



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
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WASHINGTON, DC 20240

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May

## Memorandum

To: Assistant Secretary, Fish and Wildlife and Parks  
Director, U.S. Fish and Wildlife Service

Through: Associate Solicitor, Parks and Wildlife 

From: Assistant Solicitor, Fish and Wildlife

Subject: Modified legal review and clearance procedure for rule-making documents prepared under Section 4 of the Endangered Species Act (ESA).

Recent experience with the development, review, and clearance of Section 4 listing and critical habitat rule-making documents indicates that there are fundamental problems with the current process for obtaining and responding to legal comments and advice provided by the Office of the Solicitor. These problems result from the fact that the current rule-making process has no specific mechanism to carry forward key legal advice provided by the Solicitor's Office at the Regional and Field Office levels, leaving the prospect that final decisions reached at the Assistant Secretary's level may not be informed by the outcome of the Solicitor's Office review. Other problems are presented when significant changes to rule-making documents are made at the final stages of the process—well after the conclusion of legal review by the Regional/Field Solicitor's Office and without opportunity for a final legal review to determine legal sufficiency of the amended documents. These problems inherent in the current deliberative process have compounded to the point that our Regional Solicitor's Offices in Portland and Sacramento rarely provide an approval that is not subject to significant conditions and/or exclusions, and in some cases have not been able to "surname" (i.e., approve as legally sufficient) Section 4 rule-making documents, particularly those concerning critical habitat. Due to the likelihood that merits challenges to Section 4 rules will continue at the current (or possibly an accelerated) pace through 2004, it is untenable to maintain any longer the present process for legal review of Section 4 rule-making documents. Therefore, to restore an effective legal review process, we will institute the following process changes effective May 3, 2004:

1. Preliminary Solicitor's Office review will be initiated following review and surname by the Service's Division Chief for Endangered Species at the Regional Office level (or, for the California/Nevada Operations Office, the Endangered Species Program Manager). Once

the review of the draft Section 4 document is completed, the appropriate Regional or Field Solicitor's Office will issue a "Summary Results" form (see attachment) that acknowledges the completion of preliminary review or that identifies one or more legal issues that need to be resolved during the administrative process. (Because the preliminary review is intended only to provide an early alert regarding legal issues that affect the legal sufficiency of the document, no "surname" will be provided by the Regional or Field Solicitor's Office at this stage.) The "Summary Results" form must be appended to the front of the rule-making package. This form (as updated) must remain with the draft document as it moves through the "surname" (approval) process, so that each official in the administrative chain-of-command is aware of and has the opportunity to resolve any outstanding legal concerns of the Solicitor's Office. As each legal issue is resolved through the administrative process, a new, updated "Summary Results" form shall be prepared, signed, and dated by the appropriate Field or Regional Solicitor's Office, and the updated form shall be attached to the draft document.

Although formal legal review and Solicitor's Office "surnaming," if appropriate, will occur later in the administrative process, as described below, this preliminary review will nonetheless require a substantial time commitment on the part of the Field and Regional Solicitor's Offices. Therefore, we expect the Fish and Wildlife Service Regional Offices to submit complete, well-written drafts to enable our Field and Regional attorneys to carry out a meaningful legal review.

Follow-up discussions between our Field and Regional attorneys and Service officials to address legal issues that are unresolved at the preliminary stage will not require a laborious administrative effort. Updating the "Summary Results" form to document the resolution of legal issues typically would not require review of the entire rule-making package; instead, the usual follow-up review would be narrowly focused on discrete text.

In addition to the preliminary review, informal legal review and advice will be available to the Service from the Solicitor's Office at the Washington, Regional, or Field Office levels at any stage of the rule-making process. We encourage the Service to address the resolution of substantive issues early in the rule-making process, so that legal concerns can be taken into consideration at that time. This should reduce the number of "last minute" crises and minimize the loss of time and scarce resources devoted to the revision of draft documents due to legal complications. The procedural change set forth in this memorandum affects only that part of the process that calls for formal Solicitor's Office review and "surnaming" of draft Section 4 rules.

Having noted the willingness of our Field and Regional Solicitor's Offices to engage in preliminary and informal reviews of draft Section 4 documents, nothing in this memorandum should be read to excuse the Service's Regional Offices from strictly adhering to the time tables established by the Director and the Assistant Secretary for the orderly review and clearance of such documents through the chain-of-command. The short time frames that govern the drafting

and review of Section 4 documents at each stage of the administrative process impose practical limits on the number of "follow-up" reviews that can be carried out by the Field and Regional Solicitor's Offices before the package is due at the Washington Office. To the extent that unresolved legal issues exist concerning a particular draft Section 4 document as the deadline approaches for moving a package from a Regional Office to the Service's Washington Office, the "Summary Results" form (which must be attached to the draft document) will ensure that the discussion on those issues will continue at the next administrative level. The results of the Solicitor's Office review should never be cited as a justification for delay in the orderly processing of these Section 4 documents.

2. Formal Solicitor's Office review will be carried out after the draft Section 4 document is referred to the appropriate Regional or Field Solicitor's Office by the Office of the Assistant Director for Endangered Species of the U.S. Fish and Wildlife Service in Washington, D.C. (The draft document must clear the Service's Branch of Listing, Division of Conservation and Classification, before the referral for formal review is made.) As a general practice, the package should be forwarded to the Regional or Field Solicitor's Office at least six weeks prior to any court-imposed deadline, so that the results of the Solicitor's Office review can be delivered to the Assistant Director for Endangered Species at least 30 days prior to the court imposed deadline. (In exigent circumstances where a particular draft Section 4 document arrives at the Service's Washington Office with less than six weeks remaining before the expiration of a court-ordered deadline, the Assistant Director may reduce the time frame for completion of formal Solicitor's Office review to seven days after receipt of the referral.) Once the formal review is completed, the appropriate Regional or Field Solicitor's Office will either: (1) "surname" the document, thereby completing formal legal review (subject to the provisions of item 3, below); (2) "surname" the document if specific changes are made; or, (3) return the document to the Service without a surname due to legal issues that have yet to be resolved. A new "Summary Results" form will be attached to the front of the rule-making package that documents the outcome of the formal Solicitor's Office review. The formal legal review process is not concluded until each identified legal issue is resolved to the satisfaction of the Field or Regional Solicitor's Office that conducted the initial review.

The results of the formal legal review will be forwarded to the Assistant Director for Endangered Species as soon as practicable, and at least 30 days prior to the expiration of any court-ordered deadline that may apply provided the package has been provided to the Solicitor's Office for formal review at least six weeks prior to the deadline. Therefore, this procedural change should not add delay or expense to the Section 4 administrative process.

3. Significant changes that are made to the draft Section 4 document after the completion of formal legal review must be communicated to the appropriate Regional or Field Solicitor's Office at least 7 days prior to the expiration of any court-ordered deadline that may apply.

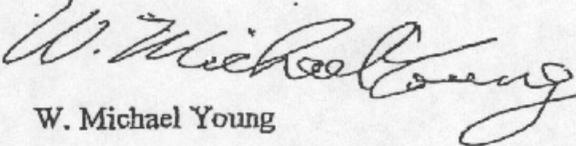
(If less than 7 days remain before the expiration of a court-ordered deadline, best efforts will be employed to carry out legal review of significant changes communicated to the Regional or Field Solicitor's Office, but there can be no guarantee that such legal review can be completed in such a short time frame.)

To ensure that the Solicitor's Office "surname," or certificate of legal sufficiency, remains in force, any significant (substantive, non-editorial) changes to the draft Section 4 rule inserted after legal review is completed must be communicated to the Solicitor's Office. *(The Service must clearly identify the significant changes that require follow-up review by either providing red-line/strikeout text or other markings that will facilitate an efficient follow-up review.)* Care must be taken during the deliberative process to ensure that "last-minute," substantive changes do not evade legal review. The Solicitor's Office "surname" only attaches to the rule-making draft that was submitted for review, unless subsequent amendments are specifically referred for follow-up review and such amendments are clearly identified with red-lined/strikeout text or other markings. (Our Field and Regional attorneys will be encouraged to retain a copy of each draft Section 4 document that they "surname.") Once the follow-up review is completed, the Solicitor's Office will provide an updated "Summary Results" form.

4. When the Section 4 document is presented to the Associate Solicitor for Parks and Wildlife for final "surnaming" (approval), the package must contain: (1) a "Summary Results" form issued by the Solicitor's Office; and (2) a statement from the Fish and Wildlife Service indicating whether any significant changes were made to the Section 4 document after the date noted on the "Summary Results of Legal Review" form.

If unresolved legal issues are noted at the time the draft Section 4 document is presented to the Associate Solicitor for "surnaming," the decision to proceed with a "surname" may be issued subject to any or all of those outstanding legal issues. Further, we will monitor these Section 4 documents for any persistent pattern of unresolved legal issues, including the completeness and quality of drafts submitted for preliminary review.

Thank you for your assistance in the implementation of these revised procedures for legal review.

  
W. Michael Young

Attachment

cc: Deputy Director, U.S. Fish and Wildlife Service  
Assistant Director, Endangered Species, U.S. Fish and Wildlife Service  
All Regional Solicitors  
All Field Solicitors

[ATTORNEY-CLIENT PRIVILEGED COMMUNICATION]

SUMMARY RESULTS OF LEGAL REVIEW OF  
DRAFT SECTION 4 (ESA) DOCUMENTS

DESCRIPTION OF DRAFT DOCUMENT (e.g., proposed rule to designate critical habitat  
for the loach minnow): \_\_\_\_\_

REVIEWING OFFICE: \_\_\_\_\_

DATE OF RECEIPT: \_\_\_\_\_

RESULTS OF LEGAL REVIEW:

\_\_\_\_\_ Preliminary review of the Field Office/Regional Office draft has been  
completed; formal review will occur once the draft document has been  
cleared by the Assistant Director for Endangered Species.

\_\_\_\_\_ The draft document is legally sufficient.

\_\_\_\_\_ The draft document is legally sufficient if the following specific changes are  
made:

\_\_\_\_\_ The draft document is not legally sufficient for the specific reasons outlined  
below:

This summary is issued by:

\_\_\_\_\_ Date: \_\_\_\_\_

Regional/Field Solicitor

Note: Any Solicitor's Office "surname" attaches only to the draft that was submitted for  
review, unless subsequent amendments are specifically referred for follow-up review.