

Revision of the Definition of “Destruction or Adverse Modification” of Designated Critical Habitat Questions and Answers

Q: What actions are the U.S. Fish and Wildlife Service and National Oceanic Atmospheric Administration’s National Marine Fisheries Service taking?

A: The U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) (together, the Services) are revising the definition for “destruction or adverse modification” of designated critical habitat contained in the regulations for implementing the Endangered Species Act (ESA).

Q: What is critical habitat?

A: Under the ESA, critical habitat is generally defined as a specific geographic area(s) that contains features essential to the conservation of a threatened or endangered species and that may require special management considerations and protection. In other words, critical habitat represents the habitat essential for the species’ recovery. Critical habitat may include areas that are not currently occupied by the species but that will be needed for its recovery. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness reserve, preserve or other special conservation area. It does not mandate government or public access to private lands. A critical habitat designation has no effect in situations that do not involve a federal agency—for example, a private landowner undertaking a project that involves no federal funding or permitting.

Q: What is the final definition?

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

Q. How does the final definition differ from the proposed definition?

A. On May 12, 2014, the Services proposed to define “destruction or adverse modification” as “a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.” We did not alter the overall meaning of the proposed definition, but made minor changes for clarification based on the comments received.

First, to avoid unnecessary confusion and more closely track the statutory definition of critical habitat, we replaced the terms “conservation value” and “life-history needs” in the proposed definition with simpler language more clearly conveying their intended meanings. Specifically, we replaced “conservation value of critical habitat for listed species” with “the value of critical habitat for the conservation of a listed species.” We also replaced “physical or biological features that support life-history needs of the species for recovery” in the second sentence with “physical or biological features essential to the conservation of a listed species.”

Second, we modified the second sentence of the definition to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition. Commenters expressed concern that, in their perception, the Services proposed a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or

biological features, to the exclusion of the alteration of existing features. We did not intend the proposed definition to signal such a shift in focus. We revised the proposed definition to explicitly reference alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features.

Q: Why are you revising the definition?

A: We are revising this definition as part of our effort to improve implementation of the ESA. Federal agencies that undertake, fund or permit activities that may affect critical habitat are required to consult with the Services to ensure such actions do not destroy or adversely modify critical habitat. In 2001 and again in 2004, the courts invalidated the Services' 1986 regulatory definition of "destruction or adverse modification," 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 of designated critical habitat applies to impacts that diminish species recovery, not just their survival.

Our revised regulatory definition is intended to add clarity and predictability to the analysis of potential impacts to critical habitat during the section 7 consultation process. This revision is consistent with Executive Order 13563 (January 18, 2011), which directs federal agencies to review their existing regulations and modify or streamline them to minimize the burden on the American public.

Q: What are you putting forward in this new definition of "destruction or adverse modification"?

A: The definition focuses the Services' review of an action's effects on the value of critical habitat for the conservation of a species. This is the quantity and quality of habitat features and how they support a species' conservation

Critical habitat is often not in optimal condition. The second sentence of the revised definition is included to make it explicit that a proposed action that precludes or significantly delays improvement in the quality and quantity of these habitat features could also result in a conclusion of "destruction or adverse modification" of critical habitat. 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.

Q: How will this definition change affect me?

A: This change was made in response to court decisions and the public's request for clarification of the definition of "destruction or adverse modification" of critical habitat. The definition applies to interagency cooperation under section 7 of the ESA. It does not apply to non-federal (i.e., state or private) actions. The new definition will not change the process for applicants requiring approval or authorization from a federal agency.

Q: How will the new definition affect the consultation process?

A: The revised definition will not change the section 7 consultation process and will not require the re-initiation of past consultations. After the courts invalidated the 1986 definition, the Services relied on language from the ESA (as outlined in a 2004 FWS internal guidance memo and a 2005 NMFS internal guidance memo) to complete destruction or adverse modification analyses. The revised definition codifies our practices and provide Service biologists a clear and consistent benchmark within the regulations to use when making their determination of "destruction or adverse modification". While this revised definition replaces one that the courts found improper, we do not

expect that its application will alter the number of “destruction or adverse modification” findings compared to recent years. In other words, we do not expect it to be substantially more or less protective of critical habitat than the internal guidance we have used in recent years.

Q: How have the Services been making adverse modification/destruction of critical habitat determinations in biological opinions?

A: After the courts invalidated the 1986 definition, the Services relied on language from the ESA (as outlined in a 2004 FWS internal guidance memo and a 2005 NMFS internal guidance memo) to complete destruction or adverse modification analyses. The policy guidance instructed the Services to apply an analytical framework that focuses on how a federal action affects the ability of the critical habitat to meet its conservation purposes of species recovery. This revised definition of “destruction or adverse modification” would continue to clarify this focus.

Q. Did the Services seek public comment on the proposed definition?

A. Yes. The Services opened a public comment period on May 12, 2014, for 60 days until July 11, 2014, and on June 26, 2014, extended the comment period for an additional 90 days until October 9, 2014, for a total of 150 days. We received 176 comments and have provided a summary of these comments and our responses in the final rule.

Q: Where can I get more information?

A: For more information, including the final rule submitted to the *Federal Register*, visit www.fws.gov/endangered/improving_esa/reg_reform.html.