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IN FOCUS

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Final Rules Changing Endangered Species Act Regulations

On August 27, 2019, the Trump Administration published three final rules that change the implementation of the Endangered Species Act (ESA; 16 U.S.C. §§ 1531 et. seq.). The final rules concern Section 4 (listing of endangered and threatened species) and Section 7 (consultation with federal agencies) of ESA. The final rules are effective on September 26, 2019.

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 the *Services* in this In Focus, and the term *Secretary* refers to the Secretary of the Interior or the Secretary of Commerce, as applicable.) The final rules are summarized below, including some of the Services' explanations for the changes.

Revision of the Regulations for Listing Species and Designating Critical Habitat

This final rule (84 *Federal Register* 45020) addresses the listing of endangered and threatened species and designation of critical habitat under Section 4 of ESA. 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 that is "likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The Secretary determines whether a species should be listed based on five factors related to threats to the species' continued existence. Listing determinations are to be made solely on the basis of the best scientific and commercial data available.

Identifying Economic Effects of Listing

The final rule removes "without reference to possible economic or other impacts" from the regulation on listing determinations (50 C.F.R. § 424.11(b)). This change allows the Services to reference the economic effects of listing decisions. The final rule specifically recognizes, however, that ESA prohibits the Services from considering economic factors in listing decisions, and that this rule does not alter the law to allow such factors to be considered in the decision to list a species. The final rule states that this change "more closely align[s]" the rule to statutory language under ESA Section 4(b)(1)(A) and provides more transparency to Congress and stakeholders on the economic impacts of listing decisions.

Foreseeable Future

The final rule creates a framework for how the Secretary will evaluate the *foreseeable future* when making listing decisions on threatened species under ESA. The final rule interprets the foreseeable future as extending in time only as far as the Services can reasonably determine that future threats and the species' responses to those threats are "likely," interpreted by the Services to mean more likely than not. The Services will determine the foreseeable future on a case-by-case basis, based on the best data available, and need not identify a specific time period.

Factors Considered in Delisting a Species

The final rule clarifies that the same criteria used to *list* a species will be used to *delist* a species. Under the final rule, 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 species or a threatened species, or is not a "species" as defined by ESA. The Services explain that this clarification addresses 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 to the maximum extent prudent and determinable. *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 ensure their actions and actions approved or funded by them are not likely to result in the "destruction or adverse modification" of critical habitat. Critical habitat designations only affect private land if some federal action (e.g., a license, loan, or permit) is also involved. Critical habitat is designated based on the best scientific data available and after considering the economic or other relevant impacts of the designation.

The final rule revises the list of circumstances under which the Services might find it prudent to *not* designate critical habitat. It removes the circumstance that designating critical habitat would not benefit the species and replaces it with four other circumstances. For example, the Secretary could determine that designating critical habitat is not prudent because no areas meet the definition of critical habitat or there are no habitat-based threats to the species (e.g., the conservation of a species threatened by sea level rise cannot be addressed through habitat management).

Critical Habitat in Unoccupied Areas

The final rule clarifies when the Secretary may designate unoccupied areas as critical habitat. Under ESA, unoccupied areas must be *essential* to the conservation of the species to be critical habitat. To determine if an unoccupied area is essential, the Secretary must find that the occupied habitat of the species at the time of listing is inadequate to ensure the conservation of the species. The

Secretary also must determine that it is reasonably certain the area will contribute to the conservation of the species and that the area contains at least one physical or biological feature essential to the conservation of the species, as defined in regulation. The latter criterion addresses the Supreme Court's 2018 opinion in *Weyerhaeuser Co. v. FWS*, which held that to be critical habitat, an area must first be *habitat*.

Revision of Regulations for Interagency Cooperation

This final rule modifies (84 *Federal Register* 44976) definitions and procedures used in implementing Section 7 consultations under ESA. Under Section 7 of ESA, if federal actions or actions of nonfederal parties with a federal nexus 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 process is referred to as a Section 7 consultation. The term *action* includes any activity authorized, funded, or carried out by a federal agency, including issuing permits and licenses.

Definitions

The rule revises the definition of *destruction or adverse modification* of critical habitat by adding the phrase *as a whole* to the end of the definition and deleting a sentence from the same definition that addressed effects from actions that alter physical and biological features essential for the conservation of the species or delay the development of such features. Adding *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. For example, according to the final rule, if a project affects a portion of critical habitat, the Services would "place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced."

The final rule changes the definition of *effects of the action* by combining direct and indirect effects into *effects* and removing the reference to *environmental baseline*. Under the final rule, *effects of the action* include all consequences to listed species or critical habitat that are caused by the proposed action. The definition specifies that a *consequence* is "caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." The Services provide a two-part test to identify a consequence: (1) whether the effect or activity would not occur but for the action and (2) whether the effect or activity is reasonably certain to result from the action.

The final rule defines *programmatic consultation*. Programmatic consultation is a consultation that addresses multiple agency actions on a program, region, or other basis. Such consultations allow federal agencies to consult with the Services on multiple, frequently occurring, or routine actions in a particular geographic area and on a proposed program, policy, or regulation that would provide a framework for future actions.

Consultation Under Section 7 of ESA

The final rule aims to clarify consultation procedures under ESA. The final rule specifies requirements to include in a request for formal consultation under Section 7 of ESA. These requirements include a description of the proposed action, efforts to offset effects of the action, a description of the effects of the action, and several other factors that relate the action to the affected species. The final rule also sets guidelines and deadlines for completing informal consultations under ESA. Under the final rule, if there is a request from a federal agency for concurrence with its determination that an action is *not* likely to affect a species, the Services must provide a written concurrence or nonconcurrence to this request within 60 days of its receipt, unless there is a mutual agreement to extend the deadline up to 120 days from the receipt of the request. The final rule includes provisions intended to streamline Section 7 consultations and exempts certain land management plans from reinitiation of programmatic consultation when new species are listed and new critical habitat is designated.

In formulating a biological opinion, the final rule states that the Services can consider proposed activities that will offset the effects of the action.

Revision of the Regulations for Prohibitions to Threatened Species

This final rule (84 *Federal Register* 44753) modifies FWS's approach to extending prohibitions to threatened species. Section 4(d) of ESA requires that species listed as threatened under ESA be regulated "to provide for the conservation of such species." Before the final rule, FWS only implemented species-specific 4(d) rules, which can deviate from protections provided for endangered species and be tailored to address the conservation of the species, for a limited number of species. For most threatened species, FWS extended most of the prohibitions that are provided for endangered species to the threatened species through a default regulation known as the *blanket 4(d) rule*. NMFS did not establish a blanket 4(d) rule and has implemented species-specific 4(d) rules for species listed as threatened.

Under the final rule, the blanket 4(d) rule will no longer apply to species listed as threatened after the rule takes effect. Instead, species newly listed or reclassified as threatened will have protective regulations only when FWS promulgates a species-specific 4(d) rule. This provision is not retroactive, so the blanket 4(d) rule will continue to apply to threatened species listed before the rule takes effect unless FWS promulgates a species-specific 4(d) rule for the species. FWS's rationale for changing its approach is that eliminating the blanket 4(d) rule will more closely align FWS policy with that of NMFS, and that species-specific 4(d) rules will incentivize conservation, reduce the need for permitting for certain actions, and streamline Section 7 consultation under ESA. FWS states that while it expects to promulgate a 4(d) rule concurrently with listing or reclassifying a species as threatened, requiring the simultaneous promulgation of such a rule is unnecessary.

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