

Landholding Agency: Navy
 Property Number: 779820018
 Status: Excess
 Comment: 4226 sq. ft., presence of lead paint,
 most recent use—maintenance shop, off-
 site use only

Bldg. Z-394
 Naval Station
 Norfolk VA 23511-
 Landholding Agency: Navy
 Property Number: 779820019
 Status: Excess
 Comment: 2400 sq. ft., presence of lead paint,
 most recent use—storage, off-site use only

Bldg. Z-398
 Naval Station
 Norfolk VA 23511-
 Landholding Agency: Navy
 Property Number: 779820020
 Status: Excess
 Comment: 1680 sq. ft., most recent use—pwc
 shop, off-site use only

Unsuitable Properties

Buildings (by State)

California

02-120 Liz White Residence
 Wilson Creek
 Klamath Co: Del Norte CA 95531-
 Landholding Agency: Interior
 Property Number: 619820002
 Status: Unutilized
 Reason: Extensive deterioration

Hawaii

Bldg. 4
 Beckoning Point Naval Station
 Pearl Harbor Co: Honolulu HI 96860-
 Landholding Agency: Navy
 Property Number: 779820002
 Status: Excess
 Reason: Extensive deterioration

Bldg. 33

Naval Magazine Lualualei
 West Loch Branch Co: Oahu HI
 Landholding Agency: Navy
 Property Number: 779820021
 Status: Unutilized
 Reason: Extensive deterioration

Maryland

Bldg. 947, Qtrs. D
 Naval Air Station
 Co: St. Mary's MD 20670-5304
 Landholding Agency: Navy
 Property Number: 779820003
 Status: Unutilized
 Reason: Extensive deterioration

New Mexico

11 Bldgs., Tech Area I
 Kirtland AFB
 #639-43, 828, 830, 863, 881-883
 Albuquerque NM 87185-
 Landholding Agency: Energy
 Property Number: 419820001
 Status: Excess
 Reason: Extensive deterioration

Washington

Bldgs. 1158, 1159
 Ross Lake Natl Recreation Area
 Co: Whatcom WA
 Landholding Agency: Interior
 Property Number: 619820001
 Status: Unutilized

Reason: Extensive deterioration

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Years 1998 and 1999

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces final guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act (Act) during fiscal year (FY) 1998 and FY 1999. Although the Service is returning to a more balanced listing program, serious backlogs remain and a method of prioritizing among the various activities is necessary. Highest priority will be processing emergency listing rules for any species determined to face a significant and imminent risk to its well being. Second priority will be processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants; the processing of new proposals to add species to the lists; the processing of administrative petition findings to add species to the lists, delist species, or reclassify listed species (petitions filed under section 4 of the Act); and a limited number of delisting and reclassifying actions. Processing of proposed or final designations of critical habitat will be accorded the lowest priority.

DATES: This Listing Priority Guidance is effective May 8, 1998 and will remain in effect until modified or terminated.

ADDRESSES: Questions regarding this guidance should be addressed to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, NW, Mailstop ARLSQ-452, Washington, D.C. 20240.

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

SUPPLEMENTARY INFORMATION:

Background

The Service adopted guidelines on September 21, 1983 (48 FR 43098-43105), that govern the assignment of priorities to species, both domestic and

foreign, under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The Service adopted those guidelines to establish a rational system for allocating available appropriations to the highest priority species when adding species to the lists of endangered or threatened wildlife and plants or reclassifying threatened species to endangered status. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies (or equivalently, distinct population segments of vertebrates). However, this system does not provide for prioritization among different types of listing actions such as preliminary determinations, proposed listings, and final listings.

Serious backlogs of listing actions resulted from major disruptions in the listing budget beginning in FY 1995 and a moratorium on certain listing actions during parts of FY 1995 and FY 1996. The enactment of Pub. L. 104-6 in April 1995 rescinded \$1.5 million from the Service's budget for carrying out listing activities through the remainder of FY 1995. Pub. L. 104-6 also prohibited the expenditure of the remaining appropriated funds for final determinations to list species, whether foreign or domestic, or designate critical habitat; in effect, this placed a moratorium on those activities. During the first half of FY 1996, the moratorium continued while a series of continuing resolutions provided little or no funding for listing activity. The net effect of the moratorium and reductions in funding was that the Service's listing program was essentially shut down. The moratorium on final listings and the immediate budget constraints remained in effect until April 26, 1996, when President Clinton approved the Omnibus Budget Reconciliation Act of 1996 and exercised the authority that the Act gave him to waive the moratorium. At that time, the Service had accrued a backlog of proposed listings for 243 domestic and foreign species. The extremely limited funding available to the Service for listing activities generally precluded petition processing and the development of proposed listings from October 1, 1995, through April 26, 1996.

When the moratorium was lifted and funds were appropriated for the administration of the listing program, the Service faced the considerable task of allocating the available resources to

the significant backlog of listing activities. The Final Listing Priority Guidance for FY 1996 was published on May 16, 1996 (61 FR 24722). The Service followed that three-tiered approach until the Final Listing Priority Guidance for FY 1997 was published on December 5, 1996 (61 FR 64475). The FY 1997 Listing Priority Guidance employed four tiers for assigning relative priorities to listing actions to be carried out under section 4 of the Act. Tier 1, the Service's highest priority, was the processing of emergency listings for species facing a significant risk to their well-being. Processing final decisions on pending proposed listings was assigned to Tier 2. Tier 3 was to resolve the conservation status of species identified as candidates (species eligible for proposed listing rules) and processing 90-day or 12-month administrative findings on petitions to list or reclassify species from threatened to endangered status. Preparation of proposed or final critical habitat designations, which provide little or no additional conservation benefit to listed species, and processing delistings and reclassifications from endangered to threatened status were assigned lowest priority (Tier 4).

While operating the listing program under the Final FY 1997 Listing Priority Guidance, the Service focused its resources on issuing final determinations (Tier 2 listing activities); no Tier 1 actions (emergency listings) were required during FY 1997. During FY 1997, the Service made final determinations for 156 species (145 final listings and 11 withdrawals). As a result of this expeditious progress, only 100 proposed species remained at the end of FY 1997 (including newly proposed species). After April 1, 1997, the Service began implementing a more balanced listing program and began processing more Tier 3 listing actions. Thus, the Service also made expeditious progress on determining the conservation status of species designated by the Service as candidates for listing. A candidate is a species for which the Service has found that there is sufficient information indicating that a listing proposal is appropriate. Such a finding may be made on the Service's own initiative, or as a result of the petition process. Once a species is placed on the Service's list of candidates, its conservation status must be resolved by either proposing the species for listing or by completing a candidate removal form. During FY 1997, the Service proposed 23 species from the candidate list. In addition, the Service published 11 petition findings

in FY 1997. The Service also updated the list of candidate species with the publication of the most recent Candidate Notice of Review published on September 19, 1997 (see 16 U.S.C. 1533(b)(3)(B)(iii)(II)); at that time, there were 207 candidate species. This total represents 52 additions to the list of candidates.

Although the Service returned to a more balanced listing program during FY 1997, serious backlogs of listing activity remain. Besides the 100 species awaiting final rules and the 207 candidates awaiting resolution of their conservation status, there were 30 species with due or overdue 12-month petition findings and 47 species with due or overdue 90-day petition findings, plus one petition to list 3700 foreign species due a 90-day finding.

It is important to recognize that the Service faces even greater backlogs in its responsibilities to implement other aspects of the Act. There is a large section 7 consultation and Habitat Conservation Planning (HCP) backlog. During FY 1998, the Service projects that it will conduct more than 40,000 consultations with other Federal agencies, including approximately 900 formal consultations. The Act mandates time frames for consultation completion. The consultation workload continues to increase as new species are listed. The Service also projects that there will be approximately 75 new HCPs requiring review in FY 1998, bringing the number of active HCPs to approximately 300. The recovery backlog includes over 300 species awaiting recovery plans and an extreme shortage of recovery implementation funding. Completing recovery plans within 2½ years after a species is listed and funding implementation of completed plans is integral to the Act's goal of removing the threats to listed species so that they can eventually be recovered. The Service bases its funding requests on the workloads faced by all activities of the endangered species program. Because the magnitude of the other endangered species backlogs exceeds that of the listing backlog, the President's FY 1998 request for increased funding for endangered species programs was focused on section 7 consultation, HCPs, and recovery rather than listing. However, the President's budget for FY 1999 includes a significant increase for the program overall and a portion of the increase is identified for listing.

In enacting the Department of the Interior's FY 1998 Appropriations Act (Pub. L. 105-83, 111 Stat. 1543 (Nov. 14, 1997)), Congress agreed with the President's priorities regarding

endangered species funding, providing significant increases to the section 7 consultation, HCP, and recovery programs. Moreover, Congress expressly limited the amount the Service can spend on listing actions (including delistings, reclassifications, and the designation of critical habitat) to \$5.19 million.

Federal agencies can act only to the extent funds are provided by the Congress. This is a fundamental check and balance of our Federal system of Government, and is indeed a constitutional requirement. The enactment of the Act does not carry with it the appropriation of funds necessary to implement that law. Absent appropriations by the Congress, the Service cannot take the actions required by the Act. Appropriations are provided to the Department of the Interior and the agencies therein, including the Service, pursuant to annual appropriation acts. The FY 1998 Appropriations Act, including the maximum of \$5.19 million for implementing listing activities (subsections (a), (b), (c), and (e) of section 4 of the Act), is binding upon the Department and must be strictly followed.

Given the backlogs of proposed species pending final action, candidate species awaiting proposal, and petitions awaiting administrative findings, and the limited funding available to address these backlogs, it is extremely important for the Service to focus its efforts on listing actions that will provide the greatest conservation benefits to imperiled species in the most expeditious and biologically sound manner. The purpose of this Listing Priority Guidance is to reconcile the requirements of the Act with the realities of the annual appropriation act. The Listing Priority Guidance is an exercise of the Service's discretion concerning how best to expend that amount of money for listing activities in a manner that provides the greatest conservation benefit to threatened and endangered species consistent with the purposes of the Act. In other words, the Listing Priority Guidance is the Service's blueprint for coming into compliance with the Act as quickly as the available appropriations allow.

It has been longstanding Service policy (1983 Listing and Recovery Priority Guidelines (48 FR 43098)) that the order in which species should be processed for listing is based primarily on the immediacy and magnitude of the threats they face. The Service will continue to base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines. The Service also must

prioritize among types of listing actions and this level of prioritization is what necessitates the guidance provided below.

The Service has made this guidance applicable to FY 1999 as well as FY 1998 to avoid any confusion over whether this guidance will remain in effect if the budget process for FY 1999 is delayed. However, when the Service receives its FY 1999 budget, it will review this guidance, and, if appropriate, modify or terminate it. Funding for delistings and reclassifications from endangered to threatened status is moved entirely to the recovery funding subactivity in the Administration's FY 1999 budget proposal, so these activities would be removed from Tier 2.

Analysis of Public Comments

On March 5, 1998, the Service published a notice in the **Federal Register** (63 FR 10931) announcing proposed listing priority guidance for FY 1998 and FY 1999 and solicited public comment on that proposed guidance. The Service received 6 letters of comment on the proposed guidance. Two letters were generally in favor of the proposed guidance and four were generally opposed. A summary of the issues raised and the Service's response follows.

Issue 1: The notice is unclear as to the application of the Listing Priority Guidance to foreign species. The commenter said that the guidance should only apply to U.S. species because the listing and delisting of foreign species is handled in the Service's headquarters by a different office than domestic listing activities and with different budget dollars.

Response: The Listing Priority Guidance is indeed applicable to both foreign and domestic species, since the Congressional budget appropriations for all listing activities, foreign and domestic, is limited in FY 1998 to \$5.19 million. The final Listing Priority Guidance has been modified to clarify this point. However, exceptions in the operation of the Guidance may be made with respect to foreign species as explained in the discussions below.

Issue 2: Two commenters recommended that the Service recognize sustainable use as a reason for delisting species, especially when the listed status of the species conflicts with the recovery and/or management program of the nation where the species occurs. Both referred primarily to delisting of foreign species, such as the Namibian cheetah and Nile crocodile. One commenter considered inclusion of delisting in Tier 2, albeit at a low level

within Tier 2, an improvement over Listing Priority Guidance of FYs 1996 and 1997. The other suggested assigning delisting activities to Tier 1 or at least the highest priority of Tier 2.

Service response: The Service recognizes the conservation benefits of delisting activities for domestic and foreign species and recognizes that, with regard to foreign game species, fees from trophy hunters can, in some cases, provide economic incentives for landowners to maintain healthy populations of game species. It should be noted, however, that several foreign big game species are listed under the Act and import permits have not been issued for hunting trophies for species listed as endangered. A large percentage of international hunters are Americans who might invest in the hunting program if the species were not listed and import was permitted.

However, the Service disagrees that delisting should be the highest priority of Tier 2, although for some foreign species it will be a higher priority. Furthermore, placing delisting activities ahead of emergency listing actions (Tier 1), as suggested by the commenter, is contrary to the intent of section 4 of the Act. With limited resources, the Service must prioritize among the various listing activities. The Service has placed highest priority on emergency listing actions since those actions may mean the difference between extinction and existence. The Service will not place any listing actions over emergency listing actions.

The Service recognizes that listing, reclassifying from endangered to threatened, and delisting actions for foreign species are different, as the conservation benefits of those actions will be different than for domestic species (species with a range that includes the United States). The Service has placed delisting at the end of Tier 2 for domestic species, because the conservation benefits of delisting are indirect. For foreign species, particularly when trade is a factor affecting the status of a species, the Service will also take into consideration the international legal status of the species. Thus, for species listed in Appendix II of the Convention on International Trade in Endangered Species (CITES), an alignment of their listing status under the Act should be evaluated. There may be species listed in CITES Appendix II (which allows for regulated trade that is not detrimental to the survival of the species), for which there can be potential conservation benefits of such trade, such as when such trade is part of the management plan of the country of origin. In such

cases, listing under the Act as endangered, which prohibits such trade, may have potential conservation detriment for some species. Certainly, the United States should endeavor, when possible, to recognize the conservation programs of foreign countries, when based on sound science.

The Service placed delisting at the end of Tier 2 because the conservation benefits of delisting are indirect. The Service expends its limited resources to conserve imperiled species through final listing actions, resolving the conservation status of candidates, including new proposals for listing, and processing petition findings. These actions are vital to the continued existence of imperiled species and are important in the protection of the habitats upon which those species depend. The Service has determined that the above actions should receive higher priority than delisting activities. The Service acknowledges its responsibilities to delist and reclassify qualified species and plans on completing a small number of these activities in FY 1998. The President's FY 1999 budget request would fund delisting and reclassification from endangered to threatened status under the recovery subactivity for domestic species and under the Permits/CITES subactivity for foreign species; the President's budget would also remove delistings and reclassifications from endangered to threatened status from the listing cap. If these aspects of the President's budget are enacted, delisting and reclassification from endangered to threatened will no longer be in direct competition for funding with other listing activity and will be removed from this Listing Priority Guidance.

Issue 3: It is disingenuous for the Service to claim that the \$5.19 million appropriated by Congress for the listing program in FY 1998 falls far short of the resources needed to completely eliminate the listing backlogs when that was all that the Department of the Interior requested for the listing program, and further, the Department specifically requested a listing cap. Therefore, the Service has failed to justify the proposed guidance.

Response: The President's budget request for the entire endangered species program for FY 1998 was \$80 million. This budget request was significantly greater than the FY 1997 enacted budget of \$68 million due to considerable workload facing the Service throughout the entire endangered species program. As stated previously in this notice, listing is not the only responsibility the Service has

under the Act. For instance, over 300 species await recovery plans, while approximately 900 formal section 7 consultations, which are, by regulation, to be completed within 90 days, will be due in FY 1998, and 200 HCP applicants are awaiting technical assistance and permit review and issuance. Consequently, the President's FY 1998 request for increased funding for the endangered species programs was focused on section 7 consultation, HCPs, and recovery rather than listing. Moreover, given the recent history of the listing budget, the FY 1998 request for listing was based on a realistic assessment of the level of funding that might be obtained.

The listing budget has always been subject to a cap, in the sense that Congressional committee reports allocate a certain amount of funds, and no more, to the listing program. For FY 1998, the Department of the Interior requested that Congress include the amount of funding available to listing on the face of the appropriations law to further clarify Congress' intent that the Service not be able to divert funding to listings from other programs. Moreover, the Service's budget justification to Congress made clear that the requested funding would not be sufficient to eliminate the listing backlog in FY 1998, particularly with regard to the designation of critical habitat. Congress could have chosen to provide additional funding and/or earmark funding for critical habitat designation, but did not do so.

The President's budget for FY 1999 seeks a \$1.7 million increase for listing activity. The FY 1999 budget also moves delisting and reclassification to recovery since these activities are the end point of the recovery process.

Issue 4: The proposed listing priority guidance is not based on sound science. Critical habitat determinations should have a higher priority than withdrawals, delistings, and reclassifications, which offer no direct conservation benefits for listed species. Tier 2 should include listing decisions, critical habitat designations, and listing proposals for species with high, imminent threats; Tier 3 should prioritize other species based on the September 1983 listing priority guidance; and Tier 4 should include downlisting, delisting, withdrawals, and other non-protective actions.

Response: The Service disagrees with the assertion that the proposed listing priority guidance is not based on sound biological considerations, and remains firm in its belief that designation of critical habitat generally provides little or no additional conservation benefits

beyond those provided by the consultation provisions of section 7 and the prohibitions of section 9, while the cost of designation is generally high. The Service will continue to determine whether critical habitat is prudent or not prudent at the time a species is listed (Tier 2) by determining whether designation of critical habitat would provide marginal benefit and, if so, weighing that benefit against any risks caused or increased by designation. However, any rulemaking resulting from a "prudent" determination will remain the Service's lowest priority because, even where there is benefit to the species, it is generally very slight. The listing of a species, on the other hand, provides an array of generally applicable prohibitions and protections, including the prohibition of agency actions causing jeopardy.

The Service has determined that inclusion of a limited number of delisting and reclassification actions in Tier 2 is justified. Although indirect, conservation benefits to individual species and the endangered species program are significant. As long as a species remains on the endangered and threatened lists, Service funds are expended for ongoing conservation activities, including reviewing and permitting activities associated with habitat conservation plans and other regulated activities pursuant to section 10 of the Act. Similarly, the Service must expend funds engaging in consultations with other Federal agencies under section 7 of the Act. Resources currently devoted to these activities could be redirected to other listed species more deserving of conservation efforts. Further, the primary objective of the Act is recovering species and removing them from the lists. Once it is determined that the Act's protections are no longer appropriate, it is important that delisting or reclassification proceed, particularly where listing creates an unwarranted management burden.

In addition to allowing the Service to direct resources to activity with greater conservation benefit, delisting a species or reclassifying a species from endangered to threatened and issuing a special rule also can provide regulatory relief to, and thus reduce the expenses of, other Federal agencies as well as State and private entities. For instance, following delisting of a species, Federal agencies are no longer required to consult under section 7 on Federal activities. In addition, the prohibitions and permit requirements of sections 9 and 10, respectively, which apply to both public and private entities, are eliminated. Thus, delisting and

reclassification not only reduces Service expenditures, but it has the added benefit of relieving unnecessary restrictions and burdens on States and private citizens, and may increase public support for the endangered species program.

While the primary focus of the FY 1998 Listing Priority Guidance will remain adding species to the endangered and threatened lists, when appropriate, the Service believes that a small number of delisting and reclassification actions is critical to the integrity of the Act. The Service would process delisting or reclassification actions as appropriate and probably no more than 10–12 species during FY 1998, as compared to approximately 170 proposed and final listing actions, provided it is allowed to follow the Listing Priority Guidance.

Pub. L. 104–6 rescinded \$1.5 million from the Service's FY 1995 listing budget and expressly prohibited the expenditure of the remaining funds for final listing and critical habitat determinations but did not prohibit delisting and downlisting activities. At the time the Pub. L. was enacted, the Service was working on several delisting and reclassification actions. For instance, on June 30, 1995, shortly after the moratorium and rescission, the Service published in the **Federal Register** (60 FR 34406) a notice of intent to delist the American peregrine falcon. Considerable status information was received from the public as a result of the notice. However, development of a delisting proposal ceased when the listing program ran out of funds and the entire program was shut down. The Service expects to proceed with this delisting proposal in FY 1998. Completing this delisting is a high priority for the Service. The Dismal Swamp shrew is another species that the Service anticipates delisting soon. Other delistings actions expected to proceed in FY 1998 include the Columbian white-tailed deer (Roseburg population), Hoover's woolly star (a plant), the Tinian monarch, and possibly one or two other domestic species. The Service estimates that approximately \$300,000 to \$400,000 of the \$5.19 million listing budget would be necessary in FY 1998 to proceed with delisting activities for these five species in addition to the delisting and reclassification activities for a small number of other species. It should be noted that recovery actions and the gathering of information for use in the evaluation of delisting actions is funded from the Service's Recovery budget allocation, and not from the Listing allocation. Therefore, the only funding

from the Listing allocation is for the preparation and processing of proposed and final delisting actions.

The costs associated with retaining these species on the endangered and threatened lists are significant. Section 18 of the Act requires that the Service annually report reasonably identifiable Federal and State expenditures for the conservation of listed species. Expenditures include, but are not limited to, activities such as research, recovery (including grants to the States under section 6 of the Act), land acquisition, consultation under section 7 of the Act, permitting under section 10, and law enforcement, to the extent such activities can be attributed to particular listed species. According to the most recent expenditures report, Federal and State Endangered Species Expenditures, Fiscal Year 1994 (U.S. Fish and Wildlife Service, October 1997), the Service spent a total of approximately \$1.2 million on conservation activities for the five species identified above (American peregrine falcon, Dismal Swamp shrew, Columbian white-tailed deer, Tinian monarch, and Hoover's woolly star). Non-Service Federal agencies expended \$1.7 million on these species, bringing the total identifiable Federal expenditures to nearly \$3 million. While it is likely that fewer resources were devoted to recovery of these species in more recent years, as recovery neared completion, expenditures associated with section 7 and section 9 typically increase as a species becomes more abundant. Consultations on Federal projects will continue to be necessary as long as these species are listed. The American peregrine falcon has made a dramatic recovery since its listing in 1970; with more than 1184 pairs currently in the wild, it has more than doubled the overall recovery goal of 456 pairs. The species occurs in nearly every State, and the eventual delisting will assist in reducing the section 7 consultation workload. At least 50 formal consultations were conducted for this species in 1996 and 1997. Even the Hoover's woolly-star, which has a much more limited range, required 7 formal consultations in 1996 and 1997. The sooner these species can be removed from the endangered and threatened lists, the sooner associated resources can be redirected to other listed species.

The Service expects to reclassify from endangered to threatened some foreign species or populations that are currently listed in CITES Appendix II, for which the United States listing under the Act prohibits commercial imports. The existing prohibition is seen by some

range countries as potentially undermining their conservation and management programs. After evaluating the conservation status of the species, and assessing the scientific basis of those management programs and the potential conservation benefits of continued trade pursuant to CITES Appendix II, the Service expects to: (1) reclassify from endangered to threatened the yacaré caiman, with a special rule to allow trade in parts and products that comply with CITES tagging and other requirements for the species (the species has never been included in CITES Appendix I); (2) reclassify from endangered to threatened those populations of the vicuña that are listed in CITES Appendix II, with a special rule to allow trade in parts and products only if they comply with all CITES requirements for the species; and (3) consider the reclassification from endangered to threatened of certain captive-bred populations of both Morelet's crocodile and the Asian bonytongue fish, that are treated as Appendix II species, as part of approved CITES captive breeding programs. Although not all species for which CITES allows commercial trade should be reclassified under the Act, the Service intends to take CITES status into consideration. The Service also plans to finalize its review, pursuant to a petition, of the biological status of the cheetah to determine if it qualifies for reclassification from endangered to threatened.

The inclusion of withdrawals of proposed listings in Tier 2 is reasonable. As stated in the FY 1997 Listing Priority Guidance, it is appropriate to process a withdrawal notice on a proposed listing if that course of action is found to be appropriate and is based on a review of the proposed listing conducted in accordance with the listing priority guidance. The resolution of regulatory uncertainty that comes with a withdrawal notice, the fact that publication of the notice is a relatively small component of the total cost invested in the decision, and the fact that a withdrawal under section 4(b)(6)(A)(i)(IV) eliminates the legal liability under the time frames of section 4(b)(6)(A), all justify the placement of this activity in Tier 2. Preparation of withdrawals require relatively limited resources beyond that required to complete the final listing status evaluation of the proposed action. Some proposed listings are withdrawn as a result of the implementation of Candidate Conservation Agreements developed to conserve the species prior to its listing. While processing of the

notice withdrawing the proposed rule is charged to the Listing budget, any funding associated with development or implementation of the Conservation Agreement is charged to a separate Candidate Conservation budget.

Issue 5: Several commenters contend that the Service lacks any authority to implement the proposed Listing Priority Guidance and that it may not be used by the Service to avoid its mandatory duty to designate critical habitat or take other actions on species. Further, it provides no deadlines by which the Service must take listing or critical habitat actions under any of the tiers, ignoring explicit deadlines set by Congress. One commenter cited several court rulings that found the Service's Listing Priority Guidance invalid because it attempted to turn the Service's mandatory duties under the Act into indefinite extensions of time.

Response: These commenters fundamentally misunderstand the purpose of the Listing Priority Guidance and the relationship between substantive law, such as the Act, and the annual appropriation of funds necessary to implement the law. The lack of deadlines in the Listing Priority Guidance is entirely appropriate, as the Listing Priority Guidance is not meant to replace the deadlines of the Act. Those deadlines are binding on the Service; the Service must comply with them *to the extent that it can do so within the limits of its appropriated funds*. See the discussion of Pub. L. 105-83 above.

Contrary to the assertions of these commenters, simply inserting deadlines into the Listing Priority Guidance would serve no purpose. If lack of funds render it impossible for the Service to meet all of the Act's deadlines, the Service must take the required actions as soon as appropriated funds make it possible to do so. Thus, if the Listing Priority Guidance included deadlines different than those of the Act, those deadlines would be no more enforceable than the Act's deadlines if the available funds prove insufficient. Conversely, the fact that deadlines arbitrarily set in the Listing Priority Guidance had not passed would not excuse the Service's failure to comply with the Act's deadlines if the Service had sufficient available funds to take the actions before the time specified in the Listing Priority Guidance.

As one commenter notes, while some courts have looked no further than the fact of the Service's violation of a particular deadline, other courts that have looked at the larger picture have held that the Listing Priority guidance is a reasonable method of prioritization,

and allowed the Service to follow the Guidance in coming into compliance with the Act. For example, in *Forest Guardians v. Babbitt*, No. CIV 97-0453 JC/DJS (D.N.M. Oct. 23, 1997), the court deferred to the Listing Priority Guidance's treatment of critical habitat designation for the silvery minnow: "The court is persuaded by the recent cases that have deferred to the Secretary's listing priority system. * * * The Court is also moved by the prudential argument advanced by the Secretary. If the Service is forced to designate a critical habitat for the silvery minnow in the wake of the budgetary constraints, other species * * * may lose-out on the ESA's protections.* * * Deferring to the Secretary's listing priority is also consistent with the overarching purposes of the ESA—maximizing species protection and reversing the trends of extinction." Slip op. at 4-5. Such decisions recognize that the Service did not receive sufficient funding in FY's 1996, 1997, or 1998 to allow it to comply with all the mandated time frames under section 4 of the Act and that it was legally prohibited by the listing moratorium from expending funds to accomplish certain of those activities for over a year. Consequently, the Service developed a rational system for setting priorities that is most consistent with the purposes of the Act and makes most efficient use of limited funding as the Service manages it way out of the significant listing backlog that was created by the moratorium and funding rescission.

Issue 6: By placing candidate species conservation status determinations over processing of petitions, the proposed Guidance effectively eliminates the petition process. Unless a petitioned species faces an emergency, it will not be addressed. The Listing Priority Guidance directs the Service to complete listing determinations for candidates species, for which the Act mandates no deadlines, over making determinations for petitioned species, which have explicit mandatory 90-day and 12-month deadlines.

Response: The Service disagrees that the Listing Priority Guidance effectively eliminates the petition process. The development of proposals for candidate species and the processing of petitions are both included in Tier 2, reflecting the Service's expectation of making significant headway in eliminating the substantial petition backlog during FY 1998. Within Tier 2, the Service has given the highest priority to the finalization of proposals and new proposals for candidate species because the Service's most immediate concern is

to initiate and finalize protection for the most imperiled candidate species. The Service also is still subject to the Fund for Animals settlement agreement, which requires resolution of the status of 85 candidate species by December 31, 1998. Thirty-five were addressed in FY 1997, 39 have been addressed so far in FY 1998 and the remaining 11 must be completed by the end of the calendar year. As the remaining candidates are addressed, the Service Regions will accelerate the pace of making petition findings.

The Service recognizes the need to address its backlog of petitions in FY 1998. At the end of FY 1997, thirty 12-month petition findings were due or overdue and forty-seven 90-day findings were due or overdue, in addition to a finding due on a petition to add 3700 foreign species to the lists. The actions requested in the various petitions include listing, delisting, reclassification, and designation or revision of critical habitat. The Service has received eight petitions thus far in FY 1998. In FY 1998, each region will assess the overdue petitions for which it has the lead responsibility. Overdue 12-month findings generally will be processed before processing new, non-emergency 90-day findings because the Service already has made an initial determination that listing of those species may be warranted. Completing the status reviews for these species and resolving whether or not listing is warranted will be a high priority. For those actions deemed warranted, the Service will assign the species a listing priority number in accordance with the 1983 listing priority guidance and either develop a listing proposal or designate the species a candidate with a "warranted but precluded" finding, thus ensuring it receives the appropriate priority for listing relative to other species. Those species for which listing is not warranted will be removed from further consideration. Among the petitions awaiting 90-day findings, the Service will process listing petitions ahead of those requesting delisting and reclassification. Petitions relating to critical habitat will have the lowest priority.

Issue 7: The Service needs to clarify what a candidate species is, what activities related to candidate species are given priority over petition findings, and how petitions will be assessed. Candidate conservation agreements must take a lower priority than statutory listing actions.

Response: Species are added to the endangered and threatened species lists through one of two mechanisms. The primary mechanism is the Service's own

candidate assessment process, which accounts for the initiation of most listing proposals. The second mechanism is the petition process, which supplements the Service's own ongoing assessment process. In fact, it is not unusual for the Service to receive a petition to list a species that is already a candidate for listing or a petition requesting another action that the Service is already actively considering. Section 4(h) of the Act required the Service to establish and publish a ranking system to assist in the identification of species that should receive priority review for listing. Pursuant to this requirement, the September 1983 listing priority guidelines established a system for prioritizing species for listing based on magnitude and immediacy of threats. Once the Service determines that a species qualifies for listing and has sufficient information to support a proposal, the species is designated a candidate and is assigned a listing priority number in accordance with this ranking system.

The assessment of potential candidate species and monitoring of species formally designated candidate species do not receive priority over processing of petitions because the Service's candidate assessment program is funded through the Service's Candidate Conservation appropriation, not the Listing appropriation. Similarly, any early conservation activities, including candidate conservation agreements, conducted on behalf of candidate species are funded through the Candidate Conservation appropriation. In fact, in many cases, an agency other than the Service takes the lead in developing candidate conservation agreements. Because candidate assessment and conservation activities do not compete with listing funds they do not factor into the Listing Priority Guidance priority system.

Issue 8: The Service should clarify its decision criteria for emergency listings.

Response: The Service will consider the need for emergency listing any candidate or potential candidate and any species included in a petition. Consistent with the 1983 listing priority guidance, any petition or other documentation that demonstrates such a need will receive the highest priority (Tier 1). A petition must substantiate that the immediacy of the threats to the species is so great to a significant proportion of the total population that the normal rulemaking process (publishing a proposed rule, considering comments, then publishing a final rule) would be insufficient to prevent large losses that may result in extinction.

Assessment of an emergency situation may consider the number of individuals of the species that may be subject to the threats, the location of the area threatened in proximity to the remaining population, or other pertinent circumstances. While many petitions that the Service receives request emergency listing, as a rule they fail to meet the necessary criteria. Emergency situations are most likely to exist when a species has a very limited distribution and a major portion of its population or its habitat is under immediate threat of loss. Petitions that do not demonstrate that an emergency exists will be considered under Tier 2.

Issue 9: The proposed guidance does not use degree of threat as its main driver, nor as a basis for missing 90-day petition finding deadlines. Consequently, the guidance is likely to result in the Service focusing substantial resources on species that are facing lower degree of threat, as will occur when the Service elevates actions involving a less biologically imperiled candidate species over an action involving more biologically imperiled species that is the subject of a petition. How will the 1983 listing priority guidance be used in this priority system?

Response: The comment is primarily addressed at Tier 2, which includes finalizing determinations on pending proposals, preparing new proposals for candidate species (or removing species from candidacy), processing petitions for listing, delisting and reclassification, and processing a limited number of delisting and reclassification actions. Although the Listing Priority Guidance describes an approach to prioritizing types of listing actions, the underlying basis for the Listing Priority Guidance is the 1983 listing priority guidelines. Now that the Service has progressed to a more balanced listing program, it can justify assigning all of the aforementioned activities to the same tier. Inclusion within the same tier provides the Service greater ability to apply the 1983 listing priority guidelines. The majority of proposals awaiting final determinations include species with high level threats; therefore, finalization of these rules is a high priority. Preparing proposals for candidates with high level threats also is a high priority. Processing of petitions to list species that appear to face high level threats will have a lower but relatively comparable priority. Among the petitions, each Service Region will screen all overdue petitions for which it has the lead to identify any that may face relatively high, imminent threats. Unless certain petitions awaiting 90-day

findings appear to warrant immediate action, such as in the case of a species with limited distribution facing a high level of threats, those petitions awaiting 12-month findings generally will have priority over those awaiting 90-day findings, since the Service has already made an initial determination that the petition contained substantial information indicating listing may be warranted. If the 12-month analysis results in a finding that listing is warranted, the species will be assigned a listing priority number in accordance with the 1983 guidelines and, depending on the priority, will be proposed for listing or designated a "warranted but precluded" candidate. Monitoring of these candidates will be accomplished using the Candidate Conservation appropriation, not the Listing appropriation. Processing 90-day findings for species for which the initial review indicates a lower urgency will have a lower priority. However, the Service wishes to emphasize its intent to make significant progress in reducing the total number of overdue 90-day and 12-month findings, provided it is allowed to follow its Listing Priority Guidance. Delisting actions, including processing of petitions for delisting and reclassifications from endangered to threatened, have the lowest priority in Tier 2, as explained in other sections of this notice.

Issue 10: The Listing Priority Guidance should not be allowed to intrude on the listing process because Congress has provided the "warranted but precluded" designation to handle limited resources.

Response: The "warranted but precluded" designation in the Act applies specifically to species subject to petitions for which the Service has found that the requested action is warranted but an immediate proposal is precluded by other higher priority listing actions. However, the Service's listing process is not limited to consideration of species under petition. The Service also actively reviews other species, identified through its own initiative, that may warrant the Act's protection. Once the Service determines that listing a species is warranted, regardless of whether it is the subject of a petition, it determines the species' priority for listing in accordance with the 1983 listing priority guidance. Therefore, the Service effectively considers all candidate species as species for which listing is "warranted but precluded." This approach expressly ensures that the degree of threat the species faces drives the urgency of a proposed listing, regardless of whether the species is subject to a

petition or is a candidate identified by the Service. This avoids a situation where, simply by virtue of a species being the subject of a petition, it takes priority over non-petitioned species in greater need of timely protection.

Issue 11: The FY 1998-99 Listing Priority Guidance appears to propose the same priority system for petitions embodied in the FY 1997 Listing Priority Guidance. Clarify how they differ.

Response: The order of priorities in the FY 1998-1999 Listing Priority Guidance is very similar to that of the FY 1997 guidance in that finalizing outstanding proposals and preparing new proposals for candidate species will be considered ahead of processing petitions. However, the FY 1998-99 Guidance differs from the FY 1997 Guidance in that petition processing has been elevated to Tier 2 along with finalization of proposals, processing new listing proposals, and, as the lowest priority in Tier 2, a limited number of reclassification and delisting actions. Placing petition processing within the same tier as these other activities in effect elevates their consideration within the whole prioritization scheme and provides the Service Regions greater latitude to process petitions simultaneous with other actions in Tier 2. Under this Guidance, the Service will focus on screening petitions to identify those that appear most likely to include a potentially high priority candidate and process those along with proposing candidates. Therefore, the Listing Priority Guidance for FY 1998-99 differs from the FY 1997 Guidance in that the Service expects to place a much greater emphasis on addressing overdue petitions in FY 1998.

Final Listing Priority Guidance for Fiscal Years 1998 and 1999

To address the biological, budgetary, and administrative issues noted above, the Service issues the following listing priority guidance for FYs 1998 and 1999. As with the Final Listing Priority Guidance for FY 1997 issued December 5, 1996 (extended on October 23, 1997), this guidance supplements, but does not replace, the 1983 listing priority guidelines, which were silent on the matter of prioritizing among different types of listing activities.

As noted above, the Department of the Interior's FY 1998 appropriation provides no more than \$5.19 million for the Service's endangered species listing program. The \$5.19 million budget for all listing activities (both foreign and domestic) will fall far short of the resources needed to completely eliminate the listing backlogs in FY

1998. Therefore, some form of prioritization is still necessary, and the Service will implement the following listing priority guidance in FY 1998 and FY 1999.

The following sections describe a three-tiered approach that assigns relative priorities, on a descending basis, to listing actions to be carried out under section 4 of the Act. The 1983 listing priority guidelines will continue to be used to set priorities among species within types of listing activities. In order to continue to move toward a more balanced listing program, the Service will concurrently undertake listing actions in Tiers 1 and 2 during FY 1998 with its listing budget of \$5.19 million. As the Service informed Congress in its budget justification, critical habitat designations (Tier 3 actions) during FY 1998 should not be expected. The FY 1998 listing appropriation is only sufficient to support high-priority listing proposals and final determinations, petition processing activities, and a minimal number of high priority delisting/reclassification actions. A single critical habitat designation could consume up to twenty percent of the total listing appropriation, thereby disrupting the Service's biologically based priorities. Higher priority listing actions (Tiers 1 and 2) provide the greatest amount of protection for imperiled species while making the most efficient use of limited resources.

Completion of emergency listings for species facing a significant risk to their well-being remains the Service's highest priority (Tier 1). Processing final decisions on pending proposed listings, the resolution of the conservation status of species identified as candidates (resulting in a new proposed rule or a candidate removal), processing 90-day or 12-month administrative findings on petitions, and undertaking a limited number of delisting/reclassification activities are assigned to Tier 2. Third priority is the processing of petitions for critical habitat designations and the preparation of proposed and final critical habitat designations; these actions generally provide little or no added conservation benefit and are therefore assigned lowest priority (Tier 3).

Tier 1—Emergency Listing Actions

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

Service will conduct a preliminary review of every petition that it receives to list a species or reclassify a threatened species to endangered in order to determine whether an emergency situation exists. If the initial review indicates an emergency situation, the action will be elevated to Tier 1 and an emergency rule to list the species will be prepared. Emergency listings are effective for 240 days. A proposed rule to list the species is usually published at the same time as an emergency rule. If the initial review does not indicate that emergency listing is necessary, processing of the petition will be assigned to Tier 2 as discussed below.

Tier 2—Processing Final Decisions on Proposed Listings; Resolving the Conservation Status of Candidate Species (Resulting in a new Proposed Rule or a Candidate Removal); Processing Administrative Findings on Petitions to Add Species to the Lists and Petitions To Delist or Reclassify Species; and Delisting or Reclassifying Actions

The majority of the unresolved proposed species face high-magnitude threats. Focusing efforts on completing final determinations provides maximum conservation benefits to those species that are in greatest need of the Act's protections. As proposed listings are reviewed and processed, they will be completed through publication of either a final listing or a withdrawal of a proposed listing. Completion of a withdrawal may not appear consistent with the conservation intent of this guidance. However, once a determination not to make a final listing has been made, publishing the withdrawal of the proposed listing takes minimal time and appropriations. Thus, it is more cost effective and efficient to bring closure to the proposed listing than it is to postpone the action and take it up at some later time. For the same reasons, the Service will consider critical habitat prudency and determinability findings to be Tier 2 activities, although actual designation of critical habitat is a Tier 3 activity. The publication of new proposals (candidate conservation resolution) and the processing of petition findings to add species to the lists of threatened and endangered species have significant conservation benefit and these actions are also now placed in Tier 2. Delisting activities also have been placed in Tier 2 because of the indirect conservation benefits of these actions, such as the reduction of section 7 consultation workload. Nationwide in FY 1998 and FY 1999, the Service will undertake the full array of listing actions in tiers 1 and

2 as appropriate. However, some Regions and some Field Offices still have significant backlogs of proposed species, candidates, petitions, and delistings. Therefore, additional guidance is needed to clarify the relative priorities within Tier 2.

Setting Priorities Within Tier 2

Pursuant to the 1983 listing priority guidelines, final determinations on proposed rules dealing with taxa believed to face imminent, high-magnitude threats have the highest priority within Tier 2. If an emergency situation exists, the species will be elevated to Tier 1. Proposed listings that cover multiple species facing high-magnitude threats have priority over single-species proposed rules unless the Service has reason to believe that the single-species proposal should be processed first to avoid possible extinction. Proposed species facing high-magnitude threats that can be quickly finalized have higher priority than proposed rules for species with equivalent listing priorities that still require extensive work to complete. Given species with equivalent listing priorities and the factors previously discussed being equal, proposed listings with the oldest dates of issue will be processed first.

Issuance of new proposed listings is the first formal step in the regulatory process for listing a species. It provides some protection in that all Federal agencies must "confer" with the Service on actions that are likely to jeopardize the continued existence of proposed species. Resolving the conservation status of candidates will be afforded the second highest priority within Tier 2. The resolution of a candidate species' conservation status will be accomplished through the publication of new proposed rules or the processing of candidate removal forms (which, when signed by the Director, remove species from the candidate list). The 1983 listing priority guidelines are the basis for assigning a candidate species a listing priority number. This system ensures that species in the greatest need of protection will be processed first. New proposed listings for species facing imminent, high-magnitude threats (candidates with the highest listing priority numbers) will be processed ahead of candidates with lower listing priority numbers. The Service includes new proposals for petitioned species that are currently on the candidate list in this priority level within Tier 2.

The processing of 90-day petition findings and 12-month petition findings to add species to the lists will be the next priority among Tier 2 listing

activities. The Service will also screen all petitions to identify species that may have an imminent, high magnitude threat and process those concurrently with proposing new species. The Service will give priority to completing 12-month findings for species for which it has made a positive 90-day finding over processing petitions for species awaiting 90-day findings. If a positive 90-day petition finding is issued, the Service will make every reasonable effort to complete the 12-month finding in the appropriate time frame. When it is practicable for the Service to complete a 90-day finding within 90 days, the Service is statutorily afforded a 12-month period from the receipt of a petition to completion of the 12-month finding. However, in those cases in which it is not practicable for the Service to complete a 90-day finding within 90 days of receipt of the petition, the Service will still require 9 months to complete a thorough biological status review and issue a 12-month finding after the 90-day finding is completed.

For foreign species only, within the limited allocation assigned to that function, those final determinations that have potential for conservation benefit, and assist developing countries with the conservation and management of their species, will be of the highest priority within Tier 2. Currently proposed listings and status determinations on petitioned foreign species have the next highest priority within Tier 2. Since the Service cannot develop recovery plans for foreign species, priorities for listing or delisting must by necessity take into account the conservation programs of other countries in determining which actions are of higher priority. In virtually all cases, the only nexus for the U.S. is whether or not to allow importation of species, either for commercial or non-commercial purposes.

Finally, the Service expects to complete a small number of delistings and reclassifications during FY 1998. The Service believes that significant, albeit indirect, conservation benefit will result from the processing of certain high-priority delisting or reclassification actions. As long as a species remains on the endangered and threatened lists, Service funds are expended for ongoing conservation activities, including reviewing and permitting activities associated with habitat conservation plans and other regulated activities pursuant to section 10 of the Act. Similarly, the Service must expend funds engaging in consultations with other Federal agencies under section 7 of the Act. Resources currently devoted to these activities could be redirected to

other listed species more deserving of conservation efforts. Further, the ultimate goal of the Act is recovering species and removing them from the lists. Once it is determined that the Act's protections are no longer appropriate, it is important that delisting or reclassification proceed, particularly where listing creates an unwarranted management burden. Moreover, the Service is obligated to maintain the lists of threatened and endangered species and it is of utmost importance to keep the lists accurate and up to date. In addition to allowing the Service to direct resources to activities with greater conservation benefit, delisting a species or reclassifying a species from endangered to threatened and issuing a special rule also can provide regulatory relief to other Federal agencies as well as State and private entities, which are subject to commerce and taking prohibitions under section 9 of the Act and permit requirements under section 10. Monitoring of species that are on the lists is accomplished through the recovery program, but the small expenditure of funds necessary to process the change in a species' status will continue to be undertaken by the listing program in FY 1998. However, the President's FY 1999 budget request proposes funding delistings and reclassifications from endangered to threatened status under the recovery subactivity rather than the listing subactivity. Therefore, if enacted, these activities will no longer complete for funding with other listing activities and will be removed from this Guidance. Until then, delisting and reclassification will be afforded the lowest priority in Tier 2.

The Service expects to make substantial progress in removing or reducing the backlogs of proposed species awaiting final determination, candidates awaiting resolution, and petitions awaiting findings during FY 1998 and FY 1999. During FY 1998 and FY 1999, the application of both the listing priority guidance described above and the 1983 guidelines are critical to maintaining nationwide and program-wide biologically sound priorities to guide the allocation of limited listing resources.

Tier 3— Processing Critical Habitat Determinations

It is essential during periods of limited listing funds to maximize the conservation benefit of listing appropriations. Designation of critical habitat is very costly. For instance, the cost of designating critical habitat is illustrated by two recent examples: The

Service spent over \$126,000 on designation of critical habitat for the marbled murrelet and approximately \$1 million for the northern spotted owl. While in some cases the cost may be much less than it was for these two birds, the Service has found that in those cases where designation of critical habitat may provide some marginal benefit, such as for some broad ranging, highly habitat-specific species, the Service expects that the cost of designation would fall in the high cost range. However, the Service has determined that in most cases little or no additional protection is gained by designating critical habitat for species already on the lists and the Service's limited resources are best utilized for adding to the lists species that presently have very limited or no protection under the Act, rather than designating critical habitat for species already receiving its full protection. Because the protection that flows from critical habitat designation applies only to Federal actions, the Service continues to believe that the designation of critical habitat provides little or no additional protection beyond the "jeopardy" prohibition of section 7, which also applies only to Federal actions. Critical habitat will remain in Tier 3 during FY 1998; this will be re-evaluated when FY 1999 appropriations are received.

A recent court ruling remanded to the Service "not prudent" critical habitat determinations for 245 Hawaiian plant species listed between 1991 and 1996. To comply with the Court's remand in this case, the Service is proposing to the Court to complete reconsideration of the 245 "not prudent" findings (Tier 2) during FY's 1998, 1999, and 2000. This option would completely suspend all other listing activities in the Hawaiian Field Office until November 2000. A second option proposed by the Service would require dedication of fewer staff to the remands and allow for other listing activities in the Field Office, but would extend reconsideration of the prudency findings to FY 2002. However, for those species for which the Service finds that designation is prudent, proposed designation would proceed only after prudency determinations for all 245 species have been completed, and would be subject to any listing priority guidance that might be in effect at that time. Regardless of the approach selected (option 1 or 2), reconsideration of the prudency findings will significantly delay the Service's Hawaii Field Office in preparing proposed or final rulemakings to add approximately 97 currently unprotected Hawaiian

species to the endangered and threatened lists.

Allocating Listing Resources Among Regions

The Service allocates its listing appropriation among its seven Regional Offices, and the Washington Office for foreign species, based strictly on the number of proposed and candidate species for which the Region has lead responsibility with the exception of providing minimum "capability funding" for one listing biologist for each Region. The objective is to ensure that those areas of the country with the largest percentage of known imperiled species will receive a correspondingly high level of listing resources. The Service's experience in administering the Act for the past two decades has shown, however, that it needs to maintain at least a minimal listing program in each Region in order to respond to emergencies and to retain a level of expertise that permits the overall program to function effectively over the longer term, thus the "capability funding" to each Region. In the past, when faced with seriously uneven workloads, the Service has experimented with reassigning workload from a heavily burdened Region to less burdened Regions. This approach has proven to be very inefficient because the expertise developed by a biologist who works on a listing package will be useful for recovery planning and other conservation activities, and that expertise should be concentrated in the ecosystem or geographic area inhabited by the species. In addition, biologists in a Region are familiar with other species in that Region that interact with the species proposed for listing, and that knowledge may be useful in processing a final decision. For these reasons, the Service has found it unwise to reassign one Region's workload to personnel in another Region. Because the Service must maintain a listing program in each Region, Regions with few outstanding proposed listings may be able to take more lower priority listing actions within Tier 2 (such as new proposed listings or petition findings), while Regions with many outstanding proposed listings will use most of their allocated funds on finalizing proposed listings.

Addressing Matters in Litigation

The Service understands the numerous statutory responsibilities it bears under the Act. These responsibilities, however, do not come with an unlimited budget. The Service is often required to make choices about

how to prioritize its responses to those statutory responsibilities in order to make the best use of its limited resources. Under these circumstances, technical compliance with the Act with respect to one species often means failure to comply with the technical requirements of the Act for another species. This guidance is part of a continuing effort to express to the public that the Service is striving towards compliance with the Act in the manner that best fulfills the spirit of the Act, using the Service's best scientific expertise.

The Service understands that some may believe they have reason to bring suit against the Service for failing to carry out specific actions with regard to specific species. These actions question the Service's judgment and priorities, placing the emphasis of Act compliance on technical fulfillment of the statute for specific species rather than on the best use of the Service's resources to provide the maximum conservation benefit to all species. There are many outstanding section 4 matters currently in litigation. In each case, the plaintiff seeks, in effect, to require the Service to sacrifice conservation actions which the Service believes would have major benefits for actions which the Service believes would have much lesser effects.

In no case will the Service adjust its priorities to reflect the threat or reality of litigation. The Service has argued and will continue to argue before the courts that it should be allowed to prioritize its activities so as to best fulfill the spirit of the Act. Should any court not accept this argument, the Service will, of course, carry out the instruction of the court or the terms of any settlement reached. The Service believes, however, that such obligations impede the overall conservation effort for a much lesser benefit for a single species.

For example, during FY 1997, a plaintiff succeeded in obtaining a court order that required the Service to designate critical habitat for the southwestern willow flycatcher. The Service acknowledges that it had a responsibility to carry out this action and intended to meet its statutory requirement, like all others, when its budget and backlog of higher priority listing actions allowed. However, the Service still contends that this particular action had relatively little conservation benefit, especially compared to the numerous listings of wildlife and plants that had to be delayed to allow it to proceed when it did. As a result, the Service's Region 2 is suffering from an inability to prioritize its responsibilities and

complete several high priority species listings last year.

Good Cause for Immediate Effectiveness

The Service finds that good cause exists to make this policy effective immediately. Immediate implementation of this policy serves to advance the public interest in maximizing the conservation benefits that can be achieved from funds appropriated for listing activities under the Act. As indicated herein, there are not sufficient funds to do all listing activities contemplated by section 4 of the ESA. The final Listing Priority Guidance for FY 1998-99 will allocate existing funds to most effectively achieve the purposes of the Act.

In addition, immediate implementation of this policy will not impose a burden on the public. This is internal Service guidance that does not in and of itself invoke or relieve restrictions on the private or public sector. Although this policy addresses the timing of particular regulatory actions (i.e., listing of species), those particular actions will be subject to public notice and comment and, in the absence of good cause, delayed effective date pursuant to the Administrative Procedures Act. Therefore, in accordance with 5 U.S.C. 533(d), the Service makes this policy effective upon publication in the **Federal Register**.

National Environmental Policy Act

The Service does not consider the implementation of this guidance to be a major Federal action significantly affecting the quality of the human environment for the purposes of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Further, the Department of the Interior's Departmental Manual (DM) categorically excludes from consideration under NEPA, "Policies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case." This guidance clearly qualifies as an administrative matter under this exclusion. The Service also believes that the exceptions to categorical exclusions (DM 2 Appendix 2) would not be applicable to such a decision, especially in light of environmental effects for such action.

Authority

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

Dated: May 1, 1998.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 98-12284 Filed 5-7-98; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****Proposed Policy on the Export of Live American Alligators and Announcement of Public Meeting**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of proposed policy.

SUMMARY: After review and analysis of comments received and for the reasons detailed in this notice, the Service proposes to adopt a policy against the issuance of permits for the export of live American alligators for commercial breeding or resale purposes. The American alligator is protected under the Endangered Species Act of 1973 (ESA) as threatened due to similarity of appearance and under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as Appendix II. The Service may issue an export permit upon finding that all applicable permit issuance requirements have been met. Exports of animals listed on Appendix II of CITES may occur only if the Scientific Authority has advised the Management Authority that such exports will not be detrimental to the survival of the species and the Management Authority is satisfied the animals were not obtained in violation of laws for their protection. Based on documentation presented for consideration by the CITES Parties in 1983, the Service has determined that the American alligator is listed on Appendix II for reasons of similarity in appearance under Article II.2(b) of CITES as well as the potential threat to the species survival under CITES Article II.2(a).

This notice announces a proposed policy by the Service on the export of live American alligators. Based on the information received in response to the June 24, 1997, notice, the Service is unable to find that the export of live American alligators either for commercial breeding or resale purposes is not detrimental as required under CITES or that such exports comply with Executive Order 11987—*Exotic*

Organisms. Applications for permits to export live American alligators for purposes such as scientific research or zoological exhibition would be evaluated on a case-by-case basis.

DATES: The Service will consider all information and comments received by June 8, 1998 in making its final decision on this proposal. A public meeting will be held at the Delta Resort Orlando, 5715 Major Boulevard, Orlando, Florida 32819-7988, on May 5, 1998, from 1:30 pm to 3:30 pm.

ADDRESSES: Please send comments or other correspondence concerning this document to the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, room 700, Arlington, VA 22203. Materials received will be available for public inspection by appointment from 8 a.m. to 4 p.m., Monday through Friday, at the Office of Management Authority.

FOR FURTHER INFORMATION CONTACT: Ms. Teiko Saito, Chief, Office of Management Authority, telephone 703-358-2095, fax 703-358-2298.

SUPPLEMENTARY INFORMATION: The Fish and Wildlife Service (Service) published a notice on June 24, 1997 (62 FR 34074), requesting submission to the Service of any information available on the impacts of exports of live American alligators. Generally, in order to export species of wildlife protected under the ESA and/or CITES, an export permit must be issued. The Service is the agency responsible for reviewing applications for export of wildlife. Each permit application must be carefully evaluated to ensure compliance with all applicable regulations and executive orders. The American alligator is protected under the Endangered Species Act of 1973 (ESA) as threatened due to similarity of appearance and under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as Appendix II. A permit for export of American alligators can only be issued if the Service can determine:

1. That the export will not be detrimental to the survival of the species (50 CFR 23.15(d)(1));
2. That the animals to be exported were not obtained in violation of laws for their protection (50 CFR 23.15(d)(2));
3. That the authorization requested does not potentially threaten a wildlife population (50 CFR 13.21(b)(4)); and
4. That the requirements of Executive Order 11987, *Exotic Organisms*, are met. (This Executive Order, in part, requires "Executive agencies shall, to the extent permitted by law, restrict the use of Federal funds, programs, or authorities used to export native species for the

purpose of introducing such species into ecosystems outside the United States where they do not naturally occur." In this instance, introduction is defined to include "the release, escape, or establishment of an exotic species into a natural ecosystem.")

5. That live specimens are prepared for shipping and shipped in compliance with the International Air Transport Association (IATA) Live Animal Regulations (for air transport) or CITES guidelines for transport (for other transport).

The Service received requests from the Florida Game and Freshwater Fish Commission and the Louisiana Department of Wildlife and Fisheries that we review the criteria for issuance of permits for export of live American alligators for commercial breeding or resale purposes and to restrict issuance of such permits until a review could be completed. In response to these concerns, the Service published the June 24, 1997, **Federal Register** notice requesting submission of any information available to assist us in evaluating such impacts.

In addition, the problems associated with the introduction of exotic species have become increasingly apparent worldwide. The problems have been discussed in a number of international fora such as the meeting of the CITES Conference of the Parties in 1997 in Zimbabwe, the World Conservation Congress in 1996, and the Conference on Alien Species in Norway in 1996. In the United States, approximately 122 species of exotic (non-indigenous) species of fish and wildlife have already established free-living populations and are causing great harm. The import of potentially harmful exotic species is currently being reviewed by the Service in the context of the Lacey Act prohibitions on import of injurious species. In relation to export of native species, E.O. 11987 restricts the use of Federal funds, programs, or authorities (i.e., the issuance of CITES export permits) to export native species outside the United States. The American alligator is one of the few native species that requires a CITES export permit and for which we have received applications for export of large numbers of live specimens. Given the documented introduction of other crocodilians outside their range, in evaluating an application for export of live American alligators the Service must take into consideration the ecological damage that could result from introduction of alligators, either planned or unplanned, into ecosystems outside their natural range in the United States.