



# Administration Marches Ahead on Critical Habitat:

## *Final Rules and Exclusion Policy Lay Groundwork for Broader Designation of Critical Habitat and Reshape the Adverse Modification Inquiry*

FEBRUARY 22, 2016

[\*Joseph Nelson\*](#) and [\*Tyson Kade\*](#)

On February 11, 2016, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together, the “Services”) published final regulatory changes and policies covering the designation and protection of critical habitat under the Endangered Species Act (“ESA”). The vehicles for these changes are:

- A final rule modifying the procedures for the designation of critical habitat;
- A related final policy on the exclusion of lands or waters from a critical habitat designation pursuant to ESA Section 4(b)(2); and
- A final rule revising the definition of “destruction or adverse modification” of critical habitat as used in consultations on federal agency actions under ESA Section 7.

As adopted, these regulatory and policy changes increase the discretion of the Services to broadly designate occupied and unoccupied areas as critical habitat, and shift the focus of adverse modification towards a “conservation” standard. For federal authorizations, actions and permitting decisions that may occur within designated critical habitat, these revisions also present the specter of increased mitigation requirements and additional project modifications necessary to meet the new “adverse modification” definition to be applied in the ESA Section 7 consultation process.

### **Existing Treatment of Critical Habitat Under the ESA**

Section 4 of the ESA directs that the Services—concurrent with the listing of a threatened or endangered species and where prudent and determinable—designate “any habitat of such species which is then considered to be critical habitat.” For over three decades, the Services have designated critical habitat based on the presence of certain physical and biological features referred to as “primary constituent elements.” The Services’ regulations currently provide that unoccupied areas should only be designated as critical habitat where a designation otherwise limited to areas within the species’ present, occupied range would be inadequate to ensure the recovery of the species.

Upon designation, critical habitat is protected from adverse modification through the ESA Section 7 consultation process. Specifically, one part of the Section 7 consultation inquiry focuses on whether a proposed federal action would destroy or adversely modify designated critical habitat. The Section 7 consultation requirement applies to discretionary federal agency actions, including issuance of a permit or authorization, granting of funds and initiation of an agency’s own projects. If an action is determined to result in adverse modification of critical habitat, the federal action agency must adopt changes to the proposed action to avoid such adverse modification. These changes are often quite extensive and can affect the scope, location, and even the feasibility of a project moving forward. The previous regulatory definition of adverse modification was invalidated in multiple federal court decisions more than ten years ago.

### **Summary of the Final Rules and Policy**

The Services have fundamentally altered the designation of critical habitat through both the revised critical habitat designation rules and the accompanying policy on limited exclusion of areas from said designation. Further, in revising the “adverse modification” definition, the Services re-orient the inquiry towards protecting future use of occupied and unoccupied critical habitat for conservation of a species.

#### Key Changes to Critical Habitat Designation Procedures and the Services' Exclusion Policy:

- Adopting the use of “physical and biological features” as the basis for designation of critical habitat and, in turn, defining physical and biological features as those features that support the “life-history needs” of the species.
- Clarifying that indirect or circumstantial evidence of migratory corridors, seasonal habitats, and other periodically used areas is sufficient for consideration of such area as occupied habitat.
- Establishing that the potential to support physical or biological features, rather than the actual presence of such features, is sufficient for designation of an area as critical habitat.
- Reserving discretion to the Services to determine the scope and “scale” of the critical habitat designation.
- Removing conditions in the existing regulations that disfavored the designation of unoccupied habitat.
- Declaring that the decision on whether to exclude areas from a critical habitat designation under ESA Section 4(b)(2) is within the sole discretion of the Services.
- Establishing policies and conditions for exclusion of land or water covered by conservation plans and agreements, with preferential consideration for those plans prepared pursuant to ESA Section 10 (i.e., habitat conservation plans, safe harbor agreements, and candidate conservation agreements).
- Adopting a presumption against exclusion of federal lands from critical habitat designations.

#### Re-orientation of the Adverse Modification Inquiry:

- Finalizing a definition of “destruction or adverse modification” that prohibits the direct or indirect alteration of habitat that appreciably diminishes the value of critical habitat for the conservation of a listed species.
- Including within the adverse modification definition those alterations that preclude or significantly delay the development of biological or physical features supporting the species’ needs.
- Clarifying that the scale of the adverse modification inquiry considers the effect of the action on the value of critical habitat as a whole, rather than solely within the areas affected by the proposed action.

#### Implications of the Final Rules and Policy

An underlying theme throughout the final rules and policy is the Services’ emphasis that the focal point of a critical habitat designation is to provide a means by which habitat is protected for the purpose of achieving conservation of a listed species. This is most evident by the removal of the limitations on the designation of unoccupied areas, the interpretation that dynamic or ephemeral habitat conditions are sufficient to demonstrate that the requisite physical or biological features are found in a specific area, and that adverse modification can include the preclusion or significant delay of physical or biological feature development.

The Services’ final rules also expressly anticipate changing habitat needs from global climate change. In its final rule reshaping the critical habitat process, the Services note that “[a]s the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important.” Notwithstanding, the Services declined to provide specific procedures for how unoccupied areas will be identified and designated as critical habitat or further explain how “adverse modification” applies to unoccupied critical habitat for purposes of Section 7 consultation.

Taken as a whole, these regulatory changes, interpretations and policies will have the effect of granting the Services greater leeway in making broad-scale designations of critical habitat, including the more

frequent designation of unoccupied areas as critical habitat. Further, the Services re-orient the “adverse modification” consultation inquiry towards protection of occupied and unoccupied critical habitat for future conservation needs. Under this re-shaped adverse modification inquiry, the Services could seek significant changes to a proposed project on the basis that the action will otherwise preclude or significantly delay growth of habitat features in the future.

### For more information

Van Ness Feldman closely monitors and counsels clients on compliance with the Endangered Species Act as well as other water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Endangered Species Act or other environmental laws, please contact [Joe Nelson](#), [Matt Love](#), [Tyson Kade](#) or any member of the firm’s [Land, Water & Natural Resources](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

Follow us on Twitter @VanNessFeldman

© 2016 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.