

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**Endangered and Threatened Wildlife and Plants; Reclassification of the Arctic Peregrine Falcon and Clarification of Its Status in Washington and Elsewhere in the Conterminous United States**

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

**ACTION:** Final rule.

**SUMMARY:** Three separate rules are promulgated: (1) The Service reclassifies the Arctic peregrine falcon (*Falco peregrinus tundrius*) from endangered to threatened status (there is no significant change in protection of this subspecies under the Endangered Species Act); (2) the range and status of the peregrine falcons in western Washington are clarified [for the purposes of the Act those falcons nesting in Washington are classified as the endangered American peregrine falcon (*Falco peregrinus anatum*)]; (3) any free-flying peregrine falcon found within the conterminous 48 States will be protected from illegal take under the Similarity of Appearance provisions of the Act. These actions are taken following the statutorily mandated 5-year review of this species. No net change in protections afforded this species will occur.

**DATE:** These rules become effective April 19, 1984.

**ADDRESSES:** The complete file for these rules is available for inspection by appointment during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia (703/235-1975).

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

**SUPPLEMENTARY INFORMATION:**

**Background**

The Service is required to conduct a status review of each species listed at 50 CFR 17.11 and 17.12 at least once every 5 years. This requirement stems from the amendments to Section 4 of the Endangered Species Act of 1973 signed into law on November 10, 1978. The rules at 50 CFR 424.20 implement this requirement of the amended Act. Subsequently, the Service published a notice of review for all species listed prior to 1975 in the *Federal Register* of

May 21, 1979 (44 FR 29566-29577), that included the two listed subspecies of North American peregrine falcons—American and Arctic. This rule is based upon data accumulated in the Service's Office of Endangered Species through December 1983.

The American peregrine falcon (*Falco peregrinus anatum*) and the Arctic peregrine falcon (*F. p. tundrius*) were added to the U.S. Department of the Interior's list of foreign endangered species on June 2, 1970 (35 FR 8495) and to the native list on October 13, 1970 (35 FR 16047). The basis for adding two of the three North American subspecies to this list was the realization, in the late 1960's, that DDT and its metabolites (hereafter referred to only as DDT) were having a direct negative impact on these falcons' survival. Only the Peale's peregrine falcons (*F. p. pealei*), which nests from the Aleutian Islands east and south to Vancouver Island, were found to be reproducing at near normal levels with only traces of DDT.

The Service proposed (48 FR 8796-8802 March 1, 1983) three changes for peregrine falcons under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*): (1) The Arctic peregrine falcon (*Falco peregrinus tundrius*) would be reclassified from endangered to threatened throughout its range (northern Alaska to Greenland); (2) the peregrines found nesting in western Washington would be considered American peregrine falcons (*Falco peregrinus anatum*) for the purposes of the Act and are, therefore, classified as endangered; and (3) all free-flying peregrine falcons found within the 48 conterminous States would be treated as endangered under the Similarity of Appearance provisions of the Act and, therefore, take would be prohibited, except under a permit (50 CFR 17.22, 17.32, 17.53).

**Summary of Comments and Recommendations**

Some 71 comments were received on this proposal. Twenty-three States (plus the Virgin Islands), 5 other Federal agencies, and 42 individuals, groups, or other entities provided comments, many quite extensive. The Canadian Wildlife Service (CWS) acted as an intermediary between the Provincial Governments (which are responsible for the management of Canadian raptors) and the U.S. Fish and Wildlife Service on this matter and provided a lengthy comment.

*Similarity of Appearance Rule*

As the proposal indicated, pursuant to the "Similarity of Appearance" provisions of Section 4(e) of the Act,

species (or subspecies or other groups of wildlife), which are not considered to be endangered or threatened, may nevertheless be treated as such for the purpose of providing protection to a species that is biologically endangered or threatened. Under this Similarity of Appearance provision (implemented by 50 CFR 17.50) the Service must find: (a) That the species so closely resembles in appearance an endangered or threatened species that enforcement personnel would have substantial difficulty in identifying listed from unlisted species; (b) that the effect of this substantial difficulty is an additional threat to the endangered or threatened species; and (c) that such treatment of an unlisted species will substantially facilitate the enforcement and further the purposes of the Act.

Therefore, the Service, in order to further the purposes of the Act, made the following finding in the proposal: (1) Enforcement personnel, as well as nearly all other persons, would be unable to routinely separate the presently listed stocks (i.e., American or Arctic peregrine falcons) from the unlisted stocks; (2) enforcement personnel would not always be able to separate the endangered American peregrine falcon from the threatened Arctic peregrine falcon; and (3) that the illegal take of any peregrine falcons in areas where listed populations occur would be without regard for, or forehand knowledge of, the status of that particular individual falcon, and thus poses direct and indirect threats to the wild native birds.

The Service is now listing all free-flying *Falco peregrinus*, not otherwise identifiable as a listed subspecies, to be endangered under the "Similarity of Appearance" provision in the 48 conterminous States.

This part of the proposal was widely accepted by nearly all those commenting on this rule. Several commentators did ask why the rule was not extended to either Alaska or Canada. In the case of Alaska, this rule would have then covered the Peale's peregrine falcon (*Falco peregrinus pealei*), an unlisted subspecies. The Peale's peregrine does not qualify for listing. Similarity of Appearance treatment is not needed because its range does not ordinarily overlap that of the other listed peregrines in Alaska. The illegal take of peregrines in Alaska, has been concentrated almost exclusively to nest sites (eggs or young), where identification as to subspecies is more easily determined.

In the case of Canada, the Act only applies to persons under the jurisdiction

of the United States. The take of a U.S. listed species within U.S. jurisdiction or on the high seas is a violation of the Endangered Species Act. (The Act would, however, control import and commercial activities for such species in interstate or foreign commerce involving persons under U.S. jurisdiction.)

Several persons expressed some confusion as to either the purpose or need for a "Similarity of Appearance" provision. Within the lower 48 States, the Similarity of Appearance provision would protect from take any *Falco peregrinus* as an endangered species. The value of this provision is that in some cases where the legal take of peregrines is planned, some of these birds may, in fact, be the subspecies *anatum* and, therefore, in need of the strictest protection possible under the Act. For example, a person authorized to take Peale's falcons on the West Coast (WA, OR, CA) could unintentionally trap an *anatum*. The review of such permits and other similar activities would be for the protection of such *anatum*.

Other examples given in the proposal included a side benefit to those falcons being released under restoration projects in various parts of the country. Regardless of their genetic origin, all peregrines released under this program would receive full protection from take under the Act. Shooting, for example, these or any other peregrines in the lower 48 States would be a violation of the Act under this provision.

#### Clarification of American Peregrine Falcon Status

As indicated in the proposal, one of the areas with persistent problems as to the identification (*ergo*, legal status) of some falcons has been the Olympic Peninsula of Washington. A few pairs of falcons nest there, and other falcons are seen in migration or during the winter. The Service believes that most of the nesting birds and some of the non-nesting birds are only an extension of the endangered *anatum* populations to the east and south. The nesting pairs in this area have been identified as *pealei* by some authorities and *anatum* by others. Based upon the best available scientific and commercial data, the Service has determined that this population is *anatum* for the purposes of the Act and should be so classified. Therefore, the Service gives notice that all peregrine falcons found nesting in Washington, not just those east of the Olympic Peninsula, would be recognized as American peregrine falcons and, therefore, treated as endangered for the purposes of the Act.

Several comments were received indicating that the peregrines in that area should not be listed under the Act because they believed these were Peale's falcons, and such birds should be left available for use by falconers. The State of Washington already classifies all *Falco peregrinus* as endangered and does not now allow the take of any peregrine falcons, except under strict permit. The State of Washington pointed out that only three active nest sites are known, and the population is still in a precarious condition statewide.

Several other comments indicated some confusion on what the effect of this rule would be. Only a few falcons in western Washington are affected. For the purposes of the Act, those birds are now considered American peregrine falcons and will be treated as an endangered species. Such falcons will receive the full protection of the Act (e.g., Sections 7 and 9).

#### Reclassification of the Arctic Peregrine Falcon to Threatened

This rule changes the status at 50 CFR 17.11 of the falcons now listed under "Falcon, Arctic peregrine, *Falco peregrinus tundrius*" from endangered to threatened. This rule formally recognizes the relative security of this population from being no longer in danger of extinction throughout a significant portion of its range.

Most of the comments received addressed this rule. Approximately one-quarter of the comments did not support reclassification to threatened at this time. Two-thirds did support reclassification. The remainder either had no comment on this issue or wanted the Arctic peregrine removed from the list. Specific comments opposed to the rule as proposed and the Service's responses are given below.

One of the major concerns expressed to the Service was the use of the Lincoln Index calculation to arrive at some estimate of the falcons' populations in the proposal. The Lincoln Index uses the following proportion: the number of nestlings banded is to the number of all nestlings as the number of banded birds caught in fall migration is to the total trapped sample. The formula, data, and assumptions were presented in detail in the proposal (48 FR 8797), to which the reader is referred. Several comments attempted to show how changing the numbers used in the calculation would influence the resulting estimate. Many questioned whether 20,000 peregrines were produced in the northern latitudes each summer as apparently reported by the calculations.

The purpose of using the index was to get a general estimate of peregrine populations: were there a few hundred pairs or perhaps a few thousand pairs? Since only a very small percentage (<3 percent) of the peregrines banded as nestlings is retrapped that first fall, then the remaining unbanded proportion (>97 percent) trapped in the fall indicates a substantial number of young were not banded in the nest. In 1983, nearly 1,000 peregrines were banded either in the nest (north of 55°) or on fall migration in the U.S., Canada, Greenland, and Mexico. Less than 3 percent of the banded nestlings were retrapped. Again, it is clear that the banders did not come close to banding a large proportion of the entire 1983 production as only a few of the falcons banded in nests were trapped on fall migration.

Two specific comments were that not all the Alaska birds banded there were Arctic peregrines and that some of those from that part of North America migrate down the West Coast, where no significant fall trapping occurs. The Lincoln Index was used to get a gross estimate for all peregrines produced north of 55°N. latitude. From other sources the Service knows that the American peregrine represents a smaller fraction of that production: Alaska, estimated 50-100 pairs; northwest Canada, 10-75 pairs; and eastern Canada, 25-100 pairs. The North Slope of Alaska, all of Canada above the tree line, and Greenland may have a few thousand pairs of Arctic peregrine falcons.

The assumptions that pertain to the use of the Lincoln Index do not require all the marked birds to pass by a trapping station. So long as the behavior of the *unbanded* nestlings does not differ from the behavior of the *banded* nestlings (e.g., 50 percent of all Alaskan birds migrate down the West Coast), then the basic assumptions are met. Other commenters noted that males are less frequently trapped along the coast in autumn. Again, the banded nestlings represented the same male to female ratios that were assumed to be present in the unbanded sample of nestlings. Removing the banded nesting males reduces the  $n_1$  values (see 48 FR 8797 for details) by the expected 50 percent. Similar adjustments for the other values still yields estimates of the numbers of female peregrines produced each year that are similar to the original estimates for both sexes.

Several individuals commented on the lack of any trapping stations on the West Coast of the United States. They argued that such stations would

increase, perhaps, the number of Alaska-banded birds in the sample and "therefore" decrease the Lincoln Index estimates. There are two problems with this idea. First, not all the peregrines that would be trapped along the West Coast of the U.S. would be from the area north of 55°. Some could be *anatum* (or *pealei*) from the western States and Provinces, particularly further south in California. Peregrines originating south of 55° could account for more than 10 percent of the unbanded sample, if such stations were operated. Secondly, the Lincoln Index uses the "total trapped" at such fall migration stations.

Presumably, 95-98 percent of any such sample would be unbanded when trapped. Even if a substantial number (more than 3 birds) were already banded when caught at a station, the total trapped would be added to the totals of all stations. The index would still indicate that more than a few thousand peregrines are being produced to the fledging stage in the area north of 55°.

Two letters asked if two specific retrap records of banded falcons were included in the Lincoln Index calculations. One record (Greenland to Mexico) was already included, while the second (Alaska to Washington) was known but rejected for the reasons given above. No new records were brought to the attention of the Service to otherwise alter the data presented in the proposal.

Other comments suggested that the banded birds may not migrate the same way as the unbanded. In other words, the banded sample may not be representative of the population as a whole. This would be a possibility, if peregrines migrated in the same traditional manner as such groups as cranes, swans, and geese. Falcons banded in the same area have been encountered in a broad range of migration paths and wintering grounds. Not one reasonable sample (>40) of banded falcons has shown an exceptional band retrap rate (>5 percent) or the use of a single migration route. In the context of the entire Arctic, such banding samples are not being selected for banding and their possible migration route. (Accessibility and numbers of falcons are more the determining factors in the choice of banding falcons.) Thus, unbanded birds can be expected to arrive at any trapping station in the same relative proportion as the banded nestlings.

In summary, the index does yield a gross estimate of the number of peregrines produced each summer. The index only gives a rough estimate in answer to the question: Are the banded nestling falcons a small or large

proportion of all the nestlings in the areas north of 55°? All of the estimates show a relatively large number of peregrines is involved. The Service does not believe it necessary to make a specific estimate of the size of the population, except to observe that the production almost certainly exceeds 3,000 young per annum and may be increasing. Therefore, this estimate, when used in conjunction with estimates of pairs of both American and Arctic peregrines from different portions of their total range, does not support the continued listing of at least the Arctic subspecies as endangered. This estimate is only one small part of all the information used by the Service in the overall assessment of the status of these birds, as indicated in the proposal.

The Service has used additional evidence in its assessment of the status of these falcons: rough population estimates, nesting productivity, fall migration counts, and DDT levels in migrant falcons. The Act requires the Service to use the best available scientific and commercial data in evaluating the status of any species. The proposed reclassification of the Arctic peregrine (and the retention of the American peregrine as endangered) was suggested to the Service in 1980 as a result of the 5-year review. That recommendation came principally from the Eastern Peregrine Falcon Recovery Team and the Peregrine Fund.

The second major point raised by several who commented dealt with the Alaska Peregrine Falcon Recovery Plan. This plan is concerned with the two listed falcons in Alaska and was approved by the Service in October 1982 after some 7 years in various drafts and revisions. The team preparing this plan was given the charge to define recovery goals for the falcons in Alaska but not throughout the range of the two subspecies. In the proposed reclassification, the Service reviewed the status of all peregrines nesting in North America, not just those in Alaska. In that context, it remains the view of the Service that the Arctic subspecies is clearly no longer in danger of extinction throughout all or a major portion of its range. Alaska may represent about 10 percent of the total Arctic peregrine population. The above recovery plan remains a useful document for the management of peregrines within Alaska, but it was not intended to address peregrine recovery considerations over all of North America.

Other specific comments and responses concerning the proposed reclassification are given below.

The Service estimated that approximately 90 percent of the adult peregrines showed low DDT (herein, includes DDE) blood levels on the Texas Gulf Coast in the spring. One comment indicated those data may be biased, as "it is not known how many birds failed to make it to the sampling station . . . because of pesticide-induced stress." The Service believes that this sample is representative of the peregrines headed towards the Arctic and sub-Arctic regions of North America. Any that did not make it to the latitude of south Texas from such stress very probably failed to reach their nesting grounds as well. This does not mean the Service believes all peregrines pass over the trapping stations in Texas, only that a large random assortment occurs there in spring migration.

A few States and others indicated they had concerns that this proposal might lead to some form of take of peregrines for falconry purposes. The rule was definitional and does not expand the situations in which Arctic peregrines can be taken. In order for threatened birds to be taken for falconry, a special rule (50 CFR 17.41) would have to be proposed and finalized to allow for any such use. This final rule does not reduce the protection afforded the Arctic peregrine falcon beyond the general restrictions and exceptions at §§ 17.31 and 17.32 for the take of any threatened species. Endangered species may be taken under special permit only for scientific research or for enhancing the propagation or survival of the species (§ 17.22). In addition to those purposes, threatened species may be taken under permit for zoological exhibition, educational, or other special purposes consistent with the purposes of the Act (§ 17.32).

The Service has promulgated final rules to allow for the sale of captive produced raptors, including listed peregrine falcons (48 FR 31600-31610, July 8, 1983). The Service does not intend to allow the take of wild American or Arctic peregrine falcons for the purposes of falconry until these subspecies are removed from the List of Endangered and Threatened Wildlife.

Several commenters suggested that only the full species, *Falco peregrinus*, should appear on the list at 17.11, and then geographic populations could be "clearly defined." The Service prefers to use the subspecific entries in the list, so long as actions taken with respect to any falcon can be reasonably identifiable as to their effect upon American or Arctic peregrines or both. In either case, the actual effect under the law is that there are no differences

between the two classifications. Penalties are the same regardless of the bird being classified as endangered or threatened. The effect of this reclassification rule is definitional; the Service believes that the Arctic peregrine is no longer in danger of extinction, although threats do remain. To delimit in precise geographical terms all the boundaries between various subspecies of this species, when such boundaries have no management value nor assist Federal agencies in satisfying their Section 7 responsibilities, would serve no benefit to the species.

Several comments were received that the Service had not adequately addressed the continued use of DDT south of the United States—the principal wintering grounds for the bulk of the Arctic and American peregrine falcons. Some assessment of current, past, and expected future usage rates could have been done. Regardless, if 1 pound or billions of pounds of DDT have been used in the past decade, the returning nesting falcons and their productivity levels have provided a reasonably clear index of the effect of the contamination and have not indicated that DDT is still a critical biological problem for the falcon.

Moreover, correlating varying usage rates in various countries to contamination rates of returning breeders would be difficult. Individual breeders from the same nesting area may winter thousands of miles apart or be feeding on different prey and, therefore, be exposed to totally different levels of environmental contamination. The Service believes that data such as nesting success and contaminant levels in the blood of spring migrants give an overall picture of significant levels of DDT contamination in only a small portion of the breeding-aged falcons. If, for example, half the eggs were failing to hatch because of DDT and half the spring blood samples were likewise at high DDT levels, then the falcons would still be under very severe stress from this environmental threat. Therefore, under such circumstances, the Service would not have considered reclassification from endangered to threatened for the Arctic peregrine falcon.

Several commenters from Alaska indicated that the change to threatened for the Arctic peregrines could produce several undesirable results. Monies for studies on the bird might be in shorter supply with a "lower" status level. Developers and land managers could reduce their concern for the birds and start projects that could be detrimental to some nesting falcons. The Service

appreciates these concerns. However, all Federal agencies must still follow the requirements under Section 7 of the Act. Section 7 makes no distinction whatsoever between treatment of endangered and threatened species. Also, Section 4(a) of the Act does not allow concern for the availability of research or management monies to influence the determination of an endangered, threatened, or unlisted classification for a species.

Several comments suggested that the 1981-82 nesting productivity data from the North Slope of Alaska may be atypical and not to be expected in the future. The data for 1983 was the highest (2.2 young produced per known nesting attempt, 1981-83 average was 1.73) yet recorded, since the first data were obtained in the early 1950's. The 5-year (1979-83) mean for this area was 1.59 young per known attempt. (The Alaska recovery plan calls for 1.4, although that level was not reached in the years 1979 and 1980.) The initial studies in the 1950's estimated about 1.0 young per attempt was normal and required to maintain the population.

One comment was received from a biologist regarding the Service's statement in the proposal that there had been a gradual improvement over the past 5-6 (now 6-7) years in productivity in the Arctic. His own data from Greenland showed a weighted mean of 1.97 young per attempt for the past 12 years, but in the first 6 years (1972-1977) only 1 year (1973: 2.2) was above the mean, while in the past 6 only 1 (1979: 1.6) was below the mean. The same general trend appears to be working in Greenland, although the population there was never known to have suffered the dramatic reproductive failures seen in the western Arctic populations in the late 1960's and early 1970's. (The lowest productivity reported from Greenland was 1.50 for 3 years: 1974, 1975, and 1977.)

Several comments were received that the North Slope, Alaska, population is not nearly as well off as the American peregrines in the central part of Alaska (mostly Yukon River drainage). The Service agrees that the Alaskan population of American peregrine falcons is in stable condition. However, it is just about the only American peregrine population in such a condition. South and east from this population there are many areas now devoid of nesting American peregrines or areas with a few pairs producing a relatively small number of young per nest. In the case of such a wide ranging species, the Service considers either whole subspecies or very large segments of

peregrine populations for listings or reclassifications.

Other comments were made that the proposal frequently combined some known data for Alaskan *anatum* populations with those of *tundrius*, particularly with respect to the Lincoln Index discussed above. The Service is now reclassifying the Arctic peregrine falcon and acknowledges that some of the adjacent populations (frequently referred to as "Taiga birds") may be doing as well or better than some *tundrius* populations.

At the present time, taxonomists usually assign these Taiga birds to the *anatum* subspecies. Others suggest that these are in the zone of intergradation (interbreeding of two adjacent subspecies). The use of Alaska *anatum* data was to show that no falcon population segment has totally recovered from the effects of DDT. At this time, this is the only Taiga population to have made a partial recovery. They must be included in the Lincoln Index, since they are an integral part of the migration sample.

The main point the Service is following in this regard is that for *anatum* as a whole (Taiga to Mexico), the falcon is still in serious trouble. Most of the American peregrines are barely able to maintain their current population level, even with some assistance in the form of artificial production (i.e., captive-produced or hatched eggs and young). There is no clear-cut distinction over the entire range of *Falco peregrinus* in North America between the productivity in one small locale and that in the adjacent locale. There is a continuum of nesting success rates over the continent. By and large, the worst situations are found in the Rocky Mountains and central Canada (from Colorado to northern Alberta) for *anatum*.

Some comment was raised in Canada that this proposal deals with the North American peregrine falcons and not just those within the confines of the United States. The Act under which this proposal and final rule are issued does not address nationality of the species. In fact, any species in the world is eligible for listing. Such listing (non-U.S. species or populations) serves the purposes of import controls and bringing world attention to the condition of the species. That attention often benefits the species, by assisting those governments and private conservation groups in raising monies and initiating programs to save those species.

Several questions were raised concerning the breeding areas toward which the falcons migrating in spring

were headed when blood samples were taken in Texas. Several suggested that the Service could not assume that most were *tundrius*, and that, in fact, some large proportion could be *anatum*. Several sources commenting on the proposal, plus data already on file, indicated that no more than several hundred pairs of *anatum* are present in Canada. The Canadian Wildlife Service pointed out that when the blood sampling was being done in Texas, the American peregrines from Alberta (and southward) were already on their nests and, therefore, not likely to be a major component in the Texas blood samples.

Unless there is an undetected and very large population of American peregrine falcons somewhere in North America, the preponderance of evidence suggests that only *tundrius*, Alaska *anatum*, and a small number of other Taiga birds comprise the bulk of those flights. (The marked captive-produced falcons released in eastern U.S. and southeastern Canada are excluded from the fall samples, as they are both of local origin and easily identified—the same as the capture of a different species in the trapping sample.)

The low number of pairs in some parts of the range of *tundrius* was pointed out by several commenters. The Service acknowledged in the proposal that some areas have only a few pairs. In 1980, no breeding pairs occurred on the North Slope of the Yukon (historical level is given as 16 pairs). On the other hand, the Service has received reports in the recent past of random survey sites, (i.e., not picked for peregrines) that were represented by large numbers of peregrines. There is an extremely large potential habitat area available to the Arctic peregrine. The Service finds it difficult to accept that even 10 percent of the possible peregrine habitat in the Arctic has been thoroughly and intensively surveyed.

Even in areas under intensive study, pairs of falcons are easily missed. In a few cases, the pair was not seen in early visits to the site and the site was initially assumed to be abandoned, until large young were later seen perched on the edge of the site. In other cases, pairs were found nesting a few hundred meters behind the previous sites, but out of sight to most observers. Arctic surveys for most wildlife are difficult at best. The peregrine falcon is not always easy to find.

The State of California now estimates a breeding population of perhaps 60 pairs. A decade ago, before any intensive surveys were made, the population was thought to be only a dozen or less. California has one of the largest aggregations of bird watchers,

falconers, and others who share a special interest in raptors. To imagine more than a few pairs escaping notice was almost unthinkable in those early years. After intensive surveys were initiated, over 30 pairs were located.

The Service simply implied that all populations estimates for this species must be used with caution, including those estimates derived from the Lincoln Index calculations. From all available evidence and allowing for the variety of possible errors in those estimates, the Service concludes that not less than 3,000 pairs probably occupy the Arctic and sub-Arctic areas of North America. Current populations are almost certainly lower than those found prior to use of DDT (pre-1945). The Act does not require that an endangered species be recovered to historical levels, in all cases, in order to be reclassified to threatened or be removed from the list.

#### Summary of Reclassification Issue

No convincing argument nor data were presented to the Service to indicate that the peregrine falcons in the Arctic are still in danger of extinction. The Service sees a continuing threat from DDT (and possibly other environmental contaminants) usage in Central and South America. Until that threat is clearly removed, these two subspecies (*anatum* and *tundrius*) will remain on the List of Endangered and Threatened Wildlife (50 CFR 17.11).

The majority of those who opposed or questioned this proposal either implied or indicated that there would be some measurable difference in treatment for a threatened species versus an endangered one. Under the law, there is no difference in treatment, except for some permits that could be issued in Alaska (see discussion below). The effect of this action is simply one of definition: Is the Arctic peregrine still in danger of extinction when compared to the American peregrine falcon (Alaska to Mexico), as well as to such species as the California condor (*Gymnogyps californianus*), whooping crane (*Grus americana*), and many of the Hawaiian Island endemics? The Arctic peregrine falcon is not in such danger of extinction in the foreseeable future.

#### Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Arctic peregrine falcon should be reclassified as a threatened species. Procedures found in Section 4 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations promulgated to implement the listing provisions of the

Act (codified at 50 CFR Part 424: under revision to accommodate 1982 Amendments) were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the falcon *Falco peregrinus tundrius* are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* As indicated in the proposal, this falcon has not been threatened with any significant losses of habitat throughout its range. Some migration and wintering areas have been lost to development, but the Arctic region and many areas elsewhere can still support this bird.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* No measurable overall effects can be demonstrated for losses in the past to falconry (or any other interests) to this subspecies.

C. *Disease or predation.* Except for normal losses, this falcon is not threatened by disease or predation.

D. *The inadequacy of existing regulatory mechanisms.* Protection under the Act is still assured. No change in the protection afforded this falcon is being made by these rules.

E. *Other natural or manmade factors affecting its continued existence.* Both the American and the Arctic peregrine falcons are still contaminated by DDT. The former has been greatly reduced or extirpated from the bulk of its range in Canada and the United States. From Colorado to northern Alberta, the *anatum* are producing few young of their own and are unable to maintain their population without augmentation. Only *anatum* populations in Alaska and perhaps parts of California, Arizona, and New Mexico, as well as a few places in Mexico, are at least producing reasonable numbers of young falcons, but the general population is still well below historic levels.

As reflected by current productivity, the contamination level of Arctic peregrines is less than for most *anatum*. Average productivity of Arctic birds is now greater than 1.0 young/attempt in most areas. A number of old sites have been reoccupied. This population does not have the prospect of extinction at this time or in the foreseeable future. Chronic low levels (some 5-10 percent of birds will be "high") of DDT contamination are expected to remain for the immediate future.

#### Available Conservation Measures

Conservation measures provided to species listed as endangered or

threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for opportunities for land acquisition, cooperation with the States, requires that recovery actions be carried out for all listed species, and further requires a review of their status every 5 years.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402 and are now under revision (see proposal at 48 FR 29990; June 29, 1983). Section 7 requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If it is determined that a Federal action may affect a listed species, the Federal agency must enter into consultation with the Service.

The Act and implementing regulations found at 50 CFR 17.21 (for endangered species) and §§ 17.21 and 17.31 (for threatened species) set forth a series of general prohibitions and exceptions that apply to all listed wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce listed species. It also would be illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that was illegally taken. Certain exceptions would apply to agents of the Service and State conservation agencies (§§ 17.21 and 17.31) and for certain falcons (see § 17.7 and §§ 21.28-21.30).

Permits may be issued to carry out otherwise prohibited activities involving listed animal species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.32. Such permits are available for scientific purposes or to enhance the propagation or survival of endangered species (§ 17.22). In addition to these permits, permits for threatened species may be issued (§ 17.32) for zoological exhibition or education or other purposes consistent with the purposes of the Act.

All protections under the Act shall continue for the Arctic peregrine falcon. There is a change for a permit

application (50 CFR 17.32) for the take of Arctic peregrines on the Alaskan North Slope. Applications meeting the requirements of § 17.32 would not be published in the *Federal Register*, as applications for endangered species permits are. Consultations on threatened species permit issuances would still occur. As a matter of policy, the Service has issued the one permit for all work on listed peregrines in Alaska to the Service's Regional Director in Anchorage. The activities of all agencies and individuals are rigidly controlled under the provisions of that permit.

For the purposes of the Act, the peregrines nesting in western Washington are determined to be an endangered species. In the future, Federal agencies will be required to consult under Section 7 of the Act, if any action they propose may affect those peregrines nesting, as well as wintering, in western Washington. Until now there has been confusion as to whether to consult or not on those nesting in this area.

All peregrines not identifiable as American peregrine falcons found in the lower 48 States will be treated as endangered for law enforcement purposes under the Similarity of Appearance provisions (see § 17.50). This ensures the protection from take of American peregrine falcons that may be nesting, migrating, or wintering in the lower 48 States.

The species *Falco peregrinus* is on Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which requires both a permit for export from the country of origin and an import permit from the recipient country. No change in this status is being proposed by the Service to other parties of CITES as a result of this reclassification.

#### Critical Habitat

The previously determined critical habitat for American peregrine falcons in California remains unaltered in § 17.95(b). Critical habitat has not been designated for the Arctic peregrine falcons because such action would not be prudent. No benefit would ensue from designation of critical habitat for the Arctic peregrine falcons.

#### National Environmental Policy Act

A draft Environmental Assessment was prepared at the time of the proposal. Subsequently, and in accordance with a recommendation from the Council on Environmental Quality (CEQ), the Service is no longer preparing Environmental Assessments for Section 4(a) actions. The

recommendation from CEQ was based, in part, upon a decision in the Sixth Circuit Court of Appeals, which held that the preparation of NEPA documentation was not required as a matter of law for Section 4(a) actions under the Endangered Species Act. *PLF v. Andrus*, 657 F.2d 829 (6th Cir., 1981).

#### References

There have been many scientific papers, books, administrative reports, recovery plans, letters, petitions, and other documents used in the preparation of this rule. Some of these documents have been prepared for future publication in appropriate scientific journals. Others are still part of ongoing research or management projects and constitute only interim reports of data gathered to date. Some of the documentation goes back several decades, while some has been obtained as recently as last fall (1983). The Service is unable to provide a brief list of these hundreds of sources within this *Federal Register* document. Persons interested in examining these materials, including all comments received, may review them at the Service's Office of Endangered Species by appointment during normal business hours (703/235-1975).

#### Author

The author of this rule is Jay M. Sheppard of the Service's Office of Endangered Species (703/235-1975, see **ADDRESS** section).

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

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

#### Regulations Promulgation

#### PART 17—[AMENDED]

Accordingly, the Service amends Part 17 of Title 50 of the Code of Federal Regulations as follows:

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

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1241; and Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Amend the table at § 17.11(h) by revising the entries of the "Falcon, American peregrine" and "Falcon, Arctic peregrine" and adding the entry "Falcon, peregrine" under "BIRDS" to read as follows:

#### § 17.11 Endangered and threatened wildlife.

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

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Falcon, American peregrine.	<i>Falco peregrinus anatum.</i>	Nests from central Alaska across north-central Canada to central Mexico, winters south to South America.	Entire .....	E.....	2,3, 145	17.95(b)...	NA.
Falcon, Arctic peregrine.	<i>Falco peregrinus tundrius.</i>	Nests from northern Alaska to Greenland, winters south to Central and South America.	.....do.....	T.....	2,3, 145	NA.....	NA.
Falcon, peregrine.	<i>Falco peregrinus</i> .....	Worldwide, except Antarctica and most Pacific islands.	Wherever found in wild in the conterminous 48 States.	E(S/A).....	145	NA.....	NA.

Dated: March 14, 1984.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

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