



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS–HQ–IA–2021–0004; FF09A30000–212–FXIA16710900000]

RIN 1018–BF60

### Endangered and Threatened Wildlife and Plants; Regulations Pertaining to the American Alligator (*Alligator mississippiensis*)

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS or Service), are proposing to amend regulations concerning American alligators (*Alligator mississippiensis*) by revising provisions pertaining to interstate and foreign commerce. We are proposing these changes to increase clarity and eliminate unnecessary regulation while at the same time maintaining what is necessary and advisable for the conservation of this and other endangered or threatened crocodilian species under section 4(d) of the Endangered Species Act of 1973, as amended.

**DATES:** You may comment on this proposed rule until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments by one of the following methods:

- Electronically using the Federal eRulemaking Portal: <http://www.regulations.gov> in Docket No. FWS–HQ–IA–2021–0004 (the docket number for this rulemaking).
- U.S. mail: Public Comments Processing, Attn: FWS–HQ–IA–2020–XXXX; U.S. Fish and Wildlife Service Headquarters, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will not accept e-mail or faxes. Comments and materials we receive, as well as supporting documentation, will be available for public inspection on <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Pamela Hall Scruggs, Chief, Division of Management Authority, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: IA, Falls Church, VA 22041–3803; telephone 703–358–2095 or email: [managementauthority@fws.gov](mailto:managementauthority@fws.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The American alligator (*Alligator mississippiensis*) is an iconic U.S. animal with a history of both drastic decline and complete recovery. As a result of State and Federal cooperation, its recovery is one of the most prominent successes of the Nation’s endangered species program.

The American alligator is a large, semi-aquatic, armored reptile that is related to crocodiles. Alligators can be distinguished from crocodiles by head shape and color. Adult alligators, which are almost black in color, have a broad, large, long head with visible upper teeth along the edge of the jaws. Crocodiles, which are brownish in color, have a narrower snout and

have lower jaw teeth that are visible even when its mouth is shut. The American alligator has a large, slightly rounded body, which ranges for adult alligators from 6 to 14 feet long, as well as thick limbs and a very powerful tail that it uses to propel itself through water. The tail accounts for half the alligator's length. Its front feet have five toes, while the rear feet have four toes that are webbed. In the wild, the American alligator often lives to 50 years of age and possibly over 70 years of age (Wilkinson *et al.* 2016, p. 843).

The breeding range of the American alligator is distributed in the southeastern United States in Arkansas, North Carolina, South Carolina, Georgia, Florida, Louisiana, Alabama, Mississippi, Oklahoma, and Texas. Within this range, American alligators inhabit freshwater swamps, lakes, marshes, and streams (Elsey *et al.* 2019, p. 1). They also inhabit brackish water habitats and, although they have a low tolerance for salt water, will occasionally use marine environments for feeding (Rosenblatt and Heithaus 2011, p. 786).

In the late 1860s, the leather industry's demand for exotic hides led to widespread commercial hunting of the American alligator. The demand in Europe and the United States for luxury leather products was so rapacious that, within a few years, large American alligators became extremely rare. This situation created a market for exported crocodile hides from Mexico and Central America. Tens of thousands of alligator and crocodile skins entered world markets, making their way from swamps to tanneries to exclusive department stores and boutiques. The precipitous decrease in size and numbers of American alligators taken for trade reflected a species in decline.

Today, American alligator populations thrive, as a result of creative partnerships between Federal and State governments. The States led the way in providing legal protection. Alabama adopted protective legislation for its American alligator population in 1941, followed by Florida (1961), Louisiana (1962), and Texas (1970). The wild American alligator population trend is increasing and is estimated to be 3–4 million non-hatchling individuals, of which approximately 750,000–1,060,000 are mature individuals (Elsey *et al.* 2019, p. 3).

Alligator farming and ranching played a role in the conservation success. American alligator “farming” involves captive breeding of American alligators. American alligator “ranching” involves gathering eggs from the wild, returning some juveniles to the wild, and raising the remainder to market size. For example, to ensure wild alligators are not depleted as a result of egg collections, and to ensure future recruitment of subadult alligators to the breeding population, the Louisiana Department of Wildlife and Fisheries currently requires a quantity of juvenile alligators equal to 10 percent of the eggs hatched by the rancher be returned to the wild within 2 years of hatching (Louisiana’s Alligator Management Program 2017–2018 Annual Report, page 5). Alligator ranching has minimal adverse effects on the environment, and it has direct positive effects on alligator conservation. It may reduce demand for poached wild alligator skins and likely creates an incentive for ranchers to contribute to maintenance of wild populations and their habitats (Nickum *et al.* 2018, p. 87). Practiced primarily in Louisiana, Florida, Georgia, and Texas, American alligator farming and ranching is an aquaculture industry worth tens of millions of dollars (Nickum *et al.* 2018, p. 88). Particularly in Louisiana and Florida, farming and ranching are now being carried out on a large scale; stocks in over 100 commercial farms and ranches throughout the country are high, with more than 923,000 American alligators on farms in Louisiana alone in 2016 (Elseby *et al.* 2019, p. 3).

The American alligator first received protection under Federal law in 1967 when it was listed as endangered throughout its range under the Endangered Species Preservation Act of 1966 (32 FR 4001, March 11, 1967), a predecessor to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.* (Act, ESA)). Its endangered classification was transferred to the Act effective December 28, 1973, (Pub. L. 93–205, §1, Dec. 28, 1973, 87 Stat. 884).

Under the ESA, species may be listed either as “threatened” or as “endangered” (16 U.S.C. 1532(6) (defining “endangered”); 16 U.S.C. 1532(20) (defining “threatened”)). ESA regulations are set forth in title 50 of the Code of Federal Regulations in parts 17 and 424. Section 4(e) of the Act (16 U.S.C. 1533(e); 50 CFR 17.50–17.51) gives the Secretary of the

Interior authority to list a species, subspecies, or distinct population segment as endangered or threatened by reason of similarity of appearance if: (A) Such species so closely resembles in appearance, at the point in question, an ESA-listed endangered or threatened species that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species; (B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and (C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of the Act. All applicable prohibitions and exceptions for species treated as threatened under section 4(e) of the Act due to similarity of appearance to a threatened or endangered species are provided in a rule issued under section 4(d) of the Act (16 U.S.C. 1533(d)), as discussed further below.

When a fish or wildlife species is listed as endangered under the ESA, certain actions are prohibited under section 9 (16 U.S.C. 1538(a)(1)), as specified at 50 CFR 17.21. These include prohibitions on “take” (16 U.S.C. 1532(19) (defining “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”); 50 CFR 17.3 (defining “harm” and “harass”)) within the United States, within the territorial seas of the United States, or upon the high seas; possession, sale, delivery, carrying, transport, or shipment of unlawfully taken specimens; import; export; sale and offer for sale in interstate or foreign commerce; and delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity. It is also unlawful to attempt to commit, solicit another to commit, or cause to be committed, any of these offenses (16 U.S.C. 1538(g)).

The ESA does not specify particular prohibitions and exceptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA (16 U.S.C. 1533(d)), the Secretary of the Interior is given the discretion to issue such regulations as deemed necessary and advisable to provide for the conservation of the species. The Secretary also has the discretion to prohibit by regulation, with respect to any threatened species, any act prohibited under section 9(a)(1) of the ESA for endangered species of fish or wildlife. Accordingly, under section 4(d) of the ESA, the

Service may develop specific prohibitions and exceptions tailored to the particular conservation needs of a threatened species (50 CFR 17.31(c)).

We have gained considerable experience in developing species-specific rules over the years. Where we have developed species-specific 4(d) rules, we have seen many benefits, including removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species. This proposed rule will allow us to capitalize on these benefits in tailoring the regulations to species conservation needs by eliminating unnecessary regulation while at the same time maintaining what is necessary and advisable for the conservation of this and other crocodylian species under section 4(d) of the ESA.

Section 4(d) of the Act states that the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of species listed as threatened. The U.S. Supreme Court has noted that statutory language very similar to “necessary and advisable” demonstrates a large degree of deference to the agency (see *Webster v. Doe*, 486 U.S. 592 (1988)). “Conservation” is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). Additionally, section 4(d) states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants. Thus, regulations promulgated under section 4(d) of the Act provide the Secretary with broad discretion to select appropriate provisions tailored to the specific conservation needs of the threatened species. The statute grants particularly broad discretion to the Service when adopting the prohibitions under section 9. The Service also has discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination.

The section 4(d) rule at 50 CFR 17.42(a), which currently pertains to any specimen of the American alligator, first became effective in 1975 (40 FR 44412, September 26, 1975). In 1975, American alligators in certain parts of Louisiana were reclassified from endangered to threatened because of recovery of these populations of the species and their similarity of appearance with endangered American alligators in Louisiana and elsewhere in the American alligator range (40 FR 44412, September 26, 1975). The preamble to the 1975 rule explained that the primary threat to American alligators in certain areas was the absence of adequate regulatory and enforcement mechanisms “to prevent malicious and illicit commercially oriented killing” and “to control illegal commerce in products.” To address concerns that once a legal market was established it could provide a “screen” for American alligator products from endangered populations, the 1975 rule established a marking and tagging regime for American alligator hides and included permitting requirements for fabricators, buyers, and tanners to allow identification throughout the marketing and processing chain. The 1975 rule allowed take of American alligators from threatened populations and captive alligators provided the take was in accordance with State of Louisiana laws and regulations, including marking and tagging requirements, and allowed sale of hides only to persons holding a valid Federal license as buyers. Sale of meat and other parts was prohibited under the 1975 section 4(d) rule. In the years that followed, the species continued to improve. See the following rulemaking documents:

- 42 FR 2071 (January 10, 1977) (reclassifying the American alligator from “endangered” to “threatened” in all of Florida and certain coastal areas of Georgia, Louisiana, South Carolina, and Texas);
- 44 FR 37130 (June 25, 1979) (expanding “threatened due to similarity of appearance” classification from 3 to 12 Louisiana parishes);
- 46 FR 40664 (Aug. 10, 1981) (expanding “threatened due to similarity of appearance” classification to all of Louisiana);
- 48 FR 46332 (Oct. 12, 1983) (all of Texas); and

- 50 FR 25672 (June 20, 1985) (all of Florida).

The American alligator 4(d) rule was also amended several times during these years:

- 42 FR 2071, January 10, 1977;
- 44 FR 51980, September 6, 1979;
- 44 FR 59080, October 12, 1979;
- 45 FR 78153, November 25, 1980;
- 46 FR 40664, August 10, 1981;
- 48 FR 46332, October 12, 1983;
- 50 FR 25672, June 20, 1985;
- 50 FR 45407, October 31, 1985;
- 52 FR 21059, June 4, 1987;
- 72 FR 48402, August 23, 2007.

For example, in 1979 (44 FR 51980, September 6, 1979), a final rule amending the 4(d) rule noted that the “consistent intent” throughout these rulemakings has been to authorize controlled harvest of American alligators in specified areas, subject to State and Federal law. The final rule reclassified the American alligator populations in nine additional parishes in Louisiana from endangered to threatened due to similarity of appearance to endangered American alligators in the remainder of the species’ range and, among other things, authorized sale of meat and other parts, except hides, only within the State of Louisiana and subject to the laws and regulations of the State of Louisiana. Although some commenters had recommended also allowing sale of meat and parts in other States, the Service did not adopt that recommendation and explained that licensing and recordkeeping requirements imposed by the State of Louisiana had facilitated effective enforcement with respect to sale of meat and other parts in Louisiana but that no regulatory scheme existed to provide effective enforcement outside of Louisiana. On October 12, 1979 (44 FR 59080), another rulemaking revised the section 4(d) rule to allow limited

commercial export and import of lawfully taken American alligator hides and products manufactured from those hides in accordance with the requirements of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), after the transfer of American alligator from CITES Appendix I to CITES Appendix II, effective June 28, 1979, allowed for international trade in American alligator for commercial purposes.

Revisions to the section 4(d) rule in 1980 (45 FR 78153, November 25, 1980) removed the requirement for fabricators to obtain Federal permits, but to ensure that fabricators only received lawfully taken hides, maintained the requirement limiting sale of raw (untanned) hides to a person holding a valid Federal permit to buy hides. The 1980 revisions also allowed interstate commerce of fully tanned hides that had been tagged by the State where the taking occurred and allowed sale or transfer of meat and other parts except hides, provided these parts were sold or otherwise transferred only in accordance with the laws and regulations of the State in which the taking occurred and the State in which the sale or transfer occurred. The 1980 section 4(d) rule also allowed interstate commerce in manufactured products.

By 1987, the American alligator had recovered enough so that it did not qualify as endangered or threatened based on its own conservation status. However, it was reclassified under the Act as “threatened due to similarity of appearance” throughout its range (52 FR 21063, June 4, 1987) based on its resemblance to the American crocodile and other threatened crocodylian species. As noted above, populations in Florida, Louisiana, and Texas and portions of other States had already been reclassified. This rule reclassified the remaining endangered populations in Alabama, Arkansas, Georgia, Mississippi, North Carolina, and South Carolina. The preamble to the final rule explained that the rule “supports a need for continued Federal controls on taking and commerce to ensure against excessive taking and to continue necessary protections for the American crocodile (*Crocodylus acutus*) in the U.S. and foreign countries, and other endangered crocodylians in foreign countries” (52 FR 21060, June 4, 1987).

The classification of the American alligator as threatened due to similarity of appearance is intended to protect other listed species that bear a resemblance to the American alligator. Take of American alligators is regulated by States and Tribes and section 4(d) regulations at 50 CFR 17.42, Special rules—reptiles. Under 50 CFR 17.42(a), the Service regulates the harvest of American alligators, and subsequent interstate commerce and international trade in the legally harvested animals, their skins, and products made from them, as part of efforts to prevent the illegal take and trafficking of threatened and endangered reptiles that are similar in appearance to American alligators. Illegally harvested alligators cannot legally be entered into commerce or trade under the 4(d) rule.

As noted above, currently, the American alligator is listed under the Act as threatened due to similarity of appearance to the American crocodile (*Crocodylus acutus*) in the United States and foreign countries, and other ESA-listed crocodylians (50 CFR 17.11). The Service recognizes that some populations of crocodylians that are managed as a sustainable resource can be utilized for commercial purposes without adversely affecting the survival of those populations, when scientifically based management plans are implemented. When certain positive conservation conditions have been met, the Service has allowed utilization and trade from managed populations of the American alligator, and other crocodylians. For example, we have allowed the importation of commercial shipments of Nile crocodile (*Crocodylus niloticus*) from several southern and eastern African countries, and allowed for similar shipments of saltwater crocodile (*Crocodylus porosus*) specimens from Australia (61 FR 32356, June 24, 1996). In each of these examples, the species or population is not an ESA-listed endangered species, and also is not included in CITES Appendix I.

We are aware that there have been questions raised regarding proposed or recently enacted State laws that would prohibit commercial activities involving American alligator and concerns that such laws may result in a reduction in proceeds from lawful interstate commerce in alligators that is used to fund important conservation efforts for alligators and their habitat. See

Section II below regarding *Petition to Amend Endangered Species Act Section 4(d) Rule Actions Concerning the American Alligator*. This proposed rule would amend the 4(d) rule to remove the requirement at 50 CFR 17.42(a)(2)(ii)(B) that “[a]ny American alligator specimen may be sold or otherwise transferred only in accordance with the laws and regulations of . . . the State or Tribe in which the sale or transfer occurs.” This amendment clarifies that any State law regulating commercial sale or transfer that effectively prohibits interstate commerce or foreign commerce authorized by the 4(d) rule would be preempted by section 6(f) of the ESA and would be void to the extent of the conflict (16 U.S.C. 1535(f)(2); the Supremacy Clause of the U.S. Constitution). We also explained the preemptive effect of 4(d) rules and section 6(f) in the most recent prior rulemaking amending the American alligator 4(d) rule. See 72 FR 48402, 48406 (Aug. 23, 2007) (relying on *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9<sup>th</sup> Cir. 1983)). By amending the 4(d) rule to remove the provision relating to the State or Tribe in which a sale or transfer occurs, we intend to eliminate the potential tension between those State laws and the well-regulated American alligator management regime that has been established through decades of cooperation between the Service, States in the alligator’s range, and the alligator industry, and which is facilitated by the regulation of interstate commerce and international trade through the 4(d) rule.

Although it can be difficult to identify the species in products manufactured from crocodilian species, and this situation can pose a problem for law enforcement, over the more than 30 years that the provision in question has been in place, we have no reason to believe that this provision at 50 CFR 17.42(a)(2)(ii)(B) has added to the conservation benefits provided by other provisions in the current American alligator 4(d) rule. Further, the first phrase in the sentence at 50 CFR 17.42(a)(2)(ii)(B) pertaining to “the laws and regulations of the State or Tribe in which the taking occurs” is largely redundant, as it restates what is already stated earlier in 50 CFR 17.42(a)(2)(ii).

The conditional language in 50 CFR 17.42 (a)(2)(ii)(B) may be inhibiting interstate commerce that has developed since the American alligator was first reclassified under the Act and which provides funding to support crocodylian conservation and helps States and Tribes address threats to these populations. Confusion caused by this provision concerning the interaction between Federal, State, and Tribal rules and regulations could deter protection of American alligator habitat, upsetting regulatory protocols that have been in place for decades, and thereby undermining the conservation of this and other crocodylian species under section 4(d) of the Act.

Quotas for controlled hunting of adults, and collection of eggs and hatchlings on both private and public lands are based on annual monitoring of nests and local population densities and occur in accordance with the laws and regulations of the State or Tribe in which the taking of American alligators occurs. Commercial production of skins and meat is highly regulated by State agencies through a system of permits, licenses, periodic stock inventories, ranch inspections, and tagging requirements, which occur in accordance with the laws and regulations of the State or Tribe in which the taking of American alligators occurs. Fees collected through State and Tribal regulatory systems (also in accordance with the laws and regulations of the State or Tribe in which the taking of American alligators occurs) provide funding for management, regulation, enforcement, and research programs for the American alligator. Conservation of American alligators has succeeded by sustainable regulated harvests, protecting important alligator habitat, and providing economic incentives for private landowners to maintain alligator habitat (Elsley *et al.* 2019, p. 5). For these reasons, we reaffirm the need to ensure that take of, and interstate commerce in, American alligators may only be in accordance with the laws and regulations of the State or Tribe of taking but propose to remove as unnecessary and confusing the provision that sale or transfer may only be in accordance with the laws and regulations of the State or Tribe where the sale or transfer occurs.

Separate from its listing and conservation status under the ESA, the American alligator is protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a treaty that regulates international trade in species included in one of three Appendices. In 1975, the American alligator was included in Appendix I of CITES. CITES Appendix I includes species threatened with extinction that are or may be affected by trade.

In 1979, the American alligator was transferred from CITES Appendix I to Appendix II. Appendix II includes species that are not presently threatened with extinction, but may become so if their trade is not regulated. It also includes species that need to be regulated so that trade in certain other Appendix-I or -II species may be effectively controlled (due to similarity of appearance to other CITES species). Commercial international trade of Appendix-II species is allowed under CITES export permits issued by the Management Authority of the exporting country, provided specific determinations have been made, including that the Management Authority of the exporting country has determined that the specimens involved have been legally acquired and the Scientific Authority of the exporting country has determined that the trade will not be detrimental to the survival of the species. In the United States, the ESA (16 U.S.C. 1537a) designates the Secretary of the Interior as the CITES Management Authority and Scientific Authority and requires the functions of each shall be carried out by the Service.

The Parties to CITES reviewed management activities prior to transferring the American alligator from CITES Appendix I to Appendix II (thereby allowing commercial trade), reviewed assessments of population status, reviewed determinations of sustainable harvest quotas (or approval of ranching programs), and reviewed the control of the illegal harvest. Management regulations imposed after harvest included the tagging of skins and issuance of permits to satisfy the requirements for CITES Appendix-II species. As a Party to CITES, in addition to ESA requirements, the United States implements CITES requirements for trade in American alligators. The United States implements CITES through the ESA (16 U.S.C. 1537a; 16 U.S.C.

1538(c)(1)) and the Service's CITES implementing regulations (50 CFR part 23). CITES requirements for international trade specific to American alligator are found at 50 CFR 23.70.

## **II. Petition to Amend Endangered Species Act Section 4(d) Rule Actions Concerning the American Alligator**

### *Petition*

The Secretary of the Interior received a petition in the form of a letter dated December 9, 2019, from the State of Louisiana, titled, *Petition for Rulemaking to Correct the American Alligator Regulations at 50 C.F.R. § 17.42(a) Pertaining to the Sale of Hides*. The petition requests “the repeal of those regulations which limit the sale or transfer of alligator hides to compliance with the State in which the sale or transfer occurs.” The petition asserts that the language in the regulation imposing this requirement may have been included or retained as the result of administrative error or confusion. The petition asserts that, as the result of a series of proposed rules and final rules issued between 1980 and 1987, the Service inadvertently added alligator hides to the list of products required to be sold or transferred in interstate commerce only in accordance with the law of the State in which the sale or transfer occurs.

The petition requests a new rulemaking to amend 50 CFR 17.42(a)(2)(ii)(B) to eliminate the change that included alligator hides in the group of parts and products that may only be sold or transferred in interstate commerce in accordance with the law of the State or Tribe in which the sale or transfer occurs. The petition requests that the Service amend the rule to revert back to the regime set out in the 1980 alligator section 4(d) regulations, which allowed for take of American alligators wherever listed as threatened due to similarity of appearance, in accordance with the laws in the State of taking subject to certain conditions including that “any meat or other part except the hide is sold or otherwise transferred only in accordance with the laws and regulations of the State in which the taking occurs and the State in which the sale or transfer occurs;” (45 FR 78153, November 25, 1980).

It is true that earlier versions of the section 4(d) rule did not, in the phrase in question, include hides in the group of parts and products that could only be sold in accordance with the laws of the State or Tribe in which the sale or transfer occurred. However, those earlier versions also strictly regulated the sale and transfer of hides, including by requiring that hides could only be sold or transferred to a person holding a valid buyer permit (issued under the section 4(d) rule) and that the hides must be tagged by the State where they were taken. Tanners and, for a time, fabricators also had to obtain permits under the section 4(d) rule, and buyer, tanner, and fabricator permittees were prohibited from violating any State, Federal, or foreign laws concerning hides and other parts and products. Tagging of alligator hides by the State or Tribe of taking is still required under the current section 4(d) rule and forms the basis of the traceability regime that allows us to ensure that hides in trade (including those to be exported) have been legally acquired under an approved State or Tribal program. The current section 4(d) rule for the American alligator does not require hide buyers, tanners, or fabricators to obtain permits.

#### *Service Response to the Petition*

The ESA section 4(d) rule concerning the American alligator became effective over 45 years ago. More than 33 years have passed since publication of the 1987 revision to the rule that included the provision that the petition seeks to amend. In reviewing the conservation success story related to the alligator, we find that the requirement for interstate commerce in American alligator to adhere to laws of the States and Tribes where the sale or transfer occurs is not necessary. Under the Administrative Procedure Act (APA), any person may petition for the issuance, amendment, or repeal of a rule (5 U.S.C. 553(e)). In considering the petition, we follow Department of the Interior regulations concerning petitions for APA rulemakings, found at 43 CFR part 14 (43 CFR 14.2, Filing of petitions.). To that end, interested persons may obtain a copy of the petition on the internet at <http://www.regulations.gov>, in the docket supporting materials section provided above in **ADDRESSES**. This proposed rule addresses the petition.

### **III. This Proposed Rule**

As a result of the petition received from the State of Louisiana, we conducted a review of our regulations at 50 CFR 17.42(a) and have determined that this proposed rulemaking action is necessary and advisable for the conservation of this and other crocodylian species under section 4(d) of the Act. The Service has the responsibility to periodically update and clarify our implementing regulations when it is necessary to do so. With this proposed rule, we reflect the outcome of our review.

We have evaluated the petition received from the State of Louisiana concerning the requested amendment to our regulations at 50 CFR 17.42(a). We have also conducted our own evaluation of our regulations at 50 CFR 17.42(a), and have concluded that there is sufficient reason for a new rulemaking that removes the requirement in the 4(d) rule's authorization of interstate or foreign commerce that American alligators, including hides and other parts and products, may only be sold or transferred in accordance with the law of the State or Tribe in which the sale or transfer occurs. As noted above, the section 4(d) rule for the American alligator has been revised a number of times since it was first promulgated in 1975. Changes to the section 4(d) rule were adopted in response to changes in the conservation status of various populations of the species (and the reclassification of those populations) and to the related and evolving need for Federal control of taking and commerce in American alligators and American alligator parts and products, as well as for the effective protection and enforcement of requirements for other ESA-listed crocodylians.

We believe the requirement at 50 CFR 17.42(a)(2)(ii)(B) that any American alligator specimen may be sold or otherwise transferred only in accordance with the laws and regulations of the State or Tribe in which the sale or transfer occurs is unnecessary and can be removed as a condition of the 4(d) rule's authorization of interstate and foreign commerce. Through this amendment, any State law regulating commercial sale or transfer that effectively prohibits

interstate or foreign commerce authorized by the 4(d) rule would be preempted by section 6(f) of the ESA and would be void to the extent of the conflict (16 U.S.C. 1535(f)(2); the Supremacy Clause of the U.S. Constitution). Further, the first phrase in the sentence at 50 CFR 17.42(a)(2)(ii)(B) is largely redundant, as it restates what is already stated in 50 CFR 17.42(a)(2)(ii), and therefore can also be removed along with conforming amendments. We believe that this proposed amendment could reduce confusion concerning the interaction between Federal, State, and Tribal rules and regulations and clarify the activities that are authorized by Federal regulation. We believe that the requirement at 50 CFR 17.42(a)(2)(ii)(B) that any American alligator specimen may be sold or otherwise transferred only in accordance with the laws and regulations of the State or Tribe in which the sale or transfer occurs, is not necessary for the conservation of the American alligator and for other crocodilian species to which the American alligator bears similarity of appearance.

#### **IV. Public Comments Solicited**

We invite interested organizations and the public to comment on this proposed rule. We analyzed the 4(d) rule in response to the petition from Louisiana and have drafted this proposed amendment to 50 CFR 17.42(a)(2)(ii)(B) following our review and analysis. We are seeking comments related to any proposed revisions to the ESA section 4(d) rule concerning the American alligator at 50 CFR 17.42(a). We will not consider comments regarding this proposed rule sent by e-mail or fax or to an address not listed in **ADDRESSES**. If you submit a comment via <http://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final 4(d) rule may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may change the parameters of the prohibitions or the exceptions to those prohibitions if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the listed crocodilians that are similar in appearance to the American alligator. Conversely, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the listed crocodilians that are similar in appearance to the American alligator.

## **V. Required Determinations**

### *Clarity of the Proposed Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs

that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

We are required under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) to assess the impact of any Federal action significantly affecting the quality of the human environment, health, and safety. This proposed rule is being analyzed under the criteria of NEPA, the Department of the Interior procedures for compliance with NEPA (Departmental Manual (DM) and 43 CFR part 46), and Council on Environmental Quality regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). We are preparing a draft environmental assessment to determine whether this proposed rule will have a significant impact on the quality of the human environment under NEPA. We will announce the availability of the draft environmental assessment as soon as it is completed. When completed, the draft environmental assessment will be available on the internet at <http://www.regulations.gov> in the docket provided above in **ADDRESSES**.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.).*

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial

number of small entities.”

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*) amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. According to the Small Business Administration (SBA), small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201).

The SBA has developed size standards to carry out the purposes of the Small Business Act. These standards can be found in 13 CFR 121.201. For a specific industry identified by the North American Industry Classification System (NAICS), small entities are defined by the SBA as an individual, limited partnership, or small company considered at “arm’s length” from the control of any parent company, which meet certain size standards. The size standards are expressed either in number of employees or annual receipts. This proposed rule is most likely to affect entities nationwide that sell alligator products such as hides, eggs, and meat. The industries most likely to be directly affected are listed in the table below along with the relevant SBA size standards.

**Table 1. Industries Potentially Affected by the Proposed Rule**

| <b>Industry</b>  | <b>NAICS Code</b> | <b>Size standards in millions of dollars or employees</b> |
|--|-------------------|---|
| Full-Service Restaurants                                   | 722511            | \$ 8.0  |
| Limited-Service Restaurants                                | 722513            | \$12.0  |
| Supermarkets and Other Grocery (except Convenience) Stores | 445110            | \$35.0  |
| Other Aquaculture  | 112519            | \$1.0   |
| Leather and Hide Tanning and Finishing                     | 316110            | 500 employees   |

Based on these thresholds, the proposed rule may affect small entities. In addition to determining whether a substantial number of small entities are likely to be affected by this

proposed rule, the Service must also determine whether the proposed rule is anticipated to have a significant economic impact on those small entities. This rule would not significantly impact interstate commerce, as the proposed changes would not change the fact that interstate commerce is allowed under the provisions of this 4(d) rule. Therefore, we do not expect any significant impacts to these businesses because interstate commerce would continue as provisioned by the Endangered Species Act and the 4(d) regulations, and any potential positive economic impact from the preemption of any conflicting State or Tribal law is too speculative to estimate. The rule would not have a significant economic effect on a substantial number of small entities in any region or nationally.

Therefore, based on the information available to us at this time, we certify that this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the RFA. An initial regulatory flexibility analysis is not required. Accordingly, a small entity compliance guide is not required.

*Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 801 et seq.)*

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Would not have an annual effect on the economy of \$100 million or more.
- (b) Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.
- (c) Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

This proposed rule would provide clarity regarding interstate commerce in alligators, whether alive or dead, including any skin, part, product, egg, or offspring thereof held in captivity or from the wild. It would reaffirm current, longstanding provisions that allow interstate commerce in lawfully harvested American alligators but would remove text conditioning sale or transfer in accordance with the law of the State or Tribe in which sale or transfer occurs. Therefore, we do not anticipate significant economic impacts because interstate commerce would continue as provisioned by the Endangered Species Act and the section 4(d) regulations and any potential economic impact from the preemption of any conflicting State or Tribal law is too speculative to estimate.

#### *Executive Order 13771*

This rule is not an Executive Order (E.O.) 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required. This proposed rule would revise the current regulations in 50 CFR part 17 that pertain to the harvest of American alligators and regulate legal trade in the animals, their skins, and products made from them, as part of efforts to prevent the illegal take and trafficking of endangered reptiles that are similar in appearance to American alligators. This proposed rule will not significantly affect energy supplies, distribution, and use.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both Federal intergovernmental mandates and Federal private sector mandates. These terms are defined in 2 U.S.C. 658(5)–(7).

“Federal intergovernmental mandate” includes a regulation that would impose an enforceable duty upon State, local, or Tribal governments with two exceptions. It excludes a condition of Federal assistance. It also excludes a duty arising from participation in a voluntary Federal program, unless the regulation relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority, if the provision would increase the stringency of conditions of assistance or place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide

funding, and the State, local, or Tribal governments lack authority to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

(2) This proposed rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule will not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

#### *Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of this proposed rule.

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. This proposed rule would update and clarify the regulations concerning the harvest of American alligators and regulate legal trade in the animals, their skins, and products made from them, as part of efforts to prevent the illegal take and trafficking of endangered reptiles that are similar in appearance to American alligators. A takings implication assessment is not required.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant federalism effects. A federalism summary impact statement is not required. These proposed revisions to 50 CFR part 17 do not contain significant federalism implications.

*Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. Specifically, this proposed rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2 (Department of the Interior Manual, Series 30,

Part 512, Chapter 2: *Departmental Responsibilities for Indian Trust Resources*), we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have evaluated this proposed rule under the criteria in Executive Order 13175 under the Department's consultation policy and are not aware of any substantial effects to federally recognized Indian Tribes but will consider comments from Tribes on this proposed rule. We will consult and solicit comments from Tribes. Individual Tribal members must meet the same regulatory requirements as other individuals under our regulations at 50 CFR 17.42 (Special rules—reptiles).

### **References Cited**

A complete list of references cited in this rulemaking is available on the internet at <http://www.regulations.gov> in the docket provided above in **ADDRESSES**.

### **Authority**

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

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

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

**Proposed Regulation Promulgation**

Therefore, for the reasons discussed in the preamble, we hereby propose to amend part 17 of title 50, Code of Federal Regulations, as set forth below.

**PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

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

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Section 17.42 is amended by revising paragraph (a)(2)(ii) to read as follows:

**§ 17.42 Special rules—reptiles.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(ii) Any person may take an American alligator in the wild, or one which was born in captivity or lawfully placed in captivity, and may deliver, receive, carry, transport, ship, sell, offer to sell, purchase, or offer to purchase such alligator in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, if such activities are in accordance with the laws and regulations of the State or Tribe in which taking occurs, and subject to the following condition: Any skin of an American alligator may be sold or otherwise transferred only if the State or Tribe of taking requires skins to be tagged by State or Tribal officials or under State or Tribal supervision with a Service-approved tag in accordance with the requirements in part 23 of this subchapter.

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**Aurelia Skipwith,**  
*Director,*

*U.S. Fish and Wildlife Service.*

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