

require that such records be kept for any vehicles. However, buyers of heavy vehicles are free to insist that maintenance records be made available to them at the time of, and as a condition of, purchase of such vehicles, just as buyers of automobiles, light trucks, and other motor vehicles not exempt from odometer disclosure ensure that the odometer disclosure statement is available at the time of purchase. Removing the odometer certification exemption would not alleviate this concern over maintenance records, and purchasers have sufficient market power to mandate records before they purchase the vehicles in question.

In NHTSA's experience, there has not been a significant odometer fraud problem involving heavy trucks or buses. The agency receives very few complaints pertaining to these types of vehicles. Eliminating the exemption for these vehicles would impose costs on state and the sellers of such vehicles that, in the aggregate, are not insignificant. Moreover, expenditure of agency resources on a rulemaking to eliminate this exemption would divert those resources from the agency's regulatory priorities, which involve measures that may save numerous of lives on the nation's highways.

For the foregoing reasons, the petition is denied.

Issued on: January 18, 2006.

**Daniel C. Smith,**

*Associate Administrator for Enforcement.*

[FR Doc. E6-858 Filed 1-24-06; 8:45 am]

BILLING CODE 4910-59-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; Petitions To Reclassify the Florida Scrub-Jay From Threatened to Endangered

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

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on two petitions to reclassify the Florida scrub-jay (*Aphelocoma coerulescens*) from threatened to endangered under the Endangered Species Act of 1973, as amended (Act). We find the petitions do not provide substantial scientific information indicating that reclassification of the Florida scrub-jay

may be warranted. Therefore, we will not initiate a further status review in response to these petitions. However, the public may submit to us any new information that becomes available concerning the status of the species or threats to it at any time.

**DATES:** The administrative finding announced in this document was made on January 25, 2006.

**ADDRESSES:** Data, comments, information, or questions concerning these petitions should be sent to the Field Supervisor, Jacksonville Ecological Services Office, 6620 Southpoint Drive South, Suite 310, Jacksonville, FL 32216; or by electronic mail (e-mail) to [floridascrubjay@fws.gov](mailto:floridascrubjay@fws.gov). The petition finding, supporting information, and comments are available for public inspection, by appointment, during normal business hours at the above address.

#### FOR FURTHER INFORMATION CONTACT:

David L. Hankla, Field Supervisor, at the above address (telephone 904/232-2580; facsimile 904/232-2404).

#### SUPPLEMENTARY INFORMATION:

#### Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

This finding summarizes information included in the petitions and information available to us at the time of the petition review. Under section 4(b)(3)(A) of the Act and our regulations in 50 CFR 424.14(b), our review of a 90-day finding is limited to a determination of whether the information in the petition meets the "substantial scientific information" threshold. Our standard for substantial information with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)).

We have to satisfy the Act's requirement that we use the best available science to make our decisions. However, we do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, at the 90-day finding stage, we accept the petitioner's sources and characterizations of the information, to the extent that they appear to be based

on accepted scientific principles (such as citing published and peer reviewed articles, or studies done in accordance with valid methodologies), unless we have specific information to the contrary. Our finding considers whether the petition states on its face a reasonable case for reclassification. Thus our 90-day finding expresses no view as to the ultimate issue of whether the species should be reclassified.

#### Petitions

On March 13, 2002, we received a petition, dated March 13, 2002, from John A. Fritschie on behalf of the Partnership for a Sustainable Future of Brevard County, Florida; Indian River Audubon Society; Friends of the Scrub; Sierra Club Turtle Coast Group; Conradina Chapter of the Florida Native Plant Society; Sea Turtle Preservation Society; League of Women Voters of the Space Coast, Inc.; and Barrier Island Preservation Association, Inc. (hereafter referred to as the 2002 petition). The 2002 petition requested that the Florida scrub-jay be reclassified from threatened to endangered and that critical habitat be designated with reclassification. The 2002 petition contained supporting information regarding the species' taxonomy and ecology, historical and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the 2002 petition in a letter to Mr. Fritschie, dated April 12, 2002.

On May 1, 2003, we received a petition, dated April 22, 2003, from Brett M. Paben, WildLaw Florida Office, on behalf of Save Our Big Scrub, Inc. (hereafter referred to as the 2003 petition). The 2003 petition requested that the Florida scrub-jay be reclassified from threatened to endangered and that critical habitat be designated with reclassification. The 2003 petition contained supporting information regarding the species' taxonomy and ecology, historical and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the 2003 petition in a letter to Mr. Brett Paben, dated June 20, 2003.

On March 14, 2004, several of the petitioners filed a complaint (*Save Our Big Scrub, Inc. v. Norton*, Case No. 6:04cv349-Orl-28KRS) (M.D. Fla.) alleging our failure to make 90-day and 12-month petition findings on reclassifying the Florida scrub-jay and to revise the critical habitat designation. In a stipulated settlement agreement adopted by the court on December 20, 2004, we agreed to submit one 90-day finding for both petitions to the **Federal Register** by January 15, 2006, and to

complete, if applicable, a combined 12-month finding for both petitions by January 15, 2007. A decision on whether or not to designate critical habitat will be considered if reclassification is warranted.

On August 1, 2005, the Service received two supplements to the 2003 petition (dated July 12, 2005 and July 14, 2005), containing additional information for our consideration in making a finding on the 2003 petition. References to the 2003 petition in the following discussion includes the supplements.

### Species Information

For more information on the Florida scrub-jay, please refer to the final listing rule published in the **Federal Register** on June 3, 1987 (52 FR 20715), and the most recent recovery plan for this species (see the **ADDRESSES** or **FOR FURTHER INFORMATION CONTACT** sections, above, for information on how to obtain a hard or electronic copy of the plan).

The Florida scrub-jay is in the order Passeriformes and the family Corvidae. It was considered a subspecies (*A. c. coerulescens*) for several decades (AOU 1957). It regained recognition as a full species (Florida scrub-jay, *Aphelocoma coerulescens*) from the American Ornithologists' Union (AOU 1995) because of genetic, morphological, and behavioral differences from the other members of this group: The western scrub-jay (*A. californica*) and the island scrub-jay (*A. insularis*). In this notice, Florida scrub-jays will be referred to as scrub-jays.

Scrub-jays are about 25 to 30 centimeters (cm) (10 to 12 inches (in)) long and weigh about 77 grams (3 ounces). They are similar in size and shape to blue jays (*Cyanocitta cristata*) but differ significantly in coloration (Woolfenden and Fitzpatrick 1996a). It lacks the crest, conspicuous white-tipped wing and tail feathers, black barring, and bridle of the blue jay. The scrub-jay's head, nape, wings, and tail are pale blue, and its body is pale gray on its back and belly. Its throat and upper breast are lightly striped and bordered by a pale blue-gray "bib" (Woolfenden and Fitzpatrick 1996a).

Scrub-jays forage mostly on or near the ground, often along the edges of natural or man-made openings. They visually search for food while hopping or running along the ground beneath the scrub or by jumping from shrub to shrub. Insects, particularly orthopterans (such as locusts, crickets, grasshoppers, beetles) and lepidopteran (butterfly and moth) larvae, form most of the animal diet throughout most of the year (Woolfenden and Fitzpatrick 1984).

Small vertebrates are eaten when encountered, including frogs and toads, lizards, snakes, rodents, and some young birds. Acorns are the principal plant food (Woolfenden and Fitzpatrick 1984; Fitzpatrick *et al.* 1991).

Scrub-jays have a social structure that involves cooperative breeding, a trait that the other North American species of scrub-jays do not show (Woolfenden and Fitzpatrick 1984, 1990). Scrub-jays live in families ranging from two birds (a single mated pair) to extended families of eight adults (Woolfenden and Fitzpatrick 1984) and one to four juveniles.

Scrub-jay pairs occupy year-round, multi-purpose territories (Woolfenden and Fitzpatrick 1978, 1984; Fitzpatrick *et al.* 1991). Territory size averages 9 to 10 hectares (ha) (22 to 25 acres (ac)) (Woolfenden and Fitzpatrick 1990; Fitzpatrick *et al.* 1991), with a minimum size of about 5 ha (12 ac) (Woolfenden and Fitzpatrick 1984; Fitzpatrick *et al.* 1991). Persistent breeding populations of scrub-jays exist only where there are scrub oaks in sufficient quantity and form to provide an ample winter acorn supply, cover from predators, and nest sites during the spring (Woolfenden and Fitzpatrick 1996b).

The scrub-jay has specific habitat needs. It is endemic to peninsular Florida's ancient dune ecosystems or scrubs, which occur on well-drained to excessively well-drained sandy soils (Laessle 1958, 1968; Myers 1990; Fitzpatrick *et al.* unpubl. data). This community type is adapted to nutrient-poor soils, periodic drought, and frequent fires (Abrahamson 1984). Xeric oak scrub on the Lake Wales Ridge is predominantly made up of four species of stunted, low-growing oaks: sand live oak (*Quercus geminata*), Chapman oak (*Q. chapmanii*), myrtle oak (*Q. myrtifolia*), and scrub oak (*Q. inopina*) (Myers 1990). In optimal habitat for scrub-jays, these oaks are 1 to 3 m (3 to 10 ft) high, interspersed with 10 to 50 percent unvegetated, sandy openings, and a sand pine (*Pinus clausa*) canopy of less than 20 percent (Woolfenden and Fitzpatrick 1991). Trees and dense herbaceous vegetation are rare. Other vegetation noted along with the oaks includes saw palmetto (*Serenoa repens*), scrub palmetto (*Sabal etonia*), and such woody shrubs as Florida rosemary (*Ceratiola ericoides*) and rusty lyonia (*Lyonia ferruginea*).

### Status and Distribution

The Florida scrub-jay was federally listed as threatened in June 3, 1987, primarily because of habitat fragmentation, degradation, and loss (52 FR 20715). A threatened species is one

that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Scrub habitats associated with Florida's barrier islands, mainland coasts, and Lake Wales Ridge are some of the most imperiled natural communities in the United States, with estimates of habitat loss since pre-European settlement times ranging from 70 to more than 80 percent (Woolfenden and Fitzpatrick 1996a; Fitzpatrick *et al.* unpubl. data). Historically, oak scrub occurred as numerous isolated patches in peninsular Florida. These patches were concentrated along both the Atlantic and Gulf coasts and on the central ridges of the peninsula (Davis 1967). Today, only relict patches of xeric oak scrub remain. Fitzpatrick *et al.* (1994) believed that fire suppression was just as responsible as habitat loss in the decline of the scrub-jay, especially in the northern third of its range. Cox (1987) noted local extirpations and major decreases in numbers of scrub-jays and attributed them to the clearing of scrub for housing and citrus groves. The greatest population decline had occurred during the early 1980s with an estimated 25 to 50 percent reduction in scrub-jay numbers (Fitzpatrick *et al.* 1994).

A Statewide scrub-jay census was last conducted in 1992–1993, at which time there were an estimated 4,000 pairs of scrub-jays in 31 counties in Florida (Fitzpatrick *et al.* 1994). The scrub-jay was considered extirpated in 10 counties (Alachua, Broward, Clay, Dade, Duval, Gilchrist, Hernando, Hendry, Pinellas, and St. Johns), and was considered functionally extinct in an additional 5 counties (Flagler, Hardee, Levy, Orange, and Putnam), where 10 or fewer pairs remained. Recent information indicates that there are at least 12 to 14 breeding pairs of scrub-jays located within Levy County, higher than previously thought (K. Miller, FWC, in litt. 7/16/04), and there is at least one breeding pair of scrub-jays remaining in Clay County (K. Miller, FWC, in litt. 7/16/04). A scrub-jay has been documented in St. Johns County as recently as 2003 (J.B. Miller, FDEP, in litt. 5/13/03). In 1992–1993, population numbers in 21 of the counties were below 30 or fewer breeding pairs (Fitzpatrick *et al.* 1994).

Results from a population viability analysis indicated that a population of scrub-jays with fewer than 10 breeding pairs had a 50 percent probability of extinction over 100 years (Stith 1999). Populations with at least 100 pairs had a 2 to 3 percent chance of extinction. Results from this population viability analysis indicated that 3 of 21

metapopulations identified had enough breeding pairs to have a low extinction risk and an estimated 99 percent probability of survival over 100 years (Stith 1999).

### Threats Analysis

Pursuant to section 4 of the Act, we may determine whether a species, subspecies, or distinct population segment of vertebrate taxa is endangered or threatened because of any of the following five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. In making this 90-day finding, we evaluated whether the scientific information presented and referenced in the petitions would lead a reasonable person to believe that the species may now meet the definition of endangered (that is, in danger of extinction throughout all or a significant portion of its range) instead of threatened, and thus reclassification may be warranted. Our evaluation of these threats, based on information provided in the petition and available in our files, is presented below.

#### *A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*

##### Information Provided in the Petitions

The 2003 petition stated that, historically, scrub habitat occurred as large contiguous patches, some more than hundreds of miles (Cox 1987). Today, only relict patches remain. The 2002 petition stated that most of the remaining populations of scrub-jays are vulnerable to extinction due to low population size and the continued loss, degradation, and fragmentation of scrub habitat. The 2002 and 2003 petitions estimate that the historic range of the scrub-jay has decreased anywhere from 70 to 90 percent, and that these losses of habitat equate to equal loss of scrub-jays. The 2002 petition contained no references for the estimate provided, but the 2003 petition referenced Bergen (1994). The 2003 petition states that habitat losses are a result of conversion to citrus and residential development (Fernald 1989; Fitzpatrick *et al.* 1991) due to Florida's rapidly growing human population (USCB 1995, 1997, undated; FHDC undated). The population growth and resulting urbanization bring transportation projects, and any increase in roads, traffic volumes, and speeds

through scrub-jay habitat are significant concerns for the continued survival of the scrub-jay (Noss undated; Mumme *et al.* 2000).

As an example of habitat loss, the 2002 and 2003 petitions noted the vulnerability of the central Brevard County, Florida, population of scrub-jays to human population expansion there. The petitioners stated that the area provides the necessary link between the relatively large southern population and potentially large northern population of scrub-jays and that loss of the link will put the core population at risk of extinction (Breining *et al.* 2001, 2003). As other examples of habitat loss, the 2003 petition also expressed concern about the decline in the scrub-jay populations in and around the Cedar Key State Reserve in Levy County (Miller *et al.* 2003) and scrub-jay population declines in southwest Florida (Service 1999).

##### Evaluation of Information in the Petitions

While Cox (1987) did discuss the historical range of scrub-jays, he did not make any statements about how scrub historically was situated within the state of Florida, as stated in the 2003 petition. The 2002 petition did not provide documentation that the remaining populations of scrub-jays are more vulnerable to extinction due to a reduced population size, and the claim of continued loss, degradation, and fragmentation of scrub habitat was provided with no supporting documentation.

In the 2002 petition, no reference was given to support estimates of scrub loss, but the 2003 petition cited Bergen (1994). However, Bergen (1994) made no estimates of scrub loss Statewide, because his work dealt only with Brevard County, Florida. Within Brevard County, however, Bergen (1994) estimated that 68.8 percent of scrub habitat was lost between 1943 and 1991. Bergen (1994) does not provide an estimate of the amount of scrub lost in Brevard County between 1987 (the year that the scrub-jay was listed as threatened) and 1991, the year of the most recent information utilized in his review. Other studies report that the majority of the habitat loss occurred prior to 1987 and was one of the reasons the scrub-jay was listed as threatened. Cox (1987) relayed a 1980 report that the number of scrub-jays in Brevard County had declined sharply since 1955. Further, Fitzpatrick *et al.* (1994) report that the greatest population decline had occurred during the early 1980s with an estimated 25 to 50 percent reduction in scrub-jay numbers.

The petition also stated that the scrub habitat rangewide has been fragmented by agriculture and commercial and residential development (Fernald 1989; Fitzpatrick *et al.* 1991). No substantial information was presented by the petitioner that indicates what proportion of the scrub loss has occurred since the time of the scrub-jays' listing, nor has the petitioner provided justification that as a result of the land-clearing activity, and destruction and fragmentation of scrub habitat, the species is now in danger of extinction throughout all or a significant portion of its range.

The 2003 petition cites U.S. Census Bureau and Florida Housing Data Clearinghouse figures to support its claim that the extensive loss of scrub-jay habitat is a result of Florida's rapidly growing human population. These data, however, do not provide an analysis of whether or not the new development is occurring in scrub habitat. Further, the 2003 petition acknowledged that a growing human population alone is not proof that scrub habitat has been destroyed. There has been no substantial information presented by the petitioner that the growing human population of Florida is placing the scrub-jay in danger of extinction throughout all or a significant portion of its range.

Both petitions stated that along with population growth and urbanization comes an increase in transportation projects. Roadsides often provide attractive habitat for scrub-jays to hunt insects and cache acorns, and scrub-jay territories often spread across roads (meaning that the scrub-jays will frequently cross the roads). The 2003 petition alleged that the construction of high-speed roads adjacent to scrub habitat occupied by scrub-jays has been shown to impact negatively the scrub-jay populations living there (Mumme *et al.* 2000). However, Mumme *et al.*'s work looked at only a small portion of one high-speed road, so we are unable to draw conclusions about the rangewide effect of this threat and whether the scrub-jay is threatened with extinction because of it.

As examples of loss of scrub habitat and scrub-jay populations since the species was listed in 1987, the 2002 and 2003 petitions discuss in detail human impacts to scrub-jay habitat serving as critical connectors between metapopulations in central Brevard County, Florida (Breining *et al.* 2001, 2003). However, Breining *et al.*'s (2001, 2003) work only focused on the non-Federal lands in Brevard and a small portion of Indian River County. Regarding the risk of extinction for this

portion of the range, Breininger *et al.* (2001) acknowledges that their “ideas about population dynamics are untested and insufficient data on edge effects, density dependence, and metapopulation dynamics provide much uncertainty.” The 2003 petition also raised concerns about loss of scrub habitat and scrub-jays in the area in and around Cedar Key State Reserve (Miller *et al.* 2003) and the scrub-jay population declines in southwest Florida (FWS 1999). While we acknowledge that some scrub-jay populations have declined, the petitioners have not provided substantial information indicating that the species is now in danger of extinction throughout all or a significant portion of the range.

While a variety of activities that affect scrub habitat are occurring in Florida (such as agriculture and development (Cox 1987; Fernald 1989; Fitzpatrick *et al.* 1991; Bergen 1994; Mumme *et al.* 2000; Breininger *et al.* 2001, 2003; Miller *et al.* 2003)), the petitions do not provide substantial information that these activities, either singly or in combination, may be destroying or modifying the Florida scrub-jay’s habitat to the extent that the species is now in danger of extinction throughout all or a significant portion of the species’ range. Also, with some exceptions, the petitions fail to provide scientific documentation to demonstrate that the areas where habitat loss has occurred are also the areas where scrub-jay populations occur.

Although the limited amount of scrub habitat in Florida makes this species vulnerable to additional habitat loss and fragmentation, the petitions do not address what the effects of these changes have been on scrub-jay population numbers across the range of the species since the time the species was listed. Based on the preceding discussion, we do not believe that substantial information has been presented by the petitioners indicating that the present or threatened destruction, modification, or curtailment of habitat or range may, either singularly or in combination with other factors, rise to the level at which the scrub-jay is now in danger of extinction throughout all or a significant portion of its range and should be reclassified from threatened to endangered status.

#### *B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

##### Information Provided in the Petitions

The petitions cited the original listing rule (52 FR 20715) as evidence that

malicious shooting of the birds by vandals continues to pose a threat to the scrub-jay.

##### Evaluation of Information in the Petitions

The information presented is not different from that addressed in the original listing rule and the petitioners did not present any information about how this threat has affected population viability. Therefore, the petitions did not present substantial information indicating that the scrub-jay may now be in danger of extinction throughout all or a significant portion of its range as a result of malicious shooting by vandals.

#### *C. Disease or Predation*

##### Information Provided in the Petitions

The 2003 petition stated that scrub-jay populations are affected by the frequency and severity of catastrophic mortalities (Fitzpatrick *et al.* unpubl. data) and that epidemic disease is the only known catastrophe that affects scrub-jay populations (Fitzpatrick *et al.* 1991). Both petitions expressed concern for the arrival of West Nile virus in Florida and its potential negative impacts on scrub-jays, since scrub-jays are in the same family (Corvidae) as are blue jays, American crows, fish crows, and Western scrub-jay; all of these species have been negatively affected by West Nile virus (Root 1996; Allison 2001; CDC undated; USGS 2003). In addition, the 2003 petition expressed concern for scrub-jays’ vulnerability to predation from domestic animals, particularly feral cats (Fitzpatrick *et al.* unpubl. data; FWC 2001; ABC undated).

##### Evaluation of Information in the Petitions

We acknowledge the vulnerability of scrub-jays to catastrophic mortalities (Woelfenden and Fitzpatrick 1984; Breininger *et al.* 1999; Stevens and Hardesty 1999; Fitzpatrick *et al.* unpubl. data), especially that resulting from epidemic disease (Woelfenden and Fitzpatrick 1984; Fitzpatrick *et al.* 1991; Breininger *et al.* 1999; Stevens and Hardesty 1999; Breininger *et al.* 2001, 2003). The arrival of the West Nile virus in Florida in 2001 (Stark and Kazanis 2001; Wallace 2001; Breininger *et al.* 2001, 2003) is of particular concern because of the scrub-jay’s close familial relationship to other species which have been negatively impacted by this virus (CDC undated), even though it has not been confirmed that scrub-jays have been affected in Florida (Stark and Kazanis 2001; Collins *et al.* 2002, 2003; Rivers *et al.* 2004). Local die-offs of scrub-jays have been reported since the

arrival of West Nile Virus in Florida, with the causes not yet determined (Breininger *et al.* 2001, 2003). The petitioners have presented no substantial information that the scrub-jay may now be in danger of extinction throughout all or a significant portion of its range as a result of the arrival of West Nile virus in Florida.

Scrub-jays are vulnerable to predation by feral and domestic cats, as alleged in the petitions (Fitzpatrick *et al.* 1991; Bowman and Averill 1993; Bergen 1994; Breininger *et al.* 1995, 2001; Woelfenden and Fitzpatrick 1996a, 1996b; Breininger 1999; Toland 1999; Christman 2000). These references, however, do not discuss the extent of the threat by feral and domestic cats to scrub-jays. Woelfenden and Fitzpatrick (1996b) state that in suburban habitats, house cats are “important” predators to young and adult scrub-jays. Fitzpatrick *et al.* (1991) suspect that domestic cats supported by human food offerings could eliminate a small local population of scrub-jays, but there has not been any quantitative work done on this issue to date. Thus, the petitioner did not provide substantial information that such predation has placed the scrub-jay in danger of extinction throughout all or a significant portion of its range.

#### *D. Inadequacy of Existing Regulatory Mechanisms*

##### Information Provided in the Petitions

##### Service Regulatory Process

Both petitions claim that, because critical habitat has not been designated for the scrub-jay, the section 7 consultation process of the Act does not consider impacts to unoccupied suitable habitat and the loss of both occupied and adjacent unoccupied suitable habitat (Service 2002a cited in the 2002 petition; FEAR 2003 cited in the 2003 petition). The 2003 petition claims that without the designation of critical habitat, section 7 consultation with the U.S. Army Corps of Engineers (USACE) has proven to be difficult for the protection of unoccupied habitat of listed species (*Defenders of Wildlife v. Ballard*, 73F. Supp.2d at 1094 (D. Ariz. 1999), concerning pygmy owls; *Fund for Animals v. Rice*, 85 F.3d 535 (11th Cir. 1996), concerning Florida panthers). The 2003 petition, therefore, asks that critical habitat be designated for the scrub-jay.

The 2002 petition contends that the USACE is failing to consider the cumulative impact of its actions (Service 2001b). Both petitions express concern for the Service regulatory program regarding scrub-jays (Fritschie 2002, Attachment B; Service 2003), with

the 2002 petition citing the Plantation Point biological opinion as an example (Service 2001b; Fritschie 2002, Attachment B). The 2003 petition contends that the location of incidental take permits issued between 1994 and 2002 demonstrates that a lot of development activity is occurring in scrub-jay habitat without the necessary permits required by the Act (USCB 1995, 1997; Service 2003). The 2002 petition further cites the failure of the Service to develop a county-wide approach to deal with scrub-jay mitigation as evidence of the inadequacy of existing regulatory mechanisms in protecting the scrub-jay (Service 2001a). The 2003 petition contends that the Service fails to follow its own mitigation guidance when consulting under section 7 of the Act (Service 1999; 2002b) and that the Service doesn't hold local counties responsible for illegal taking of scrub-jays (Service 1991a, 1991b, 1992, 1993, 1998; Brevard County 1996; PSF 1998). The petitioners believe that, as a result, local governments do not require Federal permits prior to issuing local ones (Service 1994a, 1994b), which could facilitate unauthorized take of scrub-jays.

The 2003 petition claims that, despite Federal agencies' knowledge of the presence of scrub-jays on lands they manage, scrub-jay numbers have continued to decline on those lands since the species was listed as threatened (52 FR 20715). In the Ocala National Forest, for example, the petitioner states that there has been a 31 percent decrease in scrub-jays since the estimate made during the period of 1981 to 1983 (U.S. Forest Service (USFS) 2002; Cox 1987). One reason hypothesized by the petitioner for the decline is that naturally-occurring fires are suppressed at Ocala National Forest (outside of congressionally designated wilderness areas) and by the State of Florida (USFS 1999; F.S. section 590.01).

In addition, both petitions contend that the scrub-jay recovery plan needs to be revised and implemented because it is out-of-date.

#### State Regulatory Process

The 2003 petition contends that Florida law does not protect scrub-jays from habitat destruction, which is the major cause of the species' decline in Florida (F.A.C. 68A-27.004(1)(a); 52 FR 20717). In addition, the 2003 petition claims that in 1999, the Florida Fish and Wildlife Conservation Commission (FWC) adopted a new process for classifying species as endangered, threatened, or species of special concern

(IUCN 1994); therefore, it is questionable whether the scrub-jay still classifies as a threatened species under the Florida statute. The International Union for Conservation of Nature and Natural Resources (IUCN) classifies the scrub-jay as "vulnerable" (IUCN 2002), which would be the equivalent of a "species of special concern" for the purposes of the FWC classification, meaning that the scrub-jay would receive less protection if the status is subsequently adopted by FWC. Such a designation would allow catastrophic losses to the scrub-jay population before it could be classified as threatened by the FWC.

#### Evaluation of Information in the Petitions

##### Service Regulatory Process

Under the section 7 consultation process, Federal agencies are required to consult with us when their actions may affect a listed species. Therefore, impacts to unoccupied habitat may not be considered unless the unoccupied habitat has been designated as critical habitat for the species under consultation. The petitions, therefore, present a factual statement about the Act. The 2002 petition cites a letter from the Service, in which we acknowledge that there are many areas with potentially suitable scrub habitat that have become overgrown due to fire suppression. Most of these sites are unoccupied by scrub-jays due to the unsuitable condition of the site's habitat, and therefore, the consultation requirement is not triggered. The 2003 petition cites court cases that do not relate specifically to the scrub-jay. The petitions do not provide substantial information showing a clear link between the section 7 process and their assertion that the species should be reclassified. We do, however, address the petitions' claims regarding threats of habitat destruction and fragmentation under Factor A. We also note that designation of unoccupied areas as critical habitat would not impose any requirement that land owners or land managers not suppress fires or conduct prescribed burns on that land.

The Service and the USACE have permitted numerous developments in central Brevard County and other portions of the species' range, as claimed by the petitioners. These permits are processed in accordance with applicable laws, regulations, and agency policies. The 2002 petition cited a project for Plantation Point (Service 2002b; Fritschie 2002, Attachment B) as evidence that development in central Brevard County that may affect scrub-

jays continues to occur. The court determined that the biological opinion for this project followed the provisions of the Act (U.S. District Court 2002). Further, the claim raised by the 2002 petition is not different from that addressed in the 1987 final rule listing the species, because section 7 of the Act has not been radically changed since that time. As for the evidence cited by the 2003 petition (Service 2003), that 28 incidental take permits had been issued by the Service for projects involving scrub-jay habitat between 1994 and 2002 and that additional applications have been received and processed to date, this information is factual. However, cumulative impacts of these actions are addressed as part of compliance with the National Environmental Policy Act (42 U.S.C. 4371 *et seq.*) and in the individual intra-Service section 7 consultations conducted on the actions. The petitions do not provide substantial information showing a link between these regulatory actions and their assertion that the scrub-jay should be reclassified to endangered. We do, however, address the petitions' claims regarding threats of habitat destruction and fragmentation under Factor A.

The Service has a rangewide approach to scrub-jay mitigation for development activity, which has been revised most recently in 2004 (Service 2004). The 2003 petition claims that we fail to follow our own mitigation guidance for impacts to scrub-jays, as shown in the outcome of the Plantation Point project (Service 1999, 2002b). The mitigation guidelines referenced (Service 1999) are written for incidental take permit actions under section 10(a)(1)(B) of the Act, which requires that impacts be avoided, minimized, and mitigated to the maximum extent practicable. The project used as an example to demonstrate our failure to follow the guidelines, however, was not processed under the provisions of section 10, but rather section 7. Under section 7, the action agency is required only to minimize impacts; the measures outlined in the mitigation guidance are utilized for section 7 subject to the "ultimate determination of acceptability by the action agency" (Service 2002b, 2004). The petitioners have not presented substantial information that indicates that as a result of this mitigation guidance, the scrub-jay is now in danger of extinction throughout all or a significant portion of its range.

All counties in which scrub-jays are present, as well as many of the local municipalities, have been advised of their responsibilities under the Act. Even though Brevard County did not

adopt a regional HCP, numerous individual permit applications have been reviewed by the Service. The petition does not provide substantial information to support their claim that take is occurring as a result of local governments that are not requiring Federal permits. Further, the petition does not identify a clear link between the claim and the need to reclassify the species to endangered status.

The 2003 petition cites the Ocala National Forest as an example of the inadequacies of regulatory programs, citing a 31 percent drop in the number of scrub-jays from the early 1980s to the early 2000s. (Cox 1987; USFS 2002). We contend, however, that the survey methodologies cited in these two studies were different from one another and cannot be compared to demonstrate a drop in scrub-jay numbers. Further, no substantial information was presented by the petitioner that population declines on Federal lands in Florida are placing the scrub-jay in danger of extinction throughout all or a significant portion of its range.

Finally, both the 2002 and 2003 petitions contend that the scrub-jay recovery plan is in need of revision. Recovery plans are not regulatory documents; therefore, this claim is not relevant to this factor. Further, the petitions do not provide substantial information that as a result of the lack of revision to the scrub-jay recovery plan, the scrub-jay is now in danger of extinction throughout all or a significant portion of its range. We note, however, that the recovery plan is being revised.

#### State Regulatory Process

The 2003 petition's contention that Florida law does not protect scrub-jays from habitat destruction is not different from that addressed in the 1987 final rule. In addition, while the information that a new process has been adopted by FWC for classifying species as endangered, threatened, or species of special concern is factual, according to the most recent list of imperiled species for the State of Florida (FWC 2004), the scrub-jay is still listed as threatened. The petition provides no substantial information that indicates as a result of the existing State laws, the scrub-jay is now in danger of extinction throughout all or a significant portion of its range.

#### *E. Other Natural or Manmade Factors Affecting the Species Continued Existence*

##### Information Provided in the Petitions

Both the 2002 and 2003 petitions claim that the fire regime in scrub habitat has been altered, which has

negatively affected scrub-jays (TNC 2001). Scrub-jay habitat, if not continuously managed, can quickly become population sinks for scrub-jays, creating difficulties for land managers and negatively impacting scrub-jays (Breininger and Carter 2003; Breininger and Oddy 2004). Throughout the northern portion of the species' range, the petitioners attribute population declines of scrub-jays to scrub fragmentation and degradation, due primarily to widespread fire suppression (Cox et al. 1994). In addition, the 2003 petition claims that a previous model for the scrub-jay (Root 1998) may have been too optimistic, because the possibility that certain kinds of impacts of environmental noise (such as loud sounds) on scrub-jays was ignored (Heino and Sabadell 2003).

##### Evaluation of Information in the Petitions

We share opinions provided in both the 2002 and 2003 petitions regarding the negative effects to scrub-jays from fire suppression (Breininger and Carter 2003; Breininger and Oddy 2004). However, fire suppression was considered a threat to the scrub-jay when the species was first listed as threatened in 1987 (52 FR 20715). The petitions provided no substantial information that indicates as a result of fire suppression, the scrub-jay is now in danger of extinction throughout all or a significant portion of its range.

The work presented by Heino and Sabadell (2003) indicates that ignoring the effects of environmental noise on scrub-jays in population viability analysis can result in serious biases to a model. However, the petitioner did not provide substantial information that by not considering environmental noise, the scrub-jay is now in danger of extinction throughout all or a significant portion of its range.

##### Finding

We have reviewed the petitions and literature cited in the petitions, and we have evaluated that information in relation to other pertinent literature. After this review and evaluation, we find the petitions do not present substantial scientific information to indicate that reclassification of the Florida scrub-jay from threatened to endangered may be warranted at this time. Although we will not be commencing a status review in response to these petitions, we will continue to monitor the species' population status and trends, potential threats, and ongoing management actions that might be important with regard to the

conservation of the scrub-jay across its range.

We encourage interested parties to continue to gather data that will assist with the conservation of the species. If you wish to provide information regarding scrub-jays, you may submit your information or materials to the Field Supervisor, Jacksonville Fish and Wildlife Office (see **ADDRESSES** section).

##### References Cited

A complete list of all references cited herein is available, upon request, from the Jacksonville Fish and Wildlife Office (see **ADDRESSES** section).

##### Author

The primary author of this notice is Dawn Zattau, U.S. Fish and Wildlife Service, Jacksonville Field Office (see **ADDRESSES** section).

##### Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 13, 2006.

**Matt Hogan,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 06-551 Filed 1-24-06; 8:45 am]

**BILLING CODE 4310-55-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-AT38**

#### **Endangered and Threatened Wildlife and Plants; Designating the Greater Yellowstone Ecosystem Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife**

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

**ACTION:** Proposed rule; Notice of public hearing.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the location and time of a public hearing to receive public comments on the proposal to establish a distinct population segment (DPS) of the grizzly bear (*Ursus arctos horribilis*) for the greater Yellowstone Ecosystem and surrounding area and to remove the Yellowstone DPS from the List of Threatened and Endangered Wildlife.