

children, other relative with whom you live, or your employer?

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

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## Fish and Wildlife Service

### Endangered and Threatened Wildlife and Plants; Extension of Listing Priority Guidance for Fiscal Year 1997

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) announces that it is extending its listing priority guidance until an appropriations law is approved for the Department of the Interior for fiscal year 1997 (FY 97). The Service also proposes to amend and continue implementation of guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act (Act) during FY 97 and seeks public comment on this proposed guidance. The extension is necessary because the Service expects appropriated funds to fall short of those needed to eliminate the existing backlog of proposed listings and complete all listing actions required by the Act in FY 97. Under the proposed guidance, the Service would assign all listing actions to one of four tiers, as distinguished from the three tiers in the current guidance (61 FR 24722).

**DATES:** The extension of the existing listing priority guidance is effective October 1, 1996 and will remain in effect until the Service can determine the effects of any FY 97 appropriations law and then issue final guidance. Comments on the proposed FY 97 guidance will be accepted until October 17, 1996.

**ADDRESSES:** Comments on the proposed guidance should be addressed to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Mailstop ARLSQ-452, Washington, D.C., 20240.

**FOR FURTHER INFORMATION CONTACT:** E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 703-358-2171 (see **ADDRESSES** section).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Service adopted guidelines on September 21, 1983 (48 FR 43098-43105) that govern the assignment of

priorities to species under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The Service adopted those guidelines to establish a rational system for allocating available appropriations to the highest priority species when adding species to the lists of endangered or threatened wildlife and plants or reclassifying threatened species to endangered status. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies (or equivalently, distinct population segments of vertebrates).

The enactment of Pub. L. 104-6 in April, 1995 rescinded \$1.5 million from the Service's budget for carrying out listing activities through the remainder of fiscal year 1995. Public Law 104-6 also contained a prohibition on the expenditure of the remaining appropriated funds for final determinations to list species or designate critical habitat which, in effect, placed a moratorium on those activities.

From October 1, 1995 through April 26, 1996, funding for the Service's endangered species programs, including listing of endangered and threatened species, was provided through a series of continuing resolutions, each of which maintained in force the moratorium against issuing final listings or critical habitat designations. The continuing resolutions also severely reduced or eliminated the funding available for the Service's listing program. Consequently, the Service reassigned listing program personnel to other duties. The net effect of the moratorium and reductions in funding was that the Service's listing program was essentially shut down.

The moratorium on final listings and the budget constraints remained in effect until April 26, 1996, when President Clinton approved the Omnibus Budget Reconciliation Act of 1996 and exercised the authority that Act gave him to waive the moratorium. At that time, the Service had accrued a backlog of proposed listings for 243 species. Moreover, although the moratorium imposed by Pub. L. 104-6 did not specifically extend to petition processing or the development of new proposed listings, the extremely limited funding available to the Service for listing activities generally precluded these actions from October 1, 1995 through April 26, 1996. The Service continued to receive new petitions and accrued a backlog of petitions that

request the listing or delisting of 57 species under section 4(b)(3) of the Act. The Service has historically attempted to strike a balance among the various listing activities required by the Act, but as appropriations have not kept pace with the Service's workload, an increased backlog of listing actions has developed.

In anticipation of receiving a listing appropriation for the remainder of FY 96, the Service issued and requested comment on interim listing priority guidance on March 11, 1996 (61 FR 9651). On May 16, 1996, the Service addressed all public comments received on the interim guidance and published final listing priority guidance for fiscal year 1996 activities (61 FR 24722). It is this guidance that is now extended until the Service can prepare final guidance based on the terms of a FY 97 appropriations law.

When the moratorium was lifted and funds were appropriated for the administration of a listing program, the Service faced the considerable task of allocating the available resources to the significant backlog of listing activities. Over the past four months, the Service has focussed its resources on processing existing proposals and has issued final rules listing five species.<sup>1</sup> The relatively low number of final rules issued during this period resulted primarily from the time needed to restart the listing program from a total shutdown and the need to consider factual developments related to proposed listing packages (e.g., changes in known distribution, status, or threats) that took place during the year-long moratorium.

Although progress has been made with regard to proposed rules, the Service also needs to make expeditious progress on determining the conservation status of the 183<sup>2</sup> species designated by the Service as candidates for listing in the most recent Candidate Notice of Review (61 FR 7596; February 28, 1996; see 16 U.S.C.

§ 1533(b)(3)(B)(iii)(II)). The Service is also subject to extensive litigation that could require it to process a variety of actions under section 4 of the Act.

Furthermore, it now appears that Congress will probably appropriate only about two-thirds of the amount the President's FY 97 budget requested for the listing program. The President's budget for FY 97 requested \$7.483 million for the listing program, but appropriations bills passed by the

<sup>1</sup> Final rules listing the red-legged frog, wahane (Hawaiian plant), and 3 plants from the Island of Nihoa, Hawaii.

<sup>2</sup> Effective August 26, 1996, the U.S. population of the short-tailed albatross (*Diomedea albatrus*) was designated a candidate species.

House of Representatives and reported out by the Senate Appropriations Committee each propose to appropriate only \$5 million for the program. The Senate bill also proposes to "earmark" \$500,000 to be devoted specifically to withdrawal notices, delistings, or reclassifications of endangered species to threatened species.

The above discussed backlogs and the pending funding shortfall underscore the need for program-wide priorities to guide the allocation of limited resources. Moreover, existing and threatened litigation may overwhelm the limited resources the Service anticipates receiving in FY 97 unless priorities are set in advance.

For example, the plaintiffs in *Fund for Animals v. Babbitt*, Civ. No. 92-800 (SS) (D.D.C.), recently filed a motion to enforce the December 15, 1992 Settlement Agreement in that case. They request the District Court to order the Service to publish listing proposals for 41 of the candidate species covered by the Agreement (referred to hereafter as "settlement species") by December 30, 1996, and to publish listing proposals for the remaining 44 settlement species by March 30, 1997.

Resolution of the conservation status of these 85 settlement species would require, for each species, publication of either a proposed listing rule or a notice stating reasons why listing is not warranted. The Agreement does not require final decisions on listings. Therefore, full compliance with the Agreement will not bring the full protection of the Act to any species, but rather would only somewhat advance the process toward listing.

Up to the time the funding for the listing program became severely constrained, the Service was on track to achieve full compliance with this Agreement. The Service had published, during the period covered by the Agreement, proposed listing rules for 359 candidate species.

Despite this progress, the Service is now left with the following dilemma. If it were to continue to spend scarce appropriated funds to move candidate species forward to the proposed listing stage in order to comply with the Settlement Agreement, it would deplete the entire \$4.5 million listing appropriation that is anticipated for FY 97. Processing of proposed listing rules requires the investment of considerable time and resources. It involves substantial research, status review, coordination with State and local governments and other interested parties, and conducting public hearings and peer review. Furthermore, since most of the 98 candidate species that are

not subject to the terms of the Agreement have high listing priority number assignments (64 non-settlement, candidate species have priority numbers of 1, 2 or 3), the Service would, in order to be consistent with the 1983 listing priority guidance, have to process all 183 candidate species (85 settlement, 98 non-settlement) if ordered to comply fully with the terms of the Settlement Agreement during FY 97.

The Service's entire anticipated FY 97 listing budget is insufficient to comply with the *Fund for Animals* Settlement Agreement. If it attempted to comply, it would devote no resources to making final listing decisions on the 237 species, the vast majority of which face high-magnitude threats, that have already been proposed for listing. Though so close to receiving the full protection of the Act, these species would move no closer to that goal while all the Service's efforts would be bent toward deciding whether to move candidate species closer to proposed listing, where they receive some limited procedural protection (the Section 7 conference requirement, see 16 U.S.C. § 1536(a)(4)), but not the full substantive and procedural protection afforded by final listing.

This course of action would also result in a still larger backlog of up to 420 proposed species. Meanwhile, the administrative records on many of the 237 species pending final decision could require, due to the additional one-year delay in the decision-making process, further public notice and comment proceedings in fiscal year 1998 because the scientific data they contain may no longer be current.

In short, enforcement of the *Fund for Animals* Settlement Agreement in FY 97 would delay for at least one year the issuance of final listing rules and, in fiscal year 1998, would make the process of issuing final listing rules for the aging backlog of proposed species more time and labor intensive. Such action would entirely frustrate the objective of waiving the final listing moratorium in April of 1996. Therefore, in accordance with the Interior Department's recommendation, the Department of Justice has filed a motion with the District Court that seeks appropriate relief from the terms of the Agreement, consistent with the listing priorities articulated in this Notice.

In order to focus conservation benefits on those species in greatest need of the Act's protections, the Service believes that processing the outstanding proposed listings should receive higher priority than other actions authorized by section 4 such as new proposed listings,

petition findings, and critical habitat determinations.

Section 4(b)(1) of the Act requires the Service to use the "best available scientific and commercial information" to determine those species in need of the Act's protections. It has been long-standing Service policy that the order in which species should be processed for listing is based primarily on the immediacy and magnitude of the threats they face. Given the large backlogs of proposed species, candidate species awaiting proposal, and petitions, it is extremely important for the Service to focus its efforts on actions that will provide the greatest conservation benefits to imperiled species in the most expeditious manner.

The Service will continue to base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines. These decisions will be implemented by the Regional Office designated with lead responsibility for the particular species.

The Service allocates its listing appropriation among its seven Regional Offices based primarily on the number of proposed and candidate species for which the Region has lead responsibility. The objective is to ensure that those areas of the country with the largest percentage of known imperiled biota will receive a correspondingly high level of listing resources. The Service's experience in administering the Act for the past two decades has shown that it needs to maintain at least a minimal listing program in each Region, in order to respond to emergencies and to retain a level of expertise that permits the overall program to function effectively over the longer term. In the past, when faced with seriously uneven workloads, the Service has experimented with reassigning workload from a heavily burdened Region to less-burdened Regions. This approach has proven to be very inefficient because the expertise developed by a biologist who works on a listing package will be useful for recovery planning and other activities and that expertise should be concentrated in the area which the species inhabits. In addition, biologists in a Region are familiar with other species in that Region that interact with the species proposed for listing, and that knowledge may be useful in processing a final decision. For these reasons, the Service does not believe it is wise to reassign workload from one Region to another.

By maintaining a listing program in each Region, and with resource allocation based on workload, Regions with few outstanding proposed listings

will be able to process Tier 3 actions (such as new proposed listings or petition findings), while Regions with many outstanding proposed listings will use most or all of their allocated funds on Tier 2 actions. For example, following the lifting of the moratorium in April 1996, the Service allocated \$2,336,000 to Region 1 (Pacific/Western Region), which continues to face a substantial backlog of Tier 2 actions, while Region 3 (Great Lakes/Midwest Region) received only \$27,000. The Service cannot make Regional allocation of funds for FY 97 until it receives a final appropriation; however, it expects that a similar funding disparity will result based on workload. Workload variations will also mean that Region 3, which only has two proposed species, could begin work on some Tier 3 actions under the revised guidance proposed in this notice while Region 1, which has 196 proposed species, will be primarily only processing final decisions on proposed listings in FY 97. The Service anticipates that Nationwide, only a small amount of funding will be used on activities below Tier 2, because Regions that do not face a sizeable backlog of Tier 2 actions will not receive significant amounts of funding.

In light of the continued budgetary uncertainty facing the Service at this time, through this notice the Service is extending the listing priority guidance currently in effect until the Service can prepare final guidance based on the terms of a FY 97 appropriations law. To address the biological, budgetary, and administrative issues noted above in the longer term, the Service proposes to adopt the following revised listing priority guidance. As with the guidance issued May 16, 1996, this guidance would supplement, but not replace, the 1983 listing priority guidelines, which are silent on the matter of prioritizing among different types of listing activities.

#### Proposed Listing Priority Guidance for Fiscal Year 1997

As noted above, the bill reported out of the Senate Appropriations Committee for FY 97 would " earmark " \$500,000 of the listing budget to be devoted specifically to withdrawal notices, delistings, or reclassifications of endangered species to threatened species. If such an " earmark " emerges from the congressional process, those actions would be processed as the " earmarked " amount of funding permits and would not be subject to this proposed guidance.

Since it is unclear at this date whether any amount will be " earmarked " in the FY 97 appropriations law for any

delistings or reclassifications of endangered species to threatened species, the Service has not proposed to include them within this priority system. If the FY 97 appropriations law does not contain an earmark for those activities, the Service's final guidance would prioritize such activities as appropriate. The Service invites public comment on how it ought to prioritize such activities if no earmark emerges from the appropriations process.

If \$4,500,000 would remain in the listing budget for all other listing activities, it will fall far short of the resources needed to eliminate the backlog of proposed species and complete all listing actions required by the Act in FY 97, and some form of prioritization will still be necessary. Therefore, the Service proposes to implement the following guidance in FY 97, on the assumption that the listing program budget will be appropriated no more than \$5,000,000.

The following sections describe a multi-tiered approach that assigns relative priorities, on a descending basis, to listing actions to be carried out under section 4 of the Act. The 1983 listing priority guidelines would be used as applicable to set priority among actions within tiers. The Service emphasizes that this guidance would be effective until September 30, 1997 (unless extended or canceled by future notice) and the agency fully anticipates returning to concurrently processing petition findings, proposed and final listings, and critical habitat determinations after the backlog of proposed listings has been further reduced.

Completion of emergency listings for species facing a significant risk to their well-being would remain the Service's highest priority (Tier 1) under the revised system. Processing final decisions on pending proposed listings would, as now, be assigned to Tier 2. Third priority would be to resolve the conservation status of species identified as candidates and processing 90-day or 12-month administrative findings on petitions to list, delist, reclassify, or revise critical habitat. Preparation of proposed or final critical habitat designations would be assigned lowest priority (Tier 4).

#### Tier 1—Emergency Listing Actions

The Service would immediately process emergency listings for any species of fish, wildlife, or plant that faces a significant risk to its well-being under the emergency listing provisions of section 4(b)(7) of the Act. This would include preparing a proposed rule to list the species. The Service would conduct

a preliminary review of every petition that it receives to list a species or change a threatened species to endangered status in order to determine whether an emergency situation exists. If the initial screening indicates an emergency situation, the action would be elevated to Tier 1. If the initial screening does not indicate that emergency listing is necessary, processing of the petition would be assigned to Tier 3 below.

#### Tier 2—Processing Final Decisions on Proposed Listings

In issuing the proposed listings that remain outstanding, the Service found that the vast majority of the proposed species faced high-magnitude threats. The Service believes that focusing efforts on making final decisions relative to these proposed species would best comport with the overall purpose of the Act by providing maximum conservation benefits to those species that are in greatest need of the Act's protections. As proposed listings are reviewed and processed, they will be completed through publication of either a final listing or a notice withdrawing the proposed listing. While completion of a withdrawal notice may appear inconsistent with the thrust of the guidance, once a determination not to make a final listing has been made, publishing the notice withdrawing the proposed listing takes minimal time and appropriations, and it is important and more cost effective and efficient to bring closure to the proposed listing, as compared to postponing action and taking it up at some later time.

#### Setting Priorities Within Tier 2

Most of the outstanding proposed listings deal with species that face high-magnitude threats, such that additional guidance is needed to clarify the relative priorities within Tier 2. Proposed rules dealing with taxa believed to face imminent, high-magnitude threats (listing priority assignments of 1 through 3) would have the highest priority within Tier 2.

Proposed listings that cover multiple species facing high-magnitude threats would have priority over single-species proposed rules unless the Service has reason to believe that the single-species proposal should be processed to avoid possible extinction.

Due to unresolved questions or to the length of time since proposal, the Service may determine that additional public comment or hearings are necessary before issuing a final decision for Tier 2 actions. Proposed listings for species facing high-magnitude threats that can be quickly completed (based on

factors such as few public comments to address or final decisions that are nearly complete) would have higher priority than proposed rules for species with equivalent listing priorities that still require extensive work to complete.

Given species with equivalent listing priorities and the factors previously discussed being equal, proposed listings with the oldest dates of issue would be processed first.

#### *Tier 3—Resolving the Conservation Status of Candidate Species and Processing Administrative Findings on Petitions*

As of this date, the Service has determined that 183 species warrant issuance of proposed listings. The Act directs the Service to make “expeditious progress” in adding new species to the lists. Issuance of new proposed listings is the first formal step in the regulatory process for listing a species. It provides some procedural protection in that all Federal agencies must “confer” with the Service on any actions that are likely to jeopardize the continued existence of proposed species.

Administrative findings for listing petitions that are not assigned to Tier 1 after initial screening would also be processed as a Tier 3 priority. As the Regional offices complete their pending Tier 1 and 2 actions, they will be expected to begin processing Tier 3 actions. Within the discretionary funds available, each Region should begin processing Tier 3 actions once all Tier 2 determinations are underway and near completion and then Tier 4 actions once Tier 3 actions are underway. Setting priorities within Tier 3 is discussed below.

#### *Setting Priorities Within Tier 3*

The 1983 listing priority guidelines and the basic principle that species in greatest need of protection should be processed first would be the primary bases for establishing priorities within Tier 3. Highest priority within Tier 3 would be processing of new proposed listings for species facing imminent, high-magnitude threats. If the initial screening of a petition suggests that the species probably faces imminent, high magnitude threats, processing that action will be accorded high priority.

#### *Tier 4—Processing Critical Habitat Determinations*

Designation of critical habitat consumes large amounts of the Service’s listing appropriation and generally provides only limited conservation benefits beyond those achieved when a species is listed as endangered or threatened. Because the protection that

flows from critical habitat designation applies only to Federal actions, situations where designating critical habitat provides additional protection beyond the consultation provisions of section 7, which also apply to Federal actions, are rare. It is essential during this period of limited listing funds to maximize the conservation benefit of listing appropriations. The Service believes that the small amount of additional protection that is gained by designating critical habitat for species already on the lists is greatly outweighed by the benefits of applying those same dollars to putting more species on the lists, where they would gain the protections included in sections 7 and 9. The Service has decided, in other words, to place higher priority on addressing species that presently have no or very limited protection under the Act, rather than devoting limited resources to the expensive process of designating critical habitat for species already protected by the Act.

#### *Addressing Matters in Litigation*

Using the proposed guidance and the 1983 listing priority guidelines, the Service will assess the status and the relative priority of all section 4 petition and rulemaking activities that are the subject of active litigation. The Service, through the Department of the Interior’s Office of the Solicitor, will then notify the Justice Department of its priority determinations and request that appropriate relief be sought from each district court to allow those species with the highest biological priority to be addressed first. As noted in the guidance issued May 16, 1996, when the Service undertakes one listing activity, it inevitably foregoes another, and in some cases courts have ordered the Service to complete activities that are simply not, in the Service’s expert judgment, among the highest biological priorities. However, to the extent that these efforts to uphold the Service’s listing priority guidance and the 1983 listing priority guidelines do not receive deference in the courts, the Service will need to comply with court orders despite any conservation disruption that may result. The fact that the Service acknowledges its duty to comply with court orders should not, however, be interpreted to mean that any court order is consistent with this guidance without regard to how disruptive it may be to the Service’s effort to make the most biologically sound use of its resources.

The Service will not elevate the priority of proposed listings for species under active litigation. To do so would let litigants, rather than expert

biological judgments, set listing priorities. The Regional Office with responsibility for processing such packages will be responsible for determining the relative priority of such cases based upon this proposed guidance and the 1983 listing priority guidelines, and for furnishing supporting documentation that can be submitted to the relevant court to indicate where such species rank in the overall priority scheme.

#### *Public Comments Solicited*

The Service intends that any action resulting from this proposed guidance be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, environmental groups, industry, commercial trade entities, or any other interested party concerning any aspect of this proposed guidance are hereby solicited. The Service will take into consideration any comments and additional information received (especially the final FY 97 appropriations law) and will announce further guidance after the close of the public comment period and as promptly as possible after a FY 97 appropriations bill for the Department of the Interior is approved and becomes law.

#### *Authority*

The authority for this notice is the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Dated: September 9, 1996.

John G. Rogers,

*Acting Director, U.S. Fish and Wildlife Service.*

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#### **Environmental Assessment; Texas**

**ACTION:** Availability of an Environmental Assessment/Habitat Conservation Plan and Receipt of Application for Incidental Take Permit for Construction of One Single Family Residence on 8.0 acres on Bullick Bluff (Tax parcel #01–5947–011600007), Austin, Travis County, Texas.

**SUMMARY:** Jane Marie Hurst (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to Section 10(a) of the Endangered Species Act (Act). The applicant has been assigned permit number PRT–818874. The requested permit, which is for a period of 5 years, would authorize the incidental take of the endangered golden-cheeked warbler (*Dendroica*