

TABLE 1.—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
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[FR Doc. 05-2454 Filed 2-8-05; 8:45 am] <b>BILLING CODE 6560-50-P</b>		
<b>ENVIRONMENTAL PROTECTION AGENCY</b> <b>40 CFR Part 271</b> [FRL-7870-3] <b>South Carolina: Final Authorization of State Hazardous Waste Management Program Revisions</b>  <b>AGENCY:</b> Environmental Protection Agency (EPA). <b>ACTION:</b> Proposed rule.	<p>You can examine copies of the materials submitted by South Carolina during normal business hours at the following locations: EPA Region 4 Library, Atlanta Federal Center, Library, 61 Forsyth Street, SW., Atlanta, Georgia 30303; (404) 562-8190; or South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201, (803) 896-4174.</p> <p><b>FOR FURTHER INFORMATION CONTACT:</b> Thornell Cheeks, South Carolina Authorization Coordinator, RCRA Programs Branch, Waste Management Division, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, GA 30303-3104; (404) 562-8479.</p> <p><b>SUPPLEMENTARY INFORMATION:</b> For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this <b>Federal Register</b>.</p> <p>Dated: January 18, 2004.</p> <p><b>A. Stanley Meiburg,</b> <i>Deputy Regional Administrator, Region 4.</i> [FR Doc. 05-2456 Filed 2-8-05; 8:45 am] <b>BILLING CODE 6560-50-P</b></p>	<p>10 or more years thereafter until a self-sustaining population is established. We propose to designate this reintroduced population as a nonessential experimental population (NEP) according to section 10(j) of the Endangered Species Act of 1973 (Act), as amended. The geographic boundary of the proposed NEP includes all of New Mexico and Arizona. A draft environmental assessment (EA) has been prepared on this proposed action and is available for comment (see <b>ADDRESSES</b> section below).</p> <p>This proposed action is part of a series of reintroductions and other recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the species' historical range. This proposed rule provides a plan for establishing the NEP and provides for limited allowable legal taking of the northern aplomado falcon within the defined NEP area.</p> <p><b>DATES:</b> We will consider all comments on this proposed rule received from interested parties by April 11, 2005. We will also hold one public hearing on this proposed rule; we have scheduled the hearing for March 15, 2005 at 7 p.m. (see <b>ADDRESSES</b> section of this proposed rule for the location).</p> <p><b>ADDRESSES:</b> You may submit comments and other information by any of the following methods (please see "Public Comments Solicited" section below for additional guidance):</p> <ul style="list-style-type: none"> <li>• Mail or Hand Delivery: Field Supervisor, New Mexico Ecological Services Field Office, 2105 Osuna Road NE., Albuquerque, New Mexico 87113.</li> <li>• Fax: (505) 346-2542</li> <li>• E-mail: <a href="mailto:R2FWE_AL@fws.gov">R2FWE_AL@fws.gov</a>.</li> </ul> <p>You may obtain copies of the proposed rule and the draft EA from the above address or by calling (505) 346-2525. The proposed rule and draft EA are also available from our Web site at <a href="http://ifw2es.fws.gov/Library/">http://ifw2es.fws.gov/Library/</a>.</p> <p>The complete file for this proposed rule will be available for public inspection, by appointment, during normal business hours at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113.</p> <p>The public hearing will be held March 15, 2005, at the Corbett Center Student Union, New Mexico State University, Las Cruces, New Mexico, 88003. The Corbett Center Student</p>
<b>DEPARTMENT OF THE INTERIOR</b> <b>Fish and Wildlife Service</b> <b>50 CFR Part 17</b> <b>RIN 1018-AI80</b>  <b>Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Northern Aplomado Falcons in New Mexico and Arizona and Availability of Draft Environmental Assessment</b>  <b>AGENCY:</b> Fish and Wildlife Service, Interior. <b>ACTION:</b> Proposed rule; notice of availability; notice of public hearing.	<p><b>SUMMARY:</b> We, the U.S. Fish and Wildlife Service (Service), propose to reintroduce northern aplomado falcons (<i>Falco femoralis septentrionalis</i>) (falcon) into their historic habitat in southern New Mexico and Arizona with the purpose of establishing a viable resident population. If this proposed rule is finalized, we may release captive-raised falcons as early as the summer of 2005 and release up to 150 additional falcons annually in the summer and/or fall for</p>	

Union is located at the intersection of Jordan Street and University Avenue. The hearing will begin at 7 p.m. and last until 8:45 p.m., with an informal question and answer session beginning at 6 p.m. Parking is located in Lot 27 off of Triviz and University Avenue.

**FOR FURTHER INFORMATION CONTACT:**

Susan MacMullin, Field Supervisor, New Mexico Ecological Services Field Office, telephone (505) 346-2525 (see ADDRESSES above).

**SUPPLEMENTARY INFORMATION:**

**Public Comments Solicited**

We want the final rule to be as effective as possible and the draft EA on the proposed action to evaluate all potential issues associated with this action. Therefore, we invite the public, concerned Tribal and government agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule and the draft EA. Comments should be as specific as possible.

To issue a final rule to implement this proposed action and to determine whether to prepare a finding of no significant impact or an environmental impact statement, we will take into consideration all comments and any additional information we receive. Such communications may lead to a final rule that differs from this proposal. All comments, including names and addresses, will become part of the supporting record.

If you wish to provide comments and/or information, you may submit your comments and materials by any one of several methods (see ADDRESSES section). Comments submitted electronically should be in the body of the e-mail message itself or attached as a text file (ASCII), and should not use special characters or encryption. Please also include "Attn: Falcon Proposed 10(j) Rule," your full name, and your return address in your e-mail message. Our practice is to make comments that we receive on this rulemaking, including names and home addresses of respondents, available for public review during regular business hours.

Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by Federal law. In some circumstances, we may withhold from the rulemaking record a respondent's identity, as allowable by Federal law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous

comments. We will make all submissions from organizations or businesses, including individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

**Background**

1. *Legislative:* Congress made significant changes to the Act in 1982 with addition of section 10(j), which provides for the designation of specific reintroduced populations of listed species as "experimental populations." We have always had the authority to reintroduce populations into unoccupied portions of a listed species' historical range when doing so would foster the conservation and recovery of the species. However, local citizens often opposed these reintroductions because they were concerned about placement of restrictions and prohibitions on Federal and private activities. Under section 10(j) of the Act, the Secretary of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range as "experimental." Based on the best available information, we must determine whether an experimental population is "essential" or "nonessential" to the continued existence of the species. Regulatory restrictions are considerably reduced under a nonessential experimental population (NEP) designation.

Without the "nonessential experimental population" designation, the Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of an endangered species. "Take" is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibition of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical

habitat. Section 7 of the Act does not affect activities undertaken on private lands unless they are authorized, funded, permitted, or carried out by a Federal agency.

For purposes of section 9 of the Act, individual species within a NEP area are treated as threatened regardless of the species' designation elsewhere in its range. Through section 4(d) of the Act, we have greater discretion in developing management programs and special regulations for threatened species than we have for endangered species. Section 4(d) of the Act allows us to adopt whatever regulations are necessary to provide for the conservation of a threatened species. The special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. Regulations issued under section 4(d) for NEPs are usually more compatible with routine human activities in the reintroduction area.

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

Individuals used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. In this case, captively bred birds obtained

from a donor population were propagated with the intention of re-establishing a wild population within the United States to achieve recovery goals.

**2. Biological:** The northern aplomado falcon (hereafter referred to as falcon) is one of three subspecies of the aplomado falcon and the only subspecies recorded in the United States. This subspecies was listed as an endangered species on February 25, 1986 (51 FR 6686). The falcon is classified in the Order Falconiformes, Family Falconidae. Adults have a buffy upper breast with broad, blackish flanks usually extending into a band across the breast; the lower breast and undertail feathers are rufous (red). They have a long blackish tail marked with narrow white bands. Wings are dark above with blackish wing linings and white-edged feathers that form a narrow white line on the trailing edges of the wings. The falcon has a bold black and white facial pattern. Cere (nose area), eye-ring, legs, and feet are bright yellow. Males and females look the same, but males are noticeably smaller than females (Keddy-Hector 2000).

Falcons require open habitats that have scattered trees for hunting, roosting, and nesting and an understory of grass and shrubs. Habitat types include yucca-covered ridges in coastal prairie, riparian woodland in open grassland, palm and oak savannas, deciduous woodland, yucca-mesquite grasslands, and a variety of other open desert grassland and shrub habitats (see review in Keddy-Hector 2000).

Falcons are long-lived monogamous birds that court through a series of aerial displays by the male and mutual soaring and diving by the pair. They do not build their own nests; instead they use abandoned stick nests of other bird species, including other raptor species, crows, and ravens. Falcons are territorial during the breeding season and some pairs remain near and defend nest sites throughout the year. Clutches of two to four eggs are laid between January and July with most clutches initiated in April and May. Both sexes participate in incubation of eggs, and brooding and feeding of young. Young fledge after about 35 days and continue to be fed by their parents for at least another month (Hector 1987). Falcons feed upon medium-sized birds, insects, rodents, bats, and reptiles. Falcon pairs often hunt cooperatively (Keddy-Hector 2000).

Historically, falcons occurred throughout coastal prairie habitat along the southern Gulf coast of Texas, and in savanna and grassland habitat along both sides of the Texas-Mexico border,

southern New Mexico, and southeastern Arizona. Falcons were also present in the Mexican states of Tamaulipas, Veracruz, Chiapas, Campeche, Tabasco, Chihuahua, Coahuila, Sinaloa, Jalisco, Guerrero, Yucatan, and San Luis Potosi, and on the Pacific coast of Guatemala and El Salvador (Keddy-Hector 2000). Falcons were fairly common in suitable habitat throughout these areas until the 1940s, but subsequently declined rapidly with no documented nesting attempts by wild birds in New Mexico between 1952 and 2001. There have been no verified sightings of falcons in Arizona since 1940 (Corman 1992).

A number of factors contributed to the decline of the falcon throughout its range, including pesticide contamination, habitat destruction, habitat modification, and stream channelization that reduced riparian foraging habitat (Hector 1987, Service 1990). Habitat changes brought about through cattle grazing and agricultural practices may have caused some decline in population numbers and distribution. Pesticide exposure was probably the most significant cause of the species extirpation from the United States with the initiation of widespread DDT (dichloro-diphenyl-trichloroethane) use after World War II coinciding with the species disappearance (51 FR 6686, February 25, 1986). Falcons in Mexico in the 1950s were heavily contaminated with DDT residue, and these levels were likely responsible for a 25 percent decrease in eggshell thickness (Kiff *et al.* 1980). Such high residue levels are likely to cause reproductive failure through egg breakage (Service 1990). Currently, the continued pesticide influence, shrub encroachment into Chihuahuan grasslands, low densities of avian prey in some areas, and the increased presence of the great-horned owl (*Bubo virginianus*), which preys upon the falcon, may be limiting recovery of the species.

Sporadic sightings of falcons have occurred in New Mexico with sightings from every decade since the 1970s (Williams 1997). It appears that at least some of these sightings may be juvenile birds that are dispersing from existing populations in the Mexican state of Chihuahua. Any significant natural recolonization of habitats in Arizona and New Mexico would likely take decades, if it occurred at all, because the reproductive rate of the population in Mexico has declined, possibly due to extended drought (Burnham, *et al.*, 2002).

**3. Recovery Efforts:** The recovery plan for the falcon was published in June 1990 (U.S. Fish and Wildlife Service 1990). The recovery plan's short-term

goal was to downlist the falcon from endangered to threatened by achieving a self-sustaining population of 60 breeding pairs in the United States. Although no specific goals have been set for delisting the falcon, the recovery plan outlines six objectives to be implemented to reach the downlisting goal, including "reestablish the falcon in the U.S. and Mexico" (U.S. Fish and Wildlife Service 1990). The establishment of successfully reproducing falcons distributed across their historical range is critical to the recovery of this species. The recovery plan notes that private lands may be needed to fully recover falcons. The approach and techniques we propose to use (see section 5. "Reintroduction Procedures" below) have been successful for other species, including the peregrine falcon (*Falco peregrinus*), California condor (*Gymnogyps californianus*), harpy eagle (*Harpia harpyja*), and Mauritius kestrel (*Falco punctatus*).

Northern aplomado falcon recovery efforts started when 25 nestling falcons were brought into captivity from populations in Veracruz, Tabasco, Campeche, and Chiapas, Mexico, beginning in 1977, and were transferred in 1983 to the Peregrine Fund's facility in Boise, Idaho. Since 1985, falcons have been propagated and reintroduced to southern Texas on and around the Laguna Atascosa National Wildlife Refuge (NWR) and Matagorda Island NWR under a Safe Harbor Agreement with The Peregrine Fund. A released pair nested and fledged one young on Port of Brownsville land in extreme southern Texas in 1995. In 1996, four territorial pairs produced three fledglings in the same vicinity (P. Jenny, The Peregrine Fund, pers. comm., 1996). These reintroduced falcons were the first known successful nestings in the United States since the last recorded nesting near Deming, New Mexico, in 1952 (Ligon 1961).

There are currently 46 pairs in the captive population, which produce over 100 young per year. From this captive population, 1,004 captive-bred falcons have been released in Texas. The Peregrine Fund conducted a pilot release project in Texas during 1985–1989, and increased restoration efforts began in 1993. These releases have established at least 39 pairs in south Texas and adjacent Tamaulipas, Mexico, where no pairs had been recorded since 1942 (Jenny, pers. comm. 2004). Moreover, established pairs began breeding in 1995, and have successfully fledged more than 179 young (Jenny, pers. comm. 2004). Nests were located on a variety of structures both man-

made and natural. Predation from the great-horned owl (*Bubo virginianus*), raccoon (*Procyon lotor*), and coyote (*Canis latrans*) is significant, affecting more than half of all nesting attempts (Jenny 2003).

Beginning in 2002, falcons have been released in west Texas, also under the Safe Harbor Agreement with The Peregrine Fund. One hundred and twenty-five young have been released at four sites on private ranches near Valentine, Texas (Jenny, pers. comm. 2004). In 2003, despite great-horned owl predation, at least 25 young (71 percent) reached independence (Jenny 2003). Nesting productivity increased by approximately 40 percent in 2003 and 2004 when falcons were provided artificial nesting structures with barred sides arranged so that falcons can enter the nest while predators cannot (Jenny, pers. comm. 2004). Pairs of falcons in south Texas successfully fledged young where they had never been successful prior to the use of the new artificial nests (Jenny, pers. comm. 2004).

Releases in Texas have occurred on private property under Safe Harbor Agreement permits (*i.e.*, agreements between a private land owner and the Service which permit future incidental taking of listed species on their private land) with an enrollment of more than 1.4 million acres. Releases have also occurred on Laguna Atascosa, Matagorda Island, and Aransas NWRs in Texas. We believe that it is possible to accelerate the establishment of a breeding population in the Southwest through releases of captive-raised birds. The experience in Texas, where the population went from 0 birds in 1994, to at least 37 pairs that had produced at least 92 young by 2002, illustrates the rapidity with which a population can be established through releases. Despite the relative success of the falcon releases in Texas, we believe the Safe Harbor Agreements used to release falcons in Texas are not the best mechanism for establishing falcons in New Mexico and Arizona. Safe Harbor Agreements can only be developed for private land owners. There is a vast amount of public land in New Mexico and Arizona (about 40 percent in the proposed reintroduction area). Therefore, the public land will be very important for recovery of the falcon in this area. Not only is the public land important because of its high percentage in the NEP area, but it is important because of its habitat characteristics. We believe there is very low probability that falcons will populate lands outside their historic range because their behavioral ecology is not adapted to survival in those habitats. The historic range in the

NEP area is Chihuahuan desert grassland, and public lands make up a higher percentage of the Chihuahuan desert grassland than does private land (Young, K.E. and others, 2002).

In New Mexico, standardized falcon surveys have been conducted annually on Department of Defense land (White Sands Missile Range and Fort Bliss) over the last decade (U.S. Fish and Wildlife Service FO records, Albuquerque, NM). Armendaris Ranch in New Mexico and areas immediately adjacent to known falcon habitat (south of Deming, New Mexico) have been similarly surveyed, and surveys were conducted last year on Gray Ranch in New Mexico (USFWS FO records, Albuquerque, NM). After a 50-year absence, a nesting attempt was documented in Luna County, New Mexico, in the spring of 2001 (Ray Meyer, La Tierra Environmental Services, pers. comm. 2004). In 2002, this pair successfully fledged three chicks (Meyer, pers. comm. 2004). In 2003, only a single female was seen in the area of the 2002 nest (Meyer, pers. comm. 2004). In 2004, a pair of falcons was seen on one monitoring site visit and a single falcon was seen on several other occasions.

We do not consider the 2002 nesting pair and any offspring produced as a population. Based on definitions of "population" used in other experimental population rules (see the November 22, 1994, final rule for reintroduction of gray wolves to Yellowstone National Park (59 FR 60252)), we believe that a determination that a falcon population already exists in a designated area would require a minimum of two successfully-reproducing falcon pairs over multiple years. Biologically, the term "population" is not normally applied to a single pair, and so the few birds in New Mexico could be considered emigrants disconnected from the Chihuahuan population. Also, two, or even three, birds are not considered a self-sustaining population. Self-sustaining populations need a sufficient number of individuals to avoid inbreeding depression and occurrences of chance local extinction; this can range from 50 to 500 breeding individuals, according to minimum viable population theory (Soule, M.E. (ed.) 1987).

**4. Reintroduction Sites:** Falcons historically occurred in Chihuahuan desert grasslands within the proposed NEP area, and habitats in the release areas are similar to those that support nesting falcons in northern Mexico populations. Primary considerations for identifying falcon release sites include

areas: (1) Within or in proximity to potentially suitable habitat, including open grassland habitats that have scattered trees/shrubs/yucca for nesting and perching; (2) supporting available prey (*i.e.*, insects, small to medium-sized birds, and rodents) to support falcons; (3) with minimal natural and man-made hazards (*i.e.*, predators, open-water tanks) and potential hazards should be addressed and minimized where practical; (4) with access for logistical support; (5) with sufficient potentially suitable habitat surrounding a potential release site and its proximity to other similar habitats; and (6) with a willing landowner or land manager.

While the NEP area will include both Arizona and New Mexico, release sites will only be on lands within New Mexico. Release sites within the proposed NEP area shall be selected to increase the distribution of the population and its rate of growth. Selection will be based upon suitability and extent of available habitat, as well as any dispersal patterns from prior releases. Released falcons are expected to move around within the areas of their release, but may disperse to more distant areas. The 10(j) designation and supporting 4(d) rule cover both private and public lands in New Mexico and Arizona, so Safe Harbor Agreements will not be necessary with private landowners. If finalized, incidental take will be authorized through this rule.

**5. Reintroduction Procedures:** The rearing and release techniques to be used in establishing this NEP have proven successful in establishing a wild population of falcons in southern Texas. Falcons will be raised in The Peregrine Fund's captive propagation facility in Boise, Idaho. Newly hatched falcon chicks are fed by hand in sibling groups for up to 25 days. They are then raised in sibling groups with minimal human exposure until their transportation to a release site at 32–37 days of age. Falcons are then shipped by air between Boise and the release locations, and driven to the release site (hack site). At the release site, the falcons are placed in a protective box on top of a conspicuous tower and fed for 7 to 10 days. The box is then left open and falcons are allowed to come and go freely. Food is provided on the tower and, initially, the falcons return each day to feed. Eventually the falcons begin chasing prey, making their own kills, and spending more and more time away from the hack site. A falcon is considered to be "successfully released" when it is no longer dependent on food provided at the release site. This process generally takes from 3 to 6 weeks (Jenny 2003). The hack site attendants will evaluate the

progress of the released falcons. The release process can be extended to ensure a successful release or a bird may be returned to the propagation facility in Boise if it does not attain independence.

Falcons will be released in groups of 5 to 7 similarly-aged nestlings with the total annual release not to exceed 150 birds. Within a single year, multiple releases may occur at a single release site. Allowing multiple releases from a single site increases chances of establishing breeding pairs and also allows released birds to learn from independent birds that are already established on the site. Juvenile falcons are reasonably gregarious and problems of aggression at release sites in southern Texas have not generally developed until adult pairs become established. The Service believes that the techniques described above, and implemented successfully in southern Texas, will also be successful in New Mexico. We anticipate releasing falcons for 10 or more years.

**6. Status of Reintroduced Population:** We propose this reintroduced population to be nonessential to the continued existence of the species according to the provisions of section 10(j) of the Act. We have concluded that this experimental population is nonessential to the continued existence of the falcon for the following reasons:

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

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

We fully expect that the proposed NEP will result in the establishment of a self-sustaining, resident population, which will contribute to the recovery of the species. We expect this reintroduction to be compatible with current or planned human activities in the release area. There have been no reported conflicts between human activities and falcons in Texas, where 1,004 falcons have been released over the course of 18 years (Jenny, pers.

comm. 2004). If the actions carried forward as a result of this proposed rule fail to demonstrate sufficient success toward recovery, as determined by the Service, then the Service, in coordination with other Federal land managers, the States of Arizona and New Mexico, and private collaborators, would reevaluate management strategies.

Although uncertainties regarding the reintroduction of the proposed NEP exist, the success of the southern Texas reintroduction suggests that this effort will succeed. Based on that experience, we have good reason to believe that appropriately managed captive-reared birds are suitable for release into the wild and can survive and successfully reproduce. Although prey-base biomass (g/ha) may be lower throughout the proposed NEP area than in south Texas, prey-base biomass (g/ha) in the proposed NEP area is similar to occupied habitat in Chihuahua, Mexico, where the falcons consume primarily birds (Truett 2002). Further, the establishment of a third, wild, self-sustaining population provides further assurances that the species will survive in the United States. For example, if the Texas population was significantly affected by catastrophic events such as a Gulf coast hurricane, the NEP in New Mexico would provide a buffer for the species in the wild while the Texas population recovered.

**7. Location of Reintroduced Population:** Section 10(j) of the Act requires that an experimental population be geographically separate from other populations of the same species. The proposed NEP area covers all of New Mexico and Arizona, with the expectation that falcons would only persist within the Chihuahuan Desert, which extends north from Mexico into southern Texas, southern New Mexico and southeast Arizona. The NEP area is geographically isolated from existing falcon populations in Mexico and Texas by a sufficient distance to preclude significant contact between populations. Although no falcons have been documented in Arizona since the 1940s, sporadic falcon sightings have occurred in New Mexico. Most recently, breeding was documented in Luna County, New Mexico, in 2001 and 2002 (Meyer, pers. comm. 2003). However, we do not believe the presence of these falcons meets a minimal definition of a population as stated in section 3 "Recovery Efforts" above.

It is difficult to predict where individual falcons may disperse following release within the proposed NEP area. A 70-day old male falcon dispersed 136 kilometers (km) (84.5

miles (mi)) from a hack site in Texas (Perez *et al.* 1996), and a falcon banded in Chihuahua, Mexico, was observed 250 km (155 mi) north in New Mexico (A. Montoya, The Peregrine Fund, pers. comm.). Perez *et al.* (1996) placed radio transmitters on 14 falcons in Texas and found home range size varied from 36–281 square km (km<sup>2</sup>) (14–108.5 square mi). Designation of a large NEP area around planned release sites allows for the possible occurrence of falcons in a large geographic area. Any falcon found within the NEP area will be considered part of the experimental population.

It is possible that some captive-bred falcons from Texas, or their progeny, could disperse into the NEP. Under the proposed rule, any falcon within the NEP shall be treated as a part of the NEP. Such treatment affords birds originating from Safe Harbor releases in Texas essentially the same treatment as they receive when on Safe Harbor properties (*i.e.*, unknowing take would not be prosecuted), and is generally consistent with the Service's June 17, 1999, Safe Harbor Policy to "use the maximum flexibility allowed under the Act in addressing neighboring properties under Safe Harbor Agreements" (64 FR 32717).

**8. Management:** (a) **Monitoring:** The Service is developing a monitoring plan, and it will be finalized prior to publishing a final rule. It will be available from the Service (see **ADDRESSES** section). The Service, The Peregrine Fund, Turner Endangered Species Fund, and other cooperators will monitor the success of the release program in New Mexico. Falcons will be observed daily before they are released. Facilities for release of the birds will be modeled after facilities used for falcons in Texas. Information on survival of released birds, movements, behavior, reproductive success, and causes of any losses, will be gathered during the duration of the proposed program. Program progress will be summarized and reported annually at stakeholder meetings. We plan to evaluate the progress of the program every 5 years. Telemetry may be used to monitor falcon movements. Blood samples may be taken to monitor contaminant levels.

(b) **Disease:** The Peregrine Fund has raised aplomado falcons since 1977. In 1996, a novel systemic adenovirus killed 57 chicks. The outbreak was controlled and transmission arrested. Maintenance and hygiene at the Boise, Idaho, captive rearing facility is more than sufficient to prevent and/or contain a similar outbreak (B. Rideout, Head of Pathology, Center for Reproduction of Endangered Species, San Diego

Zoological Society, San Diego, California, pers. comm. 2003).

(c) *Genetics*: The captive flock is managed to maintain and maximize genetic diversity (The Peregrine Fund Operation Reports, 1993–2003).

(d) *Mortality*: The Act defines “incidental take” as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as military training, livestock grazing, recreation, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. A person may take a falcon within the proposed NEP area provided that the take is unintentional and was not due to negligent conduct. Unintentional take will be considered “incidental take,” and will be authorized under the proposed rule. We expect levels of incidental take to be low since the reintroduction is compatible with existing land use practices for the area.

When we have evidence of knowing (*i.e.*, intentional) take of a falcon, we will refer matters to the appropriate authorities for investigation. Knowing, or intentional take, refers to actions such as shooting, purposeful destruction of active nests, or harassment of falcons from active nests for purposes other than those described in section (e) “Special Handling” below. Any take of a falcon, whether incidental or not, must be reported to the local Service Field Supervisor (see **ADDRESSES** section).

(e) *Special Handling*: The Service, New Mexico Department of Game and Fish (NMDGF) and Arizona Game and Fish Department (AGFD) employees, and their agents (including employees and agents of The Peregrine Fund) are authorized, when permitted by the Service (50 CFR parts 13, 21, and 17.32), to: (1) Relocate falcons to avoid conflict with human activities; (2) relocate falcons that have moved outside the proposed NEP area when removal is necessary or requested; (3) relocate falcons within the proposed NEP area to improve survival and recovery prospects; (4) aid animals that are sick, injured, or otherwise in need of special care; and (5) monitor and band falcons. Employees of the Service, in consultation with NMDGF and AGFD employees and their agents (including employees and agents of The Peregrine Fund), can determine if a falcon is unfit to remain in the wild and should be returned to captivity, and are authorized by permit (as above) to salvage dead falcons. When falcons are handled, blood may be taken for physiological, environmental contaminant, and/or genetic analysis.

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

(g) *Potential for Conflict with Military, Industrial, Agricultural and Recreational Activities*: We do not expect conflicts between falcon management and agricultural, oil and gas development, military, or recreational activities. These activities on private or military lands within the proposed NEP area will continue without additional restrictions during implementation of the falcon reintroduction activities. With proper management, we do not expect adverse impacts to falcons from agricultural, oil and gas development, military, or recreational activities in the proposed NEP area. If proposed agricultural, oil and gas development, military, or recreational activities may affect the falcon’s prey base within release areas, State, Tribal, and/or Federal biologists can determine whether falcons could be impacted and, if necessary, work with the other agencies and stakeholders in an attempt to avoid such impacts. If private activities impede the establishment of falcons, we will work closely with the State, Tribe, and/or landowners to suggest alternative procedures to minimize conflicts. The States of Arizona and New Mexico are not directed by this proposed rule to take any specific actions to provide any special protective measures, nor are they prevented from imposing restrictions under State law, such as protective designations and area closures. Neither of the States within the proposed NEP area, both of which are participants in the northern aplomado falcon working group, has indicated that they would propose hunting restrictions or closures related to game species because of the falcon reintroduction. There have been no reported conflicts between human activities and falcons in Texas, where 1,004 falcons have been released over

the course of 18 years (Jenny, pers. comm. 2004).

Overall, the presence of falcons is not expected to result in restrictions or constraints on the hunting of wildlife or to affect economic benefits that landowners might receive from hunting leases. The action will not affect the establishment of future hunting seasons or conservation actions approved for other migratory bird species. There will be no federally mandated hunting area or season closures or season modifications resulting from the establishment of the NEP. Conflicts with upland bird hunting in the release area are not anticipated since neither of the States within the proposed NEP area has indicated that they would propose hunting restrictions or closures related to game species because of the falcon reintroduction.

The principal activities on private property near the initial release areas are agriculture and recreation. We do not believe that use of these private properties by falcons will preclude such private uses because these activities and the falcon’s needs do not conflict with each other.

Released falcons might wander into other parts of the proposed NEP area or even outside the NEP area. We believe the frequency of movements outside the proposed NEP area is likely to be very low based on the experience with falcon reintroduction in Texas (Burnham, *et al.* 2002). Any falcons outside the proposed NEP area will be considered endangered under the Act. Any falcons that occur within the proposed NEP area will be considered part of the proposed NEP and will be subject to the protective measures in place for the proposed NEP. The decreased level of protections afforded to falcons that cross into the proposed NEP is not expected to have any significant adverse impacts to the wild population, since we do not anticipate this to occur very often.

(h) *Protection of Falcons*: We will release falcons in a manner that provides short-term protection from natural predators, and human-related sources of mortality. Improved release methods, and discouraging predators, should help reduce natural mortality. Releasing falcons in areas with little human activity and development will minimize human-related sources of mortality. Should causes of mortality be identified, we will work with the State, Tribe, and/or landowners to correct the problem.(h)

(i) *Potential for Conflict with Natural Recolonization of Falcons*: Natural, *i.e.*, unaided, falcon recolonization of New Mexico and Arizona would be dependent on dispersing falcons from

Mexico, Texas, or possibly unknown nesting pairs within the United States. We do not consider the unaided recolonization of falcons in the proposed NEP area a likely occurrence for a number of reasons. The half-century absence of falcons in Arizona and New Mexico suggests that the Chihuahua, Mexico, falcon population cannot recolonize New Mexico and Arizona with sufficient numbers to establish a population. The low fledging success in Chihuahua, and stable or declining breeding numbers there since observations first began in 1992 (Montoya *et al.* 1997), suggest that birds in this area are not likely to provide enough dispersers to populate New Mexico. We do not consider the presence of the documented 2001 and 2002 breeding pair in Luna County to represent a population. Although there may be occasional falcon dispersal movements from Mexico to New Mexico, we do not believe this will lead to the establishment of a viable population within New Mexico. Given the lack of a falcon population in the action area, and the low probability that falcons from Chihuahua, Mexico, can recolonize New Mexico, we believe that releases are needed in order to establish a resident falcon population in the U.S. Chihuahuan desert grasslands.

If natural recolonization does occur in significant numbers, then we may amend this rule. However, we do not think this action will be necessary since any falcons that occur in the proposed NEP area will be considered part of the proposed NEP and will be subject to the protective measures in place for the proposed NEP.

(j) *Public Awareness and Cooperation:* We will inform the general public of the importance of this reintroduction project in the overall recovery of the falcon. The designation of the proposed NEP for New Mexico and Arizona would provide greater flexibility in the management of reintroduced falcons. The proposed NEP designation is necessary to secure needed cooperation of the States, Tribes, landowners, agencies, and other interests in the proposed NEP area. As mentioned before, despite the relative success of the falcon releases in Texas, we believe the Safe Harbor Agreements used to release falcons in Texas are not the best mechanism for establishing falcons in New Mexico and Arizona. Safe Harbor Agreements can only be developed for private land owners, whereas there is a vast amount of public land in New Mexico and Arizona (about 40 percent in the reintroduction area). Therefore, the proposed NEP designation will facilitate the recovery of the falcon on

this public land, as well as on private land. As mentioned under the "Legislative" section above, a NEP designation requires consultations under section 7(a)(2) only for National Wildlife Refuges and units of the National Park System. All other Federal actions only require the Federal action agency to confer with us under section 7(a)(4); the results of which are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities. The opportunity for greater discretion in developing management programs or conducting other activities in a NEP area can be appealing to Federal agencies and the general public.

Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that creating a NEP of northern aplomado falcons and releasing them into the NEP area will further the conservation of the species.

#### Public Hearings

The Act provides for one or more public hearings on this proposed rule, if requested. Given the likelihood of a request, we have scheduled one public hearing. We will hold a public hearing as specified above in **DATES** and **ADDRESSES**. Announcements for the public hearing will be made in local newspapers.

Public hearings are designed to gather relevant information that the public may have that we should consider in our rulemaking. During the hearing, we will present information about the proposed action. We invite the public to submit information and comments at the hearing or in writing during the open public comment period. We encourage persons wishing to comment at the hearing to provide a written copy of their statement at the start of the hearing. This notice and public hearing will allow all interested parties to submit comments on the proposed NEP rule for the falcon. We are seeking comments from the public, other concerned governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning the proposal. Persons may send written comments to the New Mexico Ecological Services Field Office (see **ADDRESSES** section) at any time during the open comment period. We will give equal consideration to oral and written comments.

#### Peer Review

In accordance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we will provide copies of

this proposed rule to three appropriate and independent specialists in order to solicit comments on the scientific data and assumptions relating to the supportive biological and ecological information for this proposed NEP rule. The purpose of such review is to ensure that the proposed NEP designation is based on the best scientific information available.

We will invite these peer reviewers to comment during the public comment period. We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### Required Determinations

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

In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action subject to Office of Management and Budget review. As described below, this rule will not have an annual economic effect of \$100 million or more on the economy and will not have an adverse effect on an economic sector, productivity, competition, jobs, the environment, or other units of government. Therefore, a cost-benefit and full economic analysis will not be required.

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

This proposed rule will not create inconsistencies with other agency's actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are the Bureau of Land Management (BLM) and Department of Defense (DOD) because they manage large areas of suitable falcon habitat within the proposed NEP area. These agencies participated in the northern aplomado falcon working group and had the opportunity for development and review of the resulting action proposed by this rulemaking, so as to have it consistent with their land management plans. Because of the substantial regulatory relief provided by

the NEP designation, we believe that the reintroduction of northern aplomado falcons in the areas described will not conflict with existing human activities or hinder public utilization of the area.

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

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

#### Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 804(2)), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area affected by this proposed rule includes the States of Arizona and New Mexico. We do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the proposed NEP area because the proposed NEP designation provides no restrictions on most Federal (see next paragraph for National Wildlife Refuges and units of the National Park System) and all non-Federal actions that may affect falcons. In addition, the special rule authorizes unknowing or incidental

take of falcons (*i.e.*, take that is incidental to an otherwise lawful activity). Direct take for research or educational purposes would require a section 10 recovery permit. Knowing take (such as shooting) would not be permitted. The action will not affect the establishment of future hunting seasons or conservation actions approved for migratory bird species. The principal activities on private property near the initial release areas are agriculture and recreation. We believe the presence of the falcon will not preclude use of lands for these purposes. Because there will be no new or additional economic or regulatory restrictions imposed upon States, Federal agencies, or members of the public due to the presence of the falcon, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

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

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

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

1. On the basis of information contained in the "Required Determinations" section above, this rule will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the

Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the proposed NEP designation will not place additional requirements on any city, county, or other local municipalities.

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

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

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

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

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

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule will not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with

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

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

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections 3(a) and 3(b)(2) of the Order. We establish experimental populations in accordance with section 10(j) of the Act.

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

In accordance with Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951); Executive Order 13175; and the Department of the Interior's requirement at 512 DM 2, we have notified the Native American Tribes within the NEP area about this proposal. They have been advised through verbal and written contact, including informational mailings from the Service. Information was also presented to the Native American Fish and Wildlife Society in 2003 (Maureen Murphy, USFWS, pers. comm. 2004). If future activities resulting from this proposed rule may affect Tribal resources, the Service will communicate and consult on a Government-to-Government basis with

any affected Native American Tribes in order to find an agreement.

#### *Paperwork Reduction Act*

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) require that Federal agencies obtain approval from OMB before collecting information from the public. This proposed rule contains information collection activity for experimental populations. The Fish and Wildlife Service has Office of Management and Budget approval for the collection under OMB Control Number 1018-0095. The Service may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act*

We have prepared a draft environmental assessment (EA) as defined under the authority of the National Environmental Policy Act of 1969. It is available from the New Mexico Ecological Services Field Office (see **ADDRESSES** section). We published a notice of intent to prepare an EA and a notice of public scoping meetings in the January 27, 2003, **Federal Register** (68 FR 3889)

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

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

#### *Clarity of This Regulation (E.O. 12866)*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the

format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the proposed rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the proposed rule in the Supplementary Information section of the preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand? Send your comments concerning how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail your comments to: *Exsec@ios.doi.gov*.

#### **References Cited**

A complete list of all references cited in this proposed rule is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

#### **Authors**

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

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

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

#### **Proposed Regulation Promulgation**

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

#### **PART 17—[AMENDED]**

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

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

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

#### **§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

(h) \* \* \*

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

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

**§ 17.84 Special rules—vertebrates.**

\* \* \* \* \*

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

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

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

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

(4) A falcon may be taken within the NEP area, provided that such take is incidental to and not the purpose of, the carrying out of an otherwise lawful activity; and that such taking is reported as soon as possible as provided under paragraph (o)(6) of this section.

(5) Any employee or agent of the Service, New Mexico Department of Game and Fish, Arizona Game and Fish Department, or The Peregrine Fund, who is designated for such purpose may, when acting in the course of official duties, take a falcon if such action is necessary to:

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

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

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

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

(v) Collect nesting data or band individuals.

(6) Any taking pursuant to paragraphs (o)(3) through (5) of this section must be reported as soon as possible by calling the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; (505) 346-2542. Upon contact, a determination will be made as to the disposition of any live or dead specimens.

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

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

(9)(i) The boundaries of the designated NEP area are based on county borders and include the entire States of New Mexico and Arizona. The release area is within the historic range of the species. Release sites will be in New Mexico.

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

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

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

(10) The NEP will be monitored closely for the duration of the program, generally using radio telemetry as appropriate. Any bird that is determined to be sick, injured, or otherwise in need of special care will be recaptured to the extent possible by Service and/or State or Tribal wildlife personnel or their designated agent and given appropriate care. Such birds will be released back to the wild as soon as possible, unless physical or behavioral problems make it necessary to return them to a captive breeding facility.

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

Dated: January 26, 2005.

**Craig Manson,**

Assistant Secretary for Fish and Wildlife and Parks.

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