Endangered Species Act

Proposed Revisions to the Regulations
Background

• Section 4 of the Act
  – Provides for how to add and remove species from the Federal lists of threatened and endangered species
  – Provides procedures for designating critical habitat
  – Implementing regulations are at 50 CFR 424
  – Addresses protective regulations for threatened species (i.e., 4(d) rules)

• Section 7 of the Act
  – Provides requirements for Federal agency cooperation and consultation procedures
  – Implementing regulations are at 50 CFR 402

• Section 9 of the Act
  – Establishes prohibitions for listed species
  – Implementing regulations are at 50 CFR 17
How were the proposed revisions made?

• Implementing an Executive Order aimed at reducing the regulatory burden on citizens and promoting innovation

• DOI and NMFS requested public input on regulatory reform initiatives (June 2017 Federal Register)

• DOI and DOC Policy Officials met with the FWS and NMFS ESA leadership in Dec 2017 to brainstorm improvements to the ESA – decided to focus on sections 4 and 7 of ESA

• Underwent Federal interagency review led by the Office of Management and Budget
Proposed Changes to 50 CFR 424

Listing, Delisting, or Reclassifying species

- Creates a regulatory framework for the phrase “foreseeable future”
- Clarifies that the standard for listing and delisting of species is the same
- Removes reference to economic or other impacts in classification decisions
Proposed Changes to 50 CFR 424

Criteria for Designating Critical Habitat

• Clarifies when designation of critical habitat may not be prudent

• Revises the process and standards for designation of unoccupied critical habitat
Foreseeable Future

• Extends only so far as we can reasonably determine that conditions potentially posing a danger of extinction in the foreseeable future are probable.

• Described on a case-by-case basis, using the best available data for each species

• No specific timeframes are necessary, qualitative descriptions are ok

• Based on a reasonable determination that both the future threats and the species’ responses to those threats are probable.
Factors Considered in Delisting

- Clarifies that the standard for listing and delisting of species is the same (i.e., whether a species meets the definitions of endangered or threatened)
- Clarifies it is appropriate to delist a species when:
  - It is extinct
  - It does not meet definition of an endangered or threatened species
  - Listed entity does not meet the definition of a species
Economic or Other Impacts

• Aligns the regulatory text more closely to the statutory language
• Removes “without reference to possible economic or other impacts of such determination”
• Determination made *solely* on the basis of the best available scientific and commercial information regarding a species’ status
• Impacts information, if compiled, would be to inform the public in the interest of transparency
Critical Habitat – Not Prudent

- Critical habitat may be not prudent when:
  - Increased degree of threat
  - Habitat impacts not a threat or threats to habitat stem solely from causes not able to be addressed by section 7(a)(2) of the Act
  - Areas within U.S. jurisdiction provide no more than negligible conservation value for species occurring primarily outside U.S. jurisdiction
  - No areas meet definition
- Removes language regarding “designation of critical habitat would not be beneficial to the species”
Designating Unoccupied CH

• First evaluate areas occupied by the species
• Only consider unoccupied areas to be essential when occupied areas would:
  – Be inadequate to ensure conservation of the species or
  – Result in less efficient conservation of the species
    • Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species.
Designating Unoccupied CH, cont.

- Only designate unoccupied areas upon a determination that such areas are essential for the conservation of the species.
- An area can only be considered essential if the Secretary determines there is a reasonable likelihood that the area will contribute to the conservation of the species.
Proposed Changes -- 50 CFR 402

The proposed revisions would:

• Address alternative consultation mechanisms

• Revise the definitions of “destruction or adverse modification” and “effects of the action”

• Address certainty of mitigation proposed by action agencies

• Otherwise improve the consultation process
Addressing Alternative Consultation Mechanisms

- Define “programmatic consultation”

- Allow the Services to adopt all or part of a Federal agency’s initiation package in their biological opinions

- Insert a new provision – Expedited consultation – to offer opportunities to streamline consultation in certain circumstances
Clarifying “Effects of the Action”

- Revise the definition of “effects of the action”
- Insert a new section that clarifies “Activities reasonably certain to occur”
- Propose a standalone definition for “environmental baseline”
- Clarify what information is needed to initiate consultation
Revising the Definition of “Destruction or Adverse Modification”

• Add the phrase “as a whole” to the first sentence

• Strike the definition’s second sentence
Revising the Definition of “Destruction or Adverse Modification”

Revised definition would be:

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.
Addressing Certainty of Mitigation

Clarify that measures included in a proposed action or reasonable and prudent alternative to avoid, minimize, or offset the effects of a proposed action will not be held to a higher standard than other portions of the action.
Otherwise Improving the Consultation Process

- Clarify the analytical steps the Services undertake in formulating a biological opinion
- Clarify that reinitiation of consultation applies to all 7(a)(2) consultations (acknowledges court rulings and practice)
- Eliminate need to reinitiate consultation on certain land management plans upon listing of new species or designation of new critical habitat
  - Potentially expand to other types of programmatic land or water management plans
  - in light of the recently enacted Omnibus language we will consider whether to retain this provision in our final rule
Other Potential Consultation Improvements

We are also seeking input on potentially:

- Establishing a deadline for informal consultation
- Codifying the ability to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS
- Revising the definition of “environmental baseline” as it relates to ongoing Federal actions
- Clarifying the circumstances upon which Federal agencies are not required to consult
Other Potential Consultation Improvements

We are also seeking input on potentially:

• Limiting the scope of a consultation to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.
Proposed Changes to 4(d) Rules
50 CFR Part 17 (FWS Only)

- Rescinds current regulations that automatically apply prohibitions for endangered species to threatened species
- Protections for species listed as threatened in the future will be made on a case-by-case basis tailored to what is necessary and advisable for that species (i.e., via a species-specific 4(d) rule)
- No change in protections for species currently listed as threatened
- Aligns the Fish and Wildlife Service with the National Marine Fisheries Service practice
Questions?