

# *Endangered Species Act*

## ESA Implementing Regulations

### Final Revisions

### 50 CFR Parts 17, 402 and 424

### April 2024



# Presentation Overview

Two Joint Final Rules by U.S. Fish and Wildlife Service and NOAA Fisheries:

- Listing and critical habitat, 50 CFR 424
- Interagency cooperation, 50 CFR 402

U.S. Fish and Wildlife Service-only:

- Protective regulations for endangered and threatened species, 50 CFR 17

Final rules published April 5, 2024, and will become effective May 6, 2024.



# Why were the rules developed?



- In January 2021, E.O. 13990 directed all Federal agencies to review regulations issued between January 20, 2017, and January 20, 2021
- In June 2021, we announced our intention to revise three ESA implementing regulations that were finalized in 2019
- In November 2022, as an outcome of litigation over the regulations issued in 2019, the rules that were finalized in 2019 were remanded to the Services

# Public Comments



- Proposed rules published June 22, 2023, with public comment periods to August 21, 2023
- Comments received
  - 424: >160,000
  - 402: >140,000
  - 17: >160,000
- Held 6 informational webinars with >500 attendees
- Provided information and recorded presentation on website
- Final rules published in the Federal Register April 5, 2024



# 50 CFR 424

## *Listing and Critical Habitat Designations*

# Overview of the Final Revisions

- Economic and other impacts relative to species classification
- Foreseeable future framework
- Standards for delisting
- Not prudent critical habitat determinations
- Criteria for designation of unoccupied critical habitat





# Economic Impacts

We reinstated the phrase as shown below to 50 FR 424.11(b):

The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status without reference to possible economic or other impacts of such determination.



# Foreseeable Future

Minor revisions to the second sentence of the foreseeable future framework in 424.11(d), as shown below:

In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The **term** foreseeable future extends **as only so** far into the future as the Services can **make** reasonably **reliable predictions about** ~~determine~~ **that both** the future threats **to the species** and the species' responses to those threats **are likely**. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.



# Standards for Delisting

We revised portions of 424.11(e), as shown below:

Species will be delisted ~~The Secretary shall delist a species~~ if the Secretary determines ~~finds that, after conducting a status review based on~~ consideration of the factors and standards set forth in paragraph (c) of this section, that the best scientific and commercial data available substantiate that available:

(1) The species is extinct;

(2) The species has recovered to the point at which it no longer meets the definition ~~does not meet the definition~~ of an endangered species or a threatened species; ~~In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in paragraph (c) of this section regarding listing and reclassification;~~

(3) New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or

~~(4)~~ 3 New information that has become available since the original listing decision shows the ~~The~~ listed entity does not meet the ~~statutory~~ definition of a species.



# Standards for Delisting

The (clean) revised portions of 424.11(e), is as follows:

Species will be delisted if the Secretary determines based on consideration of the factors and standards set forth in paragraph (c) of this section, that the best scientific and commercial data available substantiate that:

- (1) The species is extinct;
- (2) The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species;
- (3) New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or
- (4) New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.



# Not Prudent Determinations

We revised 424.12(a)(1), as shown below:

Designation of critical habitat ~~The Secretary may but is not required to, determine that a designation would~~ not be prudent in circumstances such as, but not limited to, the following:

- (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;
- (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, ~~or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;~~
- (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or
- (iv) No areas meet the definition of critical habitat.
- ~~(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.~~



# Not Prudent Determinations

The (clean) revised portions of 424.12(a)(1):

Designation of critical habitat may not be prudent in circumstances such as, but not limited to, the following:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(iv) No areas meet the definition of critical habitat.





# Unoccupied Critical Habitat Designations

We revised 50 CFR 424.12(b)(2), as shown below:

After identifying areas occupied by the species at the time of listing, the~~The~~ Secretary will identify designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing only upon a determination that the Secretary determines such areas are essential for the conservation of the species. Such a determination must be based on the best scientific data available. ~~When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.~~



# Unoccupied Critical Habitat Designations

The (clean) revised version of 50 CFR 424.12(b)(2) is as follows:

After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.



# 50 CFR 402

## *Interagency Cooperation/Section 7*

# Overview of the 2024 Revisions

- Minor revisions to the definitions of “effects of the action” and “environmental baseline”
- Clarification to the responsibilities of the Federal agency and the Services regarding reinitiation of consultation
- Removal of section 402.17 “Other provisions” in its entirety
- Revisions to regulations pertaining to reasonable and prudent measures (RPMs) in incidental take statements, including revision to the definition of RPM





# Definition of Effects of the Action

We revised 402.02 “Effects of the action”, as shown below in orange:

*Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17)*



# Definition of Environmental Baseline

We revised 402.02 Environmental baseline, as shown below in orange:

*Environmental baseline* refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone completed formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The impacts consequences to listed species or designated critical habitat from ~~ongoing~~ Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.



# Reinitiation of Consultation

We revised 402.16 Reinitiation of consultation, as shown below in orange:

(a) Reinitiation of consultation is required and shall be requested by the Federal agency ~~or by the Service~~, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.



# Removal of “Other provisions”

- We removed 402.17 Other provisions which included:
  - Factors relevant to Reasonably certain to occur (RCTO) standard
  - Other considerations when reviewing whether a consequence is not RCTO
  - Clear and substantial information standard
- Due to deletion of 402.17, we moved the phrase "but that are not part of the action" to the definition of “Effects of the action”
- The RCTO factors will be addressed and expanded in updates to the Services’ Consultation Handbook



# Reasonable and Prudent Measures

- To better reflect congressional intent and the goals of the ESA, the Services may consider for inclusion as RPMs in an ITS, measures that offset any remaining impacts of incidental take that cannot be avoided
- Offsetting measures can include:
  - Purchasing credits from an approved conservation bank
  - Contributing to an approved in-lieu fee program
  - Other offsets that could be undertaken by the applicant or action agency
- Offsetting measures may occur inside or outside of the action area



# Reasonable and Prudent Measures

We revised 402.02 Definition of RPMs, as shown below in orange:

*Reasonable and prudent measures* refer to those actions the Director ~~believes~~ considers necessary or appropriate to minimize the impacts of the incidental take on the species , ~~i.e., amount or extent, of incidental take.~~

## **Reference 7(b)(4)**

*If after consultation under subsection (a)(2), the Secretary concludes that— ... the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—*

- (i) specifies the impact of such incidental taking on the species,*
- (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact*

# Reasonable and Prudent Measures

We revised 402.14(i)(1) Formal consultation, Incidental take, as shown below in orange:

(i) Specifies the impact of incidental taking as the amount or extent of such taking., i.e., the amount or extent, of such incidental taking on the species (

A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take, provided that the biological opinion or incidental take statement...;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact of incidental taking on the species;



# Reasonable and Prudent Measures

We revised 402.14(i)(2) Formal consultation, Incidental take, “minor change rule” as shown below in orange:

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, ~~and~~ may involve only minor changes, and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.





# Reasonable and Prudent Measures

Lastly, we revised 402.14(i) Formal consultation, Incidental take by adding the language below in orange:

(3) Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.



# Reasonable and Prudent Measures

- The Service will develop offsetting RPMs in coordination with the Federal action agency and applicant
- As with all RPMs, offsetting measures must be reasonable and prudent:
  1. Necessary or appropriate to minimize the impact of the incidental taking on the species
  2. Cause only minor changes to the action, and
  3. Within the legal authority and jurisdiction of the action agency or applicant to authorize, fund, or carry out



# Reasonable and Prudent Measures

## 1. Offsets must be **Necessary or appropriate**

- Have a nexus between the impacts of incidental take caused by the action and measures that minimize those impacts
- Target the impacts of incidental take caused by the proposed Federal action
- Set the impact of the take caused by the action, as expressed in the ITS as the amount or extent of incidental take, as an upper limit on the scale of any offsetting measures



# Reasonable and Prudent Measures

## 2. Cause only minor changes to the project

- Offsetting measures operate as additional measures to minimize impacts of incidental take that would not prevent the action subject to consultation from proceeding essentially as proposed
- If the measure would not alter the fundamental design of the proposed development project, the action would go forward as essentially planned, and the change in design would not violate the “minor change rule”



# Reasonable and Prudent Measures

3. Within the legal authority and jurisdiction of the action agency or applicant to authorize, fund, or carry out
- The Services consider the legal authority and jurisdiction of the action agency or applicant
  - The Services consider the technological and economic feasibility of RPMs; measures that are cost-prohibitive in view of the nature of the action, may not be considered reasonable and prudent
  - If there are laws that apply to the proposed action that restrict specific offsetting measures, then those offsets would not be within the action agency's (or applicant's) authority to implement



# Reasonable and Prudent Measures

## *Hypothetical Example 1*

- Formal consultation for proposed action that will impact habitat of a listed bat species
- An ITS is included because take is reasonably certain to occur. The ITS uses a habitat surrogate for impacts to hibernaculum. Impacts are quantified at 10 acres
- FWS includes RPMs that reduce impacts, but 10 acres of impacts to the species remain
- A FWS approved conservation bank for this species exists with a service area that includes the action area and has only 8 acres of credits remaining. No other banks or in-lieu fee programs exist
- The bank provides greater conservation benefit to the bat species than any other offsetting measures

An RPM offset is included in the ITS to purchase 8 acres of credits from the approved conservation bank



# Reasonable and Prudent Measures

## *Hypothetical Example 2*

- Formal consultation for proposed action with impacts to a listed fox species
- An ITS is included because take is reasonably certain to occur and identifies take of 1 adult fox
- FWS includes RPMs that reduce impacts to the fox, but it does not avoid the take
- There are no existing conservation banks or in-lieu fee programs for this species and no other offsetting measures inside or outside the action area could be identified that would offset the remaining impacts to the species

No offsetting RPMs are included in the ITS





# 50 CFR 17

## *Endangered and Threatened Species Protections*



# Background

- Section 9 of the Act
  - Establishes prohibitions for endangered species
  - Implementing regulations are at 50 CFR 17.21 for wildlife and 17.61 for plants
- Section 4(d) of the Act
  - Addresses protective regulations that are necessary and advisable for the conservation of threatened species
  - Allows for promulgation of prohibitions for threatened species
  - Implementing regulations are at 50 CFR 17.31 for wildlife and 17.71 for plants



# The "Blanket Rules"






- In the 1970s and 1980s FWS applied all endangered species prohibitions and several exceptions to those prohibitions to threatened species UNLESS we issued a species-specific 4(d) rule (50 CFR 17.31(a), 17.71(a))
- FWS-only
- August 27, 2019 (effective September 26, 2019) – we ended the "blanket rule" option for future listed threatened species



# Final Revisions



## Finalizing as proposed

- Reinstated the “blanket rule” option for protecting threatened species pursuant to section 4(d) of the ESA
  - Extended to federally recognized Tribes the exceptions to prohibitions for threatened species to aid, salvage, or dispose of threatened species
  - Updated endangered plant regulations at 50 CFR 17.61(c)(1) to match language in amendments to the ESA enacted in 1988
  - Made minor edits to improve clarity and consistency among sections
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## Reinstated "Blanket Rule" Option



"Blanket rules" include all section 9 prohibitions and several exceptions to the prohibitions such as:



- Exceptions for law enforcement to handle species illegally taken
- Exceptions for FWS, NMFS, or States with Cooperative Agreements to conduct conservation actions for threatened species





## Reinstated "Blanket Rule" Option

- For every newly listed threatened species, we will determine what protections are appropriate
- We continue to have the option to customize individual species protections with species-specific 4(d) rules
- Allows for an efficient method to protect threatened species for which we find the “blanket rule” protections are appropriate
- Ensures there is never a lapse in threatened species protections

# Federally Recognized Tribes

We extended to federally recognized Tribes the exceptions to prohibitions for threatened species to aid, dispose of, or salvage threatened species

## Example for wildlife

- i. Aid a sick, injured or orphaned specimen; or
- ii. Dispose of a dead specimen; or
- iii. Salvage a dead specimen that may be useful for scientific study; or
- iv. Remove specimens that constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in an appropriate area.





# Endangered Plants



We updated endangered plant regulations at 50 CFR 17.61(c)(1) to match language in amendments to the ESA enacted in 1988



(c) *Remove and reduce to possession.*

(1) It is unlawful to remove and reduce to possession any endangered plant from an area under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.



# Timeline of Final Rules



- The regulations will become effective on May 6, 2024.
- None of our previous decisions under section 4 or 7 require reevaluation on the basis of these final revisions.
- For more information visit:  
<https://fws.gov/project/endangered-species-act-regulation-revisions>





Thank you!