

Billing Code 4333-15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-HQ-ES-2018-0007; 4500030113]

RIN 1018-BC97

Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to revise our regulations extending most of the prohibitions for activities involving endangered species to threatened species. For species already listed as a threatened species, the proposed regulations would not alter the applicable prohibitions. The proposed regulations would

require the Service, pursuant to section 4(d) of the Endangered Species Act, to determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened.

DATES: We will accept comments received or postmarked on or before [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2018–0007, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0007; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Request for Information**, below, for more information).

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (“ESA” or “Act”; 16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act. This proposed rulemaking action pertains primarily to sections 4 and 9 of the Act: Section 9 sets forth prohibitions for activities pertaining to species listed under the Act, and section 4(d) pertains to protective regulations for threatened species.

This proposed rule is one of three related proposed rules that are publishing in today’s *Federal Register*. All of these documents propose revisions to various regulations that implement the ESA.

In carrying out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” the Department of the Interior (DOI) published a document with the title “Regulatory Reform” in the *Federal Register* of June 22, 2017 (82 FR 28429). The

document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule and the two related proposed rules in today's *Federal Register* address some of the comments that DOI has received in response to the regulatory reform docket.

Proposed Changes to Part 17

The regulations that implement the ESA are located in title 50 of the Code of Federal Regulations. This proposed rule would revise regulations found in part 17 of title 50, particularly in subpart D, which pertains to threatened wildlife, and subpart G, which pertains to threatened plants.

We primarily propose to amend §§ 17.31 and 17.71. Among other changes, the proposal would add language in both sections to paragraph (a) to specify that its provisions apply only to species listed on or before the effective date of this rule. Species listed as a threatened species after the effective date of this rule, if finalized, would have protective regulations only if the Service promulgates a species-specific rule. This change would make our regulatory approach for threatened species parallel with the approach that the National Marine Fisheries Service (NMFS) has taken since Congress added section 4(d) to the Act, as discussed below. The protective regulations that currently apply to threatened species would not change, unless the Service adopts a species-specific rule in the future. As of the date of this proposal, there are species-specific protective regulations for threatened wildlife in subpart D of part 17, but the Service has not adopted any species-specific protective regulations for plants. The

proposed regulations would not affect the consultation obligation of Federal agencies pursuant to section 7 of the Act.

The Act authorizes the Secretaries of the Interior and Commerce to tailor the protections for threatened species. 16 U.S.C. 1533(d). *See, e.g.*, S. Rep. 93-307 (July 1, 1973) (in amending the ESA to include the protection of threatened species and creating “two levels of protection” for endangered species and threatened species, “regulatory mechanisms may more easily be tailored to the needs of the” species). Our existing regulations in §§ 17.31 and 17.71, extending most of the prohibitions for endangered species to threatened species unless altered by a specific regulation, is one reasonable interpretation of the discretion granted to the Service by section 4(d) of the Act. *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 7 (D.C. Cir. 1993) (“regardless of the ESA’s overall design, § 1533(d) arguably grants the FWS the discretion to extend the maximum protection to all threatened species at once, if guided by its expertise in the field of wildlife protection, it finds it expeditious to do so”), *altered on other grounds in rehearing*, 17 F.3d 1463 (D.C. Cir. 1994).

Another reasonable interpretation is the approach that the Department of Commerce, through NMFS, has taken in regard to the species under their purview. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, for each species that they list as threatened, NMFS promulgates the appropriate regulations to put in place prohibitions, protections, or restrictions tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

Moreover, we have gained considerable experience in developing species-specific rules over the years. Where we have developed species-specific 4(d) rules, we have seen many benefits, including removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species. This revision allows us to capitalize on these benefits in tailoring the regulations to the conservation needs of the species.

For example, we finalized a species-specific 4(d) rule for the coastal California gnatcatcher (*Poliophtila californica californica*) on December 10, 1993 (58 FR 65088). In that 4(d) rule, we determined that activities that met the requirements of the State of California's Natural Communities Conservation Plan for the protection of coastal sage scrub habitat would not constitute violations of section 9 of the Act. Similarly, in 2016, we finalized the listing of the Kentucky arrow darter (*Etheostoma spilotum*) with a species-specific 4(d) rule that exempts take as a result of beneficial in-stream habitat enhancement projects, bridge and culvert replacement, and maintenance of stream crossings on lands managed by the U.S. Forest Service in habitats occupied by the species (81 FR 68963, October 5, 2016).

Upon reviewing the approach NMFS has taken and in light of the benefits we have noted in developing species-specific rules, we now conclude these proposed changes will align our practices with those of NMFS regarding threatened species under Department of Commerce purview, but also that they will better tailor protections to the needs of the threatened species while still providing meaning to the statutory distinction between "endangered species" and "threatened species."

The proposed regulations would remove the references to subpart A in § 17.31 and § 17.71. In § 17.31, we propose to specify which sections apply to wildlife, to be more transparent as to which provisions contain exceptions to the prohibitions. In § 17.71, we propose to remove all reference to subpart A, because none of those exceptions apply to plants.

In proposing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Service is establishing prospective standards only. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previous listing, delisting, or reclassification determinations or species-specific protective regulations be reevaluated on the basis of any final regulations.

Finally, we propose minor changes to the language of § 17.31(c) and § 17.71(c) to streamline and modernize the current language. We also propose numerous administrative revisions to current species-specific rules in part 17 to remove references to specific paragraphs of § 17.31. The paragraph designations in § 17.31 will change if this rule is finalized as proposed, and the current cross-references would no longer be correct.

Request for Information

Any final rule based on this proposal will consider information and recommendations timely submitted from all interested parties. We solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other

interested parties on this proposed rule. All comments and materials received by the date listed in **DATES**, above, will be considered prior to the approval of a final rule.

We request comments and information regarding whether the revision of the regulations for 4(d) rules would support the conservation of threatened wildlife or plants, and why.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0007.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This proposed rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no

regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises the regulations for 4(d) rules for species determined to meet the definition of a “threatened species” under the Act. The changes in this proposed rule are instructive regulations and do not affect small entities.

The Service is the only entity that is directly affected by this proposed regulation change at 50 CFR part 17 because we are the only entity that is affected by changes to this section of the Code of Federal Regulations. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. Consequently, this proposed rulemaking action is not a major rule under SBREFA.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the *Regulatory Flexibility Act* section above, this proposed rule would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of \$100 million or more in any given

year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this proposed rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. This proposed rule would not pertain to “taking” of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this proposed rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to

prohibitions for activities pertaining to threatened species under the Endangered Species Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify the prohibitions to threatened species under the Endangered Species Act.

Government-to-Government Relationship with Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and the Department of the Interior’s manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8).

We anticipate that the categorical exclusion found at 43 CFR 46.210(i) likely applies to these proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule, if made final, is not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we hereby propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Revise § 17.31 to read as follows:

§ 17.31 Prohibitions.

(a) Except as provided in §§ 17.4 through 17.8, or in a permit issued under this subpart, all of the provisions of § 17.21, except § 17.21(c)(5), shall apply to threatened species of wildlife that were added to the List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE], unless the Secretary has promulgated species-specific provisions.

(b) In addition to any other provisions of this part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.40 through 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The species-specific rule will contain all the applicable prohibitions and exceptions.

§ 17.40 [Amended]

3. Amend § 17.40 as follows:

a. In paragraph (g)(1), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;

b. In paragraph (i)(1), by removing “§ 17.31(a)” and adding in its place “§ 17.31”;
and

c. In paragraph (m)(1)(i), by removing the words “§ 17.31 (a) and (b)” and adding in their place “§ 17.31”.

§ 17.41 [Amended]

4. Amend § 17.41 as follows:

a. In paragraph (b)(1), by removing the words “§ 17.31(a) and (b)” and adding in their place “§ 17.31”; and

b. In paragraph (b)(4), the fifth sentence, by removing the words “50 CFR 17.31(a) and (b)” and adding in their place “§ 17.31”.

§ 17.42 [Amended]

5. Amend § 17.42, paragraph (f)(2), by removing the words “Sec. 17.31 (a) and (b) of this part” and adding in their place “§ 17.31”.

§ 17.44 [Amended]

6. Amend § 17.44, paragraph (y)(2)(i), by removing the words “§§17.31(a) and 17.32” in both places they appear and adding in their place the words “§§ 17.31 and 17.32”.

§ 17.46 [Amended]

7. Amend § 17.46, paragraph (a)(1), by removing the words “§17.31 (a) and (b)” and adding in their place “§ 17.31”.

§ 17.47 [Amended]

8. Amend § 17.47, paragraph (a)(1), by removing “§17.31(c)” and adding in its place “§ 17.31”.

9. Revise § 17.71 to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued under this subpart, all of the provisions of § 17.61 shall apply to threatened species of plants that were added to the List of Endangered and Threatened Plants in § 17.12(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE], with the following exception: Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of § 17.61, provided that a statement that the seeds are of “cultivated origin” accompanies the seeds or their container during the course of any activity otherwise subject to these regulations.

(b) In addition to any provisions of this part 17, any employee or agent of the Service or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those threatened species of plants that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.73 through 17.78 applies to a threatened species, the species-specific rule will contain all the applicable prohibitions and exceptions.

§ 17.84 [Amended]

10. Amend § 17.84 as follows:

- a. In paragraph (e)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- b. In paragraph (m)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- c. In paragraph (o)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- d. In paragraph (q)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- e. In paragraph (r)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- f. In paragraph (s)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- g. In paragraph (t)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”;
- h. In paragraph (u)(3)(i), by removing the words “50 CFR 17.31(a) and (b)” and adding in their place “§ 17.31”;
- i. In paragraph (w)(3)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”; and
- j. In paragraph (x)(6)(i), by removing the words “50 CFR 17.31(a) and (b)” and adding in their place “§ 17.31”.

§ 17.85 [Amended]

- 11. Amend § 17.85 as follows:

a. In paragraph (a)(2)(i), by removing the words “17.31(a) and (b)” and adding in their place “§ 17.31”;

b. In paragraph (b)(2)(i), by removing the words “§17.31(a) and (b)” and adding in their place “§ 17.31”; and

c. In paragraph (d)(3)(i), by removing the words “50 CFR 17.31(a) and (b)” and adding in their place “§ 17.31”.

Dated: _____.

Jason Larrabee

Principal Deputy Assistant Secretary
for Fish and Wildlife and Parks
Exercising the Authority of the Assistant Secretary
for Fish and Wildlife and Parks

~~[Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants]~~