

eye, little Mariana fruit bat, or member of the Guam population of the Mariana fruit bat in interstate or foreign commerce. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been illegally taken. Certain exceptions apply to agents of the Service and Territorial and Commonwealth conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing such permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes or to enhance the propagation or survival of the species. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

The Service will now review the nine species covered by this rule to determine whether any should be considered for placement on the appendices of the Convention on

International Trade in Endangered Species of Wild Fauna and Flora or for other appropriate international agreements.

**National Environmental Policy Act**

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined by the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

**Author**

The primary author of this rule is Ronald M. Nowak, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235-1975 or FTS 235-1975).

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

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

**Regulations Promulgation**

**PART 17—[AMENDED]**

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for Part 17 reads as follows:

Authority: Pub. L. 83-205, 87 Stat. 834; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 98-153, 93 Stat. 1225; Pub. L. 97-304, 90 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Section 17.11(h) is amended by adding the following, in alphabetical order, to the List of Endangered and Threatened Wildlife under "MAMMALS" and "BIRDS":

§ 17.11 Endangered and threatened wildlife.

\* \* \* \* \*  
(h) \* \* \*

Species		Historical range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
<b>Mammals</b>							
Bat, little Mariana fruit	<i>Pteropus tokudae</i>	Western Pacific Ocean (Guam).	Entire range	E	1956	NA	NA
Bat, Mariana fruit	<i>Pteropus manauanus manauanus</i>	Western Pacific Ocean (Guam, Rota, Tinian, Saipan, Agaña).	Guam	E	1956	NA	NA
<b>Birds</b>							
Broadbill, Guam	<i>Myzagra freycineti</i>	Western Pacific Ocean (Guam).	Entire range	E	1956	NA	NA
Crow, Mariana	<i>Corvus kubaryi</i>	Western Pacific Ocean (Guam, Rota).	do	E	1956	NA	NA
Gallinule, Mariana	<i>Gallinula chloropus guami</i>	Western Pacific Ocean (Guam, Tinian, Saipan, Pagan).	do	E	1956	NA	NA
Kingfisher, Micronesian	<i>Halcyon cinnamomea cinnamomea</i>	Western Pacific Ocean (Guam).	do	E	1956	NA	NA
Rail, Guam	<i>Rallus owstoni</i>	Western Pacific Ocean (Guam).	do	E	1405, 1956	NA	NA
Swiftlet, Vanikoro	<i>Aerodramus (Collocalia) vanikorensis bartschi</i>	Western Pacific Ocean (Guam, Rota, Tinian, Saipan, Agaña).	do	E	1956	NA	NA
White-eye, bridled	<i>Zosterops conspicillata conspicillata</i>	Western Pacific Ocean (Guam).	do	E	1956	NA	NA

Dated: August 1, 1984.  
G. Ray Arnett,  
Assistant Secretary for Fish and Wildlife and Parks.

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BILLING CODE 4310-55-M

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Experimental Populations**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Fish and Wildlife Service amends Part 17 of Title 50 of the Code of Federal Regulations in order to comply with certain changes made in the Endangered Species Act of 1973 (Act) by the Endangered Species Act Amendments of 1982 (Amendments). Part 17 is hereby amended to establish procedures for: (1) The establishment and/or designation of certain

populations of species otherwise listed as endangered or threatened as experimental populations; (2) the determination of such populations as "essential" or "nonessential"; and (3) the promulgation of appropriate protective regulatory measures for such populations. This final rule is issued by the Service to amend Part 17 and implement section 10(j) of the

Endangered Species Act. This rule outlines the procedure to be utilized in designating experimental populations of listed species.

**DATE:** The effective date of this rule is September 26, 1984.

**ADDRESSES:** Questions concerning this action should be addressed to the Associate Director—Federal Assistance, U.S. Fish and Wildlife Service, Washington, D.C. 20240, Attention: Experimental populations. Comments and materials relating to this rule are available for public inspection by appointment during normal business hours (7:45–4:15 p.m.) at the Service's Office of Endangered Species, 1000 North Glebe road, Suite 500, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235-2771).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Endangered Species Act Amendments of 1982, Pub. L. 97-304, became law on October 13, 1982. Among the significant changes made by the 1982 Amendments was the creation of a new section 10(j), which established procedures for the designation of specific populations of listed species as "experimental populations." Prior to the 1982 Amendments, the Service was authorized to translocate listed species into unoccupied portions of their historic range in order to aid in the recovery of the species. Significant local opposition to translocation efforts often occurred, however, due to concerns over the rigid protection and prohibitions surrounding listed species under the Act. Section 10(j) of the 1982 Amendments was designed to resolve this dilemma by providing new administrative flexibility for selectively applying the prohibitions of the Act to experimental populations of listed species.

As a result of the 1982 Amendments, the provisions of section 7 and section 9 may now be discretionarily applied to an experimental population. Section 9 stringently prohibits the taking of endangered species of fish and wildlife. The 1982 Amendments provide new flexibility under that section by authorizing the treatment of an experimental population as "threatened" even though the donor population from which the experimental population came is currently listed as endangered. Treatment of the experimental population as threatened enables the Secretary to impose less restrictive taking prohibitions under the

authority of section 4(d) of the Act. As for section 7, subsection 7(a)(2) of that section prohibits Federal agencies from authorizing, funding, or carrying out any activity which would be likely to jeopardize the continued existence of an endangered or threatened species or adversely modify their critical habitats. Under the 1982 Amendments, however, experimental populations that are not "essential" to the continued existence of a species in the wild (and not located within a unit of the National Park System or National Wildlife Refuge System) are excluded from protection under section 7(a)(2) of the Act. For such species, Federal agencies would only be required under the Act to informally confer with the Fish and Wildlife Service (treating the species as if they were proposed species) under the terms of section 7(a)(4). (The provisions of section 7(a)(1) would also apply to "nonessential" experimental populations.) On the other hand, experimental populations determined to be "essential" to the survival of a species would remain subject to all of the provisions of section 7. The individual organisms comprising the designated experimental population would be removed from an existent source or "donor" population only after it has been determined that their removal would not violate section 7(a)(2) of the Act and would comply with the permit requirements of section 10(a)(1) (A) and (d). This rule would add a new subpart to 50 CFR Part 17 governing designations of experimental populations and would allow for the identification of special rules governing experimental populations in the lists of endangered and threatened wildlife and plants.

The 1982 Amendments specified a regulatory procedure to be followed for the designation of experimental populations of listed species. In addition, the Conference Report accompanying the Amendments also provides for the conservation of experimental populations by means of written agreements or memoranda of understanding (MOU) between the Service and other Federal land managing agencies. The Conference Report indicates, however, that MOU, which may be used to address special management concerns, cannot be used as a substitute for the rulemaking process outlined in this rule to identify the location of an experimental population, to determine its essentiality, and to determine whether the establishment of the population will further the conservation of the species. The use of MOU without the promulgation of section 10(j) regulations

would not relieve any of the restrictions under sections 7 and 9 otherwise applicable to the species. However, MOU may be used in appropriate cases as a substitute for additional protective regulations under section 4(d) if the Federal land managing agency has an effective management program in place that satisfies the standards of section 4(d). See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 34 (1982).

The designation of an experimental population would include the development of special rules to identify geographically the location of the experimental population and identify, where appropriate, procedures to be utilized in its management. The special rule for each experimental population would be developed on a case-by-case basis. It is expected that some regulations to designate an experimental population may also authorize special activities designed to contain the population within the original boundaries set out in the regulation. This will avoid law enforcement problems stemming from the inability to distinguish between fully-protected specimens of the donor population from lesser protected specimens of the experimental population.

Regulations for the establishment or designation of individual experimental populations will be issued in compliance with the informal rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553, in order to secure the benefit of public comment and address the needs of each particular population proposed for experimental designation. A rulemaking under section 10(j) will provide a minimum 30-day comment period. Because it does not involve an actual determination of endangered or threatened biological status for a species, section 10(j) rulemaking is not required to follow the usual section 4 regulatory process for listing under the Act. (However, if critical habitat is proposed, then the section 4 listing process would apply.) An experimental population is by statute given the classification of "threatened," and the section 10(j) process is primarily involved with legal determinations and the promulgation of "special rules" that can be issued under the informal rulemaking process of the APA.

**Summary of Comments and Recommendations**

The Service received comments from the following: Delaware Department of Natural Resources and Environmental Control; Illinois Department of Conservation; Maryland Department of

Natural Resources; Michigan Department of Natural Resources; Montana Department of Fish, Wildlife and Parks; New Mexico Department of Game and Fish; North Carolina Wildlife Resources Commission; Puerto Rico Department of Natural Resources; South Dakota Department of Game, Fish and Parks; Texas Parks and Wildlife Department; Utah Resource Development Coordinating Committee; Wisconsin Department of Natural Resources; Colorado River Water Conservation District; Oregon Department of Transportation; Texas Department of Water Resources; U.S. Department of Interior, Bureau of Reclamation (BOR); U.S. Department of Interior, Bureau of Land Management (BLM); U.S. Department of Agriculture, Forest Service (USFS); Marine Mammal Commission (MMC); Defenders of Wildlife (DW); Environmental Defense Fund (EDF); Friends of the Sea Otter; National Wildlife Federation (NWF); Wildlife Management Institute (WMI); American Mining Congress; Conoco Inc.; Northern Colorado Water Conservancy District, Colorado Water Congress (provided by Davis, Graham and Stubbs); Ecological Analysts, Inc.; National Forest Products Association (NFPA); Standard Oil Company (Indiana); Utah International Inc., and Western Oil and Gas Association (WOGA).

Many comments expressed overall approval of the proposal. Comments of a general nature are addressed below. More specific recommendations and responses follow, organized by the section of the proposed rule to which they refer.

#### *General Comments*

Comments received from Colorado, Utah, and the USFS indicate that they find the entire designation/listing process too cumbersome and complex. According to these agencies, the procedure to be used for experimental designation was not clearly stated. The Service regrets this confusion but believes that the guidance stated in section 10(j) and the accompanying Conference Report has been followed as clearly as possible in developing these regulations. The USFS also states that Memoranda of Understanding (MOU) between agencies would be more effective in encouraging species recovery. The Service agrees that MOU are useful/viable tools in species recovery efforts, but that they should not serve as a substitute for the actual designation of an experimental population in the first instance if an experimental designation is considered the best approach for enhancing the

recovery efforts. Once designated, however, MOU can be used to implement or supplement the various conservation programs for an experimental population, and under the right circumstances this would be encouraged.

WOGA requested clarification of the phrase "special management concerns" used to describe a possible use for MOU. The Service considers "special management concerns" to refer to a situation that could exist between a Federal land management agency and the Service in which some specific action, such as building a fence, providing a buffer, diverting water flow, or maintaining timber activities at a specific distance from breeding areas, would promote the conservation of a listed species. MOU could be used to implement such actions.

Concern was voiced by the Colorado River Water Conservation District (CRWCD) that an Environmental Impact Statement (EIS) should have been prepared for these proposed regulations to insure a more comprehensive analysis. BLM suggested that public involvement would strengthen the development of future experimental population regulations by utilizing the procedures identified under the National Environmental Policy Act (NEPA), and NFPA stated that an EIS should be required for the release of experimental populations on public land. In addition, comments received by WOGA recommended that criteria be established in the regulation to determine whether an EIS should be prepared with regard to the establishment of an experimental population. As for the comment from CRWCD, the Service believes that an environmental assessment is adequate and that an EIS is not required for this rulemaking. This generic regulation is procedural in nature and as such no significant impact on the quality of the human environment is anticipated. Subsequent regulations dealing with the designation and establishment of specific populations will be evaluated as to the need for the preparation of an EIS as they are developed. Moreover, there is no need to encumber these regulations with an additional section on NEPA compliance; the regulations promulgated by the Council on Environmental Quality will be followed by the Service as it complies with NEPA on future section 10(j) rulemakings. See 40 CFR Parts 1500-1508.

Several commenters discussed the scope of environmental reviews that must be prepared for "nonessential" experimental populations. DW argued

that nonessential populations should be considered in NEPA analysis, in section 7(c) biological assessments, and in other environmental reviews. EDF agreed that nonessential populations, which are treated for purposes of section 7 requirements as species proposed for listing, must be discussed in biological assessments. The Service concurs with DW on the point that Federal agencies should analyze impacts on nonessential experimental populations, along with other populations of fish and wildlife, when complying with the requirements of NEPA. However, the Service notes that biological assessments under section 7(c) are not required to cover impacts to species proposed for listing. Although the Service must provide a list of all listed and proposed species that may be present in the action area to the requesting Federal agency, the biological assessment itself need only identify listed species that are likely to be affected by the action.

The purpose of the biological assessment is to facilitate compliance with section 7(a)(2)—the "jeopardy" prohibition—that applies only to listed species. The Service encourages Federal agencies to include proposed and candidate species in their biological assessments, because the early identification of project impacts may lead to the orderly resolution of potential section 7 conflicts. Nevertheless, the Service acknowledges that the inclusion of nonessential experimental populations (that are outside the boundaries of any unit of the National Wildlife Refuge System or the National Park System) in biological assessments performed under section 7(c) is at the discretion of Federal agencies.

Extensive comments were received which addressed the essential/nonessential categorization of experimental populations. New Mexico and the Colorado Water Congress/Northern Colorado Water Conservancy District believe that once a population has been designated nonessential and reintroduced into the wild, reclassification to essential and/or endangered status should not be permitted. The Service cannot categorically state that such reclassification will never occur; however, the Service deems it highly unlikely that any such action would proceed without full cooperation with the affected parties. In conjunction with this discussion, Standard Oil of Indiana commented that as populations of the same species are established, the essentiality of subsequent reintroductions would decrease. The

Service agrees with this position and believes this best describes the intent of the experimental designation, that is, to increase the recovery potential of listed species. Montana stated that the status of a population should be determined prior to its establishment. The Service concurs with this position, and through the regulatory process for each experimental population designation will require that all determinations on essentiality be made prior to any action being taken.

Colorado River Water Conservation District, BOR, and NFPA suggested that all reintroduced populations be nonessential. BOR believes all populations are being reintroduced as an "experiment" to see if expansion of the population into historic range is possible. The Colorado River Water Conservation District suggests that Congress intended that all populations be nonessential, while NFPA contends that a nonessential designation will insure flexibility and encourage cooperation. The USFS stated that they would be reluctant to enter into a management agreement with the Service for the reintroduction of an essential population. While the Service cannot agree in advance of specific rulemakings that all experimental populations will be designated as nonessential, it nevertheless concurs with the general observation that a nonessential designation would be the most advantageous to encourage cooperation and should be most actively pursued. However, the Service feels that the requirement of a determination of "essentiality" in section 10(j) indicates Congress's intent that such a designation be given consideration and that, under some circumstances, essential status is justified. Where the biological facts support an essential designation, the Service intends to make this determination. In a situation where an affected agency, organization, or individual refuses to cooperate on a reintroduction because of an essentiality designation, the Service will reevaluate the designation and, if the status remains unchanged, may withdraw the proposal.

Contrary to the comments discussed above, Ecological Analysts, Inc. and the USFS state that no species classified as endangered could have populations that are biologically nonessential to their survival. The Service disagrees with this statement, because there can be situations where the status of the extant population is such that individuals can be removed to provide a donor source for reintroduction without creating adverse impacts upon the parent

population. This is especially true if captive propagation efforts are providing individuals for release into the wild. The commenters also ignore Congressional intent in explaining the "essential" determination:

\* \* \* The Secretary shall consider whether the loss of the experimental population would be *likely to appreciably reduce the likelihood of survival of that species in the wild*. If the Secretary determines that it would, the population will be considered essential to the continued existence of the species. The level of reduction necessary to constitute "essentiality" is expected to vary among listed species and, *in most cases, experimental populations will not be essential*.

H.R. Conf. Rep. No. 835, *supra* at 34 (emphasis added). An "essential" experimental population will be a special case, not the general rule.

Several commenters (BLM, Texas Department of Water Resources, Utah International) have stated that the proposed regulations limit the participation of affected agencies, organizations, and private landowners from taking part in the procedures utilized to designate experimental populations. The Service regrets that the proposed regulation gave this impression since this is not, and never has been, the intent of the Service. The Service encourages and seeks full participation in these procedures, and Congress obviously intended it by requiring the development or regulations which include a public comment period. The Service intends to make every effort to contact the affected parties during the development of the experimental regulation and to seek input from *all* such parties during the official comment period following publication of the proposed rule.

Comments from the Texas Department of Water Resources suggest that experimental population designations could be used to stop pending development projects which could be avoided if the Governors of each State had the right to veto inappropriate species translocations. Without question, a State may impose more restrictive taking prohibitions than those enforced by the Service. See section 6(f) of the Act. The Service acknowledges the States' authority to establish more stringent conservation measures for resident species. This section 6(f) authority reserves for the States the power to implicitly control translocation activities within their borders to the extent those activities involve takings of resident listed species which would first have to be approved by the State.

South Dakota suggests that this rule could be used as a special tool to benefit private industry or special interest groups. Conoco recommends not locating experimental populations in, or adjacent to, areas that could be subjected to development activities. In addition, the NFPA believes that experimental populations should only be located on public land.

The Service recognizes the concern expressed in these comments that section 10(j) may not be appropriately or judiciously applied. The Service can only restate that its primary concern in the application of this regulation is the recovery of listed species. It is not the Service's intent to use section 10(j) as a short-cut to be applied in every circumstance where a translocation or reintroduction has been identified as a viable recovery action. Section 10(j) will only be considered in those instances where the involved parties are reluctant to accept the reintroduction of an endangered or threatened species without the opportunity to exercise greater management flexibility on the introduced population. When selecting a site for reintroduction, biological concerns will be given primary consideration; however, all relevant factors, including economic considerations, will be weighed before any action is proposed. Additionally, the Service does not believe that private lands should be summarily excluded from consideration. If a private landowner is willing to cooperate and the site is biologically feasible, the Service believes that the site should be given full consideration.

Friends of the Sea Otter, DW, and EDF expressed concern that the Service would use section 10(j) exclusively and abandon traditional reintroduction policies, whereas Standard Oil (Indiana) believes that this Section should be used for conservation purposes only.

WOGA also believes the Service should further clarify the relationship between the prior propagation and enhancement permit authorizations in section 10(a) and the new provisions of section 10(j) of the ESA: Is section 10(j) the only authority the Service will use to establish a separate population of a listed species? The Service does not believe that the Secretary's authority to take action to enhance the recovery of a listed species is limited to the establishment of experimental populations as described in section 10(j). As discussed above, the Service believes that adequate authority, apart from section 10(j), exists to authorize translocation efforts for listed species and could be exercised in those

instances where the administrative flexibility of section 10(j) is not required. Section 10(j) was added by Congress to expand, not to limit, the Service's existing authority and range of options on the issue of transplantation.

WOGA also requested that these regulations explain the relationship of section 10(j) of the ESA to other wildlife protection statutes that may hinder the establishment of experimental populations. It must be noted that an experimental population established under section 10(j) of the ESA does not exempt that population from the restrictions imposed by other applicable Federal wildlife laws. Thus, to the extent that these rules only set forth how management flexibility can be achieved under section 10(j) for purposes of ESA (sections 7 and 9) compliance, there is no need to address any further the applicability of other Federal wildlife laws which cannot be affected by an experimental population designation under section 10(j).

The Colorado River Water Conservation District and the Colorado Water Congress/Northern Colorado Water Conservancy District have expressed concern about the stocking of endangered and threatened fish and how this relates to the experimental population regulation. The Service does not consider fish stocking per se as a method of establishing experimental populations and stocking as traditionally used by the Service is not covered by these regulations. Stocking to augment existing populations could be viewed, in some cases, as a separate activity from an experimental population reintroduction. Stocking, as traditionally used by the Service and referred to in the comments discussed here, is a method of adding additional numbers of individuals into an existing population. In most cases, this would not apply to an experimental population since geographical isolation is a prerequisite for the introduction of an experimental population, and authorized release by the Secretary must be outside the current range of the species.

New Mexico has proposed that under some circumstances experimental populations could be designated for purposes other than recovery of a listed species. For example, they suggest that certain species of listed fish could be introduced into areas for use in mosquito control. While the Service recognizes that some of the activities carried out by experimental populations could incidentally benefit the public in ways unrelated to the recovery of the species, the intent of section 10(j) was that an experimental designation only

be applied when necessitated by the conservation and recovery needs of a listed species. See section 10(j)(2)(A). Consequently the Service would not support an experimental designation based on nonconservation purposes.

South Dakota asked what would happen to a State listed species if the Federal listing changed as a result of an experimental nonessential designation. For the reasons stated above regarding section 6(f), the Service believes that State laws regulating take may continue to apply and that an experimental designation will not mandate an amendment to the State list.

USFS and NWF raised concerns over the impact of the recent decision in *Sierra Club v. Clark*, Civil No. 5-83-254 (D. Minn. Jan. 5, 1984), appeal pending, on the less restrictive taking prohibitions that could apply to an experimental population under section 10(j). In the above-cited case, the court rejected the Secretary's assertion of authority to allow regulated taking of threatened species absent a showing of the need to reduce population pressures in an ecosystem which "cannot be otherwise relieved." The Service notes that Congressional intent behind authorizing an experimental population release was not to relieve pressure on an existing ecosystem but to enhance the recovery potential of a listed species. Section 10(j)'s essential purpose was to provide the Secretary sufficient flexibility so that public opposition to the release of experimental populations could be avoided:

The [House] Committee [on Merchant Marine and Fisheries] also expects that, where appropriate, the [experimental population] regulations could allow for the directed taking of experimental populations. For example, the release of experimental populations of predators, such as red wolves, could allow for the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition.

H.R. Rep. No. 567, 97th Cong., 2d Sess. 34 (1982) (emphasis added). Thus, based upon the legislative history behind this section, the Service believes that the taking provisions adopted under section 10(j) would not be restricted by the ruling in *Sierra Club v. Clark*.

#### Section-by-Section Analysis

##### *Section 17.60 Definitions.*

*Section 17.60(a)*—WOGA and MMC have commented on the restrictive nature of the definition of "experimental population" used in the proposed regulation. WOGA expressed concern that migratory species are being excluded from the application of this

regulation. They state that those situations which result in excessive overlap of experimental and nonexperimental species or, in situations which may exist after the expansion of the first generation of introduced species, are not adequately addressed in the regulation as presently stated. Their suggestion is to reword the definition to identify an "experimental population area" as an area within which all individuals will be considered experimental and outside of which they will be considered nonexperimental. The Service supports this concept but believes that if the present definition is carefully examined, it will be shown that the criterion for an experimental population area is being met in the current definition without it being expressly stated. An "experimental" designation, in conjunction with § 17.81(c)(1), requires that there be included within the regulation establishing an experimental population a description of the area in which the species will be found and where it will be identified as experimental. This establishes, in effect, an experimental population area. The Service believes that this occurs without changing the wording of the proposed regulations. Boundaries will be identified and the population within these boundaries will be experimental.

Should individuals move outside this area and commingle with nonexperimental individuals of the same species, the experimental designation will no longer apply outside the boundaries of the experimental zone. In reference to a migratory population, the entire population could be identified as experimental and thereby the location where that population is found would be the experimental population area. If a species has fixed migration patterns, then its location (including periods of overlap) is predictable.

The MMC comments focused on what they believed to be the narrow interpretation of the current definition. Their main concern was the use of the phrase "during specific periods of time" which they stated does not take into account those situations in which migration patterns may vary in such a way that separation, even though predictable, may not occur at specific periods of time. They also identify the phrase "during a portion of the year" as too restrictive and not accounting for those species which may not overlap on an annual basis. Additionally MMC recommended that the word "treated" be inserted in the fourth sentence of § 17.60(a) to add consistency to the definition. The Service concurs with

these suggestions and has made changes in the final rule accordingly.

The Colorado Water Congress/Northern Colorado Water Conservancy District included a comment that the introduction of an experimental fish population into a river system with natural populations would result in an unacceptable implementation of this regulation in regards to separating natural and experimental populations. The Service concurs that this would result in an unreliable application of this regulation and therefore intends to review carefully all such proposals to insure that compliance with the regulation is attained.

**Section 17.80(b)**—Several commenters (DW, EDF, Friends of the Sea Otter) requested a wording change in the definition applied to an essential designation, by inserting the phrase "would be likely to," which was used in the Conference Report accompanying section 10(j). They suggest that this reduces the restrictive nature of the definition and corresponds more accurately with the intent of Congress. The Service concurs and the final rule has been altered to reflect this change. The American Mining Congress has commented that the Conference Report also included the statement that most experimental populations will be nonessential. The Service is aware of this statement and has earlier stated agreement with this position. However, the Service does not feel that this is an appropriate statement to include in the definition of essential/nonessential and, as such, will not amend the definition.

MMC comments suggest that other conditions may be applied to determine the essential/nonessential status of an experimental population and that standards should be used to make this determination. Although it is true that "likelihood of survival in the wild" may not be the only factor to be considered in determining essentiality and other factors could be applied, the Service chooses to abide by the language in the statute and not expand the scope of essentiality beyond "likelihood of survival." By the same token, the Service also does not choose to narrow the scope of "essentiality" by adopting the phrase "imminent danger of extinction" as suggested in the comments from WOGA. The Service believes that "likelihood of survival of a species in the wild" encompasses the possibility of extinction and that this factor will of necessity be considered in making a determination of essentiality. Also inherent in this determination is the consideration of what the potential

loss of the experimental population will have on the species as a whole.

#### **Section 17.81 Listing.**

**Section 17.81(a)**—Comments by NWF and BOR question the restrictions put on reintroduction of experimental populations by limiting reintroduction sites to areas within probable historic range. They suggest that this is an unnecessary constraint to apply to this statute (Ecological Analysts, Inc. takes the opposite view) and that ESA contains no such restrictions. Long-standing Service policy provides that the relocation or transplantation of native listed species outside their historic range will not be authorized as a conservation measure. For conservation measures involving the transplantation of listed species, it is Service policy to restrict introductions of listed species to historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitable and irreversible altered or destroyed. The Service believes this is the most biologically acceptable approach to utilize in species introductions. Further, the purposes and policies of the Act would be violated if the Service were to regularly permit the introduction of listed species into new habitat areas as exotic species. Under sections 2(b) and 2(c)(1) of the Act, the Service must commit itself to ecosystem protection and to programs for the conservation of listed species in their natural habitats. Generally, the transplantation of listed species to non-native habitat abandons the statutory directive to conserve species in native ecosystems. Transplantation of listed species beyond historic range would subject the population to doubtful survival chances and might result in the alteration of the species' gene pool—results that are clearly contrary to the goals of the Act. Additionally, the concept of releasing any species into non-native habitat runs afoul of the spirit of Executive Order 11987, which prohibits the introduction of exotic, foreign species into the natural ecosystems of the United States. The final rule reflects the above considerations.

MMC has pointed out that the use of the word "may" is inconsistent with the regulatory requirements identified in sections 10(j)(2)(B) and 10(j)(3). The Service has clarified the final rule to plainly show that all designations of experimental populations must comply with the rulemaking requirements of 5 U.S.C. 553 and the provisions of Subpart H.

Several commenters asked whether the Service has an affirmative duty

under section 10(j)(3) to evaluate for experimental status all populations of listed species that were released prior to the effective date of the 1982 ESA Amendments. The Service is clearly authorized under section 10(j)(3) to grant experimental status to populations released in areas separate from parent stock prior to the 1982 Amendments, but this authority *shall* be exercised only through the rulemaking process. The authority to undertake the review is discretionary; the regulatory process required for exercising the authority is mandatory. Therefore, although the Service may be petitioned to designate a previously-released population as experimental under section 10(j)(3), the ESA does not compel the Service to approve such a request. Such a petition would be handled in accordance with the requirements of the Administrative Procedure Act and 43 CFR Part 14.

WOGA asked whether actions taken by the Service to enhance the habitat of a listed species, which intentionally or unintentionally result in the natural expansion of that species' range, would constitute a release of an experimental population covered by section 10(j). Although proposals to establish experimental populations may include habitat improvement efforts in areas geographically separate from a species' current range, expansion of the species' range by habitat enhancement only is not eligible for section 10(j) treatment. Before a new population is released as "experimental," there must be a likelihood that the times of geographic separation are reasonable predictable for the released stock and the parent stock. The Service can not reduce protections for fish, wildlife, or plant species that expand naturally into contiguous habitat areas under authority of section 10(j).

In addition, DW suggests that the biological conditions for a release outside a species' current natural range be more clearly stated. The Service concurs with this comment and has added the phrase "into suitable natural habitat" in the final rule.

**Section 17.81(b)**—As a result of the comments received on this section, the Service has made several modifications in the wording. These modifications reflect suggestions by Friends of the Sea Otter, WMI, DW, and The American Mining Congress that findings by the Secretary be based on the best data available.

Other comments by WOGA and EDF indicate that the items to be considered before authorizing the release of experimental populations need to be more fully elaborated. This includes

additional findings, other than those already noted in the proposed regulation, prior to making a release. For example, both organizations suggest that experimental populations should not be authorized for release unless a reintroduction need has been identified in an approved recovery plan for that species. The Service appreciates this suggestion since recovery plans are the planning document used by the Service to track species recovery efforts. However, the Service recognizes that the writing/revision of a recovery plan is a time consuming effort and initial experimental population designations may not be identified in current plans. Moreover, now that the management option of an experimental designation is available, the Service anticipates that plans under development and scheduled for revision will begin to address this option if applicable. In any event, the Service retains the option of proposing the release of an experimental population, regardless of whether the release is documented in an approved recovery plan, if the Service determines that such action fulfills the immediate conservation need of the species.

WOGA has also identified the risk factor in releasing a population. That is, a risk to the species from a possible unsuccessful release attempt and risk to a released population because of anticipated human activity. The Service notes that the risk factor for a released population is continually under consideration. Factors relating to the success of a release effort will be reviewed in discussions with all parties involved in the project. No release will be attempted if the risk to the species is so great that it has little chance to succeed. Assessing the risk factor is inherent in the entire regulatory process. Carrying capacity of the release site, population dynamics, behavioral criteria, all items that WOGA suggests be recorded in the risk analysis, are all factors to be considered in the assessment conducted by the Service prior to proceeding with the action. The Service believes that this risk assessment analysis is covered by the finding in § 17.81(b)(s) and by its compliance with NEPA on each reintroduction proposal. WOGA also recommended the inclusion of a 17.81(g) requiring the maintenance of an administrative record. The Service contends that the regulation developed for each experimental population, along with its associated record of supporting data, analysis, and other materials, represents an adequate administrative record of the Service's assessment of an experimental population release.

WOGA and the American Mining Congress believe the Service should consider, prior to the release of a population, the effect activities being carried out by public and private organizations will have on the experimental population. Site selection for a release should take into consideration human activities. The Service concurs that this is an important factor and should be incorporated into findings assessing the potential of a release site. Paragraph (4) is added in the final rule to accommodate this concern.

**Section 17.81(c)**—Recommendations were made by EDF, DW, WOGA, and Friends of the Sea Otter to alter wording in several of the procedures found in this section. Both EDF and DW reiterated the position regarding section 10(j)(2)(B) that requires the Secretary to utilize the best information available in making a determination of essentiality. The Service concurs and § 17.81(c)(2) is altered to reflect this position. Friends of the Sea Otter, DW, Illinois Department of Conservation, and WOGA have suggested wording changes in § 17.81(c)(3) which the Service recognizes as helpful in clarifying the intent and has incorporated them in this section (especially the phrase "isolate the experimental population from the natural population" provided by DW which accurately represents the position of the Service). WOGA requested a provision be added to require a map of the release site. Inasmuch as the Service does not recognize the need to establish an "experimental population area" per se as discussed previously, this change will not be made.

EDF, DW, and WOGA have all recommended a provision be added to the regulation to require a periodic review and assessment of the release in terms of the conservation and recovery of the species. The Service concurs with this comment and a provision expressing this action has been added in the final rule.

**Section 17.81(d)**—Comments were received from New Mexico Department of Game and Fish, Oregon Department of Transportation, MMC, Utah International Inc., Conoco, Colorado Water Congress/Northern Colorado Water Conservancy District, BLM, Standard Oil (Indiana), American Mining Congress, Friends of the Sea Otter, DW, EDF, WMI, and WOGA on this section. All comments, with the exception of WMI, recommended expanding the scope of the consulting procedures during the development and implementation of the experimental population regulation. The service is

anxious to assure all commenters that no affected party will be knowingly excluded from the process. The Service feels the primary cooperators in this effort would be the States and affected Federal land managing agencies, and the Service concurs with New Mexico that the State wildlife agencies would be a primary contact in this endeavor. The Service believes that in most instances the State wildlife agencies would take the lead in the implementation of these regulations. By the same token, the Service will seek the involvement of all interested parties. Comments on proposed experimental populations will be sought from the public, concerned governmental agencies, the scientific community, industry, private interest, and other interested parties. To encourage and insure participation in this activity, the Service generally accepts the recommendations provided and has amended the final rule accordingly.

WOGA requested that several specific procedures be added to the experimental population regulations. Among these were: (1) A requirement that actual notice of a proposed experimental population be given to certain interested parties not less than 6 months before the publication of the proposed rule; and, (2) the requirement of a public meeting at least 60 days before publication of a proposed rule to establish an experimental population. The Service notes that these suggested procedures are not provided for in section 10(j), which only requires that the Service proceed "by regulation" (*i.e.*, in accordance with 5 U.S.C. 553). Because the Service does not want to unnecessarily complicate the experimental population regulatory process with specific notice and hearing requirements, WOGA's suggested procedures have not been adopted. However, the Service emphasizes that notice of all proposed experimental populations will be disseminated in a manner that encourages full involvement of interested parties in the rulemaking process. Section 10(j) was added by the 1982 ESA Amendments to give the Service more flexibility in establishing new populations of listed species; the Service intends to implement this Congressional goal while consulting with all interested parties throughout the experimental population process.

WMI recommended the work "wildlife" be substituted for the work "game." The Service concurs in the final rule.

The American Mining Congress stated that MOU are an excellent way to foster

cooperation and involvement in the experimental population regulatory process and suggests that their use be encouraged in the regulation. The Service feels that there is nothing in the regulation that restricts the use of MOU other than to state that they cannot be used as a substitute for an experimental population regulation in the first instance. MOU can be developed in cooperation with an organization (public or private) or individuals that are working with the Service toward the management of an experimental population. The Service favors the use of MOU for purposes of implementing management programs, and under some circumstance would encourage them, but does not feel that they should be required by regulation. The Service regrets any misunderstanding concerning the use of MOU but does not believe their use should be specifically required in this section.

Section 17.81(f)—DW suggests that this section is confusing and unnecessarily restricts the designation of critical habitat for essential experimental populations. The third sentence of this section restricts the designation of critical habitat in areas of overlap. The Service believes that this is a valid restriction and should not be modified. New Mexico expressed concern that the designation of critical habitat be based on the strict interpretation of the Act and that no critical habitat be designated for nonessential experimental populations. The Service concurs with this view and intends to strictly adhere to the provision outlined in section 4 of the Act when designating critical habitat. The Service restates that no critical habitat will be designated for a nonessential population. The wording of this section has been modified in the final rule for the sake of clarity.

#### Section 17.82 Prohibitions.

MMC expressed concern that by stating "all the applicable prohibitions" this regulation may be inadvertently excluding pertinent applicable prohibitions from other statutes. The Service agrees and amends the final rule accordingly. The Colorado Water Congress/Northern Colorado Water Conservancy District are concerned that prohibitions discussed in this section might interfere with stocking efforts and may result in an imposition on development activities. The Service can only restate that fish stocking as a traditional management tool would not be applicable to an experimental designation. In those circumstances where fish can be introduced into the wild as experimental, the prohibitions

implemented under Section 4(d) of the Act would apply.

#### Section 17.82 Interagency Cooperation.

MMC recommended that the regulation take into account the possibility of Park systems and Refuge systems expansion. On the other hand, WOGA urged the Service to restrict this Section to only those areas of the National Park System and National Wildlife Refuge System in existence as of the effective date of any rule establishing an experimental population. The Service concurs with the MMC comment as fulfilling Congressional intent and amends the final rule accordingly.

BOR requests clarification of the specific section 7 requirements for a nonessential population determined to be in the project area. The Service believes that an informal "conference" (section 7(a)(4)) with the Service is proper and § 17.83 follows this interpretation. DW notes that the provisions of section 7(a)(1) apply to nonessential experimental populations. The preamble has been amended to reflect this coverage.

WOGA has presented a detailed discussion on the dichotomy of the use of the term "species" relating to section 7 of the Act. When used in § 17.80(b), the term represents the entire population (existing population plus proposed experimental population), and when used in § 17.83, it is limited to experimental populations. They believe this contradiction limits the practical utility of these regulations and may result in increased conflicts under section 7. The Service's intent was to consider experimental populations and nonexperimental populations as one listed species for the purposes of section 7 analysis. The Service regrets this confusion and has clarified § 17.83 accordingly.

#### Executive Order 12291, Paperwork Reduction Act, and Regulatory Flexibility Act

The U.S. Fish and Wildlife Service has determined that this is not a major rule as defined by Executive Order 12291; that the rule would not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (Pub. L. 96-354); and that the rule as proposed does not contain any information collection or recordkeeping requirements as defined in the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

The rule is procedural in nature and principally implements the 1982 Amendments to the Endangered Species

Act. In so doing, the final rule conforms agency practice to new requirements of the Amendments. Any potential effects of such compliance stem directly from legislation and cannot be evaluated as independent effects of the final rule.

#### National Environmental Policy Act (NEPA)

An Environmental Assessment (EA) under NEPA has been prepared and is available to the public at the Office of Endangered Species, U.S. Fish and Wildlife Service at the address listed above. Based upon the information considered in the EA, a decision has been made that the preparation of an Environmental Impact Statement is not required for this action.

#### Author

The principal author of this proposal is Peter G. Poulos, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. (703/235-2760).

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

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

#### Proposed Regulation Promulgation

Accordingly, it is proposed to amend Part 17 of Chapter I of Title 50 of the Code of Federal Regulations as set forth below:

#### PART 17—(AMENDED)

1. The authority citation for Part 17 reads as follows:

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Part 17 is amended by adding to the table of contents the following new Subpart H:

\* \* \* \* \*

#### Subpart H—Experimental Populations

Sec.	
17.80	Definitions.
17.81	Listing.
17.82	Prohibitions.
17.83	Interagency cooperation.
17.84	Special rule—vertebrates. [Reserved]
17.85	Special rule—invertebrates. [Reserved]
17.86	Special rules—plants. [Reserved]

3. Part 17 is amended by revising § 17.11(f)(2) to read as follows:

§ 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(f)(1) \* \* \*

(2) The "Special Rules" and "Critical Habitat" columns provide a cross

reference to other sections in Parts 17, 222, 226, or 227. The "Special Rules" column will also be used to cite the special rules that describe experimental populations and determine if they are essential or nonessential. Separate listing will be made for experimental populations, and the status column will include the following symbols: "XE" for an essential experimental population and "XN" for a nonessential experimental population. The term "NA" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or critical habitat for that particular species. However, all other appropriate rules in Parts 17, 217-227, and 402 still apply to that species. In addition, there may be other rules in this Title that relate to such wildlife, e.g., port-of-entry requirements. It is not intended that the references in the "Special Rules" column list all the regulations of the two Services which might apply to the species or to the regulations of other Federal agencies or State or local governments.

\* \* \* \* \*

4. Part 17 is further amended by revising § 17.12(f)(2) to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*

(f) \* \* \*

(2) The "Special Rules" and Critical Habitat" columns provide a cross reference to other sections in Parts 17, 222, 226, or 227. The "Special Rules" column will also be used to cite the special rules which describe experimental populations and determine if they are essential or nonessential. Separate listings will be made for experimental populations, and the status column will include the following symbols: "XE" for an essential experimental population and "XN" for a nonessential experimental population. The term "NA" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or critical habitat for that particular species. However, all other appropriate rules in Parts 17, 217-227, and 402 still apply to that species. In addition, there may be other rules in this Title that relate to such plants, e.g., port-of-entry requirements. It is not intended that the references in the "Special Rules" column list all the regulations of the two Services which might apply to the species or to the regulations of other Federal agencies or State or local governments.

5. Part 17 is further amended by adding a new Subpart H as follows:

**Subpart H—Experimental Populations**

**§ 17.80 Definitions.**

(a) The term "experimental population" means an introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

(b) The term "essential experimental population" means an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental populations are to be classified as "nonessential."

**§ 17.81 Listing.**

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section; *provided*, that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding the Secretary shall utilize

the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The relative effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area. The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental population.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

(d) The Fish and Wildlife Service shall consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the

maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

(e) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart shall be identified by special rule in § 17.84–§ 17.86 as appropriate and separately listed in § 17.11(h) (wildlife) or § 17.12(h) (plants) as appropriate.

(f) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential populations. In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat shall be

designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.

#### § 17.82 Prohibitions.

Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The Special rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

#### § 17.83 Interagency cooperation.

(a) Any experimental population designated for a listed species (1) determined pursuant to § 17.81(c)(2) of this subpart not to be essential to the survival of that species and (2) not occurring within the National Park System or the National Wildlife Refuge System, shall be treated for purposes of section 7 (other than subsection (a)(1) thereof) as a species proposed to be listed under the Act as a threatened species.

(b) Any experimental population designated for a listed species that either (1) has been determined pursuant to § 17.81(c)(2) of this subpart to be essential to the survival of that species, or (2) occurs within the National Park System or the National Wildlife Refuge System as now or hereafter constituted, shall be treated for purposes of section 7 of the Act as a threatened species. Notwithstanding the foregoing, any biological opinion prepared pursuant to section 7(b) of the Act and any agency determination made pursuant to section 7(a) of the Act shall consider any experimental and nonexperimental populations to constitute a single listed species for the purposes of conducting the analyses under such sections.

§ 17.84 Special rules—vertebrates. [Reserved]

§ 17.85 Special rules—invertebrates. [Reserved]

§ 17.86 Special rules—plants. [Reserved]

Dated: July 17, 1984.

G. Ray Arnett,  
*Assistant Secretary for Fish and Wildlife and Parks.*

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