



Administration Proposes First Wave of Endangered Species Regulatory Revisions

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On October 27, the Biden Administration proposed to rescind two final rules that were promulgated in December 2020 to improve and clarify the process for designating or excluding areas from critical habitat under the Endangered Species Act (“ESA”). First, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) are proposing to rescind the final rule that established a regulatory definition of “habitat.” [86 Fed. Reg. 59,353](#). Second, FWS is proposing to rescind the final rule that clarified how the agency would consider and evaluate particular areas for exclusion from a critical habitat designation. [86 Fed. Reg. 59,346](#). In both cases, if finalized, the Services would revert back to the relevant regulations and policies in place before the two final rules were published. Comments on the proposed rules are due by November 26, 2021.

These proposed rules are the first of a broader set of ESA regulations promulgated in 2019 and 2020 that the Administration [announced in June](#) would be rescinded, revised, or reinstated by the current Administration. Pursuant to President Biden’s [Executive Order 13990](#), the Services reviewed certain agency actions for consistency with the new Administration’s policy objectives. As a result of that review, the Services identified five final rules related to ESA implementation that would be reconsidered. In addition to the two recently proposed rescission rules, in the coming months, the Services also anticipate:

- **Revising regulations for listing species and designating critical habitat.** On August 27, 2019, the Services published a final rule revising the procedures for listing species and designating critical habitat. [84 Fed. Reg. 45,020](#). In part, this rule clarified the duration of the “foreseeable future” when determining whether to list a species as threatened, revised the procedures for designating critical habitat including clarifications regarding the treatment of unoccupied areas, and streamlined the process for delisting and reclassifying species. The Services anticipate revising the regulations to reinstate prior language stating that listing decisions are made “without reference to possible economic or other impacts of such determination,” and are considering other additional revisions.
- **Revising regulations for interagency cooperation.** On August 27, 2019, the Services published a final rule revising the regulations governing ESA section 7 consultation. [84 Fed. Reg. 44,976](#). In part, this rule revised key terms regarding the identification of environmental 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; clarified what constitutes adverse modification of critical habitat; and adopted deadlines for the completion of informal consultation. The Services anticipate revising the definition of “effects of the action” and associated provisions and are considering other additional revisions.
- **Reinstating protections for species listed as threatened under ESA.** On August 27, 2019, USFWS withdrew its “blanket 4(d) rule,” which automatically applied the ESA section 9 take prohibitions to threatened species and adopted a threatened species-specific approach to applying the take prohibitions (similar to NMFS’s practice). [84 Fed. Reg. 44,753](#). FWS anticipates reinstating the blanket 4(d) rule.

Proposed Rescission of the Definition of “Habitat”

The Services are proposing to rescind the regulatory definition of “habitat.” [86 Fed. Reg. 59,353](#). The definition of habitat was promulgated on December 16, 2020, in response to the Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), which held that an area must be “habitat” before it can meet the ESA’s narrower definition of “critical habitat.” The term “habitat” had previously been undefined under the ESA and, as applied to critical habitat designations, the Services

defined habitat as “the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.”

Instead of revising or clarifying the definition of “habitat,” the Services are proposing to rescind it in its entirety. As justification for the rescission, the Services state that definition of “habitat” inappropriately constrains their ability to designate areas that meet the definition of “critical habitat” under the ESA. For example, the Services note that there could be areas that are in need of restoration, are degraded, or are suboptimal, but those areas “should not be precluded from qualifying as habitat because some management or restoration is necessary for it to provide for a species’ recovery.” The Services also found that their attempt to create a “one-size-fits-all” definition of “habitat” resulted in the use of overly vague and unclear terminology (i.e., the phrases “biotic and abiotic setting” and “resources and conditions”), and that the definition is inherently confusing to implement. Finally, despite the express limitation on application to critical habitat, the Services expressed concern that the “habitat” definition may create conflicts or inconsistencies with other federal agency statutory authorities or programs that also have definitions or understandings of habitat.

The Services propose to return to their prior practice of implementing the ESA without a codified definition of “habitat.” Despite recognizing that *Weyerhaeuser* was the impetus for the rulemaking, the Services intend to address that decision by considering whether an area is habitat for a particular species on a case-by-case basis using the best scientific data available. While the prior Administration’s definition of habitat may be vague from an ecological perspective, it does provide a necessary basis by which to assess whether a particular area can qualify for designation as critical habitat. Without this guidance, there will be increased uncertainty for the regulated community and the greater possibility of areas being designated as critical habitat that have no ability to support listed species or contribute to their recovery.

Proposed Rescission of Critical Habitat Exclusion Procedures

FWS also is proposing to rescind its December 18, 2020, final rule that clarified how the agency would consider and evaluate particular areas for exclusion from a critical habitat designation pursuant to ESA Section 4(b)(2) due to economic, national security, and other relevant impacts. [86 Fed. Reg. 59,346](#). Previously, in February 2016, the Services issued a joint policy describing how they implement their authority to exclude areas from critical habitat (“[2016 Policy](#)”). The 2020 final rule expanded on that Policy, and sought to provide “transparency, clarity, and certainty to the public and other stakeholders” on how the FWS conducts its discretionary exclusion analysis given the Supreme Court’s conclusion in *Weyerhaeuser* that decisions not to exclude areas from critical habitat are judicially reviewable.

As justification for the proposed rescission, FWS states that the 2020 final rule undermines its role as the expert agency for ESA implementation because it gives undue weight to outside parties, including proponents of particular exclusions, in guiding FWS’s authority to exclude areas from critical habitat designations. FWS also is concerned that the final rule employs an overly rigid ruleset for when FWS will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded, regardless of the specific facts at issue or the conservation outcomes. Finally, FWS opines that the final rule does not fulfill its stated goal of providing clarity and transparency to the critical habitat exclusion process because it is now different than the processes and standards utilized by NMFS, which is still implementing the 2016 Policy.

FWS proposes to revert to making critical habitat exclusion determinations based on the 2016 Policy and its joint regulations with NMFS at 50 C.F.R. § 424.19. In acknowledgement of the *Weyerhaeuser* decision, FWS states that it will now always explain decisions to exclude areas from critical habitat. Based on prior practices, this assurance is not likely to provide the regulated community with needed certainty or transparency, as the decisions on assigning weights to particular impacts and benefits, whether the benefits of exclusion outweigh inclusion, and whether to ultimately exclude an area have frequently been made with little insight, consistency, or explanation. In sum, FWS’s proposal would expand its discretion to determine whether or not to exclude areas from critical habitat by rescinding the recently adopted regulatory framework that guides the exercise of that discretionary authority.

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 [Tyson Kade](#), [Joe Nelson](#), or any member of the firm's Land, Water & Natural Resources Practice at (202) 298-1800.

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