



ESA Regulations & Policies Revisions Update

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What are we updating?

- Regulations and 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.
- Regulations regarding **Incidental Take Provisions** of the Section 7 Consultation Process
- Regulations concerning **listing petitions**
- Also, proposed new policy on “**Voluntary Pre-listing Conservation Actions**”

Purposes of the Revisions

- Regulations last updated in mid-1980's
- Make consistent with court decisions...and get judicial deference
- Incorporate lessons learned over the past many years and help to make ESA implementation more efficient
- 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.
- Listing petition process and Pre-listing conservation policies would implement changes to current practice.

Refresher – What is Critical Habitat?

- Habitat essential for a species' recovery.
- Designation required at time of listing by the ESA, unless:
 - Not determinable (1 additional year to complete)
 - Not prudent (no benefit or harmful to species).
- Federal agencies required to consult with FWS to ensure their actions do not result in:
 - Destruction or 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 of revised regulations:
 - Better describe **scope and purpose** of Critical Habitat
 - Add & remove some definitions
 - Clarify criteria for designation

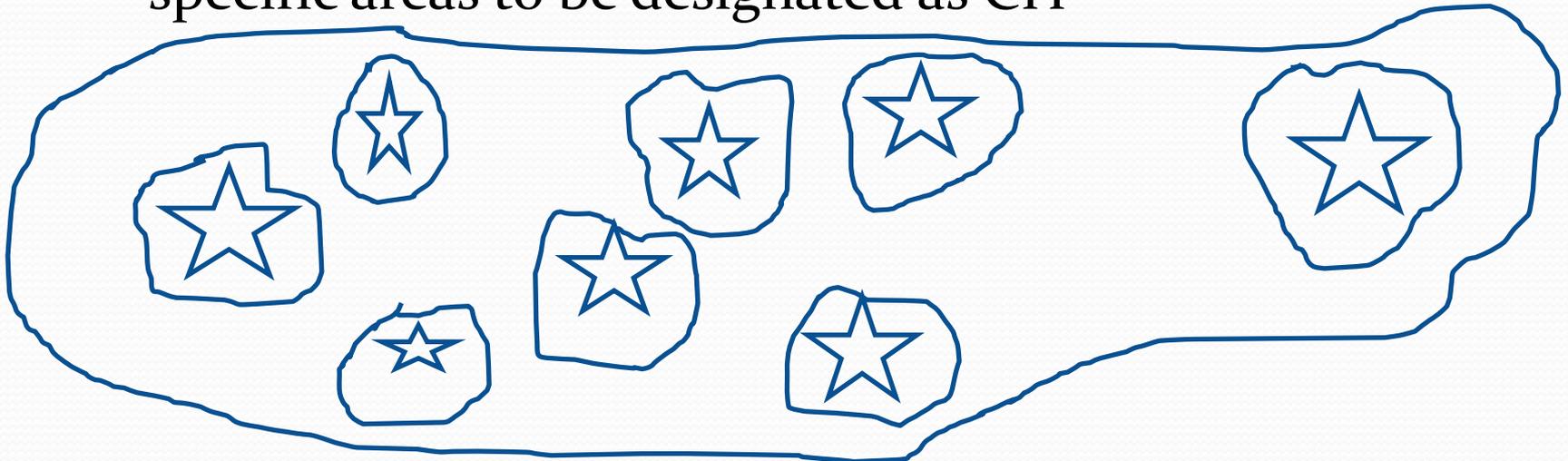
Process & Criteria Changes

- **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

- 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

- “Occupied”
- The revised definition of “Geog. Area occupied by the species” would also clarify what is meant by occupied.
- Clarifies that occupied also 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

- **Physical & biological features** – new definition
- Term is part of Critical Habitat definition in statute
- 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 regime)

Process & Criteria Changes

- 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

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



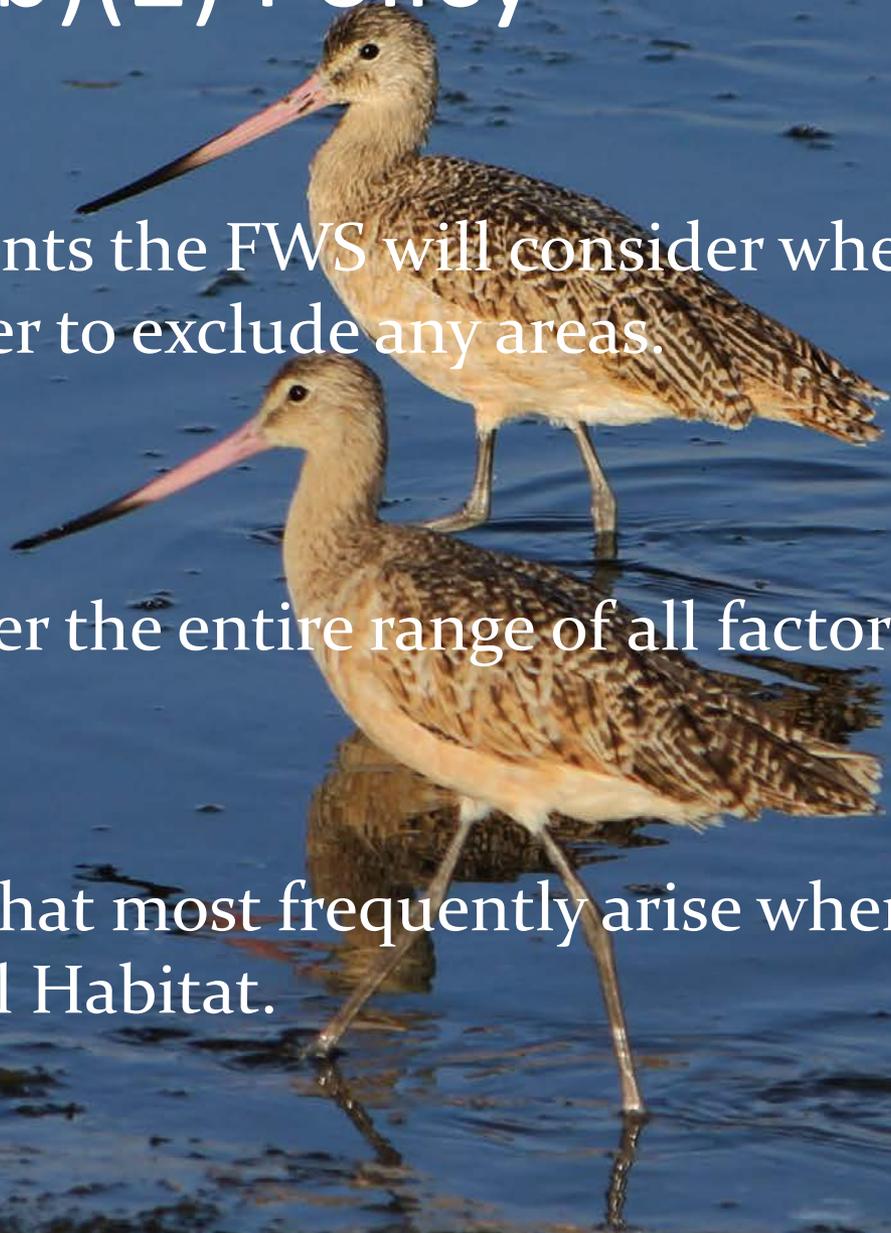
Section 4(b)(2) Proposed Policy



- 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.
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- 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 does 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 considerations:
- **Inclusion**: The benefits of the plan diminish the added 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 generally will be excluded.
- These plans already provide benefit to the covered species and habitat.
- Another layer of regulation could impair partnerships

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.
- **TENSION:** 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 (i.e. 7(a)(1)) 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

A lizard with brown and yellow spots is positioned in the center of the frame, resting on a rocky, sandy ground. The lizard's body is oriented towards the left, and its tail extends towards the bottom right. The background consists of various sized rocks and sand, creating a textured, natural environment. The overall scene is brightly lit, suggesting a sunny day.

- **Element 6: Economic impacts**
- Each CH designation includes an Economic Analysis as part of the proposal
- 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, additional impacts on stakeholders are not expected.



Proposed Revised Definition of Adverse Modification of CH

- Previous interpretation required diminishment of **BOTH survival AND recovery**.
 - Invalidated by 5th and 9th Circuit Courts.
- New definition: alteration that appreciably **diminishes the conservation value** of CH .
 - **Now: Adverse Mod does not require diminishment of survival**
- Can include effects that preclude or delay physical/biological features of CH
- Helps make this standard distinct from the Jeopardy standard of the ESA.
- No change to consultation process or outcomes of biological opinions since we have been in effect using this standard since 2004.
- Public comments received; EA being prepared; hope to finalize later this summer

Incidental Take Statements

- Final policy published May 11, 2015
- Changes address two issues:
 - 1. Use of “SURROGATES” to express amount of anticipated take.
 - Codifies current policy of FWS re: surrogates
 - 2. ITSs for ‘PROGRAMMATIC’ federal actions
 - Addresses recent court decisions

ITS - Refresher

- When federal actions may adversely affect a listed species a Biological Opinion is issued by FWS.
- A BO contains an ITS.
- The ITS expresses amount/extent of take anticipated as a result of the proposed action.
- ITS also provides an exemption from the ESA Sect. 9 prohibitions on take.



ITS: Use of Surrogates

- Amt. of take can be very difficult to determine, and/or monitor and detect
 - Examples:
 - Action may not result in direct mortality but may decrease fitness by reducing food resources;
 - Spotted owl territories are large, and dead owls are hard to detect.

ITS: Surrogates

- NEW POLICY: FWS can use surrogates if the ITS:
 - 1. Describes the relationship between the surrogate and take of the species
 - 2. Explains why not practical to express take as numbers of individuals or to monitor take-related impacts to individuals
 - 3. Sets a clear standard for determining when take has been exceeded.

ITSs for Programmatic Actions

- What is a Programmatic Action?
 - Federal action that provides a framework for development of future actions, and
 - Any take of species would not occur until those future actions are implemented.
- Example: Forest Service or BLM land management plans
- Subsequent actions that may adversely affect listed species will be subject to a project-level consultation and an ITS will be developed at that time.

Proposed Changes to Listing Petition Process

- Citizens may petition the FWS to list a species as Threatened or Endangered.
- Quantity and quality of information in petitions varies.
- Proposed changes:
 - Require petitioners to solicit information from State F&W agencies before submitting the petition.
 - Details the types of information needed to ensure completeness of the petition an increase likelihood of a “substantial” finding on the petition.
 - No more ‘Mega-petitions’ allowed....petitions can be for single species only.

Petition Process Proposed Changes

A small bird with a red head and orange wing patch is perched on a spiny cactus. The background is a blurred desert landscape with green grass and a blue sky.

- Would help ensure we are basing on evaluations on best available information since States often have the best information regarding a species.
- Increases coordination with States
- Reduce the incidences where FWS would waste resources evaluating petitions for species that are not in trouble.
- Comments due July 20, 2015.

Voluntary Pre-Listing Conservation Actions - - - Proposed Policy

- Program to give credit to any landowner for voluntary conservation actions for species at risk.
- Purposes:
 - 1. Provide incentives for conservation actions for species before they reach the point of needing to be listed under the ESA.
 - 2. Reward those landowners who voluntarily undertake conservation actions by allowing them to use accrued benefits to species to compensate for impacts to those species if they are listed.

Pre-Listing Proposed Policy

- Major Provisions:
- Applies to non-federal and federal landowners
- Actions must be voluntary
 - (Not actions otherwise required)
- Cons. Actions must be in accordance with a conservation strategy for the species.
- Actions must be undertaken before a species is listed.
- Must be part of a State-administered program.

Pre-Listing Conservation

- Major Provisions – continued
 - Benefits to species can be used to offset mitigation required as a result of issuance of a Section 10 (Incidental Take) permit to a non-federal landowner; OR
 - To offset adverse effects of federal actions that require consultation under Sect. 7 of the ESA.
- Pre-listing action combined with detriment for a future action must result in net benefit to the species.

Pre-Listing Conservation - Status



- Proposed policy published July 22, 2014
- Plan to finalize the policy sometime this Fall.

Status of Revised Regulations and New Policies

- FWS HQ working on drafting the final versions of the CH regulations and 4(b)(2) Policy.
- Incidental Take Regulations have been issued.
- Listing Petition Regulation changes - public comment period open now
- Pre-listing Conservation Actions - Tentative schedule calls for publication in the Federal Register this Fall.



Improving ESA Implementation

[Improving ESA Home](#)

[Listing Workplan »](#)

[Regulatory Reform »](#)

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For more than 35 years, the Endangered Species Act (ESA) has prevented the probable extinction of hundreds of species across the nation and contributed to the recovery of many others. Although we have made significant progress in safeguarding imperiled species and their ecosystems, we face continuing challenges. Ensuring that imperiled species continue to be protected and recovered requires an ongoing commitment to implementing a strong, effective ESA—one that is responsive to both the needs of species and to the ideas and concerns of our citizens.

The Ecological Services Program's commitment to excellence in carrying out our responsibilities under the ESA will guide our efforts to continually enhance our conservation success. To better fulfill the purposes of the ESA and achieve our conservation goals, we will put increasing emphasis on the following principles:

- Focus on Recovery
- Provide Conservation Incentives
- Increase Public Participation
- Ensure Clear and Consistent Policies and Implementation
- Base Decisions on Sound Science
- Reduce the frequency and intensity of conflicts

