



## U.S. Fish & Wildlife Service

# Improving ESA Implementation Through Regulation Review

The U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) are working collaboratively to improve the implementation of the Endangered Species Act (ESA) by considering appropriate changes to our practices, guidance, policies, and regulations to enhance conservation of listed species. This review and update of regulations, policies, guidance and practices is consistent with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," and our selected areas for regulatory review and improvement are outlined in the Department of Interior's (DOI) "Preliminary Plan for Retrospective Regulatory Review."

To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA Fisheries have identified areas where changes in ESA implementing regulations and policies may reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort is guided by the following objectives:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective conservation partnerships with other federal agencies, the states, tribes, conservation organizations, and private landowners;
- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.



Eric Porter/USFWS

The federally endangered El Segundo blue butterfly is found only along coastal dune habitat on the southeaster shores of California's Santa Monica bay.

### FOCUS AREAS FOR REGULATORY IMPROVEMENT

The Service has identified key regulations and associated policies where there is both a need and an opportunity for improving administration of the ESA. The following changes to the ESA regulations or policies will improve conservation effectiveness, reduce administrative burden, enhance clarity and consistency for agency staff and impacted stakeholders, and encourage partnerships, innovation, and cooperation.

#### Minimize requirements for written descriptions of critical habitat boundaries in favor of map- and internet-based descriptions.

In the interest of efficiency, saving taxpayers' money, and making the critical habitat designation process more user friendly to the public, we will continue to publish critical habitat maps, but will make optional any textual description of boundary-coordinate lists in our regulations. Although the boundaries as mapped—or otherwise described in our regulations—would remain the official delineation of a critical habitat designation, we will provide the public easier-to-use tools that clarify which areas are covered by a designation. These tools will be available on the

Internet and at the applicable Service or NOAA Fisheries office.

#### Clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners, including habitat conservation plans, safe harbor agreements, and candidate conservation agreements.

Although we finalized the implementing regulations and policies for these landowner agreements years ago, we have not systematically reviewed or revised them in response to stakeholder feedback. Comments on these programs have led us to conclude that these tools are valuable in meeting our goals; however, there is room for improvement in the way we implement these tools. A few key improvements that have been identified include:

- Improving consistency in implementing the processes of landowner agreements and plans;
- Reducing the transaction costs associated with developing and approving landowner agreements;
- Providing guidance to allow flexibility and creativity in application of the tools to accommodate diverse landowner needs.

**Expand opportunities for the states to engage more often and more effectively in the implementation of the ESA's various provisions, especially those pertaining to the listing of species.**

The Service and NOAA Fisheries have established, in coordination with the States, a Joint Federal/State Task Force for ESA Policy to review operational policies and issues, and to recommend solutions to improve and strengthen the partnership between the States and the Services in implementing the ESA. Through this effort, we will explore ways to improve the implementation of our 1994 policy on state cooperation (94 FR 16020) at the field, regional, and national levels.

**Review and revise the process for designating critical habitat to design a more efficient, defensible, and consistent process.**

A number of factors (such as litigation and the Services' experience over the years in interpreting and applying the statutory definition of critical habitat) have highlighted the need to clarify or revise the current regulations for designating critical habitat under section 4 of the ESA. The Service has proposed revisions to clarify expectations regarding critical habitat, and provide for a more predictable and transparent critical habitat designation process.

**Clarify the definition of the phrase "destruction or adverse modification" of critical habitat, which is used to determine if an action may diminish the value of critical habitat for listed species.**

The courts 5th and 9th circuit courts of appeal have invalidated the Services' 1986 regulatory definition of "destruction or adverse modification" reasoning that the definition set too high a threshold for triggering adverse modification. The proposed regulatory definition is intended to add clarity and predictability to the analysis of potential impacts to critical habitat during the section 7 consultation process, codify our practices, and provide a clear and consistent benchmark for determining "destruction or adverse modification."

**Clarify the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult.**

An incidental take statement accompanies a biological opinion and expresses the amount or extent of anticipated take and its impact on listed



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The Pacific walrus is currently a candidate species for listing under the Endangered Species Act.

species. An incidental take statement provides an exemption from the ESA Section 9 prohibitions on take of listed species, provided the federal agency and any applicant comply with the reasonable and prudent measures necessary to minimize the take. This regulation change specifically addresses the use of surrogates to express the amount or extent of exempted take and the circumstances under which inclusion of an incidental take statement with a biological opinion on a programmatic action is appropriate. Greater flexibility in the quantification of anticipated incidental take will help improve the efficiency and effectiveness of developing and implementing biological opinions while at the same time, ensuring conservation benefits to listed species.

**Working through an interagency group of staff and managers from the Service, NOAA Fisheries, and the Environmental Protection Agency (EPA), complete nationwide section 7 consultations on the registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). One major element of this effort is to develop methodologies relevant to core scientific issues addressed by the committee convened by the National Academy of Sciences on behalf of the agencies.**

In April of 2014, the committee convened by the National Academy of Sciences provided its expert advice on certain core

scientific and technical issues which serve as the foundation for assessing risks to listed species associated with EPA's FIFRA-related activities. The Service, NOAA Fisheries, and EPA are currently developing methodologies to characterize the risk of pesticide exposure to listed species that incorporate the advice of the committee. The interagency workgroup is incorporating these novel approaches into pilot assessments for five nationwide chemicals registrations. In addition, the agencies are implementing a new framework for incorporating expanded opportunities for registrants, the affected states, farming organizations, and other interested parties to participate in the consultation processes.

## **PUBLIC REVIEW AND COMMENT**

Any proposed policies or regulatory changes will be published in the *Federal Register* and will be subject to an extensive public comment process, including a full analysis under the National Environmental Policy Act.

For more information, please visit: [http://www.fws.gov/endangered/improving\\_ESA/reg\\_reform.html](http://www.fws.gov/endangered/improving_ESA/reg_reform.html)

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