

BACKGROUND INFORMATION

ENDANGERED SPECIES ACT SECTIONS 4, 7 & 9 PROPOSED REVISIONS

Overview of USFWS ESA Rulemaking:

The USFWS and NOAA (NMFS) have proposed revisions to the implementation of sections 4, 7, and 9 of the Endangered Species Act (ESA). The proposed revisions pertain to 2019 rulemaking affecting the ESA, modifying and removing language from that rulemaking to:

- Apply the prohibitions granted to endangered species to species listed as threatened
- Broaden the range of intent on reducing federal agency incidental take previously limited to an “action area”
- Remove language that conflicted with science-based determination of critical habitat designation

The following information provides background and additional context on the 2019 rulemaking affecting the implementation of sections 4, 7, and 9 of the ESA.

Sections 4(d), 9

Nicknamed the “blanket rule,” Section 4(d) of the ESA requires that the Secretary issue regulations necessary to provide for the conservation of threatened species. The Secretary has the authority to determine what protections would meet this standard for a given species. [Section 9 of the ESA](#) lists prohibited acts pertaining to endangered species, excluding threatened species. Implementation of section 4(d) of the ESA applies Section 9 protections to threatened species. The blanket application of section 4(d) was discontinued in 2019; [the rule](#) then only applied to threatened species that had species-specific rules approved for them.

Section 7

[Section 7 of the ESA](#) requires all Federal agencies to consult with USFWS and NMFS to affirm that agency actions are not going to risk harming endangered or threatened species or their habitats. In 2019, a final rule was issued revising several aspects of the consultation process. The rule also [revised the definition](#) of “effect of the action” by removing “environmental baseline” from said definition. Reasonable and prudent measures (RPMs) authorized under section 7(b)(4) are issued by the Services to minimize impacts to species from incidental take from a Federal action. The Service has previously taken the position that RPMs should be confined to only those measures that avoid or reduce incidental take and that occur within the “action area.”

Section 4

[Section 4 of the ESA](#) defines, “present or threatened destruction, modification, or curtailment” of a species’ habitat or range as the first of the factors that may underlie a determination that a species meets the definition of an endangered or threatened species. The Act sets forth a two-part definition for critical habitat based on whether the species occupies an area or does not occupy an area at the time of listing. In 2019, rulemaking revised the language around critical habitat, prioritizing the designation of occupied areas over unoccupied. The 2019 regulatory revision cast doubt on the Service’s intention to factor in climate change for critical habitat designations.

Summary of Proposed Revisions

Sections 4(d), 9 - [88 FR 40742](#)

The USFWS proposes to reinstate the “blanket rule” option for protecting newly listed threatened species pursuant to section 4(d) of the ESA. Federally recognized Tribes will also receive the same exceptions to prohibitions for threatened species that employees or agents of the Service receive to aid, salvage, or dispose of threatened species.*

Section 7 - [88 FR 40753](#)

The USFWS and NMFS propose to revise the definition of “effects of the action” and “environmental baseline.” In response to the review of the 2019 rule, they propose changes to the regulatory provisions relating to the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). The Service will revise the definition of “reasonable prudent measures” by specifying offsets outside the action areas as RPMs. Lastly, revisions to formal consultation will be made to reflect the revised interpretation of RPMs.*

Section 4 - [88 FR 40764](#)

The USFWS and NMFS propose to revise language in the 2019 finalized rule. First, wording in this section will further deemphasize the consideration of economic impacts of listings. Next, language will more clearly specify the Service’s ability to quickly delist a species following completion of status review, as well as make clarifications regarding the population health of that species. Furthermore, additional language will be removed that conflicted with science-based determination of critical habitat designations. Lastly, the requirement for unoccupied areas to contain one or more of the physical or biological features essential to the conservation of the species (essential features) will be removed for clarity.

***Novel Rulemaking Included With Proposed ESA Revisions**

USFWS/NMFS are seeking comments on the proposed revisions described above, as well as the novel rulemaking actions listed here (denoted above with an * and described in greater detail) by August 21, 2023.

- 88 FR 40742: Exceptions to prohibitions for threatened species that the regulations currently provide to employees or agents of the Service to federally recognized Tribes
- 88 FR 40753: Revisions regarding the scope of RPMs in incidental take statements

Prior TWS Engagement and Relevant Resources

The TWS links and information provided below offer additional context on TWS’ engagement with the 2019 rulemaking and the ESA more broadly. Units with questions on proposed ESA revisions or interest in submitting comments to the USFWS can contact koconnor@wildlife.org.

- Previous TWS [comments](#) on 2019 rule changes
- TWS [article](#) released in 2021 supporting the Services for their efforts reevaluating the implementation of the ESA.
- [TWS Policy Brief on the ESA](#)
- TWS Position Statement: [The U.S. Endangered Species Act](#)
- TWS Position Statement: [Threatened and Endangered Species in the U.S](#)
- TWS Position Statement: [The Use of Science in Policy and Management Decisions](#)