

proponent of the original notice or order, to conduct a hearing pursuant to APA § 554 upon the request of the permittee. Moreover, § 525 of the Act does not “provide otherwise” for the burden of proof. In fact, it expressly adopts, by cross-reference, the APA standard. Therefore, since the proponent must have the ultimate burden of persuasion, OHA must modify 43 CFR 4.1171 to be consistent with federal law and the *Greenwich Collieries* case.

### 3. Permit Suspension or Revocation Proceedings—§ 4.1194

This regulation improperly places the ultimate burden of persuasion on the permittee in proceedings to suspend or revoke a permit that has previously been approved. OSM merely bears the burden of going forward with a prima facie case for suspension or revocation of the permit. 43 CFR 4.1194. The allocation of the burden of proof for this regulation must be amended to place both the burden of going forward with a prima facie case and the ultimate burden of persuasion on the agency. *See, e.g. Roach v. National Transportation Safety Board*, 804 F.2d 1147, 1159 (10th Cir. 1986) (holding that in a proceeding to suspend commercial pilot's license, the burden of proof always remained with the Administrator), *cert. denied*, 486 U.S. 1006.

Section 525(d) of SMCRA governs hearings held following the issuance of an order under § 521(a)(4) to show cause why a permit should not be suspended or revoked. Section 525(d) specifically requires the Secretary to “hold a public hearing \* \* \* [and that] any hearing shall be of record and shall be subject to § 554 of title 5 of the United States Code.” 30 U.S.C. 1275(d). Section 525(d) does not provide a burden of proof distinct from that in the APA, but expressly incorporates the APA as the governing procedure. Since OSM is the proponent of the order to show cause, it must bear the burden of presenting a prima facie case and proving it by a preponderance of the evidence.<sup>4</sup>

### 4. Petitions for Review of Proposed Individual Penalty Assessments Under § 518(f) of the Act—§ 4.1307

This regulation inappropriately requires “the individual” to carry the burden of proof on the issues of (1) whether the individual at the time of the violation, failure, or refusal was a director or officer of the corporation; and (2) whether the individual violated a condition of a permit or failed or refused to comply with an order issued under § 521 of

the Act or an order incorporated in a final decision by the Secretary under the Act. 43 CFR 1307(b) (1994). This regulation was issued pursuant to § 518(f) of the Act.

Section 518(b) of the Act expressly provides that any hearings arising under § 518 are to be governed by § 554 of the APA. The assignment of the burden of proof by the agency to the individual by this regulation is improper and inconsistent with SMCRA and the APA. A defendant's status as a corporate officer or director and the fact of the violation are both necessary elements to impose the civil penalties called for in § 518(f) of the Act. Therefore, the agency must amend 43 CFR § 4.1307 so that the proponent of the notice or order, the agency, has the ultimate burden of persuasion on all of these critical elements.

### 5. Request for Review of Approval or Disapproval of Permit Revisions—§ 4.1366(b)

Section 4.1366(b) improperly requires the permittee to carry the ultimate burden of persuasion that a revision of their permit ordered by OSM is not justified. While a new permit applicant may bear the burden of persuasion that he has complied with all of the permitting requirements, 30 U.S.C. 1260(a); 43 CFR 4.1366(a)(1) (1994); *see also Greenwich Collieries* at 280, (holding that applicants for statutory benefits bear ultimate burden of proof on entitlement thereto); *United States Steel Corp. v. Train*, 556 F.2d 822, 834, (7th Cir. 1977) (holding that where law prohibits conduct for which applicant seeks a permit, unless applicant receives permit, applicant is proponent); the agency becomes the proponent once the applicant becomes a permittee and the agency is trying to change the status quo. *Roach v. National Transportation Safety Board*, 804 F.2d 1147, 1159 (10th Cir. 1986) (holding that in a proceeding to suspend a commercial pilot's license, the burden of proof always remained with the Administrator), *cert. denied*, 486 U.S. 1006 (1988).

Pursuant to § 511(c), 30 U.S.C. 1261(c), the regulatory authority may require reasonable revisions provided that such revision or modification shall be based upon a written finding and subject to notice and hearing requirements. Section 511(c) of SMCRA does not provide for a burden of proof different than that established under § 7(c) of the APA. Moreover, as a general matter, OSM's rules provide that administrative hearings under Federal programs for such permit revisions “shall be of record and subject to 5 U.S.C. 554 \* \* \*” 30 CFR 775.11(c) (1994). Accordingly, when the regulatory authority orders the permittee to revise its permit, the regulatory authority is the proponent of the order, and thus bears the burden of proof.

Since the burden of proof carried by the proponent of a rule or order has now been settled to mean the burden of persuasion, OHA must amend 43 CFR 4.1366(b) to place the ultimate burden of persuasion on the

agency when the agency seeks to revise a permit.

### V. Conclusion

The requested amendments and modifications to OHA's burden of proof requirements in situations where the agency is the proponent of the rule or order (and the Act does not provide for a different burden of proof) will conform the agency's regulatory review procedures to the plain language of the Act, Congressional intent, and the controlling Supreme Court decision in *Greenwich Collieries*. Moreover, these changes will correct several flaws in OSM's current approach to adjudicatory proceedings and will provide for a more consistent and equitable system of jurisprudence. Under OHA's current regulations, OSM may essentially assess penalties, revise or revoke valid permits, and/or have their notices of violation or cessation orders affirmed without proving their case by a preponderance of the evidence. As the D.C. Circuit noted:

\* \* \* in American law a preponderance of the evidence is rock bottom at the fact-finding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating “something less than the weight of the evidence.” \* \* \* the bare minimum for a finding of misconduct is the greater convincing power of the evidence. That the proceeding is administrative rather than judicial does not diminish this wholesome demand \* \* \*

*Charlton v. F.T.C.*, 543 F.2d 903, 907–8 (D.C. Cir. 1976).

Amending the OHA regulations outlined above will afford mine operators this minimum level of protection that is required by SMCRA and the APA.

Accordingly, for the reasons stated herein, the National Mining Association requests that the Director immediately grant the petition pursuant to § 201(g) of the Surface Mining Act, 30 U.S.C. 1211(g), and 30 CFR 700.12, and promptly thereafter commence an appropriate proceeding to promulgate the requested amendments and modifications in accordance with § 501 of the Surface Mining Act, 30 U.S.C. 1251, and 5 U.S.C. 553.

Respectfully submitted,  
National Mining Association,  
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By:  
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<sup>4</sup> In addition to properly allocating the burden of proof to OSM in review of suspension or revocation proceedings, this modification to 43 CFR § 4.1194 would correct an inconsistency with 43 CFR § 4.1355. In § 4.1355, OHA correctly allocated to OSM both the burden of going forward with a prima facie case and the ultimate burden of persuasion as to the existence of a demonstrated pattern of willful violations.

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 223****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****[I.D. 022803A]****Endangered and Threatened Wildlife;  
Revision of the Loggerhead Sea Turtle  
Recovery Plan**

**AGENCIES:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce, and Fish and Wildlife Service (USFWS), Interior.

**ACTION:** Notice to announce the revision of the loggerhead sea turtle recovery plan; request for information.

**SUMMARY:** We, NMFS and USFWS, announce our intention to revise the 1991 recovery plan for the loggerhead sea turtle (*Caretta caretta*), listed as threatened throughout its range, under the Endangered Species Act of 1973 (ESA), as amended. The 1991 recovery plan addressed recovery needs for the U.S. population of the loggerhead in the northwestern Atlantic Ocean and the Gulf of Mexico. A comprehensive revision of the 1991 recovery plan is needed to incorporate an abundance of new information on the biology and population status of the loggerhead and to provide an updated framework for addressing problems of the species and for prioritizing actions necessary for recovery. To ensure a comprehensive revision, we are soliciting information on the loggerhead population status and trends, threats and conservation efforts.

**DATES:** Information related to this notice must be received by May 5, 2003, to be considered in the initial stages of the revision. However, we will accept information and comments submitted after this date, for consideration at later stages in the recovery process, until further notice.

**ADDRESSES:** Information should be addressed to the National Sea Turtle Coordinator, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, FL 32216. Information may also be sent via fax to 904-232-2404 or through the internet website address for the loggerhead recovery plan at <http://northflorida.fws.gov/SeaTurtles/loggerhead-recovery/default-loggerhead.htm>.

**FOR FURTHER INFORMATION CONTACT:**

Barbara Schroeder (ph. 301-713-1401, fax 301-713-0376, e-mail [Barbara.Schroeder@noaa.gov](mailto:Barbara.Schroeder@noaa.gov)) or Sandy MacPherson (ph. 904-232-2580, fax 904-232-2404, e-mail [sandy\\_macpherson@fws.gov](mailto:sandy_macpherson@fws.gov)).

**SUPPLEMENTARY INFORMATION:****Background**

The loggerhead was listed as threatened under the ESA in 1978. Upon listing a species, section 4(f) of the ESA requires the preparation and implementation of a recovery plan and revisions to such plans as necessary. Under section 4(f)(1)(B), each plan, at a minimum, must contain: (a) A description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; (b) objective, measurable criteria that, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and (c) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

In addition, recovery plans must include a concise summary of the current status of the species and its life history, and an assessment of the factors that led to population declines and/or which are impeding recovery. The plan must also include a comprehensive monitoring and evaluation program for gauging the effectiveness of recovery measures and overall progress toward recovery.

Conservation and recovery of listed sea turtles, including the loggerhead, are the joint responsibility of NMFS and USFWS. In 1984, we issued a multi-species recovery plan for listed sea turtles in the southeastern United States region. This plan was revisited in the early 1990's culminating in an individual species recovery plan for the loggerhead in the northwestern Atlantic Ocean and Gulf of Mexico in 1991. In 2001, we initiated the process to revise the plan for a second time. An Atlantic Loggerhead Sea Turtle Recovery Team, consisting of species experts, was established to draft this revision.

Since the development of the 1991 plan, significant research has been accomplished and important conservation and recovery activities have been undertaken. As a result, we have a greater knowledge of the species and its status. These advances in our understanding of the loggerhead turtle make a second revision to the recovery plan necessary. The revised recovery

plan will serve as a basis for future recovery efforts, guide research to ensure that new information will contribute toward the greatest research needs, and enable effective monitoring to allow us to track the status of the loggerhead and the factors that may affect the species.

A schedule for completing the revised recovery plan is available on the internet website address for the loggerhead recovery plan (see ADDRESSES). Draft sections of the Work in Progress will also be made available on the internet website to provide interested stakeholders an opportunity to review and provide input on the revised plan during its development. Once all sections of the revised plan have been drafted, we will publish a notice of availability of the draft recovery plan in the **Federal Register** and will formally solicit public comment on the draft prior to finalizing the plan.

To ensure that the revised recovery plan is based on the best available data, we are soliciting information on historical and current abundance; historical and current distribution and movements; population status and trends; genetic stock identification; current or planned activities that may adversely impact the species; and ongoing efforts to protect the loggerhead in the northwestern Atlantic and Gulf of Mexico. We request that all data, information, and comments be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications.

All submissions must contain the submitter's name, address, and any association, institution, or business that the person represents. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the USFWS' Jacksonville Field Office (see ADDRESSES).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold their home address, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with

applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: March 14, 2003.

**Phil Williams,**

Chief, Endangered Species Division, National Marine Fisheries Service

Dated: March 5, 2003.

**Sam D. Hamilton,**

Regional Director, Southeast Region, Fish and Wildlife Service.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-A121

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus pycnostachyus* var. *lanosissimus* (Ventura marsh milk-vetch)

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

**ACTION:** Proposed rule; reopening of comment period and notice of availability of draft economic analysis.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the reopening of the comment period for the proposed designation of critical habitat for the threatened *Astragalus pycnostachyus* var. *lanosissimus* (Ventura marsh milk-vetch) in Ventura and Santa Barbara Counties, California, and the availability of the draft economic analysis for the proposed designation of critical habitat. We are reopening the comment period to allow all interested parties to comment simultaneously on the proposed rule and the associated draft economic analysis. Comments previously submitted on the proposed critical habitat rule that was published in the **Federal Register** on October 9, 2002 (67 FR 62926), need not be resubmitted as they will be incorporated into the public record as part of this reopened comment period and will be fully considered in the final rule.

**DATES:** We will accept public comments until April 21, 2003.

**ADDRESSES:** Comments and information should be sent to the Field Supervisor,

Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003.

Written comments may also be sent by fax to 805/644-3958 or hand-delivered to our office at the above address. You may also send comments by electronic mail (e-mail). For instructions, see Public Comments Solicited under **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Rick Farris or Anna Toline of the Ventura Fish and Wildlife Office at 805/644-1766.

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 9, 2002, we proposed to designate approximately 170 ha (420 ac) of land in three units in Ventura and Santa Barbara counties as critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* (67 FR 62926). We accepted public comments on this proposed rule until December 9, 2002. Private lands comprise approximately 33 percent of the proposed critical habitat, and State lands comprise 67 percent. No Federal lands are proposed for inclusion. No federally listed animal species are known to occur on the proposed critical habitat units.

Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Endangered Species Act of 1973, as amended (Act), with regard to actions carried out, funded, or authorized by a Federal agency. Section 4(b)(2) of the Act requires that we designate or revise critical habitat on the basis of the best scientific and commercial data available, after taking into consideration the economic and any other relevant impact of specifying any particular area as critical habitat. Based upon the previously published proposal to designate critical habitat for *Astragalus pycnostachyus* var. *lanosissimus*, we have prepared a draft economic analysis of the proposed critical habitat designation. The economic analysis shows that the proposed designation is not likely to result in any consultation costs pursuant to section 7 of the Act. As a result, the analysis concluded that the potential economic cost attributed to the proposed designation is expected to be \$0. The draft analysis is available on the Internet and from the mailing address in the **ADDRESSES** section above. We are reopening the comment period to allow all interested parties to comment simultaneously on the proposed rule and the associated draft economic analysis.

#### Public Comments Solicited

We have reopened the comment period at this time in order to accept the best and most current scientific and commercial data available regarding the proposed critical habitat determination for *Astragalus pycnostachyus* var. *lanosissimus*, and the draft economic analysis associated with the designation of critical habitat. Previously submitted written comments on the critical habitat proposal need not be resubmitted. We will accept written comments and information during this reopened comment period. If you wish to comment, you may submit your comments and materials concerning this proposal by any of several methods:

You may mail or hand-deliver written comments and information to the Field Supervisor (*see ADDRESSES* section). Hand deliveries must be made during normal business hours.

You may send comments by electronic mail (e-mail) to: [fw1venturamilkvetch@fws.gov](mailto:fw1venturamilkvetch@fws.gov). If you submit comments by e-mail, please submit them as an ASCII file and avoid the use of any special characters and any form of encryption. Also, please include "Attn: RIN 1018-A121" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact the Ventura Fish and Wildlife Office at 805/644-1766.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat and the draft economic analysis, will be available for inspection, by appointment, during normal business hours at the address above. You may obtain copies of the draft economic analysis on the Internet at <http://www.r1.fws.gov>, or by writing to the Field Supervisor at the address above.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this request prominently at the beginning of your comments. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions for organizations or businesses, and from individuals