




Endangered Species Act Revisions 2019

Sections 4, 7, 9
50 CFR Parts 424, 402, and 17

NATIONAL MARINE FISHERIES SERVICE





Background

- Section 4 (50 CFR 424)
  - Adding, removing, reclassifying species from the list
  - Designating critical habitat
  - Addresses protective regulations for threatened species (i.e., 4(d) rules)
- Section 7 (50 CFR 402)
  - Provides requirements for Federal agency cooperation and consultation procedures
- Section 9 (50 CFR 17)
  - Establishes prohibitions for listed species





Revisions to 50 CFR 424 ESA-Section 4

Listing, Delisting, or Reclassifying species

- Created a regulatory framework for the phrase “foreseeable future”
- Clarifies that the standard for listing and delisting of species is the same
- Removed reference to economic or other impacts in classification decisions





Revisions to 50 CFR 424 ESA-Section 4

Criteria for Designating Critical Habitat

- Clarifies when designation of critical habitat may not be prudent
- Revised the process and standards for designation of unoccupied critical habitat
- Revised the definition of physical or biological features
- These changes are effective as of 9/26/19





Revisions to 50 CFR 402 ESA-Section 7

- Addressed alternative consultation mechanisms
- Revised the definitions of “destruction or adverse modification” and “effects of the action”
- Addressed certainty of mitigation proposed by action agencies
- Clarified our interpretation of “activities that are reasonably certain to occur”





Revisions to 50 CFR 402 ESA-Section 7

- Established a stand alone definition for “environmental baseline”
- Clarified that consequences from some ongoing activities are part of the environmental baseline
- Otherwise improved the consultation process
  - Timelines for informal consultation
  - Minor changes regarding re-initiation
- These changes anticipated to be effective on 10/28/19





Revisions to 50 CFR 17 4(d) 'blanket' Rule (FWS Only)

- Rescinds current regulations that automatically apply prohibitions for endangered species to threatened species
- Protections for species listed as threatened in the future will be made on a case-by-case basis tailored to what is necessary and advisable for that species (i.e., via a species-specific 4(d) rule)
- No change in protections for species currently listed as threatened species
- Aligns the Fish and Wildlife Service with the National Marine Fisheries Service practice
- This change is effective as of 9/26/19





For more information:

- https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html
  - This PowerPoint presentation
  - A video of this presentation
  - Federal register notices

Questions?





Break between abridged and full presentation






Endangered Species Act

Revisions to the Implementing Regulations
50 CFR Parts 424, 402, and 17

NATIONAL MARINE FISHERIES SERVICE

Background

- Section 4 of the Act
  - Provides for how to add and remove species from the Federal lists of threatened and endangered species
  - Provides procedures for designating critical habitat
  - Implementing regulations are at 50 CFR 424
  - Addresses protective regulations for threatened species (i.e., 4(d) rules)
- Section 7 of the Act
  - Provides requirements for Federal agency cooperation and consultation procedures
  - Implementing regulations are at 50 CFR 402
- Section 9 of the Act
  - Establishes prohibitions for listed species
  - Implementing regulations are at 50 CFR 17





How were the final revisions made?

- Implementing an Executive Order aimed at reducing the regulatory burden on citizens and promoting innovation
- DOI and NMFS requested public input on regulatory reform initiatives (summer 2017)
- DOI and DOC Policy Officials met with the FWS and NMFS ESA leadership in Dec 2017 to brainstorm improvements to the ESA – decided to focus on sections 4 and 7 of ESA
- 60-day public comment period; considered and addressed hundreds of thousands of comments
- Proposed and final rules underwent Federal interagency review led by the Office of Management and Budget





Changes to 50 CFR 424

Listing, Delisting, or Reclassifying species

- Creates a regulatory framework for the phrase “foreseeable future”
- Clarifies that the standard for listing and delisting of species is the same
- Removes reference to economic or other impacts in classification decisions





Changes to 50 CFR 424

Criteria for Designating Critical Habitat

- Clarifies when designation of critical habitat may not be prudent
- Revises the process and standards for designation of unoccupied critical habitat
- Revises the definition of physical or biological features

Foreseeable Future

- In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that **both** the ~~conditions potentially posing a danger of extinction in the foreseeable~~ future **threats and the species' responses to those threats** are ~~probable~~ **likely**. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time~~, 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~~.

Foreseeable Future

- Extends only so far as we can reasonably determine that threats and the species' responses to those threats are likely.
- Described on a case-by-case basis, using the best available data for each species
- No specific timeframes are necessary, qualitative descriptions are ok

Factors Considered in Delisting

- Clarifies that the standard for listing and delisting of species is the same (i.e., whether a species meets the definitions of endangered or threatened)
- Clarifies it is appropriate to delist a species when:
  - It is extinct
  - It does not meet definition of an endangered or threatened species
  - Listed entity does not meet the definition of a species

Economic or Other Impacts

- The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status ~~without reference to possible economic or other impacts of such determination~~.

- Aligns the regulatory text more closely to the statutory language
- Impacts information, if compiled, would be to inform the public in the interest of transparency

Critical Habitat – Not Prudent

- Critical habitat may be not prudent when:
  - Increased degree of threat;
  - Habitat impacts not a threat or threats to habitat stem solely from causes not able to be addressed by section 7(a)(2) of the Act;
  - Areas within U.S. jurisdiction provide no more than negligible conservation value for species occurring primarily outside U.S. jurisdiction;
  - No areas meet definition; or
  - The Secretary otherwise determines critical habitat is not prudent
- Removes language regarding “designation of critical habitat would not be beneficial to the species”

Unoccupied Critical Habitat

- "…When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."

Definition or Physical or Biological Features

Physical or biological features **essential to the conservation of the species.**

The features **that occur in specific areas and** that **are essential to** support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Revisions to 50 CFR 402

The revisions:

- Address alternative consultation mechanisms
- Revise the definitions of “destruction or adverse modification” and “effects of the action”
- Address certainty of mitigation proposed by action agencies
- Otherwise improve the consultation process

Alternative Consultation Mechanisms

the Revisions…

- Define “programmatic consultation”

- Allow the Services to adopt all or part of a Federal agency’s initiation package in their biological opinions

- Insert a new provision – Expedited consultation – to offer opportunities to streamline consultation in certain circumstances

Clarified “Effects of the Action”

- Revised the definition of “effects of the action”
- Introduced the word “consequences” as part of the definition
- Inserted a new section that clarifies factors to consider for “Activities reasonably certain to occur”
- Established a standalone definition for “environmental baseline”
- Clarified what information is needed to initiate consultation

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.
A consequence 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 consequences occurring outside the immediate area involved in the action. (Sec § 402.02)

402.17 Other Provisions

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

Environmental Baseline

- Established a standalone definition for “environmental baseline”
- Clarifies that consequences from some ongoing activities and existing facilities are part of the environmental baseline

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action.

The environmental baseline includes the past and present impacts of all 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 actions which are contemporaneous with the consultation in process.

The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Revised the Definition of "Destruction or Adverse Modification"

- Added the phrase "as a whole" to the first sentence
- Struck the definition's second sentence

Destruction or Adverse Modification

…means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. ~~Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.~~

Addressed Certainty of Mitigation

§ 402.14 (g)(8) “Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.”

402.13 Informal consultation

- Addition of the 60 day timeline for concurrence letters
- The 60-day timeframe may be extended upon mutual consent of the Service, Federal agency, and applicant (if involved), but shall not exceed 120 days total
- The changes, do not alter review and response to biological assessments prepared for actions that fit the regulatory definition of “major construction activities”. For those consultations the response would be required within 30 days as specified at 402.12 (j) and (k).
- Also clarified that request for concurrence must contain similar information as that required for formal consultation

Otherwise Improving the Consultation Process

- Clarifies the analytical steps the Services undertake in formulating a biological opinion
- Clarifies that reinitiation of consultation applies to all 7(a)(2) consultations (acknowledges court rulings and practice)
- Eliminates need to reinitiate consultation on certain land management plans upon listing of new species or designation of new critical habitat





Changes to 4(d) Rules 50 CFR Part 17 (FWS Only)

- Rescinds current regulations that automatically apply prohibitions for endangered species to threatened species
- Protections for species listed as threatened in the future will be made on a case-by-case basis tailored to what is necessary and advisable for that species (i.e., via a species-specific 4(d) rule)
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Questions?