

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-A180

#### **Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Northern Aplomado Falcons in New Mexico and Arizona**

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), plan to reintroduce northern aplomado falcons (*Falco femoralis septentrionalis*) (falcon) into their historical habitat in southern New Mexico for the purpose of establishing a viable resident population in New Mexico and Arizona. The falcon is being re-established under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and would be classified as a nonessential experimental population (NEP). The geographic boundary of the NEP includes all of New Mexico and Arizona.

This action is part of a series of reintroductions and other recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the species' historical range. This final rule provides a plan for establishing the NEP and provides for limited allowable legal taking of the northern aplomado falcon within the defined NEP area. Birds can only be released when they are a few weeks old, and this condition only occurs in the spring and summer of each year. In order to accomplish a release in 2006, we must expedite on-the-ground implementation.

**DATES:** The effective date of this rule is July 26, 2006.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the New Mexico Ecological Services Field Office, 2105 Osuna Road, NE., Albuquerque, New Mexico 87113.

You may obtain copies of the final rule, environmental analysis, and monitoring plan from the field office address above, by calling (505) 346-2525, or from our Web site at <http://www.fws.gov/ifw2es/NewMexico/>.

#### **FOR FURTHER INFORMATION CONTACT:**

Adam Zerrenner, Acting Field Supervisor, New Mexico Ecological Services Field Office at the above address (telephone 505-346-2525, facsimile 505-346-2542).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Background information that was previously provided in our February 9, 2005, proposed rule (70 FR 6819) has been condensed in this rule.

##### *Biological*

The northern aplomado falcon (hereafter referred to as falcon) is one of three subspecies of the aplomado falcon and the only subspecies recorded in the United States. This subspecies was listed as an endangered species on February 25, 1986 (51 FR 6686). The falcon is classified in the Order Falconiformes, Family Falconidae. Historically, falcons occurred throughout coastal prairie habitat along the southern Gulf coast of Texas, and in savanna and grassland habitat along both sides of the Texas-Mexico border, southern New Mexico, and southeastern Arizona. Falcons were also present in the Mexican States of Tamaulipas, Veracruz, Chiapas, Campeche, Tabasco, Chihuahua, Coahuila, Sinaloa, Jalisco, Guerrero, Yucatan, and San Luis Potosi, and on the Pacific coast of Guatemala and El Salvador (Keddy-Hector 2000). Falcons were fairly common in suitable habitat throughout these areas until the 1940s, but subsequently declined rapidly. From 1940 to the present in Arizona (Corman 1992), and from 1952 to 2000 in New Mexico (Meyer and Williams 2005), there were no documented nesting attempts by wild falcons. In 2001 and 2002, one pair of falcons nested in Luna County, New Mexico. This pair was unsuccessful in producing fledglings in 2001, but produced three fledglings in 2002. To date, the 2002 nest has been the only known successful falcon nest in either Arizona or New Mexico since 1952.

The causes for decline of this subspecies have included widespread shrub encroachment resulting from control of range fires and intense overgrazing (Service 1986; Burnham *et al.* 2002) and agricultural development in grassland habitats used by the falcon (Hector 1987; Keddy-Hector 2000). Pesticide exposure was likely a

significant cause of the subspecies' extirpation from the United States with the initiation of widespread DDT (dichloro-diphenyl-trichloroethane) use after World War II, which coincided with the falcon's disappearance (51 FR 6686, February 25, 1986). Falcons in Mexico in the 1950s were heavily contaminated with DDT residue, and these levels caused a 25 percent decrease in eggshell thickness (Kiff *et al.* 1980). Such high residue levels can often result in reproductive failure from egg breakage (Service 1990).

Collecting falcons and eggs may have also been detrimental to the subspecies in some localities. However, populations of birds of prey are generally resilient to localized collection pressure (Service 1990). Currently, long-term drought, shrub encroachment in areas of Chihuahuan grasslands, and the increased presence of the great-horned owl (*Bubo virginianus*), which preys upon the falcon, may be limiting recovery of this subspecies. On the other hand, falcons appear to be relatively tolerant of human presence. They have been observed to tolerate approach to within 100 meters (m) (328 feet (ft)) of their nests by researchers and have nested within 100 m (328 ft) of highways in eastern Mexico (Keddy-Hector 2000), and are frequently found nesting in association with well-managed livestock grazing operations in Mexico and Texas (Burnham *et al.* 2002). Burnham *et al.* (2002) concluded that falcons would be able to coexist with current land-use practices in New Mexico on the broad scale.

Over the past decade, widespread formal surveys have been conducted in southern New Mexico habitats capable of supporting individual or breeding falcons (suitable habitat). Standardized falcon surveys have been conducted annually in suitable falcon habitats on White Sands Missile Range and Fort Bliss by the Department of Defense throughout the past decade (Burkett and Black 2003; Griffin 2005a; Locke 2005). White Sands Missile Range in central New Mexico contains one million hectares (ha) (2.5 million acres (ac)). The northwest corner (81,000 ha (200,000 ac)) is highly suitable yucca/grassland preferred by falcons. There is presently no livestock grazing and no public access to this area. The 145,139-ha (358,643-ac) Armendaris Ranch, located in south central New Mexico, contains undeveloped Chihuahuan desert grassland managed by Turner Properties in cooperation with the Turner Endangered Species Fund. Armendaris Ranch managers have volunteered to provide falcon

reintroduction sites, and the Armendaris Ranch and areas immediately adjacent to known falcon habitat in Luna County have been surveyed on several occasions in recent years (Howard 2006a; Meyer and Williams 2005). Falcon surveys were conducted in 2003 on the Gray Ranch in southeastern New Mexico, which contains 130,410 ha (322,000 ac) (Lewis 2005). It includes extensive desert grasslands at its lower elevations. Bird life is abundant on the Gray Ranch; 43 percent of New Mexico's avian species occur there and would provide an excellent prey base for falcons. The Bureau of Land Management (BLM) office in Las Cruces and the New Mexico Department of Game and Fish (NMDGF) have also recently sponsored formal surveys for falcons in suitable habitats in the subspecies' historic range in New Mexico (Howard 2006a; Meyer and Williams 2005; Lister 2006a; Lister 2006c). Therefore, large areas of the southern New Mexico habitats most capable of supporting individual or breeding pairs of falcons have been formally surveyed for the presence of falcons during the past 10 years, and the results of these surveys follow.

After a 50-year absence, an unsuccessful nesting attempt was documented in Luna County, New Mexico, in the spring of 2001 (Meyer and Williams 2005). In 2002, a pair at this location successfully fledged three chicks. In 2003, only a single female was seen in the area of the 2002 nest. In 2004, a pair of falcons was seen for a short time at this location, but no nesting was detected and this male left in late May (Meyer and Williams 2005). In 2005, only a single female was observed at this site (Meyer 2005). In 2006, this breeding territory has been repeatedly surveyed, and no falcons were detected there from February through May, although a falcon was reported to be observed in a nearby area in late May (Lister 2006c).

Formal surveys and reliable sightings submitted to the Service show that a small number of falcons have occurred in New Mexico, with a small number of sightings occurring in every decade since the 1960s (Williams 1997; Howard 2006a; Howard 2006b; Meyer and Williams 2005; Service 2005; Howe 2006). Although it is a species highly sought after by bird watchers and other naturalists, an average of only 2.5 sightings was reported per year during the 1990s in New Mexico (Service 2005). Despite increasing public interest, survey effort, and reporting requirements (e.g., section 10 (a)(1)(A) recovery permits), from 2000 through 2005, this average only increased to 4.0

sightings reported per year in the State, including the Luna County appearance of the first nest in either New Mexico or Arizona since 1952 (Service 2005). On May 8, 2002, two additional falcons were observed that were thought to be different from the known nesting pair in Luna County. However, only one individual thought to be from that potential second pair was present two days later, and a second falcon nest was never located anywhere in the NEP area (Meyer and Williams 2005). In 2003 and 2004, other than the Luna County territory, no additional falcons were reported from formal surveys in New Mexico (Meyer and Williams 2005). In 2005 and through April 2006, there were nine sightings at locations in New Mexico apart from the Luna County territory (Burkett 2005; Banwart 2006; Howard 2006b; Locke 2006). Only the sighting on August 11, 2005, detected more than one falcon. The two falcons observed on that day did not exhibit behaviors that indicated they were a pair, and a photograph taken of one suggested it was a juvenile (Howard 2005a;b). Repeated follow-up by highly qualified, experienced falcon surveyors of four of these detections, including the sighting of two birds, revealed that none of these falcons appeared to be local residents or defending a territory (Griffin 2005b; Howard 2005b; Lister 2006b; Lister 2006c; Locke 2006). Absolute numbers of falcons sighted in New Mexico are unknown because all but one sighting has been of unbanded birds. Montoya *et al.* (1997) and Macias-Duarte *et al.* (2004) banded a number of juvenile falcons in the Mexican State of Chihuahua between 1996 and 2002. To date, one juvenile bird banded in this study has been seen in New Mexico. It was observed on Otero Mesa in 1999 (Howard 2006a). In Arizona, the most recent documented occurrences of falcons were recorded in 1975 and 1977, with one unconfirmed sighting in southern Arizona near the Mexican border in November 2005 (Howard 2006a). These sightings in New Mexico and Arizona may represent falcons dispersing from the population in Chihuahua that were opportunistically foraging in areas rich in prey due to vegetative growth from precipitation (Howard 2005a).

It has been noted that significant recolonization of habitats in Arizona and New Mexico by naturally occurring birds in Chihuahua would likely take decades, if it occurred at all, because the reproductive rate of the falcons in Chihuahua has typically been low. The low reproductive rate is possibly due to the effects of extended drought, and this

population has not been expanding (Burnham *et al.* 2002; Jenny and Heinrich 2004). In addition, the majority of the breeding pairs in Chihuahua are clustered in close proximity to one another, but most are approximately 120 to 135 miles away from the southern New Mexico border (Howard 2006c). As stated in the Recovery Plan for the falcon (1990), "Regardless of the status of the aplomado falcon in Mexico, an attempt should be made to establish populations in the United States. If release sites are carefully chosen, reestablished populations should be relatively free from pesticide contamination. Releases may facilitate range expansion because pesticide contamination may have reduced the ability of most populations to colonize new patches of suitable habitat. The potential for range expansion is now more promising as a result of recent brush control efforts in southern and coastal Texas and the discontinued use of DDT."

#### *Recovery Efforts*

There are currently 46 pairs of aplomado falcons in the captive population, which produces more than 100 young per year. From this captive population, 1,142 captive-bred falcons have been released in Texas (Juergens and Heinrich 2005). The Peregrine Fund conducted a pilot release project in Texas from 1985 to 1989, and increased restoration efforts began in 1993. These releases have established at least 44 pairs in southern Texas and adjacent Taumalipas, Mexico, where no pairs had been recorded since 1942 (Jenny *et al.* 2004). Moreover, pairs of reintroduced falcons began breeding in 1995, and to date have successfully fledged more than 244 young (Juergens and Heinrich 2005). Nests have been located on a variety of structures, both artificial and natural. Predation by great-horned owls, raccoons (*Procyon lotor*), and coyotes (*Canis latrans*) is significant, affecting more than half of all nesting attempts (Jenny *et al.* 2004). Nesting productivity increased by approximately 40 percent in 2003 and 2004, when falcons were provided artificial nesting structures with barred sides arranged so that falcons can enter the nest while predators cannot (Jenny *et al.* 2004). Pairs of falcons in south Texas successfully fledged young where they had never been successful prior to the use of the new artificial nests. Beginning in 2002, falcons have also been released in west Texas under a Safe Harbor Agreement with The Peregrine Fund. In 2005, 138 falcons were released at six sites on private ranches in the trans-Pecos region of the

State, and of these, 116 successfully reached independence (Juergens and Heinrich 2005).

All of these releases in Texas have occurred on private property under Safe Harbor Agreement permits, currently with an enrollment of more than 728,000 ha (1.8 million ac). Safe Harbor Agreements are between a private land owner and the Service that permit future incidental taking of listed species on their private land. Releases have also occurred on Laguna Atascosa, Matagorda Island, and Aransas National Wildlife Refuges in Texas. We believe that it is also possible to accelerate the establishment of a breeding population in the Southwest through reintroductions of captive-raised birds in New Mexico. The experience in Texas, where the population went from no known pairs in 1994, to 44 known pairs that produced at least 244 young by 2005, illustrates the rapidity with which a population can be established through reintroductions.

Despite the relative success of the falcon releases in Texas, we believe the Safe Harbor Agreements used to release falcons in Texas are not the best mechanism for re-establishing falcons in New Mexico and Arizona. Safe Harbor Agreements can only be developed for private land owners. There is a vast amount of public land in New Mexico and Arizona, totaling approximately 40 percent of the reintroduction area. Therefore, public land is very important for recovery of the falcon in this area. Not only is the public land important because of its high percentage in the reintroduction area, but it is important because of its habitat characteristics. The historical range in the NEP area is Chihuahuan Desert grassland, and public lands make up approximately 50 percent of the Chihuahuan Desert grassland compared to private land (Young *et al.* 2002). We believe there is very low probability that falcons will populate lands outside of their historical range because those habitats would not be suitable for falcons. Thus far, we have not detected falcons inhabiting areas outside of their historical range.

Extensive grasslands that would support individual or breeding falcons occur on Otero Mesa, White Sands Missile Range, southern Hidalgo County (Gray Ranch), and the Armendaris Ranch/Stallion Range area (Howard 2006a). Approximately one-half of the Chihuahuan Desert grasslands in New Mexico are federally managed, and often intermingled with State and private land. Falcons moving between Safe Harbor lands and non-Safe Harbor lands would receive different levels of

protection from the Act. Activities that may affect falcons on Federal lands (or on non-Federal lands for projects using Federal permitting, funding, or authorization) would require section 7(a)(2) consultation. Falcons released on private lands with Safe Harbor Agreements that move to non-Safe Harbor lands would receive the full protection of the Act. Actions that may take falcons on private lands would also be subject to the Act's regulatory requirements. We believe such an approach would be less efficient than establishing an NEP, would be difficult to regulate, and would ultimately provide less conservation benefit to the falcon than establishing an NEP.

The Secretary has broad discretion to manage populations to better conserve and recover endangered species. The term "experimental population" means any population, including any of their offspring, authorized by the Secretary for release, only when the population is wholly separate geographically from nonexperimental populations of the same species. In the case of the falcon, (1) This subspecies has been known to disperse up to 250 kilometers, (2) it would be virtually impossible to preclude naturally occurring individual falcons from intermingling with the experimental population, and (3) there has been only one pair that has reproduced one time within the NEP area. Designation of a 10(j) NEP requires that the reintroduced animals be "wholly separate" from any existing population. We do not consider the pair of falcons that bred in 2002 in Luna County to constitute a population. Therefore, the exclusion of the counties surrounding the 2002 pair from the 10(j) designation is not necessary. We identify the experimental population as all falcons found within the NEP area, including reintroduced falcons and any lone dispersers and their offspring. We believe this is the best manner by which to manage the falcon reintroduction program to achieve species recovery. The Act does not require the protection of individuals to the exclusion or detriment of overall species recovery, or otherwise limiting the Department of the Interior's flexibility and discretion to define and manage an experimental population pursuant to section 10(j) (*Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000)). That decision affirmed the Service's determination of whether individual wolves constituted a population.

Regulations define "population" as a potentially self-sustaining "group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when

mature," (50 CFR 17.3). The term experimental population means "an introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species" (50 CFR 17.80). These definitions preclude the possibility of population overlap as a result of the presence of individual dispersing falcons, because by definition, lone dispersers do not constitute a population or even part of a population, since they are not in "common spatial arrangement" sufficient to interbreed with other members of a population. Congress defined "species," consistent with its broad conservation and recovery goals, to constitute distinct, interbreeding population segments or subspecies, not individual animals. By definition then, an individual animal does not constitute a species, population, or population segment. In the case of the gray wolf, the Department of the Interior, exercising its discretion under section 10(j), reasonably interpreted the phrase "current range" to be the combined scope of territories defended by the breeding pairs of an identifiable wolf pack or population (*Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000)). We have used the same approach for the falcon. Therefore, a population of falcons does not exist in the NEP area. Breeding falcons are not evenly distributed between the United States border and the Chihuahuan group of falcon pairs. There is a gap of approximately 222 km (138 mi) between the Luna County pair in New Mexico and the most northern, known Chihuahuan breeding pair in Mexico (Howard 2006c). The single pair of New Mexico falcons that successfully reproduced only once in 2002 (after a 50-year absence) is neither self-sustaining, a group, nor in common spatial relationship with the group of approximately 25 to 35 breeding falcon pairs in Mexico. These Mexico falcons occur 160 kilometers (km) (100 miles (mi)) or more south of the United States border. They are clustered in common spatial relationship, are self-sustaining, and are interbreeding.

We do not consider the New Mexico 2002 nesting pair and any offspring produced by the pair to be a population. Biologically, the term "population" is not normally applied to a single pair, and so the few birds sighted in New Mexico could be considered dispersers

from the Chihuahuan population. In addition, we have no authority to manage a population in a different country. Therefore, the existence of a group in Mexico should not preclude conservation and management of falcons in the United States in order to achieve species recovery. Furthermore, two, or even three, birds are not considered a self-sustaining population. Self-sustaining populations require a sufficient number of individuals to avoid inbreeding depression and occurrences of chance local extinction (Caughley and Gunn 1996).

Designation of an NEP under section 10(j) of the Act requires that the reintroduced animals be “wholly separate geographically” from any existing population. As stated above, we do not consider the pair of falcons that bred in 2002 in Luna County, New Mexico, to constitute a population. Therefore, the exclusion of the counties surrounding the 2002 pair from the 10(j) designation is not necessary. Creating an NEP area that excludes the counties surrounding the documented New Mexico pair (Hidalgo, Grant, and Luna counties) would create a complex regulatory situation. If falcons that are released in the NEP area move into the excluded area, then they would receive the full protection of the Act. Federal land managers in the NEP-excluded area may therefore be subject to the full regulatory requirements of section 7(a)(2) for falcons that were released in the NEP area. If a falcon released in the NEP area settles on private lands, the private land owner would be prohibited from any action that may incidentally “take” the falcon. We believe the recovery of the falcon can be achieved without imposing these regulatory restrictions on land managers and the public that excluding some counties from the NEP area would require.

#### Reintroduction Sites

Falcons historically occurred in Chihuahuan Desert grasslands within the NEP area, and habitats in these areas are similar to those that support nesting falcons in northern Mexico populations. Primary considerations for identifying falcon release sites include areas: (1) Within or in proximity to potentially suitable habitat, including open grassland habitats that have scattered trees, shrubs, or yuccas for nesting and perching; (2) supporting available prey for falcons (e.g., insects, small to medium-sized birds, rodents); (3) with minimal natural and artificial hazards (e.g., predators, open-water tanks) and potential hazards that can be minimized where practical; (4) with access for logistical support; (5) with a large extent

of potentially suitable habitat surrounding a release site and its proximity to other similar habitats; and (6) with a willing landowner or land manager.

While the NEP area will include both Arizona and New Mexico, the reintroduction sites will only be on lands within New Mexico. The State of Arizona is supportive of having falcons re-established in the State under a 10(j) designation, but does not wish to conduct reintroductions. Reintroduction sites within the NEP area will be selected to increase the distribution of the population and its rate of growth. Selection will be based upon suitability and extent of available habitat, as well as any dispersal patterns from prior releases. Released falcons are expected to move around within the areas of their release, but may disperse to more distant areas. The 10(j) designation and supporting 4(d) rule cover both private and public lands in New Mexico and Arizona, so Safe Harbor Agreements will not be necessary with private landowners.

#### Reintroduction

The rearing and reintroduction techniques that will be used in establishing this NEP have proven successful in establishing a wild population of falcons in southern Texas. Falcons will be raised in The Peregrine Fund's captive propagation facility in Boise, Idaho. Newly hatched falcon chicks are fed by hand in sibling groups for up to 25 days. They are then raised in sibling groups with minimal human exposure until their transportation to a reintroduction site at 32 to 37 days of age. Careful timing of the age for reintroducing falcons is important to increase their chances for successfully fledging and reaching independence (Sherrod *et al.* 1987). Falcons are shipped by air between Boise and the release locations and driven to the hack site (*i.e.*, release site). At the hack site, the falcons are placed in a protective box on top of a conspicuous tower and fed for 7 to 10 days. The box is then left open and falcons are allowed to come and go freely. Food is provided on the tower and, initially, the falcons return each day to feed. Eventually, the falcons begin chasing prey, making their own kills, and spending more and more time away from the hack site. A falcon is considered to be “successfully released” when it is no longer dependent on food provided at the hack site. This process generally takes from 3 to 6 weeks (Jenny *et al.* 2004). The hack site attendants will evaluate the progress of the released falcons. The reintroduction process can be extended to ensure a

successful release or a bird may be returned to the propagation facility in Boise if it does not attain independence (Sherrod *et al.* 1987).

#### Status of Reintroduced Population

Before authorizing the release of any population, the Secretary shall determine, on the basis of the best available information, whether or not such a population is essential to the continued existence of an endangered species or a threatened species. The proposed experimental falcon population will be designated “non-essential, experimental” (NEP) because: (1) There are established populations in Mexico and a rapidly expanding population in south Texas; (2) reintroductions will continue in western Texas; (3) the Boise, Idaho, captive population is producing enough offspring to maintain the captive flock and provide falcons for release; and (4) the possible failure of this action would not appreciably reduce the likelihood of survival of the subspecies in the wild. We also believe the NEP designation lessens land-use restrictions associated with the Act, which makes the establishment of falcons in New Mexico and Arizona less controversial to private landowners and agency land managers, and should result in more cooperative falcon conservation efforts with stakeholders and a larger number of release sites and more widespread reintroductions. Therefore, the use of the NEP should be the fastest way to both (1) successfully establish a falcon population in New Mexico and Arizona, and (2) aid in recovery and eventual delisting of the falcon. Thus, we have determined this experimental population to be nonessential to the continued existence of the species according to the provisions of section 10(j) of the Act for the following reasons:

(a) With at least three populations—one in eastern Mexico, a second in northern Chihuahua, Mexico, and a third becoming established in southern Texas—the experimental population is not essential to the continued existence of the species. The threat of extinction from a single catastrophic event has been reduced by a gradual increase of the southern Texas and captive populations. Thus, loss of the experimental population will not appreciably reduce the likelihood of falcon survival in the United States; and,

(b) Any birds lost during the reintroduction attempt can be replaced through captive breeding. Production from the extant captive flock is already sufficient to support the release of birds

that would occur under this final rule, in addition to continued releases in west Texas (Juergens and Heinrich 2005).

We fully expect that the NEP will result in the establishment of a self-sustaining, resident population, which will contribute to the recovery of the species. We expect these reintroductions to be compatible with current or planned human activities in the NEP area (Burnham *et al.* 2002). There has been only one reported conflict between human activities and falcons in Texas, where 1,142 falcons have been released over the course of 20 years (Burnham *et al.* 2002; Bond 2005; Jenny 2005; Robertson 2006). That issue involved the use of agricultural pesticides in proximity to falcon reintroduction sites in Texas in the early 1990s, and a viable resolution of the conflict was obtained. The Service will use the best scientific and commercial data available, including, but not limited to, results from the monitoring plan developed with this rule and stakeholder meetings to prepare 5-year evaluations of the reintroduction program. If the actions carried forward as a result of this final rule fail to demonstrate sufficient success toward recovery, as determined by the Service, then the Service, in coordination with other Federal land managers, the States of Arizona and New Mexico, and private collaborators, would reevaluate management strategies.

Although there are still questions to research while these reintroductions proceed, the success of the southern Texas reintroductions suggests that this effort will have similar positive results for the recovery of the falcon. Based on that experience, we have good reason to believe that appropriately managed captively reared birds are suitable for release into the wild and can survive and successfully reproduce. Although prey-base biomass may be lower throughout the NEP area than in southern Texas, the prey-base biomass in the NEP area is similar to occupied habitat in Chihuahua, Mexico (Truett 2002). Furthermore, the establishment of a third self-sustaining population in the United States provides further assurance that the species will recover here. For example, if the southern Texas population was significantly impacted by a catastrophic event, such as a Gulf coast hurricane, the NEP in New Mexico and the reintroduced falcons in western Texas would provide buffers for the species in the wild while the southern Texas population recovered.

#### *Location of Reintroduced Population*

Section 10(j) of the Act requires that an experimental population be geographically separate from other populations of the same species. The NEP area covers all of New Mexico and Arizona, with the expectation that falcons would persist only within the Chihuahuan Desert, which extends north from Mexico into southern Texas, southern New Mexico, and southeastern Arizona. The NEP area is geographically isolated from existing falcon populations in Mexico and Texas by a sufficient distance to preclude significant contact between populations. There have been no documented nesting falcons in Arizona and only one known successful nest in New Mexico in over 50 years. However, we do not believe the presence of these falcons constitutes a population, as stated in the "Recovery Efforts" section above.

It is difficult to predict where individual falcons may disperse following reintroduction within the NEP area. A 70-day-old male falcon dispersed 136 km (84.5 mi) from a hack site in Texas (Perez *et al.* 1996), and a falcon banded in Chihuahua, Mexico, was observed 250 km (155 mi) north in New Mexico (Burnham *et al.* 2002). Perez *et al.* (1996) placed radio transmitters on 14 falcons in Texas and found that their home range size varied widely, from 36 to 281 square km (km<sup>2</sup>) (14 to 108.5 square mi (mi<sup>2</sup>)). Natal dispersal may be localized (Burnham *et al.* 2002). Designation of a large NEP area around planned release sites takes into consideration the potential occurrence and dispersal of falcons in a large geographic area. Any falcon found within the NEP area will be considered part of the NEP.

It is possible, though unlikely, that individual captive-bred falcons or their progeny from west Texas could disperse into the NEP area. The majority of falcon reintroductions in west Texas are further than 193 km (120 mi) from suitable habitat in New Mexico, and tall mountains separating the two regions may provide an obstacle to falcon migration. The Guadalupe Mountains span the border between Texas and New Mexico and rise to heights of 8,749 feet. Falcon reintroductions in west Texas only began in 2002, and as expected, there has not yet been any documented breeding by these reintroduced falcons. Furthermore, there have been no detections in New Mexico of falcons that were banded at west Texas reintroduction sites, and all of those reintroduced falcons should be banded.

#### *Management*

Because of the substantial regulatory relief provided by NEP designations, we do not believe the reintroduction of falcons will conflict with existing human activities or hinder public use of the NEP area. The NEP designation will not require land managers to specifically manage for reintroduced falcons. When NEPs are located outside a National Wildlife Refuge or unit of the National Park System, we treat the population as proposed for listing and only two provisions of section 7 would apply: section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

The Service, The Peregrine Fund, Turner Endangered Species Fund, the States of New Mexico and Arizona, BLM, Department of Defense (DOD), and other cooperators will manage the reintroduction. They will closely coordinate on reintroductions, monitoring, coordination with landowners and land managers, and public awareness, among other tasks necessary to ensure successful reintroductions of falcons.

(a) *Monitoring*: The Service has developed a monitoring plan specific to this NEP and associated release efforts (see **ADDRESSES** section). Falcons will be observed every day before they are released. Facilities for release of the birds will be modeled after facilities used for falcons in Texas. Information on survival of released birds, movements, behavior, reproductive success, and causes of any losses, will be gathered during the duration of the reintroduction program. Program progress will be summarized and reported annually at stakeholder meetings. As described above, we plan to evaluate the progress of the program every 5 years.

(b) *Disease*: (see information previously provided in our February 9, 2005, proposed rule).

(c) *Genetic Variation*: The captive breeding population of falcons is managed by The Peregrine Fund to maintain and maximize genetic diversity (Burnham *et al.* 2002). This

population was derived from nestlings collected from robust populations in Chiapas, Tabasco, and Veracruz, Mexico. Genetic testing was conducted to insure that progeny from falcons collected in southeastern Mexico would be suitable for release in northern Mexico and the United States, where the subspecies had been extirpated. Results from both mitochondrial DNA and microsatellite variation were analyzed, and revealed no genetic divergence between samples that would indicate any problems from reintroducing this lineage into the Chihuahuan grasslands of the United States (Kiff, *in litt.*, 1995; Mindell, *in litt.*, 1997; Burnham *et al.* 2002). This finding is consistent with the known dispersal tendencies of falcons and the fact that these populations are recognized as the same subspecies of northern aplomado falcon (*Falco femoralis septentrionalis*).

(d) *Mortality*: For purposes of section 9 of the Act, a population designated as experimental is treated as threatened, regardless of the species' designation elsewhere in its range. Therefore, for purposes of section 9 of the Act, northern aplomado falcons within the NEP will be treated as threatened wherever they are found. A threatened designation allows us greater discretion in devising management programs and special regulations for such a population.

The Act defines "incidental take" as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as military training, livestock grazing, recreation, and other activities that are in accordance with Federal, tribal, State, and local laws and regulations. A person may take a falcon within the NEP area provided that the take is unintentional and was not due to knowing, intentional, or negligent conduct. Unintentional take will be considered "incidental take," and is authorized under this final rule via a special rule under section 4(d) of the Act. Although a special rule under section 4(d) of the Act can contain the prohibitions and exceptions necessary and appropriate to conserve that species, regulations issued under section 4(d) for NEPs are usually less restrictive with regard to human activities in the reintroduction area. Thus, take of falcons which is not intentional and is incidental to otherwise lawful activity will be permitted. Applying the results obtained from the reintroductions in south Texas, we expect levels of incidental take to be low since the reintroductions should be compatible with existing land use practices in the

area (Burnham *et al.* 2002; Bond 2005; Jenny 2005). Intentional take such as shooting, knowingly destroying a nest, or knowingly harassing falcons from an active nest for purposes other than authorized data collection, will not be permitted.

(e) *Special Handling*: (See information previously provided in our February 9, 2005, proposed rule).

(f) *Coordination with Landowners and Land Managers*: The Service and cooperators identified issues and concerns associated with falcon reintroductions through the National Environmental Policy Act (NEPA) scoping and two public comment periods. The reintroductions have also been discussed with potentially affected State agencies and some private landowners wishing to have falcons released on their property. Affected State agencies, landowners, and land managers have indicated support for the reintroduction, provided the falcon experimental population is established as a NEP, and land-use activities in the NEP area are not constrained without the consent of affected landowners.

(g) *Potential for Conflict with Military, Industrial, Agricultural, and Recreational Activities*: With proper management, we expect falcon reintroductions to be compatible with current and planned human activities in the NEP area, including agricultural, oil and gas development, military, or recreational activities. There has been only one reported conflict between human activities and falcons in Texas, where 1,142 falcons have been released over the course of 20 years (Burnham *et al.* 2002; Bond 2005; Jenny 2005; Robertson 2006), and that issue was resolved in the early 1990s. Well-managed activities on private, State, and some Federal lands within the NEP area should continue without additional restrictions during implementation of falcon reintroduction activities. As required by section 10(j) of the Act, when the NEP is located within a National Wildlife Refuge or National Park, for section 7 consultation purposes we will treat the reintroduced falcons as threatened under the Act, and therefore the consultation requirements of section 7(a)(2) will apply on these Federal lands. If proposed agricultural, oil and gas development, military, or recreational activities may affect the falcon's prey base within reintroduction areas, State and/or Federal biologists can determine whether falcons could be impacted and, if necessary, work with the other agencies and stakeholders in an attempt to avoid such impacts. If private activities impede the establishment of falcons, we will work

closely with State and Federal agencies and/or landowners to suggest alternative procedures to minimize conflicts. The States of Arizona and New Mexico are not directed by this final rule to take any specific actions to provide any special protective measures, nor are they prevented from imposing restrictions under State law, such as protective designations and area closures. Neither of the States within the NEP area, both of which are participants in the northern aplomado falcon working group, has indicated that it would propose hunting restrictions or closures related to game species because of the falcon reintroduction.

The principal activities on private property near the initial release areas are agriculture, livestock production, and hunting. We do not believe that use of these private properties by falcons will preclude such private uses because these activities and the falcons' needs do not conflict with each other. These same human uses are occurring near falcon reintroduction sites in south Texas. As stated above, there has been only one reported conflict between human activities and falcons in Texas, where 1,142 falcons have been released over the course of 20 years (Burnham *et al.* 2002; Bond 2005; Jenny 2005; Robertson 2006), and that issue, which involved the use of pesticides, was resolved in the early 1990s.

Reintroduced falcons may disperse into other parts of the NEP area or even outside the NEP area. We believe that the frequency of movements outside the NEP area is likely to be very low based on the history of falcon reintroduction in Texas (Burnham *et al.* 2002), and the fact that the NEP area is large, spanning two entire States, while the reintroduction area is a relatively small portion. Any falcons outside the NEP area will be considered endangered under the Act. Any falcons that occur within the NEP area will be considered part of the NEP and will be subject to the protective measures in place for the NEP. The decreased level of protections afforded to falcons that cross into the NEP is not expected to have any significant adverse impacts to the wild population, since we do not anticipate this to occur very often.

(h) *Protection of Falcons*: We will reintroduce falcons in a manner that provides short-term protection from natural predators and human-related sources of mortality. Reintroduction methods designed to discourage predators include tall hacking towers as artificial nests and full-time biologists to feed and protect the young falcons and reduce natural mortality. Reintroducing falcons in areas with less human

activity and development will minimize human-related sources of mortality, such as from collisions. Should causes of mortality be identified, we will work with the private landowners or agency land managers to try to correct the problem.

(i) *Potential for Conflict with Natural Recolonization of Falcons*: Natural (*i.e.*, unaided) falcon recolonization of New Mexico and Arizona would be dependent on dispersing falcons from Mexico, Texas, or possibly unknown nesting pairs within the United States. We do not consider the unaided recolonization of falcons in the NEP area a likely occurrence for a number of reasons. The half-century absence of falcons in Arizona and New Mexico indicates that the Chihuahua, Mexico, falcon population is not likely to recolonize New Mexico and Arizona with sufficient numbers to establish a population in the foreseeable future. The low fledging success in Chihuahua and lack of significant expansion of that population since observations first began in 1992 (Montoya *et al.* 1997; Marcas-Duarte *et al.* 2004; Young *et al.* 2004; Juergens and Heinrich 2005) suggest that birds from Chihuahua are not likely to provide enough dispersers to populate New Mexico. Furthermore, the only birds that are known to be currently nesting in southern Texas are beyond the average dispersal distance for falcons. Natal dispersal to eventual breeding sites may be localized (Burnham *et al.* 2002). The longest known falcon dispersal distance is 250 km (155 mi) (Burnham *et al.* 2002), whereas the straight-line distance from currently breeding falcons near Brownsville, Texas, to Carlsbad, New Mexico, is approximately 973 km (605 mi), much further than any documented dispersal by falcons.

It is possible, though unlikely, that individual captive-bred falcons or their progeny from west Texas could disperse into the NEP area. The majority of falcon reintroductions in west Texas are farther than 193 km (120 mi) from suitable habitat in New Mexico, and tall mountains separating the two regions may provide an obstacle to falcon migration. The Guadalupe Mountains span the border between Texas and New Mexico and rise to heights of 8,749 feet. Falcon reintroductions in west Texas only began in 2002, and as expected, there has not yet been any documented breeding by these reintroduced falcons. Furthermore, there have been no detections in New Mexico of falcons that were banded at west Texas reintroduction sites, and all of those reintroduced falcons should be banded.

We do not consider the presence of the successful breeding pair in 2002 in Luna County to represent a population. The frequency and number of falcons in recent New Mexico sightings would, at that pace, be very unlikely to result in natural recolonization. Although there may be occasional falcon dispersal movements from Mexico to New Mexico, we do not believe this will lead to the establishment of a viable population within New Mexico. The population in Mexico has been known to exist since 1992, and likely existed prior to that; however, there has only been one known successful nest in the entire NEP area in over 50 years. Given the lack of a falcon population in the reintroduction area, and the low probability that falcons from Chihuahua, Mexico, can recolonize New Mexico, we believe that reintroductions are needed in order to establish a resident falcon population in the grasslands in the United States.

(j) *Public Awareness and Cooperation*: We will inform the general public of the importance of this reintroduction project in the overall recovery of the falcon. This designation will provide greater flexibility in the management of reintroduced falcons. NEP designation is necessary to secure needed cooperation of the States, landowners, Federal agencies, and other interests in the NEP area. For reasons stated, despite the relative success of the falcon releases in Texas, where there is relatively little public land, we believe the Safe Harbor Agreements used to release falcons in Texas are not the best mechanism for establishing falcons in New Mexico and Arizona. Safe Harbor Agreements can only be developed for private land owners, and the reintroduction area in New Mexico includes a vast amount of public land.

#### Summary of Comments and Recommendations

We requested written comments from the public on the proposed NEP and draft environmental assessment in the proposed rule published on February 9, 2005 (70 FR 6819). We also contacted the appropriate Federal, State, and local agencies, tribes, scientific organizations, and other interested parties and invited them to comment on the proposed rule. The initial comment period was open from February 9, 2005, to April 11, 2005. A second comment period was open from September 16, 2005, through November 15, 2005, to solicit comments on the draft monitoring plan and to announce the dates, locations, and times of the public hearings (70 FR 54701).

In conformance with our policy on peer review, published on July 1, 1994

(59 FR 34270), we solicited opinions from six expert ornithologists who are familiar with this species to peer review the proposed rule. Three of the six peer reviewers submitted comments; the others did not. Their comments are included in the summary below.

We reviewed all comments received from the peer reviewers, State agencies, and the public for substantive issues and new information regarding the proposed NEP. Substantive comments received during the comment period have either been addressed below or incorporated directly into this final rule. The comments are grouped below as either peer review, State, or public comments.

#### Peer Review Comments

(1) *Comment*: While a small population of falcons exists in southeastern Chihuahua, Mexico, there is very little evidence of a tendency towards natural reestablishment in the United States. Despite arguments to the contrary, the occasional appearance of a vagrant or a nesting pair does not forecast reestablishment and certainly not the existence of a viable population.

*Our Response*: We agree with the commentator that any significant natural re-colonization of habitats in Arizona and New Mexico would likely take decades, if it occurred at all, because the reproductive rate of the population in Mexico is low, and this population is not significantly expanding, possibly due to extended drought (Burnham *et al.* 2002).

(2) *Comment*: Aplomado falcons are colonizing New Mexico and Arizona on their own, as part of a natural range expansion.

*Our Response*: Aplomado falcons are not likely to naturally recolonize in significant numbers. Please see our response to comment 1 and information under section 2 ("Biological") of the Background section, above.

(3) *Comment*: Designation of an experimental population would hinder policy protections for naturally colonizing birds.

*Our Response*: Birds that naturally recolonize areas in New Mexico will have reduced protections under the NEP; however, birds are not likely to naturally colonize in significant numbers. Thus, the benefits to falcon recovery of having large numbers of birds reintroduced is much greater than the potential effect of reducing protection for very few naturally colonizing individuals. In addition, all falcons will still be protected from direct intentional taking (*e.g.*, hunting of falcons), and we anticipate little conflict with most otherwise lawful activities



occurring in the NEP (e.g., grazing that uses best management practices). There has been only one reported conflict, which was resolved in the early 1990s, between human activities and falcons in Texas, where 1,142 falcons have been released over the course of 20 years (Burnham *et al.* 2002; Bond 2005; Jenny 2005; Robertson 2006). The areas that falcons inhabit on private lands with Safe Harbor Agreements in Texas are more densely populated by people than the public lands in New Mexico. Therefore, if conflicts are occurring, they would be detectable in Texas, and we have had no reported conflicts after the one in the early 1990s.

(4) *Comment:* One peer reviewer summarized the proposal as “biologically sound, politically tenable, but ethically irresponsible.” The reviewer asserts that limited recovery funds should be spent on higher priority species (*i.e.*, species with lower recovery priority numbers under the Service’s Recovery Priority Guidelines).

*Our Response:* As we stated in the Recovery Priority Guidelines, “the priority systems presented must be viewed as guides and should not be looked upon as inflexible frameworks for determining resource allocations (48 FR 43098).” Many other factors, including landowner cooperation, likelihood of success of projects, public cooperation, and partner contributions, may play into the decision to focus on specific species or actions. The falcon reintroductions discussed in this rule are supported by all of these factors.

(5) *Comment:* Restoration of the falcon should occur within the natural predator community of the reintroduction area. Native predators (e.g., great-horned owls) should not be killed to protect released falcons.

*Our Response:* The release protocols have been modified over time and include carefully chosen nest sites and use of nest boxes to minimize conflict with natural predators. The Service has no intention of killing native predators to benefit falcon releases.

#### State Comments

(6) *Comment:* In general, the States of Arizona and New Mexico supported the proposed rule. One State agency suggested we develop a 10(j) population that would also allow for naturally occurring falcons (*i.e.*, experimental status individuals will only be recognized outside areas that overlap with naturally occurring individuals) (50 CFR 17.80). Such a rule could also include zones for incremental State-wide expansion of the 10(j) population based upon an annual review by the Service and stakeholders.

*Our Response:* The incremental designation proposal would likely not increase recovery benefits to the falcon for two reasons. First, falcons have the capability to move about the landscape easily and there would likely be frequent movements between NEP areas and areas without this designation within New Mexico. Therefore, the suggested scenario would create a very complicated regulatory patchwork, as the same falcons move into and out of NEP areas, and thereby became subject to changed regulations under the Act. Second, we do not anticipate that falcons will require the protections of full endangered status in order to recover in New Mexico and Arizona. We believe that designating both States as NEP areas relieves concerns of landowners and managers regarding land-use restrictions, and will lead to more sites for reintroductions and faster recovery for the subspecies.

#### Public Comments

##### *Issue 1: Procedural and Legal Compliance*

(7) *Comment:* The Service should designate critical habitat for the falcon, rather than designating a 10(j) population. If you finalize the proposed rule, then a critical habitat designation would be precluded and little to no regulatory protections would remain for occupied or unoccupied habitat.

*Our Response:* The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. There are significant limitations on the regulatory effect of designation under ESA section 7(a)(2). In brief, (1) Designation provides additional protection to habitat only where there is a Federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

We believe it is not likely that falcons will naturally recolonize areas in Arizona and New Mexico in the near future even though there is ample suitable habitat to support falcons. Because there is available habitat, but virtually no naturally occurring falcons, we believe that releases under a 10(j)

rule are more beneficial to long-term falcon conservation than designation of critical habitat.

(8) *Comment:* The proposed rule violates the ecosystem protection purposes identified in section 2(b) of the Act.

*Our Response:* We believe that releasing falcons under the section 10(j) provision of the Act is the most appropriate way to achieve conservation for this species, which has shown a remarkable ability to coexist with many human activities, and that this action is consistent with the intents and purposes of the Act. Falcon reintroductions are intended to return a missing predator to the grassland ecosystems to which it naturally belongs, and this should benefit ecosystem functioning.

(9) *Comment:* Does the 10(j) rule remove all section 7 responsibilities?

*Our Response:* For the purposes of section 7 of the Act, we treat NEPs as threatened species when the NEP is located within a National Wildlife Refuge or a unit of the National Park System, and therefore section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply in these units. When NEPs are located outside a National Wildlife Refuge or unit of the National Park System, for the purposes of section 7 of the Act we treat the population as proposed for listing and only two provisions of section 7 would apply: Section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

(10) *Comment:* One commenter noted that if the proposed rule is finalized, the falcon would be treated as a species proposed for listing on BLM or DOD lands. The agencies would only be required to confer on actions that may jeopardize the species. If the population is deemed nonessential, the jeopardy threshold would never be reached, indicating that conferences would be an administrative task with no protection for the falcon. The Service should recognize that the BLM would no longer consult on many activities previously considered to be significant threats to falcon habitat such as oil and gas development, livestock grazing, military



operations, or pesticide use. In fact, under the current nonessential experimental population proposal, the BLM could authorize a road or pipeline that destroys an occupied falcon nest without the need for an incidental take permit.

*Our Response:* Consultation under section 7(a)(2) is only required for Federal projects that may affect listed species. It is unlikely that a Federal action would affect a significant number of falcons at the present time because the recent falcons sighted in New Mexico appear to be transients and there is a near absence of any falcon sightings in Arizona. Therefore, designating the reintroduced population as non-essential will not significantly change current practices regarding consultation under 7(a)(2), on areas outside of the National Wildlife Refuge and National Parks. Since the falcon will now be treated as a species proposed for listing, sections 7(a)(1) and 7(a)(4) will apply to Federal actions.

The falcon will be treated as a threatened species on BLM and DOD lands for purposes of section 9 of the Act. Through section 4(d) of the Act, we have greater discretion in developing management programs and special regulations for threatened species than we have for endangered species. Section 4(d) of the Act allows us to adopt whatever regulations are necessary to provide for the conservation of a threatened species.

While it is true that consultation requirements are lessened, we believe that the incidental take associated with otherwise lawful activities will not pose a long-term threat to falcon conservation under this rule, as most activities that occur in the 10(j) area are compatible with falcon recovery. Furthermore, Federal agencies will continue to analyze the impacts of their actions under NEPA. In addition, birds will continue to be reintroduced into New Mexico, which will provide some buffer to the population against individual birds lost to incidental take. A special rule under section 4(d) of the Act is included in this final action, and it authorizes unknowing or incidental take of falcons (*i.e.*, take that is incidental to an otherwise lawful activity). Direct take for research or educational purposes would require a section 10 recovery permit. Knowing take (*e.g.*, shooting) or take due to negligence will not be permitted. Additional information about the special rule can be found under the Final Regulation Promulgation section below.

(11) *Comment:* How will beneficial activities (*e.g.*, prescribed fire, fencing, bank stabilization, storm water runoff

control) be handled under section 7 in the 10(j) area?

*Our Response:* These actions will be handled like any other projects subject to section 7 in the NEP area. Please see our response to comment 9 above.

(12) *Comment:* One commenter was concerned that lessees and allotment holders have to remove cows from allotments during nesting season.

*Our Response:* In our experience with reintroducing falcons in south Texas, livestock grazing using best management practices has been compatible with successful nesting by falcons. It is possible that the conference opinions for grazing on Federal lands would recommend additional grazing guidelines; however, these measures are not mandatory, and it would be up to the Federal agency and lessee or allotment holders to implement at their discretion.

(13) *Comment:* The final rule should confirm that military operations (*e.g.*, low-level overflight, bombing and gunnery activities, target placement) will not be affected by the 10(j) designation, even if occurring over National Park Service or National Wildlife Refuge lands.

*Our Response:* As stated in our response to comment 9, if aplomado falcons are found within a National Wildlife Refuge or unit of the National Park System and there may be impacts from military activities, section 7 consultation may be required. Any military operations that may affect the 10(j) falcons would only involve conferencing with the military and recommended actions, if any, would be at the discretion of the military to implement.

(14) *Comment:* In order to streamline future conference opinions, the final rule should provide authorization to Federal agencies to permit habitat destruction.

*Our Response:* Section 10(j) of the Act explicitly states that for the purposes of section 7, the species designated as non-essential will be considered a proposed species. Federal agencies will have an obligation to confer (rather than consult) with the Service on proposed activities that are likely to jeopardize the continued existence of the falcon. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

(15) *Comment:* The Service should clarify the terms “willing landowner or manager” as they relate to one of the criteria in the selection of release sites. The term “manager” should also refer to an allotment permit holder in the case of Federal or State lands.

*Our Response:* We will attempt to work with both land managers and allotment permit holders; however, we do not have authority over allotment permit holders or authority to require land managers to seek allotment permit holder approval of various projects.

#### *Issue 2: Biological Issues*

(16) *Comment:* Many commenters recommended that we omit the reference to a specific numbers of pairs, increase the number of pairs, and/or clarify the definition of “population” we used in the 10(j) proposed rule due to the lack of scientific agreement on defining this term. That definition was, “a minimum of two successfully reproducing falcon pairs over multiple years.” One commenter suggested that we instead define a population as “sustained and predictable presence of more than negligible numbers of successfully reproducing individuals over a period of many years.”

*Our Response:* We have clarified the definition of “population” used in the proposed rule in the “Recovery Efforts” section of the Background.

(17) *Comment:* Naturally occurring falcons already exist on the landscape in New Mexico and adjacent northern Chihuahua, Mexico (*e.g.*, see Young *et al.* 2002, 2004; Meyer and Williams 2005). There have been about 45 credible sightings of falcons in New Mexico since 1990, within 3 to 6 credible observations per year since the late 1990s. The territory in Luna County, New Mexico, has been occupied from 2000 to 2005. Falcons have also recently been observed crossing the United States-Mexico border. The Service has not considered all of this new information. Therefore, a 10(j) rule does not seem to be a reasonable approach for falcon recovery.

*Our Response:* In the “Recovery Efforts” section of the Background, we clarify the reasons why we do not believe that a falcon population exists in Arizona and New Mexico. In the case of the falcon, (1) This subspecies has been known to disperse hundreds of kilometers, (2) it would be virtually impossible to preclude naturally occurring individual falcons from intermingling with the experimental population, and (3) there has been only one known pair that has reproduced (and only one time) in over 50 years within the designated experimental area. Therefore, we identified the experimental population as all falcons found within the experimental area, including reintroduced falcons and any lone dispersers and their offspring. We believe this is the best manner by which

to manage the falcon reintroduction program to achieve species recovery.

(18) *Comment:* In the proposed rule, there is an inaccurate statement that the proposed nonessential experimental population is geographically isolated from existing falcon populations in Mexico and Texas by a sufficient distance to preclude contact between populations. In fact, New Mexico is easily within the documented flying (*i.e.*, dispersal) distance of these falcon populations.

*Our Response:* Even though falcons from Mexico may enter New Mexico occasionally, the 10th Circuit Court in the wolf case (*Wyoming Farm Bureau Federation v. Babbitt*) supported the use of the 10(j) designation under very similar circumstances of occasional, low frequency contact. In over 50 years, we know of only one pair of successfully reproducing falcons in New Mexico. This one occurrence does not indicate that there is self-sustaining, regular interbreeding occurring between falcons in New Mexico and those in Mexico. The single pair of falcons that successfully reproduced once in 2002, after a 50-year absence, is not self-sustaining, not a group, and not in common spatial relationship with the group of approximately 25 to 35 breeding falcon pairs in the Mexican State of Chihuahua, 160 km (100 mi) south of the United States border. These Mexican birds appear to be self-sustaining and interbreeding, even though the population is not expanding. In addition, there is a significant gap between the location of the pair in the United States and the most northern breeding pair in Chihuahua, and even more distance to the main cluster of breeding pairs there. Please also see the "Recovery Efforts" section of the Background for additional discussion on this subject.

The only birds that are known to be currently nesting in Texas are beyond the average dispersal distance for falcons. Natal dispersal to eventual breeding sites may be localized (Burnham *et al.* 2002). The longest documented falcon dispersal distance is 250 km (155 mi) (Burnham *et al.* 2002). A straight-line distance from breeding falcons near Brownsville, Texas, to Carlsbad, New Mexico, is 973 km (605 mi), much farther than any documented falcon dispersal. It is possible, though unlikely, that individual captive-bred falcons or their progeny from west Texas could disperse into the NEP area. The majority of falcon reintroductions in west Texas are farther than 193 km (120 mi) from suitable habitat in New Mexico, and tall mountains separating the two regions may provide an obstacle

to falcon migration. The Guadalupe Mountains span the border between Texas and New Mexico and rise to heights of 8,749 feet. Falcon reintroductions in west Texas began in 2002, and as expected, there has not yet been any documented breeding by these reintroduced falcons. Furthermore, there have been no detections in New Mexico of falcons that were banded at west Texas reintroduction sites, and all of these reintroduced falcons should be banded.

(19) *Comment:* The Service speculated about falcon numbers in New Mexico without conducting comprehensive surveys of potential falcon habitat. Additional falcons probably would be documented with additional surveys.

*Our Response:* Over the past decade, widespread formal surveys have been conducted in suitable falcon habitats in southern New Mexico. Please refer to the discussion on survey results under the Biology portion of the Background section.

(20) *Comment:* There is no justification for releasing such a large number of falcons in New Mexico, especially given the current increasing status of native birds and finite amount of suitable habitat.

*Our Response:* Young *et al.* (2005) indicated that there are approximately 9,060 km<sup>2</sup> (5,600 mi<sup>2</sup>), or 906,000 ha (2,238,766 ac), of suitable habitat in New Mexico. We believe there is sufficient suitable habitat for falcon recovery in New Mexico. Montoya (1995) estimated that 1 falcon pair required 4,300 ha (10,625 ac) in Chihuahua, Mexico. If this size requirement for nesting territory also applies to the estimated quantity of suitable habitat in New Mexico, the State could support up to 200 pairs of falcons. Much of this suitable habitat occurs in Otero Mesa, Fort Bliss, White Sands Missile Range, the Jornada Plain (Armendaris Ranch and Jornada del Muerto), and the southwestern corner, or boot-heel, of New Mexico south of Interstate 10. Although releases will occur only in New Mexico, falcons will likely colonize suitable habitat in southeastern Arizona, further increasing the number of falcons inhabiting Chihuahuan Desert grasslands (Montoya 1995).

(21) *Comment:* The Tenth Circuit Court of Appeals found that Congress gave the Service considerable discretion in defining the term "experimental population" as it related to the establishment of an experimental population of wolves in the northern Rockies. In that case, the occasional presence of individual animals without

any sustained successful reproduction appeared to be consistent with the purposes of a 10(j) population. The same logic should be applied to present rulemaking.

*Our Response:* We agree and discussed this court decision in the "Recovery Efforts" section of the Background, and in our responses to comments 17, 18, and 19.

(22) *Comment:* The proposed rule is not consistent with Service policy on 10(j) populations published in the **Federal Register** (49 FR 33885). As discussed in the policy, the proposal "cannot reduce protections for native fish, wildlife, and plants that expand naturally into areas designated as experimental (49 FR 33885)." The proposed rule appears to be a short-cut around natural falcon recovery that eliminates meaningful habitat protections with voluntary unenforceable measures.

*Our Response:* Please see our responses to comments 17, 18, and 19.

(23) *Comment:* It is not appropriate to conclude that in the long-term the Chihuahua population of falcons would not be able to produce dispersing falcons under improved conditions. Please consider evaluating Macías-Duarte (2004) and Jenny *et al.* (2004) in relation to Burnham *et al.* (2002) and Montoya *et al.* (1997).

*Our Response:* We evaluated the results in Macías-Duarte (2004), Jenny *et al.* (2004), Young *et al.* (2004), and Juergens and Heinrich (2005), and did not find information that would indicate that the population in Chihuahua has significantly expanded since its discovery in 1992. We found that there appears to be general agreement among the authors that the number of pairs has been fairly stable and that, in most years, productivity of the pairs has been low. Furthermore, we have no authority to improve conditions for the falcons in Mexico. Recolonization has not occurred in New Mexico since the birds were discovered in Chihuahua, and there is no indication that recolonization is occurring now, with only one known pair successfully reproducing one time in 2002 in New Mexico.

(24) *Comment:* All released falcons should be marked to ensure that dispersal of birds does not trigger additional regulations to public and private lands.

*Our Response:* In order to ascertain the success of the reintroduction effort, The Peregrine Fund will annually survey the area surrounding releases to locate surviving birds. Falcons will be located and identified and the number of territorial pairs will be recorded. If

nesting is documented, then nest success will be assessed and as many chicks will be banded as possible. All released falcons and their progeny will be banded to the extent possible. The Peregrine Fund will coordinate with the Service to develop a banding plan that complements banding efforts in Mexico and Texas. The NEP designation will cover any falcon in Arizona or New Mexico. Therefore, no additional regulations will be triggered whether a falcon is banded or unbanded. If a falcon should leave the NEP area, it would be considered fully endangered under the Act, unless it is found in a location where another designation exists or there is a Safe Harbor Agreement in place.

(25) *Comment:* The Service should describe that a mixed designation which includes both experimental and nonexperimental (*i.e.*, full protections under the Act) population areas for New Mexico and Arizona will be confusing and difficult to implement. A nonessential experimental population of falcons will assist in gaining support for the conservation of the falcon that might not exist otherwise.

*Our Response:* We agree and have incorporated these points into the "Recovery Efforts" section of the Background above.

(26) *Comment:* The Service should refrain from releases of captive-raised birds until there is a better understanding of the habitat requirements and genetics of the naturally occurring falcons. Any released falcons should be genetically appropriate for the Chihuahuan grassland population. The Service should conserve the native population of falcons, and not introduce individuals with a different genetic composition (*e.g.*, from Veracruz, Tabasco, Campeche, and Chiapas, Mexico), outside of the Chihuahuan Desert) or behavioral differences that may reduce the fitness of these locally-adapted birds.

*Our Response:* Please refer to the discussion found in the "Genetic Variation" portion of the Management section. No new genetic information was provided to the Service during either of the two public comment periods for this proposal.

(27) *Comment:* Several commenters suggested that we develop a 10(j) population that would also allow for naturally occurring falcons (*i.e.*, experimental status individuals would only be recognized outside areas that overlap with naturally occurring individuals) (50 CFR 17.80).

*Our Response:* Please see our response to State comment 6.

(28) *Comment:* Please explain why the Service does not support the selection of the alternative that implements Safe Harbor Agreements for the falcon. This would achieve landowner cooperation, achieve species recovery, and continue habitat protections.

*Our Response:* Please refer to the discussion found in the "Recovery Efforts" portion of the Background section.

(29) *Comment:* Explain why the population of reintroduced falcons would not be essential to the continued existence of the species.

*Our Response:* The proposed experimental falcon population will be designated NEP because: (1) There are established populations in Mexico and a rapidly increasing population in south Texas; (2) reintroductions will continue in west Texas; (3) the Boise, Idaho, captive population is producing enough offspring to both maintain the captive flock and provide falcons for release; and (4) the possible failure of this action would not appreciably reduce the likelihood of survival of the subspecies in the wild. The NEP designation allows for regulatory flexibility for management that contributes to the conservation of falcons, which makes the reintroduction of falcons in New Mexico less controversial to land managers, and should result in a larger number of release sites and more widespread reintroductions. Therefore, we believe the use of the NEP should be the fastest way to successfully establish a falcon population in New Mexico and Arizona. We have concluded this reintroduced population to be nonessential to the continued existence of the species according to the provisions of section 10(j) of the Act for the following reasons:

(a) With at least three populations, one in eastern Mexico, a second in northern Chihuahua, Mexico, and a third becoming established in southern Texas, the experimental population is not essential to the continued existence of the species. The threat of extinction from a single catastrophic event has been reduced by a gradual increase of the southern Texas and captive populations. Thus, loss of the experimental population will not appreciably reduce the likelihood of falcon survival in the United States; and,

(b) Any birds lost during the reintroduction attempt can be replaced through captive breeding. Production from the extant captive flock is already sufficient to support the release of birds that would occur under this final rule, in addition to continued releases in west Texas.

(30) *Comment:* Nonessential experimental populations are usually considered where there is opposition from private landowners to an endangered species reintroduction. The majority of potential falcon habitat in New Mexico is managed by the Forest Service, BLM, and DOD. You have not demonstrated in the proposed rule or environmental assessment (EA) that there is opposition by private landowners or the general public to a reintroduction on the small amount of private lands. Even if there were, a reintroduction program could accomplish the same objectives by using Safe Harbor Agreements for the private landowners, as was accomplished in south Texas.

*Our Response:* Comments received during the public comment periods from public agencies, private citizens, and landowners demonstrated that there would be a great deal of opposition to reintroducing falcons in Arizona and New Mexico without the 10(j) designation. The 10(j) designation gives us regulatory flexibility, which is beneficial when trying to reintroduce a new population.

(31) *Comment:* Falcon recovery will have an impact on other species.

*Our Response:* Falcons historically occupied this desert habitat, and the plants and animals that exist there evolved with this predatory bird. Thus, through falcon recovery, we are aiding in restoration of this desert ecosystem. In addition, we do not expect any significant impact to any other listed or unlisted species to result from falcon recovery. As predators, falcons require large home ranges in order to have adequate amounts of available prey (Keddy-Hector 2000); therefore, they would not occupy suitable habitat in large numbers. They are anticipated to be widely distributed in low numbers over the suitable habitat in New Mexico and Arizona. Furthermore, falcons are generalists and will consume a wide variety of insects, small mammals, reptiles, and small to medium-sized birds. Therefore, falcon recovery is not anticipated to negatively affect other sympatric species.

(32) *Comment:* If DDT is still used in Mexico, then it does not seem logical to start a recovery process on the United States at the Mexico border only to fail because of the use of DDT in Mexico.

*Our Response:* We have no knowledge of widespread use of DDT in Mexico, as its use was banned in 2000. In addition, we have seen a significant decrease in the concentrations of DDT remaining in the United States since its use was banned in 1972, leading to delisting of the American peregrine falcon in 1999

(64 FR 46541), and the currently proposed delisting of the bald eagle (64 FR 36454; 71 FR 8238; 71 FR 28293). We anticipate that sufficient numbers of falcons will reside and hunt in suitable habitat in New Mexico and Arizona such that any residual DDT remaining in Mexico will not preclude falcon recovery in the United States.

(33) *Comment:* Habitat degradation was one of the primary threats to the species when it was listed as endangered. Recent information indicates that habitat and avian prey are important determinants of falcon habitat (e.g., Macias-Duarte *et al.* 2004; Meyer and Williams 2005).

*Our Response:* The intense overgrazing that resulted in shrub encroachment in grasslands has moderated, with widespread implementation of improved range management techniques, including decreased stocking rates, stock rotation, and prescribed burning (Archer 1994; Heady 1994; Burnham *et al.* 2002). In addition, DDT use was banned in the United States in 1972 and in Mexico in 2000. Therefore, falcon reintroductions are considered appropriate because habitat threats are continuing to be reduced. In addition, as described in this final rule, reintroduction sites will be carefully selected to optimize habitat suitability, and falcons are known generalists and will not be dependent on the availability of any particular type of prey.

(34) *Comment:* Please explain how the reintroduction of falcons is compatible with existing land use practices (e.g., livestock grazing, oil and gas development), yet the Service has a documented history of finding these same practices are threats to the species (Service 1990, 51 FR 6686).

*Our Response:* In the 1990 recovery plan (and the 1985 and 1986 listing rules) for the falcon, the causes of decline for the subspecies included brush encroachment and agricultural development that destroyed grassland habitat; channelization of desert streams that destroyed wetland communities that provided habitat for avian prey; and pesticide contamination, such as by DDT. On the other hand, livestock grazing that uses best management practices has been recognized as compatible with nesting falcons (Burnham *et al.* 2002), and oil and gas development was not mentioned as a threat in either the recovery plan or listing rules. Existing land use practices may be a threat to individuals of a species (*i.e.*, may result in "take" of individuals under previous regulations); however, we believe the existing land use practices are compatible with

overall conservation efforts for the subspecies as a whole. This has been demonstrated by the successful recolonization of falcons reintroduced in Texas over the past two decades, where there has been only one reported conflict with existing land use practices during that period of time and it was resolved in the early 1990s (Burnham *et al.* 2002; Bond 2005; Jenny 2005; Robertson 2006).

(35) *Comment:* Initiating another reintroduction program in the Chihuahuan Desert is not prudent before the outcome of the program in west Texas is assessed. The Service should plan on conducting such an assessment.

*Our Response:* As we discussed previously in this final rule, we are designating the population of falcons in New Mexico and Arizona as experimental and will evaluate the success of our reintroduction program every 5 years. The releases in south Texas have demonstrated success toward the recovery of the falcon in the United States; and therefore, we do not believe it would be beneficial for falcon recovery to postpone this reintroduction effort to assess the success of the program in west Texas.

(36) *Comment:* The Service should not base the EA and proposed 10(j) population on an outdated recovery plan. The Service should establish a formal recovery team and update the falcon recovery plan prior to finalizing the 10(j) rule and releasing birds.

*Our Response:* A current recovery plan is not required in order to move forward with recovery actions, including any associated regulations. While we would like to update the recovery plan, we do not feel it is necessary to complete a revision prior to moving forward with this 10(j) rule. Falcon reintroductions such as these were recommended in the 1990 recovery plan, and we are implementing these recommendations. Furthermore, the recovery plan provides guidelines for the recovery process, and, in combination with the best available scientific information, we will continue to evaluate the application of these guidelines to the reintroduction process as needed in the future.

(37) *Comment:* We received comments about agreements or memoranda of understanding with land managers that ranged from: (1) The Service should have a signed memorandum of understanding with landowners prior to finalization of the 10(j) rule in order to ensure habitat guidelines are followed, to (2) agreements or memoranda of understanding with land managers

should not be required as they create undue burden on land managers.

*Our Response:* We do not anticipate that there will be conflicts between falcon reintroduction and current land use practices. Therefore, at present, we do not feel that agreements or memoranda of understanding with landowners are necessary to provide suitable habitat for falcons. We will choose falcon reintroduction sites that meet the following criteria: (1) Within or in proximity to potentially suitable habitat, including open grassland habitats that have scattered trees/shrubs/yucca for nesting and perching; (2) supporting available prey for falcons (e.g., insects, small to medium-sized birds, and rodents); (3) with minimal natural and artificial hazards (e.g., predators, open-water tanks) and potential hazards that can be minimized where practical; (4) with access for logistical support; (5) with a large extent of potentially suitable habitat surrounding a release site and its proximity to other similar habitats; and (6) with a willing landowner or land manager. We will evaluate the success of these criteria through our 5-year review process, and if indicated, we will have the option of executing agreements or memoranda of understanding with willing landowners in the future.

(38) *Comment:* The EA and proposed rule do not consider that natural recolonization is already occurring and could be facilitated by focusing scarce funding on habitat restoration, rather than releasing captive birds. Enhancing habitat for falcons is a better use of funds for the long-term recovery of the species and establishment of a naturally occurring population.

*Our Response:* We believe there is ample suitable habitat to support falcons and that focusing on habitat enhancement is not the best use of funds. Because there is available habitat, but limited numbers of naturally occurring falcons, we believe reintroductions will serve a key role in the recovery of the falcon. Furthermore, the falcon reintroductions that result from this rule will have a large partnership component, which will help spread expenses among many entities. Under the 10(j) designation, section 7(a)(1) still applies and requires all Federal agencies to use their authorities to conserve listed species. Therefore, Federal agencies can still fund habitat enhancement projects for falcons in accordance with their 7(a)(1) responsibilities.

#### *Issue 3: The Monitoring Plan*

(39) *Comment:* The Service should establish a long-term monitoring

program that addresses nesting success, prey availability, vegetation, and causes of mortality. You should also develop an adaptive management process that includes stakeholders and a large-scale landscape conservation strategy.

*Our Response:* The short-term monitoring described in the monitoring plan includes the documentation of nesting, nesting success, vegetation, and other habitat attributes of nest sites and territories. Recommended long-term monitoring activities include documentation of other avian species, including other raptors and potential prey species of falcons. As information becomes available from these efforts, we will be able to design more refined long-term monitoring efforts. The monitoring plan provides for an adaptive management process through annual stakeholder meetings and evaluation reports to review project data to determine if refinements to the program are needed.

(40) *Comment:* The Service should provide a timeframe to implement and evaluate this approach to recovering the falcon.

*Our Response:* Annual stakeholder meetings will be conducted to review project data to determine if refinements to the program are needed. We will use the best scientific and commercial data available, including, but not limited to, results from the monitoring plan and stakeholder meetings to develop interim objectives to assist in measuring the success of the program and to prepare 5-year evaluations of the restoration program. As indicated in section 5 ("Reintroduction Procedures") of the Background, we anticipate releasing falcons for 10 years or more. Although we have reason to expect success from this program, based on experiences in Texas, it is acknowledged to be a truly experimental effort involving uncertainties that preclude the identification of a more precise timeframe for implementation.

(41) *Comment:* The 10(j) designation should have a quantifiable number of falcons as a recovery target or a date set to end the program if this program is not successful.

*Our Response:* Section 10(j) and its implementing regulations do not have a requirement that we specify a population target or date, only that the release will further the conservation of the species. As stated in our response to comment 21, the best current estimate is that habitat in New Mexico is sufficient to support up to 200 pairs of falcons, and that Chihuahuan Desert habitat in Arizona may support additional individuals. We will evaluate the progress of the program through the

annual meetings and reviews of the Peregrine Fund's annual reports, 2-year progress reports on agency Tier II monitoring efforts, and 5-year evaluations. Efforts under this 10(j) rule will cease when or if it is determined that the program no longer furthers the conservation of the falcon.

(42) *Comment:* There should be provisions for banding progeny of captive-reared birds to evaluate the reintroduction program.

*Our Response:* We acknowledge the value of banding the progeny of captive-reared birds to evaluating the program. The monitoring plan provides in the post-release procedures that as many chicks as possible from successfully nesting falcons will be banded.

(43) *Comment:* Habitat conditions, particularly grassland birds that provide prey, should also be monitored.

*Our Response:* As indicated in a response to an earlier comment, the monitoring plan includes assessments of habitat suitability and surveys, including surveys of other avian species that are potential prey for falcons.

(44) *Comment:* The Service has not ensured that monitoring native falcons will occur if non-mandatory surveys are subject to available funding.

*Our Response:* We note that conservation efforts by us and our conservation partners are always subject to funding support by Congress, State legislatures, or private individuals and organizations. Although we have no guarantees about funding in future years, we have a reasonable expectation that our partners will be able to carry out the monitoring activities that they have identified as appropriate.

(45) *Comment:* The Service should include criteria and define the term "success" in the monitoring plan.

*Our Response:* We will view the program as a success as long as it is furthering the conservation of the falcon. Although our best estimate is that habitat in New Mexico could potentially support up to 200 pairs of falcons, we anticipate that information gathered during the monitoring efforts will allow us refine our understanding of what is achievable in terms of conserving the falcon.

(46) *Comment:* Prey species are particularly important during the establishment of pair bonds and territories, which usually occur in late winter or very early spring. The breeding bird survey protocol should be used during this time of the year. Consider clarifying the methodology and timing for conducting prey base surveys.

*Our Response:* We have adopted this recommendation and have added it to

the monitoring plan's discussion of surveys of avian species.

(47) *Comment:* The monitoring plan should include a discussion of what data should be collected in a given situation. For example, documenting stick nests would be especially important, but should be evaluated in light of other management goals/objectives and priorities.

*Our Response:* We believe that the information we specified is the most appropriate for beginning the monitoring effort. As information is gathered, special situations will be noted and appropriate modifications to our protocol will be adopted.

(48) *Comment:* The Service should evaluate key ecological factors to prioritize where management/recovery actions should be concentrated. These include variability of prey abundance, potential nest site availability, predator pressure, contaminant load, age and sex of dispersing falcons, and demography.

*Our Response:* We will be using available information on the falcon, including a recently finalized assessment of falcon habitat (Young *et al.* 2005), in the selection of release sites. The monitoring plan includes the gathering of information on habitat suitability and on the presence of avian predators and prey.

(49) *Comment:* The 10(j) rule should be removed once the population is "self-sustaining," and standard ESA protections resume.

*Our Response:* The removal of a 10(j) listing of an NEP would first require a finding that the information on which the original "nonessential" determination was based had changed enough that the loss of the population would be likely to appreciably reduce the likelihood of survival of the species in the wild. We foresee little likelihood that success of reintroduction in the 10(j) area would occur while severe negative changes in the status of the falcon occurred elsewhere. Any change in the 10(j) listing would require us to engage in notice-and-comment rulemaking, including publishing a proposed rule in the **Federal Register** seeking public comment on that proposal (including, if requested, public hearings), and publishing a final determination in the **Federal Register**.

(50) *Comment:* The monitoring plan lacks sufficient performance measures.

*Our Response:* We have added a statement to the monitoring plan indicating that, based on information gathered as monitoring proceeds, we will develop interim objectives to assist in measuring the success of the program. Even with prior experience in reintroducing this species, progress in

the reintroduction effort cannot be predicted sufficiently to develop more detailed performance measures at this time. From our conservation efforts on this and other species, we know that it may take several years of effort before we can more clearly judge the likelihood of success of reintroduction. Information gathered as reintroduction proceeds will be used to evaluate progress on the program. Based on this information, we will consider more precise performance measures and adopt those that are likely to increase the likelihood of success of the program.

(51) *Comment:* How long will reintroduction efforts continue?

*Our Response:* We anticipate releasing falcons for 10 years or more.

(52) *Comment:* The 10(j) rule should remain in place until the species is delisted.

*Our Response:* Our intent is for the 10(j) rule to remain in place until the status of the species improves to a point where listing is no longer necessary, and the falcon can then be delisted.

(53) *Comment:* How will the delisting process proceed when the falcon population has reached a sufficient level?

*Our Response:* Once the threats to the falcon have been reduced, and populations are self-sustaining, the Service will publish a proposed rule to delist the falcon in the **Federal Register**. There would be opportunities for the public to comment and request public hearings. Information gathered during the public comment period would be incorporated into our evaluation of listing status. If we were to determine that listing is no longer appropriate, a final rule delisting the falcon would then be published in the **Federal Register**.

(54) *Comment:* Will those involved in monitoring efforts always seek landowner and manager permission prior to entering private lands?

*Our Response:* Yes. It is our policy that landowner approval will always be obtained either in writing or by record of telephone conversation prior to entering private lands. We also specify in our permits for work on listed species that the permit does not confer right to trespass, and that landowner permission must be obtained by the permittee. Our monitoring plan states that landowner consent either in writing or by record of telephone conversation is a prerequisite for data collection on private land.

(55) *Comment:* Falcons do not normally breed until they are 2 years old, not 3 years old as indicated on page 3 of the draft monitoring plan.

*Our Response:* This correction has been incorporated into the final monitoring plan.

(56) *Comment:* The short-term monitoring section of the draft monitoring plan states that BLM will supply remote-sensing data. Only BLM in New Mexico will be supplying these data.

*Our Response:* This correction has been incorporated into the final monitoring plan.

(57) *Comment:* A new version of the habitat assessment protocol, Attachment A of the monitoring plan, is available from the New Mexico Cooperative Fish and Wildlife Research Unit.

*Our Response:* We have replaced Attachment A with the newer version. We have also added a statement to the monitoring plan that the information from the protocol is intended to be used to improve site selection for releases.

#### *Issue 5: Additional Comment*

(58) *Comment:* The Service should support research, management, and outreach efforts on public and private lands for the falcon within its core breeding range in the Chihuahua desert grasslands, including adjacent Chihuahua, Mexico.

*Our Response:* We agree and, with our partners, will attempt to support and/or coordinate these activities to the extent that we are able.

#### **Finding**

We followed the procedures required by the Act, NEPA, and the Administrative Procedures Act during this Federal rulemaking process. Therefore, we solicited public and peer reviewer comment on the proposed NEP designation. As required by law, we have considered all comments received on the proposed rule, the draft EA, and the draft monitoring plan before making this final determination. Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that creating a NEP of northern aplomado falcons and releasing them into the NEP area will further the conservation of the species.

#### **Effective Date**

We are making this rule effective upon publication. In accordance with the Administrative Procedure Act, we find good cause as required by 5 U.S.C. 553(d)(3) to make this rule effective immediately upon publication in the **Federal Register**. We expect that up to 140 falcons could be available for release in 2006 in New Mexico and western Texas (Juergens and Heinrich 2005). In order for this group of falcons

to have the optimal amount of time to successfully reach independence, they will need to be reintroduced into the wild beginning in late spring and summer 2006 (Juergens and Heinrich 2005). Careful timing of the age for reintroducing falcons is important to increase their chances for successfully fledging and reaching independence (Sherrod *et al.* 1987). A 30-day delay would be contrary to the public interest because it would result in delay of reintroductions until spring of 2007, as falcons are most successfully reintroduced when they are several weeks old and this age cohort only occurs in late spring and summer each year (Sherrod *et al.* 1987).

#### **Required Determinations**

##### *Section 7 Consultation*

A special rule under section 4(d) of the Act is included in this establishment of an experimental population under section 10(j) of the Act. A population designated as experimental is treated for the purposes of section 9 of the Act as threatened, regardless of the species' designation elsewhere in its range. The Service is not required to consult on this special rule under section 7(a)(2) of the Act. The development of protective regulations for a threatened species are an inherent part of the section 4 listing process. The Service must make this determination considering only the "best scientific and commercial data available." A necessary part of this listing decision is also determining what protective regulations are "necessary and advisable to provide for the conservation of [the] species." Determining what prohibitions and authorizations are necessary to conserve the species, like the listing determination of whether the species meets the definition of threatened or endangered, is not a decision that Congress intended to undergo section 7 consultation.

##### *Regulatory Planning and Review (E.O. 12866)*

In accordance with the criteria in Executive Order 12866, this rule to designate NEP status for northern aplomado falcon in Arizona and New Mexico is not a significant regulatory action subject to Office of Management and Budget review. As described below, this rule will not have an annual economic effect of \$100 million or more on the economy and will not have an adverse effect on an economic sector, productivity, competition, jobs, the environment, or other units of government. Therefore, a cost-benefit

and full economic analysis will not be required.

Following release, birds may use private or public lands adjacent to release areas. Because of the substantial regulatory relief provided by the NEP designation (no penalties for unintentional take or restrictions against land use), we do not believe the reintroduction of falcons will conflict with existing human activities or hinder public or private use of lands within the NEP area. Likewise, no governments, individuals, or corporations will be required to specifically manage for reintroduced falcons.

This final rule will not create inconsistencies with other agency's actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are the Bureau of Land Management and Department of Defense because they manage large areas of suitable falcon habitat within the NEP area. These agencies participated in the northern aplomado falcon working group and had the opportunity to participate in the development and review of the action finalized by this rulemaking and to ensure the action is consistent with their land management plans. Because of the substantial regulatory relief provided by the NEP designation, we believe that the reintroduction of northern aplomado falcons in the areas described will not conflict with existing human activities or hinder public utilization of the area.

This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Because there are no expected impacts or restrictions to existing human uses of the NEP area as a result of this rule, no entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients are expected to occur.

This rule does not raise novel legal or policy issues. Since 1984, we have promulgated section 10(j) rules for many other species in various localities. Such rules are designed to reduce the regulatory burden that would otherwise exist when reintroducing listed species to the wild.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 804(2)), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the

rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area affected by this rule includes the States of Arizona and New Mexico. We do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP area because the NEP designation provides no restrictions on most Federal (see next paragraph for National Wildlife Refuges and units of the National Park System) and all non-Federal actions that may affect falcons. In addition, the special rule authorizes unknowing or incidental take of falcons (*i.e.*, take that is incidental to an otherwise lawful activity). Direct take for research or educational purposes would require a section 10 recovery permit under the Act. Knowingly taking falcons (*e.g.*, shooting) will not be permitted. The action will not affect the establishment of future hunting seasons or conservation actions approved for migratory bird species. The principal activities on private property near the initial release areas are agriculture and recreation. We believe the presence of the falcon will not preclude use of lands for these purposes. Because there will be no new or additional economic or regulatory restrictions imposed upon States, Federal agencies, or members of the public due to the presence of the falcon, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

When NEPs are located outside a National Wildlife Refuge or unit of the National Park System, we treat the population as proposed for listing and only two provisions of section 7 would apply: section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to

confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities. When the NEP is located within a National Wildlife Refuge or National Park, we will treat the reintroduced falcons as threatened under the Act, and therefore the consultation requirements of section 7(a)(2) will apply on these Federal lands.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

1. On the basis of information contained in the "Required Determinations" section above, this rule will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the NEP designation will not place additional requirements on any city, county, or other local municipalities.

2. This rule will not produce a Federal mandate of \$100 million or greater in any year (*i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act). This NEP designation for the falcon will not impose any additional management or protection requirements on the States or other entities.

#### *Takings (E.O. 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. We do not expect this rule to have a potential takings implication under Executive Order 12630 because it would exempt individuals or corporations from prosecution for take that is accidental and incidental to an otherwise lawful activity. Because of the substantial regulatory relief provided by the NEP designation, we do not believe the reintroduction of falcons would conflict with existing or proposed human activities or hinder public use of lands within the NEP area. Neither of the States within the NEP area will be required to specifically manage or reintroduce falcons.



A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive uses of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of a federally listed bird) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### *Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule will not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this rule with the affected resource agencies in New Mexico and Arizona. Achieving the recovery goal for this species will contribute to its eventual delisting and its return to primary State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the States and the Federal Government and is being undertaken in coordination with the States. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

#### *Civil Justice Reform (E.O. 12988)*

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### *Government-to-Government Relationship With Tribes*

In accordance with Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native

American Tribal Governments (59 FR 22951); Executive Order 13175; and the Department of the Interior's requirement at 512 DM 2, we have notified the Native American Tribes within the NEP area about the proposed rule and this final rule. They have been advised through verbal and written contact, including informational mailings from the Service. Information was also presented at the Native American Fish and Wildlife Society meeting in New Mexico in 2003 (Murphy 2003). Furthermore, the potential reintroduction area for falcons in New Mexico does not overlap with any Tribal lands, and we do not expect falcons to move out of their preferred habitats. If future activities resulting from this rule may affect Tribal resources, the Service will communicate and consult on a Government-to-Government basis with any affected Native American Tribes in order to find a mutually agreeable solution.

#### *Paperwork Reduction Act*

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB approval is required if information will be collected from 10 or more persons (5 CFR 1320.3). "Ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including independent State, territorial, Tribal, or local entities and separately incorporated subsidiaries or affiliates. For the purposes of this definition, "persons" does not include employees of the respondent acting within the scope of their employment, contractors engaged by a respondent for the purpose of complying with the collection of information, or current employees of the Federal government when acting within the scope of their employment, but it does include former Federal employees. The Office of Management and Budget has approved our collection of information associated with reporting the taking of experimental populations (50 CFR 17.84(p)(6)) and assigned control number 1018-0095. The monitoring plan for reestablishment of the falcon

contains a requirement for information collection; however, it does not affect 10 or more persons, as defined above. Therefore, OMB approval and a control number are not needed for the data collection forms appended to the monitoring plan. In the future, if it becomes necessary to collect this information from 10 or more respondents per year, we will first obtain approval from OMB.

#### *National Environmental Policy Act*

We have prepared an environmental assessment and Finding of No Significant Impact, as defined under the authority of the National Environmental Policy Act of 1969. These documents are available from the New Mexico Ecological Services Field Office (see **ADDRESSES** section) or from our Web site at <http://www.fws.gov/ifw2es/NewMexico/>.

#### *Energy Supply, Distribution or Use (E.O. 13211)*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### **References Cited**

A complete list of all references cited in this rule is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** section) and from our Web site at <http://www.fws.gov/ifw2es/NewMexico/>.

#### **Authors**

The primary authors of this notice are the New Mexico Ecological Services Field Office staff (see **ADDRESSES** section).

#### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### **Final Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of Chapter I, title 50 of the Code of Federal Regulations, as set forth below:

#### **PART 17—[AMENDED]**

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

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the existing entry for “Falcon, northern aplomado” under “BIRDS” to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Falcon, northern aplomado.	<i>Falco femoralis septentrionalis</i> .	U.S.A. (AZ, NM, TX), Mexico, Guatemala.	Entire, except where listed as an experimental population.	E	216	NA	NA
Falcon, northern aplomado.	<i>Falco femoralis septentrionalis</i> .	U.S.A. (AZ, NM, TX), Mexico, Guatemala.	U.S.A. (AZ, NM) .....	XN	758	NA	17.84(p)
*	*	*	*	*	*		*

■ 3. Amend § 17.84 by adding paragraph (p) to read as follows:

**§ 17.84 Special rules—vertebrates.**

\* \* \* \* \*

(p) Northern aplomado falcon (*Falco femoralis septentrionalis*).

(1) The northern aplomado falcon (*Falco femoralis septentrionalis*) (falcon) population identified in paragraph (p)(9)(i) of this section is a nonessential experimental population (NEP).

(2) No person may take this species, except as provided in paragraphs (p)(3) through (5) and (p)(10) of this section.

(3) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under § 17.32 may take falcons for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Endangered Species Act (Act);

(4) A falcon may be taken within the NEP area, provided that such take is not willful, knowing, or due to negligence, or is incidental to and not the purpose of the carrying out of an otherwise lawful activity; and that such taking is reported within 24 hours, as provided under paragraph (p)(6) of this section.

(5) Any employee of the Service, New Mexico Department of Game and Fish, or Arizona Game and Fish Department, who is designated for such purpose, or any person with a valid permit issued by the Service under 50 CFR 17.32, may, when acting in the course of official duties, take a falcon if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen that may be useful for scientific study;

(iii) Move a bird within the NEP area for genetic purposes or to improve the health of the population;

(iv) Relocate falcons that have moved outside the NEP area, by returning the falcon to the NEP area or moving it to a captive breeding facility. All captures and relocations from outside the NEP area will be conducted with the permission of the landowner(s) or appropriate land management agencies; or

(v) Collect nesting data or band individuals.

(6) Any taking pursuant to paragraphs (p)(3) through (5) of this section must be reported within 24 hours by contacting the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; (505) 346–2525. Upon contact, a determination will be made as to the disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (p)(2) and (p)(7) of this section.

(9)(i) The boundaries of the designated NEP area are based on county borders and include the entire States of New Mexico and Arizona. The reintroduction area is within the historical range of the species in New Mexico.

(ii) All falcons found in the wild within the boundaries of the NEP area after the first releases will be considered members of the NEP. A falcon occurring

outside of the NEP area is considered endangered under the Act unless it is marked or otherwise known to be a member of the NEP.

(iii) The Service has designated the NEP area to accommodate the potential future movements of a wild population of falcons. All released birds and their progeny are expected to remain in the NEP area due to the geographic extent of the designation.

(10) The NEP will be monitored closely for the duration of the reintroduction program. Any bird that is determined to be sick, injured, or otherwise in need of special care will be recaptured to the extent possible by Service and/or State or permitted Tribal wildlife personnel and given appropriate care. Such birds will be released back to the wild as soon as possible, unless physical or behavioral problems make it necessary to return them to a captive-breeding facility or they are euthanized if treatment would be unlikely to be effective.

(11) The Service plans to evaluate the status of the NEP every 5 years to determine future management status and needs, with the first evaluation expected to be not more than 5 years after the first release of birds into the NEP area. All reviews will take into account the reproductive success and movement patterns of individuals released, food habits, and overall health of the population. This evaluation will include a progress report.

\* \* \* \* \*

Dated: July 7, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 06-6486 Filed 7-21-06; 3:06 pm]

BILLING CODE 4310-55-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 051128313-6029-02; I.D. 071906C]

#### Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; inseason quota transfer.

**SUMMARY:** NMFS announces that the Commonwealth of Virginia is transferring 125,000 lb (56,699 kg) of commercial bluefish quota to the State of New York from its 2006 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for New York and Virginia.

**DATES:** Effective July 21, 2006 through December 31, 2006, unless NMFS publishes a superseding document in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Douglas Potts, Fishery Management Specialist, (978) 281-9341, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

Regulations governing the Atlantic bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.160.

Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.160(f). The Regional Administrator is required to consider the criteria set forth in § 648.160(f)(1) in the evaluation of requests for quota transfers or combinations.

Virginia has agreed to transfer 125,000 lb (56,699 kg) of its 2006 commercial quota to New York. The Regional Administrator has determined that the

criteria set forth in § 648.160(f)(1) have been met. The revised bluefish quotas for calendar year 2006 are: New York, 900,526 lb (408,472 kg); and Virginia, 720,915 lb (327,002 kg).

#### Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: July 20, 2006.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 06-6489 Filed 7-21-06; 1:04 pm]

BILLING CODE 3510-22-S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 051104293-5344-02; I.D. 071306A]

#### Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2006 Winter II Quota

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; inseason adjustment.

**SUMMARY:** NMFS adjusts the 2006 Winter II commercial scup quota and possession limit. This action complies with Framework Adjustment 3 (Framework 3) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which established a process to allow the rollover of unused commercial scup quota from the Winter I period to the Winter II period.

**DATES:** This rule is effective November 1, 2006, through December 31, 2006.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin, Fishery Policy Analyst, (978) 281-9279.

**SUPPLEMENTARY INFORMATION:** NMFS published a final rule in the **Federal Register** on November 3, 2003 (68 FR 62250), implementing a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be added to the quota for the Winter II period, and to allow adjustment of the commercial possession limits for the Winter II period commensurate with the amount of quota rolled over from the Winter I period. Table 4 of the final 2006 quota

specifications for summer flounder, scup, and black sea bass (70 FR 77060, December 29, 2005) presented detailed information regarding Winter II possession limits, based on the amount of scup to be rolled over from Winter I to Winter II.

For 2006, the Winter II quota is 1,901,983 lb (862,725 kg), and the best available landings information indicates that 1,827,598 lb (828,985 kg) remain of the Winter I quota of 5,382,589 lb (2,441,501 kg). Consistent with the intent of Framework 3, the full amount of unused 2006 Winter I quota is transferred to Winter II, resulting in a revised 2006 Winter II quota of 3,729,581 lb (1,691,709 kg). In addition to the quota transfer, the 2006 Winter II possession limit is increased, consistent with the rollover specifications established in the 2006 final rule (70 FR 77060), to 6,500 lb (2,948 kg) per trip to provide an appropriate opportunity for fishing vessels to obtain the increased Winter II quota.

#### Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: July 20, 2006.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E6-11940 Filed 7-25-06; 8:45 am]

BILLING CODE 3510-22-S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 060503118-6169-02; I.D. 042606E]

RIN 0648-AT26

#### Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Framework Adjustment 6

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement measures contained in Framework Adjustment 6 (Framework 6) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) that will allow regional conservation equivalency in the summer