

**ADDRESSES:** Submit original and four copies of all comments, reply comments, and supporting comments to: Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Gary P. Schonman, FCC Mass Media Bureau, (202) 632-6402.

**SUPPLEMENTARY INFORMATION:** This is a summary of the FCC's Notice of Proposed Rule Making in MM Docket No. 93-226, adopted on July 27, 1993, and released on August 27, 1993. The complete text of the Notice of Proposed Rule Making is available for inspection and copying during normal business hours at: FCC Reference Room, Federal Communications Commission, room 239, 1919 M Street, NW., Washington, DC 20554. Copies of all documents in this proceeding may be purchased from the FCC's copy contractor, Downtown Copy Center, 1990 M Street, NW., suite 640, Washington, DC 20036 (Telephone: 202-452-1422).

#### Synopsis of Notice of Proposed Rule Making

The FCC sought comment on a proposal to amend 47 CFR 73.208(c)(8). The FCC stated that an applicant is currently entitled to demonstrate compliance with minimum distance separation requirements (e.g., § 73.207, § 73.213(c), § 73.215(e)) by rounding off to the nearest kilometer (km) the distance between its proposed transmitter site and a particular reference point (e.g., the transmitter site of an existing co-channel or adjacent channel station). The FCC proposes no change to its rules in that regard. However, the FCC stated that its rules should be amended to specify that if the applicant is unable to demonstrate such compliance by virtue of the rounding-off provision in § 73.208, the extent to which it is short-spaced should be specified with greater precision. Accordingly, the FCC sought comment on a proposal to amend § 73.208(c)(8) as follows:

#### § 73.208 Reference points and distance computations.

(c) \* \* \*

(8) Round the distance to the nearest kilometer. However, if, after rounding the distance to the nearest kilometer, an applicant is not in compliance with any Commission minimum distance separation requirement (e.g., §§ 73.207, 73.213(c), 73.215(e)), the extent to which it is short-spaced shall be specified to the nearest one hundredth of a kilometer (two decimal places).

#### Initial Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with § 603(a) of the Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. section 601 *et seq.* (1980).

**Reason for the Action:** This action is taken to clarify that applicants for FM facilities may not round off distances to the nearest km under § 73.208 of the Commission's Rules when computing the extent to which they are short-spaced.

**Objective of this Action:** By this action, the Commission seeks to clarify and rationalize the use of § 73.208 of the Commission's Rules.

**Legal Basis:** Authority for this action is found in sections 4, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 4, 303, 403.

**Number and Type of Small Entities Affected by the Proposed Action:** All applicants for FM facilities that propose transmitter sites which are not in compliance with the Commission's minimum distance separation rules.

**Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Action:** None.

**Federal Rules which Overlap, Duplicate or Conflict with the Proposed Action:** None.

**Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:** We are seeking comment to determine whether any significant alternatives exist.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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#### DEPARTMENT OF THE INTERIOR

#### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AB97

#### Endangered and Threatened Wildlife and Plants; Proposed Reclassification of the Pahrump Poolfish (*Empetrichthys latos latos*) From Endangered to Threatened Status

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

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) has reviewed the status of the Pahrump poolfish (*Empetrichthys latos latos*) and proposes to reclassify this species from endangered to threatened throughout its range under the Endangered Species Act of 1973, as amended (Act). The Pahrump poolfish (also known as the Pahrump killifish) is a small, relatively slender fish, endemic to the Pahrump Valley in southern Nye County, Nevada. In 1975, the sole natural population of Pahrump poolfish was extirpated from Manse Spring, Nye County, Nevada, when ground water pumping caused the spring to dry. Aside from water diversions and excessive ground water pumping, threats to the species include predation and competition from exotic fishes and encroachment of vegetation. Because of recovery efforts, the species now occurs in three relatively stable populations that have been artificially established in Clark and White Pine Counties, Nevada. If made final, the proposed action would reclassify the Pahrump poolfish from endangered to threatened status. The Service seeks data and comments from the public on this proposal.

**DATES:** Comments from all interested parties must be received by November 22, 1993. Public hearing requests must be received by November 8, 1993.

**ADDRESSES:** Comments and materials concerning this proposal should be sent to U.S. Fish and Wildlife Service, Reno Field Office, 4600 Kietzke Lane, C-125, Reno, Nevada 89502-5093. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Barrett at the above address (telephone 702/784-5227).

#### SUPPLEMENTARY INFORMATION:

#### Background

The Pahrump poolfish (*Empetrichthys latos latos*) was described along with

two other subspecies of *E. latos* in 1948 (Miller 1948). All three subspecies occurred only in springs found in Pahrump Valley, southern Nevada. The Raycraft Ranch springfish (*E. l. concavus*) and the Pahrump Ranch killifish (*E. l. pahrump*) are now extinct. The only congener, the Ash Meadows poolfish (*E. merriam*), became extinct in the 1940's. Thus, the Pahrump poolfish is the sole remaining representative of the genus *Empetrichthys*.

This species was originally called the Pahrump killifish. Robbins *et al.* (1991), following the recommendation of J.E. Williams, recently assigned the common name "poolfish" to fishes in the genus *Empetrichthys*. Nevertheless, the majority of the literature refers to the fish as the Pahrump killifish.

The ancestral home of the Pahrump poolfish was Manse Springs in Nye County, Nevada. In 1975, local ground water pumping for agricultural development dried the spring, destroying the only natural population of the Pahrump poolfish. Similarly, ground water pumping caused the extinction of the Raycraft Ranch springfish in the mid-1950's and the Pahrump Ranch killifish in 1958. Prior to the pumping of Manse Springs, populations of the Pahrump poolfish were established in two separate areas: Corn Creek Springs on the Desert National Wildlife Range, north of Las Vegas, Nevada, and Shoshone Springs southeast of Ely, Nevada. Subsequent to the loss of Manse Springs, a third population was established in an irrigation reservoir at Spring Mountains Ranch State Park west of Las Vegas, Nevada. Researchers attempted to establish another population in Latos Pool, near Lake Mohave, in Nevada, but the poolfish were lost during floods in the late 1970's.

All three extant populations of Pahrump poolfish occur on public lands. The Service has applied for vested water rights at Corn Creek Springs based on historical use. The Nevada Department of Wildlife has State appropriative water rights at Shoshone Ponds while the Nevada Division of State Parks has appropriated water rights for Sandstone Spring, the water source for the Spring Mountain Ranch irrigation impoundment in which the Pahrump poolfish occur.

The Act contains both recovery and protection provisions. Section 4(f) of the Act provides for the development and implementation of recovery plans for listed species. The Pahrump Killifish Recovery Plan (Plan) was published by the Service on March 17, 1980. Although information gathered since its

publication may have altered the priorities of tasks identified in the Plan, its ultimate objective, the establishment of 3 populations of 500 fish each, remains valid. The species is less likely to be subject to catastrophic perturbations simultaneously at three separate sites than at the single location it historically occupied. Implementation of recovery tasks identified in the Plan has significantly improved the status of the species. These tasks have been funded and/or carried out by the Service and by numerous Federal and State agencies and academic institutions. The cumulative effect of these efforts and the efforts of the many individuals, organizations, and government agencies at Federal, State, and local levels has been a progressive increase in numbers, as well as the secure establishment of three populations of Pahrump poolfish.

The Plan included provisions to monitor the poolfish populations twice annually. After publication of the Plan it became apparent that Pahrump poolfish are inactive during winter and early spring and therefore cannot be effectively sampled (Deacon 1984a). As a result, researchers have attempted annual summer monitoring of all three populations of Pahrump poolfish since the mid-1980's.

The primary objective of the recovery effort is the establishment of a minimum of three subpopulations of the Pahrump poolfish. Each subpopulation should maintain a minimum of 500 adults for 3 years, and the population's habitats would have to be free of immediate and potential threats before the species could be considered for reclassification to threatened status. Subsequent to reclassification as threatened, if the populations continue to exceed 500 individuals per year at each of the 3 locations for an additional 3 years, consideration should be given to delisting the species. Data collected by the Nevada Department of Wildlife indicates that there have been continual populations of over 500 individuals at all 3 sites since at least 1986. In 1988, either the populations greatly expanded, censusing techniques became more efficient, or both. From 1988 through 1992, individual ponds within each location have contained far greater than 500 individuals.

The Shoshone Ponds population is located on Federal land managed by the Bureau of Land Management (Bureau). Although Shoshone Ponds was originally considered a temporary holding site until other suitable sites could be identified, there has been a population of Pahrump poolfish in the ponds continually since August of 1976 (Logan 1977). One management

objective of the Bureau's Habitat Management Plan for the Shoshone Ponds area is the development of a refugium for the Pahrump poolfish (Cain 1970). In 1970, the Bureau also designated the ponds and 1,240 acres surrounding the ponds as the Shoshone Ponds Natural Area. Due to the apparent long-term viability of the population, and the Bureau's commitment to the maintenance of the species in Shoshone Ponds, the Service has included the Shoshone Pond population when considering the requirements for reclassification of the Pahrump poolfish.

In 1979, when the Plan was written, only two locations contained Pahrump poolfish, Corn Creek and Shoshone Ponds. Both populations were relatively young, 8 and 3 years respectively, and the Corn Creek location contained several exotic predators and competitors, as well as problems associated with the encroachment of macrophytes. Management recommendations were made to address these problems.

The Corn Creek ponds were drained to remove exotic fishes and cattails (Zeller 1985). The cattails are occasionally treated with herbicide to prevent reinfestation of the ponds. The chemical treatment has had no apparent effect on the Pahrump poolfish, while the vegetation removal has improved the poolfish habitat (Sjoberg 1989). Continual evaluation and treatment as necessary of the vegetation will be required if the ponds are to remain suitable for Pahrump poolfish.

The Plan identified Spring Mountain Ranch State Park as a site that could be renovated and used to establish a third population of Pahrump poolfish. In June of 1983, exotic fishes were eradicated from the irrigation reservoir at Spring Mountain State Park and 426 Pahrump poolfish were introduced (Haskins 1983). By June 1984, both adult and fry were present (Deacon 1984b). The population has exceeded 500 individuals every year since 1985. Although Spring Mountain Ranch State Park has no formal agreement to maintain the Pahrump poolfish population in perpetuity, it has no immediate plans to move the poolfish or introduce other species of fish (Jan Prida, personal communication, August 20, 1992).

The Service believes that the available data do not indicate that the recovery goals established in the Plan have been met. Therefore, delisting of the Pahrump poolfish is not warranted. However, the Service does believe that goals identified in the Plan as necessary to consider reclassifying the Pahrump poolfish from endangered to threatened

pursuant to the Act have been met. The Service believes reclassification is warranted and proposes to reclassify the Pahrump poolfish as threatened throughout its range.

#### Previous Federal Action

Federal action began on this species when it was listed as endangered under the Endangered Species Preservation Act of 1966, on March 11, 1967. With the 1973 passage of the Endangered Species Act, the fish retained its endangered status and gained further protection, pursuant to the Act. A recovery plan for the Pahrump poolfish (as the Pahrump killifish) was published by the Service in 1980.

#### Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of five factors described in section 4(a)(1). These factors and their application to the Pahrump poolfish (*Empetrichthys latos latos*) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* Habitat conservation and expansion efforts, including management practices by Federal and State agencies and universities, have increased the number of Pahrump poolfish populations and expanded the species' range since the early 1970's. These efforts led to the establishment of three populations of poolfish at locations from which they were historically absent. One of these, Shoshone Ponds, included the construction of a new pond by impounding an artesian well. All three populations are located on land owned and managed by Federal or State agencies. With constant water supplies and periodic renovation of the impoundments to reduce excess vegetation, each location will provide adequate habitat to ensure the continued existence of the Pahrump poolfish. The Service has filed for a vested water right at Corn Creek. Should the hydrologic basin be adjudicated, and the vested right recognized, the water supply for the Pahrump poolfish will be ensured. Both the Shoshone Springs and Spring Mountain Ranch State Park have water rights certified by the State of Nevada. The water rights were granted to the Nevada Department of Wildlife

for the former and the Nevada Division of State Parks for the latter.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* There is no known commercial or recreational use of the Pahrump poolfish. The Service has exercised, and will continue to exercise, very strict control over scientific and educational activities involving Pahrump poolfish. With reclassification to threatened, the Service could issue permits for limited exhibition and educational purposes, for selected research work not directly related to the recovery of the species, and for other special purposes consistent with the purposes and policies of the Act [50 CFR 17.22 (a)(1)]. These activities, which can be permitted for threatened species, are in addition to permits for endangered species that can only be issued for research, rehabilitation, and propagation directly related to recovering the species [50 CFR 17.32 (a)(1)] (see Available Conservation Measures).

C. *Disease or predation.* Disease is not a significant problem for the Pahrump poolfish. Prior to the introduction of poolfish into each of the three sites, all previously established fish were removed; however, the potential reestablishment of populations of competitors or predators remains a threat. If populations of undesirable species do become established, Pahrump poolfish could be trapped and salvaged, and the impoundments could then be treated to remove other species. This occurred at the Corn Creek location in 1975 when mosquitofish (*Gambusia affinis*) were eradicated. Management actions, such as fencing and public education, could reduce the likelihood of an introduction, are less costly, and have less potential to harm the poolfish.

Predators other than fish were also thought to have a potentially damaging effect on the poolfish. For example, the Plan assumed that a bullfrog (*Rana catesbiana*) infestation in Corn Creek may have a detrimental impact on the poolfish. Subsequently, several investigations of stomach contents of bullfrogs taken from the ponds at Corn Creek have shown little predation on Pahrump poolfish (Withers 1985, 1986, 1988; Heinrich 1991).

Parasites of the three populations have also been the subject of studies. Heckmann (1987, 1988) found generally low parasite loads in all three populations. However, he did find what is thought to be the first record of a blood nematode in North American freshwater fishes in both the Shoshone Ponds and Spring Mountain Ranch populations. Subsequently, Dr.

Heckmann located another nematode in the coelomic cavity of the poolfish in the Corn Creek and Spring Mountain Ranch populations. Dr. Heckmann does not believe that these parasites would be an impediment to the transfer of individuals between populations (R. Heckmann, personal communication, August 14, 1992).

D. *The inadequacy of existing regulatory mechanisms.* Pahrump poolfish and their habitats receive some protection via the Act. Section 7(a)(1) is a protective provision of the Act that directs all Federal agencies to " \* \* \* utilize their authorities \* \* \* for the conservation of endangered species and threatened species \* \* \* " Section 7(a)(2) directs each Federal agency to " \* \* \* insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species \* \* \* " Section 9 contains the specifically prohibited harmful acts. The Corn Creek and Shoshone Pond habitats occur on Federal Land. Any Federal action that would impact these areas would be subject to provisions of the National Environmental Policy Act (NEPA) of 1969 and the Act. Reclassification to threatened status would not change the current protection afforded the species by the Act.

All three poolfish populations occur within the State of Nevada, and the Pahrump poolfish is protected pursuant to Chapter 503.584 of the Nevada Revised Statutes (NRS). This statute prohibits all species or subspecies of native fish, wildlife, and other fauna threatened with extinction from capture, removal, or destruction at any time by any means except under a special permit issued by the department.

The most critical threat to the Pahrump poolfish has been the destruction of habitat through water diversion. The Shoshone Ponds and Spring Mountain State Park populations exist in waters with State-certified appropriations. These appropriations help ensure the continued existence of the respective poolfish habitats. The Service has filed an application for a vested water right at Corn Creek springs. Vested rights are rights based on laws that were in place prior to the development of the existing permit system. In Nevada, vested rights are those where appropriations procedures were initiated prior to March 22, 1913 (NRS 533.085). Should a court adjudicate water rights of the hydrologic basin, the vested rights will be examined. However, the Service has documentation for the use of the Corn Creek waters from approximately 1900

onward and, therefore, believes the water rights at Corn Creek Springs are secure.

*E. Other natural or manmade factors affecting its continued existence.* Due to the historically isolated nature of the Pahrump poolfish and its lack of commercial value, loss of habitat, as discussed in Factor A above, is the major threat to the poolfish. No other natural or manmade factors appear to affect its continued existence.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species. Based on this evaluation, the preferred action is to reclassify the Pahrump poolfish (*Empetrichthys latos latos*) as threatened, pursuant to the Act.

#### Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat for this species is not presently prudent for that reason. Such a determination would result in no known benefit to the species. The species distribution is restricted to three sites, two of which are managed by Federal agencies. It is likely that any Federal action that would adversely affect Pahrump poolfish would result in a jeopardy opinion under section 7(a)(2) of the Act. Therefore, no additional protection would be afforded the species through the designation of critical habitat. Protection of this species' habitat will continue to be addressed through the recovery process and the section 7 consultation process.

#### 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 activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking are discussed, in part, below.

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 and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife not covered by a special rule. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these activities), import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce, any threatened species not covered by a special rule. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving threatened wildlife species under certain circumstances. Regulations governing threatened species permits are at 50 CFR 17.32. Unless otherwise provided by a special rule, such permits are available for scientific purposes, to enhance the propagation or survival of the species, for economic hardship, zoological exhibition, educational purposes, special purposes consistent with the Act, and/or for incidental take in connection with otherwise lawful activities.

Requests for copies of the regulations concerning listed animals and inquiries regarding prohibitions and permits may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, room 432, Arlington, Virginia

22203-3507 (703/358-2104; FAX 703/358-2281).

#### Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

Final action concerning this proposal will take into consideration the comments and any additional information received by the Service. Such communications may lead to a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Field Supervisor, Reno Field Office (see ADDRESSES section).

#### National Environmental Policy Act

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

#### References Cited

A complete list of all references cited herein is available upon request from the Reno Field Office (see ADDRESSES section).

#### Author

The primary author of this proposed rule is Paul J. Barrett, U.S. Fish and

Wildlife Service (see ADDRESSES section); telephone 702/784-5227.

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

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

**Proposed Regulation Promulgation**

Accordingly, it is hereby proposed to amend part 17, subchapter B of chapter

I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17--[AMENDED]**

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

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

**§ 17.11(h) [Amended]**

2. It is proposed to amend § 17.11(h) by revising the entry under FISHES for "Poolfish, Pahrump" to read "T" under "Status."

Dated: August 18, 1993.

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

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