



U.S. Fish and Wildlife Service

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USFWS Updates

Recent Policy Changes and Relevance to WY Projects





ESA Regulation Changes

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Why we are doing this:

- In 2017, Administration directed federal agencies to seek public input on how the federal government can improve upon the regulatory framework.
- FWS and NOAA/Fisheries received substantial input from a wide range of stakeholders on modernizing implementation of the Endangered Species Act (ESA) to improve collaboration, efficiency and effectiveness.





Why we are doing this:

- **The ultimate goal of the ESA is recovery. By proposing actions that encourage collaborative conservation from a broad range of partners, we can make the ESA more effective in reaching that fundamental objective and return management of recovered species to the states.**
- **States, environmental and business groups, members of the public and the career professionals of FWS and NOAA/Fisheries have all encouraged efforts to improve ESA implementation through revision of our implementing regulations.**





Improving the ESA

- These changes were developed through a robust, collaborative process involving policy leadership of Interior and Commerce and experienced career professionals of FWS and NOAA/Fisheries.
- These changes have been finalized following a transparent public process, resulting in regulations that are clear and that will be effective in advancing our goal of recovery.





Improving the ESA

The ESA has led to important conservation efforts that have brought species back from the brink of extinction and recovered species to the point they no longer need ESA protection; however, there are tweaks we can make to modernize and improve the Act's implementation, so our actions are clear and consistent and provide the maximum degree of regulatory predictability to those who are affected by it.





SECTION 4: Rescinding the Blanket 4(d) Rule

- FWS has long had a “blanket 4(d)” rule that automatically applies all the ESA’s protections in cases where FWS has not developed a species-specific 4(d) rule. To be more consistent with the ESA and its intended system of tiered protection, FWS is rescinding this blanket 4(d) rule.
- During the past decade, FWS has often issued species-specific 4(d) rules when listing species as threatened and has found significant benefit from doing so. Practically, this change reflects current FWS practice to employ the 4(d) provision of the act on a case-by-case basis.





Clarifications for Several Definitions:

“Foreseeable Future”

“Adverse Modification”

“Effects of the Action”

“Environmental Baseline”





Definition of “Foreseeable Future”

Extends only so far as we can reasonably determine that threats and the species’ responses to those threats are likely.

Described on a case-by-case basis, using the best available data for each species

No specific timeframes are necessary, qualitative descriptions are ok

Based on a reasonable determination that both the future threats and the species’ responses to those threats are likely.





Clarifying that the Standard for Listing and Delisting are the Same

- When some of our delisting decisions have been challenged, courts have sometimes appeared to set a higher bar for removing a species from the list than for adding a species to the list (For example, gray wolves, bald eagle).
- Keeping species on the list when they no longer face the threat of extinction takes valuable resources away from species that still need ongoing protection under the ESA and discourages the kind of state and private partnerships essential to conserve plants and wildlife that genuinely need our help.





Occupied versus Unoccupied Critical Habitat

- (1) Clarity that we designate unoccupied critical habitat only when occupied areas are inadequate to ensure the conservation and recovery of the species.**
- (2) For an unoccupied area to be considered essential, we must determine that both:
 - (a) area will contribute to the conservation of the species**
 - (b) that the area contains one or more physical or biological features essential to the conservation of the species.****





SECTION 7: Federal Consultation

- This rule affirms our authority to use streamlining methods we have developed through experience since we last undertook a revision of our consultation regulations.
- Streamlining the consultation process helps with timely decision-making on critical infrastructure and other projects important for job creation and economic development without compromising the conservation purposes of the section 7 consultation process.





Deadline for Informal Consultation

- **Establishing a deadline for informal consultation will help ensure informal consultations are completed in a timely fashion and provide regulatory certainty to federal agencies and applicants.**

Reinitiation of Consultation

- **Amending the regulations with respect to reinitiation of consultation on land or resource management plans of the BLM or Forest Service aligns them with existing practice and congressional action (i.e., Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for Fiscal Year 2018).**





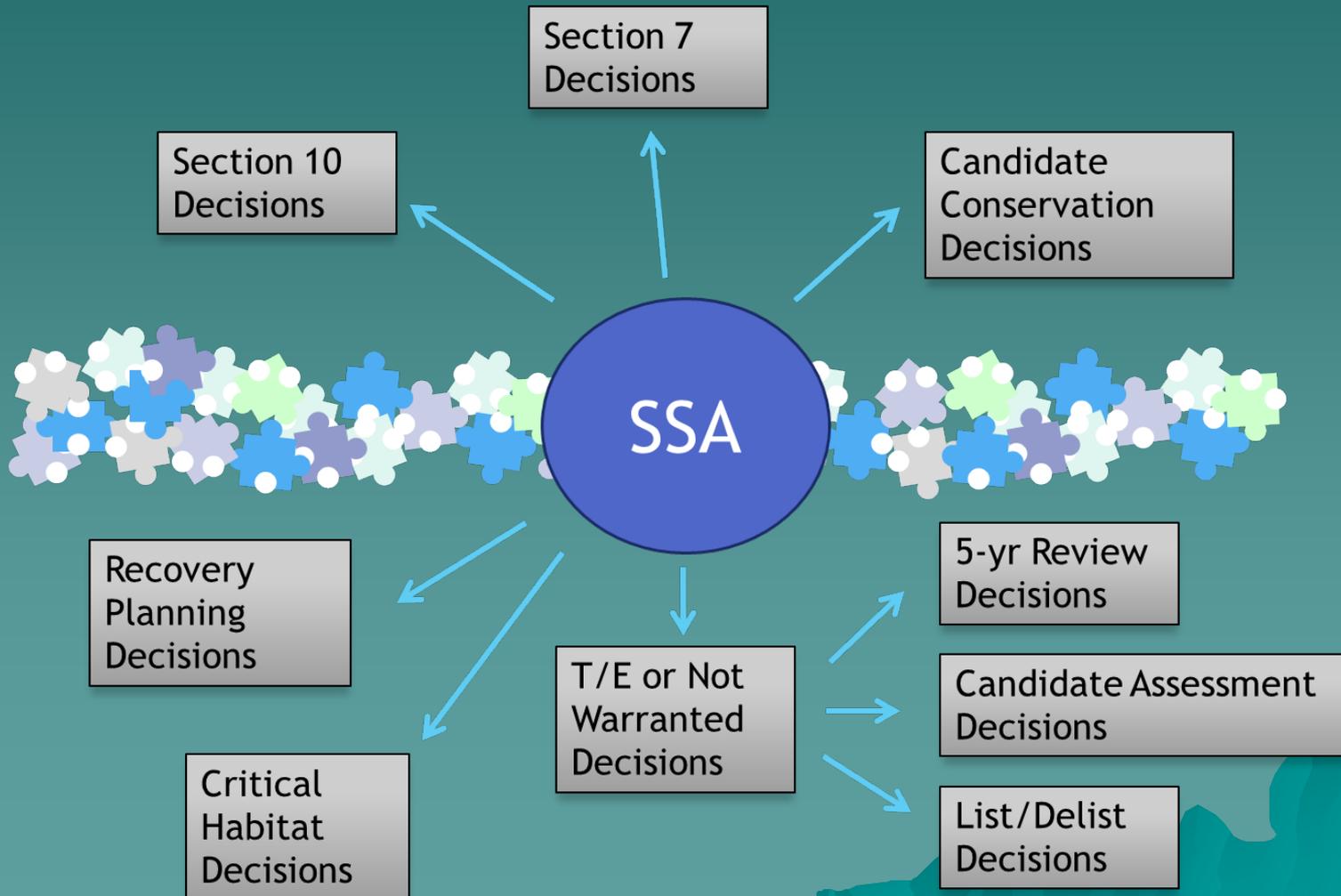
Species Status Assessment (SSA)

- An analytical approach for informing decisions and activities under the Endangered Species Act
- A transparent and explicit analysis based solely on the best available science
- Is completed before any policies are applied or decisions are made, which provides greater flexibility for us to engage with our partners and solicit peer review





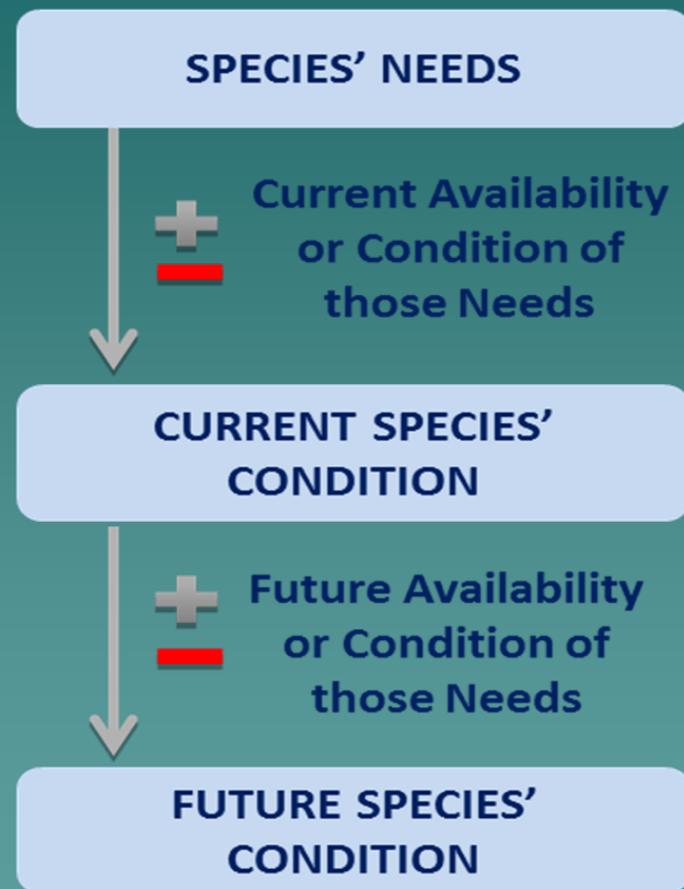
SSA Informs Many Decisions





SSA Process

- Describes species needs
- Describes species current conditions
- Provides scenarios for potential future conditions
- Provides no regulatory interpretation of data – “simple” science document





MBTA and M-Opinion



M Opinion – The MBTA does not Prohibit Incidental Take

- ◆ Memorandum M-37050- issued by Department of the Interior on December 22, 2017
- ◆ MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to intentional actions that have as their purpose the taking or killing of migratory birds, their nests, or eggs
- ◆ M-37050 overturned the previous DOI Solicitors Opinion (M-37041)- *Incidental Take Prohibited under the MBTA*- issued January 10, 2017- which concluded that the MBTA's broad prohibition on taking and killing of migratory birds by any means or in any manner includes incidental taking and killing



M Opinion – The MBTA does not Prohibit Incidental Take

- ◆ **USFWS Principal Deputy Director issued a memo on April 11, 2018:**

We interpret the M Opinion to mean that the MBTA's prohibitions on take apply when the purpose of an action is to take migratory birds, their eggs, or nests. Conversely the take of birds, eggs, or nests occurring as the result of an activity, the purpose of which is not to take birds, eggs, or nests, is not prohibited by MBTA.

- ◆ **The Service mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants, and their habitats- Migratory bird conservation remains an integral part of our mission**
- ◆ **Service will continue to work with any partner that is interested in voluntarily reducing impacts to migratory birds and their habitats**



M Opinion – The MBTA does not Prohibit Incidental Take (cont.)

- ◆ **The M Opinion (M-37050) is not a regulation or law it is a DOI Solicitors opinion**
- ◆ **At present as a matter of policy the take prohibition under MBTA does not apply to incidental take of migratory birds, eggs, nests**
- ◆ **This DOI policy only applies to DOI directly and not the 14 other Executive Departments of the U.S. Government- unless they adopt the DOI policy**
- ◆ **DoD has already issued a memo indicating they are not going to adopt the M Opinion and will continue to deal with incidental take under existing policies, etc.**
- ◆ **There are 3 lawsuits challenging the DOI issuance of the M Opinion- the first two were filed on May 24, 2018 and another was filed Sept 5, 2018 by 8 States- Stay Tuned**
- ◆ **USFWS Division of Migratory Bird Management, HQ Office is drafting regulations that implement the M Opinion**



New USFWS Memorandum on the Destruction and Relocation of Migratory Bird Nest Contents

- ◆ **Issued by USFWS on June 14, 2018 and signed by Deputy Director for Migratory Birds**
- ◆ **This Memo replaces Migratory Bird Permit Memorandum MBPM-2 on Nest Destruction (April 2003)**
- ◆ **Reasserts that a permit is not needed to destroy an inactive migratory bird nest where no possession occurs and that permits are needed for eagle and ESA-species nests**
- ◆ **Individuals or entities may destroy an active nest while conducting any activity where the intent of the action is not to kill migratory birds or destroy their nest contents- However because MBTA specifically protects migratory bird nests, eggs, chicks, and adults from possession and transport without a permit, individuals and entities cannot (in most cases) take reasonable protective actions without first obtaining a permit**



New USFWS Memorandum on the Destruction and Relocation of Migratory Bird Nest Contents

- ◆ **Memo states that there are 2 mechanisms for the temporary possession and transport of healthy unaffected birds for the purpose of removing them from imminent danger (mortality):**
- ◆ **Good Samaritan Provision-** for active nests where an individual or entity whose activity unintentionally or incidentally destroys an active nest, or is likely to do so, may collect the eggs or chicks and temporarily possess them for the purpose of transport to a federally-permitted rehabilitator under the Good Samaritan authorization
- ◆ **Special Purpose Permits- MBTA 21.27 permit-** permits are required to relocate a nest rather than destroy it, as possession of any nest is prohibited under MBTA without a permit- for projects that regularly need to intentionally remove or destroy nests USFWS can issue Special Purpose Permits (21.27)





- ◆ **To date there have been 3 lawsuits filed challenging the DOI issuance of the M Opinion- the first two were filed on May 24, 2018 and the third lawsuit was filed Sept 5, 2018 by 8 States (NY, CA, IL, MD, MA, NJ, NM, and OR)**
- ◆ **Recent ruling, 31 July, 2019, on this case in the U.S. District Court for Southern District of New York**
 - There were 5 main points of contention between the Plaintiffs and the USFWS; per this Court ruling -Plaintiffs prevailed on 4 of the 5
 - This is an initial ruling by the U.S. District Court
 - Next should come a Summary Judgement ruling from the U.S. District Court
- ◆ **Stay tuned for further updates regarding a further ruling from the U.S. District Court in this case**





USFWS Approaches in the Interim

- ◆ Pending a further ruling in the U.S. District Court the M Opinion is still in place as official policy of the U.S. DOI; hence it remains policy for USFWS- and USFWS will continue to implement it
- ◆ Regardless of the outcomes of pending District court case and DOI policy- per the USFWS memo from April 11, 2018-
 - The Service mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants, and their habitats- *and* migratory bird conservation remains an integral part of our mission
 - Service will continue to work with any partner that is interested in voluntarily reducing impacts to migratory birds and their habitats



Migratory Bird Permit Program



<https://www.fws.gov/birds/index.php>

www.fws.gov/permits

<https://www.fws.gov/birds/policies-and-regulations/permits/need-a-permit.php>



Region 6, Migratory Bird Permit Office

Office Phone Number 303-236-8171

permitsR6MB@fws.gov



Questions?







Background

Section 4 of the Act

Provides for how to add and remove species from the Federal lists of threatened and endangered species
Provides procedures for designating critical habitat
Implementing regulations are at 50 CFR 424
Addresses protective regulations for threatened species (i.e., 4(d) rules)

Section 7 of the Act

Provides requirements for Federal agency cooperation and consultation procedures
Implementing regulations are at 50 CFR 402

Section 9 of the Act

Establishes prohibitions for listed species
Implementing regulations are at 50 CFR 17





SECTION 4: Rescinding the Blanket 4(d) Rule

The ESA provides protections that distinguish between endangered species and threatened species. Full protections are automatically applied to endangered species, but the Services can tailor protections for threatened species by means of species-specific “4(d) rules.” These protections will specifically address the specific threats to the species.





Definition of “Destruction or Adverse Modification”

- We are removing confusing language from the existing definition without changing the substance of the standard.

Definition of “Effects of the Action”

- Clarifying “effects of the action” will reduce confusion about terms in existing definition and decrease resources needed for federal agencies and applicants to describe the effects of their actions to listed species or critical habitat when engaged in section 7 consultation.





Definition of “Environmental Baseline”

- Establishing “environmental baseline” as its own definition makes it clear that establishing the baseline for a consultation is a separate consideration from describing the effects of the action.
- Clarifying the environmental baseline with respect to ongoing agency activities or existing agency facilities addresses issues that have caused confusion in the past, particularly with regard to impacts from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify.





Clarifying that the Standard for Listing and Delisting are the Same

- **The ESA is clear in its requirement that when a species is in danger of extinction, either now or in the foreseeable future, it should receive the Act's protection. Likewise, when the ESA has done its job and the species is no longer in danger of extinction, it should be delisted. To provide consistency, the standard under the law for listing and delisting must be the same, i.e., whether the species meets the ESA's definitions of an endangered species or a threatened species.**





Programmatic Consultations

- **Programmatic consultations are useful in evaluating the effects of multiple related actions within a particular geographic area and in assessing federal agency programs that establish standards, guidelines or governing criteria for future actions. Increased use of programmatic consultations will streamline the consultation process, increase predictability and consistency for federal agencies and applicants, and improve conservation outcomes.**





Minimizing/Offsetting Adverse Effects

- As part of their actions, federal agencies often include measures to avoid, minimize or offset adverse effects to ESA-listed species or critical habitat.
- Courts have sometimes appeared to set a higher standard for certainty of implementing mitigation actions than for implementing the development activity itself. Our rule clarifies that these mitigation measures should be held to the same standard of certainty as the associated development action.





SECTION 7

Federal Consultation

- Interagency consultations are a cornerstone of the ESA that help ensure federal actions are not likely to jeopardize the continued existence of our most at-risk wildlife.
- We want to make the smartest use of our limited resources and ensure the effort expended on federal consultation is commensurate with the risk to the species.





Clarifying the Information Needed for Consultations

- A lack of clarity in what information we need to initiate formal consultations with federal agencies has led to frequent confusion and a loss of valuable time while we work with the agencies to compile the necessary information.
- By clarifying what we need to initiate consultation, we will shorten the time it takes for consultations and ensure taxpayer dollars are spent wisely and efficiently.
- We are not requiring any more or less information than existing practice.

