

# Final ESA Regulations Issued by the Services

## WRITTEN BY

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The Endangered Species Act regulations have become a political hot potato, with regulatory revisions occurring each time there is a change in administration. On March 28, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively Services) finalized the most recent set of revisions. While many of the changes were expected (the reinstatement of the “blanket 4(d) rule” to provide threatened species with equivalent protections as those for endangered species; updates to the listing process and critical habitat designations), the changes to the Interagency Cooperation Rule, which governs Section 7 consultation, included some significant and surprising changes. The rules will be published in the Federal Register on April 5 and will take effect on May 6.

## Reasonable and Prudent Measures

Section 7 consultation typically results in a biological opinion that includes an incidental take statement authorizing take, provided that certain reasonable and prudent measures (RPMs) are implemented to minimize the amount of take. The Services have always interpreted RPMs to preclude mitigation. Rather, mitigation in the form of a reasonable and prudent alternative can be required as part of a jeopardy opinion, and mitigation is required under the ESA Section 10 permitting process. Because the ESA refers to minimization rather than mitigation in the Section 7 context, the Services have focused RPMs on measures that avoid take or otherwise minimize the amount of take.

The final rules include a new and different interpretation that expands the scope of RPMs to include onsite or offsite offsets (which essentially means mitigation). Additionally, the new RPMs are intended not only to reduce the *amount* of take, but to minimize the *impact* of the take. The final regulations retain the language providing that RPMs “cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.”

In the response to comments, the Services explain that this change is necessary because avoiding or minimizing incidental take has not been sufficient to avoid the “continued deterioration” of listed species. The Services walk through the legislative history of the ESA to argue that they have the authority to make this change, and argue that “minimize” and “mitigation” are overlapping terms. The Services also take the position that this change does not violate the minor change rule because it is focused on onsite or offsite mitigation — and does not fundamentally change the “basic design, location, scope, duration, or timing” of the action. Cost will be considered in determining whether the required offset is “reasonable and prudent.”

It is unclear how this change will be implemented, and what the Services intend to impose as “offsets.” Based on recent compensatory mitigation guidance issued by the Service, the focus appears to be on conservation banks, in

lieu fee programs, and habitat conservation as the primary means of addressing impacts.

## **Environmental Baseline**

The 2019 regulatory changes added a stand-alone definition of “environmental baseline,” which stated that activities the action agency does not have any discretion to regulate are not part of the environmental baseline. This created confusion about how large, existing infrastructure projects, such as dams, are considered in Section 7 consultations. Although no significant revisions to the definition were made in the final rules, the Services include a lengthy discussion about the environmental baseline concept in the preamble.

First, the Services reiterate that “baseline jeopardy” does not apply; the consideration under Section 7 is the new adverse impacts caused by the action. However, the Services acknowledge that for some very rare or very imperiled species, the amount of additional adverse effects that can occur without triggering a jeopardy determination may be small.

Second, the Services reiterate that the environmental baseline includes actions or facilities that the action agency lacks discretion to modify. So — where an action agency lacks the authority to remove or modify the physical structure of a federal dam, the dam is part of the environmental baseline. But the management or operation of the dam would be part of the action assessed in Section 7 consultation.

Third, the Services suggest that federal action agencies should document in the record the separation between their discretionary action and nondiscretionary activities or facilities. The Services say that while they ultimately make the determination of the scope of the assessment in a biological opinion, they will defer to a federal action agency’s “supported interpretation” of their authorities to determine what is included in the environmental baseline.

Fourth, the Services indicate that they have revised the ESA Consultation Handbook (see below), and will be providing further guidance and examples regarding environmental baseline in that document.

## **Removal of 50 CFR 402.17**

The 2019 regulations added 50 CFR 402.17 (other provisions), which described when an effect or consequence of an action is “reasonably certain to occur.” As part of that addition, the Services referenced the need to rely on “clear and substantial” information. Due to concern that this language conflicts or creates confusion about the “best available science” requirement, the Services are removing this provision.

In removing this text, the Services offer their perspective on the recent D.C. Circuit Court decision, criticizing NMFS for giving the benefit of the doubt to the species in the absence of reliable data. *See Maine Lobstermen’s Association v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023). In the preamble to the final Interagency Cooperation Rule, the Services assert that the *Lobstermen’s Association* decision will have limited impact on their implementation of Section 7 consultation. The Services note that the decision “does not address the Services’ discretion to resolve ambiguities in the best available scientific data generally,” and note that the Services will avoid the issue raised in the *Lobstermen’s Association* case by resolving uncertainty “through accepted scientific techniques.”

## **ESA Consultation Handbook**

In the preamble to the final rules, the Services announced that the ESA Consultation Handbook has been revised. The current handbook was written in 1998, so an update is long overdue. The Services indicate that the updated handbook will be published for public comment now that the regulations have been finalized. Further, the Services plan to provide additional guidance on implementing the regulatory changes. Key definitional terms, such as “effects of the action,” “environmental baseline,” and “RPMs” will be further explained with examples. This additional guidance will shed further light on the implementation of these changes.

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