



Administration Issues Significant Revisions to Endangered Species Act Implementation

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On August 12, 2019, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) announced the publication of three final rules that significantly revise their regulations implementing the Endangered Species Act (“ESA”). These rules will be effective thirty (30) days after publication in the Federal Register.

Specifically, the final rules:

- **Modify the procedures under ESA Section 4 for listing and delisting species and designating occupied and unoccupied areas as critical habitat, including:**
 - Clarifying the duration of the “foreseeable future” when determining whether to list a species as threatened;
 - Revising the procedures for designating critical habitat; and
 - Streamlining the process for delisting and reclassifying species;
- **Revise the regulations governing the Services’ Section 7 consultation process, including:**
 - Adopting deadlines for the Services’ completion of informal consultations;
 - Revising key terms regarding the identification of baseline conditions, potential effects, and the level of causation and certainty required in the review of effects of an action on species and critical habitat;
 - Clarifying what constitutes adverse modification of critical habitat; and
 - Adopting programmatic and other alternative consultation mechanisms and;
- **Prospectively require FWS to adopt species-specific Section 4(d) rules for the identification of prohibited “take” of a threatened species (similar to NMFS’s long-standing practice).**

The species and habitat protected under the ESA extend to all aspects of our communities, lands, and waters. There are over 2,400 species listed as threatened or endangered under the ESA. Critical habitat for one or more species has been designated in all regions of the U.S. and its territories. Through the Section 7 consultation process and “take” prohibitions under Sections 4(d) and 9, the ESA imposes species and habitat protection measures on the use and management of private, federal, and state lands and waters and, consequently, on governmental and private activities.

With the issuance of these final rules, the Services again take steps to adapt and implement a 1973 law to a 21st century world. Here, the Services are grappling with central questions such as: what to consider in designating occupied and unoccupied areas as critical habitat; what is the best approach for ensuring adequate protective measures for species; how to streamline a consultation process that has overburdened federal agencies and their individual permitting and program decisions; and how to address the often-complex interactions between a proposed action and species’ needs and conservation measures.

The revisions reflect sometimes discrete, but still far-ranging consequences of changes to the ESA implementing regulations. The Services will next turn to key implementation tasks, which likely include interpretative guidance to resolve new or retained ambiguities in the broader ESA regulatory program. Finally, litigation appears inevitable as numerous opponents to these regulatory changes have publicly stated their intent to challenge the revised rules in federal court.

Highlights from each of the rules are below.

Listings and Critical Habitat

Section 4 of the ESA dictates how the Services list species as threatened or endangered, delist or reclassify species, and designate areas as critical habitat. The final rule adopts several significant revisions to the Services' regulatory procedures that implement the statutory framework under Section 4. Notable changes include:

- **Clarifying the duration of the “foreseeable future”:** As used when determining whether to list a species as threatened, the phrase “foreseeable future” will extend only so far as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely, and will be determined on a case-by-case basis.
- **Revised procedures for designating unoccupied critical habitat:** The final rule restores and clarifies a two-step process for determining when unoccupied areas may be designated as critical habitat. Specifically, the Services will first evaluate areas occupied by the species. The Services will only consider an unoccupied area to be essential where a designation limited to occupied areas would be inadequate to ensure the conservation of the species. In addition, the Services must determine that an identified unoccupied area is reasonably certain to contribute to the conservation of the species and contains one or more physical or biological features essential to the conservation of the species.
- **Not prudent to designate critical habitat:** The final rule adopts a more expansive, non-exclusive set of circumstances for when it would not be prudent to designate critical habitat. Notably, designation of critical habitat may not be prudent when the Services determine that the threats to habitat arise solely from causes that cannot be addressed through Section 7 consultations.
- **Factors for delisting and reclassifying species:** The final rule clarifies that species will be delisted or reclassified based on whether they meet the statutory definition of an endangered species or threatened species.
- **Maintaining focus on species and habitat status in listing decisions:** The Services reiterate that listing decisions are based solely on the best available scientific and commercial information available—not economic information.

These revisions to the Section 4 implementing regulations provide additional clarity and transparency regarding the listing and delisting of species and the designation of critical habitat. Notably, the Services' treatment of unoccupied critical habitat in this final rule responds to the uncertainty and confusion created by their 2016 regulatory revisions, and the Services provide factors that will be considered when determining whether an unoccupied area will contribute to the conservation of a species. In addition, while the Services partially address the Supreme Court's recent *Weyerhaeuser* decision, the final rule does not provide a robust interpretation of the term “habitat” for purposes of critical habitat designations. This interpretation, and other issues associated with the implementation of ESA Section 4, may be addressed in subsequent guidance or rulemakings.

Consultation Regulations

The ESA Section 7 consultation requirement applies to discretionary federal agency actions—including federal permits, licenses and authorizations, management of federal lands, and other federal programs. Federal actions that may adversely affect a listed species or designated critical habitat must undergo a formal consultation review and issuance of a biological opinion evaluating whether the action is likely to jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. The biological opinion also evaluates the extent to which “take” of a listed species may occur as a result of the action and quantifies the level of incidental take that is authorized.

The final rule addresses many aspects of the consultation program, including:

- **Deadlines for the Services' concurrence on an agency's informal consultation determinations:** For the first time, the Services are adopting a 60-day deadline for the Services to respond to an agency's request for concurrence on its determination as to whether a proposed activity is/is not likely to adversely affect a listed species or critical habitat.
- **Clarifying key terms used in the evaluation of effects on listed species and critical habitat, including:**
 - Clarifying that the "environmental baseline" is supposed to capture the conditions for the species and critical habitat within the action area without the consequences of the action under review. Further, the final rule provides that an existing agency activity or agency facility that is not presently within an agency's authority to modify is included in the environmental baseline.
 - Removing an artificial distinction between direct, indirect, and interrelated effects to focus on the consequences of an action.
 - Adopting an approach to "effects of an action" that reinforces the need for a causal link between the proposed action and an identified effect (i.e., a "consequence" of the action) which is reasonably certain to occur.
 - Excluding from consultation review those effects (i.e., consequences) that are remote in time or geography, or otherwise dependent on an attenuated string of causation as to not be reasonably certain to occur.
- **Revisiting the definition of "adverse modification":** The final rule further clarifies the definition of "destruction or adverse modification" (adopted in 2016) to ensure that the Services consider the effect of an action on critical habitat "as a whole" and removes, as confusing and redundant, language attempting to describe a subset of activities that may be considered an "alteration" of critical habitat.
- **Codifying the use of programmatic consultations and accommodating expedited consultations:** Recognizing that programmatic consultations can improve both process efficiency and conservation in consultations, the Services adopt regulations streamlining site-specific consultations for programmatic agency activities. Under the final rule, a "programmatic consultation" can address multiple agency actions which may be carried out through a program, region, or other basis. Separately, the final rule allows for the Services and an action agency to agree upon an expedited consultation for an action or class of actions. This is contemplated primarily as a tool to expedite review of conservation actions that will have a beneficial effect on a listed species.

These changes to the Section 7 implementing regulations provide for a further opportunity to streamline the consultation process. Further, it is notable that the Services continue to grapple with how best to identify the scope of effects that can be reasonably attributed to an agency action and appropriately analyzed under the framework of the statutory text. The Services' revisions focusing on the determination of an environmental baseline, the identification of a causal relationship between the proposed action and an identified effect, and the distinction between what is reasonably certain to occur as compared to a remote or attenuated effect goes to the heart of evaluating whether jeopardy or adverse modification will result from a proposed action.

Revisions to "4(d) Rule"

The FWS final rule allows for the application of species-specific "4(d) rules" to threatened species. As enacted, the ESA treats threatened and endangered species differently with respect to what are often called the "take" prohibitions of the Act. ESA Section 9(a)(1) prohibits the unauthorized "take"—which is defined as an act "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"—of an endangered species. In contrast, under Section 4(d) of the ESA, the Secretary "may" issue a regulation applying any prohibition set forth in ESA Section 9(a)(1) to a threatened species.

In the past, FWS followed a 1978 regulation that established a blanket “4(d) rule” that extended all ESA Section 9(a)(1) take prohibitions to a threatened species unless a species-specific rule was otherwise adopted. In this final rule, FWS rescinds the blanket “4(d) rule” and, for new listed species, provides for the adoption of species-specific “4(d) rules.” This approach aligns with NMFS’s long-standing practice.

The new rule is being finalized without changes from the July 2018 proposed rule and includes the following elements:

- **Prospective application:** The changes apply to wildlife and plant species listed or reclassified as threatened on or after the effective date of the final rule.
- **Species-specific “take” prohibitions:** FWS will apply “applicable prohibitions and exceptions” on a species-specific basis for newly listed threatened species. In the preamble discussion, FWS explained that its intent is to tailor the prohibitions to the “specific actions or activities that are driving the species to a threatened status.” Typically, such threats are identified in the listing decision.
- **Intent to issue concurrent with listing determination:** FWS generally intends to finalize a species-specific rule concurrent with the final listing or reclassification determination for the threatened species. However, noting that such deadlines are not within the ESA, FWS did not commit itself to binding timeframes for finalizing species-specific rules relative to final listing or reclassification rules.
- **Grandfathering of existing threatened species:** Threatened species listed prior to the effective date of the new rule will continue to be covered by the blanket “4(d) rule”—by which all Section 9(a)(1) prohibitions are broadly applied. FWS has the right, but no obligation, to issue a new species-specific rule for a threatened species that was listed prior to the effective date of the new rule.

Additional Resources

- Visit the [FWS landing page on ESA regulation revisions](#)
- Read the [news release](#)
- View the [revised regulations for listing species and designating critical habitat](#)
- View the [revised regulations for prohibitions to threatened wildlife and plants](#)
- View the [revised regulations for interagency cooperation](#)

For More Information

Van Ness Feldman counsels clients on ESA compliance and, when necessary, litigates to protect clients’ interests. If you would like more information about the implementation of the ESA 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.

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