

Federal Agencies Finalize Rule to Amend Incidental Take Statement Regulations

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On May 1, 2015, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the wildlife agencies) issued a final rule amending the regulations governing Incidental Take Statements (ITS) for endangered and threatened species under the Endangered Species Act (ESA).

Under the ESA, when federal agencies act in ways that are likely to adversely impact threatened or endangered species, they must consult with the wildlife agencies first. The wildlife agencies then issue a biological opinion, which is often accompanied by an ITS. The ITS will, among other things, specify the impact of potential incidental taking on the species. With this final rule, the wildlife agencies codified the use of surrogates to express the amount or extent of take in an ITS. In this context, a surrogate is an alternative indicator by which biologists can quantify harm to a species (examples include habitat loss, ecological conditions, or impacts to similar species). The wildlife agencies had previously adopted the use of surrogates as part of their national policy for preparing incidental take statements.

Additionally, the final rule addressed ITSs for “programmatic” federal actions, defined as a federal action that provides a framework for the development of future actions that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future actions are implemented. Under the final rule, the wildlife agencies have codified their authority not to provide an ITS with a biological opinion for federal planning decisions that anticipate future harm to protected species; rather, an ITS will be provided at the point when future activities that could result in takings are authorized.

The wildlife agencies assert that the changes brought about by this rule do not create less protection for listed species; however, the rule drew immediate criticism from some environmental organizations, who stated that the rule will allow federal agencies to avoid quantifying future harm to imperiled wildlife, putting hundreds of plants and animals at greater risk of extinction.

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