

flesh or push the child's body into an unnatural position.

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Issued on September 26, 2002.

Annette M. Sandberg,

Deputy Administrator.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AF30

Endangered and Threatened Wildlife and Plants; Amended Special Regulations for the Preble's Meadow Jumping Mouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: On May 22, 2001, the U.S. Fish and Wildlife Service adopted special regulations governing take of the threatened Preble's meadow jumping mouse (*Zapus hudsonius preblei*), which provide exemption from take provisions under section 9 of the Endangered Species Act for certain activities related to rodent control, ongoing agricultural activities, landscape maintenance, and perfected water rights. On August 30, 2001, the Service published a proposal to amend those regulations to provide additional exemptions. This action amends the regulations to exempt certain noxious weed control and ditch maintenance activities from the section 9 take prohibitions.

DATES: This amendment will be effective from October 1, 2002 through May 22, 2004.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service's Colorado Field Office, Ecological Services, Suite 361, Lakewood, Colorado 80215.

FOR FURTHER INFORMATION CONTACT: In Colorado, contact LeRoy W. Carlson at the above address or telephone (303) 275-2370. In Wyoming, contact Mike Long, Field Supervisor, Cheyenne, Wyoming, at telephone (307) 772-2374.

SUPPLEMENTARY INFORMATION:

Background

The final rule listing the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) as a

threatened species under the Endangered Species Act (Act) of 1973, as amended, (16 U.S.C. 1531 *et seq.*) was published in the **Federal Register** on May 13, 1998 (63 FR 26517). Section 9 of the Act prohibits take of endangered wildlife. The Act defines take to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. However, the Act also provides for the authorization of take and exceptions to the take prohibitions. Take of listed species by non-Federal property owners can be permitted through the process set forth in section 10 of the Act. For federally funded or permitted activities, take of listed species may be allowed through the consultation process of section 7 of the Act. We, the Fish and Wildlife Service, have issued regulations (50 CFR 17.31) that generally apply to threatened wildlife the prohibitions that section 9 of the Act establishes with respect to endangered wildlife. Our regulations for threatened wildlife also provide that a "special rule" under section 4(d) of the Act can be tailored for a particular threatened species. In that case, the general regulations for some section 9 prohibitions do not apply to that species, and the special rule contains the prohibitions, and exemptions, necessary and advisable to conserve that species.

On December 3, 1998, we proposed a section 4(d) rule (63 FR 66777) to define conditions under which certain activities that could result in incidental take of Preble's would be exempt from the section 9 take prohibitions. We held two public meetings, attended by 129 people. We also received 614 comment letters. On May 22, 2001, we published a final rule (66 FR 28125) adopting certain portions of this proposal. Some comments received on the proposed rule suggested additional exemptions to promote conservation of the Preble's. On August 30, 2001, we published a proposed rule (66 FR 45829) to amend the section 4(d) rule to add special provisions providing exemptions from section 9 prohibitions for certain noxious weed control and ditch maintenance activities. We are now adopting the amendment providing these additional exemptions.

Summary of Comments and Recommendations

In the August 30, 2001, proposed amendment and associated notifications, we asked all interested parties to submit comments on the proposed amendment. We received nine comment letters in response to the proposed amendment to the 4(d) rule.

The State of Wyoming sent comments from two of their State agencies under one cover letter. One Colorado and one Wyoming county submitted comments, as did a Colorado municipality. Two letters came from water and irrigation-related organizations or companies, one letter came from a real estate interest in the development community, and two letters came from ranching/agriculture-related groups.

Most of the comment letters acknowledged the need for the proposed exemptions. Many stated that the exemptions are necessary to allow citizens and companies to comply with State laws in both Colorado and Wyoming, and to improve landowner and ditch owner cooperation in conservation of the mouse and its habitat. The comments also generally recognized that the exemptions are necessary for the long-term maintenance of the ditches and the adjacent mouse habitat that is dependent upon those ditches.

Several of the comment letters expressed general concerns or questions about the validity of the Preble's listing and its scientific foundation, questions about uncertainty in distinguishing Preble's from similar species and the need for genetic testing, and requests that the listing be withdrawn or that the Service delist the Preble's. These issues are not germane to the proposed amendment and, therefore, are not discussed here.

Written comments received during the comment period that are specific to the proposed amendment are addressed in the following summary. Comments of a similar nature are grouped under a number of general issues.

Issues and Discussion

Issue 1—Two letters expressed confusion regarding the timeframe that the proposed amendment would be in place, believing that it extended or continued beyond the 36-month timeframe of the existing 4(d) rule.

Response—The amendment should run concurrently with the existing 4(d) rule that became effective on May 22, 2001 (66 FR 45829). Therefore, this rule should expire on May 22, 2004, at the same time as the existing 4(d) rule.

Issue 2—One commentor felt that the definition of noxious weeds is unclear and seems to apply only to plants designated on the State lists of noxious weeds as defined by Colorado and Wyoming. This letter suggests that the term "noxious" should be replaced with the term "undesirable" wherever it occurs in the rule.

Response—State statutes in both Colorado and Wyoming require noxious

weeds to be controlled. The term "noxious" is legally defined in statutory requirements to mean plant species that are nonindigenous and have negative impacts on crops, livestock, native plant communities, or the management of natural or agricultural systems. The term "undesirable" is not a legally defined term relating to these statutory requirements and is not consistent with our purpose to limit the exemption to control actions for "noxious" weeds as defined by the States of Colorado and Wyoming. This amendment exempting noxious weed control should alleviate possible conflicts due to the Preble's listing with statutory requirements regarding weed control activities in the States of Colorado and Wyoming and is consistent with the conservation of the Preble's.

Issue 3—The requirement for noxious weed control to be done pursuant to a weed management plan implemented in "consultation with the weed control officer designated by the applicable county or municipal government" will be administratively burdensome. The commentor suggests that "consultation" with local governments use a "programmatic approach."

Response—We discovered that our proposed rule language regarding noxious weed control did not properly consider regulations within the State of Wyoming. The Colorado Noxious Weed Act requires county and municipal governments to develop a recommended integrated management plan for noxious weed control and also requires that individual landowners either implement the county or local government plan or develop their own integrated management plans for their property. The Wyoming Weed and Pest Control Act requires weed management plans to be completed by the individual weed and pest districts and requires individual landowners to control noxious weeds identified by the State list and the local jurisdiction.

To more accurately reflect these State's regulations, we have changed the language of § 17.40 (l)(2)(vi) to read as follows:

(vi) *Noxious weed control.* Preble's meadow jumping mice may be taken incidental to noxious weed control that is conducted in accordance with:

(A) Federal Law, including Environmental Protection Agency label restrictions;

(B) Applicable State laws for noxious weed control;

(C) Applicable county bulletins;

(D) Herbicide application guidelines as prescribed by herbicide manufacturers; and

(E) Any future revisions to the authorities listed in paragraphs (1)(2)(vi)(A)–(D) of this section that apply to the herbicides proposed for use within the species' range.

The language in the proposed rule requiring a weed management plan and consultation with the weed control officer has been deleted. We intend to exempt those noxious weed control activities that are conducted in accordance with State law. We are willing to work with county and local municipality weed management personnel or other weed management professionals familiar with local areas to develop a suitable programmatic approach with reasonable and easy-to-follow guidelines.

In the event of future revisions to EPA label restrictions and herbicide application guidelines, users shall follow these revisions to assure protection of the Preble's meadow jumping mouse.

Issue 4—One commentor suggested that the standards for "best available methods of integrated management" be prescribed in the local weed management plan, and the required contents of such a plan should be understood and agreed to by the local governments prior to including this provision in the final rule.

Response—As addressed in the Response to Issue 3, the proposed language in section (vi) (B) referring to "best available methods of integrated management" language has been deleted from the rule. With this rule language, local governments and municipalities retain control over noxious weed management. We should exempt those noxious weed control activities that are conducted in accordance with State law.

The Colorado Noxious Weed Act requires that Integrated Pest Management techniques be used to the extent that they are the least environmentally damaging, practical, and economically reasonable means of control. Integrated Pest Management is defined as the planning and implementation of a coordinated management program using a variety of mechanical, biological, and chemical methods to control noxious weeds. Article 3 of the Wyoming Weed and Pest Control Act calls for a "Special Management Program," which strongly emphasizes the use of integrated management and provides for financial incentives when individuals sign up under this program. In addition, the Wyoming Department of Agriculture, Wyoming Weed and Pest Council, and the University of Wyoming conduct two training sessions annually that emphasize integrated weed management techniques and the latest information in environmentally friendly methods of control.

Issue 5—Comments included concerns regarding the amount of area

in which noxious weeds can be controlled and what limitations the Service deems "appropriate." One commentor suggested that no limitations should be considered because that would contradict State laws and Federal policy and that incomplete control would not be effective.

Response—The rule includes no limitations concerning the "amount of area" in which noxious weeds can be controlled. The only area limitations in the rule relate to ditch maintenance activities. The language in the amendment exempts noxious weed control activities that are conducted pursuant to State law and in accordance with EPA herbicide labeling. We encourage efforts to reduce the adverse effects of weed control on native plant communities and limit unnecessary eradication of entire plant communities and suggest that methods to reduce impacts to nontarget species should be employed whenever possible, such as the use of selective herbicides that target broad-leaved plants and do not damage native grasses.

Issue 6—One comment letter requested unrestricted ditch maintenance be allowed when the ditch is located outside "naturally occurring potential Preble's habitat," which the commentor defined as "the 100-year flood plains associated with rivers and creeks, between 7,600 feet and 4,500 feet in elevation."

Response—This amendment provides certain exemptions from take as defined by the Act. If a ditch does not have habitat and/or mice, then no exemption is needed.

Trapping data show that many ditches have suitable habitat for Preble's and, in several areas, that Preble's exist on ditches that occur outside the 100-year floodplain. We intend to limit exemption of ditch maintenance to those activities that have minimal take of Preble's and are consistent with the protection and enhancement of Preble's habitat. As stated in the May 22, 2001, 4(d) rule, we believe it is imprudent to provide unrestricted exemption from take along ditches because in some areas: (a) Many ditches are suspected or known to be occupied by Preble's; (b) the stability of the local Preble's population is uncertain; (c) the degree of importance of ditch habitat to Preble's populations is not completely known; and, (d) some occupied ditches may serve as important population refugia and travel corridors connecting populations.

Under appropriate circumstances, permits can be obtained to carry out ditch maintenance activities even when

more than minimal take is likely to occur. These activities may be addressed through future Habitat Conservation Plans or section 7 consultations.

Issue 7—One comment letter suggested that exemption will not be sufficient and ditches will be unable to convey water. This letter requested that the exemption be changed to an “entire range-wide exemption.”

Response—As discussed above, we do not believe it would be prudent to grant a range-wide or unrestricted exemption for ditch maintenance activities. It is our intent to limit exemption of ditch maintenance to those activities that have minimal take of Preble's and are consistent with the protection and enhancement of Preble's habitat.

Issue 8—How does the exemption apply to ditch maintenance activities that are subject to other Federal approvals?

Response—This exemption does not affect other Federal approvals required for ditch maintenance. Under section 7 of the Act, a Federal agency that undertakes, permits, or funds activities that are likely to adversely affect a listed species, whether or not take is involved, shall formally consult with the Service regarding the proposed action. Exemption from take prohibitions in section 9 of the Act does not alter responsibility of Federal agencies under section 7. This said, the number of section 7 consultations is expected to be low based on past numbers and, because of exempted actions, the amended rule should further expedite the section 7 process because subsequent consultations will consist of verifying whether the effects of the proposed action are consistent with the effects analysis conducted in establishing this regulation and documenting the determination. For actions that are consistent with this regulation, consultation will be streamlined by linking to the biological opinion prepared in conjunction with this rulemaking. For any actions not consistent with this regulation, preparation of a separate biological opinion will be necessary.

Issue 9—Does the exemption apply to both sides of the ditch or just one?

Response—The exemption applies to both sides of the ditch. Ditch maintenance activities under the exemption should allow for the loss of $\frac{1}{4}$ -mile of riparian shrub habitat on both banks of a ditch within any 1 linear mile of ditch within any calendar year.

However, if only one bank of a ditch is to be maintained, the $\frac{1}{4}$ -mile loss limit still applies.

Issue 10—The final rule should consider both physical and legal access under the requirement to “avoid shrubs if possible.”

Response—The amendment states that impacts to shrub vegetation shall be avoided “to the maximum extent practicable.” The intention of this statement is to refer to both physically practicable and legally practicable, *i.e.*, through legal access to the ditch.

Issue 11—The $\frac{1}{4}$ -mile limitation on ditch maintenance activities will result in changes to normal procedures and increased maintenance costs. Additionally, one letter expressed concern that the two additional exemptions would not benefit landowners and the economy. The commentator argued that any benefits to the landowner or economy would only be because the owners would not have to consult on every ditch-cleaning project. This commentator also stated that limits on maintenance activities of $\frac{1}{4}$ -mile per mile of ditch are inconvenient for owners because it would take 4 years to be able to clear the entire ditch.

Response—This rule does not place any additional restrictions on land use activities and does not place any additional prohibitions on take of Preble's. Rather, this rule removes some take prohibitions that might otherwise restrict certain activities. Currently, on ditches that are occupied by Preble's, take is prohibited by section 9 of the Act without the appropriate permits. This take prohibition is removed by this amendment within the limitations given in the amendment. Therefore, this exemption is expected to decrease any current financial burden caused by the existing prohibitions. Normal ditch maintenance activities should be allowed without the time, money, and effort required to obtain incidental take permits, while still allowing for the conservation of the species. Under certain circumstances when more than minimal take is likely to occur, permits can be obtained through Habitat Conservation Plans or section 7 consultations to carry out additional maintenance activities not covered by the rule or amendments.

Issue 12—The November to April timeframe for ditch maintenance activities is difficult in Wyoming where it may snow from September through May.

Response—This seasonal limitation for ditch maintenance activities is designed to occur while the mouse is in hibernation, in order to reduce adverse impacts and be consistent with the conservation of the Preble's. However, as stated in the amended rule in “Timing of Work”, under “Best

Management Practices”, this restriction is to be observed to the “maximum extent practicable.” Otherwise, if this restriction is impracticable, exempted maintenance activities shall be conducted during daylight hours and only carried out during the Preble's active season, May through October.

Issue 13—The proposed rule has too many “subjective” standards and does not provide “adequate notice” or understandable definitions regarding which activities are covered and which are not (*e.g.*, “normal and customary,” “maximum extent practicable,” “functionally intact and viable”).

Response—The goal of this amendment is to allow agriculture and water use to continue while being consistent with conservation of the species. We did not want to define the exemptions too narrowly because there is a wide variation of how these activities might be applied on the ground. The Service recognizes the need to maintain some amount of flexibility in interpretation.

Issue 14—One comment letter stated that the scale of agricultural operations in Wyoming makes the rule “unworkable.” The commentator believes that these exemptions may be reasonable for smaller, more intensively managed plots in Colorado, but will only result in “frustrations and resentment” in Wyoming. The commentator states that we are placing an unfair and disproportionate burden on agriculture in Wyoming when the real threats lie within the Front Range of Colorado.

Response—This rule does not place any additional restrictions on land use or any additional prohibitions on take. Current prohibitions on take through section 9 of the Act require a Federal permit for activities that are deemed to adversely affect the Preble's to the point where take may occur. Our goal in exempting noxious weed control and ditch maintenance activities through this amendment is to remove some of these take prohibitions and provide relief from current regulatory restrictions on agricultural entities and water users, regardless of location.

Issue 15—Some respondents believed that any exemption should include maintenance of (1) water supply wells and water measurement devices, (2) dams and other infrastructure, and (3) associated roads.

Response—In regard to (1) above, an exemption applying to activities covered in § 17.40 (1)(2)(v) of the final rule relates to existing uses of water associated with the exercise of perfected water rights, so maintenance of water supply wells and water measurement

devices is covered. In regard to (2), this exemption covers only maintenance and replacement of dams or infrastructure directly related to, and used in, the operation of ditches. Any person contemplating dam or infrastructure work not covered by either of these two exemptions should consult with us when the maintenance procedure has the potential to take Preble's. Finally, pertaining to (3), this amendment includes a limited exemption for maintenance of roads used to access existing ditches and related infrastructure provided that these activities do not exceed the maximum allowable loss of riparian shrub habitat in any calendar year.

Provisions of the Rule Amendment

Term

The special regulations contained in this amendment are applicable until May 22, 2004, which is the end of the effective period for the May 22, 2001, final 4(d) rule. We expect that, by that date, comprehensive Habitat Conservation Plans for the Preble's should be developed, and a recovery plan and other conservation efforts for the Preble's should be completed.

Additional Exemptions

The activities discussed below, which may result in incidental take of Preble's, are exempted from the section 9 take prohibitions. "Incidental take" refers to a taking that is otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Take not exempted by this amendment and not otherwise authorized under the Act may be referred to the appropriate authorities for civil enforcement or criminal prosecution.

a. *Noxious weed control activities*—Comments on the proposed 4(d) rule of December 3, 1998, included a request to consider a rangewide exemption for control of noxious weeds. The comments stressed that laws in both Colorado and Wyoming require control of noxious weeds and that such control is compatible with Preble's conservation. We are amending the final 4(d) rule by including a rangewide exemption for noxious weed control to conform to existing State laws and Federal regulations regarding herbicide labeling. We believe that this exemption should facilitate conservation of the Preble's, because noxious weeds are displacing desirable natural vegetation on which the Preble's depends for survival.

b. *Ongoing ditch maintenance activities*—In the December 3, 1998,

proposed 4(d) rule, we stated that we considered adopting an unrestricted exemption for periodic maintenance of existing water supply ditches, but chose not to do so because ditches support occupied and potential Preble's habitat. We received a large number of comments on this decision, many supporting an unrestricted exemption and arguing that current maintenance practices have resulted in viable habitat for the Preble's.

In response to these comments, we have elected to adopt a limited exemption for customary ditch maintenance activities that are designed to result in only minimal take of Preble's and are consistent with the protection and enhancement of Preble's habitat. This exemption builds upon the guidance provided in a January 31, 2001, "To Whom It May Concern Letter" (Letter), which we originally issued on March 11, 1999, and reissued on February 1, 2000, and January 31, 2001, and which was our initial response to these comments. While the Letter specifically describes activities throughout the range of the Preble's that we believe would not constitute take under section 9 of the Act, this amendment to the 4(d) rule specifies certain activities that may result in take and grants exemption from such take.

Our intent is to allow normal and customary maintenance activities that should result only in temporary or limited disturbance of Preble's habitat, and that should result in only minimal take of Preble's. We intend for this exemption to apply only to manmade ditches and not to alteration of habitat along naturally occurring streams and watercourses.

We believe that a limited exemption is necessary and advisable, not only to provide relief to those who shall maintain active ditches, but to assure that currently existing Preble's habitat along ditches remains functionally intact and viable. Should limited ditch maintenance not be allowed to continue, we face the possibility that these ditches would no longer be capable of conveying water and any habitat dependent on this water would degrade over time and eventually be lost. Maintenance of these ditches, as defined by this amended rule, is necessary and advisable to maintain future conservation options for the Preble's.

Therefore, we are exempting from the section 9 take prohibitions, limited maintenance activities on water conveyance ditches throughout the range of the Preble's. We believe that providing unrestricted exemption from take for all ditch maintenance activities

would be imprudent because—(a) Some areas contain many ditches known or thought to be occupied by Preble's, (b) the stability of many local Preble's populations is uncertain, (c) the importance of ditch habitat to Preble's populations in many areas is not completely known, and (d) some occupied ditches may serve as important population refugia and travel corridors connecting populations.

The following ditch maintenance activities are exempted from the take prohibitions of section 9 of the Act, if the Best Management Practices described below are followed:

1. Normal and customary ditch maintenance activities that result in the annual loss of no more than ¼-mile of riparian shrub habitat within any 1 linear mile of ditch within any calendar year. Riparian shrub habitat is defined as vegetation dominated by plants that generally have more than one woody stem that measures less than 2 inches in diameter and are typically less than 10 feet in height at maturity, put on new growth each season, and have a bushy appearance. Examples of shrubs include, but are not limited to, willow, snowberry, wild plum, and alder.

2. Included in No. 1 above is the burning of ditches that results in the annual loss of no more than ¼-mile of riparian shrub habitat within any 1 linear mile of ditch within any calendar year and is conducted out-of-season (see "Best Management Practices").

The following Best Management Practices shall be implemented in order for the exemptions to apply:

1. Persons engaged in ditch maintenance activities shall, to the maximum extent practicable, avoid impacts to shrub vegetation. For example, if it is possible to access the ditch for maintenance or repair activities from an area containing no shrubs, then damage to adjacent shrub vegetation shall be avoided.

2. Persons engaged in placing or sidecasting (a) silt and debris removed during ditch cleaning, (b) vegetation or mulch from mowing/cutting, or (c) other material from ditch maintenance shall, to the maximum extent practicable, avoid shrub habitat, and at no time disturb more than ¼-mile of riparian shrub habitat within any 1 linear mile of ditch within any calendar year.

3. To the maximum extent practicable, all ditch maintenance should be carried out during the Preble's hibernation season, November through April. Any maintenance activities carried out during the Preble's active season, May through October, should be conducted during daylight hours only.

This exemption includes maintenance of roads used to access ditches and related infrastructure. These maintenance activities are limited to the historic footprint associated with the infrastructure and access roads. Examples of activities that are covered by the exemption include the following activities, each limited to the destruction of 1/4-mile of riparian shrub habitat within 1 linear mile of ditch within any calendar year:

1. *Clearing trash, debris, vegetation, and silt by either physical, mechanical, chemical, or burning procedures*—Examples include mowing or cutting grasses and weeds, removal of silt and debris from the ditch below the high-water line, and control of shrubs that could result in ditch leakage.

2. *Reconstruction, reinforcement, repair, or replacement of existing infrastructure with components of substantially similar materials and design*—Examples include replacement of a damaged headgate, grading or filling areas susceptible to ditch failure, patchwork on a concrete ditch liner, or replacement of failed culvert with a new culvert of the same design and material.

The following maintenance activities are not exempted from the take provisions of section 9 of the Act:

1. *Replacement of existing infrastructure with components of substantially different materials and design*—such as replacing an existing gravel access road with a permanently paved road.

2. *Construction of new infrastructure or the movement of existing infrastructure to new locations*—Examples include redrilling a well in a new location, building a new access road, change in the location of a diversion structure or installation of new diversion works where none previously existed.

We proposed the two additional exemptions contained in this rule in the August 30, 2001, proposed amendment in response to comments received during the public review of the December 3, 1998, 4(d) rule proposal. Water rights owners argued that the lack of an exemption for periodic maintenance of existing ditches conflicted with the exemption for existing uses of perfected water rights, because ditch maintenance is an intrinsic part of exercising a perfected water right. In addition, respondents noted that ditch maintenance is required by State law in both Wyoming and Colorado. Failure to adequately maintain water conveyance structures can result in fines, penalties, and liability for damage to property caused by ditch failures. Finally, respondents

noted that prohibition of ditch maintenance could subsequently result in curtailment or cessation of water diversions. This situation in turn could result in forfeiture or abandonment of water rights under State law.

By exempting limited periodic maintenance activities on existing water supply ditches, this amendment facilitates consistency among the rangewide exemptions. Where appropriate, permits can be issued under section 10 of the Act to allow incidental take of Preble's for activities not exempted through this rule.

Several respondents requested rangewide exemptions for maintenance of other types of water-related infrastructure. The suggested exemptions included: maintenance of (1) sewer lines; (2) wastewater treatment and conveyance facilities; and (3) storm water collection, conveyance, and treatment facilities.

We elected not to exempt these types of water-related infrastructure. These systems typically incorporate extensive pipeline systems that either cross Preble's habitat, or are installed along stream corridors that provide Preble's habitat. Activities to maintain this infrastructure can create large areas of surface disturbance within or near Preble's habitat that could temporarily or permanently prevent occupation of habitat or migration from one Preble's habitat area to an adjacent Preble's habitat area.

Owners and operators of stormwater and wastewater systems should contact us when their maintenance activities have the potential to result in take of Preble's. We will work with wastewater and stormwater system owners and operators to develop maintenance procedures that minimize and mitigate take of Preble's when maintenance activities occur within Preble's habitat.

Required Determinations

We prepared a Record of Compliance for the May 22, 2001, final rule that exempted from the take prohibitions listed in section 9 of the Act, the four activities of rodent control, ongoing agricultural activities, landscaping, and ongoing use of existing water rights. A Record of Compliance certifies that a rulemaking action complies with the various statutory, Executive Order, and Department Manual requirements applicable to rulemaking. Amendment of the May 22, 2001, rule to include the two additional exemptions adopted herein, noxious weed control and ongoing ditch maintenance, does not add any significant elements to this Record of Compliance.

Without this amendment, noxious weed control or ongoing ditch maintenance activities that may result in take of Preble's would not be exempted from the take prohibitions. This rule allows certain affected landowners to engage in certain noxious weed control and ditch maintenance activities that may result in take of Preble's. Without this rule, anyone engaging in those activities would need to seek an authorization from us through an incidental take permit under section 10(a)(1)(b) or an incidental take statement under section 7(a)(2) of the Act. This process takes time and can involve an economic cost. The rule allows these landowners to avoid the costs associated with abstaining from conducting these activities or with seeking an incidental take permit from us. These economic benefits, while important, do not rise to the level of "significant" under the following required determinations.

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, the Office of Management and Budget has determined that this rule is not a significant regulatory action. This rule does not have an annual economic impact of more than \$100 million, or significantly affect any economic sector, productivity, jobs, the environment, or other units of government. This rule reduces the regulatory burden of the listing of the Preble's meadow jumping mouse under the Act as a threatened species by providing certain exemptions to the section 9 take prohibitions that currently apply throughout the Preble's range. These exemptions reduce the economic costs of the listing; therefore, the economic effect of the rule benefits landowners and the economy. This effect does not rise to the level of "significant" under Executive Order 12866.

This rule should not create inconsistencies with other Federal agencies' actions. Other Federal agencies are mostly unaffected by this rule.

This rule should not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Because this rule allows landowners to continue otherwise prohibited activities without first obtaining individual authorization, the rule's impacts on affected landowners is positive.

This rule should not raise novel legal or policy issues. We have previously promulgated section 4(d) rules for other species, including the special rule for the Preble's pertaining to rodent control,

ongoing agricultural activities, landscaping, and activities associated with water rights. This rule simply adds exempted activities to that rule.

Regulatory Flexibility Act

We have determined that this rule does not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial regulatory flexibility analysis is not required, and a Small Entity Compliance Guide is not required. This rule reduces the regulatory burden of the listing of the Preble's as a threatened species. Without the final special rule and this amendment, all of the take prohibitions listed in section 9 of the Act would apply throughout the range of the Preble's. This amended rule allows certain affected landowners to engage in noxious weed control and ditch maintenance activities that may result in take of Preble's. This rule enables these landowners to avoid the costs associated with abstaining from conducting these activities to avoid take of Preble's or seeking incidental take permits from us.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of \$100 million or more; does not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. As described above, this rule reduces regulatory burdens on affected entities, who are mostly agricultural producers.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. By

reducing the regulatory burden placed on affected landowners resulting from the listing of the Preble's as a threatened species, this rule reduces the likelihood of potential takings. Affected landowners have more freedom to pursue activities, *i.e.*, noxious weed control and ditch maintenance, that may result in take of Preble's without first obtaining individual authorization.

Federalism

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. Currently, the State of Colorado, the Service, and various local governmental entities in Colorado and Wyoming are working together to develop plans to conserve the Preble's and its habitat. This collaborative approach is expected to result in the development of Habitat Conservation Plans that should provide the foundation upon which to build a lasting, effective, and efficient conservation program for the Preble's. Because we anticipate beneficial impacts of such collaborative conservation efforts, this rule is applicable only until the end of the 36-month timeframe of the May 22, 2001, special rule.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

Paperwork Reduction Act

We have examined this amended rule under the Paperwork Reduction Act of 1995 and found it to contain no requests for information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

The National Environmental Policy Act analysis has been conducted. An Environmental Assessment was prepared for the final special rule. The additional exemptions covered in this amended rule were included in this analysis.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951) and E.O. 13175, we have evaluated possible

effects on federally recognized Indian Tribes. We have determined that, because no Indian trust resources occur within the range of the Preble's, this rule has no effects on federally recognized Indian Tribes.

Executive Order 13211

We have evaluated this amended rule in accordance with E.O. 13211 and have determined that this rule has no effects on energy supply, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, the Service amends 50 CFR part 17, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.40 by adding paragraphs (l)(2)(vi) and (vii) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(1) * * *

(2) * * *

(vi) *Noxious weed control.* Preble's meadow jumping mice may be taken incidental to noxious weed control that is conducted in accordance with:

(A) Federal law, including Environmental Protection Agency label restrictions;

(B) Applicable State laws for noxious weed control;

(C) Applicable county bulletins;

(D) Herbicide application guidelines as prescribed by herbicide manufacturers; and

(E) Any future revisions to the authorities listed in paragraphs (1)(2)(vi)(A) through (D) of this section that apply to the herbicides proposed for use within the species' range.

(vii) *Ditch maintenance activities.* Preble's meadow jumping mice may be taken incidental to normal and customary ditch maintenance activities only if the activities:

(A) Result in the annual loss of no more than ¼ mile of riparian shrub habitat per linear mile of ditch, including burning of ditches that results in the annual loss of no more than ¼

mile of riparian shrub habitat per linear mile of ditch.

(B) Are performed within the historic footprint of the surface disturbance associated with ditches and related infrastructure, and

(C) Follow the Best Management Practices described in paragraphs (1)(2)(vii)(C)(1) through (3) of this section.

(1) Persons engaged in ditch maintenance activities shall avoid, to the maximum extent practicable, impacts to shrub vegetation. For example, if accessing the ditch for maintenance or repair activities from an area containing no shrubs is possible, then damage to adjacent shrub vegetation shall be avoided.

(2) Persons engaged in placement or sidcasting of silt and debris removed during ditch cleaning, vegetation or mulch from mowing or cutting, and other material from ditch maintenance shall, to the maximum extent practicable, avoid shrub habitat and at no time disturb more than ¼-mile of riparian shrub habitat per linear mile of ditch within any calendar year.

(3) To the maximum extent practicable, all ditch maintenance activities should be carried out during the Preble's hibernation season, November through April.

(D) All ditch maintenance activities carried out during the Preble's active season, May through October, should be conducted during daylight hours only.

(E) Ditch maintenance activities that would result in permanent or long-term loss of potential habitat that would not be considered normal or customary include replacement of existing infrastructure with components of substantially different materials and design, such as replacement of open ditches with pipeline or concrete-lined ditches, replacement of an existing gravel access road with a permanently paved road, or replacement of an earthen diversion structure with a rip-rap and concrete structure, and construction of new infrastructure or the movement of existing infrastructure to new locations, such as realignment of a ditch, building a new access road, or installation of new diversion works where none previously existed.

* * * * *

Dated: June 21, 2002.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02-24633 Filed 9-30-02; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 020612146-2211-02 ; I.D. 042602F]

RIN 0648-AP90

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Quota Specifications and General Category Effort Controls

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

ACTION: Final initial 2002 quota specifications and General category effort controls.

SUMMARY: NMFS announces the final initial specifications for the Atlantic bluefin tuna (BFT) fishery to set BFT quotas and General category effort controls for the fishing year beginning June 1, 2002. The final initial quota specifications and effort controls are necessary to implement the 1998 recommendation of the International Commission for the Conservation of Atlantic Tunas (ICCAT), which established a rebuilding program for Western Atlantic BFT and is required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: The final initial quota specifications and General category effort controls are effective October 1, 2002, through May 31, 2003.

ADDRESSES: Copies of supporting documents, including the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP), are available from the Highly Migratory Species Management Division, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Brad McHale at (978) 281-9260.

SUPPLEMENTARY INFORMATION: Atlantic tunas are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to implement binding recommendations of ICCAT. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background

On May 28, 1999, NMFS published in the **Federal Register** (64 FR 29090) final regulations, effective July 1, 1999, implementing the HMS FMP that was adopted and made available to the public in April 1999. The HMS FMP and its implementing regulations require that NMFS issue quota specifications and effort controls for the BFT fisheries on an annual basis in accordance with internationally set quotas and domestic allocations. Further background information and rationale for these final initial quota specifications and General category effort controls were contained in the proposed initial quota specifications and effort controls (67 FR 43266, June 27, 2002) and are not repeated here.

The final initial quota specifications are necessary to implement the 1998 ICCAT recommendation, which established a rebuilding program for Western Atlantic BFT and is required by ATCA, and to achieve domestic management objectives under the Magnuson-Stevens Act. In accordance with the HMS FMP, the final initial quota specifications allocate the total ICCAT-recommended quota, including carryover of unharvested 2001 fishing year quota, among the established domestic fishing categories and are consistent with the BFT rebuilding program.

NMFS issues the 2002 fishing year (June 1, 2002—May 31, 2003) BFT final initial quota specifications under the annual and inseason adjustment procedures of the HMS FMP. Also, in accordance with the HMS FMP, NMFS announces the General category effort control schedule, including time-period subquotas and restricted fishing days (RFDs), for the 2002 fishing year. The final initial quota specifications may subsequently be adjusted during the course of the fishing year, consistent with the provisions of the HMS FMP. Notice of any such adjustments will be published in the **Federal Register**.

Changes From the Proposed Specifications

Based upon consideration of public comments received during the comment period, NMFS is revising the number of RFDs proposed for the 2002 fishing year. The revised schedule is indicated in the section addressing effort controls. Specifically, NMFS is not implementing the RFDs proposed for August, September, or early October, and is implementing RFDs for portions of October, and November. The intent of these revisions is to help spread out fishing effort, slow the pace of landings