

Summary of ESA Regulatory Reform Proposals

On July 25, 2018, the US Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), collectively the Services, published three proposed rules aimed at reforming portions of their regulations that implement the Endangered Species Act (ESA). The proposed changes are to ESA Sections 4 and 7, with the intent of (1) revising how “take” prohibitions for activities are extended to threatened species, (2) reforming the procedures and criteria used for listing or delisting species and designating critical habitat, and (3) improving and clarifying interagency Section 7 consultation processes. The proposed rules closely align with NRECA advocacy efforts to make the ESA more efficient, effective, and less costly, while striking a balance that accommodates essential electric cooperative activities and conserves America’s natural resources. NRECA filed comments on the proposed rules on September 24, 2018.

Below is a summary of the proposed ESA regulatory improvements.

FWS Proposed Revision of the Prohibitions to Threatened Wildlife and Plants **(83 Fed. Reg. 35174)**

This proposed rulemaking pertains to ESA Sections 4 and 9 – whereas, Section 9 sets forth “take” prohibitions only for endangered species and Section 4(d) allows the Services to establish special protective regulations for threatened species, meaning the Services may extend some or all of the Section 9 “take” prohibitions to species listed as threatened.

Contrary to NMFS practices, the FWS used its authority in 1978 to extend full Section 9 “take” prohibitions to all threatened species. This practice is commonly referred to as the “blanket 4(d) rule,” by which FWS-designated threatened species receive the same level of protection as endangered species unless a species-specific special 4(d) rule is established.

The proposed changes are not retroactive, meaning applicable “take” prohibitions for FWS-designated species already listed as threatened under the ESA would not be altered. Instead, it would require the FWS to determine what, if any, protective regulations are appropriate for future listing determinations for threatened species. If finalized, species listed or reclassified as threatened after the rule’s effective date would only have “take” prohibitions if the FWS promulgates a species-specific special 4(d) rule. Otherwise, “take” would not be prohibited.

If finalized, this would rescind the “blanket 4(d) rule” and align FWS practices with those of NMFS regarding threatened species. This would also allow the FWS to better tailor “take” protections to the needs of the threatened species while still providing meaning to the ESA statutory distinction between “endangered” and “threatened” species.

Services Proposed Revision of the Regulations for Listing Species and Designating Critical Habitat ([83 Fed. Reg. 35193](#))

This proposed rulemaking pertains to ESA Section 4 procedures for listing, delisting, and reclassifying a species status under the ESA, as well as criteria used for designating critical habitat. The proposed regulatory revisions include the following:

- ◆ *Economic Impacts* – By statutory requirement, the Services must make species listing determinations based “solely on the basis of the best scientific and commercial data available” and “without reference to possible economic or other impacts of such determination.” The Services propose removing the phrase “without reference to possible economic or other impacts.” While the Services state they will continue to make determinations based solely on biological considerations, they believe there may be circumstances where referencing economic or other impacts may be informative to the public.
- ◆ *Foreseeable Future* – The ESA defines a threatened species as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” The Services are proposing to include a framework that sets out how they will determine what constitutes the “foreseeable future” when determining the status of a threatened species. The proposed rule limits the term to “extend only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.” The Services state that they need not identify the “foreseeable future” in terms of a specific time period, but may instead explain the extent to which they can reasonably determine that both the future threats and the species’ responses to those threats are probable.
- ◆ *Factors Considered in Delisting Species* – The proposed revisions would require the Services to use the same standard and apply the same five statutory factors for delisting species as it does for making listing decisions. This would thereby remove the current requirement that a species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it no longer meets the statutory definition of a threatened or endangered species.
- ◆ *Not Prudent Determinations* – The Services propose to set forth a non-exhaustive list of circumstances in which they may find it is not prudent to designate critical habitat. This includes (1) areas that do not meet the definition of critical habitat and (2) where threats to the species’ habitat stem solely from causes that cannot be addressed by management actions that may be identified through ESA Section 7(a)(2) consultation.
- ◆ *Designating Unoccupied Areas* – The Services recognize that the critical habitat regulations (February 11, 2016) created a perception that they intended to designate expansive areas of unoccupied habitat as critical habitat. To address this concern, the Services are revising when they consider the designation of unoccupied critical habitat essential for the conservation of the species. There are two proposed situations where the Services would consider designating unoccupied habitat: when a critical habitat designation limited to geographical areas occupied would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. In addition, the Services must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species in order for an unoccupied area to be considered essential.

Services Proposed Revision of Regulations for Interagency Cooperation **(83 Fed. Reg. 35178)**

This rulemaking proposes to amend portions of the regulations that implement ESA Section 7, which requires federal agencies to consult with the Services to ensure any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of critical habitat. Nothing in these proposed revisions is intended to require that any previously completed Section 7 consultations be reevaluated, if this rulemaking is finalized. The intent of these proposed changes are to improve and clarify consultations, making it more efficient and consistent, while reducing costs. The proposed revisions include:

- ◆ *Definition of Destruction or Adverse Modification* – The definition would be simplified and revised as follows: “a direct or indirect alternation that appreciably diminishes the value of critical habitat as a whole for the conservation of listed species.”
- ◆ *Definition of Effects of the Action* – The definition would be simplified and revised to remove the current reference to direct and indirect effects. The proposed revision defines “effects of the action” as “all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action. An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action.”
- ◆ *Definition of Environmental Baseline* – The Services are proposing a stand-alone definition for “environmental baseline” that removes any reference to “indirect effects.” The following language is proposed: “Environmental baseline is the state of the world absent the action under review and includes the past, present, and ongoing impacts of all past and ongoing federal, state, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of state or private action in the action area which are contemporaneous with the consultation in process. Ongoing means impacts or actions that would continue in the absence of the action under review.”
- ◆ *Definition of Programmatic Consultation* – The Services propose to add a definition for “programmatic consultation,” which includes consultations that “address multiple similar, frequently occurring, or routine actions expected to be implemented in a particular geographic areas.” Programmatic consultations may also cover a “proposed program, plan, policy, or regulation providing a framework for future actions.”
- ◆ *Consultation Applicability* – The Services seek input on criteria that would preclude the need for federal agencies to consult when “take” is not an anticipated result of the proposed action. In addition, the Services seek comment on whether the scope of a Section 7 consultation should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.
- ◆ *Deadline for Informal Consultation* – Unlike formal consultations, there is currently no deadline for the Services to complete an informal consultation. The Services are considering adding a 60-day deadline, subject to extension by mutual consent, for informal consultations.

- ◆ *Formal Consultation* – The Services propose to clarify what information is necessary to initiate formal consultation.
- ◆ *Biological Opinions* – The proposed revisions would allow the Services to adopt all or part of a federal agency’s consultation “initiation package” in its biological opinion, thus creating an additional optional procedure within formal consultation and streamlining duplicative processes. The Services also propose a collaborative process to facilitate the federal agency’s development of an “initiation package.”
- ◆ *Expedited Consultation* – The Services propose adding a new provision, “expedited consultations,” to offer opportunities to streamline consultation, particularly for actions that have minimal adverse effects or predictable effects based on previous consultation experience.
- ◆ *Reinitiation of Consultation* – The proposed rulemaking seeks to clarify that the duty to reinitiate consultation “does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act (FLPMA) or the National Forest Management Act (NFMA) when a new species is listed or new critical habitat is designated” under the ESA. However, any “on-the-ground subsequent actions taken pursuant to a land management plan must be subject to a separate Section 7 consultation if those actions may affect newly listed species or critical habitat.” These revisions address issues arising under the “*Cottonwood* decision,” *Cottonwood Environmental Law Center v. US Forest Service*, 789 F.3d 1075 (9th Circ. 2015), *cert. denied*, 137 S. Ct. 293 (2016).