



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-HQ-ES-2021-0033; FF09E41000 2223 FXES111609C0000]

RIN 1018–BF98

Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish Wildlife Service (Service), propose to revise the regulations concerning experimental populations of endangered species and threatened species under the Endangered Species Act (ESA). We are proposing to remove language generally restricting the introduction of experimental populations to only the species’ “historical range” to allow for the introduction of populations into habitat outside of their historical range for conservation purposes. To provide for the conservation of certain species, we have concluded that it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the ability of the habitat to support one or more life history stages has been reduced due to threats, such as climate change or invasive species. We are also proposing minor changes to clarify the existing regulations. These minor changes are not intended to alter the substance or scope of the regulations.

DATES: We will accept comments from all interested parties until [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

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

<https://www.regulations.gov>. In the Search box, enter FWS-HQ-ES-2021-0033, 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.”

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS-HQ-ES-2021-0033; U.S. Fish and Wildlife Service, MS: PRB/3W, 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 <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments** below for more information).

FOR FURTHER INFORMATION CONTACT: Lisa Ellis, Acting Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703-358–2171. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the ESA 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 ESA states that it is the policy of Congress that Federal agencies shall seek to conserve threatened and endangered species and use their authorities to further the purposes of the ESA (16 U.S.C. 1531(c)(1)). The ESA’s implementing regulations are found in title 50 of the Code of Federal Regulations (CFR).

The 1982 amendments to the ESA added section 10(j) to facilitate reintroductions of listed species by allowing the Service to designate “experimental populations.” The regulations to carry out section 10(j) provide that the Service may designate as an experimental population a population of an endangered species or a threatened species that will be released into suitable natural habitat outside the species’ current natural range (but within its probable historical range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed) (50 CFR 17.81). At the time the Service adopted these regulations, it did not anticipate the impact of climate change on species and their habitats. We have since learned that climate change is causing, or is anticipated to cause, many species’ suitable habitat to shift outside of their historical range. In addition, other threats such as invasive species may also reduce the ability of habitat to support one or more life history stages within the species’ historical range. Therefore, it may be necessary and appropriate to establish experimental populations outside of the species’ historical range to provide for their conservation and adapt to the habitat-related impacts of climate change and other threats. These proposed regulatory changes will more clearly establish the authority of the Service to introduce experimental populations into areas of habitat outside of the historical range of the affected listed species. The proposed revisions will not otherwise change the process for designating an experimental population.

Proposed Regulatory Revisions

We seek public comments on the proposed revisions to the regulations in 50 CFR part 17, subpart H. The primary proposed revision is to delete the reference to a species’ “historical range.” We intend for this change to allow for experimental populations to be introduced into habitat outside of the historical range of the species under appropriate circumstances. Such circumstances could include instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, or is undergoing, irreversible decline or change, rendering it unable to support one or more life

history stages for the species, thereby leading to the need to establish the species in habitat in areas outside the historical range. If this proposal is finalized, it will be applied to future designations and will not require the reevaluation of any prior designation of an experimental population.

Section 17.80 Definitions

In this section under paragraph (a), we propose to replace the word “natural populations” with “nonexperimental populations” to improve clarity.

Section 17.81 Listing

We propose several edits and additions to this section. Under paragraph (a), the terms “natural” and “suitable” would be deleted from the first sentence because these terms are not defined. We propose to replace “suitable” with “is necessary to support one or more life history stages,” i.e., “suitable natural habitat” would be revised to “habitat that is necessary to support one or more life history stages.” In addition, the parenthetical phrase generally limiting an experimental population of a species to its “probable historic (sic) range” would be deleted.

We propose to move the sentence following paragraph (b)(4) to a new paragraph. That sentence does not relate to introduced populations being affected by actions within or adjacent to the experimental population area. Rather, it addresses the Secretary’s authority to issue section 10(a)(1)(A) permits for establishment and maintenance of an experimental population. Because this is an undesignated sentence in the regulatory text, and to provide more emphasis on the need for section 10(a)(1)(A) permits, we propose to move this sentence about Secretarial authority to a new paragraph (d).

In paragraph (c)(3), the reference to “natural populations,” which are not defined, would be replaced with “nonexperimental populations.”

In the existing paragraph (d), describing with whom the Service will consult, we propose to add Tribal governments to those affected by the establishment of experimental populations. We are also making a minor change from “local governmental entities” to “local government

agencies” to be consistent with National Marine Fisheries Service section 10(j) regulations, although this proposed word change does not reflect any intent to change our obligation to consult with local governments. Also, we propose to add “water” to identify that the interest of agencies, Tribes, or persons may be in water as well as in land. Because of the previously described addition of text to paragraph (d), we would move the current provisions of paragraph (d) to paragraph (e) and the current provisions of paragraph (e) to paragraph (f).

In the existing paragraph (f), we propose to add “experimental” to the third sentence to clarify that the referenced nonessential populations are experimental populations under section 10(j). In addition, we propose to delete the last sentence because this language is not included in the ESA and it is not necessary to implement the statutory provisions related to critical habitat designations. We would redesignate this paragraph as paragraph (g).

Section 17.82 Prohibitions

We propose to replace the phrase “Special rules” with “species-specific rules” to clarify that the rules are developed for specific species.

Section 17.83 Interagency cooperation

In this section, which relates to how experimental populations are treated for purposes of interagency consultation under ESA section 7, we propose the following changes:

Paragraph (b) would be divided because it covers two different subjects. The first is how the Service will treat an experimental population that either: (1) is essential to the survival of the species or (2) occurs within the National Park System or the National Wildlife Refuge System. The second is how agencies should consider experimental and nonexperimental populations during section 7 consultations (i.e., together as a single species).

The new paragraph (c) would contain part of paragraph (b), as described above, including the existing provision that any section 7 consultation or conference on a proposed Federal action will consider both experimental and nonexperimental populations to constitute a single species for the purposes of conducting the section 7 analyses.

Sections 17.84 and 17.85

These sections contain the regulations that apply to experimental populations of particular listed species. We propose to change the title of each section by deleting “special” and inserting “species-specific” because “special” is vague and “species-specific” is a better description to indicate that each rule is specific to a particular species.

Section 17.86

This section is removed and reserved.

Public Comments

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <https://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on <https://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov>.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rulemaking is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 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. Executive Order 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 proposed 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.”

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 rulemaking 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 that person’s designee, certifies that the rulemaking 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 rulemaking would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking would revise and clarify requirements for the Service regarding factors for establishing experimental populations under the ESA. The proposed changes to these regulations do not expand the reach of species protections.

The Service is the only entity that is directly affected by this proposed rule because we are the only entity that would apply these regulations to designate experimental populations. No external entities, including any small businesses, small organizations, or small governments, would experience any economic impacts from this rulemaking.

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 rulemaking 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 species 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 designation of experimental populations under the ESA 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 factors for designation of experimental populations under the ESA.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior’s manual at 512 DM 2, we are considering possible effects of this proposed rule on federally recognized Indian Tribes. We will continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

Paperwork Reduction Act of 1995 (PRA)

This proposed regulation revision does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the PRA (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with reporting requirements associated with experimental populations and assigned the following OMB Control Number: 1018–0095, “Endangered and Threatened Wildlife, Experimental Populations, 50 CFR 17.84” (expires 9/30/2023). An agency may not conduct or

sponsor, and a person is 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 the 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; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. When the Service proposes to establish an experimental population, the proposed action will be subject to the NEPA process at that time.

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 regulation.

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

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The proposed revised regulations are 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 Rulemaking

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 rulemaking, 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.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

For the reasons described above, we hereby propose to amend subpart H, of part 17, 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. Amend § 17.80 by revising paragraph (a) to read as follows:

§ 17.80 Definitions.

(a) The term *experimental population* means an introduced and/or designated population (including any offspring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with nonexperimental populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will be recognized only outside the areas of overlap. Thus, such a population will be treated as experimental only when the times of geographic separation are reasonably predictable, e.g., fixed migration patterns, natural or manmade barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

* * * * *

3. Amend § 17.81 by:

- a. Revising paragraph (a) and paragraph (b) introductory text;
- b. Removing the undesignated paragraph following paragraph (b)(4);
- c. Revising paragraph (c)(3);
- d. Redesignating paragraphs (d), (e), and (f) as paragraphs (e), (f), and (g);
- e. Adding a new paragraph (d); and
- f. Revising newly redesignated paragraphs (e), (f), and (g).

The revisions and addition read as follows:

§ 17.81 Listing.

(a) The Secretary may designate as an experimental population a population of endangered

or threatened species that has been or will be released into habitat that is necessary to support one or more life history stages outside the species' current range, subject to the further conditions specified in this section, provided that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding, the Secretary will use the best scientific and commercial data available to consider:

* * * * *

(c) * * *

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from nonexperimental populations; and

* * * * *

(d) The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental population.

(e) The Service will consult with appropriate State fish and wildlife agencies, affected Tribal governments, local governmental agencies, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section will, to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, Tribal

governments, local government agencies, and persons holding any interest in land or water that may be affected by the establishment of an experimental population.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart will be identified by a species-specific rule in §§ 17.84 and 17.85 as appropriate and separately listed in § 17.11(h) (wildlife) or § 17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential experimental populations.

4. Revise § 17.82 to read as follows:

§ 17.82 Prohibitions.

Any population determined by the Secretary to be an experimental population will be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The species-specific rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

5. Amend § 17.83 by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 17.83 Interagency cooperation.

* * * * *

(b) For a listed species, any experimental population that, pursuant to § 17.81(c)(2), has been determined to be essential to the survival of the species or that occurs within the National Park System or the National Wildlife Refuge System, as now or hereafter constituted, will be treated for purposes of section 7 of the Act as a threatened species.

(c) For purposes of section 7 of the Act, any consultation or conference on a proposed

Federal action will treat any experimental and nonexperimental populations as a single listed species for the purposes of conducting the analyses and making agency determinations pursuant to section 7(a) of the Act.

6. Amend § 17.84 by:

a. Revising the section heading; and

b. Removing the word “special” where it appears in the heading and first sentence of paragraph (l)(1) and in the headings to paragraphs (l)(16) and (x)(8).

The revision reads as follows:

§ 17.84 Species-specific rules—vertebrates.

* * * * *

7. Amend § 17.85 by revising the section heading and paragraph (a)(2)(i) to read as follows:

§ 17.85 Species-specific rules—invertebrates.

(a) * * *

(2) * * *

(i) Except as expressly allowed in the rule in this paragraph (a), all the prohibitions of § 17.31(a) and (b) apply to the mollusks identified in the rule in this paragraph (a).

* * * * *

§ 17.86 [Removed and Reserved]

8. Remove and reserve § 17.86.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.