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IN FOCUS

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Description of Proposed Changes to Implementation of the Endangered Species Act

On July 25, 2018, the Trump Administration proposed three rules that would change implementation of the Endangered Species Act (ESA; 16 U.S.C. 1531 et. seq.). The proposed rules are open for public comment until September 24, 2018. The federal agencies that implement ESA include the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration through the National Marine Fisheries Service (NMFS). FWS and NMFS are referred to as *action agencie*s in this In Focus, and the term *Secretary* refers to the Secretary of the Interior unless otherwise stated. The proposed rules are summarized below without an analytical discussion, although some Administration explanations of the changes are included.

Listing Species and Designating Critical Habitat

The first proposed rule addresses the listing of species and designation of critical habitat under Section 4 of ESA. A species may be designated as either endangered or threatened, depending on the severity of its decline and threats to its continued survival. Under Section 3 of ESA, an *endangered* species is defined as a species that is "in danger of extinction throughout all or a significant portion of its range." A *threatened* species is defined as a species "likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The determination of whether a species should be listed is based on several scientific factors related to a species and threats to its continuance. Listing determinations are to be made only on the basis of the best scientific data available.

Identifying Economic Effects of Listing

The proposed regulation would allow the action agencies—in their listing decision and at their discretion—to include an analysis of the economic effects of the listing. The proposed rule specifically states that this change would not allow economic factors to be considered in the decision to list the species. The proposed rule states that this change would "more closely align" the rule to statutory language under ESA Section 4(b)(1)(A).

Foreseeable Future

The proposed rule would create a framework for how the Secretary would consider the *foreseeable future* in making listing decisions regarding threatened species under ESA. The proposal interprets the foreseeable future as extending in time only as far as the action agencies can reasonably determine that conditions that potentially could put a species in danger of extinction are probable and can be reasonably determined or are reliable. Under the proposal, the foreseeable future would be determined on a case-by-case basis based on the best data available.

Factors Considered in Delisting a Species

The proposed rule states that the same criteria used to list a species will be used to delist a species. Specifically, a listed species will be delisted if, using the best scientific and commercial data available, it is extinct, does not meet the definition of an endangered or threatened species, or cannot be defined as a species under the law. The proposal states that this clarification would address concerns that the standard for delisting a species is higher than the standard for listing a species.

Critical Habitat Designation

When a species is listed under ESA, the Secretary also must designate critical habitat. *Critical habitat*, as defined under ESA, includes not only geographic areas occupied by the species at the time of listing but also areas outside that geographic area, if the Secretary determines that such additional areas are essential for the conservation of the species. Federal agencies must avoid "destruction or adverse modification" of critical habitat, either through their direct action or activities that they approve or fund. Private land is affected by critical habitat designation only if some federal action (e.g., a license, loan, or permit) also is involved. Critical habitat is designated on the basis of the best scientific data available and after taking into consideration the economic or other relevant impacts of the designation.

The proposed rule provides a list of circumstances under which the action agencies might find it prudent not to designate critical habitat. This could occur, for example, if designating critical habitat would result in a greater chance of the species being harmed by human activity because its habitat is identified (e.g., by encouraging vandals or poachers), if areas do not meet the definition of critical habitat, or if there are no habitat-based threats to the species.

Critical Habitat in Unoccupied Areas

The proposal would allow the Secretary to designate unoccupied areas as critical habitat if the occupied habitat of the species at the time of listing is inadequate to ensure the conservation of the species or results in less efficient conservation of the species than habitat that includes unoccupied areas.

Under the proposal, for an unoccupied area to be *essential* for the conservation of the species, the Secretary is to determine that there is a likelihood that the area would contribute to the conservation of the species, according to the proposal. In this coming 2018-2019 term, the Supreme Court will address, among other things, whether ESA prohibits FWS from designating private land as unoccupied

critical habitat essential for the conservation of the endangered dusky gopher frog based solely on the multiple breeding sites on the land. The Court is scheduled to hear oral argument for this case, *Weyerhaeuser Co. v. FWS*, on October 1, 2018.

Regulations for Interagency Cooperation

The second proposed rule would modify definitions and procedures used in the implementation of Section 7 consultations under ESA. The proposal addresses the definitions of some terms and phrases, notably the definition of *destruction or adverse modification* and *effects of the action*.

Definitions

Under Section 7 of ESA, if federal actions or actions of nonfederal parties might adversely affect a listed species or its habitat, as determined by the Secretary, the federal agencies must consult with either FWS or NMFS to ensure that their actions are "not likely to jeopardize the continued existence" of any endangered or threatened species or to adversely modify critical habitat. This is referred to as a Section 7 consultation. *Action* includes any activity authorized, funded, or carried out by a federal agency, including permits and licenses.

The proposed rule would revise the definition of *destruction or adverse modification* by adding the phrase *as a whole* to the end of the definition and deleting a sentence from the same definition that addresses effects from actions that alter physical and biological features essential for the conservation of the species and delay the development of such features. The addition of *as a whole* to the definition is intended to clarify the appropriate scale of the effect of the destruction or adverse modification of critical habitat, according to the proposal. For example, if a project affects a portion of critical habitat, the action agencies would "place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced," according to the proposal.

The proposal also would change the definition of *effects of the action* by modifying the definition to combine direct and indirect effects into effects and removing the reference to environmental baseline in the definition. Further, the proposed definition would include a new sentence: "An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." This sentence, according to the proposal, would provide a two-part test for an effect caused by the action to be evaluated: (1) whether the effect or activity would occur regardless of the action and (2) whether the effect or activity is certain to occur as a result of the action.

Consultation Under Section 7 of ESA

The proposal contains several provisions that aim to clarify interagency consultation under Section 7 of ESA and save time and costs associated with consultation, according to the Administration.

The proposed rule would define a new term: *programmatic consultation*. Programmatic consultation, under the proposal, is a Section 7 consultation that addresses multiple agency actions on a program, region, or other basis. It allows federal agencies to consult with FWS or NMFS, for example, on multiple, frequently occurring, programmatic actions in a geographic area and on a proposed program, policy, or regulation that would provide a framework for future actions. The proposal also seeks comment on instances when federal agencies would not be required to consult under Section 7 of ESA. These instances, as discussed in the proposal, are when (1) the federal agency does not anticipate "take" and the action does not affect listed species and habitat; (2) there are effects that are manifested in global processes that cannot be reliably predicted, result in insignificant effects, or have potential risk to the species that is remote; or (3) there are effects that are beneficial or not capable of being measured or detected. The term *take* under ESA means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

The proposal seeks comment on setting a deadline for informal consultations under Section 7 of ESA and clarifies what is necessary to initiate formal consultation. Further, the proposal includes provisions that would streamline consultations to reduce the time it takes to complete them. The proposal also includes changes to the procedures addressing the reinitiation of programmatic consultation for certain land management plans when new species are listed and new critical habitat is designated.

Regulations for Threatened Species

Section 4(d) of ESA requires that species listed as threatened under ESA are regulated "to provide for the conservation of such species." FWS generally regulates threatened species by extending most of the prohibitions on activities that are provided for endangered species, unless FWS promulgates a species-specific 4(d) rule that can deviate from this standard. Extending prohibitions for endangered species to threatened species is referred to as the *blanket 4(d) rule*.

Under the third proposed rule, FWS would no longer implement the blanket 4(d) rule. Instead, FWS would determine appropriate protective regulations for each species listed as threatened on a case-by-case basis. Species-specific rules would be required for all species newly listed or reclassified if the rule is finalized. According to the proposed rule, FWS states that issuance of species-specific rules would align FWS policy with that of NMFS, which shares responsibility for implementing ESA with FWS. FWS also postulates that switching to a species-specific approach would "better tailor protections to the needs of the threatened species while still providing meaning to the statutory distinction between 'endangered species' and 'threatened species.'"

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