

offerors to be selected for phase-two must not exceed 5 unless the contracting officer determines that specifying a number greater than 5 is in the Government's interest and is consistent with the purpose and objectives of the two-phase selection process. For phase-two the solicitation should identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the lease and state the relative importance the Government places on those evaluation factors and subfactors and otherwise comply with paragraph (a)(7)(i) of this section.

* * * * *

Dated: May 10, 1996.

Ida M. Ustad,

Deputy Associate Administrator for Acquisition Policy.

[FR Doc. 96-12198 Filed 5-15-96; 8:45 am]

BILLING CODE 6820-61-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1330

[STB Ex Parte No. 547]

Removal of Obsolete Regulations Concerning Filing Quotations for Government Shipments

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (the Board) is removing from the Code of Federal Regulations obsolete regulations concerning the filing of rate quotations for government shipments.

EFFECTIVE DATE: January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927-7513. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: Effective January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA) abolished the Interstate Commerce Commission (ICC) and established the Board within the Department of Transportation. Section 204(a) of ICCTA provides that "[t]he Board shall promptly rescind all regulations established by the [ICC] that are based on provisions of law repealed and not substantively reenacted by this Act."

Former 49 U.S.C. 10721(b)(1) expressly provided that a common carrier could provide transportation for the United States government without

charge or at a reduced rate.¹ That provision is retained in new 49 U.S.C. 10721 (rail transportation), 15712 (transportation by motor or water carriage and freight forwarders), and 15504 (pipeline transportation). However, the ICCTA removed the requirement of former 49 U.S.C. 10721(b)(2) that common carriers generally file copies of rate quotations or tenders with both the ICC and the department, agency or instrumentality of the United States government for which they were made. Therefore, the ICC regulations to implement the quotation filing requirement, which were codified in part 1330 at 43 FR 59844 (December 22, 1978),² have been rendered obsolete. Because the statutory basis for the part 1330 regulations has been removed, we are eliminating those rules.

Because this action merely reflects, and is required by, the enactment of the ICCTA and will not have an adverse effect on the interests of any person, this action will be deemed to be effective as of January 1, 1996.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1330

Freight, Government procurement, Motor carriers, Moving of household goods, Pipelines, Railroads.

Decided: May 2, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams,
Secretary.

PART 1330—[REMOVED]

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 721(a), title 49, chapter X of the Code of Federal Regulations is amended by removing part 1330.

[FR Doc. 96-12280 Filed 5-15-96; 8:45 am]

BILLING CODE 4915-00-P

¹ Former section 10721 recodified section 22 of the Interstate Commerce Act. Section 22 allowed common carriers to depart from their tariffs in providing service to the government.

² The regulations were later modified to exempt nonagricultural rail rate quotations from the filing requirements. *Railroad Exempt.—Filing Quotations—Section 10721*, 7 I.C.C.2d 325 (1991).

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of listing priority guidance.

SUMMARY: On March 11, 1996, the Fish and Wildlife Service (Service) published a notice in the Federal Register describing interim guidance for setting priorities in the listing program and solicited public comments. The Service took this action in anticipation of receiving a limited amount of funds to resume listing activities. Having received a limited appropriation of listing funds for the remainder of fiscal year 1996, the Service announces final listing priorities that will govern the expenditure of the available funds for the remainder of the fiscal year.

DATES: This guidance takes effect May 16, 1996 and will remain in effect until September 30, 1996, unless extended by further notice.

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

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

SUPPLEMENTARY INFORMATION:

Background

Moratorium and Funding Constraints

Over the past thirteen months, the Service's Endangered Species listing program, which operates under the authority of section 4 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), has been sharply curtailed by a variety of legislative and funding restrictions. Public Law 104-6, which took effect April 10, 1995, rescinded \$1.5 million from the Service's then-current listing appropriation of \$7.999 million and also stipulated that the remaining listing funds could not be used to make final listing or critical habitat designations. The net effect of Pub. L. 104-6 has been that no new species have been added to the lists of endangered and threatened

wildlife and plants in more than a year and as a result, a backlog of 243 proposed listings has accrued.

From October 1, 1995, until April 26, 1996, the Department of the Interior operated without a regularly enacted, full-year appropriations bill. Instead, funding for most of the Department's programs, including the endangered species listing program, was governed by the terms of a series of thirteen "continuing resolutions" (CRs). The details of these are complex, and are summarized in what follows. Their net effect was essentially to shut down the listing program.

The CR for the period October 1, 1995, through November 13, 1995, continued the moratorium on final listings and critical habitat designations from the April 10, 1995, enactment. The listing program was funded at a level equal to 95% of the average of the funding for these activities provided in the appropriate appropriations bills then pending before the House and Senate. For listing activities, the House bill provided zero funds. The Senate bill provided only a token amount (\$750,000) for the entire fiscal year. Averaging these two, and apportioning 95% of the average across the six weeks the CR was in effect meant that only \$43,000 was available during this time period.

The Acting Director of the Service issued guidance on October 13, 1995, describing the activities on which these funds could be spent—(1) completion of any comment periods and public hearings for pending proposals; (2) completion of pending petition findings; and (3) processing of any delistings or reclassifications that were in the Washington Office awaiting approval. In the same memorandum the Director also ordered each Regional Director to begin the orderly transfer of listing personnel into other activities that were likely to be funded during fiscal year 1996. This step was necessary because all indications were that Congress would further restrict the listing budget, which could have resulted in reductions in force. The resulting loss of institutional and scientific expertise would have crippled the listing program.

The listing program had to be shut down completely upon expiration of the first continuing resolution. The CR in effect from mid-November through December 15 provided no funds to the listing program and also continued the moratorium provisions of Pub. L. 104-6. Therefore, on November 22, 1995, the Director ordered the reassignment of all listing staff to other duties until funds for these activities were restored. Similar constraints applied during the

governmental shutdown and the CRs in effect from December 16, 1995, through January 26, 1996.

The CR that governed the period January 27 through March 15, 1996, provided that funds would be available for the listing program based on the rate established in the House-Senate conference report the Department of the Interior's fiscal year 1996 Appropriations Act (Section 126 of Pub. L. 104-99). This report included an annual rate of \$750,000 for listing activities and continued the moratorium. At an annual rate of \$750,000, about \$100,000 were available for listing activities during the period of this CR.

Short-term CRs covered the periods March 16-22, March 23-29, March 30-April 24, and April 24-26, 1996. These CRs continued the moratorium on final listings and critical habitat designations, and altogether provided the Service with very limited funding (\$90,000) during this period.

These very limited funds were quickly expended in paying for Federal Register publication charges for a variety of listing documents that were in the Washington Office awaiting publication (e.g., Vertebrate Population Policy, miscellaneous petition findings, and delistings or reclassifications) and providing biological information to the district courts.

On April 26, 1996, the appropriation for the Department of the Interior for the remainder of fiscal year 1996 was finally enacted into law. It provides approximately \$4 million for the Service's listing program over the entire fiscal year. The Service had already expended \$233,000 of the appropriation, leaving \$3,767,000 for the remainder of fiscal year 1996. This act also extends the moratorium on expenditure of funds for final decisions on listings and critical habitat designations, but it also empowered the President to waive the moratorium provisions. The President issued a waiver of these provisions on April 26, 1996, shortly after signing the Omnibus Budget Reconciliation law.

Significant obstacles remain as the Service restarts its listing program. The available funds fall far short of what is needed to clear away the backlog that has built up. Currently the Service faces a backlog of 243 proposed species, a far larger backlog than has existed in recent times. This poses a particularly difficult problem for the Service in light of the other Section 4 activities that require attention such as resolving the conservation status of 182 candidate species (see 61 FR 7596; February 28, 1996); addressing pending court orders;

and resolving petitions for 57 species. This highly irregular situation demands that the Service establish biologically defensible work priorities to guide expenditures of the limited listing appropriations in a manner that best serves the purposes of the Act.

The Service is aware that the Department of Commerce and the National Marine Fisheries Service (NMFS) have also faced a highly irregular funding situation in fiscal year 1996 and may have different priorities with respect to restarting their section 4 listing program. This guidance and its priorities are not intended in any way to affect the interpretation of the Act, the Secretary of Commerce's and NMFS' decisions regarding implementation of the Act, Commerce's and NMFS' budget priorities or Commerce's and NMFS' administration of its section 4 listing program. This guidance is intended only to reflect the implementation difficulties faced by the Department of the Interior and the Service, and not those of other agencies or Departments.

Principles for Restarting the Listing Program

The primary purposes of the Endangered Species Act are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

16 U.S.C. 1531(b). It is long-standing Service policy that highest priority be given to those species believed to face the greatest threat of extinction. It is especially important to continue this policy with the current financial constraints. In carrying out that policy, four basic principles will govern the Service's implementation of the listing process as the listing program is restarted:

(1) Highest priority will be given to protecting species most in need, based on the priorities established by the listing priority guidance finalized in this notice and the 1983 Listing Priority Guidelines (48 FR 43098-43103; September 21, 1983);

(2) Biological need, not the preferences of litigants, should drive the listing process. The Service will work closely with the Department of Justice to defend its priority system in those cases where plaintiffs, in pending or new cases, request actions that would cause the Service to diverge from the principles discussed here, and therefore,

in the judgment of the Service, would divert resources from providing prompt protection to those species the Service believes to be in greatest need of the protections of the Endangered Species Act;

(3) Sound science, including peer review, will form the foundation of each and every listing action; and

(4) Public comment and participation in the petition and rulemaking processes will be enhanced to ensure that the States, other Federal agencies, and the affected public are provided with complete explanations of the action and are provided every opportunity to provide comments or information. All comments received will be carefully evaluated and responded to.

Actions Required To Restart the Listing Program

The resumption of an effective listing program will require a variety of actions. First, the budget interruptions described above required the Service to reassign all personnel funded through the listing program to other activities from mid-November 1995 through April 26, 1996. Many of the listing biologists are in the process of being returned to their regular duties. The tasks that these biologists have been working on during the listing shutdown will require a period of orderly shutdown or transfer. The Service estimates that it may require as much as 45 days to fully reengage all listing personnel. Where vacancies exist, steps are being taken to fill them.

As staff come back to the program, all listing packages will be reviewed as quickly as possible to determine their priority placement according to the listing priority guidance reconfirmed here.

Upon completion of this initial stage, the next step will be determined by the facts involved in each package. The packages are in various states of completeness, both as to substance and to process. Some merely require a final review to ensure that they accurately reflect the current situation, while others will require extensive revision because the biological situation may have changed since the proposal was issued. Still other proposals were issued shortly before the funding interruption, so that requests for public hearings or to extend the comment periods could not be acted upon. As a result of this variety, final determinations on the pending proposed listings will move through the system at very different rates. Those that still require addressing public comments will take considerably

more time to bring to the stage of final decision.

The \$4 million currently appropriated is substantially less than what is needed to eliminate the current backlog of 243 proposed species. Because the facts involved in each final listing determination can vary widely, it is impossible to generate meaningful "average" costs for each listing activity. Processing a proposed final listing may take only a few thousand dollars if basically all steps except final approval and Federal Register publication are completed. But processing may take many thousands of dollars if additional comment and responses or public hearings are required. The economic analyses required for critical habitat designations, for example, may require substantial dollars as well as time.

Following completion of work by the Field Office, draft recommendations on each package will be sent to the Regional Office for policy review and, if appropriate, concurrence. Depending on the remaining steps that must be completed, the above described steps may take from 30–120 days.

Following approval by the Regional Office, the draft recommendations will be sent to the Washington Office for technical and policy review and approval by the Director. Including a brief review by the Department's Office of Regulatory Affairs, review time in the Washington Office may require 30 to 60 days, especially if changes are necessary. Rules with critical habitat also require review by the Office of Management and Budget and will take additional time to complete.

Pending Litigation

The Service is presently involved in numerous cases in federal court that involve proposed and final listings, petition findings, and critical habitat designations. As of April 1, 1996, approximately 60 separate civil suits directed at the process of listing species under the Act were pending against Federal officials or agencies. As of April 1, 1996, the Secretary of the Interior had received approximately 300 Notices of Intent to Sue (required under the Act before suit may be filed (see 16 U.S.C. § 1540(g))), on which litigation has not yet been, but could be filed at any time. Many of these Notices of Intent deal with the listing process.

During the moratorium on final listings and critical habitat designation that was in effect for nearly thirteen months, the courts generally agreed with the Service that it could not legally act to meet deadlines without a lawful source of funds. See, e.g., *Environmental Defense Center v.*

Babbitt, 73 F.3d 867 (9th Cir. 1995). Now that the moratorium is no longer in effect, and funds, albeit limited, are available for this task, the Service must decide how to best spend these funds to carry out the purposes of the Act. The press of pending and threatened new litigation could complicate this task immensely.

This pending and threatened litigation presents many competing and conflicting claims, and in the current budgetary situation translates into expensive demands on inadequate resources. Actions requested by plaintiffs cover the entire spectrum of listing activities, from petitions to add species to the list to requests to overturn existing listings. Taken collectively, these pending and potential cases seek different and sometimes diametrically opposed results.

Defending existing and any new lawsuits can divert considerable resources away from the Service's efforts to conserve endangered species. When the Service undertakes one listing activity, it inevitably forgoes another. In some cases courts have ordered the Service to complete activities that are simply not, in the Service's expert judgment, among the highest biological priorities.

Development and Publication of Interim Listing Priority Guidance and Its Relationship to the 1983 Priority Guidance

In 1983 the Service adopted guidelines to govern the assignment of priorities to species under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act (48 FR 43098–43105; September 21, 1983). The purpose of those guidelines was 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 1983 guidelines do not establish priorities among different types of listing activities, which include processing pending proposed listings, new proposed listings, delistings or reclassifications, petition findings, and critical habitat determinations. The backlog of proposed species created by the moratorium and the recent funding

constraints prompted the Service to establish priorities among the various listing activities.

Accordingly, earlier this spring, in anticipation of facing a possible lifting of the moratorium on final listings and critical habitat designations but with only limited funds available to clear away the large backlog of proposed species that had built up in the interim, the Service published interim listing priority guidance in the March 11, 1996 edition of the Federal Register (61 FR 9651-9653) and solicited public comment on that guidance. Summaries of the interim guidance and all comments received, and responses to the comments, are included in the following sections.

The 1983 guidelines properly set priorities for the Service, under a fully-funded Section 4 program, for making expeditious progress in adding species to the Lists of Endangered and Threatened Wildlife and Plants. They are not, however, sufficient to deal with the present backlog of proposed species. The Service developed the Interim Listing Priority Guidance, which in a slightly modified form is now republished as final guidance, to provide a means to reconcile these competing and conflicting demands in a biologically effective and efficient way to best carry out the purposes of the Act. Specifically, after careful deliberation, the Service has decided that, in order to focus conservation benefits on those species in greatest need, processing final determinations relative to the pending proposed listings should receive higher priority than other actions required by section 4 (such as petition findings, new proposed listings, reclassifications or delistings, and critical habitat determinations). Publication of the priority guidance is intended to explain to the public (including litigants and reviewing courts) precisely how the Service believes it should use its limited listing appropriations to maximum effect to carry out the purposes of the Act.

The Department of Justice and the Department of the Interior Solicitor's Office will generally ask litigants and the courts to defer to this listing priority system. Near the end of fiscal year 1996, the Service will review the extent of the remaining listing backlog and the fiscal year 1997 budget situation to determine if an extension of this guidance is necessary. For the reasons set out in the preamble of the notice, the Service finds that good cause exists under 5 U.S.C. 553(d) to make this guidance effective upon the date of publication in the Federal Register.

Summary of Interim Listing Priority Guidance

The main principle underlying the listing priority guidance is to focus the limited listing resources on those actions that will result in the greatest conservation benefit for the species in most urgent need of the Act's protections. Because only listed species receive the full conservation benefits and substantive protections of the Act, and because the vast majority of the proposed species face high-magnitude threats to their continued survival, the Service decided to give highest priority to handling emergency situations and resolving the listing status of the 243 outstanding proposed listings. Highest priority actions were assigned to Tier 1, lowest priority to Tier 5.

Tier 1—Emergency listings. Under section 4(b)(7) of the Act, the Secretary may list a species on an emergency basis (without the usual public notice and comment procedure) if an emergency exists that poses "a significant risk to the well-being of any species of fish or wildlife or plants. * * *" Generally, an emergency listing rule remains in effect for 240 days, during which time the Service typically issues a proposed listing and makes a final determination as to whether final listing is appropriate.

Tier 2—Preparation and processing of final decisions on outstanding proposed listings. Within Tier 2, highest priority will be given to species facing the highest magnitude and most imminent threats. For species with equal listing priority assignments, the following types of actions will receive subsequent priority—listing packages that cover multiple species; listing packages that can be quickly cleared (e.g., those with few public comments or factual questions presented); and proposals that have been pending the longest.

Tier 3—Preparing and processing new proposed listings for species facing high-magnitude threats; and screening petitions for emergency situations.

Tier 4—Preparing and processing proposed listings for species facing moderate- or low-magnitude threats; processing final decisions on pending proposed reclassifications and delistings; preparing and processing administrative findings for petitions.

Tier 5—Preparing and processing critical habitat determinations and preparing or processing new proposed delistings or reclassifications.

Summary of, and Responses to, Comments and Recommendations on the Interim Listing Priority Guidance

Comments on the interim listing priority guidance were received from

the following organizations—BMI Marketing and Marine Services Corp.; Arizona Game & Fish Department; the Marine Industries Association of Florida, Inc.; and Messrs. Eric Glitzenstein, Michael Sherwood, and William Snape, counsel for the plaintiffs in the *Fund for Animals v. Lujan*, Civ. No. 92-800, D.D.C.

The comments from the Arizona Department of Game & Fish expressed general support for the interim priority guidance, but recommended that reclassifications and delistings should receive higher priority, perhaps in Tier 2 of the interim guidance. The Service recognizes the useful regulatory relief that delistings or reclassifications can provide. The priority guidance provides that to the extent such actions have been processed and approved through the Regional offices, these actions will proceed while the subject guidance is in effect. However, generation of new proposed delistings or reclassifications cannot be justified in a time of extreme budget constraints and while there is an extensive backlog of proposed species awaiting final determinations. The Service regrets that the limited appropriations made available, coupled with the backlog of new listings built up by the moratorium, have delayed delistings and reclassifications. The Service has decided to combine all activities that were assigned to Tiers 3, 4, and 5 and place them collectively in a single Tier 3 for reasons explained below.

The Marine Industries Association of Florida, Inc. (MIA) expressed a similar concern about the lower priority of delisting or reclassification actions, responded to above. The MIA also commented that the proposed guidance should not be used to "rush new listings thru" for species that are highly scientifically controversial. In the interim listing priority guidance, the Service noted that additional public comment periods might be necessary before rules can be finalized if there are unresolved questions or new information that must be evaluated. (See 61 Fed. Reg. at 9653, section entitled "Setting Priorities Within Tier 2"). The Service will ensure that sound science, including peer review, forms the foundation for all listing decisions.

Comments submitted by BMI Marketing & Marine Services Corp., cautioned that final decisions on proposed listings should not be rushed, advising the Service to take the same care and procedure as if no time had been lost. The Service agrees with this comment. Each pending proposal will be reviewed to ensure it contains current and accurate information.

Where necessary, public comment periods will be reopened.

The attorneys representing the Fund For Animals (FFA) expressed concern that they were not consulted prior to release of the interim guidance, since it will substantially affect the Service's implementation of a court-ordered settlement agreement with FFA dealing with the processing of species regarded as candidates for listing under the Act. The FFA attorneys also expressed concern that the Service violated section 4(h) of the Act by failing to provide opportunity for public comment prior to enactment of the priority guidance. The FFA attorneys asserted that requiring completion of all final listings before beginning new proposals is contrary to the settlement agreement and inconsistent with sound administration of the Act. The FFA also expressed concern that the Service has erected a series of administrative hurdles that unnecessarily slow the speed at which species can be added to the list.

On the objection to making the interim guidance effective immediately, the Service believes it acted reasonably and responsibly in so doing. More importantly, although the Service found, as stated in the interim guidance (see 61 FR 9651), that good cause existed to make the guidance effective immediately, it nonetheless solicited and received comments from the public, and has taken them into account and responded to them now in confirming the guidance. There was no opportunity to implement the interim guidance anyway, because the listing program was essentially unfunded and the moratorium was not lifted until President Clinton approved a waiver of the moratorium on April 26, 1996.

As discussed above, the limited appropriated funds for listing activities now available are simply not sufficient to allow the Service to meet all of its immediate responsibilities under Section 4 of the Act. Thus the Service must make difficult decisions about how best to allocate the limited funds. In anticipation of this situation, the Service made the interim listing priority guidance effective immediately upon publication on March 11, 1996 since it had no idea when a full year appropriation might be enacted (Congress having enacted several short-term Crs during this period) and the Service wanted to have a plan for dealing with the situation it knew it would face when the moratorium was lifted. Comments received in response to the interim guidance were considered and are addressed in this notice.

Unless extended, the guidance is effective until the end of this fiscal year

on September 30, 1996. Given the magnitude of the backlog and the limited funds available, however, it is highly unlikely that the Service will complete processing of all of the pending proposed listings within that time. Most of the outstanding proposed listings are for species determined to face high-magnitude threats (priority 1-6 under the 1983 listing priority guidelines). Once the backlog of proposed species that face high-magnitude threats has been brought under control, the Service will rescind this guidance and return to a more typical implementation of section 4 that also includes preparation of proposed listings, delistings, and processing of petitions.

The court-approved Settlement Agreement in *Fund for Animals v. Lujan*, Civ. No. 92-800 (GAG) (D.D.C., Dec. 15, 1992) discussed by Glitzenstein *et al.* in their comments illustrates the problem posed by competing resource demands. That agreement requires the Service to resolve the conservation status of 443 candidate species (either by the publication of a proposed listing rule or the publication of a notice stating reasons why listing is not warranted) by September 30, 1996. Resolution of their status would require, for each species, publication of either a proposed listing rule or a notice stating reasons why listing is not warranted. The agreement does not, of its own terms, require final decisions on listings. Therefore, while it in a sense advances the process of formally protecting species, full compliance with the agreement will not bring the full protections of the Act to any species.

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

Despite this progress, the Service is now left with the following dilemma. If it were to continue to expend money on moving candidate species forward to the proposed listing state in order to comply with the settlement agreement, it would deplete the entire \$4 million listing appropriation for fiscal year 1996. Processing of proposed listing rules requires the investment of considerable time and resources. It involves substantial research, status review, coordination with State and local governments and other interested parties, and conducting public hearings and peer review.

If the Service were to devote its entire budget for the remainder of fiscal year

1996 to complying with the *Fund for Animals* Settlement Agreement, the available funds would be insufficient. More important, if the Service were to follow this course, it would be devoting no resources to final listing decisions on the 243 species that have already been proposed for listing. Being so close to receiving the full protection of the Act, these species would remain unprotected under this course of action, while all the Service's efforts in the listing process would be bent toward deciding whether to move candidate species closer to proposed listing, where they receive some limited procedural protection (the section 7 conference requirement, see 16 U.S.C. 1536(a)(4)), but not the full substantive and procedural protections offered by final listing. This course of action would also result in a still larger backlog of proposed species awaiting final action.

Put a little differently, this one court-approved settlement agreement, absent modification, would defeat a primary purpose of lifting the listing moratorium. The Service is recommending, therefore, that the Department of Justice seek appropriate relief from the courts to allow the highest priority proposed species to be processed and, if appropriate, added to the lists of endangered and threatened wildlife and plants, consistent with the provisions of this listing priority guidance.

The FFA also expressed concern that the Service has erected a series of administrative hurdles that unnecessarily slow the speed at which species can be added to the list. This comment does not pertain to the subject matter of this notice, which deals with the relative priority of various listing activities undertaken by the Service, rather than the procedures used to accomplish those activities. Nevertheless, the Service reaffirms it will process decisions on proposed species as expeditiously as possible, consistent with the substantive and procedural requirements of Section 4 of the Act.

The administrative "hurdles" noted by the FFA consist of joint policy statements issued by the National Marine Fisheries Service and the Fish and Wildlife Service on July 1, 1994 (59 FR 34270-34275). Those joint policies are aimed at ensuring that the Act's requirement to use the "best available scientific and commercial data" in the decision-making process on petitions and proposed listing rules, see 16 U.S.C. 1533(b), is met and that appropriate coordination occurs with State conservation agencies and the public.

Final Listing Priority Guidance

The Service has considered all comments and believes that some revision of the interim guidance is appropriate. The Service has decided to assign all activities other than emergency listings and final review of pending proposals to Tier 3. This decision is based on the reality that the fiscal year 1996 appropriation is insufficient to fully dispense with the entire backlog of proposed species, such that the Service is unlikely to undertake any actions below Tier 2 prior to September 30, 1996. The Service adopts the revised listing priority guidance as final guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act, to remain in effect until September 30, 1996, unless extended. This guidance supplements, but does not replace, the current listing priority guidelines (48 FR 43098; September 21, 1983), which are silent on the matter of prioritizing among different types of listing activities. The terms of this guidance are effective only on the listing priorities of the Service. Listing actions under the jurisdiction of the Department of Commerce, National Marine Fisheries Service will be processed according to priorities established by that agency.

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 backlog of proposed species, the backlog of pending petitions, and the list of 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 base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines and the priority guidance in this notice. 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. Given the workload-based allocation, and the fact that the \$4 million is not sufficient to complete final determinations on all pending proposed listings, the Service does not anticipate undertaking any actions in Tier 3 prior to September 30, 1996.

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

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 will be used as applicable. The Service emphasizes that this guidance is effective until September 30, 1996 (unless extended by future notice) and the agency looks forward to returning to a more typical implementation of the Act's listing responsibilities, to concurrently process petition findings; proposed and final listings, reclassifications, or delistings; and critical habitat determinations, after the backlogs have been reduced.

Tier 1—Emergency Listing Actions

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. The Service will screen all petitions and other status information it receives to determine if an emergency situation exists.

Tier 2—Processing Final Decisions on Proposed Listings

In issuing the pending proposed listings, the Service found that the vast majority of the proposed species faced high-magnitude threats. The Service believes that focusing efforts on making final decisions relative to these proposed species will provide maximum conservation benefits to those species that are in greatest need of the Act's protections. Since only emergency or final listings provide substantive protection, the Service is of the strong belief that this activity should take precedence over new proposed listings, reclassifications or delistings, petition findings, and critical habitat designations, which in comparison to

listing, provide limited conservation benefits.

Setting Priorities Within Tier 2

Most of the pending 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.

To further prioritize among the Tier 2 actions, proposed listings that cover multiple species will be processed based on the most urgent listing priority of the component species and multi-species packages will have priority over single-species proposed rules with equal priority unless the Service has reason to believe that the single-species proposal should be processed to avoid possible extinction. Furthermore, in those cases where a proposed listing for a high-priority species also includes other species with lower listing priorities, the listing package will not be disassembled to deal only with the high priority species.

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 some Tier 2 actions. If the listing priorities are equal, proposed listings 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.

Tier 3—All Other Listing Actions, Including Processing Reclassifications and Delistings, New Proposed Listings, Petition Findings, and Critical Habitat Designations

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. However, this step provides only limited conservation benefits and the Service believes that issuance of new proposed listings, even for species facing imminent, high-magnitude threats, should therefore be afforded lower priority so long as a large backlog exists of proposed listings for species facing high-magnitude threats.

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. The historical record on listing petitions reveals that fewer than 25 percent of all petitions are found to warrant listing.

Processing reclassifications and delistings can provide welcome regulatory relief. The Service regrets that such activities must be accorded Tier 3 priority due to the limited appropriations provided by Congress and the need to devote scarce funds to carry out the overall protective purposes of the Act.

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 apply only to Federal actions, situations where designating critical habitat provides additional protection beyond that provided by the jeopardy prohibition of section 7 are rare. It is critical during this period to maximize the conservation benefit of every dollar spent in the listing activity. The relatively small amount of additional protection that is gained by designating critical habitat for species that are already listed 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.

Rules and Findings Currently Near Completion

The Headquarters Office will promptly process any draft final rules to add species to or remove species from the lists, draft proposed listings or delistings, draft petition findings, draft proposed or final critical habitat determinations, and draft withdrawal notices that were in the Washington Office prior to the date of this notice but could not be processed because of the funding constraints or the moratorium. These actions will require little additional work to complete and the Service believes it to be cost-effective to finish up these actions that were inadvertently delayed by the funding constraints. The anticipated number of such actions is fewer than ten.

Notifying the Courts on Matters in Litigation

The Service will assess the relative priority of all section 4 petition and rule-making activities that are the subject of active litigation using this guidance and the 1983 listing priority guidelines. In many cases, simply identifying the tier in which an activity falls will suffice to determine whether the Service will undertake that action during the time this priority guidance is in effect. 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. To the extent that the courts do not defer to the Service's priority guidance and the 1983 listing priority guidelines, the Service will of course comply with court orders despite any conservation disruption that may result.

The Service will not elevate the priority of proposed listings for species simply because they are subjects of 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.

Authority

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

Dated: May 10, 1996.
Mollie Beattie,
Director, Fish and Wildlife Service.
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 658

[I.D. 050896B]

Shrimp Fishery of the Gulf of Mexico; Texas Closure

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

ACTION: Adjustment of the beginning date of the Texas closure.

SUMMARY: NMFS announces an adjustment of the beginning date of the annual closure of the shrimp fishery in the exclusive economic zone (EEZ) off Texas. The closure is normally from May 15 to July 15 each year. This year the closure will begin on June 1, 1996. The Texas closure is intended to prohibit the harvest of brown shrimp during the major period of emigration from Texas estuaries to the Gulf of Mexico so the shrimp may reach a larger, more valuable size and to prevent the waste of brown shrimp that would be discarded in fishing operations because of their small size.

EFFECTIVE DATE: The EEZ off Texas is closed to trawl fishing from 30 minutes after sunset, June 1, 1996, to 30 minutes after sunset, July 15, 1996, unless the latter date is changed through notification in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Michael E. Justen, 813-570-5305.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico shrimp fishery is managed under the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented by regulations at 50 CFR part 658 under the authority of the Magnuson Fishery Conservation and Management Act. The FMP implementing regulations at 50 CFR 658.26 describe the Texas closure and provide for adjustments to the beginning and ending dates by the Director, Southeast Region, NMFS, under specified criteria.

Biological data collected by the Texas Parks and Wildlife Department indicate