

New Regulations- February 9, 2016

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 FWS and National Marine Fisheries Service (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

Petition Process Changes (proposed): On May 21, 2015, the Services published in the *Federal Register* proposed changes to the ESA petition process. The public comment period was subsequently extended from July 20, 2015 to September 18, 2015. Most notably, the proposed changes would require petitioners 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 final regulation is anticipated to be published in early summer 2016. For further information, please refer to the following web page:

http://www.fws.gov/endangered/improving_ESA/petition-regulations.html

Publication of 90-day Findings and 12-Month Findings: The Service has changed its standard procedures for publishing both 90-day petition findings, and 12-month findings. Whereas we used to publish a fairly detailed 90-day finding for each petition in the *Federal Register*, the Service now publishes "batches" of streamlined 90-day 'substantial' and 'not substantial' 90-day findings in the *Federal Register* approximately four times per year. Similarly, we now publish batches of summaries of 12-month 'not warranted for listing' findings two or three times per year. The Director described these processes in a memo dated October 27, 2015. Final guidance is anticipated to be issued after the publication of final revisions to the petition process (see previous item) – probably summer 2016.

CRITICAL HABITAT

Procedures and Standards for Designating Critical Habitat (final): On February 11, 2016, the Services published a final 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 amendments 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 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 rule also revises 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. For further information, please refer to the following web page:

http://www.fws.gov/endangered/improving_ESA/DCH.html

Exclusions from Critical Habitat Designations (final): Also on February 11, 2016, the Services published a final policy regarding how the Services consider exclusions from critical habitat designations under section 4(b)(2) of the Act. The 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. Basically, this document puts into policy the guidance regarding exclusions that the Fish and Wildlife Service has been using for quite some time. For further information, please refer to the following web page:

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

Definition of Destruction or Adverse Modification of Critical Habitat (final): On February 11, 2016, the Service published a final regulation that redefines destruction or adverse modification of critical habitat. The courts invalidated the Services' 1986 regulatory definition of adverse modification. The courts reasoned 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 revised definition focuses 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 new definition will also make 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 Section 7 Handbook will be modified at a later date to reflect this changed definition. For further information, please refer to the following web page:

http://www.fws.gov/endangered/improving_ESA/AM.html

SECTION 7 CONSULTATION

Incidental Take Statements (final): A final rule that amends the incidental take provisions of the regulations implementing section 7 of the ESA became 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