Regulatory Analysis

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. It does not impose costs on regulated parties; it merely removes a Part that has become obsolete and whose underlying statutory authority has lapsed. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 671

Grant programs-transportation, Mass Transportation.

Accordingly, for the reasons set forth above, and under the Authority 49 U.S.C. 5334 (b)(2), part 671 is hereby removed.

Issued: March 5, 1996.

Gordon J. Linton,

Administrator.

[FR Doc. 96–5670 Filed 3–8–96; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of interim listing priority guidance.

SUMMARY: The U.S. Fish and Wildlife Service (Service) adopts interim guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act (Act). Congress enacted a moratorium on final listings and critical habitat designations in April 1995 which, combined with severe funding constraints, essentially shut down the Service's listing program beginning in October 1995. During this shutdown, a large backlog of listing actions, particularly unresolved proposed listings, is accruing. When the moratorium is lifted and adequate funding is restored to operate a listing program, the Service will need to act expeditiously to resolve the status of outstanding proposed listings. This guidance supplements, but does not replace, the current listing priority guidelines, which are silent on the matter of prioritizing among different types of listing activities. While the backlog exists, and in order to focus conservation benefits on those species in greatest need, the Service believes that processing the outstanding proposed listings should receive higher priority than other actions authorized by section 4 (such as petition findings, new proposed listings, and critical habitat determinations).

DATES: This guidance takes effect March 11, 1996. Comments on this guidance will be accepted until April 10, 1996. This interim guidance will remain in effect until September 30, 1996, unless extended by further notice.

ADDRESSES: Comments on this interim 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, DC 20240.

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

SUPPLEMENTARY INFORMATION:

Background

The Service adopted guidelines on September 21, 1983 (48 FR 43098–43105) that govern the assignment of priorities to species under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The Service adopted those guidelines to establish a rational system for allocating available appropriations to the highest priority species when adding species to the lists of endangered or threatened wildlife and plants or reclassifying threatened species to endangered status. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies (or equivalently, distinct population segments of vertebrates).

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

Since the end of Fiscal Year 1995, funding for the Service's endangered species programs, including listing of endangered and threatened species, has been provided through a series of continuing resolutions, each of which has maintained in force the moratorium against issuing final listings or critical habitat designations. The continuing resolutions also severely reduced or eliminated the funding available for the Service's listing program. Consequently, the Service reassigned listing program personnel to other duties. The net effect of these legislative and administrative actions is that the Service's listing program has been essentially shut down since October 1995, and will remain so until adequate funding is restored. The moratorium and severe funding restrictions have created problems that require additional guidance.

When adequate appropriations are provided by the Congress for the administration of a listing program and when the listing program is no longer restricted by moratoria or similar conditions, the Service will face the considerable task of restaffing its listing program and allocating the available resources to the following listing activities that have accrued significant backlogs. First, the Service has issued proposed listings for 243 species, which require final decisions. Second, although the moratorium imposed by Pub. L. 104–6 does not specifically extend to petition processing or the development of new proposed listings, the extremely limited funding available to the Service for listing activities has generally precluded these actions since October 1, 1995. However, during this period the Service has continued to receive new petitions and now has a backlog of petitions that request the listing or delisting of 41 species under section 4(b)(3) of the Act. Third, the Service is required by numerous court orders or settlement agreements to process a variety of actions under section 4 of the Act. Fourth, the Service also needs to make expeditious progress on determining the conservation status of the 182 species designated by the Service as candidates for listing in the recently published Candidate Notice of Review (61 FR 7596; February 28, 1996). These backlogs and court orders illustrate the need for program-wide priorities to guide the allocation of resources once the listing program is revived. For the above reasons, good cause exists to make this guidance effective immediately.

Section 4(b)(1) of the Act requires the Service to use the ''best available scientific and commercial information'' to determine those species in need of the Act's protections. It has been long-standing Service policy that the order in

which species should be processed for listing is based primarily on the immediacy and magnitude of the threats they face. Given the large backlogs of proposed species, petitions, and candidate species awaiting proposal, it will be extremely important for the Service to focus its efforts on actions that will provide the greatest conservation benefits to imperiled species in the most expeditious manner.

The Service will continue to base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines. These decisions will be implemented by the Regional Office designated with lead responsibility for the particular species. The Service allocates its listing appropriation among the Regional Offices based primarily on the number of proposed and candidate species for which the Region has lead responsibility. This ensures that those areas of the country with the largest percentage of known imperiled biota will receive a correspondingly high level of listing resources. The 1983 listing priority guidelines and this guidance will be applied at the National, Regional, and local levels.

While funding for listing activities is allocated based on expected workload, the types of activities composing each Region's listing workload vary greatly. As a result, Regions with few outstanding proposed listings may be able to process new proposed listings or petition findings before all of the outstanding proposed listings have been processed in Regions with large numbers of outstanding proposed listings.

To address the biological, budgetary, and administrative issues noted above, the Service therefore adopts the following interim listing priority guidance.

Interim Listing Priority Guidance

The Headquarters Office will promptly process any draft petition findings, draft proposed rules or final rules (once the moratorium is lifted) to add species to the lists, draft proposed or final critical habitat determinations (once the moratorium is lifted), or draft withdrawal notices that could not be processed because of the funding constraints or the moratorium. This will only apply to draft documents already approved by the Field and Regional Offices but for which final action could not be completed per guidance issued by the Director.

The following sections describe a multi-tiered approach that assigns relative priorities, on a descending basis, to actions to be carried out under section 4 of the Act. The various types of actions within each tier (such as new proposed listings, administrative petition findings, etc.) will be accorded roughly equal priority, but the 1983 listing priority guidelines should be used as applicable. The Service emphasizes that this guidance is effective until September 30, 1996 (unless extended by future notice) and the agency fully anticipates returning to a more balanced implementation of the Act's listing responsibilities to concurrently process petition findings and proposed and final listings and critical habitat determinations, after funding has been restored and the backlogs reduced.

Tier 1—Emergency Listing Actions

Once the moratorium is lifted, the Service will immediately process emergency listings for species that face an imminent risk of extinction under the emergency listing provisions of section 4(b)(7) of the Act and will prepare a proposed listing immediately upon learning of the need to emergency list. This provision will also apply to any petitioned species for which the Service deems an emergency situation exists.

Tier 2—Processing Final Decisions on Proposed Listings (Applies After the Moratorium is Lifted)

In issuing the outstanding proposed listings, the Service deemed that the vast majority of the proposed species faced high-magnitude threats. The Service believes that focusing efforts on making final decisions relative to these proposed species will provide maximum conservation benefits to those species that are in greatest need of the Act's protections.

Tier 3—Processing New Proposed Listings for Species Facing High-Magnitude Threats (Listing Priority Numbers 1 through 6) and Initial Screening of Petitions

While the backlog of candidate species has been reduced substantially since 1992, the Service has determined that 182 species warrant issuance of proposed listings. The Act directs the Service to make ''expeditious progress'' in adding new species to the lists and thereby necessitates steady work in reducing the number of outstanding candidate species. Issuance of new proposed listings is the first formal step in the regulatory process for listing a species. Many candidate species face high-magnitude threats and the need to start the regulatory process justifies placement of this activity in Tier 3.

The Service will conduct a preliminary review of any petition to list a species or change a threatened species to endangered status to determine if an emergency situation exists or if the species would probably be assigned a high listing priority upon completion of a status review. If the initial screening indicates an emergency situation the action will be elevated to Tier 1. If the initial screening indicates a species that probably faces high-magnitude threats, processing of the petition will be assigned to Tier 3.

Tier 4—Processing new Proposed Rules for Species Facing Moderate- or Low-Magnitude Threats; Processing Administrative Findings on Petitions not Assigned to Tiers 1 or 3; and Processing Final Decisions on Proposed Delistings or Reclassifications

Processing of new proposed rules for species facing moderate- or low-magnitude threats would provide less conservation benefit than actions described in Tiers 1 through 3, so the Service is assigning this activity to Tier 4.

Administrative findings for petitions that are not assigned to Tiers 1 or 3 after initial screening will be processed as a Tier 4 priority but only to the extent that such action does not substantially deter from the Service's ability to deal with the backlog of proposed listings.

Processing of final decisions for previously proposed delistings and reclassifications provides relief from unnecessary regulations. The Service believes that providing such regulatory relief is an appropriate Tier 4 activity.

Tier 5— Processing Critical Habitat Determinations and Processing new Proposed Delistings or Reclassifications

Designation of critical habitat consumes large amounts of the Service's listing appropriation and generally provides only limited conservation benefits beyond those achieved when a species is listed as endangered or threatened. Because critical habitat protections are restricted to Federal actions, situations where designating critical habitat provides additional protection beyond the protections included in section 7 are rare. It is critical during this interim period to maximize the conservation benefit of every dollar spent in the listing activity. The small amount of additional protection that is gained by designating critical habitat for species that are already on the lists is greatly outweighed by providing the protections included in sections 7 and 9 to newly-listed species. Therefore, the Service will place higher priority on

addressing species that presently have no protection under the Act rather than devoting limited resources to the expensive process of designating critical habitat for species already protected by the Act.

Issuing new proposed delistings and downlistings can provide regulatory relief but will be accorded Tier 5 priority due to limited listing resources and the fact that such actions will not become effective in the immediate future.

Setting Priorities Within Tier 2

Most of the outstanding proposed listings deal with species that face high-magnitude threats, such that additional guidance is needed to clarify the relative priorities within Tier 2. Proposed rules dealing with taxa deemed to face imminent, high-magnitude threats will have the highest priority within Tier 2. The Service will promptly review the backlog of 243 proposed species and each Region will reevaluate the immediacy and magnitude of threats facing all species that have been proposed for listing and revise the species' listing priority assignments accordingly. Those with the highest listing priority will be processed first.

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

Due to unresolved questions or to the length of time since proposal, the Service may determine that additional public comment or hearings are necessary before issuing a final decision for Tier 2 actions. Proposed listings for species facing high-magnitude threats that can be quickly completed (based on factors such as few public comments to address or final decisions that were almost complete prior to the moratorium) will 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 should be processed first.

Notifying the Courts on Matters in Litigation

The Service will assess the status and the relative priority of all section 4 petition and rule-making activities that are the subject of active litigation using this interim guidance and the 1983 listing priority guidelines. The Service, through the Office of the Solicitor, will then notify the Justice Department of its priority determination and request that appropriate relief be requested from each district court to allow those species with the highest biological priority to be addressed first. The Service will provide periodic updates to each district court on the progress that it is making in addressing high priority proposed and candidate species. However, to the extent that these efforts to uphold the Service's interim priority guidance and the 1983 listing priority guidelines do not receive deference in the Courts, the Service will need to comply with court orders despite any conservation disruption that may result.

The Service will not elevate the priority of proposed listings for species under active litigation. To do so would let litigants, rather than expert biological judgments, control the setting of listing priorities. The Regional Office with responsibility for processing such packages will need to determine the relative priority of such cases based upon this guidance and the 1983 listing priority guidelines and furnish supporting documentation that can be submitted to the relevant Court to indicate where such species fall in the overall priority scheme.

Public Comments Solicited

The Service intends that any action resulting from this guidance be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, commercial trade entities, or any other interested party concerning any aspect of this guidance are hereby solicited. While the guidance will be used immediately, the Service will take into consideration the comments and any additional information received. Such communications may lead to the adoption of additional or revised guidance that differs from this interim guidance.

Authority

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

Dated: March 1, 1996.

John G. Rogers,

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

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