

ESA Regulations Revision Update



Mike Long
FWS Region 8 Regional Office

What are we updating?

- May 2014 Proposals:

 - 2 Regulations and 1 policy dealing with Critical Habitat.

- How we designate Critical Habitat
- How we will consider exclusions from CH.
- Revised definition of ADVERSE MODIFICATION of Critical Habitat.

Why we are Revising Regs

- Regulations last updated in mid-1980's
- Make consistent with court decisions...and get judicial deference
- Incorporate lessons learned
- Help make our rulemakings and decisions more transparent and predictable.
- Response to EO 13563 – Review & modify regs based on what has been learned since regs promulgated

Effects of changes

- Primarily codify current practice.
- Putting into regulation and policy what we are already doing
- Expect to see little change in designations of CH or biological opinions.

Refresher – What is Critical Habitat?

- Habitat essential for a species' recovery.
- Designation required at time of listing by the ESA, unless:
 - Not determinable
 - Not prudent (no benefit or harmful to species).
- Federal agencies required to consult with FWS to ensure their actions do not result in:
 - Destruction
 - Adverse modification
- Does NOT create refuge or protected areas.
- No effect when no Federal involvement in an action.

Quick Review – Definition of CH

- i. The specific areas within the **geographical area occupied by the species** at the time it is listed.....on which are found those **physical or biological features** (I) essential to the conservation of the species and (II) which may require **special management considerations or protection**; AND
- ii. Specific areas outside the geographical area occupied by the species at the time it is listed[if] such areas are essential for the conservation of the species.

Process & Standards for Designation

- Summary:
 - Better describe **scope and purpose** of Critical Habitat
 - Add & remove some definitions
 - Clarify criteria for designation

Process & Criteria Changes

- **Scope & Purpose:**

- Remove reference to CH being designated only “**where appropriate**” to avoid misunderstanding
- Implied greater flexibility re: whether to designate
- We believe ‘not prudent’ determinations will be rare

Process & Criteria Changes (p.2)

- Definitions:
- Conserve, conserving, conservation – clarify this is a process culminating in recovery of the species modified to clarify these basically mean to recovery the species
- Delete **critical habitat, endangered species, plant, Secretary, State Agency and threatened species** (redundant with definitions in the ESA itself).

Process & Criteria Changes (p.3)

- New: “**Geographical area occupied by the species**”:
 - Term is part of the definition of Critical Habitat
 - Def. - Geog. Area generally delineated around the species’ occurrences... (i.e. the range of the species)
 - ESA makes clear Geog. Area occupied is larger than specific areas to be designated as CH



Process & Criteria Changes (p.4)

- “Occupied”
- The revised definition of “Geog. Area occupied by the species” would also clarify what is meant by occupied.
- Clarifies that occupied includes those areas used only temporarily or periodically during some portion of its life history (e.g., breeding areas, foraging areas, migratory corridors)

Process & Criteria Changes (p.5)

- **Physical & biological features** – new definition
- Term is part of Critical Habitat definition
- Definition: “the features that support the life history needs of the species.....”
- To help ID specific areas within area occupied that are essential
- Including, for example, soils, veg., prey, combination of habitat characteristics, features/events that support ephemeral habitat conditions (e.g., flooding, flow)

Process & Criteria Changes (p6)

- Remove the term “Primary Constituent Elements”
- Redundant w/ Physical & Biological Features (term used in the ESA) and unclear how the two terms were different.
- Added unnecessary complexity and confusion to designating CH.
- **Does not change the manner in which CH designated.**

Process & Criteria Changes (p.6)

- Clarify “Special management considerations or protection”
- Clarification –
- Can be existing management/protection, or management/protection that may be needed

Section 4(b)(2) Proposed Policy

- What is Section 4(b)(2) of the ESA?
- Sect. 4(b)(2) – we must designate CH after considering the economic and national security impacts, and any other relevant impact.
- We may EXCLUDE an area from CH designation if the benefits of exclusion outweigh the benefits of inclusion. (Balancing Analysis)
- The decision to exclude is always completely discretionary.

Proposed 4(b)(2) Policy

- Consists of 6 elements the FWS will consider when considering whether to exclude any areas.
- Policy not cover the entire range of all factors we may consider.
- Covers the factors that most frequently arise when designating Critical Habitat.

Proposed 4(b)(2) Policy

- **Element 1: Partnerships & Conservation Plans**
- We will generally exclude areas covered by approved & implemented plans and programs, or partnerships that provide a benefit to the species' habitat.
 - We must look at certainty of implementation & success.
- **Balancing Analysis:**
- **Inclusion:** The benefits of the plan diminish the value of designating CH.
- **Exclusion:** Excluding areas covered by plans may serve to maintain existing partnerships and foster future partnerships.

Proposed 4(b)(2) Policy

- **Element 2: Conservation plans permitted under Section 10 of the ESA.**
- HCPs, CCAAs, Safe Harbor Agreements
- These plans already provide benefit to the covered species and habitat, and will generally be excluded from designation.

Proposed 4(b)(2) Policy

- **Element 3: Tribal Lands**
- **S.O. 3206:** CH shall not be designated on Tribal lands unless determined essential to conserve a listed species.
- However, the ESA directs that FWS must identify areas that meet the definition of CH.
- Thus we determine those areas that qualify as CH irrespective of ownership.
- However, we will **ALWAYS** consider exclusions of Tribal lands.
- We will give great weight to Tribal concerns in analyzing the benefits of exclusion.

Proposed 4(b)(2) Policy

- **Element 4: Impacts on National & Homeland Security**
- FWS will give great weight and consideration to an agency's judgment as to the impact of designation on national security.

Proposed 4(b)(2) Policy

- **Element 5: Federal Lands**
- Federal agencies have an independent obligation to conserve listed species per the ESA.
- One of major benefits of CH is the requirement for Federal agencies to consult with the FWS to ensure their actions do not adversely modify CH.
- Federal lands should be prioritized for supporting recovery of listed species.
- Thus, to the extent possible **we try to focus designation on Federal lands.**
- Exclusion of Federal lands will continue to be uncommon.

Proposed 4(b)(2) Policy

- **Element 6: Economic impacts**
- We may exclude an area if the economic impacts are high and the relative conservation value of the proposed CH area is low.

Proposed 4(b)(2) Policy

- Effect of New Policy?
- No change to how FWS currently conducts exclusion analyses.
- Therefore, there will be no additional impact on stakeholders.

Revised Definition of Adverse Modification

- 2 court cases invalidated our previous definition.
- Previously, adverse mod. Required diminishment of both survival AND recovery of a species.
- New definition: ...alteration that appreciably **diminishes the conservation value** of the critical habitat for listed species.
- Helps make this standard distinct from the Jeopardy standard of the ESA.
- No effect to federal agencies since we have been in effect using this standard since 2004.

Status of Revised Regulations and New Policy

- Public comments have been reviewed.
- FWS HQ working on drafting the final versions of the regulations and 4(b)(2) Policy.
- Tentative schedule calls for publication in the Federal Register in early summer.