended that, in addition to the types of information to be considered in determining whether a petition presents substantial information under § 424.14(b)(2)(ii), the Secretary consider whether a petition describes, "* * * the features of economic and biologic importance of any recommended critical habitat."

The Services note that the Conference Report on the Amendments expressed the intention that petitioners not be required to provide economic information, other than evidence of trade, if any, in connection with a petition to list or delist a species or a petition to revise critical habitat. Thus, it would be inappropriate to require such information among that to be considered under § 424.14(b)(2). Proposed § 424.14(b)(2)(iii) was concerned with information bearing on the appropriateness and extent of any critical habitat designation recommended in a petition primarily concerned with the determination of a species' status. The Services believe that proposed paragraph (iii) adequately outlined the types of information to be considered in evaluating a recommended critical habitat designation on biological grounds. However, to make clear that such information need not be included in a petition in order for it to satisfy the requirement to present substantial information, the proposed paragraph has been removed from the list of considerations to be examined in determining substantiality. The information regarding the concurrent designation of critical habitat is requested from each petitioner but not required in two new concluding sentences to § 424.14(b)(2). The Act's requirement that the Secretary consider economic impacts of such a designation is interpreted as applying directly to the Services, and is not necessarily to be addressed in a petition in order for that petition to be judged substantial.

NWF commented in reference to § 424.14(b)(3) that, "* * * the proposed regulations do not discuss what happens when the Secretary makes a negative finding on a petition, and they completely ignore the judicial review process * * *." Section 424.14(b)(1) requires that any negative 90-day finding on a petition be published in the **Federal Register** with notification being sent to the petitioner. Such publication and notice will constitute the Services' final action with regard to such a petition. The Services recognize the mechanism established by the Amendments to provide judicial review of findings on petitions. This mechanism is in place and available independently of the regulations adopted in Part 424, which are intended to prescribe the procedures to be followed by the Services in implementing the Act. It would appear to be inappropriate and superfluous to provide for such review in the present regulations. The statute speaks for itself.

NWF requested that provisions be made in § 424.14(c) for notification to a petitioner to explain the reason for rejecting a petition to revise critical habitat. The Services note that notice of any negative finding under § 424.14(c) must be published in the **Federal Register**. As noted above in reference to § 424.14(b), the Services intend to notify a petitioner of the reasons for any negative finding regarding substantiality. Nevertheless, it would not be possible to detail in every case the exact type of additional information that would be required to make a positive finding, and the Services do not consider it advisable to mandate such explanation by regulation.

NWF also requested that a provision be added to § 424.14(c) that would make clear that a petition to revise critical habitat is not required to present economic information relevant to the revision recommended. The Services consider it to be clear that no such information is solicited in connection with any class of petition, and thus believe it to be unnecessary to expressly state that such information need not be provided by a petitioner. However, although the Services may not require the submission of economic data with a petition to revise critical habitat, they must consider the economic and other impacts of specifying a particular area as critical habitat before issuing a final rule.

APC recommended that § 424.14(c)(2) refer back to § 424.12(b) in setting out the types of information that must be considered in determining whether a petition to revise critical habitat presents substantial information, rather than establishing the separate standards proposed to be placed at § 424.14(c)(2) (i) and (ii). The Services believe that the standards applied to petitions are sufficiently different from those governing the overall designation of critical habitat that it could be confusing to accept APC's recommendation, and could imply that a higher standard would be applied in judging substantiality of such petitions than is intended by the Act. A petition may fall short of supplying all the information that would be necessary to issue a proposed rule, but still be judged to present substantial information indicating that a revision of critical habitat may be warranted. Inasmuch as the criteria of § 424.12 are aimed at the information needed by the Services to allow them to propose a rule, such critieria would be unnecessarily burdensome if applied to petition findings.

APC also recommended that § 424.14(d) be altered to include a statement that the Secretary designate critical habitat on the basis of the best scientific data available and after taking into consideration the economic and other impacts of the designation. The Services do not believe such a provision would be appropriately placed in § 424.14(d), which deals with petitions to designate critical habitat. The substance of the recommendation is already provided for in §§ 424.12 and 424.19.

NWF requested that § 424.14(d) be expanded to indicate information standards, time limitations, and appeal provisions for petitions to designate new critical habitat. Because the Act imposes no specific standards for such petitions, the Services see no necessity to adopt such standards administratively. Properly considered, the Act's specific petition procedures appear to be intended as an attention-calling device to ensure that the Services take prompt and appropriate action when newly notified of a situation affecting the welfare of a species or of the apparent inappropriateness of some past listing or designation of critical habitat. Because consideration of designating critical habitat is an integral part of the process of listing a species, it is unlikely that a petition to designate critical habitat for a listed species will be intended to call the Services' attention to a situation of which they were previously unaware. It thus makes sense not to treat petitions to designate critical habitat under standards as stringent as those applied to other petitions.

Section 424.15 Notices of review.

CUS requested a clarification of what was meant by the statement that, "No legal consequences shall arise under the Act as a result of the designation of a species as a candidate for listing." This statement was intended to make clear that species so identified, but not proposed for listing, are not subject to the protections or prohibitions of the Act under sections 7 and 9.

HSC recommended that candidate species be given some legal protection to prevent destruction of the species or their habitats before a listing decision is made. The Services note that the Act makes no provisions for the legal protection of candidate species, and thus none can be afforded in these rules. Nevertheless, it is the belief of the Services, as also recommended by EDF, that such species should be taken into consideration in environmental planning under such laws as the National Environmental Policy Act. Such consideration, however, is not appropriately included in the present rule, which is intended only to govern listing procedures under the authority of the Endangered Species Act.

The Department of State requested that an alteration be made in the notification provisions of this section to ensure that notifications to foreign countries be made through the Secretary of State. This correction has been made in the final rule.

Section 424.16 Proposed rules.

NWF questioned the advisability of including a map in all proposals of critical habitat because of the possibility of thereby increasing the threat to a species by making public the area in which it occurs. When publication of maps would increase threats to species, the Services intend to forego entirely the designation of critical habitat as not prudent. Critical habitat designation will be proposed, and detailed maps published, only when it is judged that such designation will be to the net benefit of the species involved.

AAPA supported the provision contained in § 424.16(c)(1)(ii) for notifying local authorities, but recommended that it be broadened to include all jurisdictions within a local area. The Services intend to notify all known affected local authorities of proposed rules. Section 424.16(c)(1)(iii) has been modified to express this intent.

EPA requested that this section require notification of all appropriate Federal agencies. A provision has been added to the final rule at § 424.16(c)(1)(iii) to make clear that the Services will notify Federal agencies as well as private individuals and organizations known to be affected by a proposal. This is in keeping with existing administrative practice.

The State of Utah requested that provisions be made in § 424.16(c)(1)(vi) for publication of notice of any proposed rule in appropriate scientific journals. The Services note that § 424.16(c)(1)(v) requires notification of appropriate scientific organizations, as required in the Amendments. The Services believe that this provision adequately allows for notification of the scientific community.

NWF requested that § 424.16(c)(2) specifically provide that a comment period may be extended for good cause. The Services note that the paragraph in question provides only minimum periods for public comment, without any express or implied limitation of the maximum period that may be allowed. Nevertheless, the paragraph has been modified in the final rule in order to clarify the Secretary's discretion to extend or reopen a comment period on a proposed rule.

NWF also pointed out that the legislative history of the Amendments indicates that more than one public hearing may be held in connection with a proposed rule. Although the Services do not believe the proposed rule necessarily implied any limitation on the Secretary's discretion to hold more than one hearing, the final version of § 424.16(c)(3) has been modified to make this point clear.

Section 424.17 Time limits and required actions.

EDF requested that § 424.17(a)(1)(iii) (now at § 424.17(a)(1)(iv)) be expanded to indicate that the substantial disagreement concerning the sufficiency or accuracy of data, upon which a 6-month extension may be based, must be a disagreement among scientists knowledgeable about the species in question. The Services agree that this was the intention of the Amendments, and have modified the final rule to make this clear.

NWF recommended that the clarity of the rule would be improved if §§ 424.17(a)(1) (iii) and (iv) were reversed in order. The Services agree and have so modified the final rule.

Section 424.18 Final rules—general.

NWF recommended two minor changes in this section: (1) Specification that a final rule would take effect 30 days after publication, rather than, "not less than" 30 days, and (2) substitution of "proposed regulation" for "regulation" in § 424.18(c). In the first case, the Services note that final regulations adopted pursuant to Part 424 ordinarily do take effect 30 days following publication, but prefer not to make this a regulatory requirement. The second recommendation would conflict with the provisions of the Act as amended, which deal with the adoption, rather than proposal, of a regulation. The paragraph remains as proposed.

WLFA recommended that any justification provided a State agency under § 424.18(c) be required to, "* * * set forth the reasons that the State agency's position was rejected, in sufficient detail and with sufficient supporting data, that the agency may have an evidentiary basis for comparing its position with that of the Secretary." The Services do not believe that Congress intended to establish such a strict standard for justifications to State agencies. Rather, the Services interpret this provision of the Act to provide that State agencies be adequately informed of the basis for any action that is not in agreement with that agency's recommendation. Section 424.18(c) remains in the form proposed.

Section 424.19 Final rules—impact analysis of critical habitat.

MSS recommended that provisions for considering economic and other impacts of critical habitat designations be relocated to § 424.12, because the proposed placement, "* * * diminishes the weight to be given economic impacts in the designation of Critical Habitats."

The Services deliberately placed the substantive consideration of economic impacts of critical habitat designation in a section apart from that discussing the biological criteria for designating critical habitat. This was done in response to the expressed intent of Congress that economic considerations not affect or delay the listing of species. In that designations of critical habitat are customarily included in rules that list species, the consideration of economic impacts before issuance of a proposed rule could inappropriately delay proposal. Once a rule is proposed, however, the Services are ordinarily required to take final action within 1 year and, if economic analyses are not yet complete, must extend the critical habitat portion of a rule while making the listing final. Thus, if economic impacts are not considered until after the proposal stage, the possibility that economic considerations will prevent the listing of a species is reduced. The Services do not believe this represents a diminution in the weight given to the consideration of the economics of a designation, consideration of which will be completed once a proposed listing has been published. Moreover, since the Services expressly solicit public comment on the economic consequences of a given critical habitat proposal, the Services will have the benefit of such comments as they develop a final rule.

EPA requested clarification of the intended scope and methodology of any economic analysis performed on a designation of critical habitat, specifically asking whether environmental as well as economic impacts would be addressed and whether standard cost-benefit techniques would be used. EPA recommended that both classes of impacts be addressed and that the analytical methodology be cited in the final rule. The Services intend that analyses performed under this section will be focused primarily on the economic costs associated with designation, which was the intent of Congress in requiring such analyses. Consideration of biological impacts of critical habitat designation are more properly addressed in determining whether designation is prudent and will be of benefit to a species. The methodology and specific techniques employed have been developed and refined since economic considerations were first required by the 1978 Amendments to the Endangered Species Act. To fully address the issues at hand, these procedures must vary according to the specific area under review. Impacts should not be expected to remain static or to apply uniformly to all cases.

The Services' consideration of economic and other impacts resulting from the designation of critical habitat will cover all activities affecting or affected by the proposed critical habitat designation. The best available data on economic and other impacts must be gathered on the full scope of proposed critical habitat to assist the Services in determining whether adjustments should be made before the critical habitat designation is made final.

EPA requested that this section and § 424.12 be cross-referenced. For the reasons mentioned above in reply to a recommendation from MSS, the Services believe that it is advisable to keep separate the biological and economic considerations that lead to a final designation of critical habitat.

EPA also recommended that the provision of this section that prohibits the Secretary from excluding any area from critical habitat if so doing would result in extinction of the species concerned be altered to prohibit exclusion if so doing would "preclude the recovery of the species." The Services appreciate the inconsistency between the discretion allowed the Secretary in excluding areas from critical habitat and the stated purpose of the Act of providing not only for the survival of species, but for their recovery as well. Nevertheless, the Services must follow the provision of the Act that allows exclusions of certain areas from critical habitat so long as it will not result in extinction of the species concerned. It should be noted that this provision is permissive rather than prescriptive, and does not *require* exclusion of an area from critical habitat under any given set of circumstances.

Section 424.20 Emergency rules.

NWF recommended that this section include a provision that would require the Secretary to, "* * * publish emergency rules in the **Federal Register** within 10 days after they are issued [sic] * * *." The Services assume that this is intended to mean that emergency rules should be published within 10 days after being approved by the Secretary, inasmuch as issuance and publication are the same. The Services intend that emergency rules be published as quickly as possible after approval, but see no need to make this a regulatory requirement.

DOD recommended that this section contain a requirement to notify concerned Federal land managers of emergency rules. The provision for notification of State agencies of emergency rules is adopted directly from the Act. The Services do routinely notify affected Federal agencies as well when adopting emergency rules, but do not believe it necessary to make this a regulatory requirement, since inadvertent failure to comply with such a required notification could then cast doubt on the validity of a rule. Nevertheless, the Services will endeavor to notify Federal land managers of such emergency rules to the maximum extent possible.

Executive Order 12291, Paperwork Reduction Act, and Regulatory Flexibility Act

The Department of the Interior, as lead agency in the development of this rule, has determined that it is not a major rule as defined by Executive Order 12291; that the rule would not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (Pub. L. 96–354); and that the rule does not contain any information collection or recordkeeping requirements as defined in the Paperwork Reduction Act of 1980 (Pub. L. 96–511).

National Environmental Policy Act

The Fish and Wildlife Service has determined that these proposed regulations are categorically excluded from National Environmental Policy Act (NEPA) requirements (Part 516 of the Departmental Manual, Chapter 6, Appendix I, section 1.4A.(3) categorically excludes the issuance of regulatory procedures when the impacts are limited to administrative or technological effects). This rule is procedural in nature, adopted in strict, non-discretionary compliance with the Amendments and will have no independent environmental consequences.

Author

The principal author of this rule is Dr. John J. Fay, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235–1975).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulation Promulgation

Accordingly, Part 424 of Chapter IV of Title 50 of the U.S. Code of Federal Regulations is revised to read as set forth below:

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

Subpart A—General Provisions

Sec.
424.01 Scope and purpose.
424.02 Definitions.

Subpart B—Revision of the Lists

424.10 General.
424.11 Factors for listing, delisting, or reclassifying species.
424.12 Criteria for designating critical habitat.
424.13 Sources of information and relevant data.
424.14 Petitions.
424.15 Notices of review.
424.16 Proposed rules.
424.17 Time limits and required actions.
424.18 Final rules—general.
424.19 Final rules—impact analysis of critical habitat.
424.20 Emergency rules.
424.21 Periodic review.

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. § 1531 *et seq.*).

Subpart A—General Provisions

§ 424.01 Scope and purpose.

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

(b) The purpose of these rules 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) "Candidate" means any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule.

(c) "Conservation," "conserve," and "conserving" mean to use and the use of all methods and procedures that are necessary to bring any endangered 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.

(d) "Critical habitat" means (1) the specific areas within the geographical area currently 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) that 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 Secretary that such areas are essential for the conservation of the species.

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

(f) "List" or "lists" means the Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

(g) "Plant" means any member of the plant kingdom, including, without limitation, seeds, roots, and other parts thereof.

(h) "Public hearing" means an informal hearing to provide the public with the opportunity to give comments and to permit an exchange of information and opinion on a proposed rule.

(i) "Secretary" means the Secretary of the Interior or the Secretary of Commerce, as appropriate, or their authorized representatives.

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

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

(l) "State agency" means any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

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

(n) "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 Secretary may add a species to the lists or designate critical habitat, delete a species or critical habitat, change the listed status of a species, revise 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) applied to a threatened species only in accordance with the procedures of this Part.

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

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in § 424.02(k) is eligible for listing under the Act. A taxon of higher rank than species may be listed only if all included species are individually found to be endangered or threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.

(b) The Secretary shall make any determination required by paragraphs (c) and (d) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination.

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available 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) Overutilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

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

(d) The factors considered in delisting a species are those in paragraph (c) of this section as they relate to the definitions of endangered or threatened species. Such removal must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) *Extinction.* Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) *Recovery.* The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) *Original data for classification in error.* Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

(e) 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 (see Part 23 of this Title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

(f) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

§ 424.12 Criteria for designating critical habitat.

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) 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

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(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 a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal 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 may 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 species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State(s), 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(s) and county(ies) are provided for information only and do not constitute the boundaries of the area. Ephemeral reference points (*e.g.*, trees, sand bars) shall not be used in defining critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in 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 if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary 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.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

§ 424.13 Sources of information and relevant data.

When considering any revision of the lists, the Secretary shall consult as appropriate with 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 Secretary may include, but are not limited to scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties.

§ 424.14 Petitions.

(a) *General.* Any interested person may submit a written petition to the Secretary requesting that one of the actions described in § 424.10 be taken. Such a document must clearly identify itself as a petition and be dated. It must contain the name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner. The Secretary shall acknowledge in writing receipt of such a petition within 30 days.

(b) *Petitions to list, delist, or reclassify species.* (1) To the maximum extent practicable, within 90 days of receiving a petition to list, delist, or reclassify a species, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. For the purposes of this section, "substantial information" is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. The Secretary shall promptly publish such finding in the **Federal Register** and so notify the petitioner.

(2) In making a finding under paragraph (b)(1) of this section, the Secretary shall consider whether such petition—

(i) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;

(ii) Contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;

(iii) Provides information regarding the status of the species over all or a significant portion of its range; and

(iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.

The petitioner may provide information that describes any recommended critical habitat as to boundaries and physical features, and indicates any benefits and/or adverse effects on the species that would result from such designation. Such information, however, will not be a basis for the determination of the substantiality of a petition.

(3) Upon making a positive finding under paragraph (b)(1) of this section, the Secretary shall commence a review of the status of the species concerned and shall make, within 12 months of receipt of such petition, one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the **Federal Register** and so notify the petitioner.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the **Federal Register** a proposed regulation to implement the action pursuant to § 424.16 of this Part, or

(iii) The petitioned action is warranted, but that—

(A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or reclassify species, and

(B) Expeditious progress is being made to list, delist, or reclassify qualified species,

in which case, such finding shall be promptly published in the **Federal Register** together with a description and evaluation of the reasons and data on which the finding is based.

(4) If a finding is made under paragraph (b)(3)(iii) of this Section with regard to any petition, the Secretary shall, within 12 months of such finding, again make one of the findings described in paragraph (b)(3) with regard to such petition, but no further finding of substantial information will be required.

(c) *Petitions to revise critical habitat.* (1) To the maximum extent practicable, within 90 days of receiving a petition to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scienific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the **Federal Register** and so notify the petitioner.

(2) In making the finding required by paragraph (c)(1) of this section, the Secretary shall consider whether a petition contains—

(i) Information indicating that areas petitioned to be added to critical habitat contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species involved; or

(ii) Information indicating that areas designated as critical habitat do not contain resources essential to, or do not require special management to provide for, the conservation of the species involved.

(3) Within 12 months after receiving a petition found under paragraph (c)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the **Federal Register.**

(d) *Petitions to designate critical habitat or adopt special rules.* Upon receiving a petition to designate critical habitat or to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

§ 424.15 Notices of review.

(a) If the Secretary 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 at that time, a notice of review may be published in the **Federal Register.** The notice 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.

(b) The Secretary from time to time also may publish notices of review containing the names of species that are considered to be candidates for listing under the Act and indicating whether sufficient scientific or commercial information is then available to warrant proposing to list such species, the names of species no longer being considered for listing, or the names of listed species being considered for delisting or reclassification. However, none of the substantive or procedural provisions of the Act apply to a species that is designated as a candidate for listing.

(c) Such notices of review will invite comment from all interested parties regarding the status of the species named. At the time of publication of such a notice, notification in writing will be sent to State agencies in any affected States, known affected Federal agencies, and, to the greatest extent practicable, through the Secretary of State, to the governments of any foreign countries in which the subject species normally occur.

§ 424.16 Proposed rules.

(a) *General.* Based on the information received through §§ 424.13, 424.14, 424.15, and 424.21, or through other available avenues, the Secretary may propose revising the lists as described in § 424.10.

(b) *Contents.* A notice of a proposed rule to carry out one of the actions described in § 424.10 shall contain the complete text of the proposed rule, a summary of the data on which the proposal is based (including, as appropriate, citation of pertinent information sources), and shall show the relationship of such data to the rule proposed. If such a rule designates or revises critical habitat, such summary shall, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat, or may be affected by such designation. Any proposed rule to designate or revise critical habitat shall contain a map of such habitat. Any such notice proposing the listing, delisting, or reclassification of a species or the designation or revision of critical habitat shall also include a summary of factors affecting the species and/or critical habitat.

(c) *Procedures.*—(1) *Notifications.* In the case of any proposed rule to list, delist, or reclassify a species, or to designate or revise critical habitat, the Secretary shall—

(i) Publish notice of the proposal in the **Federal Register;**

(ii) Give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction therein in which the species is believed to occur, and invite the comment of each such agency and jurisdiction;

(iii) Give notice of the proposed regulation to any Federal agencies, local authorities, or private individuals or organizations known to be affected by the rule;

(iv) Insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to list, delist, or reclassify a species to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation;

(v) Give notice of the proposed regulation to such professional scientific organizations as the Secretary deems appropriate; and

(vi) Publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur.

(2) *Period of public comments.* At least 60 days shall be allowed for public comment following publication in the **Federal Register** of a rule proposing the listing, delisting, or reclassification of a species, or the designation or revision of critical habitat. All other proposed rules shall be subject to a comment period of at least 30 days following publication in the **Federal Register.** The Secretary may extend or reopen the period for public comment on a proposed rule upon a finding that there is good cause to do so. A notice of any such extension or reopening shall be published in the **Federal Register,** and shall specify the basis for so doing.

(3) *Public hearings.* The Secretary shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to list, delist, or reclassify a species, or to designate or revise critical habitat. Notice of the location and time of any such hearing shall be published in the **Federal Register** not less than 15 days before the hearing is held.

§ 424.17 Time limits and required actions.

(a) *General.* (1) Within 1 year of the publication of a rule proposing to determine whether a species is an endangered or threatened species, or to designate or revise critical habitat, the Secretary shall publish one of the following in the **Federal Register:**

(i) A final rule to implement such determination or revision,

(ii) A finding that such revision should not be made,

(iii) A notice withdrawing the proposed rule upon a finding that available evidence does not justify the action proposed by the rule, or

(iv) A notice extending such 1-year period by an additional period of not more than 6 months because there is substantial disagreement among scientists knowledgeable about the species concerned regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.

(2) If an extension is made under paragraph (a)(1)(iv) of this section, the Secretary shall, within the extended period, take one of the actions described in paragraphs (a)(1) (i), (ii), or (iii) of this section.

(3) If a proposed rule is withdrawn under paragraph (a)(1)(iii) of this section, the notice of withdrawal shall set forth the basis upon which the proposed rule has been found not to be supported by available evidence. The Secretary shall not again propose a rule withdrawn under such provision except on the basis of sufficient new information that warrants a reproposal.

(b) *Critical habitat designations.* A final rule designating critical habitat of an endangered or a threatened species shall to the extent permissible under § 424.12 be published concurrently with the final rule listing such species, unless the Secretary deems that—

(1) It is essential to the conservation of such species that it be listed promptly; or

(2) Critical habitat of such species is not then determinable,

in which case, the Secretary, with respect to the proposed regulation to designate such habitat, may extend the 1-year period specified in paragraph (a) of this section by not more than one additional year. Not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

§ 424.18 Final rules—general.

(a) *Contents.* A final rule promulgated to carry out the purposes of the Act will be published in the **Federal Register.** This publication will contain the complete text of the rule, a summary of the comments and recommendations received in response to the proposal (including 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 any conservation measures available under the rule. Publication of a final rule to list, delist, or reclassify a species or designate or revise critical habitat shall also provide a summary of factors affecting the species. A rule designating or revising critical habitat will also contain a description of the boundaries and a map of such habitat and will, to the maximum extent practicable, be accompanied by a brief description and evaluation of those activities (whether public or private) that might occur in the area and which, in the opinion of the

Secretary, may adversly modify such habitat or be affected by such designation.

(b) *Effective date.* A final rule shall take effect—

(1) Not less than 30 days after it is published in the **Federal Register**, except as otherwise provided for good cause found and published with the rule; and

(2) Not less than 90 days after (i) publication in the **Federal Register** of the proposed rule, and (ii) actual notification of any affected State agencies and counties or equivalent jurisdictions in accordance with § 424.16(c)(1)(ii).

(c) *Disagreement with State agency.* If a State agency, given notice of a proposed rule in accordance with § 424.16(c)(1)(ii), submits comments disagreeing in whole or in part with a proposed rule, and the Secretary issues a final rule that is in conflict with such comments, or if the Secretary fails to adopt a regulation for which a State agency has made a petition in accordance with § 424.14, the Secretary shall provide such agency with a written justification for the failure to adopt a rule consistent with the agency's comments or petition.

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

§ 424.20 Emergency rules.

(a) Sections 424.16, 424.17, 424.18, and 424.19 notwithstanding, the Secretary may at any time issue a regulation implementing any action described in § 424.10 in regard to any emergency posing a significant risk to the well-being of a species of fish, wildlife, or plant. Such rules shall, at the discretion of the Secretary, take effect immediately on publication in the **Federal Register.** In the case of any such action that applies to a resident species, the Secretary shall give actual notice of such regulation to the State agency in each State in which such species is believed to occur. Publication in the **Federal Register** of such an emergency rule shall provide 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, 424.18, and 424.19 (as appropriate) have been complied with during that period.

(b) If at any time after issuing an emergency rule, the Secretary determines, on the basis of the best scientific and commercial data available, that substantial evidence does not then exist to warrant such rule, it shall be withdrawn.

§ 424.21 Periodic review.

At least once every 5 years, the Secretary shall conduct a review of each listed species to determine whether it should be delisted or reclassified. Each such determination shall be made in accordance with §§ 424.11, 424.16, and 424.17 of this Part, as appropriate. A notice announcing those species under active review will be published in the **Federal Register.** Notwithstanding this section's provisions, the Secretary may review the status of any species at any time based upon a petition (see § 424.14) or upon other data available to the Service.

Dated: July 18, 1984.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

Dated: August 22, 1984.

William G. Gordon,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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Monday
October 1, 1984

Part VII

Department of Justice

Bureau of Prisons

28 CFR Part 545

Control, Custody, Care, Treatment, and Instruction of Inmates; Final Rule

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 545

Control, Custody, Care, Treatment, and Instruction of Inmates

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: The Bureau of Prisons is publishing its final rule on inmate work and performance pay. Some of the areas discussed include inmate work and program assignments, work conditions, performance pay, and achievement awards. The rule is intended to reduce inmate idleness, while allowing an inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment and ensure that activities necessary to maintain day-to-day operations of the institution are completed.

EFFECTIVE DATE: October 1, 1984.

ADDRESS: Office of General Counsel, Bureau of Prisons, Room 760, 320 1st Street NW., Washington, D.C. 20534.

FOR FURTHER INFORMATION CONTACT: Mike Pearlman, Office of General Counsel, Bureau of Prisons, phone 202/724-3062.

SUPPLEMENTARY INFORMATION: In this document the Bureau of Prisons is publishing its final rule on inmate work and performance pay. A proposed rule on this subject was published in the **Federal Register** April 29, 1983 (48 FR 19579 et seq.). Interested persons were invited to submit comments on the proposed rule. Members of the public may submit comments concerning the final rule by writing the previously cited address. These comments will be considered but will receive no response in the **Federal Register**.

The Bureau plans to implement its inmate work and performance pay rule on October 1, 1984, so as to coincide with the beginning of a new fiscal year. This will enable the Bureau to assess its performance pay program within an established time period. There were few public comments on the proposed rule, with these either encompassed within the final rule, determined beyond the scope of the Bureau to implement, or set aside for further study. For these reasons, the Bureau finds good cause under 5 U.S.C. 553(d) to make this rule effective without a delay in the effective date.

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. The Bureau of Prisons has determined that EO 12291 does not apply to this rule since the rule involves agency management. After review of the law and regulations, the Director, Bureau of Prisons, has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

Summary of Changes

1. Section 545.20

In § 545.20(a), the word "useful" is substituted for "meaningful". Section 545.20(b) is reworded, with the term "outstanding" deleted. Other sections of the rule describe more specifically what is expected for an inmate to receive performance pay.

2. Section 545.21

Section 545.21(g) is reworded, although its intent is unchanged.

3. Section 545.23

In response to public comment, paragraph (c) is clarified by inserting the phrase, "to the extent medically possible".

4. Section 545.24

Because a work assignment may consist of a non-standard work week, final § 545.24(a) deletes the proposed rule's reference to the scheduled work day not exceeding eight hours. The final rule also deletes the specific reference to work in excess of eight hours being compensated at an overtime rate. An inmate who works beyond the scheduled work day is compensated at the inmate's prevailing rate of pay, and the inmate is eligible to receive bonus pay as set forth in § 545.27. Based on this deletion, final § 545.23(b)(6) refers to bonus pay (and special bonus pay) procedures, rather than the proposed rule's "overtime" procedures.

5. Section 545.25

Paragraph (a) is reworded, although its intent is unchanged. For purpose of clarification, the term "monitoring" is substituted for "supervision" in paragraph (c). In paragraph (e), the term "Central Office" is substituted for the misprinted "General Office" and the term "unallocated" is added to identify the nature of the funds retained.

6. Section 545.27

Paragraph (a) is modified to allow for an inmate to receive a copy of the inmate's position description upon request. Paragraph (b) is clarified by inserting the word "allotted" in referring to inmate work assignments. This clarification is necessary because in the event of prison overcrowding, an institution may have more inmates assigned to a work detail, as required by § 545.23, than it has allocated pay grades. Inmates in a work assignment for which there is no allocated pay grade are eligible for a temporary, flat rate of compensation, pending the opening of an allocated pay grade.

The first sentence of paragraph (c) is deleted, with each institution now being permitted to set their own monthly pay periods, e.g., by the month, or from the 10th of one month to the ninth of the following month. Paragraph (e) is modified. The terms "excellent", "satisfactory", or "unsatisfactory" are deleted and will be replaced by more descriptive guidelines. In addition, the final rule provides an expanded list of examples, rather than a specified list, of categories which may be examined in evaluating an inmate's work performance.

Section 545.27(f), Bonus pay, is expanded by adding the phrase "or appreciably contributed to the work assignment". The final rule also includes an example of a situation whereby an inmate is eligible for bonus pay. Section 545.27(g), Special bonus pay, is clarified by stating that the provision applies only to a "temporary job assignment" determined critical to the institution. The last sentence of both paragraph (f) and (g), which established upper limits on the amount of both bonus and special bonus pay, is deleted from the rule language, but is retained in the Bureau's internal directive as an implementing instruction to staff. Section 545.27(i) is new and requires that each inmate in performance pay status be notified of monthly earnings.

We believe the rule adequately addresses a comment that an inmate be paid for the time the inmate actually works. Section 545.27 (d) and (e)(1) are responsive to this comment, since they provide for an inmate to receive performance pay for that period of time during which the inmate is satisfactorily or better performing work. Thus, if an inmate's workday is seven and one-half hours, the inmate is eligible to receive compensation for seven and one-half hours.

7. Section 545.28

This section has been modified. The first paragraph of proposed § 545.28, now final § 545.28(a), states that an inmate who has worked full-time for 12 consecutive months on an institution work assignment is eligible for a one week (five-day), rather than the proposed rule's six-day, paid vacation at the inmate's prevailing hourly rate. This change recognizes that five days constitutes the ordinary work week. The recommendation for vacation credit is made from the work supervisor, through the Department Head, to the Unit Team, which has the approval authority. The final rule deletes the proposed rule's reference to the Associate Warden as the approval authority. The Bureau is reassessing proposed paragraphs (a), the first sentence of (b), and (c)–(f) and has decided not to include these provisions in its final rule. Based on this determination, proposed § 545.28(g) becomes final § 545.28(c). The phrase "to continue" is deleted from final paragraph (c).

A commenter suggested that inmates working in non-UNICOR jobs should be paid for vacations and suggested that the rules on inmate performance pay were revised to bring them in line with existing UNICOR wages (see Part 345). While the Bureau has compared the two programs, it is not presently feasible to have identical provisions. Each system has a different focus. Federal Prison Industries (UNICOR) is a government corporation, in effect, a business, that sells goods to other departments or agencies of the United States, whereas the performance pay program focuses primarily on activities necessary to maintain the day-to-day operation of the institution. With respect to paying inmates working in non-UNICOR work assignments for their vacation, the final performance pay rule allows an inmate to take a vacation with pay. No determination has been made concerning an inmate being paid in lieu of taking the vacation. As previously stated, the Bureau is reassessing the entire area of inmate vacations. The Bureau anticipates republishing a proposed rule on this subject.

8. Section 545.29

Because achievement awards are given for educational participation, the final rule establishes the Education Department, rather than the inmate's unit team, as the approving authority for such awards.

9. Section 545.30

Paragraph (b) deletes the non-essential term "lump sum" and also provides an example of a non-monetary award (extra good time).

10. Section 545.31

A new section 545.31, Funds due deceased inmates, is being added to this rule on inmate work and performance pay. A similar section is included in the rule on Inmate Pay, Federal Prison Industries, Inc. (see Part 345, Subpart B). Section 545.31 provides for funds due an inmate for work performed and not yet paid to be made to a legal representative of the inmate's estate or in accordance with the laws of descent and distribution of the state of the inmate's domicile. This provision is intended to set forth the Bureau's statement of policy on funds due deceased inmates. For this reason, the Bureau finds good cause under 5 U.S.C. 553 to publish this section without a notice of proposed rulemaking, an opportunity for public comment, or a delay in effective date.

11. Section 545.32

Based on new § 545.31, proposed § 545.31 becomes final § 545.32.

A commenter, while supportive of the pay provisions in the Bureau's rule, strongly recommends that a percentage (up to 75%) of the inmate's earned compensation be used to render monetary restitution to crime victims and their families. Such a provision, however, is beyond the authority of the Bureau of Prisons and would require the enactment of federal legislation.

List of Subjects in 28 CFR Part 545

Prisoners.

Conclusion

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(q), 28 CFR Chapter V is amended as set forth below.

Dated: September 27, 1984.

Norman A. Carlson,

Director, Bureau of Prisons.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 545—WORK AND COMPENSATION

In Part 545, Subpart C is added to read as follows:

Subpart C—Inmate Work and Performance Pay Program

Sec.
545.20 Purpose and scope.
545.21 Definitions.
545.22 Institution work and performance pay committee.
545.23 Inmate work/program assignment.
545.24 Inmate work conditions.
545.25 Funding for, and allocation of performance pay.
545.26 Eligibility for performance pay.
545.27 Performance pay provisions.
545.28 Inmate vacations.
545.29 Achievement awards.
545.30 Special awards.
545.31 Funds due deceased inmates.
545.32 Training.

Authroity: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082, 4126, 5006–5024, 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

Subpart C—Inmate Work and Performance Pay Program

§ 545.20 Purpose and scope.

(a) The Bureau of Prisons operates an inmate work program within its institutions. To the extent practicable, the work program (1) reduces inmate idleness, while allowing the inmate to improve and/or develop useful job skills, work habits and experiences that will assist in post-release employment; and (2) ensures that activities necessary to maintain the day-to-day operation of the institution are completed. Sentenced inmates who are physically and mentally able to work are required to participate in the work program. When approved by the Warden or designee, educational or vocational training may be substituted for all or part of the work program.

(b) The Warden may recognize an inmate's work performance or productive participation in specified correctional programs by granting performance pay.

§ 545.21 Definitions.

(a) *Inmate.* For purposes of this rule, the term "inmate" refers to any person committed to, or in the custody of, the U.S. Attorney General.

(b) *Institution Work Assignment.* A work assignment which contributes to the day-to-day operation of the institution (e.g., carpentry, plumbing, food service).

(c) *Industry Assignment.* A Federal Prison Industries (UNICOR) work assignment.

(d) *Full-Time Work Assignment.* A work assignment to which an inmate is assigned for the entire scheduled work day.

(e) *Part-Time Work Assignment.* A work assignment to which an inmate is assigned for only a portion of the scheduled work day. Part-time work assignments are ordinarily made in conjunction with educational and vocational training programs.

(f) *Medically Unassigned.* An inmate who, because of medical restrictions, is unable to be assigned to any work program.

(g) *Light Duty Work Assignment.* A work assignment in which an inmate may, because of physical limitations, temporary or otherwise, only perform limited work functions, e.g., sedentary work, no prolonged standing, no lifting over 25 lbs., etc.

§ 545.22 Institution work and performance pay committee.

(a) The Warden at each Bureau of Prisons institution is to establish an Institution Inmate Work and Performance Pay Committee to administer the institution's work and performance pay program. The Committee is to be comprised of an Associate Warden, the Inmate Performance Pay Coordinator, and any other member(s) the Warden considers appropriate.

(b) The Committee is responsible for approving the following aspects of the institution's inmate work and performance pay program:

(1) Number of inmates on each work detail;

(2) Number of pay grades in each detail;

(3) Job descriptions;

(4) Performance standards;

(5) Budgeting for special act awards; and

(6) Bonus pay/special bonus pay procedures.

§ 545.23 Inmate work/program assignment.

(a) Each sentenced inmate who is physically and mentally able is to be assigned to an institutional or industrial work program. An inmate shall be assigned to an educational or vocational program, on either a full or part-time basis, where this involvement is mandated by Bureau policy (for example, Adult Basic Education (ABE) Program) or statute (for example, Youth Corrections Act). An inmate, for whom educational or vocational participation is not required by either policy or statute, may request and, upon approval of the Warden or designee, will be able to participate in an educational or vocational training program rather than work full-time.

(b) A pre-trail inmate may not be required to work in any assignment or area other than housekeeping tasks in the inmate's own cell and in the community living area. Unless the pre-trial inmate signs a waiver, the Warden may not permit the pre-trial inmate to work with convicted inmates or in any assignment or area other than housekeeping tasks (see Part 551, Subpart J).

(c) Medically unassigned inmates may be required, to the extent medically possible, to perform housekeeping tasks in the inmate's own cell and in the community living area.

(d) In making the work and/or program assignment(s), staff shall consider the inmate's capacity to learn, interests, requests, needs, and eligibility, and the availability of the assignment(s). An inmate's assignment shall be made with consideration of the institution's security and operational needs, and should be consistent with the safekeeping of the inmate and protection of the public.

§ 545.24 Inmate work conditions.

(a) The scheduled work day for an inmate in a federal institution ordinarily consists of a minimum of seven (7) hours.

(b) An inmate is expected to report to the place of assignment at the required time. An inmate may not leave an assignment without permission.

(c) An inmate, regardless of assignment, is expected to perform all assigned tasks diligently and conscientiously. Disciplinary action may be taken against an inmate who refuses to work, who otherwise evades attendance and performance standards in assigned activities, or who encourages others to do so.

(d) Work, vocational, and educational programs are to meet the appropriate minimum standards for health and safety. Safety equipment is to be available where needed.

(e) An inmate is expected to perform the work assignment in a safe manner, using safety equipment as instructed by the Work Supervisor. In the event of any work related injury, an inmate shall notify the Work Supervisor so that appropriate action (for example, medical attention, and submission of necessary reports) may be taken.

§ 545.25 Funding for, and allocation of performance pay.

The Board of Directors Federal Prison Industries (UNICOR) will fund the Bureau's performance pay program.

(a) The Assistant Director, Correctional Programs Division is responsible for overseeing the allocation of performance pay. The Assistant Director shall establish and, as necessary, periodically revise the performance pay hourly rate.

(b) Within the Central Office, the specific authority to allocate performance pay funds to each Region is delegated to the Administrator, Correctional Programs Branch.

(c) Within each Region, the Regional Correctional Programs Administrators are responsible for institution allocations and for monitoring of institution performance pay programs.

(d) Within each institution, each Department Head shall be credited with an equitable share of the performance pay money allocated to the institution.

(e) The Central Office, regional offices and institutions are authorized to hold limited unallocated performance pay in a reserve status. These reserve funds will be used to cover such contingencies as institution mission changes, payment of special act awards, and to cover fluctuations in population within the institutions.

§ 545.26 Eligibility for performance pay.

(a) An inmate may receive performance pay for accomplishments in one or more of the following areas:

(1) Institution work assignment;

(2) Adult Basic Education (ABE) program participation;

(3) General Educational Development (GED) participation;

(4) Apprenticeship training; and

(5) Vocational Training courses (approved by the Bureau of Prisons as certified vocational training instruction).

(b) An inmate is eligible for performance pay from the date of work or program assignment. An inmate is eligible to receive performance pay for each month that the inmate's performance justifies such payment.

§ 545.27 Performance pay provisions.

(a) The Warden shall ensure that all institution work assignments have standardized work descriptions. Each inmate work position is assigned one of four pay grade levels. Factors to consider in assigning a grade level to the specific work position include the position's educational and vocational requirements, physical demands, working conditions (exposed to dusts, odors, etc.), and the degree of responsibility held by the inmate worker. The inmate assigned to a specific work position shall sign, and, if requested, receive a copy of, that position description.

(b) In recognition of budgetary constraints and for the effective management of the overall performance pay program, the percentage of inmates assigned to each grade level is approximately as follows (Grade 1 is highest pay):

Grade 1—5% of the institution's allotted inmate work assignments;

Grade 2—15% of the institution's allotted inmate work assignments;

Grade 3—25% of the institution's allotted inmate work assignments; and

Grade 4—55% of the institution's allotted inmate work assignments.

(c) An inmate may receive performance pay only for that portion of the month that the inmate was working. Performance pay may not be awarded retroactively.

(d) An inmate is eligible to receive performance pay only for those hours during which the inmate is actually performing work or actively participating in an educational or vocational training program. Absences from the inmate's scheduled assignment for such reasons as call-outs, visits sick call, interviews, or making telephone calls shall be deducted from the monthly number of hours worked and will accordingly reduce the amount of pay received by the inmate.

(e) Work Evaluation—At the end of each month the work detail/program supervisor shall compute on an evaluation form the hours worked by the inmate and the pay to be awarded. The supervisor shall also rate the inmate's performance over the past month in each of several categories. For example, an inmate may be rated in such categories as quality of work, quantity of work, initiative, ability to learn, dependability, response to supervision and instruction, safety and care of equipment, ability to work with others, and overall job proficiency.

(1) An inmate shall receive performance pay only for those hours during which the inmate is satisfactorily or better performing work or is actively participating in an educational/ vocational program.

(2) An inmate's monthly pay shall be based on the grade and the number of hours during the month that the inmate's performance was satisfactory. The hourly rate may not be reduced for unsatisfactory performance; the inmate is either paid the hourly rate for an hour of at least satisfactory performance or receives no pay for an hour of unsatisfactory performance.

The work detail/program supervisor shall review the evaluation with the inmate and request that the inmate sign the evaluation form. If the inmate refuses to sign the form, the supervisor shall note this refusal on the evaluation and, if known, the reasons for refusal.

(f) Bonus pay—When the supervisor of an inmate worker or program participant believes the inmate has made exceptional accomplishments or appreciably contributed to the work assignment, the supervisor may recommend that the inmate receive a bonus. For example, an inmate who works in excess of the scheduled work day can qualify for bonus pay. Written justification for the bonus request must be forwarded to the Department Head for approval.

(g) Special bonus pay—An inmate may receive special bonus pay based on the inmate's exceptional work in a temporary job assignment, provided this assignment has been previously identified by the Warden, and approved by the Regional Director, as critical to the institution. When the supervisor of an inmate worker assigned to this temporary job assignment believes the inmate has performed exceptionally well, the supervisor may recommend that the inmate received a special bonus. Written justification for the special bonus request must be forwarded to the Department Head for approval.

(h) An inmate's performance pay, once earned, becomes vested.

(i) Each inmate in performance pay status shall be notified of monthly earnings.

§ 545.28 Inmate vacations.

(a) An inmate who has worked full-time for 12 consecutive months on an institution work assignment is eligible to take a five-day paid vacation at the inmate's prevailing hourly rate. A recommendation for an inmate to receive vacation credit is made by the inmate's work supervisor, through the Department Head, to the Unit Team, who shall approve the request if the inmate's work performance qualifies for vacation credit.

(b) Staff shall schedule an inmate's vacation so it is compatable with shop production and administrative support requirements.

(c) The Warden or designee may authorize an inmate to accumulate vacation credit when:

(1) The inmate is transferred to another institution for the benefit of the government or because of the inmate's favorable adjustment (custody reduction); or

(2) The inmate is placed in a new work assignment in the institution for the benefit of the government or institution, rather than solely at the inmate's request or because of the inmate's poor performance or adverse behavior.

§ 545.29 Achievement awards.

With prior approval of the Education Department, each inmate who completes Adult Basic Education, GED, Vocational Training, or related trades classroom work that is part of a certified apprenticeship program may be granted an achievement award from performance pay funds.

§ 545.30 Special awards.

(a) Inmates who perform exceptional services not ordinarily a part of the inmate's regular assignment may be granted a special award regardless of the inmate's work or program status. Examples of actions which may result in the inmate being considered for a special award are the following:

(1) An act of heroism;

(2) Voluntary acceptance and satisfactory performance of an unusually hazardous assignment.

(3) An act which protects the lives of employees or inmates, or the property of the United States. (This does not apply to informants.)

(4) Suggestions which result in substantial improvements or cost-savings in institutional programs or operations.

(5) Other exceptionally meritorious or outstanding services consistent with the general character of the preceding cases.

(b) The special award may be given in the form of a monetary payment in addition to any other award (e.g., extra good time) given.

(c) The Warden of each institution is empowered to approve special awards not exceeding $150. Awards in excess of this amount may not be made unless approved by the Regional Director.

§ 545.31 Funds due deceased inmates.

Funds due a deceased inmate for work performed and not yet paid shall be made to a legal representative of the inmate's estate or in accordance with the laws of descent and distribution of the State of the inmate's domicile.

§ 545.32 Training.

The Warden shall ensure that staff receive training on their roles in, and on the operation of, the work and performance pay program. The Warden shall also ensure that the inmate population is informed of the work and performance pay program, and of the hourly rates paid to inmate workers.

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