



Improving ESA Implementation through Regulation Review

The U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) are working collaboratively to improve the implementation of the Endangered Species Act (ESA) by considering appropriate changes to our practices, guidance, policies, and regulations to enhance conservation of listed species. This review and update of regulations, policies, guidance and practices is consistent with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," and our selected areas for regulatory review and improvement are outlined in the Department of Interior's (DOI) "Preliminary Plan for Retrospective Regulatory Review."

To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA Fisheries have identified areas where changes in ESA implementing regulations and policies may reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort is guided by the following objectives, which are in line with the principles espoused in Executive Order 13563, as well as the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective



Florida Panther.

Connie Bransilver, USFWS

conservation partnerships with other Federal agencies, the states, tribes, conservation organizations, and private landowners;

- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

FOCUS AREAS FOR REGULATORY IMPROVEMENT

The Service has identified key regulations and associated policies where there is both a need and an opportunity for improving administration of the ESA. The following changes to the ESA implementing regulations or policies will improve conservation effectiveness, reduce administrative burden, enhance clarity and consistency for agency staff and impacted stakeholders, and

encourage partnerships, innovation, and cooperation.

Minimize requirements for written descriptions of critical habitat boundaries in favor of map- and internet-based descriptions.

In the interest of efficiency, saving taxpayers' money, and making the critical habitat designation process more user friendly to the public, we will continue to publish critical habitat maps, but will make optional any textual description of boundary-coordinate lists in our regulations. Although the boundaries as mapped—or otherwise described in our regulations—would remain the official delineation of a critical habitat designation, we will provide the public easier-to-use tools that clarify which areas are covered by a designation. These tools will be available on the Internet and at the applicable Service or NOAA Fisheries office.

Clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners, including habitat conservation plans, safe harbor agreements, and candidate conservation agreements.

Although we finalized the implementing regulations and policies for these landowner agreements years ago, we have not systematically reviewed or revised them in response to stakeholder feedback. Comments on these programs have led us to conclude that these tools are valuable in meeting our goals; however, there is room for improvement in the way we implement these tools. A few key improvements that have been identified include:

- Improving consistency in implementing the processes of landowner agreements and plans;
- Reducing the transaction costs associated with developing and approving landowner agreements; Providing guidance to allow flexibility and creativity in application of the tools to accommodate diverse landowner needs;

Expand opportunities for the states to engage more often and more effectively in the implementation of the ESA's various provisions, especially those pertaining to the listing of species.

The Service and NOAA Fisheries have established, in coordination with the States, a Joint Federal/State Task Force for ESA Policy to review operational policies and issues, and to recommend solutions to improve and strengthen the partnership between the States and the Services in implementing the ESA. Through this effort, we will explore ways to improve the implementation of our 1994 policy on state cooperation (94 FR 16020) at the field, regional, and national levels.

Review and revise the process for designating critical habitat to design a more efficient, defensible, and consistent process.

A number of factors (such as litigation and the Services' experience over the years in interpreting and applying the statutory definition of critical habitat) have highlighted the need to clarify or revise the current regulations for designating critical habitat under section 4 of the ESA. Changes are being



Willamette daisy.

Jeff Dillon, USFWS

considered to clarify the purpose and role of critical habitat, to refine the process for designating critical habitat.

Clarify the definition of the phrase “destruction or adverse modification” of critical habitat, which is used to determine what actions can and cannot be conducted in critical habitat.

The 5th and 9th circuit courts of appeal have invalidated the regulatory definition, finding that the definition “reads the “recovery” goal out of the adverse modification inquiry” by requiring that a “survival” threshold be met (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service* No. 23-35279 (9th Cir. 2004); *Sierra Club v. U.S. Fish and Wildlife Service* 245 F3d. 434 (5th Cir. 2001)). Since 2004, both the Service and NOAA Fisheries have based determinations on policy guidance without the benefit of a regulatory definition. A new regulatory definition would provide a consistent basis to determine whether Federal actions have met their responsibilities under Section 7(a)(2) of the ESA.

Clarify the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult.

An incidental take statement is a component of a biological opinion that specifies the impact of an incidental taking of an endangered or threatened species and provides reasonable and prudent measures that are necessary to minimize those impacts. Greater flexibility in the quantification of

anticipated incidental taking could reduce the burden of developing and implementing biological opinions without any loss of conservation benefits.

Working through an interagency group of senior policy leaders from the Service, NOAA Fisheries, and the Environmental Protection Agency (EPA), craft a multi-faceted strategy to address the challenge of the conservation of endangered species and the administration of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). One major element of this effort is to address core scientific issues underlying the effective of FIFRA and ESA responsibilities.

EPA Administrator Lisa Jackson, acting on behalf of herself and the Secretaries of the Interior, Commerce and Agriculture, has requested that the National Academy of Sciences convene an independent scientific panel to provide its expert advice on certain core scientific and technical issues which serve as the foundation for assessing risks to listed species associated with EPA's FIFRA-related activities. In addition, the agencies intend to incorporate expanded opportunities for registrants, the affected states, farming organizations, and other interested parties to participate in the consultation processes – within the constraints of existing budgets, staffing resources, and judicially-required schedules. Lastly, this workgroup will design and execute a pilot project to explore the use of new methodologies to refine the estimates of pesticide and herbicide uses and potential environmental and aquatic exposures in these types of consultations.

PUBLIC REVIEW AND COMMENT

Any proposed policies or regulatory changes will be published in the *Federal Register* and will be subject to an extensive public comment process, including a full analysis under the National Environmental Policy Act.

For more information, please visit: http://www.fws.gov/endangered/improving_ESA/reg_reform.html

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