demonstrating that the vehicle identified by the petitioner under paragraph (a)(1) of this section either was originally manufactured to conform to such standard, or is capable of being readily modified to conform to such standard.

(b) If the basis of the petition is that the vehicle's safety features comply with or are capable of being modified to comply with all applicable Federal motor vehicle safety standards, the petitioner shall provide the following information:

(1) Identification of the model and model year of the vehicle for which a determination is sought.

(2) With respect to each Federal motor vehicle safety standard that would have applied to such vehicle had it been originally manufactured for importation into and sale in the United States, data, views, and arguments demonstrating that the vehicle has safety features that comply with or are capable of being modified to conform with such standard. The latter demonstration shall include a showing that after such modifications, the features will conform with such standard.

§ 593.7 Processing of petitions.

(a) NHTSA will review each petition for sufficiency under §§ 593.5 and 593.6. If the petition does not contain all the information required by this part, NHTSA notifies the petitioner, pointing out the areas of insufficiency, and stating that the petition will not receive further consideration until the required information is provided. If the additional information is not provided within the time specified by NHTSA in its notification, NHTSA may dismiss the petition as incomplete, and so notify the petitioner. When the petition is complete, its processing continues.

(b) NHTSA publishes in the Federal Register, affording opportunity for comment, a notice of each petition containing the information required by this part.

(c) No public hearing, argument, or other formal proceeding is held on a petition filed under this part.

(d) If the Administrator is unable to determine that the vehicle in a petition submitted under § 593.6(a) is one that is substantially similar, or (if it is substantially similar) is capable of being readily modified to meet the standards, (s)he notifies the petitioner, and offers the petitioner the opportunity to supplement the petition by providing the information required for a petition submitted under paragraph 593.6(b).

(e) If the Administrator determines that the petition does not clearly demonstrate that the vehicle model is eligible for importation, (s)he denies it and notifies the petitioner in writing. (S)he also publishes in the Federal Register a notice of denial and the reasons for it. A notice of denial also states that the Administrator will not consider a new petition covering the model that is the subject of the denial until at least 3 months from the date of the notice of denial. There is no administrative reconsideration available for petition denials.

(g) If the Administrator determines that the petition clearly demonstrates that the vehicle model is eligible for importation, (s)he grants it and notifies the petitioner. (S)he also publishes in the Federal Register a notice of grant and the reasons for it.

§ 593.8 Determinations on the agency's initiative.

(a) The Administrator may make a determination of eligibility on his or her own initiative. The agency publishes in the Federal Register, affording opportunity for comment, a notice containing the information available to the agency (other than confidential information) relevant to the basis upon which eligibility may be determined.

(b) No public hearing, argument, or other formal proceeding is held upon a notice published under this section.

(c) The Administrator publishes a second notice in the Federal Register in which (s)he announces his or her determination whether the vehicle is eligible or ineligible for importation, and states the reasons for the determination. A notice of ineligibility also announces that no further determination for the same model of motor vehicle will be made for at least 3 months following the date of publication of the notice. There is no administrative reconsideration available for a decision of ineligibility.

§ 593.9 Effect of affirmative determinations; lists.

(a) A notice of grant is sufficient authority for the importation by persons other than the petitioner of any vehicle of the same model specified in the grant.

(b) The Administrator publishes annually in the Federal Register a list of determinations made under Sec. 593.7, and Sec. 593.8.

§ 593.10 Availability for public inspection.

(a) Except as specified in paragraph (b) of this section, information relevant to a determination under this part, including a petition and supporting data, and the grant or denial of the petition or the making of a determination on the Administrator's initiative, is available for public inspection in the Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590. Copies of available information may be obtained, as provided in part 7 of this chapter.

(b) Except for release of confidential information authorized under part 512 of this chapter, information made available for inspection under paragraph (a) of this section does not include information for which confidentiality has been requested and granted in accordance with part 512 of this chapter, and 5 U.S.C. 552(b). To the extent that a petition contains material relating to the methodology by which the petitioner intends to achieve conformance with a specific standard, the petitioner may request confidential treatment of such material on the grounds that it contains a trade secret or confidential information in accordance with part 512 of this chapter.

Issued on September 26, 1989.

Jeffrey R. Miller,

Acting Administrator.

[FR Doc. 89-23083 Filed 9-27-89; 10:40 am]

BILLING CODE 4910-59-M

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49 CFR Part 594

[Docket No. 89-8; Notice 2]

RIN 2127-AC98

Schedule of Fees Authorized by the National Traffic and Motor Vehicle Safety Act

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: The National Traffic and Motor Vehicle Safety Act, as revised by the Imported Vehicle Safety Compliance Act of 1988 (Pub. L. 100-562), provides that motor vehicles not originally manufactured to conform to Federal motor vehicle safety standards may nevertheless be imported into the United States under certain circumstances. In general, such a vehicle may be imported under bond for certification of its conformance, or exportation in the event it is not conformed, by those who have registered with NHTSA as importers, provided that NHTSA has determined that the nonconforming vehicle is capable of being conformed to meet the safety standards.

The Safety Act authorizes NHTSA to establish fees to cover its cost of administering the registration program, and of making conformance capability determinations, and to reimburse the U.S. Customs Service its costs in processing the importation bond. The purpose of this rule is to adopt the fee

schedules that will implement the statutory authorization. The agency has concluded that the initial annual fee for the registration program is $255. The fee to accompany a petition for a determination that a vehicle is eligible for importation is either $1560 or $2150, depending upon the basis of the petition. These fees are identical to those proposed. The fee required to reimburse the U.S. Customs Service for bond processing costs is $4.35 per bond. This is less than the proposed fee of $125.

DATE: The effective date of the final rule is September 30, 1989.

FOR FURTHER INFORMATION CONTACT: Taylor Vinson, Office of Chief Counsel, NHTSA, (202–366–5263).

SUPPLEMENTARY INFORMATION:

Introduction

On December 5, 1988, the National Highway Traffic Safety Administration published a notice of the amendment of section 108 of the National Traffic and Motor Vehicle Safety Act by Public Law 100–562, the Imported Vehicle Safety Compliance Act of 1988 (53 FR 49003). The effective date of the amendments is January 31, 1990. On and after that date, with the exceptions specified in the notice, motor vehicles that have not been originally manufactured to conform to the Federal motor vehicle safety standards may be imported only by persons who have registered with NHTSA as undertaking to bring the vehicle into conformance, or by persons who have contracts with registered importers to perform conformance work. In addition, such a vehicle may not be imported unless NHTSA has determined that it is capable of being conformed to the standards. The agency may make such a determination in a response to a petition by a registered importer, or on its own initiative. Each vehicle permitted entry must be accompanied by a bond given to secure performance of the conformance work, or, to ensure its exportation or abandonment to the United States in the event that the vehicle is not brought into full conformance.

Rules have been issued to implement the other provisions of the Vehicle Safety Act described above, and are being published simultaneously with this notice. They are 49 CFR part 591, *Importation of Vehicles and Equipment Subject to Federal Motor Vehicle Safety Standards;* part 592, *Registered Importers of Vehicles not Originally Manufactured To Conform to the Federal Motor Vehicle Safety Standards;* and part 593, *Determinations That a Vehicle not Originally Manufactured To Conform to the Federal Motor Vehicle Safety Standards Is Eligible for Importation.* A proposed schedule of fees (part 594) was published on April 25, 1989 (54 FR 17792).

The new provisions also specifically authorize NHTSA to impose fees to cover certain administrative costs incurred in implementation of the new importation procedures. There are two or more types of fees to cover three types of costs for which fees may be charged: an annual fee to cover the costs of administration of the importer registration program, an annual fee or fees to cover the costs of processing the bond furnished to the Customs Service, and an annual fee or fees to cover the costs of making import eligibility determinations.

The purpose of this rule is to adopt a fee schedule that appears appropriate for recovery of each cost, and to explain the rationale behind each of these fees. In identifying those agency activities that may form the cost basis of a fee authorized by the new import provisions, the agency has considered the experience of other agencies in establishing users fees under the Independent Offices Authorization Act (31 U.S.C. 9701), and the Consolidated Omnibus Budget Reconciliation Act (Pub.L. 99–272). Thus, as proposed, and as repeated in this notice, the agency will: identify each service it provides, explain why it is entitled to recover the cost of providing that service, identify each type of expenditure incurred in providing that service, explain the criteria used to include or exclude a particular expenditure, and calculate the amount of each such expenditure.

There were three substantive responses to the proposal, submitted by Auburn Motors, Inc., The Dealer Action Association, and Mercedes-Benz of North America.

1. Requirements of the Fee Regulation

Section 594.6 Annual Fee for administration of the importer registration program

Section 108(c)(3)(A)(iii) of the Vehicle Safety Act provides that registered importers must pay "such annual fee as the Secretary establishes to cover the cost of administering the registration program. . . ."

The first issue addressed by the agency in its proposal was whether the term "registration program" is inclusive of all activities under section 108(c) (except for the other activities for which a fee may be imposed), or whether it is restricted to activities relating directly to the registration process, such as reviewing registration applications and acting upon them. The agency interpreted "registration program" conservatively, and concluded that it refers only to activities connected with the development and maintenance of the registration process, including monitoring, and enforcement activities resulting in suspension or revocation of a registration. Although it could be argued that NHTSA's verification of the certification submitted by a registered importer is relevant to the maintenance by that registered importer of its status, this agency believes that Congress did not intend to include such an activity in the registration program. Specifically, section 108(c)(3)(B)(i) prohibits the application of fees collected under the Vehicle Safety Act to NHTSA's inspection of vehicles for which certifications have been filed. Thus, NHTSA proposed to exclude, from the fee structure of the registration program, activities connected with processing of certificates and compliance documentation of motor vehicles.

Mercedes-Benz and The Dealer Action Association disagreed with NHTSA's conclusions, and argued that all costs except those specifically exempted in the statute ought to be included. Each believes that the costs associated with processing certificates of conformity and monitoring compliance should also be included. They argued that Congress intended that the costs be borne in full by those who would benefit from the new legislation, and that the presence of specific exclusions in the legislation argues for an inclusive approach. Specifically, the commenters believe that two separate provisions must be read together to understand the scope of the fee structure Congress meant to establish. Section 108(c)(3)(A)(iii) requires collection from each Registered Importer of its pro rata share of administering the registration program. Section 108(c)(3)(B) then defines the scope of agency activities covered. It states in relevant part "All fees collected shall be available until expended * * * solely for use * * * in the administration of all of the requirements of this subsection * * *", other than NHTSA's periodic inspection of motor vehicles for which certificates have been furnished, and regulations governing the Registered Importer's financial ability to notify and remedy.

The commenters further argue that the legislative history also evidences Congressional intent to establish comprehensive fees. Remarks by Senator Inouye are cited in support:

> This new program will be financed through fees paid by registered importers upon registration, and annually thereafter, as

calculated by the Secretary to cover the additional costs of administering the program. We felt it was appropriate in this limited instance to require the payment of such fees because this new program is being established solely for the benefit of registered importers and will continue to permit them to stay in business.

Cong. Rec. S14734, daily ed. October 5, 1988.

The commenters believe that NHTSA should recalculate the costs it will incur and make appropriate adjustments in the fees it will require Registered Importers to pay annually.

The agency has carefully considered these comments. NHTSA notes the comment by Senator Rudman (S14375) that the fees cover the costs of administering only "certain provisions", and that "the user fees would not apply to the testing of these vehicles. . . . This is a responsibility normally assumed by the Department." NHTSA believes that it was not the intent of Congress to assess fees for activities that represent "a responsibility normally assumed by the Department", *i.e.*, a responsibility that was part of the agency's enforcement program before enactment of the 1988 Act. The registration requirements (section 108(c)(3)(D)) constitute an entirely new program, but the requirements for submission and evaluation of certification and documentation (section 108(c)(3)(E)) have a direct counterpart in the agency's present enforcement program under which a statement of conformance supplemented by documentary evidence must be provided before action is taken upon the bond. Therefore the agency has not broadened its interpretation of the elements of the registration program in section 108(c)(3)(D) to cover activities in section 108(c)(3)(E).

The second issue addressed by NHTSA, and relevant to the other authorized fees as well, was whether the agency can recover both direct and indirect costs associated with its activities. It noted that there is no modifier of the word "costs", and concluded that both direct and indirect costs may be recovered. Such costs include all costs of administering the program, including salaries and other personnel costs (retirement, insurance and leave), travel, postage, maintenance and depreciation of equipment, supplies, and a proportionate share of agency management and supervisory costs as well as accrued liabilities, which include severance pay, unemployment compensation, workers compensation, and unused leave costs. The commenters did not address this issue.

The initial annual fee attributable to the registration program contains three components. The first component is one that would cover the cost of processing an application by a person seeking to become a registered importer. It would not be refundable in the event of a denial. The second component represents the costs attributable to such inspection of an applicant's facilities as the agency may deem necessary to conduct prior to a decision on an application. The third component is intended to cover the remaining costs. The first and third components of the initial annual fee will be paid at the time that an applicant seeks to become a registered importer. The second component will be paid only if an inspection is actually conducted, and would be payable by the end of the tenth calendar day after notification by the agency. If the application is denied, the amount of the fee representing the third component will be refunded to the applicant.

Annual fees after the initial annual fee will also have three components. Instead of a component attributable to processing an application, the first component of a regular annual fee will cover the costs of processing the registered importer's annual statement (or mid-year changes) attesting that there is no material change in its condition and that it is maintaining its financial and technical ability to meet its statutory obligations. The second component will cover the cost, if any, of such inspections the agency might have conducted with respect to the registered importer during the year. The third component is again intended to cover remaining costs.

With respect to the first component of the initial annual fee, the relatively simple, discrete activities involved in processing and acting upon registration applications permit a uniform first component sum to be developed, payable by all who seek to become registered importers. Similarly, the agency tasks involved in processing and reviewing annual statements appear to permit a uniform first component sum to be developed. The direct costs that the agency will consider in this regard are the amount of time spent in reviewing applications or annual statements for form and content, analysis, and drafting of documents relating to the analysis and disposition of the application or annual statement, including direct supervisory time. Other direct costs associated, such as postage, computer time, and meetings to discuss the merits of an application or annual statement, will be included in the fee structure. However, while the application is pending, NHTSA may wish to inspect the premises of the applicant. The costs of this inspection would form the basis of the second component of the fee that must be paid before a determination is made on the merits of the application. Inspections conducted after registration (the second component of the regular annual fee) would be reflected in the next annual fee payable by the registered importer concerned.

The agency will include indirect costs as well. For example, if one-third of a staffer's time at a word processing terminal is spent in drafting documents relative to an application determination, then a third of the cost of maintaining the space and the terminal will be factored into a registration fee. Indirect general and administrative costs can be included in the fee structure as a pro rata share of the costs attributable to running the program.

Once a registration has been granted, section 108(d)(2) imposes an obligation on a registered importer to maintain evidence satisfactory to NHTSA that it continues to be financially able to meet its statutory responsibilities "relating to discovery, notification, and remedy of motor vehicle defects." Further, section 108(c)(3)(D)(ii) directs the agency to set requirements for registered importers, including at a minimum (1) requirements for record-keeping; and (2) requirements for records and facilities inspection for registered importers. Activities of the agency associated with satisfying it of financial ability and meeting other specified responsibilities may be included in the cost basis of the registration program annual fee. The initial annual fee adopted by this notice is based upon NHTSA's estimates of costs for the first fiscal year that the registration program is in effect. If the amount of the annual fee for a succeeding year is adjusted, the adjustment will take into account NHTSA's actual experience in the year preceding.

Under § 592.6(a)(7) of the regulation on Registered Importers, the agency may inspect a facility or the records which the Registered Importer must keep to fulfill its program responsibilities. There are two purposes for which such inspections may be conducted. The first is to verify that the regulatory criteria for obtaining or maintaining the status of registered importer are met. These inspections are directly related to administration of the registration program. The agency will include direct and indirect costs associated with these inspection activities in the fee structure for the program. The second purpose for which an inspection may be conducted is to verify that a certification filed by a registered importer is supported by the conformance work performed. This

activity is specifically excluded as a cost towards which fees may not be applied. Consequently, if inspecting a facility for compliance with registration requirements also involves vehicle inspection, agency staff will segregate costs to exclude those attributable to the inspection of vehicles. Only those costs directly attributable to the registration program will be included in the second component of the next regular annual fee.

As with the costs of processing an initial application or annual statement, all direct and indirect costs associated with the suspension and reinstatement of Registered Importer status are recoverable by the agency. These include costs associated with notifying a registrant that the agency is considering suspension, plus the costs of allowing it to present its opposition to suspension under § 592.7(b) of the Registered Importer regulation, and costs associated with processing a registrant's request that NHTSA reconsider a suspension under § 592.7(e). The final associated cost is that of notifying the registrant of the determination regarding its suspension.

Similarly, the costs associated with revoking a registration are recoverable. These include notifying a Registered Importer in writing that NHTSA intends to revoke registration under § 592.7(b), or that the agency has revoked a registration under § 592.7(c) because the registrant knowingly filed a false or misleading certification. Further recoverable costs are those associated with reviewing, analyzing and responding to the registrant's written opposition to a preliminary decision to revoke its registration.

The agency will include whatever activities are associated with making a determination under § 592.7(d) that the basis for a suspension no longer exists. The nature of the reinstatement process will vary depending on the reason for the suspension. For example, the process will be comparatively simple if the suspension was for failure to pay a fee.

Section 594.7 Fee for Vehicle Importation Eligibility Petitions

Section 108(c)(3)(A)(iii)(II) also requires Registered Importers to pay "such other annual fee or fees as the Secretary reasonably establishes to cover the cost of * * * making the determinations under this section." Pursuant to part 593, these determinations are whether the vehicle sought to be imported is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, and certified as meeting the Federal standards, and whether it is capable of being readily modified to meet those standards, or, alternatively, where there is no substantially similar U.S. motor vehicle, whether the safety features of the vehicle comply with or are capable of being modified to comply with the U.S. standards. These determinations are made pursuant to petitions submitted by Registered Importers or manufacturers, or pursuant to determinations made upon the Administrator's initiative.

In developing this regulation, the agency considered the type and frequency of fees that would best implement the purpose of the 1988 Act. With respect to making eligibility determinations, it considered an "annual fee", in which total costs attributable to eligibility determinations would be divided equally among all Registered Importers. Such a fee would be payable at the time of the next regular annual fee for administration of the registration program. This type of fee appeared equitable in the sense that more than one Registered Importer may benefit from an eligibility determination, and that the costs would not be borne by the petitioner alone. However, NHTSA proposed and adopted a requirement that a fee be charged for individual petitions for determinations of eligibility. The benefit of this approach is that it permits "pay-as-you-go", under which costs are more quickly recovered. This fee would be payable by a petitioner for a determination, or by the importer who first benefits from a determination made on the agency's initiative (see further discussion below).

The agency requested comments on each approach, but it proposed the second approach. Under this, a petition by a manufacturer or Registered Importer for a determination would be accompanied by the fee specified in § 594.7. The payment of this fee by the petitioner is premised upon the likelihood that the petitioner would be the immediate beneficiary of any favorable determination, and therefore, ought to pay the costs authorized by statute for consideration of its petition. The immediate beneficiary of a favorable determination made upon the Administrator's initiative would be the first Registered Importer, or other person, who imports a vehicle that is covered by the determination. Therefore, NHTSA proposed to establish a fee that would be payable by the Registered Importer who furnishes a certificate of conformity covering the first vehicle imported under a declaration filed after notice of the Administrator's initiative determination has appeared in the Federal Register. The notice would include a discussion of the fee to be paid and the basis for it. Subsequently, upon receipt of the first declaration covering the vehicle, NHTSA would notify the Registered Importer concerned that the stated fee is due at the time the certificate of conformity covering the vehicle is received. However, NHTSA is aware that such costs would remain unrecoverable until such time as (and unless) a declaration is filed on such a vehicle.

The three commenters on the proposal recommended that it would be more equitable to divide the petition fee among all Registered Importers. NHTSA gave close attention to these comments and examined various ways that this could be accomplished. Because of the requirement of section 108(c)(3)(B) that the fee applicable in any fiscal year be established before the beginning of such year, NHTSA concluded that it could not implement the suggestion it had discussed in the proposal, to establish a pro rata fee applicable to all Registered Importers at the end of a fiscal year to cover all petition determinations of that year. Collection of such a sum appeared difficult also; the agency did not appear to have leverage over manufacturers who had filed petitions without a fee, and as for Registered Importers, to defer renewal of registration until the annual petition fee was paid seemed irrelevant to maintenance of the qualifications of Registered Importers.

The agency concluded that payment by the petitioner at the time of the petition represented the most effective way to recover the costs of eligibility determinations, but within that framework it explored ways of equalizing the burden by an allocation at the end of the fiscal year. As an alternative to dividing total petition fees by the number of Registered Importers, the fee for a petition for a specific make/model could be divided by the number of only those Registered Importers who had furnished certificates of conformity for that make/model during the year. A variation of this alternative would be a formula with weights given Registered Importers according to the specific number of that specific make/model each had imported. At the end of the fiscal year, there would be a reconciliation of sums, under which certain Registered Importers could be given cash refunds or credits toward future petitions, or, if the reconciliation showed otherwise, an assessment imposed on a Registered Importer. No approach appeared to be without problems, and each, other than payment at the time of the petition,

would add costs to the general fee structure. Nevertheless, NHTSA remains interested in the concept of equalizing the burden, and on the basis of its experience in the first year of the petition program, will consider additional ways that this might be accomplished. It would be interested in having constructive comments during this period.

As NHTSA observed in the notice, the activities that may form the cost basis for petitions appear to include logging-in, notifying the petitioner of receipt, and evaluating the petition. If the agency grants a written request by the petitioner to appear to discuss a petition under § 593.7(c), it will recover the cost of processing the written request and discussing the petition. Although the 1988 Act does not require an actual demonstration of conformance, only that a vehicle is capable of conformance, a petitioner may wish to substantiate its arguments with presentation of a modified vehicle. In that event, it may be necessary for NHTSA to inspect the modified vehicle as part of its role in determining whether the vehicle is eligible for importation. The cost of that inspection would be properly recoverable. The new import provisions require publication of a notice in the **Federal Register**; thus the agency will also recover costs associated with preparing and processing **Federal Register** documents generated in connection with the petition, processing and analyzing comments submitted in connection with a **Federal Register** document; and notifying a petitioner of the agency's decision.

When NHTSA makes a determination on its own initiative, it will also publish a notice in the **Federal Register** and receive and evaluate comments on it.

The new import provisions do not require the agency to publish a second **Federal Register** notice immediately after a decision is made. Section 108(c)(3)(C)(iv), however, does require NHTSA to publish annually in the **Federal Register** a list of all vehicles determined to be eligible for import under the Act. Compiling and publishing this list is connected with making and announcing eligibility determinations, and the costs will be included in the fee structure.

Section 594.8 Fee payable for Administrator's determination

Costs to be recovered through payment of a fee also cover those attributable to determinations of import eligibility made on NHTSA's initiative. The principal issue here is how such costs are to be recovered in the absence of a petitioner. The method proposed was that it be paid by the first Registered Importer who furnishes a certificate of conformity covering such vehicle after NHTSA's determination on its own initiative. There were no specific comments on this method, though it was clearly implied by the three commenters that such costs should be shared equally by all Registered Importers. For the reasons set forth above in the discussion on allocation of fees among Registered Importers, it is impracticable to do so, and NHTSA has adopted the method proposed.

Section 594.9 Fee to Recover the Costs of Processing the Bond

Section 108(c)(3)(A)(iii)(II) also requires a registered importer to pay "such annual fee or fees as the Secretary reasonably establishes to cover the cost of processing the bond furnished to the Secretary of the Treasury" upon the importation of a nonconforming vehicle to ensure that the vehicle will be brought into compliance within a reasonable time, or if the vehicle is not brought into compliance within such time, that it is exported without cost to the United States, or abandoned to the United States.

The statute contemplates that NHTSA make a reasonable determination of the cost to the United States Customs Service of processing the bond. The agency has met with representatives of the Customs Service to obtain such information as would allow it to include the cost basis of processing the bond in the fee structure. The analysis that Customs has provided NHTSA indicates that it has followed the same guidelines as the agency does to determine whether each activity associated with processing the bond gives rise to a recoverable cost. The 1988 Act requires the bond to be furnished the Secretary of the Treasury acting on behalf of NHTSA. However, NHTSA has decided, and Customs concurs, that the bond in question is not the general importation bond which covers duties and other obligations relevant to merchandise. It is a bond given to secure performance of obligations under the Vehicle Safety Act, and will therefore be a bond of the Department of Transportation and not of the Treasury. The two Federal agencies have determined that this bond will accompany the declaration at the time of entry, and be submitted with it to NHTSA. Thus the role of Customs in "processing" the bond will be limited to two activities. At the time of importation, it will ensure that the bond is attached to the entry form (or reject the entry for lack of the bond). After bond verification, it will forward the bond and entry form to NHTSA. A third activity will be required in the event that a vehicle must be exported for failing to meet NHTSA's requirements: the supervision of export.

The first two activities will form the basis for the processing cost payable by the registered importer. The cost of the third activity will be part of the bond, so that if the vehicle must be redelivered for export, a sum covering the third activity would be payable to NHTSA on behalf of Customs. Although NHTSA will advance Customs its costs in accordance with statutory requirements, it will recover these costs on an *ad hoc* basis, requiring a registered importer to submit a bond processing fee at the time it submits conformance verification on each vehicle.

2. Calculations of the agency's costs in setting fees

To the extent possible, the agency's costs in setting fees are based upon an accounting of each discrete activity involved in the process. Thus, the fees imposed by part 594 include the agency's best direct and indirect cost estimates of the man-hours involved in each activity, on both the staff and supervisory levels, the costs of computer and word processor usage, postage costs, costs attributable to travel, salary and benefits, and maintenance of work space, to name the ones set forth in the proposed regulation.

Specifically, each fee is calculated on the basis of the direct and indirect costs associated with the activity for which the fee is paid. The direct costs include the average cost per professional staff-hour, computer and word processor time, stationery and postage, and transportation.

The average cost per professional staff-hour is calculated based upon the full costs for time spent (to the nearest quarter-hour) using the following applicable professional staff rates:

(A) Office of Vehicle Safety Compliance—

Clerical staff—$13 per hour.
Computer contract staff—$25 per hour.
Review staff—$26 per hour.
Supervisors—$41 per hour.

(B) Office of Chief Counsel—$41 per hour.

The average cost per computer-hour is calculated at the rate of $100 per hour.

The average cost for postage is calculated to be $3.00.

The indirect costs include a pro rata allocation of the average salary and benefits of persons employed in processing the applications and recommending decisions on them, and a pro rata allocation of the costs

attributable to maintaining the office space, and the computer or word processor. The staff rates above include benefits; the costs associated with office space, equipment maintenance, communications and other overhead amount to an additional $6.71 per hour.

The cost for determining the salary and benefits of persons employed is calculated based upon the time spent multiplied by the employee's hourly wage.

The cost of maintaining the computer or word processor is calculated based upon maintenance, time sharing, and staff operations.

The cost of maintaining the office space is calculated based upon standard government regulations based upon grade levels.

The cost of travel is based upon an estimated round trip air fare of $250, and a 3-day per diem of $100 a day, for a total trip cost of $550.

A. Registration Program Fee

The Registration Program Annual Fee has two and in some instances three components: a portion attributable to the registration process, a portion attributable to any inspection of an applicant that the agency deems needed to verify information submitted in an application for registration, and a portion attributable to other activities occurring in the registration program. Exclusive of the inspection portion, the agency has decided that the initial Annual Registration Program fee shall be $255.

The initial component of the Registration Program Fee is the portion of the fee attributable to processing and acting upon registration applications. The agency estimates this portion of the fee as $85.99.

In calculating the direct costs of processing registration applications, NHTSA estimates that one staff member and one supervisor will spend a total of one man-hour in processing, reviewing, and acting upon applications, that a quarter hour of computer, and computer-operator time will be required to verify that the applicant has not had a registration revoked, that a half-hour of clerical time will be required, and that postal charges will be incurred. These costs are estimated at $74.25.

In calculating the indirect costs of processing registration applications, NHTSA has estimated that these will average $6.71 per hour spent. Processing will require a total of 1.75 hours per application, thus NHTSA estimates that indirect costs will total $11.74. Thus the total direct and indirect costs of this component are $85.99.

With respect to other costs attributable to maintenance of the registration program, these consist principally of reviewing a registrant's annual statement verifying the continuing validity of information already submitted, and processing annual fees. These costs also include costs attributable to revocation or suspension of a registration.

In calculating the direct costs of administering the registration program other than costs connected with the initial application, NHTSA estimates that one staff member and one supervisor will spend a total of 1.5 man-hours in administration activities, that one-half hour of computer time, and computer operator time will be required, that 1.5 hours of clerical and recordkeeping time will be needed, and a postal charge will be incurred. The total direct charges for administering the registration program are estimated at $131.50. The total overhead costs of the 3.5 hours involved are $23.49, or a total of $154.99. These costs, of course, are exclusive of costs associated with revocation or suspension.

At this point, it appears fairest that a suspended registrant bear the costs associated with suspension and reinstatement, to be included in its next annual fee. However, it will not be feasible to recover costs from an importer whose registration has been revoked. Those costs appear best borne by each registered importer paying a pro rata share in its annual fee. Obviously, before the effective date of the 1988 Act, NHTSA has no knowledge of how many registered importers there will be or how many suspensions or revocations may occur in the first year of the program. However, for purposes of determining this portion of the registration fee, NHTSA estimates there will be 20 registered importers during the fiscal year beginning October 1, 1989, and ending September 30, 1990, and that there will be one revocation. Under Part 592, the procedures that the agency will follow in determining whether a registration should be revoked or suspended are identical. This means that the direct and indirect costs should also be identical, up to the point of an agency determination. Because a suspended registration may be reinstated, either upon expiration of the term stated in the agency's letter of suspension, or upon cure of the cause giving rise to the suspension, there will be a slight additional cost commensurate with the clerical aspects of ending the suspension.

NHTSA contemplates that its Enforcement Office will recommend suspensions or revocations to the Office of Chief Counsel, and that 1 hour of staff time, and .25 hour computer operator time will be involved in recommendations. In addition, .25 hour of computer time will be used. The Office of Chief Counsel will require 1.75 hours to review the recommendation and draft a letter to the registrant, and an additional 1.75 hours to review the registrant's reply and to draft a letter of suspension, or revocation, or declining to take further action. Postal charges will total $6.00. The total direct costs associated with this procedure are $206.75, and the overhead costs for 4.75 hours of agency time, $34.87. The sum of $238.62 divided by the 20 estimated Registered Importers gives a figure of $11.93 to be added to the portion of the annual fee representing maintenance of the registration program (For reinstatement, to be borne by the registrant, NHTSA estimates that the total direct and indirect costs will be $40.36, representing .25 hour of clerical time, .25 hour of computer time, and .25 hour of computer operator time).

Thus, the total portion attributable to maintenance of the registration program, as estimated by NHTSA, is approximately $166.92. When added to the $85.99 representing the registration application component, the cost per applicant equals $252.91. Therefore, NHTSA has determined that the initial annual registration fee, for the period October 1, 1989 through September 30, 1990, is $255. In the event that an application is denied or withdrawn, NHTSA will refund all but $86 of this amount, or $169.

B. Fee for Vehicle Eligibility Petitions

In calculating the direct costs of processing and acting upon a petition for a determination of eligibility, NHTSA estimates that the costs involved for determinations involving substantially similar vehicles will require substantially less agency time than those for non-similar vehicles. For purposes of this determination, NHTSA has chosen passenger cars and multipurpose passenger vehicles, the most frequently imported types of motor vehicles. The agency estimates the total direct and indirect costs for a determination involving a substantially similar vehicle at $1558.68, and for a non-similar vehicle at $2151.61. In this light, a fee of $1560 for substantially similar vehicle determinations, and one of $2150 for those that are not substantially similar, appears to fulfill the statutory directive.

More specifically, the following cost breakdown has been estimated for substantially similar (and non-similar)

vehicles. The process will result in personnel costs related to 2 (5) supervisory hours, 24 (35) staff hours, .25 (.25) hour computer time, .25 (2) hour(s) data entry time, .50 (2) hour(s) clerical time, and .25 (.50) hour recordkeeping time. In addition, .25 hour of computer time would be used for each. However, costs associated with preparing and publishing the two Federal Register notices, and evaluating comments to the first notice, should be identical. Each notice may require two columns of space ($125 per column), for a cost of $250 per notice, and total publication costs of $500. Following agency practice with other petitions, the notices will be prepared by the Office of Chief Counsel. It is estimated that each notice will require 1 hour of preparation time, and .50 hour of clerical time, or a total of 3 hours for both notices. The estimated total direct charges for determinations of eligibility will be $1342 ($1817.50). In calculating the indirect costs of processing and acting upon eligibility petitions, NHTSA estimates that the process, including the Federal Register preparation time, will take 30 (47.50) man hours, for a cost of $201.30 ($318.73), or a total cost of $1543.30 ($2136.23). These totals include .25 hour of computer time. To this must be added the pro rata cost of the yearly Federal Register school. It is estimated that this will require 1 hour of Office of Chief Counsel time, .50 hour clerical time, and two columns in the **Federal Register.** The total direct costs to fulfill this statutory requirement would be $297.50. The overhead costs, $10.07. The total of $307.56 divided among the estimated 20 registered importers adds $15.38 to each petition cost, or a total of $1558.68 ($2151.61). Therefore, a petition fee of $1560 ($2150) is being adopted. At this point, costs appear similar for those determinations made upon the agency's own initiative, and the same fee will be used in recovery of costs.

C. Bond Processing Costs

With respect to the costs attributable to processing the bond furnished the Secretary of the Treasury, the agency estimated and proposed $125 per bond. However, after the proposal, NHTSA determined that the role of Customs in "processing" the bond under the 1988 Act would be limited to ensuring that the bond was completed and attached to the entry form, and that both would be forwarded to NHTSA. Customs then provided NHTSA with a detailed estimate of the costs involved in its processing of the bond. These tasks would be performed by a GS 9 Step 5 employee (hourly rate $12.94). Eighteen minutes would be required to verify the content of the bond information, amount, and completeness, and to enter the information into Customs' data processing system. These tasks would cover all nonconforming vehicles imported. It is Customs practice to conduct verification inspections on approximately 15% of vehicles, verifying VINs to bonds, and this inspection would occupy 13 minutes. Finally, Customs estimates that 1% of the vehicles entered would not be brought into satisfactory conformity, requiring fulfillment of the bond condition of export. The associated tasks of supervising lading, reviewing documents, and verifying vehicle identification would require 20 minutes. Using the estimate of 2100 vehicles entered per year (the importation rate for 1989 to date), Customs' total bond processing costs are $9,140.04, or $4.352 per vehicle. NHTSA has adopted $4.35 as the bond processing fee per vehicle.

Effective Date

Section 108(c)(3)(B) requires that the fee applicable in any fiscal year shall be established by NHTSA before the beginning of each such year. Therefore, pursuant to 5 U.S.C. 553(d)(3), it is found that good cause is shown for an effective date that is earlier than 30 days after publication of the final rule. Therefore, this final rule is effective September 30, 1989, so that the fees it establishes will be applicable in Fiscal Year 1990, which begins October 1, 1989.

Impacts

After considering the impacts of this rulemaking action, NHTSA has determined that the action is not major within the meaning of Executive Order 12291 "Federal Regulation". It implements Public Law 100–562 under which fees may be established to cover the costs of administering the program for registration of importers of vehicles not originally manufactured to conform to the Federal motor vehicle safety standards, of determinations that nonconforming vehicles are capable of conformity to the standards, and of reimbursing or advancing the U.S. Customs Service its costs in processing safety standards conformance bonds. It is not significant under Department of Transportation regulatory policies and procedures. The action does not involve any substantial public interest or controversy. There is no substantial effect upon state and local governments. There is no substantial impact upon a major transportation safety program. Both the number of registered importers and vehicles for which determinations are established to be comparatively small, and the number of vehicles imported per year is estimated to be less than 3000. Nevertheless, a regulatory evaluation analyzing the economic impact of this and the related final rules required by P.L. 100–562 has been prepared, and is available for review in the docket, as part of the Regulatory Flexibility Analysis.

NHTSA has analyzed this rule for purposes of the National Environmental Policy Act. The rule will not have a significant effect upon the environment because it is anticipated that the annual volume of motor vehicles imported through registered importers will not vary significantly from that existing before promulgation of the rule even with the imposition of fees to be paid by registered importers.

The agency has also considered the effects of this rule in relation to the Regulatory Flexibility Act. I certify that this rule will not have a significant economic impact upon a substantial number of small entities. Although entities that currently modify nonconforming vehicles are small businesses within the meaning of the Regulatory Flexibility Act, the agency has no reason to believe that a substantial number of these companies could not pay the fees imposed by this regulation. However, some small businesses currently conforming vehicles may not choose to register as importers because of the fee and other requirements. Accordingly, these businesses will no longer be able to perform conformance work on vehicles imported on or after January 31, 1990. The cost to owners or purchasers of modifying nonconforming vehicles to conform with the safety standards may be expected to increase to the extent necessary to reimburse the registered importer for the fees payable to the agency for the cost of administering the registration program and to compensate Customs for its bond processing costs. Governmental jurisdictions will not be affected at all since they are generally neither importers nor purchasers of nonconforming motor vehicles.

The agency has analyzed the proposed rule in accordance with the principles and criteria contained in Executive Order 12612 "Federalism" and determined that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 594

Imports, Motor vehicle safety, Motor vehicles.

In consideration of the foregoing, a new part 594, *Schedule of Fees*

Authorized by the National Traffic and Motor Vehicle Safety Act, is added to Title 49, Chapter V, to read as follows:

PART 594 SCHEDULE OF FEES AUTHORIZED BY THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT.

Sec.

Authority: Public Law 100-562, 15 U.S.C. 1401, 1407; delegation of authority at 49 CFR 1.50.

§ 594.1 Scope.

This part establishes the fees authorized by the National Traffic and Motor Vehicle Safety Act.

§ 594.2 Purpose.

The purposes of this part is to ensure that NHTSA is reimbursed for costs incurred in administering the importer registration program, in making determinations whether a nonconforming vehicle is eligible for importation into the United States, and in processing the bond furnished to the Secretary of the Treasury given to ensure that an imported vehicle not originally manufactured to conform to all applicable Federal motor vehicle safety standards is brought into compliance with the safety standards, or will be exported, or abandoned to the United States.

§ 594.3 Applicability.

This part applies to any person who applies to NHTSA to be granted the status of a Registered Importer, to any person who has been granted such status, and to manufacturers who are not Registered Importers who petition the Administrator for a determination pursuant to Part 593 of this chapter.

§ 594.4 Definitions.

All terms used in this part that are defined in section 102 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1391) are used as defined in the Act.

"*Administrator*" means the Administrator of the National Highway Traffic Safety Administration.

"*NHTSA*" means the National Highway Traffic Safety Administration.

"*Registered Importer*" means any person who has been granted the status of registered importer under Part 592 of this Chapter, and whose registration has not been revoked.

§ 594.5 Establishment and payment of fees.

(a) The fees established by this part continue in effect until adjusted by the Administrator. The Administrator reviews the amount or rate of fees established under this part and, if appropriate, adjusts them by rule at least every 2 years.

(b) The fees applicable in any fiscal year are established before the beginning of such year. Each fee is calculated in accordance with this part, and is published in the **Federal Register** not later than September 30 of each year.

(c) An applicant for status as Registered Importer shall submit an initial annual fee with the application. A fee for a determination that a vehicle is eligible for importation shall be submitted with the petition for a determination. No application or petition will be accepted for filing or processed before payment of the full amount specified. Except as provided in § 594.6(d), a fee shall be paid irrespective of NHTSA's disposition of the application or petition, or of a withdrawal of an application or petition.

(d) A Registered Importer annual fee, other than the initial annual fee, is payable not later than October 31 of each year.

(e) A fee atrributable to a determination of eligibility made on the Administrator's initiative shall be paid by a Registered Importer in accordance with § 594.8(b).

(f) A fee for reimbursement for bond processing costs shall be filed with each certificate of conformity furnished the Administrator.

(g) Any other annual fee is payable not later than October 31 of each year. Any other fee is payable not later than 30 calendar days after the date of written notification by the Administrator.

(h) Fee payments shall be by check, draft, money order, or Electronic Funds Transfer System made payable to the Treasurer of the United States.

§ 594.6 Annual fee for administration of the registration program.

(a) Each person filing an application to be granted the status of a Registered Importer pursuant to part 592 of this chapter during the period October 1, 1989 through September 30, 1990, shall pay an initial annual fee of $225, as calculated below, based upon the direct and indirect costs attributable to:

(1) Processing and acting upon such application;

(2) Any inspection deemed required for a determination upon such application;

(3) The estimated remaining activities of administering the registration program in the fiscal year in which such application is intended to become effective.

(b) That portion of the initial annual fee attributable to the processing of the application for applications filed from October 1, 1989, through September 30, 1990, is $86. The sum of $86, representing this portion, shall not be refundable if the application is denied or withdrawn.

(c) If, in order to make a determination upon an application, NHTSA must make an inspection of the applicant's facilities, NHTSA notifies the applicant in writing after the conclusion of any such inspection, that a supplement to the initial annual fee in a stated amount is due upon receipt of such notice to recover the direct and indirect costs associated with such inspection and notification, and that no determination will be made upon the application until such sum is received. Such sum is not refundable if the application is denied or withdrawn.

(d) That portion of the initial annual fee attributable to the remaining activities of administering the registration program from October 1, 1989, through September 30, 1990, is set forth in subsection (i) of this section. This portion shall be refundable if the application is denied, or withdrawn before final action upon it.

(e) Each Registered Importer who wishes to maintain the status of Registered Importer shall pay a regular annual fee based upon the direct and indirect costs of administering the registration program, including the suspension and reinstatement, and revocation of such registration.

(f) The elements of administering the registration program that are included in the regular annual fee are:

(1) Calculating, revising, and publishing the fees to apply in the next fiscal year, including such coordination as may be required with the U.S. Customs Service.

(2) Processing and reviewing the annual statement attesting to the fact that no material change has occurred in the Registered Importer's status since filing its original application.

(3) Processing the annual fee.

(4) Processing and reviewing any amendments to an annual statement received in the course of a fiscal year.

(5) Verifying through inspection or otherwise that a Registered Importer is complying with the requirements of Sec. 592.6(b)(3) of this chapter for recordkeeping.

(6) Verifying through inspection or otherwise that a Registered Importer is able technically and financially to carry out its responsibilities pursuant to 15 U.S.C. 1411 *et seq.*

(7) Invoking procedures for suspension of registration and its reinstatement, and for revocation of registration pursuant to Sec. 592.7 of this chapter.

(g) The direct costs included in establishing the annual fee for maintaining registered importer status are the estimated costs of professional and clerical staff time, computer and computer operator time, and postage, per Registered Importer. The direct costs included in establishing the annual fee for a specific Registered Importer are costs of transportation and *per diem* attributable to inspections conducted with respect to that Registered Importer in administering the registration program, which have not been included in a previous annual fee.

(h) The indirect costs included in establishing the annual fee for maintaining Registered Importer status are a pro rata allocation of the average salary and benefits of persons employed in processing annual statements, or changes thereto, in recommending continuation of Registered Importer status, and a pro rata allocation of the costs attributable to maintaining the office space, and the computer or word processor. This cost is $6.71 per man-hour for the period October 1, 1989, through September 30, 1990.

(i) Based upon the elements, and indirect costs of paragraphs (f), (g), and (h) of this section, the component of the initial annual fee attributable to administration of the registration program, covering the period from October 1, 1989, through September 30, 1990, is $168.92. When added to the component representing the costs of registration of $85.99, as set forth in paragraph (b) of this section, the costs per applicant to be recovered through the annual fee is $252.91. The annual registration fee for the period October 1, 1989, through September 30, 1990, is $255.

§ 594.7 Fee for filing petition for a determination whether a vehicle is eligible for importation.

(a) Each manufacturer or registered importer who petitions NHTSA for a determination that—

(1) a nonconforming vehicle is substantially similar to a vehicle originally manufactured for importation into and sale in the United States and of the same model year as the model for which petition is made, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards, or

(2) a nonconforming vehicle has safety features that comply with or are capable of being modified to comply with all applicable Federal motor vehicle safety standards,

shall pay a fee based upon the direct and indirect costs of processing and acting upon such petition.

(b) The direct costs attributable to processing a petition filed pursuant to paragraph (a) of this section include the average cost per professional staff-hour, computer and computer operator time, and postage. The direct costs also include those attributable to any inspection of a vehicle requested by a petitioner in substantiation of its petition.

(c) The indirect costs attributable to processing and acting upon a petition filed pursuant to paragraph (a) of this section include a pro rata allocation of the average salary and benefits of persons employed in processing the petitions and recommending decisions on them, and a pro rata allocation of the costs attributable to maintaining the office space, and the computer or word processor.

(d) The direct costs attributable to acting upon a petition filed pursuant to paragraph (a) of this section, also include the cost of publishing a notice in the Federal Register seeking public comment, the cost of publishing a second notice with the agency's determination, and a pro rata share of the cost of publishing an annual list of nonconforming vehicles determined to be eligible for importation.

(e) The fee payable for a petition for a determination that a nonconforming vehicle is eligible for importation into the United States for petitions filed from October 1, 1989, through September 30, 1990, is $1560 if a petition is filed under paragraph (a)(1) above, and $2150 if filed under paragraph (a)(2) above, when the petitioner does not request inspection of a vehicle. When the petitioner requests an inspection of a vehicle, the sum of $550 shall be added to such fee. No portion of this fee is refundable if the petition is withdrawn or denied.

§ 594.8 Fee for importing a vehicle pursuant to a determination made on the Administrator's initiative.

(a) A fee shall be paid to cover the direct and indirect costs incurred by NHTSA in determinations made under § 593.8(a) of this chapter, pursuant to its own initiative, that a vehicle is eligible for importation into the United States. The basis of such fee is that set forth in § 594.7 (b), (c), and (d). If the basis of the determination is that a vehicle meets the criteria of § 594.7(a)(1), the fee is $1560. If the basis of the determination is that a vehicle meets the criteria of § 594.7(a)(2), the fee is $2150. These fees are applicable to each determination made from October 1, 1989, through September 30, 1990.

(b) After NHTSA has made a determination on its own initiative, the notice published in the Federal Register announcing the determination includes a fee attributable to NHTSA's direct and indirect costs incurred pursuant to such determination, and an advisory that such fee shall be payable by the Registered Importer who furnishes a certificate of conformity pursuant to § 592.6(a)(3)(vi) of this chapter, on behalf of the first person who files a declaration pursuant to § 591.5(f) of this chapter that the vehicle is eligible for importation.

(c) After receipt of the first declaration covering a vehicle eligible for importation because of a determination made pursuant to the Administrator's initiative, NHTSA informs the appropriate Registered Importer that a fee in the stated amount shall accompany the certificate of conformity that the registered importer must furnish for the vehicle. No certificate shall be accepted for filing or processing unless and until such fee has been paid. A certificate for which no remittance is received may be returned to the registered importer.

§ 594.9 Fee for reimbursement of bond processing costs.

(a) Each registered importer shall pay a fee based upon the direct and indirect costs of processing each bond furnished to the Secretary of the Treasury with respect to each vehicle for which it furnishes a certificate of conformity to the Administrator pursuant to § 591.7(e) of this chapter.

(b) The direct and indirect costs attributable to processing a bond are provided to NHTSA by the U.S. Customs Service.

(c) Based upon information from the U.S. Customs Service, the bond processing fee for each vehicle for which a certificate of conformity is furnished from October 1, 1989, through September 30, 1990, is $4.35.

Dated: September 26, 1989.

Jeffrey R. Miller,

Acting Administrator.

[FR Doc. 89-23082 Filed 9-27-89; 10:41 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB31

Endangered and Threatened Wildlife and Plants; Designation of the Ring Pink Mussel as an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The service designates a freshwater mussel, the ring pink mussel (*Obovaria retusa*), formerly referred to as the golf stick pearly mussel, as an endangered species under the Endangered Species Act of 1973, as amended (Act). This freshwater mussel historically occurred in the Ohio River and its large tributaries in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Kentucky, Tennessee, and Alabama. Presently, the ring pink mussel is known from four relic, apparently nonreproducing, populations in the States of Kentucky and Tennessee. The distribution and reproductive capacity of this species has been seriously impacted by the construction of impoundments on the large rivers it once inhabited. Determination of endangered species status implements the protection of the Act for the ring pink mussel.

EFFECTIVE DATE: October 30, 1989.

ADDRESSES: A complete file of this rule is available for public inspection, by appointment, during normal business hours at the Asheville Field Office, U.S. Fish and Wildlife Service, 100 Otis Street, Room 224, Asheville, North Carolina 28801.

FOR FURTHER INFORMATION CONTACT: Mr. Richard G. Biggins at the above address (704/259-0321 or FTS 672-0321).

SUPPLEMENTARY INFORMATION:

Background

The ring pink mussel (*Obovaria retusa*), formerly referred to and proposed for listing by the Service as the golf stick pearly mussel, was described by Lamarck (1819). This freshwater species, which is characterized as a large-river species (Bates and Dennis 1985), has a medium to large shell that is ovate to subquadrate in outline (Bogan and Parmalee 1983). The shell exterior lacks rays and has a yellow-green to brown color. Older individuals are usually darker brown or black. The inside of the shell is salmon to deep purple surrounded by a white border. Like other freshwater mussels, it feeds by filtering food particles from the water. It has a complete reproductive cycle in which the mussel's larvae parasitize fish. The mussel's life span, fish species its larvae parasitize, and other aspects of its life history are unknown.

The ring pink mussel was historically widely distributed in the Ohio, Cumberland, and Tennessee River systems in Pennsylvania, West Virginia, Ohio, Illinois, Indiana, Kentucky, Tennessee, and Alabama (Bogan and Parmalee 1983, Kentucky Nature Preserves Commission 1980, Parmalee and Klippel 1982, Lauritsen 1987, Stansbery 1970). Based on personal communications with knowledgeable experts (Steven Ahlstedt and John Jenkinson, Tennessee Valley Authority, 1987; Arthur Bogan, Philadelphia Academy of Sciences, 1988; Arthur Clarke, Corpus Christi State University, 1986; Ronald Cicerello, Kentucky Nature Preserves Commission, 1988; James Sickel, Murray State University, 1987; and David Stansbery, Ohio State University, 1987) and a review of current literature (see above plus Sickel 1985), the species is known to survive in only four river reaches. The species still exists but apparently does not reproduce in the Tennessee River, Livingston, Marshall, and McCracken Counties, Kentucky; the Tennessee River in Hardin County, Tennessee; the Cumberland River, Wilson, Trousdale, and Smith Counties, Tennessee; and the Green River, Hart and Edmonson Counties, Kentucky.

The continued existence of these four populations is questionable. Unless reproducing populations can be found or methods can be developed to maintain these or create new populations, the species will become extinct in the foreseeable future. The individuals that still survive in these four river reaches are also threatened from other factors. The Green River in Kentucky has experienced water quality problems related to the impacts from oil and gas production in the watershed. The individuals still surviving in the Tennessee and Cumberland Rivers are potentially threatened by gravel dredging, channel maintenance, and commercial mussel fishing. Although the species is not commercially valuable, incidental take of the species does sometimes occur during commercial mussel fishing for other species.

The ring pink mussel was recognized by the Service in the May 22, 1984, **Federal Register** (49 FR 21664) and the January 6, 1989, **Federal Register** (54 FR 554) as a species that was being considered for possible addition to the Federal List of Endangered and Threatened Wildlife and Plants. On March 17, 1987, and October 27, 1987, the Service notified Federal, State, and local governmental agencies and interested individuals by mail that a status review was being conducted specifically on this mussel and that the species could be proposed for listing. Since that time, additional contacts with Federal and State agency personnel and the scientific community have occurred concerning the species' status and its potential for being protected under the Act.

On March 7, 1989, the Service published in the **Federal Register** (54 FR 9529) a proposal to list the golf stick pearly mussel, now referred to as the ring pink mussel, as an endangered species. That proposal provided information on the species' biology and status and threats to its continued existence. The proposal also solicited comments on the species.

Summary of Comments and Recommendations

In the March 7, 1989, proposed rule and associated notifications, all interested parties were requested to submit factual reports and information that might contribute to development of the final rule. Appropriate Federal and State agencies, county governments, scientific organizations, and interested parties were contacted and requested to comment. A legal notice was published in the following newspapers: *Hart County News*, Munfordville, Kentucky, March 23, 1989; *Lebanon Democrat*, Lebanon, Tennessee, March 24, 1989; *Paducah Sun*, Paducah, Kentucky, March 26, 1989; and *Savannah Courier*, Savannah, Tennessee, April 6, 1989.

Support for listing the ring pink mussel as an endangered species was received from the Tennessee Valley Authority, National Park Service, Kentucky Department of Fish and Wildlife Resources, Ohio Environmental Protection Agency, Ohio Department of Natural Resources, and one private individual. The U.S. Soil Conservation Service, Nashville, Tennessee, stated that they had "* * * no current of planned activities that would likely

jeopardize the continued existence of the species." Three respondents suggested that the ring pink mussel is a more accepted common name for the species. The Service has made that name change in the final rule.

The Alabama Department of Conservation and Natural Resources stated that the proposed rule does not support listing because, as the fish host is unknown and none of the presently known populations are reproducing, Federal protection could not save the species. The Service agrees that these problems plus other considerations make it doubtful that this species can ever be recovered. However, the Service references section 4 (a)(1) and (b) of the Act, which requires the Secretary of Interior to determine whether a species is an endangered or threatened species based solely on one or more of five specific factors. These five factors and their application to the ring pink mussel are presented in the "Summary of Factors Affecting the Species" section of this rule. Neither incomplete life history information, lack of reproducing populations, nor the relative likelihood of recovery is pertinent to any of the five factors considered in determining a species' Federal status.

The Alabama Department of Conservation and Natural Resources also stated that it is not reasonable to list a species that does not have a recovery plan. The Service responds that recovery plans, in accordance with section 4(f) of the Act, are developed subsequent to a species being listed. This, listing is a precursor to and facilitates the development and implementation of recovery plans.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information, the Service has determined that the ring pink mussel should be classified as an endangered species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to the ring pink mussel (*Obovaria retusa*) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The ring pink mussel was once widespread in the Ohio River and its large tributaries in Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Illinois, Tennessee, and Alabama (Bogan and Parmalee 1983). However, most of the historically known populations were apparently lost due to conversion of many sections of these big rivers to a series of large impoundments. This seriously reduced the availability of preferred riverine gravel/sand habitat, and it likely affects the distribution and availability of the mussel's fish host. As a result, the species' distribution has been substantially reduced.

The species was last taken in Pennsylvania in 1908 (Daniel Devlin, Pennsylvania Department of Environmental Resources, personal communication, 1987). No live or fresh-dead specimens have been taken in West Virginia in recent years (William Tolin, U.S. Fish and Wildlife Service, personal communication, 1987). According to a personal communication with Robert McCance, Jr. (Ohio Department of Natural Resources, 1987), the last Ohio collection of the ring pink mussel was made in 1938. In Indiana waters, the species has not been collected in decades (Max Henschen, Indiana Mollusk Technical Advisory Committee, personal communication, 1987). The Illinois Department of Energy and Natural Resources (Kevin Cummings, personal communication, 1987) reported that the species has not been collected from Illinois in over 30 years.

The species is presently known from only four river reaches—two in Kentucky and two in Tennessee. In Kentucky waters, the ring pink mussel has been taken in recent years only from the Tennessee River in McCracken, Livingston, and Marshall Counties, and from the Green River in Hart and Edmonson Counties (Linda Andrews, Kentucky Department of Fish and Wildlife Resources, and Ronald Cicerello, personal communication, 1987). Kentucky's Tennessee River population is represented by the collection of only two live individuals in recent years. One was taken in 1985 (Sickel 1985), and the other was collected in 1988 (C.E. Moore, U.S. Army Corps of Engineers, personal communication, 1987). In the Green River, only one fresh-dead individual was taken during a mussel survey between Munfordville, Kentucky, and Mammoth Cave, Kentucky, in 1987 (Ronald Cicerello, personal communication, 1987). The last live specimen taken from the Green River was collected in the mid-1960s (Mary Heller, Kentucky Natural Resources and Environmental Protection Cabinet, personal communication, 1987).

In Tennessee the species apparently still survives in the Cumberland River in Wilson, Trousdale, and Smith Counties, and in the Tennessee River in Hardin County. According to personal communications with knowledgeable individuals, the species is taken on rare occasions by commercial mussel fishermen from both these rivers (Paul Parmalee, University of Tennessee, personal communication, 1986; Steven Ahlstedt, personal communication, 1987; Paul Yokley, University of North Alabama, personal communication, 1987).

The four surviving populations are all threatened for impacts to their environment. The Green River population is threatened from degradation of water quality resulting from inadequate environmental controls at oil and gas exploration and production facilities, and from altered stream flows from an upstream reservoir. The other populations are potentially threatened by river channel maintenance, navigation projects, and gravel and sand dredging.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Although the species is not commercially valuable, it does exist in harvested mussel beds, and the species is therefore sometimes taken by mussel fishermen. Thus, take does pose some threat to the species. Federal protection will help to control the take of individuals.

C. *Disease or predation.* Although the ring pink mussel is undoubtedly consumed by predatory animals, there is no evidence that predation threatens the species. However, freshwater mussel die-offs have recently (early to mid-1980s) been reported throughout the Mississippi River basin, including the Tennessee River and its tributaries (Richard Neves, Virginia Polytechnic Institute and State University, personal communication, 1986). The cause of the die-offs has not been determined, but significant losses have occurred to some populations.

D. *The inadequacy of existing regulatory mechanisms.* The States of Kentucky and Tennessee prohibit taking fish and wildlife, including freshwater mussels, for scientific purposes without a State collecting permit. However, these States do not protect the species from take for other purposes. Federal listing will provide the species additional protection under the Endangered Species Act by requiring Federal permits to take the species and by requiring Federal agencies to consult with the Service when projects they fund, authorize, or carry out may affect the species.

E. *Other natural or manmade factors affecting its continued existence.* None of the four populations is known to be reproducing. Therefore, unless reproducing populations can be found or methods can be developed to maintain these or create new populations, the species will be lost in the foreseeable future. In fact, three of the populations (Cumberland and Tennessee River populations) may contain only old individuals that have passed their reproductive age.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list the ring pink mussel (*Obovaria retusa*) as an endangered species. Historical records reveal that the species was once much more widely distributed in many of the large rivers of the Ohio River system. Presently only four isolated, apparently non-reproducing, populations are known to survive. Due to the species' history of population losses and the vulnerability of the four remaining populations, threatened status does not appear appropriate for this species (see "Critical Habitat" section for a discussion of why critical habitat is not being designated for the ring pink mussel).

Critical Habitat

Section 4(a)(3) of the Act requires, to the maximum extent prudent and determinable, that the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not presently prudent for the ring pink mussel owing to the lack of benefits from such designation. The U.S. Army Corps of Engineers, the Tennessee Valley Authority, and the National Park Service are the three Federal agencies most involved, and they, along with the State natural resources agencies in Tennessee and Kentucky, are already aware of the location of the remaining populations that would be affected by any activities in these river reaches. These Federal agencies have conducted studies in these river basins and are knowledgeable of the fauna and of impacts that could result from their projects. No additional benefits would accrue from critical habitat designation that would not also accrue from the listing of the species. In addition, this species is so rare that taking for scientific purposes or private collections could be a threat. The publication of critical habitat maps and other information accompanying critical habitat designation, such as the location of inhabited river reaches, could increase that threat. The location of populations of this species has consequently been described only in general terms in this final rule. More precise locality data is available to appropriate Federal, State, and local governmental agencies through the Service office described in the "**ADDRESSES**" section.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibition against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. The Service has notified Federal agencies that may have programs that affect the species. Federal activities that could occur and impact the species include, but are not limited to, the carrying out or the issuance of permits for hydroelectric facility construction and operation, reservoir construction, river channel maintenance, stream alteration, wastewater facilities development, and road and bridge construction. It has been the experience of the Service, however, that nearly all Section 7 consultations have been resolved so that the species has been protected and the project objectives have been met. In fact, the areas inhabited by the ring pink mussel are also inhabited by other mussels that have been federally listed since 1976. The Service has a history of successful section 7 conflict resolutions.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes to enhance the propagation or survival of the species and/or for incidental take in connection with otherwise lawful activities.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

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Author

The primary author of this final rule is Richard G. Biggins, U.S. Fish and Wildlife Service, Asheville Field Office, 100 Otis Street, Room 224, Asheville, North Carolina 28801 (704/259–0321 or FTS 672–0321).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Fish, Marine mammals, Plants (agriculture).

Regulation Promulgation

PART 17—[AMENDED]

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

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1543; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under CLAMS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Clams							
*	* * *		*				
Mussel, ring pink (=golf stick pearly)	*Obovaria retusa*	U.S.A. (AL, IL, IN, KY, OH, PA, TN, WV)	NA	E	368	NA	NA
*	* * *		*				

Dated: September 26, 1989.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 89–23069 Filed 9–28–89; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 662

[Docket No. 90775–9215]

Northern Anchovy Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Emergency interim rule.

SUMMARY: The Secretary of Commerce (Secretary) issues this emergency interim rule changing current regulations promulgated under the Northern Anchovy Fishery Management Plan (FMP). This action is necessary to allow a reduction fishery for northern anchovy during the 1989–1990 fishing season, which otherwise would be unnecessarily denied due to a low estimated spawning biomass resulting from atypical environmental conditions during the spawning season. Since the estimated total biomass is large, a small reduction quota (5,000 mt) is established.

EFFECTIVE DATES: The emergency rule is effective from 0001 hours Pacific Daylight Time (PDT) September 25, 1989 until 2400 hours PDT December 23, 1989.

ADDRESS: Copies of the environmental assessment may be obtained from, and comments should be addressed to, E.C. Fullerton, Director, Southwest Region, NMFS, 300 South Ferry Street, Terminal Island, CA 90731.

FOR FURTHER INFORMATION CONTACT: James J. Morgan, Fisheries Management and Analysis Branch, Southwest Region, NMFS, 213–514–6667.

SUPPLEMENTARY INFORMATION: The FMP provides for a reduction fishery for northern anchovy when the abundance of the resource is above the level needed to sustain adequate levels of predator fish, birds, and marine mammals. Harvest in the reduction fishery is converted into fishery products, such as fish flour, fish meal or fertilizer, that are not intended for direct human consumption. Because of the large natural fluctuations of the anchovy resource, a fixed annual harvest would be too large in some years and too small in others; therefore, annual harvest allocations are based on estimates of current spawning stock biomass (spawning biomass). Spawning biomass estimates are useful as a measure of population size of northern anchovy because they usually represent about 95 percent of the total stock biomass (total biomass), and because egg and larval surveys have been conducted for many years, resulting in a long time-series of data. Spawning biomass of the central subpopulation of northern anchovy is estimated annually; from this estimate, the optimum yield and harvest quotas are determined by formulas contained in the FMP and its implementing regulations at 50 CFR Part 662. The allocation formulas assume a close correlation between spawning biomass estimates and total stock biomass.

The annual spawning biomass of northern anchovy is determined during January-February, which is during the period of peak spawning. About 90 percent of age 0–1 fish usually are sexually mature at that time; however, maturity and spawning are greatly affected by water temperature. During 1989, the index of historical egg production indicated that egg production was very low, and environmental data showed that the mean sea surface temperatures during and preceding the spawning season were much lower than normal. At the temperatures measured during January-February, 1989, only 5 percent of 1-year old fish are expected to be sexually mature and actively spawning. Data from the fishery and surveys indicated that the 1988 year class (1-year-old fish) is large, and that this large year class is being recruited to