

## **Questions and Answers**

### **Proposed Revisions to Regulations for Identifying Habitat Essential to the Survival and Recovery of Species Protected by the ESA November, 2012**

#### **1. What action is being taken?**

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (NOAA Fisheries) the two federal agencies responsible for administering the Endangered Species Act (ESA), are reopening the public comment period on their joint proposal to simplify the process of identifying habitat essential to the survival and recovery of species protected by the Endangered Species Act (ESA). Due to public interest in this proposal and multiple requests for additional time, the agencies, which jointly administer the ESA, will accept comments and information from the public for an additional 90 days, until February 6, 2013.

Comments and information submitted during the original 60-day comment period, which closed on October 23, 2012, will still be considered and do not need to be resubmitted.

#### **2. What would the joint proposal do?**

The joint proposal would amend the ESA's implementing regulations to require release of preliminary estimates of the economic impacts of any proposal to specifying particular habitat areas, at the same time as the habitat proposals themselves are released for public review and comment. The agencies' past practice has been to complete draft economic analyses after the habitat proposal has been published for public review.

Completion of the draft economic analyses at this time would allow the agencies to refine habitat proposals earlier in the process, and provide the public with additional information to help them understand and comment on those proposals. This change in the regulations aims to reduce the uncertainty on the part of the public by simultaneous presentation of the best scientific data available and the draft economic analysis of the proposed identification of habitat essential to the survival and recovery of the species.

#### **3. Why are the Services proposing changes to the regulations?**

The Service seeks to accelerate recovery of threatened and endangered species across the nation, while making it easier for people to coexist with these species. These changes are being proposed as outlined by a February 28, 2012, Presidential memorandum, which directed the agencies to improve transparency and better inform public comment by providing more information earlier in the habitat identification process. The proposed rule is also consistent with Executive Order 13563, which requires federal agencies to examine existing regulations and identify changes that will achieve objectives in a more efficient and effective manner.

The proposed changes to the regulations that implement the ESA will make for a more efficient rule-making process, will not impose any additional burdens on the American people, nor will it impose additional costs to either agency.

This joint proposal is part of a broader effort by the agencies to engage conservation partners and the public in the search for improved and innovative ways to conserve and recover imperiled species. The Fish and Wildlife Service has initiated a review of its implementation of the ESA designed to identify ways to eliminate unnecessary procedural requirements, improve the clarity and consistency of

regulations; engage the states, tribes, conservation organizations, and private landowners as more effective conservation partners; encourage greater creativity in the implementation of the Act; and reduce the frequency and intensity of conflicts as much as possible.

#### **4. Why do the agencies need to specify habitat for species protected by the ESA?**

The majority of species that require the protection of the ESA face extinction due to the destruction and fragmentation of their native habitat, although other factors and threats may also contribute. These species cannot survive and recover without sufficient habitat to support them. Recognizing this fact, the ESA requires the Services to specify the location of habitat essential for the conservation of protected species. This habitat, which the ESA terms “critical habitat,” helps federal agencies identify where to utilize their authorities to benefit these species as the law requires. Identifying this habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, non-governmental organizations, and individuals. Identifying this habitat at the time of listing provides early conservation planning guidance to bridge the gap until the Service can complete more thorough recovery planning.

#### **5. What impact does identifying critical habitat have on land use activities?**

Although private and non-federal lands may be identified as containing habitat essential to the species, activities on these lands will not necessarily be affected if they are included. Only if an activity requires federal actions, funding or permitting will the agency in question need to work with the Service to avoid, reduce or mitigate potential impacts to listed species or specified habitat.

#### **6. What role does the economic analysis have in this process?**

In addition to requiring the Services to identify habitat necessary to support the survival and recovery of protected species, the ESA also requires both agencies to assess the economic impacts of these habitat identifications, and gives the agencies the authority to exclude habitat if the costs of identifying that habitat outweigh the benefit to the species – so long as the exclusion does not jeopardize the species’ existence.

#### **7. What other information is used to refine the identification of critical habitat?**

The Services refine habitat proposals using the economic analyses and comments and information provided by the public and peer reviewers. This information often shows that areas initially identified as essential to the species’ survival no longer have the biological or physical characteristics needed by the species. Other modifications may be made to reflect newer scientific information concerning threats to the species, its distribution and abundance, and the species’ biological requirements.

Habitat may also be excluded from the final identification that is already protected under voluntary conservation agreements, including Department of Defense lands covered by an Integrated Natural Resources Management Plan, and non-federal lands covered by Habitat Conservation Plans, Safe Harbor Agreements, Candidate Conservation Agreements and other state and federal programs.

#### **8. What will change if this proposed regulation is approved?**

If this proposed regulation is finalized, the Services will be able to provide the public a complete view of the rulemaking process as it relates to the identification of habitat essential to the survival and recovery of species protected by the ESA. It will also eliminate the need for a second round of public comments on the draft economic analysis and streamline the process of refining the initial habitat proposal.

Current practice allows for a second public comment period on a proposed designation of critical habitat when the draft economic analysis is made available after the designation of critical habitat is published. The Services will still be required under the ESA to finalize a designation of critical habitat within one year of the proposal. This change will ensure both agencies follow the same process.

**9. Where can more information be found?**

The *Federal Register* notice and additional background can be found online at:

[http://www.fws.gov/endangered/improving\\_ESA/CH\\_Econ.html](http://www.fws.gov/endangered/improving_ESA/CH_Econ.html).