



MAJOR REVISIONS TO ENDANGERED SPECIES ACT PROPOSED; NOW OPEN FOR PUBLIC COMMENT

The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) joined forces to **overhaul Endangered Species Act** (ESA) implementation in the future. On July 25, 2018, the agencies published significant changes to three sections of the ESA—Section 4, Section 4(d), and Section 7 – in the Federal Register. The proposed changes, which are the most **extensive revisions** to ESA regulations since the adoption of the rules in 1968, would affect protections for threatened species, consultation regulations, and would explain contested language in the Act in an attempt to streamline processes and reduce costs associated with compliance.

Here is a quick overview of the major changes that the agencies have proposed:

1. Revision of Regulations for Prohibitions to Threatened Wildlife and Plants

Threatened species under USFWS control have historically maintained equal protections to those of endangered species as a default rule; however, USFWS is proposing to overturn this rule under ESA Section 4(d) to make species-specific protection determinations. This means that under the new rule, current protections including “take prohibition,” which bans harm, capture, or collection of the species, will no longer apply to threatened species unless those protections are granted by the USFWS in a species-specific rule. This change would not affect the protections of threatened species that are currently listed under the default rule.

2. Revision of Regulations for Interagency Cooperation

USFWS and NMFS are also proposing changes to ESA consultations, a long-standing part of the approval process for almost all federal permits and approvals. The proposed rule would exempt three categories of activities from required consultation:

- Activities that will not impact species
- Activities resulting in beneficial or unmeasurable effects
- Certain activities with effects manifested through global processes such as global warming

Additionally, this rule would clarify the requirements to initiate formal consultation and aim to provide two alternative consultation types – “tiered” and “expedited” consultations – to streamline procedures.

3. Revision of Regulations for Listing Species and Designating Critical Habitat

The last proposed rule revises the language of ESA Section 4, which sets criteria for the classification or reclassification of a threatened, endangered, or protected species. The agencies propose to remove the phrase “without reference to possible economic or other impacts of such determination,” which prohibits economic impacts to be included in the listing criteria. The rule also seeks to clarify the definition of threatened species, one “likely to become endangered within the foreseeable future throughout all or a significant part of its range,” so that “foreseeable future” is determined on a species-by-species basis and is only extended as far as the agencies can “reasonably determine” that conditions posing a danger are likely.

Another modification would allow a species to be delisted if it is extinct, recovered so that it no longer meets the definition of threatened or endangered, or does not meet the definition of a species. Lastly, the agencies propose to undo the Obama-era regulation for critical habitat designation. This means that critical habitat would be limited to the areas occupied by the species when it is listed. Unoccupied areas will only be granted designation as critical habitat when areas are essential for the conservation of the species and an area limited to the occupied area is inadequate or less efficient.

So, what’s next?

The proposed **revisions** have implications for mining, oil and gas companies, landowners, states, and other stakeholders. Interested parties can provide input, suggestions, and comments regarding the proposed rules in the Federal Register until September 24, 2018. Our team will continue to keep track of legal developments as they unfold and will provide updates after the comment period closes.

Questions?

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