

May 9, 2002

Note

To: Reviewers

From: Assistant Solicitor for Fish and Wildlife

Subject: Draft final rule to reclassify certain populations of vicuña as threatened species.

Upon review of the draft final rule to reclassify vicuña populations as threatened species, this Office surmised the draft notice subject to certain corrections. One of those corrections called for the deletion of all references to the economic analysis requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., and of other statutes and executive orders from the preamble of the draft notice. These changes are required because the Fish and Wildlife Service was expressly forbidden by Congress through the Endangered Species Act Amendments of 1982 from considering economic effects when determining the eligibility of species for listing as endangered or threatened species under Section 4 of the ESA. In the Conference Report that accompanied the 1982 Amendments, the Congress clearly noted that a primary purpose of the amendments to Section 4 was to clarify that "economic considerations have no relevance to determinations regarding the status of species and the economic analysis requirements of Executive Order 12291 [the predecessor of E.O. 12866], and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process." H.R. Conf. Rep. No. 835, 97<sup>th</sup> Cong., 2d Sess. 20 (1982). The prescription of protective regulations under authority of Section 4(d) of the ESA is a necessary phase of the Section 4 listing process (unless the Service is comfortable with allowing the default protection offered by 50 C.F.R. 17.31 to apply in place of a special rule), and the inclusion of protective regulations within the final rule that reclassifies the four vicuña populations as threatened species does not remove or affect the statutory mandate that the Service make its listing determination solely on the basis of the best available biological or trade data. See ESA, § 4(b)(1).

Please call me at 208-3449 if you have any questions on this point.



Michael Young