

PLAINTIFFS' EXHIBIT E
To Plaintiffs' Opposition to Defendants' Motion
For Summary Judgment
Civ. No. 03-2006 (EGS/JMF)

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[50 CFR Part 17]

Captive Wildlife Regulation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rulemaking.

SUMMARY: Regulation of activities concerning captive wildlife under the Endangered Species Act of 1973 appears to have hindered propagation efforts. In view of this, the service has determined that its primary concern under the Act should be to conserve wild populations of Endangered and Threatened species, and that regulations should interfere as little as possible with captive propagation of these species. This proposed rule incorporates public comments on an advance notice about the same topic. The Service proposes to grant general permission to the public to take, engage in interstate and foreign commerce, and conduct certain other prohibited activities with captive-bred wildlife. Such permission would be limited to activities conducted to enhance the propagation or survival of the affected species. It also would be limited to exotic species and those native species that are sufficiently protected in the wild. Persons operating under these rules would be required to register and report on activities to the Service so that a necessary minimum level of control can be maintained.

DATES: Comments must be received on or before July 23, 1979.

ADDRESSES: Send comments to the Director, U.S. Fish and Wildlife Service, Federal Wildlife Permit Office, Washington, D.C. 20240. Materials received in connection with this rulemaking are available for public inspection during business hours of 7:45 a.m. to 4:15 p.m., Monday through Friday, in room 616, 1000 N. Glebe Road, Arlington, Va.

FOR FURTHER INFORMATION CONTACT: Dr. Richard L. Jachowski, Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240, telephone (703) 235-2418.

SUPPLEMENTARY INFORMATION:**A. Is it necessary to revise the regulations for captive wildlife?**

The Endangered Species Act of 1973, as amended, establishes prohibitions against certain activities involving species of wildlife that are determined to be Endangered. By regulation, the

Secretary of the Interior has applied these same prohibitions to species determined to be Threatened. These activities include, among other things, taking (defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct), importation, exportation, and interstate or foreign commerce.

The Act and the regulations that implement it provide that permission may be granted for such activities if they are conducted for certain purposes. In the case of Endangered Species, the Act limits them to scientific purposes or to purposes of enhancing the propagation or survival of the affected species. In the case of Threatened species, regulations limit them to scientific purposes, purposes of enhancing the propagation or survival of the affected species, economic hardship, zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act.

When these provisions were first put into effect, it became evident to the Service and the affected public that many routine activities involved with captive propagation of Endangered and Threatened species were prohibited, and could be authorized only by permit. Numerous zoos and breeders of cats, pheasants, waterfowl and other animals, as well as circuses and animal dealers, wrote to the Service about their new legal problems. One prevalent argument was that the wildlife in question belonged to them, and that what they did with it had little or no relationship to conserving wild populations of the species. Another argument was that even when their activities were for purposes allowed by the Act or by the regulations, the red tape involved in obtaining permits was counterproductive. Effective propagation depends, in part, on prompt treatment of sickness or injury, and on the ability to transfer breeding stock without long delays. Permit requirements led some animal breeders to reduce productivity by separating animals or by using contraceptives so that they did not have surpluses.

In response to this problem, the Service issued regulations for Captive Self-Sustaining Populations of Endangered Species (CSSP's). These regulations, published on June 1, 1977 (42 FR 28052-28057), determined that populations of eleven Endangered species in captivity in the United States were to be treated as Threatened species. Permit requirements for activities involving these CSSP's were simplified. Persons obtaining such permits were allowed to

freely engage in interstate commerce with other permit holders, provided they reported all transactions on forms supplied by the Service.

The CSSP regulations did not sufficiently alleviate problems for animal breeders, as summarized in the advance notice of proposed rulemaking on captive wildlife regulation, issued April 14, 1978 (43 FR 16144-16145). The problems, expressed in numerous letters to the Service, are mainly that:

(1) The CSSP approach does not promote the propagation of other species not yet qualified for CSSP treatment;

(2) The CSSP list does not include enough qualified species, and the procedure for adding them is cumbersome;

(3) The permit requirements place an excessive burden on the public, as in the case of a pheasant breeder who might have only a few birds as a hobby; and

(4) The classification of CSSP's as "species" distinct from wild populations of the same biological species is an artificial distinction.

The Service is convinced that a change is necessary, after reviewing all of the public comments and after almost two years of administering the CSSP system. Comments in response to the advance notice on this subject overwhelmingly favored a change to make the controls less restrictive. Advantages and disadvantages of such a move are discussed later in this proposal.

B. Why should activities with captive wildlife be regulated?

The Act requires that certain activities be regulated if a species is determined to be Endangered. The Service has consistently maintained that the Act applies to both wild and captive populations of a species. This view has been confirmed by recent action of Congress to specifically exempt from the prohibitions any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978.

There are reasons other than this legal one why certain activities with captive Endangered and Threatened wildlife should be regulated. Captive propagation and other uses of captive wildlife can benefit wild populations, which are of primary concern to the Service, by:

(1) Increasing the likelihood that captive breeding populations will be established as a source of known genetic stock to bolster or reestablish populations in the wild;

(2) Reducing the need to take stock from the wild for scientific or other purposes; and

(3) Providing opportunities for research that can lead to improved management of wild populations.

On the other hand, uses of captive wildlife can be detrimental to wild populations if:

(1) Consumptive uses of captive wildlife stimulate a demand for products which might further be satisfied by wild populations;

(2) Persons illegally obtain specimens from wild populations and claim them to be captive-produced; and

(3) Captive propagation is sustainable only with a continuous supply of wild-caught animals.

The obligation of the Service to further the purposes of the Act requires that its implementing regulations be designed to encourage the beneficial

effects listed above while discouraging detrimental effects.

C. How should activities with captive wildlife be regulated?

It is impossible to have regulations that will encourage all of the beneficial effects and at the same time effectively discourage all of the detrimental ones, because they are connected to each other. The Service's effort in this proposed rulemaking is to strike the most favorable balance for conservation of the wildlife.

Table I summarizes the major advantages and disadvantages of each general type of regulation that could be applied to captive wildlife under the Act. It includes alternative approaches discussed in the advance notice of April 14, 1978. The listed advantages and disadvantages are a compilation of public comments in response to the advance notice and the Service's views.

Table I.—Advantages and disadvantages of regulatory options for wildlife in captivity

Option	Advantages	Disadvantages
1. Expand the present CSSP system.	Provides strict control to protect wild populations. Limits permission to conduct certain activities to qualified persons. Restricts liberal treatment to those captive populations that are self-sustaining (an incentive?). Simplifies transaction paperwork.	Does not promote propagation of other species not yet qualified for CSSP. Does not include enough species, and procedure for adding is cumbersome. Permit application procedure is burden on public. Classification of CSSP's as "species" separates from wild populations is a scientifically artificial distinction.
2. Reclassify all Endangered and Threatened wildlife in captivity as Threatened, with special rules.	Reduces paperwork for propagators. Provides the controls needed to protect wild populations of exotic species. Provides flexibility to regulate activities with captive wildlife as needed.	Classification of captive wildlife as separate "species" is a scientifically artificial distinction. If reclassification must be done species-by-species, process will be lengthy. Reclassification could be a risk to wild populations unless limited to exotic wildlife in the U.S. and certain well-protected native species.
3. Reclassify all Endangered and Threatened wildlife in captivity as E(S/A) or delist entirely.	Reclassification would simplify but not eliminate permit requirements. Delisting of captive wildlife would eliminate paperwork for propagators.	Reclassification could be a risk to wild populations. Delisting of captive wildlife would allow use for purposes contrary to those of the Act. Delisting could make it difficult to insure that wildlife acquired or imported under permit is only used for authorized purposes.
4. Issue general permit to eligible persons for activities with captive wildlife.	Eliminates need to make artificial distinctions between wild and captive populations. Provides flexibility to regulate activities with captive wildlife as needed. Reduces paperwork for propagators. Provides the controls needed to protect wild populations. Limits permission for conducting certain activities to qualified persons.	Permit could be a risk to wild populations unless limited to exotic wildlife in the U.S. and certain well-protected native species.

The advance notice prompted 1,021 letters to the Service (Table II). The vast majority stated that the Service should not be involved in regulating interstate trade in captive-bred wildlife. Many specifically asked that recognized zoological institutions be exempt from such control on the grounds that current permit requirements interfere with captive propagation.

Very few commenters opposed a change in the rules concerning captive wildlife. The State governments of North Carolina, New Mexico, New York and Washington expressed concern for the law enforcement problems that would arise if the delisting of exotic or native wildlife, or the less restrictive treatment of native wildlife were to occur. The Committee for Humane Legislation, Inc., opposed any loosening of the rules or any allowance for commercial activities involving Endangered or Threatened species. Finally, the Environmental Defense Fund expressed concern that relaxation of the rules might harm wild populations, and that it should be

limited to animals in captivity at the time of publication of the Service's advance notice and the progeny of such animals. All of these points are addressed below.

Table II.—Sources of letters commenting on the advance notice of April 14, 1978, concerning captive wildlife regulations

Source	Number of letters
Private individuals	737 farm letters, 23 personal letters
Zoos	130
Bird breeders (both individuals and organizations)	63
State and Federal Government agencies	34
Professional organizations	17
Mammal breeders	7
Crosses	2
Conservation organizations	2
Falconers	2
Total	1,021

The Service prefers the fourth alternative outlined in Table I. More than any other alternative, it provides sufficient control to protect wild populations of Endangered and

Threatened species while interfering as little as possible with captive propagation activities. The following is a detailed discussion of how this alternative can best be implemented.

D. Discussion of the Proposal

In developing a proposed rulemaking that would grant general permission to conduct certain otherwise prohibited activities, the Service has addressed the following questions.

(1) *Should such permission be limited to wildlife bred in captivity? The advantage of limiting the treatment to wildlife bred in captivity is that it helps to insure that such treatment does not extend to specimens taken from the wild, which are to be more strictly protected. This limitation might also serve as an incentive for persons to make captive populations eligible, thus enhancing propagation. The Service has used in the proposed rule a definition of "bred in captivity" developed through a series of public meetings in preparation for the Second Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. This definition has been adopted by the Party nations. It was drafted in a way that would protect wild populations, and its use in the present regulations would simplify permit requirements where a species is subject to both the Act and the Convention.*

(2) *Should the regulations be limited to exotic species? The primary concern about captive wildlife regulation, as expressed in public comments on the advance notice, was that it could jeopardize Endangered and Threatened species native to the United States. If such an animal were taken from the wild, it would be difficult for law enforcement officials to show that it was not bred in captivity. This concern led the Service to limit the determination of CSSP's to exotic species, even though it had earlier proposed CSSP status for three native species: The nene goose (*Branta sandvicensis*), Hawaiian duck (*Anas wyvilliana*) and Laysan teal (*Anas laysanensis*). The Service intended to rely on strict import controls to protect wild populations from exploitation. The CSSP regulations, therefore, were applied only to certain exotic species for which interstate commerce, taking and exportation were allowed. Importation was not allowed under these regulations except for previously exported wildlife because the CSSP's were defined as populations in captivity in the United States.*

Several persons commenting on the advance notice asked that a less-restrictive approach be taken toward importation of wildlife bred in captivity in foreign zoos. The difficulty with this, in the Service's view, is that the acquisition of specimens from the wild by such zoos is beyond our control, and the evidence demonstrating that the wildlife is bred in captivity might be difficult to verify. The only importation favored by the Service under captive

wildlife rules is the return of individually identified specimens previously exported from the U.S.

Certain native Endangered and Threatened species are more secure from unauthorized taking than others. If protection of wild populations of native species is adequate, captive populations could be afforded less-restrictive treatment. Import controls serve to protect wild populations of exotic species generally, but special treatment of captive-bred native wildlife must be determined species-by-species. Factors to consider would include whether there is a low demand for taking specimens from the wild because of the success of captive breeding, whether the habitat of wild populations is sufficiently inaccessible to discourage taking, and whether protection of wild populations by law enforcement officials would be effective if captive-bred populations were not as strictly regulated. The Service proposes that the less-restrictive rules for captive wildlife be applied to any native Endangered or Threatened species meeting these conditions.

Three candidates for this treatment are the nene goose, Hawaiian duck and Laysan teal. Evidence gathered when proposing their CSSP status shows that they are successfully bred in captivity to the extent that there is a low demand for taking specimens from the wild. The remoteness of Laysan Island, sole natural habitat of the Laysan teal, combined with the low commercial value of this species when bred in captivity, effectively protect its wild population. The small wild populations of the nene goose and Hawaiian duck are vulnerable to taking, and it is not clear that law enforcement is sufficiently effective. Despite the possibility that survival of these species depends on captive propagation, the Service is not yet convinced that conservation of these two species would best be served by relaxing controls on captive populations.

(3) *Should the regulations treat only taking and interstate commerce, or should they also cover import and export?* The Act prohibits a number of activities involving Endangered Species that are routine practices for breeding animals in captivity. However, the Act provides that permits may be granted for these activities if they are to enhance the propagation or survival of the species.

The Service clarified the meaning of "enhance the survival" in a rule issued on June 1, 1977 [42 FR 28052-28057]. It was defined to include, among other things, conservation exhibition, euthanasia and the holding of surplus

animals. The Service recognizes the need for a more comprehensive definition of enhancing the propagation or survival of species. It proposes to expand the existing one to include the provision of health care, culling, contraception, grouping and handling of wildlife and similar normal practices of animal husbandry, in recognition of the fact that all of these practices are necessary to maintain healthy captive populations.

Although this is an expansion of the definition, all of the included activities are currently authorized by various permits. On occasion, these activities also are known to occur without authorization, as in the case of emergency euthanasia of an injured animal by a person who did not previously obtain a permit for this purpose. It is impractical for every person holding captive-bred Endangered or Threatened wildlife to have a permit that will insure full technical compliance with the law when routine practices of animal husbandry are involved.

The prohibitions of the Act most relevant to captive wildlife, other than "taking" are importation, exportation, and interstate or foreign commerce. Difficulties with importation have been discussed above. The only form of importation acceptable to the Service, under less-restrictive rules would be the return of individuals of captive wildlife that were previously exported from the United States and that are identifiable as originating in this country.

Exportation does not pose the same risks to wild populations as does importation. However, exportation could lead to misuse of captive wildlife if specimens are not used for purposes intended to enhance the propagation or survival of the species. Present rules for CSSP's allow exportation and reimportation, but only for a specified transaction or series of transactions to avoid an unrestricted drain of animals from the CSSP. If there is sufficient evidence that exportation is for the purpose of enhancing the propagation or survival of the species, and that the foreign recipient is qualified to conduct related activities, the Service believes it is appropriate to allow exportation of captive-bred wildlife under less-restrictive rules.

Interstate commerce in captive-bred wildlife has been difficult to regulate because transfers of wildlife are often characterized as breeding loans instead of commercial transactions. In addition, many persons do not see the use of prohibiting interstate commerce when commerce within a state is not controlled. Some other persons would

like to see commercial activities with Endangered and Threatened wildlife banned altogether. The Service recognizes that interstate commerce is an important element of captive wildlife propagation, and that it is allowable under the Act when conducted to enhance the propagation or survival of the species. A total ban on interstate commerce would substantially reduce the funds available for captive propagation.

Accordingly, the Service proposes to reduce controls on interstate commerce in captive-bred wildlife provided this activity is to enhance propagation or survival?

(4) *Should the regulations be limited to living specimens?* The purpose of this proposal is to improve regulations with regard to conservation of Endangered and Threatened species by facilitating those activities involved with enhancing their propagation or survival. The Service is therefore concerned with activities involving living wildlife, not dead wildlife or its products. There might be situations where interstate or foreign commerce in products of captive-bred wildlife actually enhances the propagation or survival of the species. However, such situations might also present a risk to the survival of both wild and captive populations. It appears best to retain strict control of such activities under the normal permit provisions of 50 CFR Part 17.

Disposition of dead specimens of captive-bred wildlife would not require permits or the Service's prior approval unless it involved one of the activities prohibited by the Act. If such were the case, permits would be required in accordance with existing regulations. These requirements might entail delays, but urgency is not as important for dead specimens as for living ones. Public comments on the advance notice have not raised this issue. It does not appear to be a significant problem with the species under consideration.

(5) *To whom should the regulations apply?* Under the CSSP regulations, there are strict criteria for determining the species that may be included as well as the persons who are eligible for permits. The philosophy behind the CSSP system was that slightly relaxed controls would facilitate captive propagation of wildlife by qualified persons while preventing any abuses. The present proposal is based on a different proposition: That activities involving captive wildlife should be regulated only to the extent necessary to conserve the species, with emphasis on the conservation of wild populations,

A consequence of this approach is that the Service does not wish to place heavy burdens of paperwork on persons who seek to take, export, or engage in interstate or foreign commerce with captive-bred exotic wildlife. The Service proposes to require that any person who wants to conduct such activities must register with the Service. Registration requirements would be minimal. They would be based on standards set by the U.S. Department of Agriculture under the animal Welfare Act [9 CFR Parts 2 and 3]. These standards, which apply to all warmblooded animals (mammals and birds), are generally adequate to insure proper care of wildlife. Similar standards, with appropriate modifications would be required of persons maintaining coldblooded animals.

A significant difference between this proposed requirement and the existing one for permits is that persons would no longer need to demonstrate to the Service their prior experience in caring for a particular type of wildlife or describe the containers and treatment for wildlife being transported or temporarily stored. Persons who are already registered or licensed by the Department of Agriculture would need only to show such registration or license in order to register with the Service. One benefit of this arrangement is that it would eliminate overlapping requirements of the two federal agencies. Another benefit is that persons who want to start breeding wildlife would be able to do so if they have suitable facilities, even if they do not have prior experience with the species in question. It should be kept in mind that intrastate sale and interstate noncommercial transfer of captive wildlife presently occur without need for permits, unless the particular specimens were originally acquired under a permit that requires prior approval of transfers as one of its conditions. Many persons are able to acquire captive-bred Endangered or Threatened wildlife without a permit under existing regulations.

To simplify registration, the Service intends to inform persons now holding valid CSSP permits or other Endangered or Threatened species permits for captive-bred exotic wildlife that they need only write the Service to request registration. Information on file in support of their permit application should suffice for registration under the proposed regulations.

(6) *How will the Service monitor activities involving captive-bred wildlife?* The Service needs to know what is happening to captive-bred

populations of Endangered and Threatened species for several reasons:

(a) Such information will indicate whether or not the public complies with the regulations;

(b) The information will aid the Service in determining the effectiveness of its regulations in conserving wildlife; and

(c) The information may be used to facilitate the transfer of wildlife between persons who have surpluses to relocate or who need breeding stock.

Many zoos participate in the International Species Inventory System (ISIS), a computerized system that keeps track of wildlife in captivity. ISIS was developed with the support of the Service to improve management of captive wildlife. Each participating institution is supplied with information on the species, number, sex, age and location of wildlife in all member institutions. The Service does not now have the resources to duplicate this system or to provide a similar one for persons or institutions not participating in ISIS, despite its obvious value. When the Service's permit files are computerized, certain of this information may be accessible on a current basis to aid the public.

Specific types of information that the Service proposes to request from registrants are:

(a) Reports of each transaction involving an otherwise prohibited activity within ten days of its completion (these activities include export, import of previously exported wildlife, and interstate or foreign commerce);

(b) Written descriptions of the identifying marks on any captive-bred wildlife that is to be exported and later reimported, submitted to the Service prior to export;

(c) Semiannual written reports of any taking of captive-bred wildlife that results in its death or permanent loss of reproductive ability; and

(d) In the case of exportation to another person, documentary evidence that the recipient has adequate facilities and expertise, and that the recipient will use the wildlife to enhance the propagation or survival of the species.

In conclusion, the Service has found that the conservation of Endangered and Threatened species in captivity would be improved by reducing regulatory controls. Evidence supports a finding that normal practices of animal husbandry, the accumulation, holding and transfer of surplus wildlife, and the live exhibition of wildlife to educate the public about the ecological role and conservation needs of the species are

activities that are beneficial for the purpose of enhancing propagation or survival. Accordingly, the Service proposes to permit such activities under conditions that will provide sufficient regulatory control without impeding the activities. Although the Service's primary concern is conservation of wild populations, there are valid reasons for extending this concern to captive populations of the same biological species: They can be used to bolster or restock wild populations, they provide an alternative to wild populations, as a source of animals for research or other uses, and they provide opportunities for research that can benefit wild populations. The Act explicitly provides that permits may be issued for persons to otherwise prohibited activities for the purpose of enhancing the propagation or survival of the affected species. If wild populations are sufficiently protected from unauthorized taking, the Service believes that a wide range of activities involved in propagation and maintenance of wildlife may be permitted for this purpose, when it can be shown that they would not be detrimental to the survival of wild or captive populations of the species.

Accordingly, it is proposed to amend Part 17, Title 50 of the Code of Federal Regulations as follows:

§ 17.3 [Amended]

1. In § 17.3, insert the following definitions between the definitions of "Authentic native articles of handicrafts and clothing" and "Endangered":

* * * * *

"Bred in captivity" refers to progeny of wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if reproduction is asexual. The parental breeding stock must be (1) established in a manner not detrimental to the survival of the species in the wild, (2) maintained without augmentation from the wild except for the occasional addition of animals, eggs or gametes from wild populations to prevent deleterious inbreeding, with the magnitude of such addition determined by the need for new genetic material and not by other factors, and (3) managed in a manner designed to maintain the breeding stock indefinitely. A parental breeding stock shall be considered to be managed in a manner designed to maintain it indefinitely only if it is managed in a manner that has been demonstrated to be capable of

reliably producing second-generation offspring in captivity.

"Captivity" means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing the selected species, and that has boundaries designed to prevent animals, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

* * * * *

§ 17.3 [Amended]

2. § 17.3, replace the definition of "Enhance the survival," "Enhancing the survival," or "Enhancement of survival" with the following definition:

* * * * *

"Enhance the propagation or survival," when used in reference to wildlife that is in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of the wild or captive populations of the species in question:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control

survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive populations at the location from which the wildlife would be removed; and

(c) Live exhibition of wildlife in a manner designed to educate the public to the ecological role and conservation needs of the species.

§ 17.7 [Deleted]

3. Delete § 17.7 entirely.

§ 17.11 [Amended]

4. In § 17.11, delete the last sentence of paragraph (c) that reads as follows: "The addition of the letters "C/P" in parentheses indicates that the reason for designating the species as threatened is that it constitutes a captive, self-sustaining population."

§ 17.11 [Amended]

5. In § 17.11, delete the following species entries from the list of endangered or threatened wildlife.

determined the wild populations to be sufficiently secure from unauthorized taking in accordance with paragraph (h) of this section; (ii) the purpose of such taking is to enhance the propagation or survival of the affected species; and (iii) the person taking such wildlife maintains accurate written records of any taking that results in the death or permanent loss of reproductive potential of the wildlife, and submits a semiannual written report of any such taking to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240, by June 30 and December 31 of each year.

* * * * *
§ 17.21 [Amended]

7. In § 17.21, add a new paragraph (g) as follows:

* * * * *

(g)(1) Notwithstanding paragraphs (b), (e) and (f) of this section, any person may (i) import or export, (ii) deliver, receive, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity, or (iii) sell or offer for sale in interstate or foreign commerce any living wildlife that is bred in captivity in the United States provided: (i) The wildlife is of a species whose natural range of geographic distribution does not now include any part of the United States, or the wildlife is of a species for which the Service has determined the wild populations to be sufficiently secure from unauthorized taking in accordance with paragraph (h) of this section (ii) the purpose of such activity is to enhance the propagation or survival of the affected species; (iii) each specimen of the wildlife is uniquely and permanently identified by a band, tattoo, or other mark that is reported in writing to an official of the Service at the port of export prior to export, if such wildlife is to be subsequently imported; (iv) the Service has received evidence sufficient to indicate that any person receiving such wildlife is able to properly maintain the wildlife, as specified in paragraph (g)(2) or (g)(3) of this section; and (v) any person subject to the jurisdiction of the United States who transfers or receives such specimens maintains accurate written records of all such transactions and reports each such transaction to the Service within 10 days after completing the transaction, using reporting forms provided by the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service Washington, D.C. 20240.

(2) Prior to engaging in any of the activities authorized in paragraph (g)(1)

Common name	Scientific name	Popula- tion	Known distrib- ution	Portion of range where threatened or endangered	Status	When listed	Special rules
MAMMALS							
Jaguar.....	Panthera onca.....	In captivity in U.S.....	N/A	Entire.....	T(C/P)	22	N/A
Lemur, black.....	Lemur macaco.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Lemur, ringtailed.....	Lemur catta.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Leopard.....	Panthera pardus.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Tiger.....	Panthera tigris.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
BIRDS							
Pheasant, brownheaded.....	Crossoptilon mantchuricum.....	In Captivity in U.S.....	N/A	Entire.....	T(C/P)	22	N/A
Pheasant, Edward's.....	Lophura edwardsi.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Pheasant, bar-tailed.....	Symaticus humiae.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Pheasant, Mikado.....	Symaticus mikado.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Pheasant, Palawan peacock.....	Polyplectron emphanum.....	do.....	N/A	Entire.....	T(C/P)	22	N/A
Pheasant, Swinhoe's.....	Lophura swinhoi.....	do.....	N/A	Entire.....	T(C/P)	22	N/A

§ 17.21 [Amended]

6. In § 17.21, add a new paragraph (c)(6) as follows:

* * * * *

(c) * * *
(6) Notwithstanding paragraph (c)(1) of this section, any person may take

endangered wildlife that is bred in captivity in the United States provided: (i) The wildlife is of a species whose natural range of geographic distribution does not now include any part of the United States, or the wildlife is of a species for which the Service has

of this section any person subject to the jurisdiction of the United States seeking to receive wildlife must register with the Service. Requests for registration must be accompanied by documentary evidence that (i) the person is a licensee or registrant under the Animal Welfare Regulations of the U.S. Department of Agriculture (9 CFR Part 2); (ii) the person complies with the specifications of the U.S. Department of Agriculture for the humane handling, care, treatment, and transportation of warmblooded animals (9 CFR Part 3), or (iii) the person has adequate facilities and expertise for the humane handling, care, treatment and transportation of coldblooded animals, as appropriate. Registration will remain in effect only so long as subdivision (ii) or (iii) of this subparagraph continues to be applicable. Requests for registration must be sent to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

(3) Prior to engaging in any of the activities authorized in paragraph (g)(1) of this section, any person subject to the jurisdiction of the United States seeking to export wildlife to another person must provide the Service with documentary evidence demonstrating to the satisfaction of the Service that the proposed recipient of the wildlife has adequate facilities and expertise for the proper handling, care, and treatment of such wildlife, and that the recipient will use the wildlife for purposes of enhancing the propagation or survival of the affected species. Such evidence must be sent to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

* * * * *
§ 17.21 [Amended]

8. In § 17.21, add a new paragraph (h) as follows:

(h)(1) The Service shall use the following criteria in determining if wildlife bred in captivity of any species whose natural range of geographic distribution includes any part of the United States is eligible for the provisions of paragraphs (c)(6) and (g) of this section: (i) Whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons; and (ii) whether the wild populations of the species are effectively protected from unauthorized taking as a result of the inaccessibility of their habitat to man or as a result of the effectiveness of law enforcement.

(2) In accordance with the criteria in paragraph (h)(1) of this section, the

Service has determined the following species to be eligible for the provisions of paragraphs (c)(6) and (g) of this section:

Laysan teal (*Anos laysanensis*).

§ 17.31 [Amended]

9. In § 17.31, revise paragraph (a) to read as follows:

(a) Except as provided in Subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 (a) through (c)(4), (c)(6), (g) and (h) shall apply to threatened wildlife.

* * * * *

§ 17.33 [Deleted]

10. Delete § 17.33 entirely.

This proposed rule is issued under the authority contained in the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884, as amended), and was prepared by Dr. Richard L. Jachowski, Federal Wildlife Permit Office.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044.

Dated: May 17, 1979.

Lynn A. Greenwalt,
Director, Fish and Wildlife Service.

[FR Doc. 79-10077 Filed 5-22-79; 8:43 am]
BILLING CODE 4310-55-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 17

Captive Wildlife Regulation

AGENCY: Fish and Wildlife Service.

ACTION: Final rule.

SUMMARY: There is evidence that federal regulation of activities involving captive-bred wildlife under the Endangered Species Act of 1973 has interfered with effective propagation of Endangered and Threatened species in the United States. The Service recognizes that captive propagation is, in some cases, important for conserving such species, and that the Act authorizes the permitting of otherwise prohibited activities to enhance the propagation or survival of affected species. This rule grants general permission for persons to conduct otherwise prohibited activities with captive-bred wildlife under specified conditions, which are designed to protect wild populations of wildlife and to ensure that the activities will be conducted to enhance the propagation or survival of the species.

EFFECTIVE DATE: Amendments to §§ 17.3 and 17.21 become effective on [date of Federal Register publication]. Amendments to §§ 13.12 and 17.11, and the deletion of §§ 17.7 and 17.33 will become effective on [30 days after date of Federal Register publication].

FOR FURTHER INFORMATION CONTACT: Dr. Richard L. Jachowski, Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240, telephone (703) 235-2418.

SUPPLEMENTARY INFORMATION:

Background

The Service issued an advance notice of potential rulemaking on April 14, 1978 (43 FR 18144-18145) and a proposed rule on May 23, 1979 (44 FR 30044-30049) that would amend regulations concerning captive Endangered and Threatened wildlife. The proposal followed from a decision by the Service that activities involving captive wildlife should be regulated, as required by the Endangered Species Act of 1973, but only to the extent necessary to conserve the species. As reported in the proposal, strict regulation has interfered with the captive propagation of wildlife. It has caused persons who would otherwise breed Endangered species to cease doing so, or to reduce the number of offspring produced because they could

not readily be transferred to other persons.

The Act and the regulations implementing it prohibit activities that include, among other things, taking (defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such activities), importation, exportation, and interstate or foreign commerce. However, permission may be granted for such activities if they are conducted for certain purposes. In the case of Endangered wildlife, the Act limits them to scientific purposes or to purposes of enhancing the propagation or survival of the affected species. In the case of the Threatened wildlife, regulations limit them to scientific purposes, purposes of enhancing the propagation or survival of the affected species, economic hardship, zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act.

Considering that persons may be permitted to undertake otherwise prohibited activities for the purpose of enhancing propagation or survival of the affected species, the Service believes that a wide range of activities involved in maintenance and propagation of captive wildlife should readily be permitted when wild populations are sufficiently protected from unauthorized taking, and when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the species. This was the basis for the Service's proposal, as outlined below.

The proposed rule of May 23, 1979, contained the following provisions:

1. It defined the terms "bred in captivity" and "captivity" in order to specify the wildlife that would be eligible for special regulatory treatment;
2. It replaced the current definition of "enhance the survival, enhancing the survival, or enhancement of survival" with a broader definition of "enhance the propagation or survival" to encompass normal practices of animal husbandry;
3. It deleted the regulations for captive, self-sustaining populations of otherwise Endangered species;
4. It permitted persons to take Endangered or Threatened wildlife bred in captivity—if the species is determined to be eligible, if the taking is to enhance propagation or survival of the species, and if persons maintain records and submit semiannual reports to the Service of such taking that results in death or permanent loss of reproductive ability of the wildlife;
5. It permitted persons to import, export, or engage in interstate or foreign

commerce with Endangered or Threatened wildlife bred in captivity—if the species is determined to be eligible, if the activity is to enhance propagation or survival of the species, if wildlife to be reimported is uniquely identified prior to export, if the recipient is qualified to maintain the wildlife, and if persons maintain records and report transactions to the Service within 10 days; and

6. It established criteria for determining the eligibility of species for this treatment: either they are exotic to the United States or their wild populations in the United States are sufficiently protected from unauthorized taking and are in low demand.

Comments on the proposal

The proposed rule generated 1,498 letters to the Service (Table I).

Table I.—Sources of letters commenting on the proposed rule of May 23, 1979, concerning captive wildlife.

Source	Number of letters
Private Individuals:	
Form letters	1,240
Individual letters	115
Zoos	53
Bird breeders	39
State governments or agencies	21
Animals breeders' organizations	11
Biomedical organizations	5
Zoological organizations	4
Circus organizations	3
Conservation organizations	2
Federal employees	2
Total	1,498

All of the form letters and most of the other letters urged adoption of the regulations as proposed. Only three persons commented that captive populations should be delisted to exempt them from control under the Act. Conversely, the Director of the Game and Fish Division of the Georgia Department of Natural Resources asked that the present regulations not be changed because strict federal controls would support recent Georgia state legislation regulating possession of exotic wild animals. Other letters expressed support for the proposal but suggested that changes be made before a final rule is issued.

Specific comments regarding changes are discussed below. They concern five general topics: the definition of terms used in the rule, the criteria for registering persons, the requirements for reporting on activities, the eligibility of species for inclusion under the rule, and allowance of activities for other purposes under the rule.

1. Definition of terms

The American Association of Zoological Parks and Aquariums and several of its member institutions commented that the term "person" in the rule should be amended to refer to both persons and institutions, since many institutions would need to register.

The term "person" is used throughout the Service's regulations, and is defined in 50 CFR Part 10 to mean "any individual, firm, corporation, association, partnership, club, or private body, anyone or all, as the context requires." This appears to meet the requirements of zoos, and the term "person" alone is adequate in the present rule.

The use of the term "bred in captivity" in the proposal also prompted comments. The Director of the Gladys Porter Zoo in Brownsville, Texas, supported use of the definition contained in the proposal because it is consistent with the definition of "bred in captivity" that has been adopted by the nations that are parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Three members of the San Diego Zoo staff raised questions about the application of this definition. They asked for clarification of the means by which the Service would determine specimens to be eligible under the definition, and pointed out practical difficulties in applying the definition. In particular, they asked (1) if evidence of second-generation captive birth in one institution would suffice to qualify wildlife in other institutions, (2) what numbers will allow a species to be maintained indefinitely, and if such numbers must be at any single institution, (3) if evidence of second-generation captive birth in one subspecies would suffice to qualify other subspecies of the same species, and (4) how the magnitude of wild stock necessary to prevent deleterious inbreeding will be determined. Another individual asked that the Service publish a list of species found to be eligible under the proposed definition of "bred in captivity."

A more basic comment on the definition of "bred in captivity" was made by the Secretary of the Smithsonian Institution, who cited evidence from the National Zoological Park that a very large proportion of zoo populations of exotic ungulates which have reliably produced second-generation young have ultimately become extinct, most likely due to high juvenile mortality resulting from inbreeding. He observed that it would be best to avoid the production of

second-generation young from related animals as long as possible, and instead to mate first-generation young to any available unrelated animals. His advice was that the reliable production of second-generation young not be used as part of the definition.

Ringling Bros.-Barnum & Bailey Combined Shows, Inc. also urged the Service to adopt a simpler definition because as proposed it was "overly technical, complex and restrictive."

The Service is concerned that the proposed definition might conflict with an important purpose of this rule, which is to facilitate captive propagation. The restrictive terms of the proposed definition were adopted for the Convention because of a need to prevent wild populations from being exploited. In the present rule, that is precluded by limiting treatment to exotic species in captivity in the United States (which depends on import restrictions for all Endangered and Threatened wildlife) or to particular native species in captivity in the United States (which depends on sufficient protection from unauthorized taking, as determined for individual species of wildlife). Accordingly, there is little need to incorporate the full definition as used for the Convention in this rule. By incorporating it, the Service might encourage inbreeding of captive wildlife to avoid the need to obtain specific permits, to the long-term detriment of the species. The risk to wild populations as the result of using a simpler definition is negligible.

2. Criteria for registering persons

In the proposed rule, persons would be authorized to engage in importation, exportation, and interstate or foreign commerce involving captive-bred wildlife if they first registered with the Service. It was proposed that standards developed by the U.S. Department of Agriculture (U.S.D.A.) to implement the Animal Welfare Act (9 CFR Part 3) be used as the basis for determining if persons were eligible to be registered. Since the standards in 9 CFR Part 3 apply only to mammals, the Service would need to develop similar standards applicable to birds, reptiles and other forms for wildlife.

Several persons and organizations concerned with breeding of birds, reptiles, amphibians and fishes commented that standards for maintaining those forms of wildlife should be developed before final rules are issued. The American Federation of Aviculture, the Exotic Bird Club of Oregon and the Wisconsin Bird and Game Breeders Association further

asked that licensing by the U.S.D.A. not be required for birds.

The Humane Society of the United States, the Riverbanks Zoological Park and the Baltimore Zoo stated that the Service should develop registration standards that are more restrictive than those of the U.S.D.A. In this regard, the Institute for Herpetological Research suggested that the Service should require persons to demonstrate their competence in order to be registered. Mr. William B. Love of Jensen Beach, Florida argued that prior experience should not be a condition for registration, so that "well-meaning enthusiasts" could undertake wildlife propagation. Mr. Paul J. Hollander of Ames, Iowa, commented that the U.S.D.A. standards sometimes conflict with the best methods for inducing breeding.

In view of these comments, the Service has determined that the U.S.D.A. standards should not be used as the sole criteria for registering persons under the present rule. Considering that the purpose of this rule is to enhance the propagation or survival of species, persons should be registered if they can be expected to contribute to this purpose. Accordingly, the final rule has been revised to require additional information from applicants that will enable the Service to determine if they are capable of enhancing the propagation or survival of affected species. Consistent with the intent of this rule, application requirements and issuance criteria have been kept as simple and flexible as possible. An advantage of this approach is that it avoids the need for developing detailed federal standards for the maintenance and propagation of various types of wildlife, which would be a very lengthy and complex task, and which might prove to be counter-productive to the purposes of this rule.

There were several other comments regarding the criteria. One person suggested that the Service should only register buyers and not sellers of wildlife, while the American Federation of Aviculture stated that the registration should apply to both or neither. Considering that the Act prohibits both selling and receiving in interstate or foreign commerce, the Service considers it necessary for both buyer and seller to register. This is made clear in the final rule.

The Governor of Kentucky suggested that persons should be registered in order to take captive-bred wildlife, just as the proposal would require for persons engaging in other prohibited activities. The Service has adopted this suggestion. Otherwise, there would be

no way of enforcing the proposed reporting requirement for taking. Inclusion of taking with other activities requiring registration will simplify the rule and will not substantially increase the burden of paperwork for persons who propagate wildlife.

The Riverbanks Zoological Park, the American Federation of Aviculture, and an individual commented that the Service should clarify the criteria it would use to determine if foreign recipients of captive-bred wildlife are acceptable. The Service believes that criteria for persons receiving captive-bred wildlife should be similar whether they are in the United States or in another country. The final rule applies the same basic criteria to persons in either situation. Foreign persons will not have to register with the Service, but persons in the United States will, in essence, have to satisfy the Service that foreign recipients of wildlife would qualify for registration if they were operating in this country.

3. Reporting requirements

Many zoos in the United States and Canada, and a growing number of them in other countries participate in the International Species Inventory System (ISIS). This is a computer-based record of wildlife in captivity. Its purpose is to provide information needed to effectively manage captive populations, especially with regard to avoiding inbreeding and relocating surplus stock. The Service assisted in funding the development of ISIS because of its applicability to the Endangered Species Program. The Buffalo Zoological Gardens and the Commissioner of the Department of Environmental Conservation of New York suggested that the Service accept ISIS inventory forms as meeting the reporting requirements of participating institutions. The Fort Worth Zoological Park suggested that the Service provide funds to help support ISIS.

In reconsidering the reporting requirements, the Service has determined that there is no great advantage to requiring reports within 10 days of each taking, or on a semiannual basis for transactions. Instead, annual reports will be required summarizing all takings that result in death or permanent loss of reproductive ability and all interstate or foreign transactions. The individual ISIS inventory forms are not a convenient source of such information for the Service. Instead each registered institution might use ISIS to generate the information for its annual report. Limits to funding for the Service's Endangered Species Program, and increasing emphasis on conservation of wild

populations of Endangered and Threatened species, might preclude the Service from continuing to fund ISIS as in the past.

The San Diego Zoo asked if reports of transactions had to be made by the sender, the receiver, or both. The Service intends that both (if under U.S. Jurisdiction) should report in order to obtain a more complete accounting of activities under each registration. In this regard, the American Federation of Aviculture requested clarification as to whether the reporting requirement would include intrastate transactions or non-commercial interstate transactions, which are not prohibited by the Act.

The primary uses of reports are to assess compliance with the regulations, to determine the effectiveness of the regulations, and to measure the success of captive propagation of Endangered and Threatened wildlife. Accordingly, it would be useful to know not only the number of otherwise prohibited transactions and takings that occurred, but also the number of births, deaths, and non-prohibited transactions. Inventories of the species in captivity could be developed from these data that would be useful to the public as well as the Service. The Service intends to request such information from registrants.

Two other interesting comments were made by individuals: one that each specimen of exotic wildlife should have a certificate to show its legal origin, and the other that record-keeping should not be required of registrants. The former suggestion is impractical to administer, considering that possession of Endangered or Threatened wildlife is not prohibited unless the wildlife was illegally taken. The latter suggestion runs counter to normal practices of animal propagation, which require careful record-keeping.

The American Federation of Aviculture recommended that registration and reporting for Endangered and Threatened birds be carried out in the same manner as is required for native upland gamebirds and migratory waterfowl. The problems with this are that registration standards are not uniform throughout the United States for persons holding such birds, and that the need to promptly report each transaction has been eliminated from this rule.

The Riverbanks Zoological Park, the American Federation of Aviculture and an individual asked that the Service clarify its requirements for marking wildlife that is to be reimported. Rather than require that each such specimen be uniquely marked, which is impractical for some species or types of specimens,

the Service has revised the rule to require unique identification by marking or other means (such as a written description of identifying characteristics of the specimen in question). No single method of marking is suitable for all forms of wildlife, and the Service will accept any reliable method that can be used to distinguish wildlife bred in captivity in the United States from other wildlife that is presented for importation.

4. Eligibility of specimens

The American Association of Zoological Parks and Aquariums, eight of its member institutions, the American Pheasant and Waterfowl Society, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and several individuals asked that some means be found to facilitate importation of wildlife bred in captivity outside of the United States. One suggestion was that the Service accept documentation from foreign authorities certifying that the wildlife is bred in captivity. Another suggestion was that the Service should routinely approve permits for importing wildlife bred in captivity in a foreign facility owned by an institution in the United States.

The Service recognizes the problems of zoos, animal breeders and biomedical laboratories in importing wildlife bred in captivity outside of the United States, and is giving further consideration to ways in which importation of such wildlife might be facilitated. However, the Service also recognizes the need to protect wild populations from exploitation. At present, import controls are the only effective protection that the regulations provide with respect to wild populations of exotic species. Accordingly, the present rule does not apply to wildlife bred in captivity outside of the United States. It was beyond the scope of the proposed rule on this subject. Such importation will continue to be authorized by individual permits, rather than in a general way under this rule.

The Kansas Herpetological Society requested clarification of the means by which the Service would determine the eligibility of native species for these regulations. In response, the Service has incorporated in the final rule a reference to section 4(b) and section 4(f)(2)(A) of the Act and the implementing regulations. These references specify procedures with respect to petitions and notification of the public and governors of affected states, and are designed to ensure adequate public participation.

Other comments on the subject of eligible species concerned particular Endangered or Threatened species.

Inclusion of the Hawaiian goose (*Branta sandvicensis*) and the Hawaiian duck (*Anas wyvilliana*) was requested by the Smithsonian Institution, the American Federation of Aviculture, and the Service's Acting Endangered Species Coordinator in Hawaii. The Park Superintendent for Emporia, Kansas, and another individual also asked that the Hawaiian goose be included. However, the Governor of Hawaii asked that these two species not be included until there is a real demonstrated need to change their status in captivity. Considering that the proposed rule did not include these two species, and considering the Governor's objection to their inclusion, the Service invites further public comment and evidence to show if they should be proposed for eligibility.

The Assistant Director of the Service's Endangered Wildlife Research Program requested that the masked bobwhite quail (*Colinus virginianus ridgway*) be included, and that the criteria for determining the eligibility of native species be amended by adding consideration of "whether the stock to be made available is surplus to the needs of the restoration program for that species or subspecies." Mr. Jerome J. Pratt of Sierra Vista, Arizona, supported inclusion of this quail and the Hawaiian species mentioned above.

The Service has considered the merits of adding a criterion that would involve a judgment concerning the success of captive propagation in meeting restoration needs. In this regard, the Governor of Colorado suggested that if captive breeders benefit by removal of stock from the wild to prevent inbreeding, they should also make some repayment to the wild. The Service has concluded that conservation of wild populations must be its primary goal, and that the proposed criteria do allow consideration of the success of captive propagation in determining the eligibility of native species. The masked bobwhite quail might meet the proposed criteria and will be further considered. The suggestion by the Governor of Colorado would be difficult to implement, and would require precautions to prevent harm to existing wild stocks.

5. Other purposes

This rule is intended to facilitate activities for the purpose of enhancing propagation or survival of the affected species. As discussed above, there are a few other purposes for which permits may be issued. The American Pheasant and Waterfowl Society commented that the requirements for exporting captive-bred wildlife for purposes other than to enhance the survival of the species were

still too severe. Such concerns are beyond the scope of this rule, and perhaps beyond the scope of activities permissible under the Act. However, the Service is willing to consider further suggestions for improving this and other rules.

Organizations concerned with biomedical research on non-human primates also commented on the proposed rule. It was fully supported by the Association of Primate Veterinary Clinicians and by the California Primate Research Center. The Director of the Delta Regional Primate Research Center at Tulane University asked that the rule also apply to Threatened species used in biomedical research. The Director of the New England Regional Primate Research Center suggested that allowance be made for importing the progeny of parent breeding stock in overseas colonies owned by a research institution in the United States and for the shipment of such stock to other institutions. The National Society for Medical Research made similar comments and offered specific suggestions on procedures, but also more generally urged that the final rulemaking avoid "the imposition of repressive regulations on the utilization of individual animals captive bred specifically for research use."

The Service recognizes that scientific research is a purpose for which permits may be issued, but also that authorization of activities for that purpose is beyond the scope of the proposed rule. Only those activities conducted to enhance propagation or survival of the affected species may be authorized by the present rule. The primary use of nonhuman primates in biomedical research is to solve human problems. While in some cases there is a benefit to the affected wildlife species, it is not always the intended result. The Service will consider applications for permits to authorize transactions involving non-human primates produced in breeding colonies for the purpose of biomedical research, but not in the context of this rule unless the purpose of the activities can be shown to enhance the conservation of the affected species, in the wild or in captivity.

Description of final rule

The purpose of this rule, as described above, is to facilitate activities for the purpose of enhancing the propagation or survival of Endangered and Threatened wildlife. The Service is accomplishing this by (1) amending the regulations with respect to certain definitions and (2) granting a general permit, by regulation, to authorize persons to conduct otherwise prohibited activities

with captive-bred wildlife under a set of prescribed conditions. In accordance with section 10(d) of the Act, the Service has found that this exception was applied for in good faith (see 43 FR 16145 and 44 FR 30044), that it will not operate to the disadvantage of Endangered or Threatened species, and that it will be consistent with the purposes and policy set forth in section 2 of the Act.

The final rule contains the following provisions.

1. It defines the terms "bred in captivity" or "captive-bred" in order to clarify the conditions that must be met for wildlife to be eligible for special consideration. The definition of these terms is based on the definition adopted by nations that are parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. However, the present definition excludes, for purposes of the Act, that part of the Convention's definition limiting consideration to progeny of parental stock that is established, maintained and managed in certain ways. In cases where activities conducted under this rule are also subject to the Convention, the stricter definition used for the Convention will apply.

2. The final rule defines the term "captivity," both with respect to captive-bred wildlife as considered in this rule, and with respect to any species of wildlife for which captive populations are accorded special treatment under the Act. The definition of "captivity" is the same as that used for the Convention, and is the same as the definition in the proposed rule of May 23, 1979.

3. The final rule replaces the definition of "enhance the survival," "enhancing the survival," or "enhancement of survival" with a definition of "enhance the propagation or survival." The revised definition is essentially unchanged from the proposed rule. It includes a wide range of normal husbandry practices needed to maintain self-sustaining and genetically viable populations of wildlife in captivity, in addition to the provisions already in the regulations concerning the accumulation, holding and transfer of surplus stock and the exhibition of wildlife in an educational manner.

4. The final rule deletes regulations in §§ 13.12, 17.7 and 17.33 concerning captive self-sustaining populations. The present rule eliminates the need for special regulations concerning the captive populations of these few otherwise Endangered species. The Service is phasing out these provisions to allow persons holding valid permits

for captive self-sustaining populations to become registered under the present rule. The Service will undertake to register such persons under the provisions of § 17.21(g), considering that they have satisfied the new application requirements in obtaining their current permits. Such persons need not reapply. Persons holding other valid permits for Endangered or Threatened species might also qualify for registration under this rule. If so, they should submit a written request to the Service, asking for registration on the basis of their previous application and supplying any additional information required in § 17.21(g).

5. The final rule authorizes persons to take, import and export, deliver, receive, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce any Endangered or Threatened wildlife that is bred in captivity in the United States. Although this rule amends § 17.21, which concerns only Endangered species, the same provisions are extended to Threatened species by § 17.31(a). The authorization is limited by several conditions. First, the species of wildlife must be exotic to the United States or else its wild populations native to the United States must be determined by the Service to be adequately secure for unauthorized taking. Second, the purpose of authorized activities must be to enhance the propagation or survival of the affected species. Third, activities are not authorized for interstate or foreign commerce in the course of a commercial activity if they involve non-living wildlife. This provision is intended to discourage the propagation of Endangered and Threatened wildlife for consumptive markets rather than for direct benefit to the species. Fourth, reimport is allowed only if specimens were adequately identified when previously exported. Fifth, the authorization is extended only to persons who register with the Service.

The final rule specifies application requirements for registration. These have been kept as simple as possible, but still provide the Service with information needed to determine if the applicant has the means of enhancing propagation or survival of the affected wildlife. Registration has been extended to persons conducting research (such as pathology, for example) directly related to propagation or survival of the wildlife, even though they might not maintain living specimens. Registration also includes persons who exhibit wildlife to educate the public about the

ecological role and conservation needs of wildlife. The list of application requirements has been amended to request information about how such education is to be accomplished.

In the final rule, registrants are required to maintain written records of their authorized activities and to annually report them to the Service. Both buyer and seller must be registered in the case of interstate commerce. Registrants also must obtain approval from the Service before exporting or entering into foreign commerce in captive-bred wildlife if it is not to remain under the care of the registrant. The purposes of this requirement are to limit access to captive-bred wildlife to qualified persons and to deter potentially harmful release of captive-bred wildlife into the wild.

Since the amendments to §§ 17.3 and 17.21 relieve existing restrictions on captive-bred populations of Endangered and Threatened wildlife, the Service finds good cause to waive the 30-day period for making such amendments effective upon publication. The remaining amendments will take effect 30 days after publication, as prescribed in 43 CFR 14.5(b)(5).

This rule is issued under the authority contained in the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 844, as amended), and was prepared by Dr. Richard L. Jachowski, Federal Wildlife Permit Office.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Regulations Promulgation

Accordingly, Parts 13 and 17 of Title 50 of the Code of Federal Regulations are amended as follows:

PART 13—GENERAL PERMIT PROCEDURES

§ 13.12 [Amended]

1. Delete the following entry from the list of types of permits in § 13.12(b):

* * * * *

"Captive self-sustaining populations (wildlife only).....17.33."

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

§ 17.3 [Amended]

2. Insert the following definitions in alphabetical order:

* * * * *

"Bred in captivity" or "captive-bred" refers to wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise

transferred gametes in captivity, if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual.

"Captivity" means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

§ 17.3 [Amended]

3. Replace the definition of "Enhance the survival," "Enhancing the survival," or "Enhancement of survival" with the following definition:

* * * * *

"Enhance the propagation or survival," when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

§ 17.7 [Deleted]

4. Delete § 17.7 entirely.

§ 17.11 [Amended]

5. Delete the phrase ". . . or because they constitute a captive, self-sustaining population (see § 17.7) . . ." from the last sentence of paragraph (a) and delete the last sentence of paragraph (c)

that reads as follows: "The addition of the letters "C/P" in parentheses indicates that the reason for designating

the species as threatened is that it constitutes a captive, self-sustaining population."

§ 17.11 [Amended]

6. Delete the following species entries from the list of endangered and threatened wildlife:

Common name	Scientific name	Population	Known distribution	Portion of range where threatened or endangered	Status	When listed	Special rules
MAMMALS							
Jaguar	<i>Panthera onca</i>	in captivity in U.S.	N/A	Entire	T(C/P)	22	N/A
Lemur, black	<i>Lemur macaco</i>	do	N/A	Entire	T(C/P)	22	N/A
Lemur, ringtailed	<i>Lemur catta</i>	do	N/A	Entire	T(C/P)	22	N/A
Leopard	<i>Panthera pardus</i>	do	N/A	Entire	T(C/P)	22	N/A
Tiger	<i>Panthera tigris</i>	do	N/A	Entire	T(C/P)	22	N/A
BIRDS							
Pheasant, brown eared	<i>Crossoptilon mantchuricum</i>	in captivity in U.S.	N/A	Entire	T(C/P)	22	N/A
Pheasant, Edward's	<i>Lophura edwardsi</i>	do	N/A	Entire	T(C/P)	22	N/A
Pheasant, bar-tailed	<i>Sympticus himala</i>	do	N/A	Entire	T(C/P)	22	N/A
Pheasant, Mikado	<i>Sympticus mikado</i>	do	N/A	Entire	T(C/P)	22	N/A
Pheasant, Palawan peacock	<i>Polyplectron emphanum</i>	do	N/A	Entire	T(C/P)	22	N/A
Pheasant, Swinhoe's	<i>Lophura swinhoi</i>	do	N/A	Entire	T(C/P)	22	N/A

§ 17.21 [Amended]

7. Add a new paragraph (g) as follows:

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this Section, any person may take; import or export; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States provided the following conditions are met:

(i) The wildlife is a species having a natural geographic distribution not including any part of the United States, or the wildlife is a species that the Director has determined to be eligible in accordance with subparagraph (5) of this paragraph;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export from the United States, and

(v) Any person subject to the jurisdiction of the United States who engages in any of the activities authorized by this paragraph does so in accordance with subparagraphs (2), (3) and (4) of this paragraph.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph must first register with the Service (Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240). Requests for registration must be submitted on an official application form (Form 3-200) provided by the Service, and must include the following information:

(i) The types of wildlife sought to be covered by the registration, identified by common and scientific name to the taxonomic level of family, genus or species;

(ii) A description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered by the registration, or in conducting research directly related to maintaining and propagating such wildlife;

(iii) A description, if appropriate, of the means by which the applicant intends to educate the public about the ecological role and conservation needs of the affected species;

(iv) Photograph(s) or other evidence clearly depicting the facilities where such wildlife will be maintained; and

(v) A copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR Part 2).

(3) Upon receiving a complete application, the Director will decide whether or not the registration will be approved. In making his decision, the Director will consider, in addition to the

general criteria in § 13.2(b) of this subchapter, whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Each person so registered must maintain accurate written records of activities conducted under the registration and must submit to the Director a written annual report of such activities.

(4) Any person subject to the jurisdiction of the United States seeking to export or conduct foreign commerce in captive-bred endangered wildlife which will not remain under the care of that person must first obtain approval by providing written evidence to satisfy the Director that the proposed recipient of the wildlife has expertise, facilities or other resources adequate to enhance the propagation or survival of such wildlife and that the proposed recipient will use such wildlife for purposes of enhancing the propagation or survival of the affected species.

(5)(i) The Director shall use the following criteria to determine if wildlife of any species having a natural geographic distribution that includes any part of the United States is eligible for the provisions of this paragraph: (A) whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons, and (B) whether the wild populations of the species are effectively protected from unauthorized taking as a result of the inaccessibility of their habitat to man or as a result of the effectiveness of law enforcement.

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(ii) The Director shall follow the procedures set forth in section 4(b) and section 4(f)(2)(A) of the Act and in the regulations promulgated thereunder with respect to petitions and notification of the public and governors of affected States when determining the eligibility of species for purposes of this paragraph.

(iii) In accordance with the criteria in subparagraph (5)(i) of this paragraph, the Director has determined the following species to be eligible for the provisions of this paragraph:

Laysan teal (*Anas laysanensis*).

§ 17.33 [Deleted]

8. Delete § 17.33 entirely.

Dated: September 10, 1979.

Rolf L. Wallenstrom,

Acting Director, Fish and Wildlife Service.

[FR Doc. 79-23705 Filed 9-14-79; 8:45 am]

BILLING CODE 4310-55-M

place across the boundaries of the petitioned region. Goshawks in northern Colorado may interbreed with those in southern Wyoming, 30 miles away. The petition, and the best available information, does not support defining goshawks in Utah, Colorado, New Mexico, and Arizona as an exclusive, interbreeding population.

The Service finds that the data contained in the petition, referenced in the petition, and otherwise available to the Service does not present substantial information indicating that the petitioned action may be warranted. This negative 90-day finding results from the failure of the petitioner to present substantial scientific or commercial information indicating that northern goshawks in Utah, Colorado, New Mexico, and Arizona satisfy Service criteria for a distinct vertebrate population. In reviewing the petition and all known relevant information, the Service was also unable to demonstrate that goshawks in the Southwest satisfy current population criteria and, therefore, found that the segment of the goshawk's range identified in the petition is not a listable entity.

The Service did conclude however, that the petition did present substantial information indicating that northern goshawk population declines and loss and/or modification of its habitat may be occurring. Therefore the Service has elevated the Northern goshawk (*A. gentilis*) to Category 2 status in the upcoming Endangered and Threatened Wildlife and Plants; Animal Notice of Review, throughout its range in the United States. Initiation of a status review for the goshawk in its range throughout the United States is announced in this volume of the Federal Register.

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Authors

The primary authors of this notice are Timothy Tibbitts of the Phoenix, Arizona U.S. Fish and Wildlife Ecological Services Field Office, and Lorena Wada of the Albuquerque, New Mexico U.S. Fish and Wildlife Service Regional Office (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

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

Authority: 16 U.S.C. 1361-1467; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub L. 99-625, 100 Stat. 3500; unless otherwise noted.

Dated: December 30, 1991.

Richard N. Smith,
Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-255 Filed 1-6-92; 8:45 am]

BILLING CODE 4310-55-M

50 CFR Part 17

RIN 1018-AB10

Captive-bred Wildlife Regulation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to propose rule.

SUMMARY: Under the Endangered Species Act of 1973 (Act), the Fish and Wildlife Service (Service) regulates certain activities involving endangered or threatened wildlife of non-native species that are born in captivity in the United States. This is currently accomplished by requiring persons who wish to conduct otherwise prohibited activities with such wildlife to register with the Service, i.e., to obtain a captive-bred wildlife, or CBW, registration [50 CFR 17.21(g)]. The Service registers persons who meet certain established requirements and specifies the extent of the activities that those persons are authorized to conduct. The system is based in part on the definition of "enhance the propagation or survival" found at 50 CFR 17.3. The

Service believes that this system of regulation, as presently implemented, may impose a substantial paperwork burden on the public as well as on the Service without contributing appreciably to the conservation of many affected species. Since the Service's primary goal under the Act is the conservation of wild populations, it wishes to conduct a review of the system to determine whether changes are needed, and if so, what those changes should be. The review is based upon the principle that regulatory actions should have a sound biological basis rather than representing an overly legalistic interpretation of the Act. Several alternatives including continuation of the present system and the current definition of "enhance" are presented. The Service seeks information and comments from the public that will contribute to this review and the subsequent decision by the Service whether to propose revised regulations. Suggestions for other alternatives not presented here are welcome. Information on species that have substantial numbers of individuals that are surplus to breeding programs is also solicited.

DATES: The Service will consider all comments received by March 9, 1992.

ADDRESSES: Send comments to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, room 432, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Marshall P. Jones, or Richard K. Robinson, Office of Management Authority, at the above address (703/358-2093).

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) prohibits any person subject to the jurisdiction of the United States from conducting certain activities with any endangered or threatened species of fish or wildlife. These activities include, among other things, import, export, take, and interstate or foreign commerce. The Secretary of the Interior (or the Secretary of Commerce in the case of certain marine species) may permit such activities, under such terms and conditions as he shall prescribe, for scientific purposes or to enhance the propagation or survival of the affected species, provided these activities are consistent with the purposes of the Act. The Secretary of the Interior's authority has been delegated through the Directorate of the Service to the Office of Management Authority.

The Fish and Wildlife Service (Service) has been striving to achieve an

appropriate degree of control over prohibited activities involving living wildlife of non-native species born in captivity in the United States. This has been difficult to achieve. Twelve years ago, the Service issued proposed and final rules to address this issue (44 FR 30044, May 23, 1979, and 44 FR 54002, September 17, 1979). In announcing the final rule, the Service stated that:

The proposal followed from a decision by the Service that activities involving captive wildlife should be regulated, as required by the Endangered Species Act of 1973, but only to the extent necessary to conserve the species. As reported in the proposal, strict regulation has interfered with the captive propagation of wildlife. It has caused persons who would otherwise breed endangered species to cease doing so, or to reduce the number of offspring produced because they could not readily be transferred to other persons.

The preamble to the final rule also pointed out that conservation of wild populations must be the Service's primary goal.

The final rule amended regulations in 50 CFR 17.21 by adding § 17.21(g), which granted general permission to take; import or export; deliver, receive, carry, transport or ship in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any non-native endangered or threatened wildlife that is bred in captivity in the United States. In other words, the regulation itself is the permit. In order for persons or institutions to operate under that permit, certain conditions must be met:

(1) The wildlife is not native to the United States or is a native species determined by the Service to be eligible due to low demand for taking from wild populations and the effective protection of wild populations;

(2) The purpose of the activity is to enhance the propagation or survival of the species;

(3) The activity does not involve interstate or foreign commerce with non-living wildlife;

(4) Each specimen being reimported is uniquely identified by means that are reported in writing to the Service prior to export; and

(5) Any person seeking to operate under the permit must register with the Service by showing that their expertise, facilities, or other resources appear adequate to enhance the propagation or survival of the wildlife.

This registration is called a captive-bred wildlife, or CBW, registration.

The final rule also amended the definition of "enhance the propagation or survival" of wildlife in captivity to include a wide range of normal animal

husbandry practices needed to maintain self-sustaining and genetically viable populations of wildlife in captivity. Specifically included in those practices were "culling" and "euthanasia." "Culling" was intended to mean the removal (including by destruction) of animals with genetic defects, animals that are over-represented in the gene pool so that further use in a breeding program would result in inbreeding, or animals otherwise unsuitable for breeding. "Euthanasia" was intended to denote the true mercy killing of old or incurably ill or injured animals. Confusion has resulted because many holders of wildlife characterize destruction of healthy animals for any reason as euthanasia if the animal is given a quick and painless death.

Other aspects of the definition of "enhance" that were codified in 1979 and are still in use today include accumulation, holding and transfer of animals not immediately needed or suitable for propagative or scientific purposes, and exhibition in a manner designed to educate the public about the ecological role and conservation needs of the affected species (50 CFR 17.3). Since these definitions appear in part 17, it can be argued that they apply to all types of endangered species permits as well as to CBW registrations. However, the five application requirements for CBW registrations mandate that, among other things, the applicant must describe his/her facilities and experience in maintaining and propagating listed wildlife, and if appropriate, the manner in which the applicant intends to educate the public. The qualifier under the education clause argues that education could be used as additional justification for issuance of registration, but that it must be in combination with propagation activities. This and other questions concerning the inclusion of education in the definition of "enhance" are discussed later in this notice.

"Harass" is another definition that merits discussion and comment. Section 3 of the Act defines "take", a prohibited activity, as including harassment. "Harass" is defined in 50 CFR 17.3 as an act or omission which creates the likelihood of injury by annoying wildlife to such an intent as to significantly disrupt normal behavioral patterns, including breeding, feeding or sheltering. While the applicability of this concept to animals in the wild is obvious, its applicability to captive-born wildlife is not so clear. Some specific circumstances can obviously be defined as harassment. For example, maintenance of unsafe enclosure is an act or omission that creates the likelihood of injury to the animal. The

Service, in cooperation with the Animal and Plant Health Inspection Service (Department of Agriculture) constantly strives to ensure that captive facilities for endangered or threatened species meet the requirements of the Animal Welfare Act. The problem in applying this definition generally to captive-born wildlife is in knowing what constitutes "normal behavioral patterns." If the animal has never known anything but a captive environment, then presumably its captive behavior is "normal" for that specimen. Public comment on this point is solicited.

The Service now is evaluating the effectiveness of these regulations in accomplishing the purposes of the Act, which include providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and to provide a program for the conservation of those species. In particular, the Service is considering the practical effect of the regulations in furthering conservation programs for listed species. This includes a consideration of whether for many species regulation has had any significant impact upon the species in the wild.

The relaxation of strict permit requirements in 1979 was followed by the development of captive-breeding programs by various organizations for listed species of non-native wildlife. This development was not entirely due to the change in permit requirements; however, the same organizations previously maintained that those requirements were an obstacle to such programs.

The Service welcomes the development of organized, long-term programs for the maintenance of captive-breeding populations of endangered and threatened wildlife, such as the Species Survival Plans of the American Association of Zoological Parks and Aquariums. Such programs, involving great cost and effort, can benefit the species in several ways: (1) By preserving the existence of the species in the event that wild populations are extirpated, (2) by enabling persons who maintain and study the captive wildlife to gain knowledge about the species that can be applied to conservation of wild populations, (3) by supplying a source of animals for research or other uses to relieve demands on wild populations, and (4) by creating a reservoir of animals that can be drawn upon to reestablish or augment wild populations.

In view of these actual or potential benefits, the Service believes that the premise underlying the approach it

adopted in 1979, to regulate activities only to the extent necessary to conserve the species, aided in accomplishing the purposes of the Act. The risks of this approach, which the Service recognized and addressed in its regulations, were as follows: (1) Captive-bred animals of the listed non-native species might be used for purposes that do not contribute to conservation, such as for pets, for research that does not benefit the species, or for entertainment; and (2) persons might conduct prohibited activities with wild-caught animals of these species on the pretext that the animals were captive-bred.

The risk that captive-bred animals might be used for purposes that do not contribute to conservation of the species must be viewed in terms of the scope of the Act. The Act prohibits interstate commerce, e.g., sale or transfer of a leasehold interest in listed wildlife from one person to another across a state line. It does not prohibit intrastate commerce (e.g., commerce within a single State); non-commercial interstate transfers of legally-taken wildlife (e.g., loans, gifts); possession of lawfully acquired endangered species; or, once lawfully possessed without benefit of a permit, use of them in ways that are not encompassed by the prohibition against "take." Given these limits, the Service cannot fully control the use of captive-bred animals, nor mandate compliance with conservation programs by persons holding such animals.

Conservation programs involving captive-bred non-native species are motivated primarily by the initiative of organizations that run them, rather than by the requirements of the Act. The Service's approach to regulating prohibited activities with captive-bred non-native animals has been associated with an increase in responsible captive-breeding programs, but there is no indication that it has led to a significant increase in the use of such animals for purposes that do not contribute to conservation, insofar as those activities are prohibited by the Act. The Service believes that the array of non-prohibited activities cited above, coupled with the breeding of certain species to surplus, has contributed more to the proliferation of uses such as for pets than has any lack of regulatory effort on its part. It is true that some of the less common species have been purchased by entertainers in interstate commerce by virtue of having a CBW registration. However, species in surplus such as Bengal tigers (*Panthera tigris tigris*) and leopards (*Panthera pardus*) that are commonly used in entertainment are available in intrastate commerce in

many, if not most, states. Some entertainers also breed animals for their own use.

The risk that persons might conduct prohibited activities with non-native animals taken from the wild on the pretext that they were captive-bred is minimized by controls on importation. This risk is the reason that native species generally are not eligible for treatment under this system. The limits on the Service's authority to control activities with animals discussed above, coupled with the obvious difficulty of distinguishing between captive-bred and wild-caught animals in captivity, make it impractical to deal with this risk by means of internal controls. If the Service were to attempt to address this risk by rigorously controlling activities with animals already in captivity in the United States, captive-breeding programs could be adversely impacted by hindering the exchange of animals, and the costs of such a control program would be prohibitive. Import controls have improved significantly since the Service issued regulations on captive-bred wildlife in 1979. These improvements include an enhanced capability of Service law enforcement personnel at ports of entry, much broader participation by governments around the world in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the addition of a second enforcement officer to the staff of the CITES Secretariat.

During 1990, there were about 850 CBW registrations. At least 50 percent of these are for species that appear to have been bred to surplus—animals that are unsuitable for organized breeding programs aimed at preservation of the species because of unknown genealogy, inbreeding, over-representation in the gene pool, or because of interbreeding of different subspecies as is the case with the "Bengal" tiger. While these tigers are suitable for zoological display purposes, they are of little or no value in terms of preserving the taxon for possible reintroduction to the wild because they no longer have the same genetic makeup as the wild population. They are known in the zoo community as "generic tigers."

The Service believes that the CBW system, as currently implemented, may be more burdensome to both the public and the Service than is warranted by its contribution to conservation of wild populations. If so, it diverts limited Service resources from regulation of activities more important to the survival of the species. These include protection of native endangered and threatened

species, control of import and export, regulation of activities involving individuals of non-native species that were taken from the wild, and implementation of other laws and treaties such as CITES, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, the Bald and Golden Eagle Protection Act and the Lacey Act (injurious wildlife).

One possible approach to the problems discussed above would be to downlist certain captive populations of non-native species to threatened or threatened due to similarity of appearance, and promulgate special rules easing regulation of them. This would be limited to animals born in captivity in the United States, belonging to species present in large numbers with many individuals that are surplus to organized breeding programs for various reasons. However, this approach is not considered as an alternative within the scope of this notice, which considers possible revisions of 50 CFR part 17. Implementation of this approach would involve listing actions, the procedures for which are found at 50 CFR part 424. Various other alternatives for revision of the CBW system as set forth in 50 CFR 17.21(g) are discussed below. This will be followed by a discussion of a possible amendment of the definition of "enhance" set forth in 50 CFR 17.3.

Alternatives for the CBW System

1. Eliminate Registration Process

Amend 50 CFR 17.21(g) in a manner which would:

- (1) Leave the general permit issued by section 17.21(g)(1) in place;
- (2) Eliminate the requirement for persons to register with the Service in order to conduct certain activities under the general permission granted in that section; and
- (3) Add a rebuttable presumption that any otherwise prohibited activity involving any listed wildlife does not meet the conditions of the general permission, granted in 50 CFR 17.21(g).

The term "rebuttable presumption" means that a presumption that an activity is not properly authorized can be rebutted by evidence that it is. For example, section 9(b)(1) of the Act establishes a rebuttable presumption that a specimen is not entitled to the pre-Act exemption claimed for it absent documentation of pre-Act status.

These changes would not be expected to significantly increase either of the risks to species that are described above. The rebuttable presumption would apply to any persons, firms or institutions now possessing listed

species whether they have CBW registrations or not. The requirements for detailed record-keeping and reasonable access to inspect those records set forth in 50 CFR 13.46 and 13.47 would remain in place. These regulations require all permittees to maintain complete and accurate records of all activities and transactions authorized by permit, and to allow Service agents to enter their premises at any reasonable hour for inspection purposes. Establishment of a rebuttable presumption could be justified on the grounds that activities for which persons might be challenged are those that the Act prohibits. These changes would have the added benefits of reducing the paperwork burden on the public, and of shifting the resources in the Service that are dedicated to administering the registration process toward types of permit administration that are more important in achieving the purposes of the Act.

One drawback of this alternative is the deletion of the requirement for annual reports by persons holding endangered and threatened species. Many of the species covered by the regulation are rare in captivity and/or are difficult to breed. Under the current system, persons and organizations involved in serious breeding programs can obtain copies of annual reports for purposes such as tracking individual animals. While many institutions participate in the International Species Inventory System, a computerized system that keeps track of wildlife in captivity, many holders of listed wildlife do not.

2. Eliminate Registration for Large Captive Populations

Amend 50 CFR 17.21(g) as discussed in Alternative 1, except that only species present in the United States in large numbers, including many individuals that are surplus to organized breeding programs, would be exempted from the registration requirement. As currently implemented, the CBW system virtually mandates that the registrant breed his animals. It is counterproductive to foster breeding of species already present in surplus numbers. This exemption would not prevent those so inclined from breeding their animals; however, the Service should not be in the position of exacerbating the surplus animal problem. The species to be exempted from the registration requirement would be identified in any subsequent rulemaking process, with due consideration given to factual information received from the public. Possible examples would be pheasants,

Bengal tigers, leopards, and parakeets of the genus *Neophema*. Currently, out of approximately 850 registrants, about 380 (located in 47 states and Puerto Rico) are registered for pheasants, and about 80 (in 32 states and Puerto Rico) for *Neophema*. There are approximately 135 registrants for members of the cat family (Felidae) located in 41 states. The majority of these hold only Bengal tigers and/or leopards. It should be noted that for tigers, the registration exemption would only apply to the Bengal tiger; other sub-species of tiger for which organized breeding programs exist, and which are not so abundant in captivity, would continue to fall under the current registration requirement.

This alternative would preserve the benefit of a substantial reduction in burden on both the public and the Service, and would also preserve any potential benefits that may accrue to organized breeding programs from the registration system.

3. No Action

Make no change in the CBW system, retaining current registration and annual reporting requirements. No change in current regulatory practice would occur. There would be no change in existing risk of inappropriate use of listed wildlife. Existing burden on the public and the Service would continue. This alternative does not address the question of whether further propagation of species in surplus should continue to be encouraged, if not mandated. It would also continue to ignore the fact that for a number of species, their abundance in captivity and their lack of potential for release to the wild is such that it can be argued that neither increased nor decreased regulation will have any material impact on the species in the wild. As stated earlier, conservation of wild populations must be the Service's primary goal.

Possible Amendment of the Definition of "Enhance"

"Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species" is now deemed to constitute enhancement of survival of the species (50 CFR 17.3). Such exhibition thus qualifies as justification for issuance of a permit and, at least in part, for a CBW registration for endangered species. Theoretically, properly designed and delivered educational materials could serve to enhance the prospects for survival of endangered and threatened species by increasing public awareness and stimulating interest in the plight of listed species. This would be more likely

in the case of endangered species native to the United States, where the American public can have much more influence on the fate of species than they can in the case of species in other countries. Possible exceptions would be: (1) Species that provide popular products such as elephant ivory, to the extent that the public would be dissuaded from purchasing the product, and (2) "glamor" species for which the public could be moved to donate significant amounts of money, provided the Service could ensure that the funds were spent to benefit the species in its native country. In most cases, a cause and effect relationship between education of the American public and any significant impact on the survival of non-native species in the wild cannot be determined. This presents a problem in the case of commercial exhibitors seeking to use education as the sole justification for permits or CBW registrations. Even with good material and a good faith effort at delivery by the exhibitor, there may be a limit to the amount of educational content a public which came (and paid) to be entertained will absorb. This is especially true for commercial exhibitors who have a limited amount of time to present their shows, or whose educational message is delivered in social settings where people may not be receptive.

Section 4(d) of the Act provides authority to issue any regulations the Secretary deems necessary and advisable for the conservation of threatened species. The regulations (50 CFR 17.32) give public education as one of the acceptable purposes for issuance of a threatened species permit. However, for endangered species permits and registrations within the scope of this notice, the Act itself specifies scientific purposes or enhancement of propagation or survival as the only acceptable purposes. Therefore, it can be argued that a regulation defining education as constituting enhancement of survival of an endangered species goes beyond the intent of the Congress. Section 2(a) of the Act (findings of the Congress) refers to the educational value of endangered species or threatened species, but this appears to be in the context of "various species of fish, wildlife, and plants in the United States * * *" [section 2(a)(1)—emphasis added]. On the other hand, section 3 defines the terms "conserve" and "conservation" as the use of all methods and procedures necessary to aid the recovery of listed species to the point where the protection of the Act is no longer necessary.

The Service suggests several possible alternatives to treating education as part of the definition of "enhance" in 50 CFR 17.3. Comments and/or suggested additional alternatives are solicited.

1. Issue No Permits Based on Public Education

Delete education from the definition of "enhance" for endangered species and from the regulations governing issuance of threatened species permits (50 CFR 17.32). While this alternative might possibly be more consistent with the provisions of the Act, it would assign no value whatsoever to education as a tool for conserving either native or non-native listed species.

2. Limit Permits for Educational Purposes to Native Listed Species Only

Modify 50 CFR 17.3 and 17.32 so that education would be allowed as a purpose for native endangered and threatened species only. Expand appropriate sections of the regulations to provide more specific guidance on

types of educational material and activity that are qualifying.

3. No change in Definition of "Enhance"

Allow the current definition to remain in § 17.3, but limit its applicability to only permits and CBW registrations where education is the primary purpose for maintaining the animals.

Public Comments Solicited

The Service intends that any proposed rule will be accurate and as effective as possible in the conservation of endangered or threatened species. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this notice are hereby solicited. Suggestions for alternatives not discussed in this notice are welcome. Information and statistics are solicited on species that have substantial numbers of individuals that are surplus to, or unsuitable for, breeding programs

for any reason. Such information would be useful to the Service in administering the CBW system regardless of whether it remains unchanged, and could be disseminated for use by those interested in captive breeding.

Author

The primary authority of the notice is Richard K. Robinson, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Arlington, VA 22203.

List of subjects in 50 CFR Part 17

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

Authority continues to read: 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.

Dated: December 31, 1991.

Richard N. Smith,
Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-276 Filed 1-6-92; 8:45 am]

BILLING CODE 4310-55-M

substantially if it is not possible to certify compliance with the automatic crash protection requirements in vehicles completed from those incomplete vehicles. Similarly, final stage manufacturers and alterers cannot sell vehicles manufactured on or after September 1, 1997 that are not certified as complying with the automatic crash protection requirements. There is no reason to believe that these groups will not act cooperatively for their mutual benefit, as they did in the case of the dynamic testing requirement.

Third, the incomplete vehicle manufacturers have already conducted the analyses needed to enable them to draw up appropriate specifications for their incomplete vehicles for the dynamic testing requirements. This work should prove useful when those same incomplete vehicle manufacturers are drawing up the appropriate specifications for their incomplete vehicles for the purposes of the automatic crash protection requirements. That means the incomplete vehicle manufactureres should be able to make prototypes and specifications available to the final stage manufacturers earlier than was the case for the dynamic testing requirements.

Thus, after again considering this question, NHTSA reaffirms its previous conclusion that there is adequate leadtime for final stage manufacturers and alterers to comply with the automatic crash protection requirements as of September 1, 1997. Accordingly, NHTSA denies RVIA's petition for rulemaking asking that multistage vehicles be exclude from the automatic crash protection requirements or be given two years additional leadtime.

Issued on June 8, 1993.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 93-13864 Filed 6-10-93; 8:45 am]

BILLING CODE 4910-50-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB10

Captive-Bred Wildlife Regulation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: Under the Endangered Species Act of 1973 (Act), the Fish and Wildlife Service (Service) regulates certain activities involving specimens of

non-native endangered or threatened wildlife species that are born in captivity in the United States. This is currently accomplished by requiring persons who wish to conduct otherwise prohibited activities with such wildlife to register with the Service, *i.e.*, to obtain a captive-bred wildlife, or CBW, registration [50 CFR 17.21(g)]. The Service registers persons who meet certain established requirements and specifies the extent of the activities that those persons are authorized to conduct. In the belief that this system of regulation, as presently implemented, may impose a substantial paperwork burden on the public as well as on the Service without contributing appreciably to the conservation of many affected species, the Service has conducted a public review of the system to determine whether changes are needed. That review was announced in a Notice of Intent to Propose Rule (54 FR 548, January 7, 1992). In response to that notice, 942 individuals, institutions and organizations submitted comments. In addition, a public meeting was held in April 1992. The Service has concluded that changes are needed, and that a proposed rulemaking is in order. Proposed changes to the system include: a reduced level of paperwork regulation on several taxa that are present in the United States in large numbers; and a revision of the CBW registration system so that it will more closely relate to its original intent, *i.e.*, to encourage responsible breeding programs that are specifically designed to help preserve the species involved.

DATES: The Service will consider all comments received by September 9, 1993.

ADDRESSES: Send comments to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, room 420C, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: R. K. Robinson, Special Assistant, at the above address (703/358-2093).

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) prohibits any person subject to the jurisdiction of the United States from conducting certain activities with any endangered or threatened species of fish or wildlife. These activities include, among others, import, export, take and interstate or foreign commerce. The Secretary of the Interior (or the Secretary of Commerce in the case of certain marine species) may permit such activities, under such terms and conditions as he/she shall prescribe, for scientific purposes or to enhance the propagation or survival of the affected

species, provided these activities are consistent with the purposes of the Act. The Secretary of the Interior's authority to administer permit matters relating to endangered and threatened species has been delegated through the Director of the Fish and Wildlife Service (Service) to the Office of Management Authority (OMA).

The Service has been striving to achieve an appropriate degree of control over prohibited activities involving living wildlife of non-native species born in captivity in the United States. This has been difficult to achieve. In an early attempt to address this issue, the Service issued proposed and final rules establishing a category of captive wildlife called the Captive Self-sustaining Population, or CSSP (41 FR 18619, May 5, 1976, and 42 FR 28052, June 1, 1977). CSSP's were defined as endangered species which met certain criteria, *e.g.*, were present in large numbers in captivity, were bred by a large number of persons or institutions, and for which there was low demand from the wild. These populations were down-listed from endangered to threatened in order to reduce the stringency of regulations (permits were still required). The final rule stated:

The primary purpose of the Act is the conservation and continued existence of wild populations of fauna and flora which are endangered or threatened, and the ecosystems on which they depend. The Service recognizes that the survival of Endangered species of animals in captivity is to some extent related to this purpose. The captive individuals provide gene pools that deserve continued preservation and such individuals make it possible to re-establish or rejuvenate wild populations. For these reasons, the Service will continue to enforce the stringent prohibitions of the Act as they relate to captive individuals of a species that is Endangered in the wild, and for which procedures to develop CSSP's have not been perfected.

However, there are other species that while Endangered in the wild, are being bred in captivity in such numbers that CSSP's have been established. The successful maintenance of such populations usually depends on the ability of zoos or other propagators to transfer breeding stock and progeny in an efficient and expeditious manner.

Eleven species of wildlife were given CSSP status: 6 species of pheasants, bengal tiger (*Panthera tigris*), leopard (*Panthera pardus*), jaguar (*Panthera onca*), ring-tailed lemur (*Lemur catta*) and black lemur (*Lemur macaco*).

In 1978, the Service announced a review of regulations concerning captive wildlife (43 FR 16144, April 14, 1978). The notice reiterated the Service's philosophy concerning its approach to captive versus wild populations:

The Service considers the purpose of the Act to be best served by conserving species in the wild along with their ecosystems. Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs * * *.

The Service seeks to improve its regulations in order to protect wild populations of Endangered and Threatened species while interfering as little as possible with their captive propagation.

As a result of the review, the Service published a proposed rule (44 FR 30044, May 23, 1979) which concluded that:

The CSSP regulations did not sufficiently alleviate problems for animal breeders * * *. The problems, expressed in numerous letters to the Service, are mainly that:

- (1) The CSSP approach does not promote the propagation of other species not yet qualified for CSSP treatment;
- (2) The CSSP list does not include enough qualified species, and the procedure for adding them is cumbersome;
- (3) The permit requirements place an excessive burden on the public, as in the case of a pheasant breeder who might have only a few birds as a hobby; and
- (4) The classification of CSSP's as "species" distinct from wild populations of the same biological species is an artificial distinction.

The Service is convinced that a change is necessary, after reviewing all of the public comments and after almost two years of administering the CSSP system.

Following further review and public comment, the Service published a final rule (44 FR 54002, September 17, 1979) which established the CBW system as it currently exists. In announcing the final rule, the Service stated that:

The proposal followed from a decision by the Service that activities involving captive wildlife should be regulated, as required by the Endangered Species Act of 1973, but only to the extent necessary to conserve the species. As reported in the proposal, strict regulation has interfered with the captive propagation of wildlife. It has caused persons who would otherwise breed endangered species to cease doing so, or to reduce the number of offspring produced because they could not readily be transferred to other persons.

The preamble to the final rule also pointed out that conservation of wild populations must be the Service's primary goal.

The final rule amended regulations in 50 CFR 17.21 by adding section 17.21(g), which granted general permission to take; import or export; deliver, receive, carry, transport or ship in the course of a commercial activity;

or sell or offer for sale in interstate or foreign commerce any non-native endangered or threatened wildlife that is bred in captivity in the United States. In other words, the regulation itself contains the permit. In order for persons or institutions to operate under that permit, certain conditions must be met:

- (1) The wildlife is not native to the United States or is a native species determined by the Service to be eligible due to low demand for taking from wild populations and the effective protection of wild populations;
- (2) The purpose of the activity is to enhance the propagation or survival of the species;
- (3) The activity does not involve interstate or foreign commerce with non-living wildlife;
- (4) Each specimen being reimported is uniquely identified by means that are reported in writing to the Service prior to export; and
- (5) Any person seeking to operate under the permit must register with the Service by showing that their expertise, facilities, or other resources appear adequate to enhance the propagation or survival of the wildlife.

This registration is called a captive-bred wildlife, or CBW, registration.

The final rule also amended the definition of "enhance the propagation or survival" of wildlife in captivity to include a wide range of normal animal husbandry practices needed to maintain self-sustaining and genetically viable populations of wildlife in captivity. Other aspects of the definition of "enhance" that were codified in 1979 and are still in use today include accumulation, holding and transfer of animals not immediately needed or suitable for propagative or scientific purposes, and exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species (50 CFR 17.3).

The Service believes that the CBW system, as presently implemented, may impose substantial paperwork burden on the public without contributing appreciably to the conservation of many affected species. The system also creates a large Service workload to process new and renewal applications, to review annual reports, and to issue registrations or deny their issuance. This workload competes with other demands on the Service's limited permit resources, which must also address other types of permit applications under the Act, the Convention on International Trade in Endangered Species (CITES), the Marine Mammal Protection Act, and the Lacey Act's injurious wildlife provisions, as well as Pelly Amendment certification recommendations and other wildlife trade policy issues. In addition, the Service has recently received large new

permit-related tasks to implement the Wild Bird Conservation Act of 1992, as well as to host the CITES Standing Committee in 1993 and the CITES Conference of the Parties in 1994.

In view of this large workload and the limited resources available to accomplish it, the Service must ensure that every permit activity it conducts contributes to conservation of the affected species in proportion to the time and energy expended in that activity. Because the existing CBW system appeared to be one activity imposing burdens on the Service and the public not in balance with the conservation benefits being gained, the Service initiated a public review of the system earlier this year to determine whether changes are needed, and if so, what those changes should be. That review was announced in a Notice of Intent to Propose Rule (54 FR 548, January 7, 1992).

After a discussion of the CBW system, the notice presented three approaches that were intended to identify the scope of possible alternatives: (1) Eliminate the CBW registration process for all captive-born non-native wildlife; (2) eliminate the registration process for captive-born non-native species where there are large numbers in captivity in the United States; and (3) make no change in the existing system. Alternatives 1 and 2 would replace the registration with a rebuttable presumption that any otherwise prohibited activity does not meet the conditions of the general permit granted in 50 CFR 17.21(g). Public comments and suggestions for additional alternatives were solicited.

In addition, the notice raised questions as to whether the term "harass" applied to captive-born wildlife, and whether education of the American public through exhibition of living non-native wildlife actually accomplished any measurable enhancement of the survival of the affected species in the wild. Again, three alternatives for dealing with public education were presented: (1) Issue no permits or registrations based on public education; (2) limit permits for educational purposes to listed native species only; and (3) no change. Public comments and suggested additional alternatives were solicited.

Information and Comments

Written information and comments on the Notice of Intent were submitted by 942 individuals, institutions and organizations. Of these, 787 were either form letters or patterned responses to the notice. Opinions expressed on specific issues are summarized as

follows (a number of commenters expressed opinions on more than one issue):

Eliminate CBW registration for all captive-bred wildlife.....	144
Eliminate CBW registration for large captive populations.....	672
Retain CBW registration system.....	15
Retain system, but make more restrictive.....	25
Retain education as part of the definition of enhancement of survival of the species.....	139
Retain education, but establish high standards.....	5
Delete education.....	26
"Harass" as currently defined applies to captive-born wildlife.....	25
"Harass" does not apply to captive-born wildlife.....	8
Replace CBW registration with a rebuttable presumption.....	2
Do not apply a rebuttable presumption.....	21
Establish a time limit for processing applications, after which a registration must be issued automatically.....	5

Comment: Several commenters were critical of statements in the January 7 Notice of Intent that they took to mean that the Service disclaimed any responsibility for the current problems with over-production of wildlife of various species. One commenter contended that "surplus" animals are a direct product of the permitting/CBW system. Another felt that the Service's lax enforcement has contributed substantially to over-breeding.

Response: The Service does not disclaim any responsibility for the current situation. The intent of statements in the Notice was to indicate that activities not prohibited by the Act, *i.e.*, intrastate commerce, non-commercial interstate transfers of wildlife, and possession of lawfully acquired specimens, have contributed more to the problem than has lack of regulatory effort on the Service's part. It should be noted that possession of lawfully acquired listed wildlife is not prohibited; therefore, no permit or registration for possession is required. The fact that is generally not well understood is that there are many more holders of listed wildlife than there are CBW registrants (about 850 in 1990). For example, in 1990 there were about 380 registrants for pheasants. The president of the American Pheasant and Waterfowl Society (APWS) advises that they have about 2000 members, of whom the majority hold pheasants. This does not count holders of pheasants who are not APWS members. As another example, in 1990 there were about 80 registrants for the two listed species of the parakeet genus

Neophema. The 1990 and 1991 Psittacine Captive Breeding Surveys by World Wildlife Fund and the American Federation of Aviculture showed 88 and 93 people who responded to the questionnaire holding *Neophema*, respectively. The rate of return of questionnaires that were distributed ranged from 6-10 percent. Further, the 1990 survey states, " * * * it is not known if 10 percent, 1 percent, or 0.1 percent of the U.S. avicultural community was sampled" in the survey. Therefore, it is probably safe to assume that there are far more holders of *Neophema* than there are CBW registrants for the taxon.

Comment: One commenter felt that neutral references to impacts on wild populations set forth in the application requirements and issuance criteria for CBW registrations found at 50 CFR 17.22(a) (1) and (2) should be replaced with affirmative statements in conjunction with improved wording for the definition of "enhancement".

Response: 50 CFR 17.22(a) contains application requirements and issuance criteria for endangered and threatened species permits, not CBW registrations. Requirements and criteria for registrations are set forth in 50 CFR 17.21(g) (2) and (3). However, the Service intends to undertake a review of the remainder of Part 17 with a view to determining whether revisions are needed. Comments and suggestions received as part of the current review process that go to § 17.22 will be retained and reviewed in that context.

Comment: A number of commenters recommended that CBW registrations be restricted to those who are participants in Species Survival Plans (SSP). Others urged that CBW's not be restricted to SSP's alone, since SSP's are primarily zoo-oriented and may not be readily open to participation by many non-zoo breeders. Instead, the Service should encourage participation in studbooks, management plans and breeding consortia.

Response: The Service recognizes that participation in SSP's is primarily controlled by one organization and has taken this into account in its proposal. The objective of the proposal is to encourage responsible breeding programs whether carried out by zoos, other organizations, or a combination thereof.

Comment: A number of commenters pointed out that captive breeding of non-native wildlife helps species in the wild by satisfying demand, for example, for pet birds. Otherwise, attempts to satisfy that demand would encourage taking from the wild.

Response: The Service recognizes this. Care needs to be taken, however, to avoid stimulation of trade and to prevent law enforcement complications. The ultimate goal of any regulatory approach must be the achievement of conservation goals for the species in the wild. In addition, the newly enacted Wild Bird Conservation Act imposes a new, more strict system of regulation of imports of all CITES-listed birds.

Comment: Several commenters categorized use of listed wildlife as pets or for entertainment as improper or inappropriate.

Response: The policies advocated by various parties on the use of listed wildlife as pets or for entertainment do not fit neatly with the regulatory provisions of the Act. The Service's responsibility is to enforce the Act to achieve compliance in the ownership and use of listed captive-born non-native wildlife. This necessarily involves policy judgments that must be confined to the regulatory authorities of the Act.

Comment: One commenter stated that applications by circuses to export and import Asian elephants are virtually guaranteed of approval.

Response: Approval of such transactions is in the form of a CITES pre-Convention certificate, not a permit issued under section 10 of the Act. Currently, the majority of performing elephants that circuses seek to export and re-import qualify for the pre-Convention and captive-held (pre-Act) exemptions from permitting requirements. First-time imports of Asian elephants not qualifying for the pre-Convention exemption are not allowed for primarily commercial purposes such as for circus use.

Comment: Several commenters suggested that the problem of surplus wildlife be addressed by issuing a "non-breeding" CBW which would authorize possession but prohibit breeding or acquisition of new animals. Such holders would be required to neuter their animals.

Response: The Act does not prohibit possession of lawfully acquired listed wildlife; therefore, the Service may not require a permit or registration for mere possession of such wildlife. Further, any action under the Act to force sterilization of endangered or threatened wildlife, or to impose an absolute moratorium on the acquisition of such wildlife, would require fundamental judgments in terms of both biology and public policy before a finding could be made that such action furthered the conservation of such species. The Service is not prepared, at this time, to make such judgments and findings.

Comment: Several hundred comments favored varying degrees of deregulation ranging from complete elimination of CBW registrations to elimination of CBW's for large captive populations on a species-by-species basis, perhaps beginning with one species.

Response: In its proposal, the Service has attempted to balance these ideas with those arguing the need for continued or increased control.

Comment: Twenty one commenters objected to applying a rebuttal presumption to any holders of wildlife who would no longer be subject to a registration requirement under the proposal. The principal objection is that they feel that a rebuttal presumption is an assumption of guilt requiring proof of innocence, whereas the American system is exactly the opposite. Two commenters favored a rebuttal presumption.

Response: A rebuttal presumption is not a presumption of guilt; rather, it is a presumption against the legality of going forward with or continuing an activity absent evidence that the activity is legal. For example, section 9(b)(1) of the Act establishes a rebuttable presumption concerning the captive-held (pre-Act) exemption, i.e., a presumption that a specimen is not entitled to the pre-Act exemption claimed for it absent a rebuttal in the form of documentation of pre-Act, non-commercial status. Section 10(g) of the Act imposes a similar burden of proof on any person claiming the benefit of an exemption or permit under the Act. Therefore, the rebuttal presumption is not something new to be established by regulation only. In order to rebut such a presumption, a person operating under the general permit granted by 50 CFR 17.21(g) would only need to keep the records one would normally expect a careful breeder or dealer to keep, such as bills of sale, purchase receipts, transfer records, breeding records, births, deaths (including cause of death), etc. The requirements for detailed record-keeping and reasonable access to inspect those records set forth in 50 CFR 13.46 and 13.47 would remain in place for those persons claiming the benefit of the exception in § 17.21(g). Those regulations require all permittees to maintain complete and accurate records of all activities and transactions authorized by permit, and to allow Service agents to enter their premises at any reasonable hour for inspection purposes.

Comment: Twenty five commenters responded affirmatively to the question of whether the definition of "harass" applies to wildlife born in captivity. Most of these argued that the Service

should consider harassment in terms of the normal behavioral patterns of the species in the wild state rather than in terms of behavior exhibited by captive-born specimens.

Response: The Service is concerned that persons who legally hold such wildlife without a permit, and who provide humane and healthful care to their animals, would be held to an impossible standard by the concept that holding captive-born animals in captivity constitutes harassment simply because their behavior differs from that of wild specimens of the same species. Such a construction of the concepts of "harass" and "take" would virtually result in a comprehensive prohibition on the possession of listed wildlife species; mere possession of listed species would then require the issuance of Section 10 permits. If Congress had intended this result, the prohibition on possession in Section 9 of the ESA would not have been limited to endangered fish or wildlife species taken in violation of the ESA. Therefore, the proposal contains a clarifying amendment to the definition of "harass".

Comment: 139 commenters argued in favor of retaining education in the definition of "enhancement of propagation or survival" contained in 50 CFR 17.3. Several presented examples of how they believe that education by exhibition of living wildlife enhances the survival of foreign species in the wild. Twenty-six others argued the opposite, and five that education should be retained, but only if stringent criteria were imposed that would in essence preclude the use of education by commercial users as justification for permits or registrations.

Response: The Service notes that thus far no one has come forward with examples of how exhibition of living wildlife has any specific affirmative effect on survival of non-native species in the wild. Therefore, the Service proposes to delete education from the definition of "enhancement", but will consider changing its position in the final rule should specific evidence of conservation benefits be forthcoming during the comment period for this proposed rule. The Service recommends that any serious submission in favor of retaining education in this definition should be accompanied by suggested objective standards that the Service could use to assess the conservation benefits of educational displays.

Comment: A number of commenters voiced their frustration over delays in obtaining a decision on their applications for registrations. Several proposed that specific timeframes be

established for processing new applications and for renewals and amendments to existing registrations. If processing was not completed during these timeframes, the Service would be required to automatically issue the registration.

Response: The Service understands (and shares) the frustration of these respondents, particularly in view of the increasing permits workload cited earlier in this notice from enactment of the Wild Bird Conservation Act and the hosting of CITES meetings; however, it cannot agree to abdicate its responsibilities under the Act by issuing registrations without having considered all aspects of an application in light of the issuance criteria set forth in regulations. Several ongoing efforts in OMA should reduce the problem of delays over time. These include a reorganization of the office including emphasis on the concept of team-building, hiring of additional people, refinement of the computerized application tracking system, and regulatory efficiencies expected to result from this proposal.

Comment: Several commenters questioned why the Service does not publish notices of applications for CBW registrations in the Federal Register as set forth in section 10(c) of the Act.

Response: This long-standing Service practice is based upon the fact that a CBW registration is not a permit. Section 17.21(g)(1) in effect issues a general permit to "any person" to conduct specified prohibited activities in accordance with several provisos, one of which is that that person first register with the Service. Section 17.21(g) in its entirety was the subject of public review and comment through the rulemaking process.

Discussion of the Proposal

Of the three alternatives presented in the Notice of Intent, which were designed to show the Service's concept of the outer limits of possible action, alternatives 1 and 3 (complete elimination of CBW's and no change, respectively) were not selected for purposes of formulating this proposal. The Service has concluded that changes are needed, but that complete elimination of the CBW system is neither warranted nor advisable. The majority of captive non-native species are not present in large numbers, nor are they represented by many surplus animals. The proposal described below is designed to encourage the formation of responsible cooperative breeding programs for that majority.

1. The Service proposes to eliminate CBW registration for pheasants (family

Phasianidae); both listed parakeet species of the genus *Neophema*; the Laysan teal (*Anas laysanensis*); the "generic" tiger, which is the result of interbreeding of various subspecies of the tiger (*Panthera tigris*); and the white-winged wood duck (*Cairina scutulata*). Taxa may be added to or deleted from this "exempt" list as circumstances warrant.

The American Pheasant and Waterfowl Society (APWS) has conducted a survey of members, asking them to report how many specimens of pheasants and waterfowl they hold. A total of 482 individuals responded, showing ownership of 9,267 pheasants of 13 species. Of that number, 3,999 or 43 percent were unsexed, presumably young of the year. This indicates a healthy, productive population. Because of possible sampling bias, plus uncertainty as to how many persons actually have pheasants, it is impossible to project total pheasant population in the U.S. with any certainty. The 482 respondents are equal to almost 25% of the APWS membership, the majority of whom have pheasants. There is probably a significant number of persons with pheasants who do not belong to APWS. It seems a conservative estimate would be that there are at least 18-20,000 pheasants in the U.S. The same census shows 457 Laysan teal, of which 128, or 28 percent, are unsexed, and 282 white-winged wood ducks (52, or over 18 percent, unsexed).

The 1990 and 1991 Psittacine Captive Breeding Surveys, done by World Wildlife Fund in collaboration with the American Federation of Aviculture (AFA), show 439-465 *Neophema* held by respondents. Again, while accurate projections of the total U.S. population can't be made, it seems safe to assume that it is much larger, since the reports indicate a return of from 8-10 percent of distributed questionnaires. Also, the surveys state that it is unknown whether they surveyed 10 percent, 1 percent, or 0.1 percent of U.S. aviculturists. The surveys also found that survival of these species in captivity appears assured if inbreeding problems can be minimized, and recommend that serious thought be given to downlisting or delisting the captive populations of these species.

The "generic" tiger, as it is known in the zoo community, is of no value in terms of preserving the taxon for possible reintroduction to the wild because it no longer has the same genetic makeup as wild populations. The Service has no reliable estimate of the total population of these animals in the U.S., although the American Association of Zoological Parks and Aquariums (AAZPA) advises that there

are about 200 held in member institutions. It is AAZPA's goal to reduce this to zero over time through attrition. Given the popularity of the tiger in circuses and with other entertainers, it would appear that the non-AAZPA population is sizeable. The Service believes that there is no benefit to tigers in the wild to be had through continuing a registration requirement for generic tigers because of lack of genetic value, and because there are now Species Survival Plans (SSP) in place for four subspecies (Siberian, Sumatran, Indochinese, and true Bengal tigers). CBW registrations would continue to be required for the SSP animals.

The Service intends that no first-time importation of specimens of the above taxa that were taken from the wild will be allowed, since they exist in the United States in plentiful, or even surplus, numbers. That being the case, it would be extremely difficult to justify removing specimens from the wild population of an endangered species to add to an already large captive population. Further, the Service notes that since permit records have been computerized (late 1983), there have been only two requests for first-time imports of specimens of any of these taxa that were removed from the wild (two 1986 requests for import of white-eared pheasants). An exception to this policy could be considered in the event that any of these taxa (other than generic tigers) subsequently becomes the subject of a cooperative breeding program.

The Service believes that this relaxation of the standards in § 17.21(g) will not operate to the disadvantage of the species in the wild; further, it will be consistent with the conservation of the species because domestic demand has been, and will continue to be, satisfied by captive-born wildlife, and because first-time import of wild-caught specimens would be essentially prohibited.

As pointed out in the comments section, the Act establishes a precedent for the rebuttable presumption with regard to the captive-held (pre-Act) exemption, and, in section 10(g), imposes a similar burden of proof on all persons claiming to operate under permits and exemptions. Therefore, the main reason for adding a rebuttable presumption to this category is that it will serve as a reminder to persons and institutions operating under the general permit granted in 50 CFR 17.21(g) that they still bear the burden of proof that they are operating within the terms of that regulatory provision. Language would be added concerning the requirements for recordkeeping and

reasonable access for inspection by Service agents set forth in 50 CFR 13.46 and 13.47. Complete records would rebut the presumption against compliance.

2. The Service proposes to amend the regulation regarding CBW registration in a manner that will make the system more closely parallel its original purpose, *i.e.*, to encourage responsible breeding efforts with listed species. The required goals of the program would be to preserve the genetic makeup of the species, to establish a self-sustaining captive population, and to make animals available for any legitimate and appropriate effort to re-establish or augment wild populations of the species.

In order to qualify for a CBW registration, persons or institutions would have to be participants in an approved responsible cooperative breeding program for the taxon concerned. Persons or institutions holding animals surplus to the needs of the program, or conducting research designed to improve maintenance or breeding technology, would also qualify for a registration *provided* the animals are maintained and disposed of in accordance with the instructions of those managing the program.

While most of the current breeding programs are SSP's, an example of a non-AAZPA program is the AFA's red siskin project. Formation of other well-organized programs is encouraged. The proposed rule sets forth criteria that a breeding program must meet in order for its participants to qualify for CBW registrations. The Service believes that the programs should be computerized for efficiency and accuracy, since maintenance of studbook records by hand for a program of any size would be an overwhelming task. The AAZPA advises that all SSP's are in fact computerized.

CBW registrants would be required to keep accurate records of all transfers, births and deaths, and to make those records available for inspection by Service agents at reasonable hours. However, individual registrants would not be required to submit an annual report to the Service provided a complete annual report of activities of the breeding program is submitted to the Service by those managing the program.

If the breeding program meets all of the criteria found at proposed § 17.21(g)(1)(ii) and is therefore recognized by the Service, it will be assumed that individual participants approved by the program have the necessary facilities and expertise to properly engage in breeding operations.

At this point, the Service has identified 44 qualifying programs and, in addition, 38 studbooks for species not yet having a cooperative breeding program. As such programs come on line, the taxon concerned can be added for CBW eligibility by notice in the Federal Register.

Importation of wild-caught specimens for breeding programs could be approved only in unusual circumstances, including a definitive showing of need for new bloodlines that can only be satisfied by wild animals. However, a determination would have to be made that the status of the wild population would allow limited taking, and preference would be given to imports of specimens already in captivity. The importation of wild-caught specimens could only occur through the issuance of a permit under § 10 of the Act and § 17.22 of the regulations.

3. Holders of species not included in the exempt category, or who do not qualify for a breeding program CBW, would be required to obtain an interstate commerce permit for interstate purchases, and a specific permit under the Act for import or export activities. For the latter, in most cases the taxon involved will also be listed under CITES so that both types of permit applications could be processed simultaneously. Therefore, there would not be any significant increase in burden on the applicant in this regard. Notice of applications for such permits would be published in the Federal Register in accordance with section 10(c) of the Act. To ease the burden for those who would no longer qualify for a CBW registration, any existing registration that is valid on the date of publication of the final rule would remain in force until its expiration date. As new cooperative breeding programs are developed, those holding the taxa involved can seek to participate, thus regaining their eligibility for a CBW registration.

4. On the subject of the term "harass", the Service believes that persons who legally hold listed wildlife without a permit have been inadvertently placed in a gray area. While a permit is not required to possess lawfully acquired listed wildlife, one cannot possess it without doing something to it that might be construed as harassment under a literal interpretation of the present definition, e.g., keep it in confinement, feed it a diet that may be artificial, provide medical care, etc. Obviously, maintaining animals in inadequate, unsafe or unsanitary conditions, feeding an improper or unhealthful diet, and physical mistreatment constitute

harassment because such conditions might create the likelihood of injury or sickness of an animal. It is proposed to modify the definition of "harass" in 50 CFR 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive-born wildlife.

5. The current definition of "enhance the propagation or survival" found at 50 CFR 17.3 includes "(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species." (Emphasis added.) In the Notice of Intent of January 7, 1992, the Service raised the question of whether education of the American public about non-native listed wildlife has any significant impact in terms of fostering the survival of such species in the wild. Many of the comments in support of education merely asserted that education has value in terms of conserving species in the wild. The Service did not intend to denigrate the value of education in general; rather, it questioned whether there is a direct cause and effect relationship between education through exhibition of living wildlife and enhancement of survival in the wild of the species exhibited, as required by the plain wording of the definition. Benefits of education cited by commenters included general elevation of environmental consciousness and interest in global environmental problems. Specific examples offered included the educational value of wildlife in films, the decrease in whaling because of education about great whales, the reduction in incidental take of marine mammals by fishermen influenced by education, the National Wildlife Federation's Ranger Rick program, Earth Day observances, and the current effort to save the rain forests. While granting the value of these educational efforts, the Service notes that none of them include (or necessitate) the exhibition of living wildlife in a manner that would have a specific impact on the survival of the species exhibited. Further, no respondent offered detailed ideas for standards that could be applied to educational content or delivery to make it more meaningful. Therefore, the Service proposes to delete education from the definition of "enhance the propagation or survival". However, if during the comment period on this proposal the Service receives examples of positive impacts on survival in the wild by means of live animal exhibition, or suggestions either for improving the definition or for educational standards

and criteria, the Service's decision may differ from the proposed rule.

Public Comment Solicited

The Service intends that any final rule will be accurate and as effective as possible in the conservation of endangered or threatened species. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposed rule are hereby solicited.

Regulatory Analysis

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), because no significant burden will be added to the already mandated paperwork requirements, preparation or administration, and similar requirements that have been imposed by the existing rule.

The Service has determined that these proposed regulations are categorically excluded from further National Environmental Policy Act (NEPA) requirements. Part 516 of the Departmental Manual, Chapter 6, Appendix I, section 1.4(A)(1) categorically excludes changes or amendments to an approved action when such changes have no potential for causing substantial environmental impact. Further, Appendix I, section 1.4(C)(1) categorically excludes permitting actions not involving killing, removal from the wild, or permanent impairment of reproductive capability of endangered or threatened species. No increase in the latter activities is expected to result from this proposed revision of the existing rule.

No aggregate increase in the burden on affected individuals would be made in the information collection requirements contained in § 17.21(g), which have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1018-0022.

Finally, the Department of the Interior has determined that this action, which would amend regulations that implement exceptions to the prohibitions of the Act, does not contain significant takings implications as described in Executive Order 12630.

Author

The primary author of this proposed rule is R.K. Robinson, Special Assistant-Ecological Services, U.S. Fish and Wildlife Service, room 420C, 4401 N. Fairfax Drive, Arlington, VA 22203.

List of Subjects in 50 CFR Part 17

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

Proposed Regulations

For the reasons set forth in the preamble, it is proposed that title 50, chapter 1, subchapter B, part 17, subparts A and C be amended as set forth below.

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500.

Subpart A—Introduction and General Provisions

2. The definition of "Enhance the propagation or survival" in 50 CFR 17.3 is proposed to be amended to read as follows:

§ 17.3 Definitions.

Enhance the propagation or survival, when used in reference to living wildlife in captivity, includes, but is not limited to, the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible; and

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed.

3. The definition of "Harass" in 50 CFR 17.3 is proposed to be amended to read as follows:

§ 17.3 Definitions.

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include normal animal husbandry practices including, but not limited to, provision of adequate, safe enclosures; healthful diets; humane treatment; and confining, tranquilizing, or anesthetizing for provision of medical care or for artificial insemination procedures.

Subpart C—Endangered Wildlife

4. Section 17.21(g) is proposed to be amended by revising paragraph (g)(1) introductory text, (ii) and (v); by deleting paragraph (g)(2)(v) and revising paragraphs (g)(2) introductory text (g)(2) (ii), (iii) and (iv); by revising paragraph (g)(3); and by adding paragraph (g)(6) to read as follows:

§ 17.21 Prohibitions.

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; import or export; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States, provided either that the wildlife is of a taxon listed in paragraph (g)(6) of this section, or that the following conditions are met:

(i) The purpose of such activity is to enhance the propagation or survival of the affected species through participation in a cooperative breeding program that meets the following criteria to the satisfaction of the Service:

(A) The program must be managed by a group or organization having the necessary expertise in husbandry of the affected species to successfully conduct the program, and having a species coordinator or manager and a studbook keeper;

(B) The goal of the program is to develop a single well-managed, genetically diverse and self-sustaining population;

(C) Individual specimens must be registered in a central studbook and tracked by computer;

(D) Whenever possible and feasible, the programs must be associated with efforts to preserve natural habitat for the affected species, and to release specimens to the wild; and

(E) Individual participants in the program must:

(1) Have a demonstrated interest in preserving the species;

(2) Have, to the satisfaction of program management, proper facilities and sufficient experience with breeding, rearing, and general husbandry of the affected or similar species;

(3) Abide by the animal husbandry guidelines provided by the program management; and

(4) Be willing to breed animals according to the best genetic plan as determined by the program management.

(iii) * * *

(iv) * * *

(v) Any person subject to the jurisdiction of the United States who engages in any activities authorized by this paragraph does so in accordance with paragraphs (g) (2), (3), and (4) of this section, and with all other applicable regulations in this Subchapter B.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph, in accordance with the conditions set forth in paragraph (g)(1)(ii) of this section, must first register with the Service (Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, Virginia 22203). Requests for registration must be submitted on an official application form (Form 3–200) provided by the Service, and must include the following information:

(i) * * *

(ii) A brief description of the cooperative breeding program(s) being participated in by the applicant, including names and addresses of the persons managing the program(s);

(iii) Evidence, in writing, that the applicant has been accepted as a participant in the program; and

(iv) A copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR Part 2).

(3) Upon receiving a complete application as described in paragraph (g)(2), the Director will decide whether or not the registration will be approved. In making his decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, whether the cooperative breeding program concerned and the applicant

appear qualified to enhance the propagation or survival of the species in accordance with the conditions set forth in paragraph (g)(1)(ii) of this section. Each person so registered must maintain accurate written records of activities conducted under the registration, and allow reasonable access to Service agents for inspection purposes as set forth in §§ 13.46 and 13.47. Each person registered must submit to the Director an individual written annual report of his activities, including all births, deaths and transfers of any type. Such individual annual reports will not be required if the management of the cooperative breeding program submits a written annual report of the above activities covering the entire program and its participants.

(4) * * *

(5) * * *

(6) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by paragraph (g)(1) of this section may do so without first registering with the Service with respect to pheasants (family Phasianidae), parakeets of the species *Neophema pulchella* and *N. splendida*, the Laysan teal (*Anas laysanensis*), the white-winged wood duck (*Cairina scutulata*) and the inter-subspecific crossed or "generic" tiger (*Panthera tigris*) [i.e., specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (*Panthera tigris tigris*, *P.t. sumatrae*, *P.t. altaica* and *P.t. corbetti*, respectively)], provided:

(i) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(ii) Each specimen to be imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export of the specimen from the United States;

(iii) No specimens of the taxa set forth in this paragraph (g)(6) of this section may be imported if they were taken from the wild;

(iv) Any exports of such specimens meet the requirements of paragraph (g)(4) of this section; and

(v) Each person claiming the benefit of the exception in paragraph (g)(1) of this section must maintain accurate written records of activities, including births, deaths, and transfers of specimens, and make those records accessible to Service agents for inspection at reasonable hours as set forth in §§ 13.46 and 13.47.

Dated: January 8, 1993.

Richard N. Smith,

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

[FR Doc. 93-13545 Filed 6-10-93; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 640

[Docket No. 930491-3091; I.D. 032983A]

Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.
ACTION: Proposed rule.

SUMMARY: NMFS proposes to amend the regulations that implement the Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic (FMP). This proposed rule would modify the 2-day special recreational fishing season in the Exclusive Economic Zone (EEZ) off Florida. Specifically, proposed modifications to that season in the EEZ off Florida would: Change the season from the last weekend in July to the last Wednesday and Thursday in July; increase the daily bag and possession limit to 12 spiny lobsters, except off Monroe County, Florida, where the limit would remain 6 spiny lobsters; limit harvesting of spiny lobster to (1) Diving, and (2) the use of bully nets or hoop nets; and prohibit harvesting of spiny lobster by dividing at night off Monroe County, Florida. The intended effects of this rule are to enhance cooperative Florida/Federal management of the spiny lobster fishery by implementing Florida's recreational rules in the EEZ off Florida, reduce fishing effort off Monroe County, Florida, protect the value spiny lobster resource, reduce environmental damage, and to otherwise improve the effectiveness of necessary regulations.

DATES: Written comments must be received on or before June 28, 1993.

ADDRESSES: Comments on the proposed rule should be sent to Georgia Cranmore, NMFS, 9450 Koger Boulevard, St. Petersburg, FL 33702. Copies of documents supporting this action may be obtained from the Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, Suite 331, Tampa, FL 33609.

FOR FURTHER INFORMATION CONTACT: Georgia Cranmore, 813-893-3161.

SUPPLEMENTARY INFORMATION: The spiny lobster fishery of the Gulf of Mexico and South Atlantic is managed under the FMP, prepared and amended by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR part 640, under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

The FMP contains a regulatory amendment procedure for implementing specified gear and harvest restrictions applicable to the spiny lobster fishery in the EEZ. The intended effects of that procedure include: (1) Providing a more flexible and timely system for implementing regulations on the spiny lobster fishery; (2) enhancing cooperative Florida/Federal management of the fishery; (3) reducing Federal management costs; and (4) improving the effectiveness of necessary rules. In accordance with that regulatory amendment procedure, the Florida Marine Fisheries Commission (FMFC) has requested the Director, Southeast Region, NMFS (Regional Director), to implement in the EEZ off Florida, with the Councils' oversight, modifications to certain gear and harvest limitations that were proposed by the FMFC and approved by the Governor and Cabinet of Florida for implementation in Florida's waters.

Specifically, the FMFC requests adoption in the EEZ off Florida of (1) A change in the dates of the special 2-day recreational season from the last weekend in July to the last Wednesday and Thursday in July; (2) an increase in the daily bag and possession limit during that season from six to twelve lobsters in the EEZ off Florida, except off Monroe County, where the limit would remain at six; (3) a limit on the harvest to (a) diving, and (b) bully or hoop nets; and (4) a prohibition on night diving for lobster off Monroe County, Florida during the 2-day season. The FMFC is requesting implementation of these changes before the start of their 2-day season on July 28-29, 1993.

The objective of Florida's rules is to reduce fishing effort and participation, and thus reduce congestion and traffic, in the Florida Keys (Monroe County) during the special 2-day recreational season. Businesses, property owners, and local governments asked the FMFC to modify or abolish the 2-day lobster season to prevent further damage to the environment. In addition to crowding on land and at sea during this season, the FMFC received reports of damage to coral reefs and seagrass beds from the concentrated fishing effort in the Florida Keys during this season. On the other

effective on less than 30 days notice,⁴ so that this becomes effective by the end of the year.

3. Accordingly, *it is ordered*, That the rule change effective date adopted in the Report and Order in MM Docket No. 93-233 (58 FR 64168, December 6, 1993) is reconsidered on our own motion and amended to become effective on December 31, 1993.

4. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by § 0.283 of the Commission's Rules.

Federal Communications Commission.

Roy J. Stewart,

Chief, Mass Media Bureau.

[FR Doc. 93-31451 Filed 12-23-93; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB10

Captive-bred Wildlife Regulation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: Under the Endangered Species Act of 1973 (Act), the Fish and Wildlife Service (Service) regulates certain activities involving specimens of non-native endangered or threatened wildlife species that are born in captivity in the United States. This is currently accomplished by requiring persons who wish to conduct otherwise prohibited activities with such wildlife to register with Service, i.e., to obtain a captive-bred wildlife, or CBW, registration. The Service registers persons who meet certain established requirements and specifies the extent of the activities that those persons are authorized to conduct.

The CBW registration system has been reviewed to determine whether changes are necessary. That review was announced in a Notice of Intent to Propose Rule (54 FR 548, January 7, 1992). A public meeting was held in April 1992. After review of information and comments received, a Proposed Rule was published on June 11, 1993 (58 FR 32632). Several changes to the CBW registration system were proposed.

⁴The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days' advance public notice in the Federal Register for good cause. See 5 U.S.C. § 553(d)(1); See also 47 CFR 1.427(b).

Also proposed were two changes to Definitions, that would affect issuance of all endangered and threatened species permits as well as CBW registrations. Those proposed changes included deletion of education from the definition of "enhance the propagation or survival" so that education of the public could no longer be used as the sole justification for issuance of permits and registrations. The Service has decided to limit this final rule to the exclusion of education as the basis for issuance of CBW registrations, because the original and predominant purpose of the registration system was to encourage responsible captive breeding. Other changes to the CBW system, as well as the larger question of public education as it relates to endangered species permits will be the subject of future rulemaking actions.

EFFECTIVE DATE: January 26, 1994.

FOR FURTHER INFORMATION CONTACT:

R. K. Robinson, Special Assistant-Ecological Services, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420C, Arlington, Virginia 22203 (703/358-2093).

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et. seq.*) and implementing regulations prohibit any person subject to the jurisdiction of the United States from conducting certain activities with endangered or threatened species of fish or wildlife. These activities include, among others, import, export, take and interstate or foreign commerce. The Secretary of the Interior (or the Secretary of Commerce in the case of certain marine species) may permit such activities, under such terms and conditions as he/she shall prescribe, for scientific purposes or to enhance the propagation or survival of the affected species, provided these activities are consistent with the purposes of the Act. The Secretary of the Interior's authority to administer permit matters relating to endangered and threatened species has been delegated through the Director of the Fish and Wildlife Service (Service) to the Office of Management Authority (OMA).

Since 1976, the Service has been striving to achieve an appropriate degree of control over prohibited activities involving living wildlife of non-native species born in captivity in the United States.

In 1978, the Service announced a review of regulations concerning captive-bred wildlife (43 FR 16144, April 14, 1978). The notice reiterate the Service's philosophy concerning its

approach to captive versus wild populations:

The Service considers the purpose of the Act to be best served by conserving species *in the wild* along with their ecosystems. Populations of species in captivity are, in large degree, remove from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs * * *

The Service seeks to improve its regulations in order to protect wild populations of Endangered and Threatened species while interfering as little as possible with their captive propagation.

Following an extensive public review in 1978 and 1979, the Service published a final rule (44 FR 54002, September 17, 1979) that established the Captive-bred Wildlife (CBW) registration system as it currently exists. The final rule amended regulations in 50 CFR 17.21 by adding subsection 17.21(g), which granted general, conditional permission to take; import or export; deliver, receive, carry, transport or ship in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any non-native endangered or threatened wildlife that is bred in captivity in the United States. In other words, the regulation itself contains the permit. In order for persons or institutions to operate under that permit, certain conditions must be met, including that the person or institution must first register with the Service. Unless an exception is made under § 17.21(g)(5), the CBW system applies only to species that do not include any part of the United States in their natural geographic distribution. The individual specimens must have been born in captivity in the United States. The registration authorizes interstate purchase and sale only between entities that both hold a registration for the taxon concerned.

The 1979 final rule also amended the definition of "enhanced the propagation or survival" of wildlife in captivity to include a wide range of normal animal husbandry practices needed to maintain self-sustaining and genetically viable populations of wildlife in captivity. Other aspects of the definition of "enhance" that were codified in 1979 and are still in use today include accumulation, holding and transfer of animals not immediately needed or suitable for propagative or scientific purposes, and exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species (50 CFR 17.3).

The above definitions are found in Subpart A, the General Provisions of part 17. Therefore, they apply to all endangered and threatened species permits for captive wildlife issued under §§ 17.22 and 17.32 as well as to the CBW registrations under § 17.21(g) that are the subject of this rulemaking.

After twelve years' experience with the system, the Service initiated another review with a Notice of Intent of Propose Rule, published on January 7, 1992 (54 FR 548). The notice discussed problems the Service was experiencing with the system, and offered for discussion three options intended to show the range of possible actions that might be taken. These ranged from no action (no change in the system) to complete elimination of the CBW registration process. The notice also questioned whether the term "harass" as defined in § 17.3 applied to captive-born wildlife, and whether education of the American public through exhibition of living non-native wildlife actually accomplished any measurable enhancement of the survival of the affected species in the wild. Three options for dealing with education were presented, ranging from no change in the existing definition to deleting education as a justification for permits and CBW registrations.

Public comments and suggestions were solicited. Written responses were received from 942 individuals, institutions and organizations. Of these, 170 mentioned education, mostly in favor of retaining it.

After review of comments received, the Service published a proposed rule on June 11, 1993 (58 FR 32632), that proposed several changes to § 17.21(g): elimination of registration for several species that are present in the United States in large numbers and/or that are genetically unsuitable for scientifically based breeding programs; restriction of eligibility for CBW registrations to those entities that are participants in an approved responsible cooperative breeding program for the taxon concerned; amendment of the definition of "harass" in § 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive-born wildlife; and, conditionally, deletion of education from the definition of "enhance" in § 17.3.

Information and Comments

In an effort to ensure distribution of the proposal to those most directly affected, over 1,000 copies of the Federal Register publication were mailed to current and former CBW registrants. Three letters commented to

the effect that they found it surprising that the Service did not notify all registrants. The Service apologizes if any registrants were inadvertently missed, but notes that based on available records, two of the three apparently do not hold registrations.

A total of 658 written comments were received during the comment period. Education was discussed in 544 letters, and was the only issue mentioned in 510 of them. The majority of these objected to the deletion of education from the definition of "enhance" in § 17.3. Issues other than education were addressed in 148 comments.

Several misconceptions were apparent in the responses. A large number of comments expressed concern or at least apparently assumed that deletion of education as the sole basis for obtaining permits and registrations would result in a ban on public display by many zoos, circuses and other entities. A smaller number were concerned that deletion of education might result in confiscation of animals currently used in educational displays.

It is important to note that deletion of education would in no way affect the lawful possession of non-native wildlife that are currently being displayed or held by zoos, circuses, performers and other entities.

Regardless of the change in § 17.21(g) made by this final rule, those persons who lawfully possess listed species may continue to display them for commercial or non-commercial purposes without a permit under the Act as long as prohibited takings (e.g., harassment), transfers of ownership in interstate commerce in the course of a commercial activity, or exports are not involved.

Similarly, several commenters were concerned that collections of non-native animals could no longer be used for purposes of training in veterinary medicine, animal husbandry techniques, genetic research, etc. This is not the case; this final rule will not affect the continuation of such activities with lawfully possessed animals.

The Service does have sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife. As noted by the Service in its proposed rule:

* * * thus far no one has come forward with examples of how exhibition of living wildlife has any specific affirmative effect on survival of non-native species in the wild. Therefore, the Service proposes to delete education from the definition of "enhancement", but will consider changing its position in the final rule should specific evidence of conservation benefits be

forthcoming during the comment period for this proposed rule. The Service recommends that any serious submission in favor of retaining education in this definition should be accompanied by suggested objective standards that the Service could use to assess the conservation benefits of educational displays.

Several commenters on the proposed rule did suggest standards and criteria to enable such assessment, and these are under consideration for possible application to endangered species permits under § 17.22. However, no comments were received that convince the Service that education has any role in the CBW registration system.

Discussion of Final Rule

As stated in the proposed rule (58 FR 32632):

The Service proposes to amend the regulation regarding CBW registration in a manner that will make the system more closely parallel its original purpose, *i.e.*, to encourage responsible breeding efforts with listed species. The required goals of the program would be to preserve the genetic makeup of the species, to establish a self-sustaining captive population, and to make animals available for any legitimate and appropriate effort to re-establish or augment wild populations of the species.

The CBW system involves a special regulatory exception (a general permit available to all qualified members of the public) adopted by the Service in 1979 to allow entities in the United States to purchase in interstate commerce endangered captive-bred non-native species, to sell or exchange these specimens in interstate commerce with other CBW registrants, and to take these specimens in accordance with customary animal husbandry practices. The specimens must have been born in captivity in the United States. The CBW registration is not a possession permit because mere possession of an endangered species is not a violation of the Act. The registration allows breeders and exhibitors of wildlife to buy, sell and exchange living specimens of non-native listed species without seeking individual permits for each transaction. The Service granted general permission to those registered under the CBW system in order to encourage and facilitate the captive breeding of non-native listed wildlife by entities in the United States. The Service's intent to enhance beneficial captive breeding activities has been amply documented in seven notices and rulemaking documents published since 1976. However, given the definition of "enhance" in § 17.3, as well as preamble language in the 1979 final rule that established the CBW system, the decision criteria in § 17.21(g) were too

broadly crafted to strictly limit issuance of CBW registrations to captive breeding, and in situations where there was no intention to engage in captive breeding of the listed species, the criteria allowed education through public exhibition as the sole activity of the registrant.

The Service has decided to limit this final rule to the narrow issue of education as it relates to the CBW system. The rule eliminates public education through exhibition of living wildlife as the sole justification for issuance of a CBW registration. This should not be interpreted to mean that the Service believes that educational efforts should cease, since in general terms education is a public good. However, the scope of the CBW program must be narrowed so that only those persons who engage in beneficial captive breeding can participate.

A final rule addressing the remaining issues concerning the CBW system will be promulgated in the near future.

In today's Federal Register the Service is reopening the comment period on the balance of the proposed rule, and in particular on the larger question of what value education provides to the conservation of non-native species in the wild, as it applies to permits issued under § 17.22. In the meantime, those persons or entities that hold CBW registrations based solely on education that have not reached the expiration date shown thereon as of the effective date of this rule will be allowed to exercise them for a period of two years from the effective date.

Regulatory Analysis

This rule has been reviewed under Executive Order 12866. The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), because no significant burden will be added to the already mandated paperwork requirements, preparation or administration, and similar requirements that have been imposed by the existing rule.

The Service has determined that these regulations are categorically excluded from further National Environmental Policy Act (NEPA) requirements. Part 516 of the Departmental Manual, Chapter 6, Appendix I, section 1.4(A)(1) categorically excludes changes or amendments to an approved action when such changes have no potential for causing substantial environmental impact. Further, Appendix I, section 1.4(C)(1) categorically excludes permitting actions not involving killing,

removal from the wild, or permanent impairment of reproductive capability of endangered or threatened species. No increase in the latter activities is expected to result from this revision of the existing rule.

No aggregate increase in the burden on affected individuals would be made in the information collection requirements contained in § 17.21(g), which have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1018-0022.

Finally the Department of the Interior has determined that this action, which amends regulations that implement exceptions to prohibitions of the Act, does not contain significant takings implications as described in Executive Order 12630.

Author

The primary author of this final rule is R.K. Robinson, Special Assistant—Ecological Services, U.S. Fish and Wildlife Service, room 420C, 4401 North Fairfax Drive, Arlington, VA 22203.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

For the reasons set forth in the preamble, title 50, chapter 1, subchapter B, part 17, subpart C is amended as set forth below.

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Public Law 99-625, 100 Stat. 3500.

Subpart C—Endangered Wildlife

2. Section 17.21(g) is amended by revising paragraph (g)(1) introductory text to read as follows:

§ 17.21 Prohibitions.

* * * * *

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; import or export; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States, provided the principal purpose of these activities is to facilitate captive breeding, and

provided the following conditions are met:

* * * * *

Dated: December 6, 1993.

George T. Fgampton,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 93-31422 Filed 12-21-93; 3:10 pm]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 641

[Docket No. 931088-3333; ID 102193A]

RIN 0648-AF64

Reef Fish Fishery of the Gulf of Mexico

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

ACTION: Final rule.

SUMMARY: In accordance with the framework procedure for adjusting management measures of the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), NMFS issues this final rule to restrict the commercial landings of red snapper to one trip limit per vessel per day; prohibit the sale or purchase of red snapper exceeding one trip limit per vessel per day; and delay the opening of the commercial fishery for red snapper until February 10, 1994. The intended effects of this rule are to lengthen the commercial season for red snapper, to facilitate enforcement of the trip limits, to minimize fishing during hazardous winter weather, and to ensure that the commercial red snapper fishery is open during Lent, when there is increased demand for seafood.

EFFECTIVE DATES: January 1, 1994, through December 31, 1994, except that §§ 641.4(n)(3), 641.7(x), and 641.30 are effective January 1, 1994, through February 9, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Sadler, 813-893-3161.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented through regulations at 50 CFR part 641 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

In accordance with the FMP's framework procedure for adjustment of

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Parts 54 and 69**

[CC Docket No. 96-45; DA 98-1581]

Federal-State Joint Board on Universal Service**AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: In this document, the Commission clarifies the application of the Commission's "lowest corresponding price" requirement set forth in the *Universal Service Order*, 62 FR 32862 (June 17, 1997). The Commission clarifies that this requirement was not intended to preempt state law, and does not obligate carriers to offer rates that would violate state laws.

EFFECTIVE DATE: September 11, 1998.**FOR FURTHER INFORMATION CONTACT:** Kaylene Shannon, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418-7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document released on August 7, 1998. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C., 20554. This document is also available from the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036.

I. Background

1. In the *Universal Service Order*, 62 FR 32862 (June 17, 1997), the Commission provided that schools and libraries should be eligible to apply for discounted telecommunications services, Internet access, and internal connections, subject to certain limitations and conditions. The *Universal Service Order* concluded that, to ensure that their lack of experience in dealing with telecommunications providers does not prevent schools and libraries from receiving competitive prices, service providers must offer services to eligible schools and libraries at prices no higher than the lowest price the provider charges to similarly situated non-residential customers for similar services. The Commission clarified that, for purposes of determining the lowest corresponding price, similar services would include those provided under contract as well as those provided under tariff. The

Commission established a rebuttable presumption that rates offered within the previous three years are compensatory.

2. In the *Fourth Reconsideration*, 63 FR 2093 (January 13, 1998), the Commission concluded that earlier versions of tariffs that have been modified should be included in the comparable rates upon which the lowest corresponding rate is determined. "[u]nless a regulatory agency has found that the tariffed rate should be changed, and affirmatively ordered such change, or absent a showing that the rate is not compensatory." A question has been raised whether the lowest corresponding rate can be based on rates not lawfully offered under state law.

II. Discussion

3. Although the Commission disagreed with the general assertion that the lowest corresponding price should not reflect expired tariffs, the Commission did not expressly preempt state laws governing what rates may lawfully be offered to eligible schools and libraries. In the absence of such an expressly stated intention to preempt, we conclude that the Commission did not intend to require carriers to base the lowest corresponding rate on rates that may not lawfully be offered under state law. Thus, we interpret the *Fourth Reconsideration* as requiring only that rates that may be offered consistent with state law must be made available as the lowest corresponding price.

III. Ordering Clause

4. Accordingly, it is ordered that, pursuant to section 4(i) and section 254 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 254, and sections 0.91 and 0.291 of the Commission's rules, 47 CFR 0.91 and 0.291, the lowest corresponding price requirement is clarified.

List of Subjects**47 CFR Part 54**

Healthcare providers, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communication Commission,
Kathryn C. Brown,

Chief, Common Carrier Bureau.

[FR Doc. 98-24276 Filed 9-10-98; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AB10

Captive-bred Wildlife Regulation**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: The final rule amends the definition of "harass" in § 17.3 applied to captive wildlife to exclude generally accepted animal husbandry practices, breeding procedures, and provisions of veterinary care that are not likely to result in injury to the animal. The final rule deletes the requirement to obtain a CBW registration for eight species of pheasants, parakeets of the species *Neophema splendida* and *N. pulchella*, the Laysan duck, and the "generic" or inter-subspecific crossed tiger. This final rule will be followed in the future by a new proposed rule that will set forth proposed criteria for addition to, or deletion from, the list of taxa exempted from registration requirements, and will further consider the subject of education.

DATES: This rule is effective October 13, 1998.

ADDRESSES: The complete file for this rule is available for inspection by appointment at the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 700, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Teiko Saito, Chief, [see **ADDRESSES** section] telephone 703/358-2093; fax 703/358-2281.

SUPPLEMENTARY INFORMATION: On January 7, 1992, the Service initiated a review of the Captive-bred Wildlife (CBW) regulation (50 CFR 17.21(g)). On June 11, 1993, the Service followed with a proposed rule (58 FR 32632) that included several proposed changes to the CBW regulation, including elimination of CBW registrations for several species that are present in the United States in large numbers and/or that are genetically unsuitable for scientifically based breeding programs; amendment of the definition of "harass" in 50 CFR 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive wildlife; and deletion of education from the definition of "enhance" in § 17.3. On December 27, 1993, the Service published a final rule (58 FR 68323) that eliminated public education through exhibition of living

wildlife as the sole justification for issuance of a CBW registration. On the same date, the Service published a notice (58 FR 68383) that reopened the comment period on the balance of the issues in the proposed rule, including the larger question of the value education provides to the conservation of non-native species in the wild as it applies to endangered and threatened species permits issued under §§ 17.22 and 17.32.

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and implementing regulations prohibit any person subject to the jurisdiction of the United States from conducting certain activities with endangered or threatened species of fish, wildlife, or plants. These activities include import, export, take, and interstate or foreign commerce. The Secretary of the Interior (or the Secretary of Commerce in the case of certain marine species) may permit such activities, under such terms and conditions as he/she will prescribe, for scientific purposes or to enhance the propagation or survival of the affected species, provided these activities are consistent with the purposes of the Act. The Secretary of the Interior's authority to administer permit matters relating to endangered and threatened species generally has been delegated through the Director of the Fish and Wildlife Service to the Office of Management Authority (OMA).

Since 1976, the Service has been striving to achieve an appropriate degree of control over prohibited activities involving living wildlife of non-native species born in captivity in the United States.

In 1978, the Service announced a review of regulations on captive-bred wildlife (43 FR 16144, April 14, 1978). The notice reiterated the Service's philosophy on its approach to captive versus wild populations.

The Service considers the purpose of the Act to be best served by conserving species in the wild along with their ecosystems. Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs.

Following an extensive public review in 1978 and 1979, the Service published a final rule (44 FR 54002, September 17, 1979) that established the Captive-bred Wildlife (CBW) registration system. The final rule amended regulations in 50 CFR 17.21 by adding § 17.21(g), which granted general, conditional permission to take; export or re-import; deliver,

receive, carry, transport, or ship in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any non-native endangered or threatened wildlife (that is bred in captivity in the United States. In other words, the regulation itself contains the permit. For persons or institutions to operate under that permit, certain conditions must be met, including that the person or institution must first register with the Service. Authorization for the Service to collect information from persons wanting to register was submitted and approved by the Office of Management and Budget under the clearance number of 1018-0093.

Unless an exception is made under § 17.21(g)(5), the CBW system applies only to species that do not include any part of the United States (as defined in 50 CFR part 10) in their natural geographic distribution. Additionally, the individual specimens must have been born in captivity in the United States. The registration authorizes interstate purchase and sale only between entities that each hold a registration for living wildlife of the taxon concerned. Interstate or foreign commerce, in the course of commercial activity, with respect to non-living wildlife is not authorized under a CBW registration. To conduct such activities, separate permits must be applied for under the appropriate regulations for endangered or threatened wildlife at 50 CFR 17.22 or 50 CFR 17.32.

The 1979 final rule also amended the definition of "enhance the propagation or survival" of wildlife in captivity to include a wide range of normal animal husbandry practices used to maintain self-sustaining and genetically viable stocks of wildlife in captivity. Specifically included in those practices were "culling" and "euthanasia". Other aspects of the definition of "enhance" that were codified in 1979 and are still used today include accumulation and holding and transfer of animals not immediately needed or suitable for propagative or scientific purposes (50 CFR 17.3).

The above definition is found in subpart A, the General Provisions of part 17. Therefore, it applies not only to CBW registrations, but to all endangered and threatened species permits for captive wildlife issued under §§ 17.22 and 17.32.

After 12 years' experience with the system, the Service began another review with a notice of intent to propose a rule, published on January 7, 1992 (57 FR 548). The notice discussed problems the Service was experiencing with the system and offered for discussion three options intended to show the range of

possible actions that might be taken. These ranged from no action (no change in the system) to complete elimination of the CBW registration process. The notice also questioned whether the term "harass" as defined in § 17.3 applied to captive-born wildlife, and whether education of the American public through exhibition of living, non-native wildlife actually accomplished measurable enhancement of the survival of the affected species in the wild. Three options for dealing with education were presented, ranging from no change in the existing definition to deleting education as a justification for permits and CBW registrations.

It should be noted here that while the preamble to the proposed rule referred to "captive-born wildlife" in the context of the discussion of the proposed amendment of the term "harass", the proposed rulemaking language refers to "captive wildlife". This was, and is, the Service's intent. Therefore, the rest of this discussion is in terms of "captive wildlife" to make it agree with both proposed and final rulemaking language.

Public comments and suggestions were solicited. Written responses were received from 942 individuals, institutions, and organizations.

After review of comments received, the Service published a proposed rule on June 11, 1993 (58 FR 32632), that proposed several changes to § 17.21(g): Elimination of registration for several species that are present in the United States in large numbers and/or that are genetically unsuitable for scientifically based breeding programs; restriction of eligibility for CBW registrations to those entities that are participants in an approved responsible cooperative breeding program for the taxon concerned; amendment to the definition of "harass" in § 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive wildlife; and, the conditional deletion of education from the definition of "enhance" in § 17.3.

On December 27, 1993, the Service published a final rule (58 FR 68323) that was limited to the narrow issue of education as it relates to the CBW system. That rule eliminated public education through exhibition of living wildlife as the sole justification for issuance of a CBW registration under § 17.21(g). That decision was based on the Service's belief that the scope of the CBW system should be revised to relate more closely to its original intent, *i.e.*, the encouragement of responsible breeding that is specifically designed to help conserve the species involved. On the same date, the Service published a

notice (58 FR 68383) that reopened the comment period on the balance of the issues in the proposed rule, including the larger question of the value that education provides to the conservation of non-native species in the wild as it applies to endangered and threatened species permits issued under §§ 17.22 and 17.32.

Information and Comments

A total of 1,269 sets of written information and comments were received from individuals, institutions, and organizations in response to the proposed rule and during the re-opened comment period. Some commenters responded both times.

Of comments received, some 450 were form letters, patterned responses, or multiple signatures on letters or petitions. Opinions expressed on specific issues are summarized as follows (a number of letters offered comments on more than one issue):

Retain education as part of the definition of enhancement of survival of the species	1,165
Retain education, but establish guidelines	29
Delete education	10
Require CBW registrants to participate in a responsible cooperative breeding program	17
Do not require participation in a responsible cooperative breeding program	77
Change definition of "harass" to exclude normal animal husbandry practices for captive wildlife	18
Do not change definition of "harass"	3
Replace CBW registration with rebuttable presumption	2
Do not use rebuttable presumption	37
Completely deregulate captive-bred wildlife	36
Deregulate interstate commerce in captive-bred wildlife	65
Exempt certain species from registration requirements as proposed	26
Exempt some species but not all of the proposed taxa	13
Exempt no species	2

Because the Service has decided to reformulate its proposal concerning deletion of education from the definition of "enhancement", the discussion below deals only with comments on other aspects of the proposed rule. Comments concerning education are being considered and will be the subject of a **Federal Register** notice at a later date.

Comments Concerning Definitions

Comment: Commenters generally favored changing the definition of "harass" to exclude normal animal husbandry practices for captive wildlife.

Some felt that terms such as "normal", "adequate", "safe", and "healthful" are vague, subjective, and amenable to widely varying interpretation. Various suggestions for rewording the definition were offered.

Response: The Service agrees and believes that the revised definition in this final rule reduces subjectivity to the extent possible.

Comment: Some commenters objected to a change in the definition of "harass". Some believed that the change created a broad exception to the prohibition against harassment. One commenter suggested that any concerns over the definition be addressed through specific permit restrictions for individual permittees and registrants, thus tailoring protection to the particular affected species.

Response: The Service believes this approach could result in the need for preparing husbandry manuals for each species and would not result in a commensurate benefit to the species. To evaluate facilities and care provided by applicants, the Service will continue to consult with experts such as the Department of Agriculture's Animal and Plant Health Inspection Service, which is charged with administering the Animal Welfare Act, and knowledgeable persons in the zoo and aquarium communities and the private sector, as needed.

Comment: Several commenters recommended amending the definition of "take" to apply only to animals from the wild. This is based on the concern that holding animals in captivity or transferring them for breeding opportunities could be construed as a "taking".

Response: "Take" was defined by Congress in Section 3 of the Act as * * * "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect * * *" endangered or threatened wildlife, whether wild or captive. Therefore, the definition can be clarified by further defining its component terms, but the statutory term cannot be changed administratively.

The purpose of amending the Service's definition of "harass" is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against "take". Since captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent.

Comment: One comment was that the Service is not authorized to treat members of a particular species differently based on whether the

specimen is wild or held in captivity: the Act's protections are afforded to whole species of endangered and threatened animals and their habitats.

Response: It is true that the Act applies to all specimens that comprise a "species" (as defined in the Act) that has been listed as endangered or threatened, and in general does not distinguish between wild and captive specimens thereof. However, the definition of "take" in the Act clearly applies to individual specimens or groups of specimens, and the captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would "harass" that specimen or whether such actions would "enhance the propagation or survival" of the species. The Service believes that ample authority is provided by the Act to adopt the regulatory amendments set out in this final rule as a proper interpretation of the statutory provisions of the Act.

To decide otherwise would place those persons holding captive specimens of a listed species in an untenable position. If providing for the maintenance and veterinary care of a live animal were considered to be "harassment", those persons holding such specimens in captivity would be forced to obtain a permit or give up possession since any *failure* to provide proper care and maintenance would be an unlawful "taking". Since Congress chose not to prohibit the mere possession of lawfully-taken listed species in Section 9(a)(1) of the Act, the Service believes that congressional intent supports the proposition that measures necessary for the proper care and maintenance of listed wildlife in captivity do not constitute "harassment" or "taking".

Comments Concerning CBW Questions

Comment: Responses showed overwhelming opposition to a rebuttable presumption, usually based on the argument that it would in effect mean that a person was considered guilty until proven innocent.

Response: The Service does not agree with this assessment. As discussed in detail in the preamble to the proposed rule a rebuttable presumption is not a presumption of guilt. Section 10(g) of the Act imposes a burden of proof on any person claiming the benefit of an exemption or permit under the Act. Thus, the final regulation requires persons claiming benefit of exception at § 17.21(g) to maintain records and make them available for inspection at reasonable hours by law enforcement

officials as prescribed by 50 CFR 13.46 and 13.47 to document legal activities.

Comment: A few commenters favored completely deregulating captive-bred wildlife. However, most commenters thought the Service should deregulate and exempt only certain non-native species from the CBW registration requirements.

Response: The Service agrees that it is best, at this time, to delete the registration requirement for species that are known to be in the United States in large numbers and breeding well, and/or are genetically unsuitable for scientific breeding programs.

Comment: Commenters generally favored efforts by the Service to lessen the regulatory and paperwork requirements for interstate breeding transactions with captive-bred wildlife. Many believed that the current regulations for interstate commerce were the cause of inbreeding and hybridization of certain species within their State. Some stated that a change to the regulations would increase interstate breeding transactions resulting in better management of captive populations.

Response: The Service agrees that provisions of the final rule will facilitate interstate breeding transactions with exempted species, and thereby, increase successful breeding and maintenance of these endangered and threatened species.

Comment: Seventy-seven commenters opposed and seventeen favored the proposal to restrict CBW registrations to those entities that participate in an organized breeding program. Most of those opposed were concerned that currently there are very few organized programs other than the Species Survival Plans (SSP) of the American Zoo and Aquarium Association (AZA). As private breeders or non-AZA member institutions, they might have difficulty gaining approval to participate in an SSP. Another objection was that SSP's do not exist for most species and that it would be unrealistic to estimate more than 80-100 programs by the year 2000. Some commented to the effect that the proposed rule would create a monopoly on the part of the entity that would approve programs and would mandate a bureaucratic nightmare. Another concern was the cost and difficulty of developing and maintaining new breeding programs as opposed to participating in those already in place.

One commenter noted that the proposal doesn't meet Vice President Gore's goal of reducing regulatory burden and unnecessary paperwork; it actually creates a new layer of regulatory oversight and adds potential for litigation by those who disagree with

the Service's decisions regarding those programs or participants that do or do not qualify. Another comment was that the Service couldn't, in effect, deny a permit to one who was refused participation in a breeding program without allowing the exercise of the appeal process; this would constitute abdication of the Service's responsibility to a private group or institution.

Some commenters also questioned what would happen if there were two applications for approval of a program for the same species; some said there should only be a single program for each species/subspecies, while others argued that more than one program should be allowed. Finally, it was pointed out that the goal should not be to develop a single well-managed genetically diverse and self-sustaining population. A species can be managed for either retention of alleles or of heterozygosity, and possibly both management schemes could be correct.

Response: While the Service believes that the concept embodied in the proposal is theoretically sound, the proposal has been deleted from this final rule. The practical, socio-economic, and biological problems inherent in attempting to manage such an effort in an effective and equitable manner could result in a significant increase in workload and paperwork. There is a potential for agency decisions to be perceived as unfair or biologically improper. Such a situation might give rise to frequent appeals and litigation, that would add to the burden on the public and the Service while contributing little to management of captive-bred wildlife.

Comment: The proposal to exempt certain species from CBW registration requirements elicited 142 comments, of which 101 recommended either complete deregulation of captive-bred wildlife or at least of interstate commerce in such animals. The proposal was supported by 26 commenters and opposed by 2. Thirteen other commenters favored or opposed some, but not all of the taxa proposed for exemption. The majority of the latter were concerned about exempting generic tigers because it might encourage uncontrolled breeding and further hybridization for commercial sales and exploitation. A related concern was that purebred tigers might be "laundered" as generic in order to avoid regulation, thus losing potentially valuable breeders from the SSP's for the various subspecies.

Response: The Service believes that the breeding of generic tigers has not been affected by the CBW system. Those

who hold CBW registrations can legally purchase and sell generic tigers in interstate commerce. Non-commercial interstate transfers (e.g., breeding loans, donations) are not prohibited. As pointed out in the notice of intent to propose rule (57 FR 548), generic tigers can be found in most of the 50 states, and intrastate commerce is not regulated. The Service does not believe that "laundering" of purebred tigers as generic animals in order to avoid regulation would be widespread, since so doing would decrease the value of the animals in most cases. Further, those who would do this would probably not be likely participants in SSP's for purebred tiger subspecies.

Comment: Two commenters who generally supported the exemption for pheasants argued that several species are not present in the United States in large numbers (if at all), and therefore those species should continue to be regulated under the CBW system. These species are: Edwards, cheer, Swinhoe's, Mikado, imperial, and white eared pheasants; Sclater's and Chinese monals; and Blyth's, Cabot's, and western tragopans.

Response: Based on the 1993 survey conducted by the American Pheasant and Waterfowl Society (482 respondents, or the equivalent of nearly 25% of APWS membership), several of these species do have low captive populations: Imperial pheasant—0; Sclater's monal—0; western tragopan—25; Blyth's tragopan—32; and Cabot's tragopan—75. Therefore, these species will not be exempted from the CBW registration requirements at this time. Of the other 10 species to be exempted, the sample shows numbers of 222 or more. As stated in the proposed rule, it is impossible to project total pheasant populations in the United States with any certainty due to possible sampling bias, plus the fact that there is probably a significant number of pheasant breeders who do not belong to the APWS.

Comment: One objection to exemption was received for each of the following: Laysan duck, white-winged wood duck, and *Neophema*.

Response: The APWS survey indicates healthy captive populations of the Laysan duck (445) and the white-winged wood duck (278); therefore, they will be exempted from CBW registration requirements.

The 1991 Psittacine Captive Breeding Survey, done by World Wildlife Fund in collaboration with the American Federation of Aviculture, concludes that serious thought should be given to downlisting or delisting the captive stocks of *Neophema splendida* and *N.*

pulchella because the survival of these species in captivity appears assured if inbreeding can be minimized. Both 1990 and 1991 censuses showed that these species are well represented and are breeding well in captivity. In 1991, 114 pairs of *N. splendida* hatched 337 eggs, and 61 pairs of *N. pulchella* hatched 266 eggs. Thus, these species are exempted by this final rule.

Comment: No criteria were provided for the addition or deletion of taxa from the list exempted from the CBW registration requirement.

Response: The Service believes that a case-by-case determination of eligibility, consistent with the provisions of the Act and the public notice and comment procedure, is adequate for the small number of species that will be considered for exemptions. In the near future, the Service will propose a new rule that sets criteria for adding or deleting taxa from the list exempted from the CBW registration requirements. The Service will solicit comments from the public on the proposed rule to ensure that the proposal is as accurate and effective as possible.

Comment: The proposed exemptions from registration requirements violate the notice, comment, and finding provisions of sections 10(c) and (d) of the Act.

Response: The proposed exemptions make no change in existing CBW procedures concerning notice and review. Section 17.21(g)(1) contains a general permit issued to "any person". The question involved here is whether entities (permittees) holding the exempted taxa would be required to register with the Service. Thus, the new exemptions represent changes to the terms of the existing general permit, and public notice and comment procedures have been observed in developing those changes.

Comment: The proposed exemptions improperly do away with the Act's requirement that listed species be held for scientific purposes or to enhance the propagation or survival of the species.

Response: The proposed rule did not specify that the purpose of activities with species from taxa where the holder is exempted from registering must be for the enhancement of propagation or survival of the species. This final rule now includes such language in the regulation at § 17.21(g)(6)(i). Captive U.S. stocks of taxa to be exempted from the CBW registration requirement are characterized by large numbers of specimens and successful breeding efforts; therefore, their survival in captivity appears assured. The fact that these stocks are sufficient to satisfy demand is evidenced by little or no

demand for additional specimens from the wild. Computerized permit records show that in the 3-year period 1991 to 1993, there were no imports of wild specimens of any of these taxa (for the pheasants, there have been no requests for such imports since 1986). Importation of wild-caught specimens of these taxa for breeding purposes could be approved only in unusual circumstances, including a definitive showing of need for new bloodlines that could only be satisfied by wild animals. A determination would have to be made that the status of the wild population would safely allow limited taking. Preference would be given to imports of captive-born specimens of the exempted taxa. The importation of either wild-caught specimens or specimens born in captivity outside the United States would continue to require permits under section 10 of the Act as well as the Convention on International Trade in Endangered Species.

Comment: In the final rule published on December 27, 1993 (58 FR 68323), § 17.21(g)(1) was amended to state that the principal purpose of activities with animals regulated under the CBW system must be to facilitate captive breeding. Section 17.21(g)(1)(ii) requires that the purpose be to enhance the propagation or survival of the species. This double requirement is confusing and apparently redundant.

Response: The Service agrees. The purpose of the wording added to § 17.21(g)(1) was to indicate that public education could not be used as the sole basis for justifying issuance of a CBW registration for species that do not qualify for the exempted taxa list. The text of this final rule has been revised to clarify this issue.

Comment: An objection was made that the proposed rule would require entities such as circuses to show that permanent exports of generic tigers would be for the purpose of enhancement of propagation or survival of the species in accordance with § 17.21(g)(4). This does not make sense, since the Service has concluded that inter-subspecific crossed or generic tigers have no value in terms of preserving the species through propagation because they no longer have the same genetic makeup as wild populations.

Response: The Service agrees that generic or inter-subspecific crossed tigers cannot be used for enhancement of propagation of the species. However, they can be used in a manner that should enhance survival of the species in the wild. Examples include exhibition in a manner designed to educate the public about the ecological

role and conservation needs of the species and satisfaction of demand for tigers so that wild specimens or captive purebred subspecies are not used.

Export of any of the exempted taxa will continue to require appropriate CITES documentation under 50 CFR part 23. The information required by § 17.21(g)(4) can be submitted with the CITES application, as is current practice.

Discussion of Final Rule

This final rule revises existing §§ 17.3 and 17.21(g). These revisions and their effects are discussed below:

1. "Harass" under the definition of "take in § 17.3 is an act or omission that creates the likelihood of injury by annoying wildlife to such an extent as to significantly disrupt normal behavior patterns. The applicability of this concept to captive-held animals has been unclear, since human activities, including normal husbandry practices, provided in caring for captive-held wildlife in all probability disrupt behavior patterns.

In light of this, the definition of "harass" in 50 CFR 17.3 is modified to exclude normal animal husbandry practices that are not likely to result in injury such as humane and healthful care when applied to captive wildlife. While no permit is required to possess lawfully acquired listed wildlife, a person cannot possess wildlife without doing something to it that might be construed as harassment under a literal interpretation of the definition in use since 1979, e.g., keep it in confinement, provide veterinary care, etc. Under this scenario, a person who legally possessed wildlife without a permit could be considered in violation of the prohibition against harassment unless they obtained a specific permit that authorized them to conduct normal animal husbandry activities. Had Congress intended this result, the prohibition on possession in section 9 of the Act would not have been limited to endangered species taken in violation of the Act.

However, maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness. The Act continues to afford protection to listed species that are not being treated in a humane manner.

2. Ten species of pheasants (family Phasianidae), parakeets of the species *Neophema splendida* and *N. pulchella*, the Laysan duck, the white-winged wood duck, and the "generic" tiger are exempted from the CBW registration

requirements of § 17.21(g)(2), because their survival in captivity appears assured. All of these taxa are present in the United States in large numbers and/or are genetically unsuitable for scientifically-based breeding programs (as is the case with the generic tiger). The four purebred subspecies of tiger in captivity in the United States are the subject of breeding programs under SSP's and will continue to require CBW registrations.

Current holders of CBW registrations for the above taxa (listed in § 17.21(g)(6)) will no longer need them. Applications for new or renewed registrations for these taxa that are pending before the Service on the effective date of this rule will not be processed.

No written annual reports will be required of holders of these exempted taxa. However, record keeping and inspection requirements of 50 CFR 13.46 and 13.47 are still in place for persons holding the exempted taxa or other captive-bred species requiring a CBW registration. It is estimated that the paperwork burden of the CBW system on the Service and the public will be reduced.

The Service believes that this relaxation of the registration requirement in § 17.21(g) will not operate to the disadvantage of the species in the wild; further, it will be consistent with the conservation of the species because domestic demand has been, and will continue to be, satisfied by captive-born wildlife. The import of live wild-caught specimens, including those belonging to the exempted taxa, would not be authorized unless evidence showed a need for new bloodlines that could not be satisfied by internal exchange or that foreign-bred specimens were unavailable. Furthermore, the Service would have to determine that the wild populations could sustain limited taking.

Regulatory Analysis

This rulemaking has been reviewed by the Office of Management and Budget review under Executive Order 12866. Furthermore, the Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities (zoos, circuses, independent breeders) under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will beneficially affect about 400 small entities currently registered under the CBW system. The economic effects are minor since they represent less than \$20,000 and thus, the total effect on such small entities will be minimal. There will be a regulatory

reduction for those entities holding species to be exempted from registration by this rule. This rule may also provide a reduction of risk to holders of captive wildlife because of the amended definition of "harass".

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act and will not negatively effect the economy, consumer costs, or U.S. based-enterprises. The Service recognizes that the rule will effect a substantial number of small entities, such as zoo, circuses, or independent breeders, but in a beneficial manner.

The Service has determined and certified pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on private entities, or local or State governments.

The Department has determined that these final regulations meet the applicable standards provided in Section 3(a) and 3(b)(2) of Executive Order 12988.

This rule will not have substantial direct effects on the States, in their relationship between the Federal Government and the States or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612 the Service has determined that the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment.

The Service has determined that the rule has no potential takings of private property implications as defined in Executive Order 12630.

Persons registering with the Service for a captive-bred wildlife registration requires the collection of information, and the Office of Management and Budget has approved the collection of information contained in this rule under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1018-0093 with an expiration date of February 28, 2001. The application information submitted by a person for a captive-bred wildlife registration is used by the Service to make decisions in accordance with wildlife regulations on the issuance, suspension, revocation or denial of permits. The Service has reviewed all permit information collection requirements and ensured the burden imposed on the public is the lowest possible. It should be noted that the main intent of this rule is to lower the number of persons needing a registration.

The Service has reviewed this rule under Executive Order 12372 and

determined that intergovernmental consultation is unnecessary.

The Service has determined that these regulations are categorically excluded from further National Environmental Policy Act (NEPA) requirements. Part 516 of the Departmental Manual, Chapter 6, Appendix I, section 1.4(A)(1) categorically excludes changes or amendments to an approved action when such changes have no potential for causing substantial environmental impact.

The Service has evaluated possible effects on Federally recognized Tribes and determined that there will be no adverse effects to any Tribe. Any individual tribal member possessing a CBW registration will receive the same beneficial regulatory and economic relief as other registrants who hold wildlife species that will be exempted by this rule.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

For the reasons set forth in the preamble, title 50, chapter I, subchapter B, part 17, subpart C is amended as set forth below.

PART 17—[AMENDED]

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

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

Subpart A—Introduction and General Provisions

2. The definition of "Harass" in § 17.3 is revised to read as follows:

§ 17.3 Definitions.

* * * * *

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, or
- (3) Provisions of veterinary care for confining, tranquilizing, or

anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

Subpart C—Endangered Wildlife

3. Section 17.21(g) is revised to read as follows:

§ 17.21 Prohibitions.

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States provided either that the wildlife is of a taxon listed in paragraph (g)(6) of this section, or that the following conditions are met:

(i) The wildlife is of a species having a natural geographic distribution not including any part of the United States, or the wildlife is of a species that the Director has determined to be eligible in accordance with paragraph (g)(5) of this section;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export from the United States; and

(v) Any person subject to the jurisdiction of the United States who engages in any of the activities authorized by this paragraph does so in accordance with paragraphs (g) (2), (3) and (4) of this section, and with all other applicable regulations in this Subchapter B.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph must first register with the Service (Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, Virginia 22203). Requests for registration must be submitted on an official application form (Form 3–200-41) provided by the Service, and must include the following information:

(i) The types of wildlife sought to be covered by the registration, identified by common and scientific name to the

taxonomic level of family, genus or species;

(ii) A description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered by the registration, and when appropriate, in conducting research directly related to maintaining and propagating such wildlife;

(iii) Photograph(s) or other evidence clearly depicting the facilities where such wildlife will be maintained; and

(iv) a copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR part 2).

(3) Upon receiving a complete application, the Director will decide whether or not the registration will be approved. In making this decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Public education activities may not be the sole basis to justify issuance of a registration or to otherwise establish eligibility for the exception granted in paragraph (g)(1) of this section. Each person so registered must maintain accurate written records of activities conducted under the registration, and allow reasonable access to Service agents for inspection purposes as set forth in §§ 13.46 and 13.47. Each person registered must submit to the Director an individual written annual report of activities, including all births, deaths and transfers of any type.

(4) Any person subject to the jurisdiction of the United States seeking to export or conduct foreign commerce in captive-bred endangered wildlife that will not remain under the care of that person must first obtain approval by providing written evidence to satisfy the Director that the proposed recipient of the wildlife has expertise, facilities or other resources adequate to enhance the propagation or survival of such wildlife and that the proposed recipient will use such wildlife for purposes of enhancing the propagation or survival of the affected species.

(5)(i) The Director will use the following criteria to determine if wildlife of any species having a natural geographic distribution that includes any part of the United States is eligible for the provisions of this paragraph:

(A) Whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons, and

(B) Whether the wild populations of the species are effectively protected from unauthorized taking as a result of the inaccessibility of their habitat to humans or as a result of the effectiveness of law enforcement.

(ii) The Director will follow the procedures set forth in the Act and in the regulations thereunder with respect to petitions and notification of the public and governors of affected States when determining the eligibility of species for purposes of this paragraph.

(iii) In accordance with the criteria in paragraph (g)(5)(i) of this section, the Director has determined the following species to be eligible for the provisions of this paragraph:

Laysan duck (*Anas laysanensis*).

(6) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by paragraph (g)(1) of this section may do so without first registering with the Service with respect to the bar-tailed pheasant (*Symaticus humiae*), Elliot's pheasant (*S. ellioti*), Mikado pheasant (*S. mikado*), brown eared pheasant (*Crossoptilon mantchuricum*), white eared pheasant (*C. crossoptilon*), cheer pheasant (*Catreus wallichii*), Edward's pheasant (*Lophura edwardsi*), Swinhoe's pheasant (*L. swinhoi*), Chinese monal (*Lophophorus lhuysii*), and Palawan peacock pheasant (*Polyplectron emphanum*); parakeets of the species *Neophema pulchella* and *N. splendida*; the Laysan duck (*Anas laysanensis*); the white-winged wood duck (*Cairina scutulata*); and the inter-subspecific crossed or "generic" tiger (*Panthera tigris*) (i.e., specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (*Panthera tigris tigris*, *P.t. sumatrae*, *P.t. altaica* and *P.t. corbetti*, respectively) provided:

(i) The purpose of such activity is to enhance the propagation or survival of the affected exempted species;

(ii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iii) Each specimen to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export of the specimen from the United States;

(iv) No specimens of the taxa in this paragraph (g)(6) of this section that were taken from the wild may be imported for breeding purposes absent a definitive showing that the need for new bloodlines can only be met by wild specimens, that suitable foreign-bred,

captive individuals are unavailable, and that wild populations can sustain limited taking, and an import permit is issued under § 17.22;

(v) Any permanent exports of such specimens meet the requirements of paragraph (g)(4) of this section; and

(vi) Each person claiming the benefit of the exception in paragraph (g)(1) of this section must maintain accurate written records of activities, including births, deaths and transfers of specimens, and make those records accessible to Service agents for inspection at reasonable hours as set forth in §§ 13.46 and 13.47.

Dated: May 26, 1998.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 98-24384 Filed 9-10-98; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[I.D. 090498A]

Atlantic Tuna Fisheries; Atlantic Bluefin Tuna; Closure

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

ACTION: General category closure.

SUMMARY: NMFS has determined that the 1998 Atlantic bluefin tuna (BFT) General category subquota for the September period will be attained by September 8, 1998. Therefore, General category fishery for September will be closed effective 11:30 p.m. on September 8, 1998. This action is being taken to prevent overharvest of the adjusted subquota of 201 metric tons (mt) for the September period.

DATES: Effective 11:30 p.m. local time on September 8, 1998, through September 30, 1998.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 301-713-2347, or Pat Scida, 978-281-9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 285. Section 285.22 subdivides the U.S. quota recommended by the International Commission for the Conservation of

Atlantic Tunas among the various domestic fishing categories.

General Category Closure

NMFS is required, under § 285.20(b)(1), to monitor the catch and landing statistics and, on the basis of these statistics, to project a date when the catch of BFT will equal the quota and publish a **Federal Register** announcement to close the applicable fishery.

Implementing regulations for the Atlantic tuna fisheries at 50 CFR 285.22 provide for a subquota of 194 mt of large medium and giant BFT to be harvested from the regulatory area by vessels permitted in the General category during the period beginning September 1 and ending September 30. Due to an underharvest of 7 mt in the June-August period subquota, the September period subquota was adjusted to 201 mt. Based on reported catch and effort, NMFS projects that this revised subquota will be reached by September 8, 1998. Therefore, fishing for, retaining, possessing, or landing large medium or giant BFT by vessels in the General category must cease at 11:30 p.m. local time September 8, 1998. The General category will reopen October 1, 1998, with a quota of 65 mt for the October-December period. If necessary, the October-December subquota will be adjusted based on actual landings from September. While the General category is open, General category permit holders are restricted from all BFT fishing, including tag-and-release fishing, on restricted-fishing days. However, for the remainder of September, previously designated restricted-fishing days are waived; therefore, General category permit holders may tag and release BFT while the General category is closed prior to the October 1 opening, subject to the requirements of the tag and release program at 50 CFR 285.27.

The intent of this closure is to prevent overharvest of the September period subquota established for the General category.

Classification

This action is taken under 50 CFR 285.20(b) and 50 CFR 285.22 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 971 *et seq.*

Dated: September 4, 1998.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 98-24405 Filed 9-8-98; 2:00 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 980903229-8229-01; I.D. 051898A]

RIN 0648-AK73

Fisheries of the Exclusive Economic Zone Off Alaska; Stand Down Requirements for Trawl Catcher Vessels Transiting Between the Bering Sea and the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement a stand down requirement for trawl catcher vessels transiting between the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA). This action is necessary to prevent unexpected shifts of fishing effort between BSAI and GOA fisheries that can lead to overharvests of total allowable catch (TAC) in the Western and Central (W/C) Regulatory Areas of the GOA. This action is intended to further the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs).

DATES: Effective September 8, 1998.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action are available from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802. Attn: Lori J. Gravel, or by calling the Alaska Region, NMFS, at 907-586-7228.

FOR FURTHER INFORMATION CONTACT: Kent Lind, 907-586-7228 or kent.lind@noaa.gov.

SUPPLEMENTARY INFORMATION: The groundfish fisheries off Alaska are managed by NMFS under the FMPs. The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act. Federal regulations governing the groundfish fisheries appear at 50 CFR parts 600 and 679.

Background and Need for Action

In recent years, management of the inshore pollock and Pacific cod fisheries