Transportation Bureau finds that notice and public procedure thereon are impractical and unnecessary.

In addition, because these amendments are a relaxation of the existing rules and place no additional burden on any person, they are being made effective in less than 30 days after publication in the Federal Register.

In consideration of the foregoing, Parts 173 and 177 of Title 49 CFR are amended as follows:

1. In §173.33 paragraph (e) is revised to read as follows:

§ 173.33 Cargo tank use authorization.

(e) 1. The tank less any fittings must be subjected to a hydrostatic or pneumatic pressure of one and one-half times the design pressure (maximum allowable working pressure or rated pressure) of the tank. For pneumatic testing, the test procedure specified in §177.824(d) of this subchapter shall be followed. When a pneumatic test is performed, suitable safeguards should be provided to protect employees and other persons should a failure occur.

2. In §177.814 paragraphs (a) and (d) are revised to read as follows:

§ 177.814 Retention of manufacturer's certificate and retest reports.

(a) Each motor carrier who uses a cargo tank vehicle shall have in his files a certificate or manufacturer’s data report signed by a responsible official of the manufacturer or fabricator of the cargo tank, or a competent testing agency, certifying that the cargo tank identified in the certificate was manufactured and tested in accordance with the requirements contained in the specification under which the cargo tank was constructed. The certificate and any other data furnished as required by the specification must be retained at the principal office of the carrier during the time that the cargo tank is used by the carrier and for one year thereafter.

(1) Except for specifications MC 330 and MC 331 cargo tanks, a motor carrier may himself perform the tests and inspections to determine whether the tank meets the requirements of the specification. If the motor carrier performs the tests and inspections and determines that the tank conforms to the specification, he may use the tank if he retains the test data, in place of a certificate, in his files at his principal office for as long as he uses the tank and one year thereafter.

(2) A motor carrier using a specification MC 330 cargo tank for which such carrier is unable to obtain the manufacturer’s data report required by the specification may copy the information contained on the cargo tank’s identification plate and ASME Code plate and retain such information as required by this section.

(3) Each motor carrier who uses a specification cargo tank which he does not own and has not tested or inspected shall obtain a copy of the manufacturer’s certificate or manufacturer’s data report and retain it in his files at his principal office during the time he uses the tank and for one year thereafter.

A motor carrier using a specification MC 330 cargo tank which he does not own may copy the information contained on the cargo tank’s identification plate and ASME Code plate if the manufacturer’s data report is not available from the owner of the tank.

2. In §177.823 paragraph (e) is added to read as follows:

§ 177.823 Required exterior marking on motor vehicles and combinations.

(e) A motor vehicle, trailer, or other cargo-carrying body, other than a cargo tank, containing less than 1,000 pounds of a flammable liquid, oxidizing material, compressed gas, or corrosive liquid, may be placarded as specified in paragraph (a) of this section when such vehicle trailer or cargo-carrying body has an immediate prior or subsequent movement by vessel or rail.

(18 U.S.C. 830; 49 CFR 1.53(g).

Effective: These amendments are effective April 28, 1976.


JAMES T. CURTIS, Jr.,
Director,
Materials Transportation Bureau.
RULES AND REGULATIONS

This Rulemaking also determines the: Gray Bat (Myotis grisescens) and the Mexican Wolf (Canis lupus baileyi) each to be Endangered Species.

BACKGROUND

Schaus Swallowtail and U.S. Population of the Bahama Swallowtail butterflies. On April 22, 1975, the Service published proposed rules in the Federal Register (40 FR 17757) advising that sufficient evidence was on file to propose a determination that the two subject species of butterflies were Threatened species as provided for by the Act. That proposal summarized the factors thought to be contributing to the likelihood that each species would become Endangered within the foreseeable future; specified the prohibitions which would be applicable to each species if such a determination were made; and solicited comments, suggestions, objections and factual information from any interested person.

Section 4(b)(1)(A) of the Act requires that the Governor of each State within which a resident species of wildlife is known to occur, be notified and be permitted 90 days to comment before any such species is determined to be a Threatened Species or an Endangered Species. Such a letter was drafted but apparently was not mailed to Governor Askew or at any rate was not received by the Governor's Office. This oversight was rectified on August 15, 1975, when Acting Director Keith M. Schreiner forwarded a letter to Governor Askew advising him of the proposed action and requesting his comments.

In addition, on April 22, 1975, the Service issued a news release entitled "Two Florida Butterflies May Become First Insects Listed as Threatened Species" which advised that 

GRAY BAT AND MEXICAN WOLF.

On April 21, 1975, the Service published proposed rules in the Federal Register (40 FR 17590) advising that sufficient evidence was on file to support a proposal to determine that several species of fauna were Endangered Species or Threatened Species as provided for by the Act. Included were the Gray Bat and the Mexican Wolf, both of which were proposed to be determined Endangered Species.

On April 24, 1975, Acting Director Lynn A. Greenwalt forwarded letters notifying the Governors of the States of Arizona, Arkansas, Illinois, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Florida, Georgia, New Mexico, North Carolina, South Carolina, Texas, Virginia and West Virginia of this proposal and requesting their reviews and comments. Included among those States are all within which the Gray Bat and Mexican Wolf are known to occur except for the State of Oklahoma. Oklahoma inadvertently was one of the States on April 24 letter was prepared. Since the Gray Bat has been reported from Oklahoma, that oversight was corrected on August 25, 1975, when Acting Associate Director, Harold J. O'Connor, forwarded a letter to the Honorable David L. Boren, Governor of Oklahoma advising him of the proposal to determine the Gray Bat to be an Endangered Species and requesting his views and opinions. Associate Director, Keith M. Schreiner, subsequently forwarded a second letter dated October 3, 1975, to Governor Boren again calling the proposal to his attention and seeking any comments the State of Oklahoma cared to offer. Director Lynn A. Greenwalt forwarded, similar letter on November 18, 1975.

On April 25, 1975, the Service, through the Department of State, forwarded a cable (State 098118) to the American Embassy in Mexico City, Mexico, advising the embassy of the proposal to determine the Mexican Wolf to be an Endangered Species; instructing the embassy to so advise the proper officials of the Government of Mexico and to request from them any comments, data or other relevant information they cared to offer.

A subsequent cable (State 099714) dated April 29, 1975, was forwarded to clarify possible ambiguities in the wording of the April 25 cable.

On July 17 through July 19, 1975, a U.S. delegation headed by Director Lynn A. Greenwalt, met with a counterpart Mexican delegation headed by Senor Mario Luis Casin Goharbi in Mexico City, Mexico. The purpose of this meeting was to discuss mutual interests and problems, and to develop an agreement for implementing future coordination and cooperative work and exchanges between the U.S. Fish and Wildlife Service and the Mexican Dirección General de la Fauna Silvestre. During that meeting, the Service's proposal to determine the Mexican Wolf to be an Endangered Species was discussed with the Mexican officials who requested the Service delay the determination to provide an opportunity for them to ascertain whether there were any additional data to submit. On September 5, 1975, Acting Director F. V. Schmidt forwarded a letter to Sr. Mario Luis Cossio, Director General, Dirección General de la Fauna Silvestre in which Mexico's comments or data were again requested.

SUMMARY OF COMMENTS AND RECOMMENDATIONS

Section 4(b)(1)(C) of the Act requires that a "... summary of all comments and recommendations received..." be published in the Federal Register prior to adding any species to or removing any species from the List of Endangered and Threatened Wildlife. Schaus Swallowtail and U.S. population of the Bahama Swallowtail butterflies: Approximately 13 comments were received. No response was received from Governor Askew. In the State of Florida offer any other comments upon the proposal.

A lengthy letter dated October 23, 1975, was received from Acting Deputy Director T. G. Darling of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service. Although that letter was received long after the comment period specified in the proposed rules (July 21, 1975) it was considered.

One point in that letter is significant, reflects a degree of misunderstanding concerning the criteria and process of determining whether a Threatened or Endangered, and is commented upon below.

In his penultimate paragraph, Mr. Darling calls the two subject species, "... it would appear that no scientific survey (biometrical survey) has been made for a population index. This appears to be a basic fact in determining endangerment..."

While the Service recognizes that statistically sound population data are a very desirable ingredient in the process of determining whether a species is Threatened or Endangered, it also recognizes that seldom is such data available, particularly for the less studied, frequently obscure forms that become candidates for such determinations. While a biometrically defensible documentation of a critically low or precarious population would, of itself, be considered sufficient reason to determine a species to be Threatened or Endangered, such refined data are not necessarily a prerequisite to such determinations. Section 4(a) of the Act sets forth the factors that must be considered. Section 4(b) requires that such determination be made "... on the basis of the best scientific and commercial information available to him...", specifies the consultation process that must be followed in assessing that information. Thus, the Service does not foreclose the "due process" provided for by the Act. That process, particularly the requirements for a 60-day period for comment by interested persons and a 60-day period for comment by the affected States in cases involving "resident" species, is intended to insure that such information as is available is solicited and considered and that any comments or relevant data are a full and ample opportunity to submit comments.

Thus, the Service concurs that a complete assessment of available data and information must be made prior to determining whether a species should be listed as a Threatened or Endangered Species. However, the Service cannot support the view that the protection provided for by the Act should be denied a species, which the information available indicates is Endangered or Threatened, while biometrical surveys are conducted to gather additional data.

Comments from twelve other persons (including three biologists and two conservation organizations), fully supported the proposal to determine both butterflies to be Threatened Species. Several of these comments emphasized the dangers of habitat destruction and urged that protective measures be taken.

Two persons, while not objecting to the proposed determination, questioned its efficacy and emphasized that, for example, "the only help (for these species of butterflies) would be protection of habitat." These persons also expressed...
concern that the proposal would prohibit amateur lepidopterists from collecting specimens of these butterflies.

One professional lepidopterist wrote a lengthy letter raising an array of issues and objections concerning the determination of Threatened or Endangered butterflies in particular and the statutory criteria for protecting wildlife in general. With respect to the Schaus Swallowtail and the Bahama Swallowtail, the letter questioned the rationale and offered some conflicting interpretations of the scientific evidence available. This letter, as did many of the others, emphasized the critical need to protect the habitats of these species, and expressed the prevailing view that mere collecting by limited numbers of amateurs was not a primary threat to the species. Copies of that letter were also received by the Service via the office of members of Congress. In a letter dated July 18, 1975, Acting Associate Director Harold J. O'Connor responded individually to this person and requested any scientific data or population estimates that have been received.

Gray Bat and Mexican Wolf: Approximately 23 comments were received. Of these, about 20 dealt with the Gray Bat, 2 with the Mexican Wolf and one with both. Of the States which responded, Alabama, Arkansas, Florida, Illinois, Indiana, Kentucky, Mississippi, Missouri, and Tennessee supported the proposal to determine the Gray Bat to be an Endangered Species. The proposal also was supported by comments from specialists at the Florida State Museum and the Memphis State University.

Comments received from the State of Georgia suggested the Gray Bat be classified "rare or unusual" rather than "Endangered" based upon the status of the bat in Georgia. The Georgia Department of Natural Resources letter defined those terms as: "species with small populations in the state which, though not presently Endangered or Threatened, are not previously defined, are potentially at risk".

The North Carolina Wildlife Resources Commission and the North Carolina Department of Natural and Economic Resources both stressed the apparent rarity of the species within that State and suggested the Gray Bat be temporarily classified "Undetermined or Peripheral" in North Carolina.

The Act does not provide for classification of "rare, unusual, undetermined or peripheral"; therefore these suggestions cannot be acted upon. Taken in the context as amplified by other comments, the comments of Georgia and North Carolina are construed as supportive of, or at least not in opposition to, the proposal to determine the Gray Bat to be an Endangered Species.

The South Carolina Wildlife and Marine Resources Department advised that "a survey of known records indicates that the Gray Bat has not been described from South Carolina" and that "status investigations are being conducted of the Gray Bat of South Carolina".

RULERS AND REGULATIONS

The Office of the Governor of the Commonwealth of Virginia advised, based upon the best information available, that "the Gray Bat is believed to be found in the Clinch Valley in Russell County, that the Commission (of Game and Fisheries) has evidence that this bat has ever been recorded elsewhere in our State." No opinion concerning the proposed determination of the Gray Bat as an Endangered Species was offered.

Governor Arch A. Moore, Jr., of West Virginia indicated that "For consulting our wildlife biologists, the Wildlife Services biologist of the U.S. Fish and Wildlife Service and mammalogists at West Virginia University and Marshall University, I can find no record of the Gray Bat in West Virginia. The possibility of its occurrence cannot be dismissed due to its presence in Kentucky."

The New Mexico Department of Game and Fish advised:

"According to our best information, the Mexican wolf is extremely rare and irregular in New Mexico at present. We doubt that an resident population exists in our state, although occasional individuals are found in the southwestern part of New Mexico. The last definite report that we know we isctually collected in December 1950, as did understand that only a few wolves remain, the number perhaps being less than 500. In view of the animal's rareness, as well as the adjacent United States, it would appear that this subspecies of wolf can be classified as Endangered. It must be recognized, however, that, if the wolf is added to the list, some mechanism must be developed to protect livestock from damage and to compensate owners for losses the might occur as the result of predation.

No response has been received from the Government of Mexico nor have any subsequent data or objections been received as discussed at the July 1975 meeting in Mexico City.

Conclusion. After a thorough review and consideration of all the information available, the Director has determined that the Mexican Wolf and the Gray Bat are in danger of extinction and that the U.S. population of the Bahama Swallowtail butterfly and the Schaus Swallowtail butterfly are likely to become Endangered Species within the foreseeable future throughout all or a significant portion of their range due to one or more of the factors described in section 4(a) of the Act. The review amplifies and substantiates the description of those factors included in the proposed rulemaking.

Endangered Species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all Endangered Species. All of those prohibitions and exceptions also apply to any Threatened Species unless a Special Rule pertaining to that Threatened Species has been published and indicates otherwise. The regulations referred to above, which pertain to Endangered Species, are found at §17.21 of Title 50 and, for the convenience of the reader, are reprinted below:

§17.21 Prohibitions. (a) Except as provided in Subpart A of this part, or under permits issued pursuant to §17.22 or §17.23, it is unlawful for any person to take or possess any Endangered Species.

In addition to the Environmental Defense Fund, comments were received from the states of Texas and New Mexico regarding the proposal to determine the Mexican Wolf to be an Endangered Species.

The Texas Parks and Wildlife Department indicated:

"* * * The Mexican wolf is considered to be an extremely scarce, peripheral animal based upon only three authentic records of its occurrence in the Trans-Pecos region. The first wolf determined to represent this species was taken in 1944, and the other two were recorded in 1970. Considering the isolated and infrequent occurrence of the Mexican wolf in Texas over a long period of time, I support the listing of this species as endangered."

The Office of the Governor of the Commonwealth of Virginia advised, based upon the best information available, that "the Gray Bat is believed to be found in the Clinch Valley in Russell County, that the Commission (of Game and Fisheries) has evidence that this bat has ever been recorded elsewhere in our State." No opinion concerning the proposed determination of the Gray Bat as an Endangered Species was offered.
2. Inadvertent injury to or destruction of deposited eggs, larvae or pupae incidental during, or for other routine maintenance operations in or around buildings shall not be considered to constitute "taking"; and

3. The killing or injuring of specimens by unintentionally striking them with automobiles or other conveyances shall not be considered to constitute a "taking" within the context of the Regulations.

These rules impose no restrictions upon the otherwise legal interstate sale of lawfully taken specimens. Nor do they impose any restrictions upon the interstate movement of lawfully taken specimens unless such interstate movement is in the course of a commercial activity involving a change of ownership of the specimen. In this context, the term "commercial activity" is defined in Section 3(1) of the Act as follows:

(1) The term "commercial activity" means all activities of industry or trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.

The terms "industry or trade," as used in the above definition, were defined in the September 26, 1975, Federal Register (40 FR 44419) as follows:

"Industry or trade" in the definition of "commercial activity" in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.

The determination set forth in these rules also makes all four species eligible for the consideration provided by Section 7 of the Act. That Section reads as follows:

"INTERAGENCY COOPERATION

Section 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, determine the extent to which other Federal programs and activities further the purposes of this Act by carrying out programs for the conservation of endangered and threatened species and their habitats. Such programs may be critical."
which would be suffered if such relief were not available. Therefore, the determination that these four species are Threatened or Endangered Species will require States proposing to enter into Cooperative Agreements pursuant to Section 6 of the Act to consider these species.

Several States have State laws which recognize the List of Threatened or Endangered Wildlife promulgated pursuant to the Act and provide State protection to these species. This determination will make these four species eligible for such consideration as those State laws provide.

Effect internationally. In addition to the protection provided by the Act, the Service will review these four species to determine whether they should be proposed to the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora for placement upon the appropriate Appendices. Each assessment is the basis for a decision that these determinations are not major Federal actions which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969.

Format. These final rules are published in a format different from that set forth in the proposed rulemaking. This new format was adopted by rules published in the Federal Register of September 26, 1975, (40 FR 44412) and represents no substantive change.

Effective date. Considering the long period during which the public has had notice of the proposal to determine these species to be Threatened or Endangered, and in view of the precarious status of the species, it has been determined that there is good cause to make this rule making effective shortly after publication.

The determinations set forth in the rules shall become effective May 4, 1976.

LYNN A. GREENWALT, Director, Fish and Wildlife Service.
April 15, 1976.

Accordingly of Part 17 of Chapter I, Title 50 of the U.S. Code of Federal Regulations is amended as follows:

1. §17.11 By adding the Gray Bat to the list of “Mammals,” following the entry for “Bactant; Bibo bonhotei” and the Mexican Wolf to the list of “Mammals” following the entry for “Wolf, Manec Chrysocyon brachyurus” and by adding the U.S. Population of the Bahamas Swallowtail Butterfly and the Schaust Swallowtail Butterfly listed under “Insects,” as indicated below:

§17.11 Endangered and Threatened Wildlife.

(ii) The inadvertent injury to or destruction of deposited eggs, larvae or pupae of these species incurred during lawful fishing, hunting or other routine government operations in or around buildings shall not be considered to constitute “taking” in the context of the Act.

(iii) The killing or injuring of specimens of these species by unintentionally striking them with automobiles or other conveyances shall not be considered to constitute a “taking” within the context of the Act.

[F] 17.47 Special rules; insects.

(a) U.S. population of the Bahamas Swallowtail butterfly (Papilio andreae monchombe) and the Schaust Swallowtail butterfly (Papilio aristodemus poncense).

(i) Prohibitions—All of the provisions set forth in Section 17.31 shall apply to both species with the following exceptions:

(ii) The inadvertent injury to or destruction of deposited eggs, larvae or pupae of these species incurred during lawful fishing, hunting or other routine government operations in or around buildings shall not be considered to constitute “taking” in the context of the Act.

(iii) The killing or injuring of specimens of these species by unintentionally striking them with automobiles or other conveyances shall not be considered to constitute a “taking” within the context of the Act.

[F] 3. Delete the notation “Reserved” from §17.47 and insert the following in lieu thereof:

§17.47 Special rules; insects.

(a) U.S. population of the Bahamas Swallowtail butterfly (Papilio andreae monchombe) and the Schaust Swallowtail butterfly (Papilio aristodemus poncense).

(i) Prohibitions—All of the provisions set forth in Section 17.31 shall apply to both species with the following exceptions:

(ii) The inadvertent injury to or destruction of deposited eggs, larvae or pupae of these species incurred during lawful fishing, hunting or other routine government operations in or around buildings shall not be considered to constitute “taking” in the context of the Act.

(iii) The killing or injuring of specimens of these species by unintentionally striking them with automobiles or other conveyances shall not be considered to constitute a “taking” within the context of the Act.

[F] 1. §17.11 By adding the Gray Bat to the list of “Mammals,” following the entry for “Bactant; Bibo bonhotei” and the Mexican Wolf to the list of “Mammals” following the entry for “Wolf, Manec Chrysocyon brachyurus” and by adding the U.S. Population of the Bahamas Swallowtail Butterfly and the Schaust Swallowtail Butterfly listed under “Insects,” as indicated below:

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(ii) The inadvertent injury to or destruction of deposited eggs, larvae or pupae of these species incurred during lawful fishing, hunting or other routine government operations in or around buildings shall not be considered to constitute “taking” in the context of the Act.

(iii) The killing or injuring of specimens of these species by unintentionally striking them with automobiles or other conveyances shall not be considered to constitute a “taking” within the context of the Act.