

# **Proposal to Revise 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 (NOAA) Fisheries Service (Service) taking?**

**A:** The Services are proposing to revise 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 for the conservation of a threatened or endangered species and that may require special management 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 permit.

**Q: What is the proposed definition?**

The Services propose 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.

**Q: Why are you proposing to revise the definition?**

**A:** We are proposing this revision 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 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. 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 proposing in this new definition for “destruction or adverse modification”?**

**A:** The proposed definition would focus the Services’ review of 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.

Critical habitat is often not in optimal condition. The second sentence of the proposed 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: What other issues did you address in the proposed rule?**

**A:** We distinguish between two standards contained in section 7: “to jeopardize the continued existence of threatened and endangered species” and “destruction or adverse modification of critical habitat.” We note the analyses for the former focuses on the impacts to species reproduction, numbers or distribution; the latter focuses on effects to the quantity and quality of the physical and biological features of a habitat. The inherent linkage between a species and its habitat means alterations to a species’ habitat will, in many cases, impact the species’ reproductive success, numbers or distribution.

**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 proposed definition will not change the section 7 consultation process and will not require the reinitiation of past consultations. The Services currently rely 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 proposed definition would

codify 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 produce substantially more or less “adverse modification” findings than has been the norm for our consultations with other federal agencies in 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:** The Services have 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 proposed definition of “destruction or adverse modification” would continue to clarify this focus.

**Q: Can I provide comments on this proposed definition change?**

**A:** Yes. The Services will be accepting public comments electronically or by postal mail for 60 days immediately following publication of the proposed rule in the Federal Register. Guidance on how to provide comment is provided in the *Addresses section* of the proposed rule. Please visit [www.regulations.gov](http://www.regulations.gov) to view all Federal Register notices, and to submit an electronic comment.