

ESA Regulatory Reform: Final Rule Governing Impact Analyses of Critical Habitat Questions and Answers

What action are you taking?

The U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) are implementing changes to streamline and clarify the regulatory process undertaken when they designate critical habitat for threatened and endangered species.

The final rule published today [[link to FR](#)] revises [50 CFR 424.19](#) of the Endangered Species Act. It improves the process for making information available to the public, the method by which the impacts of critical habitat designations are assessed, and the method for considering exclusions from critical habitat.

What are the specific changes?

Previously, the Services first proposed critical habitat and then subsequently evaluated the economic impacts of that proposed designation. After soliciting public comments on both of those actions, the critical habitat designation was finalized. This rule changes the timing of when the economic analysis is conducted and made available; it will now be made public at the same time as the proposal for designating critical habitat.

The rule also codifies the Service's standard procedure for analyzing the economic impacts of critical habitat designations. In all but a few circumstances, following longstanding OMB guidance, the Services focus their economic impact analyses on the incremental effects resulting from each critical habitat designation—those impacts over and above existing protections that are solely a result of the designation. The new rule will make incremental analyses the official procedure.

A similar incremental analysis is also codified for the potential exclusion of certain areas from the critical habitat designation. The decision whether to make exclusions is made by the Secretaries of Interior and Commerce, who have wide discretion when weighing the benefits of exclusion against the benefits of inclusion. The Services concluded that it is appropriate for the Secretaries to consider these impacts using an incremental analysis.

Why are you taking this action?

In January 2011, President Obama signed [Executive Order](#) 13563 directing all Federal agencies to minimize the burden of their regulatory programs on society. The purpose of this order was to improve the regulatory review and public participation processes, and ultimately to improve the effectiveness of the regulatory results.

In February 2012, a [memorandum](#) from President Obama specifically directed the Secretary of Interior to revise the existing regulations implementing the Endangered Species Act so that a draft economic analysis on the impacts of a critical habitat designation is completed and made available for public comment at the same time the critical habitat proposal itself is published.

This final rule achieves both of these goals.

Why is this action important?

The President's February 2012 Memorandum stated "Uncertainty on the part of the public may be avoided, and public comment improved, by simultaneous presentation of the best scientific data available and the analysis of economic and other impacts."

Publishing a proposed critical habitat rule and making available the associated economic analysis at the same time means that the Services will need to spend more time analyzing and understanding the economic impacts of designating critical habitat before making the proposal public. However, public stakeholders will have more information at the time they are reviewing critical habitat proposals.

What is critical habitat?

Under the Endangered Species Act, the Services designate "critical habitat" for each listed species; these are areas that are needed for the species' conservation and recovery. To date, critical habitat has been designated for 506 of the 1,437 animals and plants on the Endangered Species List. Critical habitat does not create a refuge nor necessarily restrict development. It only impacts federal lands or lands where there is a federal nexus such as the issuance of a permit of federal funding. Read our Critical Habitat FAQs at www.fws.gov/endangered/what-we-do/critical-habitats-faq.html.

What is an economic analysis?

Along with the benefits to listed species, the Services must consider the impacts of designating critical habitat. The *potential* economic impacts are assessed in an economic analysis. An impact analysis also looks at national security and other relevant potential impacts.

Is there an opportunity to provide comments?

The Services published a proposed rule with an associated public comment period on August 24, 2012, and reopened a comment period on November 8, 2012. In total, we received approximately 100 comments from various industry, non-profit and environmental groups, as well as local government agencies and Congressional representatives. This final rule takes public stakeholder input into consideration, and made some notable changes to existing regulations. There is no longer an opportunity to provide comment on this final rule.

When does the rule go into effect?

The final rule will be available at www.regulations.gov, and goes into effect on October 30, 2013.

To view the final rule and additional information, visit www.fws.gov/endangered/improving_ESA/CH_Econ.html.

For more information on critical habitat, visit www.fws.gov/endangered/what-we-do/critical-habitats.html.