

### Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a separate Federalism assessment. This action removes the requirement that foreign-based motor carriers conduct controlled substances testing. It does not place any requirements on the States and thus does not limit the policy-making discretion of States.

### Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

### Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520.

### National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action will not have any effect on the quality of the environment.

### Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

### List of Subjects in 49 CFR Part 391

Controlled substances, Driver qualifications, Drug abuse, Drug testing, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements, Safety, Transportation.

Issued on: December 29, 1994.

### Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending title 49, Code of Federal Regulation, subtitle B, chapter III, part 391 as set forth below:

### PART 391—QUALIFICATION OF DRIVERS

1. The authority citation for part 391 continues to read as follows:

**Authority:** 49 U.S.C. 504, 31136, and 31502; and 49 CFR 1.48.

### Subpart H—Controlled Substances Testing

2. In § 391.83, paragraph (c) is revised to read as follows:

#### § 391.83 Applicability.

\* \* \* \* \*

(c) This subpart is not applicable with respect to any foreign-based employee of a foreign-domiciled motor carrier.

[FR Doc. 94-32333 Filed 12-30-94; 8:45 am]

BILLING CODE 4910-22-P

### DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AC27

### Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Arabis Perstellata*

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) determines endangered status for *Arabis perstellata* (rock cress) under the authority of the Endangered Species Act of 1973, as amended (Act). The species is made up of two subspecies occupying distinct geographic areas. The small rock cress (*Arabis perstellata* E. L. Braun var. *perstellata* Fernald) is currently known from 27 populations in Kentucky—24 in Franklin County, 2 in Owen County, and 1 in Henry County. The large rock cress (*Arabis perstellata* E. L. Braun var. *ampla* Rollins) is known from only two populations in Rutherford County, Tennessee. Both subspecies are endangered throughout their range due to habitat alteration; residential, commercial, or industrial development; timber harvesting; grazing and trampling; and competition with native and exotic weedy species, especially the European garlic mustard (*Alliaria petiolata*). This action extends Federal protection under the Act to the rock cress.

**EFFECTIVE DATE:** February 2, 1995.

**ADDRESSES:** The complete file for this rule is available for public inspection,

by appointment, during normal business hours at the Asheville Field Office, U.S. Fish and Wildlife Service, 330 Ridgefield Court, Asheville, North Carolina 28806.

**FOR FURTHER INFORMATION CONTACT:** Mr. J. Allen Ratzlaff at the above address (704/655-1195, Ext. 229).

### SUPPLEMENTARY INFORMATION:

#### Background

Both varieties of *Arabis perstellata* E.L. Braun, (*Arabis perstellata* E. L. Braun var. *ampla* Rollins, large rock cress, and *Arabis perstellata* E.L. Braun var. *perstellata* Fernald, small rock cress) are perennial members of the mustard family (Brassicaceae). The large rock cress is known from only one county in Tennessee, and the small rock cress is known from only three counties in Kentucky. Both varieties have round stems and alternate leaves. Their stems and foliage have a grayish coloration due to the large quantity of hairs. Their stems arise from horizontal bases and grow up to 80 centimeters (cm) (31.5 inches) long, often drooping from rock ledges. Each year a basal rosette of leaves is produced, and new flowering branches emerge from the old rosette of the previous season. Their lower leaves vary from 4 to 15 cm (1.6 to 6.0 inches) long and are obovate to oblanceolate with slightly toothed and pinnatifid margins. Their upper leaves are smaller—up to 3.5 cm (1.4 inches) long—and are elliptic to oblanceolate, with coarse teeth along the margin. Both surfaces of their leaves are stellate-pubescent. The inflorescence is an elongate raceme with numerous flowers. Their flowers have four petals that are 3 to 4 millimeters (mm) (0.12 to 0.16 inch) long, are white to lavender, and have four pale green sepals that are 2 to 3 mm (0.08 to 0.12 inch) long. There are six stamens, with two shorter than the other four. The ovary is elongate, two-chambered, and develops into a silique. Fruiting stalks are about 1 cm (0.4 inch) long at maturity; siliques are up to 4 cm (1.6 inches) long and are covered with both simple and stellate hairs. Flowering is from late March to early May. Fruits mature from mid-May to early June. Their oblong seeds are reddish brown; somewhat flattened; about 1 mm (0.04 inch) long; and, in places, minutely hairy (Jones 1991).

*Arabis perstellata* was named by E.L. Braun from plants collected between 1936 and 1993 on wooded hillsides along Elkhorn Creek in Franklin County, Kentucky. Braun (1940) distinguished the new taxon from the similar *Arabis dentata* (Torr.) T. & G. (now called *Arabis shortii* (Fern.) Gleason) by its

perennial habit; grayer, stellate pubescence of stems and leaves; and longer pedicels. Fernald (1946) treated *A. shortii* as a variety of *A. perstellata*, through it is now generally accepted that they represent two species (Kartesz and Kartesz 1980). In 1959, plants were discovered on steep limestone cliffs above the Stones River in Davidson County, Tennessee, by Dr. R.B. Channel. Rollins (1960) described these plants as *Arabis perstellata* var. *ampla* and distinguished them from the typical variety by their generally larger size, thinner and more entire leaves, and lesser pubescence. Rollins reported the chromosome number of the Tennessee plants as  $n=7$ . The chromosome number of the Kentucky plants has yet to be determined.

*Arabis perstellata* is typically found on wooded steep slopes with limestone outcrops. The outcrops tend to be moist but not wet; rarely, plants can be found on seepy outcrops. They also may be found in protected areas, such as around the bases of larger trees, or in areas where there is little competition, such as around areas regularly scoured by talus movement or erosion. The plants have a well-developed system of rootstocks that allow them to persist in these inhospitable sites. Sometimes plants display a weedy tendency, colonizing recent road cuts or animal paths through the woodlands. The plants survive in full shade or filtered light, but are not found in full sunlight (Jones 1991).

The distribution of *Arabis perstellata* var. *perstellata* shows a strong correlation with the Kentucky River and its tributaries (primarily Elkhorn Creek), with the majority of sites occurring in Franklin County. No sites have been found south of Frankfort along the Kentucky River, although appropriate habitat appears to be present.

Historically, *Arabis perstellata* var. *ampla* was also associated with calcareous bluff habitat of a specific river—the Stones River. The two extant populations are somewhat atypical compared to historic sites because they occur on rocky knobs about 15 miles from the Stones River (Jones 1991). The following is a description of the species' status within each State where it occurs.

**Tennessee.** The following information on *Arabis perstellata* var. *ampla* in Tennessee is primarily from Jones (1991). All known *Arabis perstellata* var. *ampla* populations in Tennessee are from the Cumberland River Subsection of the Central Basin Physiographic Region. Prior to the status survey conducted by Jones (1991), there were three records of large rock cress in Davidson County and two in Rutherford

County. All three of the sites in Davidson County have been extirpated, and one of the sites in Rutherford County could not be relocated. One additional population was discovered in Rutherford County during the status survey. Of the two remaining populations, one is small—about 25 plants—and covers about 0.06 acre. The other population contains several hundred plants scattered over about 2.2 acres. Both sites are on private land and are threatened from competition by weedy invaders.

**Kentucky.** The following information on *Arabis perstellata* var. *perstellata* in Kentucky is primarily from Jones (1991). All known *Arabis perstellata* var. *perstellata* populations in Kentucky are from the Eden Shale Belt Subsection of the Blue Grass Physiographic Region. Prior to the status survey conducted by Jones (1991), there were three counties in Kentucky with occurrence records for the small rock cress—1 in Henry County, 2 in Owen County, and 26 in Franklin County. One site in Owen County and seven sites in Franklin County have been extirpated. There was insufficient information to locate four other historic records (two in Franklin County and two from unknown counties). However, 8 new populations were discovered during the status survey, and the 27 known small rock cress sites in Kentucky are distributed as follows: 1 population from Henry County, 2 populations from Owen County, and 24 populations from Franklin County. Of these 27 populations, 10 have fewer than 100 individual plants and 12 have 20 or fewer.

The immediate threats to the 27 remaining populations include the following—(1) 8 are threatened by weedy competitors, (2) 4 by weedy competitors and trampling, (3) 2 by trampling, (4) 1 by logging, and (5) 2 by road work. One of the largest populations was severely impacted by roadwork while the species was proposed for listing. The remaining 10 populations do not appear to have any immediate threats but are vulnerable to the aforementioned threats as well as other habitat alterations and potential inbreeding problems as neighboring populations decline. All of the Kentucky populations are privately owned. Three receive limited protection through their inclusion in State designated natural areas.

#### Previous Federal Actions

Federal government actions on this species began with section 12 of the Act of 1973 (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the

Smithsonian Institution to prepare a report on those plants considered endangered, threatened, or extinct. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice (40 FR 27823) that formally accepted the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act. By accepting this report as a petition, the Service also acknowledged its intention to review the status of those plant taxa named within the report. *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* were included in the Smithsonian report and in the July 1, 1975, Notice of Review. On June 16, 1976, the Service published a proposed rule (41 FR 24523) to determine approximately 1,700 vascular plant taxa to be endangered species pursuant to section 4 of the Act; *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* were included in that proposal.

The 1978 amendments to the Act required that all proposals over 2 years old be withdrawn. On December 10, 1979 (44 FR 70796), the Service published a notice withdrawing plants proposed on June 16, 1976. The revised notice of review for native plants published on December 15, 1980 (45 FR 82480), included *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* as category 1 species. Category 1 species are those for which the Service has on file substantial information on biological vulnerability and threats to support the appropriateness of proposing to list the taxa as threatened or endangered. These subspecies were retained in their respective categories when the notice of review for native plants was revised in 1983 (48 FR 53640) and 1985 (50 FR 39526), but *Arabis perstellata* var. *ampla* was then thought to be extinct. In the 1990 notice of review (50 FR 6184), *Arabis perstellata* var. *ampla* was retained as a category 1 species but was no longer thought to be extinct (i.e., it was rediscovered), and *Arabis perstellata* var. *perstellata* was placed in category 2 because the Service believed that additional searches of potential habitat and further identification of threats were needed before a decision could be made as to whether a proposed rule should be prepared to add the species to the list. (Category 2 species are those for which the Service has information indicating that proposing to list them as endangered or threatened may be appropriate but for which substantial data on biological

vulnerability and threats are not currently known or on file to support the preparation of rules.) The Service funded surveys in 1989 in order to determine the status of *Arabis perstellata* var. *perstellata* in Kentucky. The contractors conducting the status survey for *Arabis perstellata* var. *perstellata* included a review of *Arabis perstellata* var. *ampla* in Tennessee. Final reports on these surveys were accepted by the Service in 1991.

All plants included in the comprehensive plant notices are treated as under petition. Section 4(b)(3)(B) of the Act, as amended in 1982, requires the Secretary to make certain findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This was the case for *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* because of the acceptance of the 1975 Smithsonian report as a petition. From 1983 through 1990 the Service found that the petitioned listing of both varieties was warranted but precluded by higher priority species. In 1990, it was determined that listing of *Arabis perstellata* var. *ampla* was not warranted because data on distribution, vulnerability, and threats were incomplete. Status survey information received by the Service in 1991 completed these informational gaps and was sufficient and conclusive enough to support the proposed listing of *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* published in the **Federal Register** of January 3, 1994 (59 FR 53). The proposed listing represented the final petition finding for the large and small rock cresses.

#### Summary of Comments and Recommendations

In the January 3, 1994, proposed rule, and through associated notifications, all interested parties were requested to submit factual reports and information that might contribute to the development of a final rule for the rock cress. Appropriate Federal and State agencies, county governments, scientific organizations, and interested parties were contacted by letters dated January 20, 1994. Legal notices were published in the "Frankfort State Journal" (Frankfort, Kentucky) on January 23, 1994 and in the "Daily News Journal" (Murfreesboro, Tennessee) on January 21, 1994.

Four written responses were received on the proposed rule to list rock cress. One Federal agency, one State agency,

and two individuals provided comments.

The U.S. Soil Conservation Service, Nashville, Tennessee, responded by stating they have "no projects which might affect the species proposed for listing."

The Kentucky State Nature Preserves Commission and one individual from Kentucky (who owns land that supports the species), supported the listing of the typical variety. Neither commented on the large rock cress.

One individual opposed the listing because "The Fish and Wildlife Service is intruding into an area in which it certainly has no moral or legal authority—private property." The Service response is that the Act does not allow the Service to use land ownership as a factor in determining whether a species should be placed on the Endangered and Threatened Species List. The Act requires that a decision to list a species be based solely on biological data. Further, listed plants receive very little formal protection on private lands. For the most part they are only protected on Federal lands or through section 7 of the Act (consultation with other Federal Agencies).

The same individual also stated that ". . . you (the Service) present hypothetical scenarios of what timber harvest might do to the resources and the area subject to timber harvest. All of your arguments are based on conjecture and supposition with little or no scientific data. The areas in question have undergone severe natural and man-caused changes in biodiversity over the past 200 years of European occupancy. Yet, after all that has occurred, the species under consideration persist." The Service believes that, based on the biology of the species, timber harvesting would impact the species. Not only could the species be affected by direct impacts such as heavy equipment, but because we know the species does not survive in full sunlight, removal of trees would likely have a detrimental effect. Further, timber harvest is only one of several threats to this species (see "Summary of Factors Affecting the Species" section of this rule). The Service agrees that the areas in question have undergone considerable "biodiversity" changes over the past centuries since European settlement. However, while it is not possible to say to what degree this species has become more or less abundant since that time, populations are known to have been lost and remaining populations continue to be threatened. There are many examples of species that have been reduced in number since European settlement,

many of which have become extinct. The Service believes that without the protection afforded by the Act, this species would likely follow the same course.

The individual further stated that "The scientific community, and the Service in particular, need to recognize that extinction has always been a continuing process and will continue to be so." The Service agrees that extinction is a natural process. Extinction naturally occurs as species adapt (evolve) or don't adapt (become extinct) to a changing environment. However, the present rate of extinction, by some estimates, is as high as 1,000 times the "normal" extinction rate, with virtually all of the extinction being attributable to human induced environmental changes. A species being eliminated by processes such as road building or other man-made factors is far different from a species being unable to adapt to a naturally changing environment. Even so, the Act does not make distinctions in this regard. A species may be listed due to either natural or manmade factors that affect its continued existence.

#### Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the rock cress should be classified as an endangered species. Section 4(a)(1) of the Act and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to *Arabis perstellata* E.L. Braun (rock cress) are as follows:

##### A. The present or threatened destruction, modification, or curtailment of its habitat or range

*Arabis perstellata* var. *perstellata*—Of the 27 known populations of small rock cress, 17 are threatened with destruction or adverse modification of their habitat. Eight are threatened by weedy competitors, four by weedy competitors and trampling, two by trampling, one by logging, and two by road work (one population was severely impacted by road work during the period the species was proposed for listing). The remaining 10 populations do not appear to have any immediate threats but are vulnerable to the aforementioned threats as well as other habitat alterations and potential inbreeding problems as neighboring populations decline. Active

management is required to ensure that the species continues to survive at all sites.

*Arabis perstellata* var. *ampla*—Both of the remaining large rock cress populations in Tennessee are threatened from competition by weedy invaders and potentially by livestock grazing and trampling. Also, the smaller site appears to be made up of older individuals, and there is little evidence of reproduction (Jones 1991).

**B. Overutilization for commercial, recreational, scientific, or educational purposes**

At this time there is little or no commercial trade in *Arabis perstellata* var. *ampla* or *Arabis perstellata* var. *perstellata*. Most populations of this species are very small and cannot support the collection of plants for scientific or other purposes. Inappropriate collecting for scientific purposes or as a novelty could be a threat to the species.

**C. Disease or predation**

Disease and predation do not appear to be factors affecting the continued existence of this species at this time (Jones 1991).

**D. The inadequacy of existing regulatory mechanisms**

The large rock cress is listed as endangered in Tennessee by Collins *et al.* (1978) and Somers (1989). Endangered species in Tennessee receive some protection through the "Rare Plant Protection and Conservation Act of 1985" (Tennessee Department of Conservation, 1987). The removal of plants from State properties for scientific educational, or propagative purposes is controlled, as is the disturbance of the species on private lands without the landowner's consent. There is no protection for the species if its presence conflicts with public works projects (i.e., road building).

In Kentucky, the small rock cress is listed as endangered by the Kentucky Academy of Science and Kentucky State Nature Preserves Commission (Branson *et al.* 1981, Warren *et al.* 1986). These lists, however, have no legal standing in the State. The state of Kentucky considers plants on the State endangered species list but provides no protection for them.

The Act will provide additional protection to populations that are on Federal land and to the other populations when the taking is in violation of any State law, including State trespass laws. Protection from inappropriate interstate commercial trade will also be provided.

**E. Other natural or manmade factors affecting the species' continued existence**

*Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* could be facing potential inbreeding problems as neighboring populations decline.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list the rock cress as endangered. *Arabis perstellata* (rock cress) is made up of two subspecies occupying distinct geographic areas. The small rock cress is currently known from 27 populations in Kentucky—24 in Franklin County, 2 in Owen County, and 1 in Henry County. The large rock cress is known from only two populations in Rutherford County, Tennessee. Both subspecies are endangered throughout their range due to habitat alteration; residential, commercial, or industrial development; timber harvesting; grazing and trampling; and competition with native and exotic weedy species, especially the European garlic mustard (*Alliaria petiolata*). Because of their restricted distributions and both subspecies' vulnerability to extinction, endangered status appears to be the most appropriate classification for this species. (See "Critical Habitat" section for a discussion of why critical habitat is not being proposed for this plant.)

**Critical Habitat**

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. The Service's regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) the designation of critical habitat would not be beneficial to the species. The Service finds that designation of critical habitat is not presently prudent for this species. Such a determination would result in no known benefit to this species, and designation of critical habitat could further threaten the species.

Section 7(a)(2) and regulations codified at 50 CFR part 402 require Federal agencies to ensure, in consultation with and with the assistance of the Service, that activities

they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify its critical habitat, if designated. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. (See "Available Conservation Measures" section for a further discussion of section 7.) As part of the development of this rule, Federal and State agencies were notified of the plants' general distribution, and they were requested to provide data on proposed Federal actions that might adversely affect the species. No specific projects were identified. Should any future projects be proposed in areas inhabited by this plant, the involved Federal agency will already have the general distributional data needed to determine if the species may be impacted by their action; and if needed, more specific distributional information would be provided.

Regulations promulgated for the implementation of Section 7 of the Act provide for both a "jeopardy" standard and a "destruction or adverse modification" of critical habitat standard. Due to the highly precarious status of the rock cress, any significant adverse modification or destruction of the species' habitat would also likely jeopardize the species' continued existence thereby triggering both standards. Therefore, no additional protection for the plant would accrue from a critical habitat designation that would not also occur from listing of the species. Habitat protection for the rock cress will be accomplished through the section 7 "jeopardy" standard and section 9 prohibitions against take.

In addition, the rock cress is very rare, and taking for scientific purposes and private collection could pose a threat if specific site information was released. The publication of critical habitat maps in the **Federal Register** and local newspapers and other publicity accompanying critical habitat designation could increase the collection threat and increase the potential for vandalism during the often controversial critical habitat designation process. The locations of populations of this species have consequently been described only in general terms in this final rule. Any existing precise locality data would be available to appropriate Federal, State, and local government agencies from the Service office described in the **ADDRESSES** section or from the Service's Cookeville Field

Office, 446 Neal Street, Cookeville, Tennessee 38501.

#### Available Conservation Measures

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

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify any designated critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. All *Arabis perstellata* var. *ampla* and *Arabis perstellata* var. *perstellata* populations are on privately owned land or in road rights-of-way. No Federal involvement is presently known or has been identified for the immediate future.

The Act and its implementing regulations set forth a series of general trade prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale this species in interstate or foreign commerce, or to remove and reduce to possession the species from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on Federal lands and the

removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies.

The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened species under certain circumstances. It is anticipated that few trade permits would ever be sought or issued because the species is not common in cultivation or in the wild.

It is the policy of the Service, published in the **Federal Register** on July 1, 1994, (59 FR 34272), to identify to the maximum extent practicable at the time of listing those activities that would constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. Prohibitions relating to Federal lands and to trade are not of concern at present, as none of the *Arabis perstellata* populations are known to occur on Federal lands, and there is no known current trade in this species. Collection, damage or destruction on non-Federal lands is prohibited if in knowing violation of State law, or in violation of State criminal trespass law. This would not affect any activities in Kentucky, as Kentucky State law provides no protection for plants. In Tennessee, *Arabis perstellata* is protected under the Rare Plant Protection and Conservation Act of 1985, which controls the removal of plants from State properties for scientific, educational, or propagative purposes, and the disturbance of the species on private lands without the landowner's consent. The Service is not aware of any otherwise lawful activities being conducted or proposed by the public that will be affected by this listing and result in a violation of section 9.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Asheville Office (see **ADDRESSES** section). Requests for copies of the regulations on listed plants and inquiries about prohibitions and permits should be addressed to the U.S. Fish and Wildlife Service, Division of Endangered Species, 1875 Century Boulevard, Atlanta, Georgia 30345-3301 (404/679-7110; Facsimile 404/679-7081).

#### National Environmental Policy Act

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

#### References Cited

- Branson, B.A., D.F. Harker, Jr., J.M. Baskin, M.E. Medley, D.L. Batch, M.L. Warren, Jr., W.H. Davis, W.C. Houtcooper, B. Monroe, Jr., L.R. Phillippe, and P. Cupp. 1981. Endangered, threatened, and rare animals and plants of Kentucky. *Transactions of the Kentucky Academy of Science* 42:77-89.
- Braun, E.L. 1940. New plants from Kentucky. *Rhodora* 42:47-49.
- Collins, J.L., H.R. DeSelm, A.M. Evans, R. Kral, and B.E. Wofford. 1978. The rare vascular plants of Tennessee. *Journal of the Tennessee Academy of Science* 53:128-133.
- Fernald, M.L. 1946. Identification and reidentification of North American Plants. *Rhodora* 48:207-216.
- Jones, R.L. 1991. Status Survey Report on *Arabis perstellata* var. *perstellata*. Unpublished report to the Asheville Field Office, U.S. Fish and Wildlife Service, Asheville, North Carolina. 94 pp.
- Kartesz, J., and R. Kartesz. 1980. A synonymized checklist of the vascular flora of the United States, Canada, and Greenland. University of North Carolina Press, Chapel Hill, North Carolina.
- Rollins, R. 1960. *Arabis perstellata* in Tennessee. *Rhodora* 62:242-244.
- Somers, P. 1989. Revised list of the rare plants of Tennessee. *Journal of the Tennessee Academy of Science* 64:179-184.
- Tennessee Department of Conservation, Division of Ecological Services. 1987. The Rare Plant Protection and Conservation Act of 1985. Nashville, Tennessee.
- Warren, M.L., Jr., W.H. Davis, Branson, R.R. Hannan, M. Evans, D.L. Batch, B.D. Anderson, B. Palmer-Hall, Jr., J.R. MacGregor, R.R. Cicerello, R. Athey, B.A. Branson, G.J. Fallo, B.M. Burr, M.E. Medley, and J.M. Baskin. 1986. Endangered, threatened, and rare plants and animals of Kentucky. *Transactions of the Kentucky Academy of Science* 47:84-97.

**Author**

The primary author of this final rule is Mr. J. Allen Ratzlaff, Asheville Field Office, U.S. Fish and Wildlife Service, 330 Ridgefield Court, Asheville, North Carolina 28806 (704/665-1195, Ext. 229).

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

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

**Regulation Promulgation**

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended 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. Section 17.12(h) is amended by adding the following, in alphabetical order under flowering plants, to the List of Endangered and Threatened Plants, to read as follows:

**§ 17.12 Endangered and threatened plants.**  
\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family name	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
Flowering plants:							
*	*	*	*	*	*	*	*
<i>Arabis perstellata</i>	Rock cress .....	U.S.A. (KY, TN) .....	Brassicaceae .....	E	570	NA	NA
*	*	*	*	*	*	*	*

Dated: December 12, 1994.

**Mollie H. Beattie,**

*Director, Fish and Wildlife Service.*

[FR Doc. 94-32267 Filed 12-30-94; 8:45 am]

BILLING CODE 4310-55-M

**50 CFR Part 20**

**RIN 1018-AC66**

**Migratory Bird Hunting; Decision on the Conditional Approval of Bismuth-Tin Shot as Nontoxic for the 1994-95 Season**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) is publishing this final rule to notify the public of the interim conditional approval of the use of bismuth-tin for the remainder of the 1994-1995 migratory bird hunting season. Toxicity studies undertaken by the Bismuth Cartridge Company and other pertinent materials indicate that bismuth-tin shot is nontoxic to waterfowl when ingested.

**EFFECTIVE DATE:** This rule becomes effective January 3, 1995.

**FOR FURTHER INFORMATION CONTACT:** Paul R. Schmidt, Chief, or Keith Morehouse, Staff Specialist, Office of Migratory Bird Management (MBMO), U.S. Fish and Wildlife Service, 634 ARLSQ, 1849 C St. NW, Washington D.C. 20240 (703/358-1714).

**SUPPLEMENTARY INFORMATION:** The Service published a proposed regulation in the **Federal Register** on August 22, 1994 (59 FR 43088) to provide for

conditional approval of bismuth-tin shot (in a mixture of [nominally] 97-3 percents, respectively) as nontoxic for the taking of waterfowl and coots during the 1994-1995 hunting season. This proposed action was in response to a petition for rulemaking from the Bismuth Cartridge Company received June 24, 1994. The petition requested that the Service modify the provisions of 50 CFR 20.21(j), to legalize the use of bismuth-tin shot on an interim, conditional basis for both the 1994-95 and the 1995-96 seasons. The petition cited the following reasons in support of the proposal: (a) bismuth is nontoxic; (b) the proposed rule is conditional; and (c) the evidence presented in the record, i.e., the application from the Bismuth Cartridge Company. This petition acknowledged responsibility by the Bismuth Cartridge Company to complete all the nontoxic shot approval tests as outlined in 50 CFR 20.134.

The current petition for rulemaking follows two previous applications to the Service for final approval, one dated October 21, 1993, and the other dated December 30, 1993. The Service replied that the applications were deficient because the bismuth-based shot material had not been adequately tested.

Preliminary toxicity testing by the applicants had been with essentially-pure bismuth only. Thus, there was not adequate scientific data (either available or provided with the application) covering toxicity of the material to be loaded into shotshells. The Service pledged in both replies, however, to work with the applicants to process the applications in as timely a fashion as possible.

In response to the Bismuth Cartridge Company's petition of June 14, 1994, the Service proposed (59 FR 43088) the interim conditional approval of bismuth-tin shot based on what was known about the toxicity of bismuth and on the agreement by the Bismuth Cartridge Company to conduct and complete the 30-day acute toxicity test as described in 50 CFR 20.134.

For bismuth, there are three especially recent and relevant studies that support this proposal. The three studies include Sanderson and Anderson (1994), Ringelman et al. (1992), and Sanderson et al. (1992). A complete description of these studies can be found in the proposed rule (59 FR 43088). In addition, test results with tin include those by Grandy et al. (1968) in which there were no deaths associated with mallards dosed with tin shot. Positive results from the acute toxicity test (Sanderson et al. 1994) (just concluded) and the other toxicity information (cited above) suggest that a temporary conditional approval for bismuth-tin can be provided without significant risk to migratory bird resources. The Service believes it has sufficient flexibility in the regulations to approach approval of shot in a step manner.

The toxicity analysis procedures (50 CFR 20.134) consist of three tests which represent the three major categories of toxic effects: short-term periodic exposure, chronic exposure under adverse environmental conditions, and the impact of chronic exposure on reproduction. Tests include both steel-shot and lead-shot control groups and statistical analyses of all data from each test. Test 1 is a short-term, 30-day acute