ESA Regulation Revisions - Sections 4 & 7
Frequently Asked Questions

Q1: What prompted the Department of the Interior and Department of Commerce to propose revisions to the implementing regulations of the Endangered Species Act?
A: On January 20, 2021, President Biden issued an Executive Order (E.O. 13990) directing federal agencies to review and consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis.

Following a careful review, the Interior and Commerce Departments are proposing revisions to three rules issued in 2019 that address responsibilities the U.S. Fish and Wildlife Service and National Marine Fisheries Service share under sections 4 and 7 of the ESA.

Q2: What do the proposed revisions address?
A. The Services are proposing revisions to the regulations for listing, delisting, and re-classifying species, designation of critical habitat, and interagency cooperation under the ESA. These proposed revisions are published in three, separate *Federal Register* notices (according to the specific provisions of the ESA addressed).

One proposed rule addresses interagency cooperation (consultation) under section 7 of the ESA. A second rule proposes to clarify how the Services make listing, delisting, and reclassification decisions, and revise how the Services designate critical habitat. The third rule is specific to the Fish and Wildlife Service and proposes to reinstate certain regulatory options for protecting threatened species, referred to as "blanket 4(d) rules."

Q3: What is the overall intent of these revisions?
A: The ESA is the nation's foremost conservation law whose ultimate goals include preventing the extinction of species and providing for their recovery. In proposing a series of improvements to the regulations that guide our implementation of the ESA, we reaffirm our commitment to meeting those goals. The purposes of the ESA include providing a program for the conservation of endangered and threatened species and a means for conserving the ecosystems upon which those species depend (16 U.S.C. 1531(c)).

The proposed revisions intend to improve the regulations that guide the Services' implementation of the Act by making the regulations addressing section 7 consultations, species classifications, and critical habitat more clear, straightforward, or more in line with the conservation purposes of the ESA.

Proposed changes to clarify standards for listing, delisting, and reclassifying species, and revising some criteria for critical habitat designations under section 4 of the ESA.

Q4: What are the proposed changes to ESA section 4 regulations (50 CFR 424)?

A: The Services are proposing revisions to the regulations to clarify, interpret, and improve implementation of ESA's authorities concerning listing, reclassifying, and delisting species, and designating critical habitat.

In terms of the most substantive changes, The proposed revisions would:

- Restore the phrase "without reference to possible economic or other impacts of such determination" to 50 CFR 424.11(b) to make clear that any economic impacts (costs or benefits) stemming from the listing, reclassifying, or delisting of a species cannot be considered when making classification decisions.
- Revise portions of the foreseeable future framework to align the regulation more closely with a 2009 Department of Interior Solicitor's opinion on the meaning of the term *"foreseeable future."* This term is included in the ESA's definition of a *"threatened species"* and is the period over which the Services evaluate the threats to, and responses of a species to inform an ESA status determination. The proposed revisions will more clearly indicate that the Services must be able to reasonably rely on information about future threats and species responses to those threats when considering what timeframe constitutes the foreseeable future.
- Reinsert the concept of "recovery" to the list of circumstances for delisting a species to explicitly acknowledge this fundamental goal of the ESA and recognize it as a reason for delisting species. Removal of a reference to recovery in 2019 from this section of the Services' implementing regulations generated concerns that the Services might begin to delist species before they are recovered or were otherwise undermining the value of recovery plans, which are required for listed species under section 4(f) of the ESA.
- Revise the criteria for when critical habitat may be not prudent for designation by removing the circumstance of when threats to habitat cannot be addressed through management actions taken through section 7(a)(2) consultation – a consideration which required speculation on the part of the Services regarding the outcome of future section 7 consultations and inadvertently implied that section 7(a)(2) consultation is the only benefit of critical habitat designation.
- Revise the requirements for designating unoccupied critical habitat to remove criteria that were newly added in 2019 and which could conflict with the standards for designating critical habitat outlined in the Act. As a result, and in the view of the Services, the proposed regulations would better allow the Secretaries to use their authority as appropriate to further the conservation purposes of the Act. Particular revisions proposed include:
    - Removing the strict requirement to first make a finding that occupied areas are inadequate to conserve the species before the Services can contemplate designating unoccupied areas. The proposed revisions, however, indicate that the Services would continue to identify areas that are occupied by the species as a logical initial step before evaluating areas that are unoccupied by the species.
    - Removing the requirements that, for an unoccupied area to be considered *"essential,"* the Secretary determine, with reasonable certainty, that the area will contribute to the conservation of the species and that it contains one or more of the physical or biological features essential to the conservation of the species.

Q5: Would the proposed revisions change the number or frequency of listings and delistings?
A: No. We do not anticipate any change in the number or frequency of listings and delistings as a result of the proposed regulation, because the proposed revisions do not alter the standards for making listing and delisting decisions. Rather, the proposed changes would reinstate recognition of recovery as an express circumstance in which delisting would be appropriate. The removal of mention of recovery from the regulations in 2019 had the unintended consequence of appearing to some members of the public that the Services were downplaying the role of recovery and recovery plans in species conservation. The proposed changes to portions of the foreseeable future framework align with the DOI M-Opinion and provide clarity on how the Services use information that they can reasonably rely on when considering future threats and the effects of those threats on species being evaluated under the ESA. We do not anticipate any change in the number or frequency of listings, delisting, or reclassifications of species.

Q6: How could the proposed revisions affect the amount of critical habitat designated?
A: The proposed revisions would not automatically lead to an increase or decrease in the total amount or area of critical habitat designated by either Service. Because critical habitat designations are highly fact-specific and must be determined based on the best scientific data available for the particular species, the areas ultimately designated as critical habitat are dictated primarily by the information available and the life history needs of the species. Although the nature of the proposed changes to the implementing regulations regarding unoccupied critical habitat will likely give the appearance that the Services will begin to designate more unoccupied critical habitat (i.e., areas where the species did not occur at the time it was listed under the ESA), this is not likely because the Services would still be required to base their designations on the best available science, make a finding that the areas are "essential" to the conservation of the species, and designate areas that are habitat for that species. These requirements are unchanged by the revisions to the implementing regulations we are proposing.

Q7: Will the proposed revisions allow the Services to designate critical habitat areas that are not habitat for a species?
A: No. The proposed revisions would not allow the Services to begin to designate critical habitat areas that are not "habitat" for the particular species. The proposed revisions also do not affect the need for the Services to designate critical habitat in a manner consistent with the Supreme Court's opinion in *Weyerhaeuser Co. v. U.S.F.W.S.*, 139 S. Ct. 361 (2018) that an area must be "habitat" to qualify under the narrower category of "critical habitat." The Services will continue to ensure that there is a basis and a record to support why any unoccupied areas are habitat for the species.

Proposed changes to 4(d) protection rules for threatened species – Fish and Wildlife Service only

Q8: What are the proposed changes to Threatened and Endangered Species Protections (50 CFR 17)?
A: The Fish and Wildlife Service is proposing to reinstate the 4(d) *"blanket rule"* option that was in place before 2019 for protecting threatened species. This would allow the Service to apply many of the section 9 prohibitions to threatened species and allow for greater efficiencies when

the Service finds the *"blanket rule"* protections are appropriate. The Service will continue to have the option to customize individual species protections with species-specific 4(d) rules. For every newly listed threatened species, the Service will determine what protections are appropriate.

In addition, the proposed revisions would extend to federally recognized Tribes the exceptions to prohibitions that the regulations currently provide to the employees or agents of the Service and other Federal and State agencies to aid, salvage, or dispose of threatened species. The proposed changes to the threatened species protective regulations are a recognition that Tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources.

Q9: What is a 4(d) rule?

A: "4(d) Rule" is one of many tools in the ESA for protecting threatened species. This rule gets its name from section 4(d) of the ESA, which directs the Secretary of the Interior (and therefore the U.S. Fish and Wildlife Service) to issue protective regulations deemed "necessary and advisable to provide for the conservation of" threatened species. The Secretary may by regulation prohibit concerning threatened species any action prohibited under section 9.

Q10: Why is a 4(d) rule needed?

A: The ESA (section 9) provides a specific list of prohibitions for endangered species. For example, it is illegal (without permit or authorization), concerning any endangered wildlife species to:

- Import any such species into or export any such species from the United States.
- Take any such species within the U.S. or the territorial sea of the U.S.
- Take any such species on the high seas.
- Possess, sell, deliver, carry, transport, or ship, by any means whatsoever any such species taken in violation of the ESA.
- Deliver, receive, carry transport, or ship in interstate or foreign commerce and in the course of commercial activity.
- Sell or offer for sale in interstate or foreign commerce any such species.

The ESA does not automatically provide these same protections to threatened species. Without a 4(d) rule, threatened species do not receive section 9 protections (although Federal agency ESA section 7 consultation requirements, recovery requirements, etc., still apply).

Q11: Can the Service issue a 4(d) rule for an endangered species?

A: No. The protections in ESA section 9 and our implementing regulations at 50 CFR 17.21 and 17.61 apply to endangered species. The Service has regulations and permitting mechanisms that may authorize actions that are prohibited under section 9.

Q12: Why is the Service proposing to reinstate the "blanket rules"?

A: As was our experience before 2019, we anticipate that having an option with the *"blanket rules"* that includes a standard suite of protections and exceptions would result in less confusion,

less duplication of regulatory text in the *Code of Federal Regulations*, a lower risk of error in transposing regulatory text, and reduced administrative costs associated with developing and publishing a rule in the *Federal Register* and *Code of Federal Regulations*. This is because whenever we determine that the standard suite of protections and exceptions is appropriate, we would not need to develop any additional regulatory text to codify a species-specific rule.

Q13: Did the Service issue species-specific 4(d) rules while the "blanket rules" were in effect?

A: Yes. The *"blanket rules"* did not prevent the Service from issuing species-specific 4(d) rules and if we reinstate the *"blanket rules"* we anticipate that we will continue to develop species-specific 4(d) rules when appropriate.

Q14: Will the Service continue to issue species-specific 4(d) rules?

A: Yes. Similar to before our 2019 regulations, we will maintain the ability to issue species-specific rules regardless of whether we finalize our proposal to reinstate the *"blanket rule"* option.

Proposed revisions to language, definitions, and responsibilities to further clarify and improve the federal interagency consultation processes under section 7 of the ESA.

Q15: What are the proposed changes to the ESA section 7 regulations (50 CFR 402)?

A: The proposed revisions include revising the definitions of *"environmental baseline"* and *"effects of the action,"* eliminating the section titled *"Other Provisions"*, clarifying responsibilities regarding reinitiating consultation, and revising the scope of reasonable and prudent measures in an incidental take statement.

Q16: How could the proposed revisions change the number or frequency of consultations?

A: The revisions we are proposing to the ESA section 7 regulations (50 CFR 402) are intended to provide clarity, consistency and align more closely with the statute; we do not anticipate any change in the rate or frequency of consultation under section 7 due to the proposed regulation.

Q17: How might the proposed revisions regarding reasonable and prudent measures affect consultations?

A: Under these proposed regulatory revisions, the Services would clarify that, after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion as reasonable and prudent measures that offset any remaining impacts of incidental take that cannot be avoided. This change would not affect most consultations under section 7(a)(2) of the Act. This is because most consultations are completed informally, and this change would only apply to formal consultations that require an incidental take statement containing reasonable and prudent measures. Even among formal consultations that require an incidental take statement containing reasonable and prudent measures, some of these consultations will be able to adequately address the impacts of incidental take through measures that avoid or reduce incidental take within the action area, and the change would not apply to those consultations.

Importantly, the use of offsetting measures in reasonable and prudent measures would not be required in every consultation. Additionally, as with all reasonable and prudent measures, these offsetting measures must be commensurate with the scale of the impact, subject to the existing "minor change rule," be reasonable and prudent, and be necessary or appropriate to minimize the impact of the incidental taking on the species.

Q18: What is the purpose and benefits of the proposed revisions regarding reasonable and prudent measures?

A: Minimizing impacts of incidental take on the species through the use of offsetting measures can result in improved conservation outcomes for species incidentally taken due to proposed actions and may reduce the accumulation of adverse impacts, colloquially referred to as "death by a thousand cuts." Including offsetting measures such as reasonable and prudent measures will improve the conservation outcomes of individual consultations and help stop the further decline in the condition of affected species. In addition, by allowing the Services to specify offsets outside the action area as reasonable and prudent measures, conservation efforts can be focused on where they will be most beneficial to the species. For example, in some circumstances, offsetting measures applied outside the action area would more effectively minimize the impact of the action on the subject species.

Q19: What are the next steps following this announcement?

A: The proposed rules will now be subject to public review and comment, and we will carefully consider those comments before finalizing any changes.