

## THE ESA LISTING PROCESS

**Significant Portion of its Range (final):** The ESA provides that a species may be listed as endangered or threatened throughout all *or a significant portion of its range*. On July 1, 2014, the Services published a "Final Policy on Interpretation of the Phrase *Significant Portion of its Range*" because the ESA does not provide a definition of this phrase and its interpretation had been the subject of debate and litigation. The policy clarifies the definition of two terms: 'range' and 'significant portion.' Range is defined as the general geographical area within which that species can be found at the time of listing. A portion of the range is considered significant if its contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction now or in the foreseeable future throughout all of its range. Thus, a species may be found not to warrant listing throughout all of its range, but if it is found to be threatened or endangered in a significant portion of its range, the entire species would be listed as threatened or endangered. For further information, please refer to the following web page: [http://www.fws.gov/endangered/improving\\_ESA/SPR.html](http://www.fws.gov/endangered/improving_ESA/SPR.html)

**Petition Process Changes (proposed):** The Services published in the Federal Register proposed changes to the ESA petition process. Most notably, the proposed changes would require petitioners would have to solicit information from relevant state fish and wildlife agencies prior to asking the Services to review the status of a given species. In addition, the proposal would limit a petition to a single species, as opposed to previous acceptance of multi-species petitions and mega-petitions, and describes in more detail the sort of information that needs to be included in a petition to ensure its completeness and increase the probability that the Service can make a substantial finding on the petitioned request. The comment period for the proposed rule published in the Federal Register on May 21, 2015 (80 FR 29286), was extended and comments were accepted until September 18, 2015. Final rule is expected early next year. For further information, please refer to the following web page: [http://www.fws.gov/endangered/improving\\_ESA/petition-regulations.html](http://www.fws.gov/endangered/improving_ESA/petition-regulations.html)

**Publication of 90-day Findings (final):** The Service has changed its standard procedure for publishing 90-findings on petitions. Whereas we used to publish a fairly detailed finding for each petition in the Federal Register, the Service now published "batches" of streamlined 90-day findings in the Federal Register approximately four times per year. The next "batch" of 90-Day findings is anticipated to be published in mid-June of 2015.

## **CRITICAL HABITAT**

**Procedures and Standards for Designating Critical Habitat (proposed):** On May 12, 2014, the Services published a proposed rule clarifying the procedures and standards used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation. The proposed amendments would make minor changes to the regulations to: better describe the scope and purpose of critical habitat, add and remove some definitions, and clarify the criteria for designating critical habitat. For example, the proposed rule clarifies the meaning of the phrase "geographical area occupied by the species" to be the range of the species, and removes the term "primary constituent elements" because it is redundant with the term "physical and biological features." This proposed rule would also revise the Services' regulations to be consistent with statutory amendments made in 2004 that make certain lands managed by the Department of Defense ineligible for designation as critical habitat. We anticipate this rule will be finalized in late 2015. For further information, please refer to the following web page: [http://www.fws.gov/endangered/improving\\_ESA/DCH.html](http://www.fws.gov/endangered/improving_ESA/DCH.html)

**Exclusions from Critical Habitat Designations (proposed):** Also on May 12, 2014, the Services published a proposed policy regarding how the Services consider exclusions from critical habitat designations under section 4(b)(2) of the Act. The proposed rule provides the Services' position on how they consider non-permitted conservation plans and partnerships; conservation plans permitted under section 10 of the ESA; tribal, military and federal lands; and economic impacts in the exclusion process. This policy will serve to clarify the critical habitat exclusion process for federal and state agencies, tribes, and the public. It will also provide for a more defensible and predictable critical habitat exclusion process. The proposed rule essentially puts into policy the guidance regarding exclusions that the Fish and Wildlife Service has been using for quite some time. We anticipate this rule will be finalized in late 2015. For further information, please refer to the following web page: [http://www.fws.gov/endangered/improving\\_ESA/CHE.html](http://www.fws.gov/endangered/improving_ESA/CHE.html)

**Timing of Economic Analysis for Critical Habitat Determinations (final):** This revised regulation (published August 28, 2013) requires that the draft economic analysis for proposed designations of critical habitat be made available for public review and comment concurrent with the publication of the proposed critical habitat designation. The revised regulation also codified the Services' standard practice, in most cases, of using an "incremental approach" for assessing the probable impacts of proposed critical habitat designations. For example, under the incremental approach the economic impacts of listing a species as threatened or endangered are not considered when designating areas of critical habitat for that species. This regulatory change was first outlined in Presidential Memorandum. For further information, please refer to the following web page: [http://www.fws.gov/endangered/improving\\_ESA/CH\\_Econ.html](http://www.fws.gov/endangered/improving_ESA/CH_Econ.html)

**Definition of Destruction or Adverse Modification of Critical Habitat (proposed):** The Service is proposing to redefine destruction or adverse modification of critical habitat. The courts invalidated the Services' 1986 regulatory definition of, reasoning that the regulatory definition set too high a threshold for triggering adverse modification by requiring that both "survival" and "recovery" be diminished before critical habitat could be considered destroyed or adversely modified. The courts ruled that adverse modification applies to impacts that diminish species recovery, not just their survival. The proposed definition would focus on an action's effects on the "conservation value" of critical habitat. This is a measure of the quantity and quality of habitat features and how they support a species' life history and recovery needs. The proposed definition will also make it clear that a proposed action that precludes or significantly delays improvement in the quality and quantity of these habitat features could also result in destruction or adverse modification. This definition does not create a new requirement that actions subject to section 7 consultation must contribute to the recovery of listed species, only that such actions cannot significantly delay or preclude recovery. The Service anticipates publication of the final rule later this year, and revisions to the section 7 handbook sometime in the future. For further information, please refer to the following web page:

[http://www.fws.gov/endangered/improving\\_ESA/AM.html](http://www.fws.gov/endangered/improving_ESA/AM.html)

## **SECTION 7 CONSULTATION**

**Incidental Take Statements (final):** The final rule amends the incidental take provisions of the regulations implementing section 7 of the ESA, and will be effective June 10, 2015. The rule accomplishes two things. First, it allows surrogates for individuals of listed species to express the amount or extent of incidental take. This rule codifies a common practice in Region 8 of using habitat as a surrogate for individuals in an incidental take statement (ITS). Second, this rule establishes our authority to not include an ITS in a programmatic biological opinion which provides for a framework for future, site-specific actions that are subject to their own consultations and ITSs and for which there is insufficient information to inform the amount or extent of take at the programmatic level. For further information, please refer to the following web page:

[http://www.fws.gov/endangered/improving\\_ESA/ITS.html](http://www.fws.gov/endangered/improving_ESA/ITS.html)