TRUMP ADMINISTRATION FINALIZES NEW ENDANGERED SPECIES ACT REGULATIONS

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U.S. Environment, Land and Natural Resources Alert

The Trump administration recently issued three final rules revising several key aspects of the Endangered Species Act ("ESA"), including: (1) listing species and designating critical habitat under § 4 of the ESA;[1] (2) prohibitions to threatened wildlife and plants under § 4(d);[2] and (3) the § 7 interagency consulting process.[3] The final rules largely mirror the proposed rules from July 2018 and became effective on September 26, 2019.

Democratic lawmakers, state attorneys general, and environmental groups are challenging the new rules. On September 25, 2019, seventeen states, along with Washington, D.C. and New York City, filed suit in the U.S. District Court for the Northern District of California,[4] and environmental groups filed suit on August 21, 2019.[5] Senator Tom Udall (D-NM) has threatened to invoke the Congressional Review Act ("CRA")[6] to kill the rules, although President Trump would have veto power over such a CRA resolution.[7]

K&L Gates will continue to monitor and provide updates on the implementation and legal challenges of the new ESA rules.

I. SECTION 4 REVISIONS

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") have made numerous changes to the regulations implementing § 4 of the ESA, specifically pertaining to the listing, delisting, or reclassifying of species and the designation of critical habitat.

a. Factors for Listing, Delisting, or Reclassifying Species

The Services made three changes to the factors for listing, delisting, or reclassifying species under § 4. First, the new rule removes the phrase "without reference to possible economic or other impacts of such determination" from the factors to consider for listing, delisting, or reclassifying species.[8] The Services acknowledged that the ESA prohibits listing agencies from considering economic factors in their listing decisions but asserts that the ESA "does not prohibit the Services from compiling economic information or presenting that information to the public, so long as such information does not influence the listing determination."[9] Thus, the Services found that it was "in the public interest and consistent with the statutory framework to delete the unnecessary language from our regulation while still affirming that we will not consider information on economic or other impacts in the course of listing determination."[10]

Second, the Services added a new paragraph to 50 C.F.R. § 424.11 defining how FWS will consider the "foreseeable future." The ESA defines a "threatened species" as "any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range[,]"[11] but the term

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"foreseeable future" is not defined in the ESA or previous implementing regulations. Prior to the new rule, agencies relied on a 2009 opinion from the Department of the Interior, Office of the Solicitor.[12] The new rule is consistent with the 2009 opinion. 50 C.F.R. § 424.11(d) now defines "foreseeable future" accordingly:

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> In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.[13]

Third, the Services revised the regulation governing the factors to be considered when delisting a species. The new rule clarifies that when considering whether to delist a species or not, the Services will consider the same standards for listing a species under 50 C.F.R. § 424.11(c).[14] While opponents to the final rule were concerned over the Services removal of the terms "recovery" and "error" from the regulatory text, the Services reasoned that they will "continue to explain in proposed and final delisting rules why the species is being removed from the lists — whether due to recovery, extinction, error, or other reasons. These revisions do not alter, in any way, the Services' continued goal of recovery for all listed species."[15]

b. Critical Habitat

The Services made two changes to the critical habitat rule. First, the Services expanded the situations in which a designation of critical habitat may not be "prudent." The prior regulation set forth two situations in which designation of critical habitat would not be prudent,[16] but the new regulation specifies five circumstances in which a critical habitat designation would not be prudent:

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> (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species; (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act; (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; (iv) No areas meet the definition of critical habitat; or (v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.[17]

Second, the new rule requires the "areas where threatened or endangered species are present at the time of listing to be evaluated first before unoccupied areas are considered" and imposes a "heightened standard for unoccupied areas to be designated as critical habitat."[18] The new rule responds to the U.S. Supreme Court's

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recent holding in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*[19] that "an area must be habitat before that area could meet the narrower category of 'critical habitat,' regardless of whether that area is occupied or unoccupied."[20]

Pursuant to the new rule,[21] unoccupied critical habitat will be designated only "upon a determination that such areas are essential for the conservation of the species" if the "geographical areas occupied would be inadequate to ensure the conservation of the species." Additionally, for an unoccupied area to be considered essential, there must be "reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."[22]

II. FWS RESCINDS § 4(D) BLANKET RULE FOR THREATENED SPECIES

Next, the FWS rescinded its § 4(d) "blanket rule" to better align FWS's regulatory approach for threatened species with NMFS's approach. Section 9 of the ESA prohibits the "take" (e.g., action that would harass, harm, capture, or kill) of any *endangered* species, but the ESA does not explicitly prohibit the take of *threatened species*. Instead, § 4(d) of the ESA instructs agencies to issue regulations as deemed "necessary and advisable to provide for the conservation of [threatened] species."[23] Commonly referred to as the "blanket rule," FWS regulations[24] extend most of the prohibitions for endangered species to threatened species.

NMFS does not have a § 4(d) blanket rule like the FWS. Instead, NMFS promulgates species-specific § 4(d) protections on a case-by-case basis, if warranted, at the time of listing. Under the new rule, FWS adopts NMFS' approach, and will promulgate a species-specific § 4(d) protections on a case-by-case basis, if warranted, at the time of listing.

III. SECTION 7 INTERAGENCY CONSULTATION REVISIONS

The Services made several changes to the regulations governing the interagency consulting process required by the ESA. Section 7 requires federal agencies to consult with the Services to insure that any federal action "is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction or adverse modification of critical habitat.[25]

a. Revised § 7 Definitions

The new § 7 Rule revises definitions of several key terms, which has ramifications for the § 7 process. For example, the new rule revises the definition of "destruction or adverse modification" of critical habitat in the jeopardy context by adding the phrase, "as a whole." The intent of this revision is to clarify that the "final destruction or adverse modification determination is made at the scale of the entire critical habitat designation."[26] The Services explained, "[s]maller scales can be very important analysis tools in determining how the impacts may translate to the entire designated critical habitat, but the final determination is not made at the action area, critical habitat unit, or other less extensive scale."[27]

The new rule also revised the definition of "effects of the action"[28] "by collapsing the terms 'direct,' 'indirect,' 'interrelated,' and 'interdependent' and by applying a two-part test of 'but for' and 'reasonably certain to occur.'"[29] The new definition reads: '

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> *Effects of the action* are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. 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. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

The Services do not intend this new definition to alter how they analyze the effects of a proposed action and assert that they will continue to review all effects (direct, indirect, and the effects from interrelated and interdependent activities) under the revised definition.[30]

Additionally, the new rule created a new, stand-alone definition of "environmental baseline" to make it clear that "'environmental baseline' is a separate consideration from the effects of the action."[31] The definition features a sentence "to clarify that the consequences of ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are included in the environmental baseline."[32] The Services believe this sentence was necessary to clarify what impacts should be incorporated into the environmental baseline and assert that the change is supported by the Supreme Court's conclusion in *National Association of Home Builders v. Defenders of Wildlife*.[33]

Lastly, the new rule adds a definition of "programmatic consultation" to codify a consultation technique that has been successfully used for several years to improve efficiency and conservation in consultations.[34]

b. Changes to the § 7 Consultation Processes

The Services made several amendments regarding the formal consultation process. First, the Services clarified what is necessary to initiate the formal consultation process by explicitly describing the type of information the agency needs to provide to the Services with its "initiation package." Moreover, an agency may now submit National Environmental Policy Act ("NEPA") analyses or other reports as a substitute for the "initiation package."[35] Second, the new rule allows the Services to adopt all or part of an agency's initiation package — which can now include NEPA analyses — in its biological opinions. Third, the Services also added a new provision allowing "expedited consultations" for actions that have "minimal adverse effects or predictable effects based on previous consultation experience."[36]

The Services also modified the formal consultation process by inserting a new provision, 50 C.F.R. § 402.14(g)(8), which will allow the Services to rely on an agency's assertion that it will mitigate incidental take without requiring "specific" or binding plans from that agency.[37] Section 7(a)(2) of the ESA requires federal agencies to "insure" that any action does not jeopardize endangered or threatened species or cause the destruction or adverse modification of critical habitat. To satisfy this charge, the Services' regulation (specifically 50 C.F.R. § 402.14(g)(8)) details whether and how the Services should consider measures in a proposed action intended to avoid, minimize, or offset adverse effects to listed species or critical habitat. Courts have held "that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent 'specific and binding plans' with 'a clear, definite, commitment of resources for future improvements.'"[38] In the new rule, however, the Services make it clear that "[m]easures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional

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demonstration of binding plans."[39] The Services disagree that the statute requires a "heightened standard of documentation … before the Services can consider the effects of measures included in a proposed action to avoid, minimize, or offset adverse effects."[40] The Services explain:

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> Section 7 of the Act places obligations on Federal agencies to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. A Federal agency fulfils this substantive obligation "in consultation with" and "with the assistance of" the Services. In situations where an adverse effect to listed species or critical habitat is likely, the consultation with the Services results in a biological opinion that sets forth the Services' opinion detailing how the agency action affects the species or its critical habitat. Ultimately, after the Services render an opinion, the Federal agency must still determine how to proceed with its action in a manner that is consistent with avoiding jeopardy and destruction or adverse modification. Thus, the Act leaves the final responsibility for compliance with section 7(a)(2)'s substantive requirements with the Federal action agencies, not the Services.[41]

The Services also revised the rules related to the reinitiation of consultations to clarify that reinitiation applies to all consultations[42] not just formal consultations. The new rule also exempted existing programmatic land plans prepared under the Federal Land Policy and Management Act or the National Forest Management Act from the duty to reinitiate when a new species is listed or when new critical habitat is designated.[43]

For informal consultation, the Services instituted a 60-day deadline, subject to extension by mutual consent of up to 120 days.[44] In one departure from the proposed rule, the Services declined to revise 50 C.F.R. § 402.03 for circumstances in which consultation was not required.

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[1] Endangered and Threatened Wildlife and Plants; Revision of Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424) (hereinafter, "ESA Listing Rule").

[2] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 17) (hereinafter, "FWS § 4(d) Rule").

[3] Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 402) (hereinafter, "ESA § 7 Rule").

[4] Juan Carlos Rodriguez, *17 States Sue Trump Over Endangered Species Act Rollbacks*, LAW360 (Sept. 25, 2019), https://www.law360.com/environmental/articles/1202604/17-states-sue-trump-over-endangered-species-act-rollbacks?nl_pk=5be4dbf9-237b-4e91-8d2e-77b9dc57ec85&utm_source=newsletter&utm_medium=email&utm_campaign=environmental. The states include

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California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

[5] Ctr. for Biological Diversity v. Bernhardt, No. 3:19-cv-05206 (N.D. Cal. Aug. 21, 2019).

[6] The CRA requires agencies issuing a "major rule" to delay the effective date by 60 days and submit the rule for review by Congress. Under the CRA, Congress may pass a joint resolution of disapproval that, if signed by the president, deems the rule to not have had any effect at any time. Because the president retains the right to veto such a resolution, the CRA has rarely been successful for rescinding regulations.

[7] Kellie Lunney, *Democrats vow to block new rules*, E&E NEWS (Aug. 12, 2019), https://www.eenews.net/eenewspm/2019/08/12/stories/1060932029?show_login=1&t=https%3A%2F%2Fwww.eenews.net%2Feenewspm%2F2019%2F08%2F12%2Fstories%2F1060932029.

[8] *See* 50 C.F.R. § 424.11(b). Before this change, the regulation read: "The Secretary shall make any determination required by paragraphs (c) and (d) of this section solely on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination."

[9] ESA Listing Rule at 45,024.

[10] *Id.* at 45,025.

[11] 16 U.S.C. § 1532(20).

[12] Office of the Solicitor, U.S. Dep't of the Interior, "The meaning of 'Foreseeable Future' in Section 3(20) of the Endangered Species Act," M-37021, (Jan. 16, 2009).

[13] *See* ESA Listing Rule at 45,052.

[14] Such factors include, "(1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) Overutilization for commercial, recreational, scientific, or educational purposes; (3) Disease or predation; (4) The inadequacy of existing regulatory mechanisms; or (5) Other natural or manmade factors affecting its continued existence." *See id.*

[15] *Id.* at 45,021.

[16] *See* 50 C.F.R. § 424.12(a)(1):

> (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or (ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

[17] ESA Listing Rule at 45,053.

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[18] Press Release, U.S. Dep't of the Interior, Trump Administration Improves the Implementing Regulations of the Endangered Species Act, (Aug. 12, 2019), https://www.doi.gov/pressreleases/endangered-species-act?utm_source=newsletter&utm_medium=email&utm_content=U.S.%20Fish%20and%20Wildlife%20Service%20%28USFWS%29%20announced%20final%20changes&utm_campaign=ESA%20Regulatory%20Alert%20-%20August%202019.

[19] 139 S. Ct. 361 (2018).

[20] ESA Listing Rule at 45,022.

[21] 50 C.F.R. § 424.12(b)(2).

[22] ESA Listing Rule at 45,053.

[23] 16 U.S.C. § 1533(d).

[24] See 50 C.F.R. §§ 17.31, 17.71.

[25] 16 U.S.C. § 1536(a)(2).

[26] Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178, 35,181 (July 25, 2018).

[27] *Id.*

[28] Prior to the new ESA § 7 Rule, "effects of the action" referred to "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." 50 C.F.R. § 402.02.

[29] ESA § 7 Rule at 44,976.

[30] *Id.*

[31] *Id.* at 44,978.

[32] *Id.* ("The consequences to listed species or the designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.").

[33] *Id.*; Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 667–71 (2007).

[34] *Id.* at 44,996.

[35] ESA § 7 Rule at 44,979; see also ESA § 7 Rule at 45,016–17.

[36] ESA § 7 Rule at 45,008.

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[37] ESA § 7 Rule at 454,979.

[38] *Id.* at 45,002 (citing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 935–36 (9th Cir. 2008)).

[39] *Id.* at 45,017.

[40] *Id.* at 45,002.

[41] *Id.*

[42] 50 C.F.R. § 402.16.

[43] ESA § 7 Rule at 44,980.

[44] *Id.* at 44,979.

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