

## Trump Administration Finalizes Major Changes to Endangered Species Act Regulations

The U.S. Fish and Wildlife Service and National Marine Fisheries Service issued a set of three new final rules on August 12, 2019, that substantially revise the regulations implementing the Endangered Species Act. The new rules change the criteria and procedures for (1) establishing protections for "threatened" species; (2) the listing and delisting of species and the designation of critical habitat; and (3) the interagency consultation process under Section 7 of the ESA, which is used to determine whether a federal action would jeopardize a listed species' continued existence or result in an adverse modification of a listed species' designated critical habitat. As described in our [prior update](#), the FWS and NMFS published proposed rules on these three topics on July 25, 2018.

The three new final rules were published in the Federal Register August 27, 2019, and take effect September 26, 2019. Litigation is certain as the attorneys general for California and Massachusetts, along with several environmental groups, vowed within hours of the issuance of the new rules to bring a court challenge.

### Rescission of FWS Blanket 4(D) Rule—Threatened Species

The [first rule](#) rescinds FWS's prior "blanket rule" under Section 4(d) of the ESA—this prior rule had automatically established that threatened species are subject to the same "take" prohibition and other restrictions as endangered species are, unless otherwise specified. This change aligns FWS's regulatory approach with that used by NMFS, which does not have a similar blanket rule for the threatened marine species it administers. In place of its prior blanket rule, FWS will now craft rules for each threatened wildlife species on a case-by-case basis, such that the applicable prohibitions and restrictions are tailored specifically to each such species' conservation needs.

The new rule applies only to future decisions to list a species as threatened or to reclassify a listed species from endangered to threatened. The new rule therefore does not apply to species that already have been listed or reclassified as threatened. Accordingly, existing threatened species administered by FWS will continue to receive the same protections as endangered species.

### Section 4 Rule—Listing & Delisting of Species and Designation of Critical Habitat

The [second rule](#) will change the way both Services (FWS and NMFS) make future decisions under Section 4 to list or delist a species or to designate critical habitat for a listed species.

**Listing and delisting of species.** Regarding the listing and delisting of species, the new Section 4 rule makes three changes to the existing regulations.

- *Economic effects from listing decision:* First, the new rule removes the prohibition in the regulations against referencing the economic and other impacts on landowners resulting from a listing decision. The administration's rationale is that the prohibition is unnecessary and redundant, as the statute itself already

expressly requires that listing determinations be based "solely upon biological criteria." The rule does not allow listing decisions to be based on economic or other impacts, but it does allow "compiling economic information and presenting that information to the public, as long as such information does not influence the listing decision."

- "*Foreseeable future*": Second, the new rule defines the previously undefined term "foreseeable future," which in turn is a component of the statutory definition of a "threatened" species (i.e., "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."). Under the new rule, "[t]he 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 term need not be identified "in terms of a specific period of time."
- *Delisting decisions*: Third, the new rule clarifies that, when considering whether to delist a species, the Services must "consider the same factors and apply the same standards" that they use when making an affirmative listing decision. The new rule specifies that a species may be delisted if it is extinct, does not meet the definition of a species or does not meet the standards for being listed as endangered or threatened.

**Designation of critical habitat.** The new rule also makes several important changes to the criteria for designating a listed species' critical habitat.

- *Unoccupied areas*: Under the new rule, an area unoccupied by the species may be considered for a critical habitat designation only if the occupied areas would be inadequate to ensure the species' conservation. And once this hurdle is cleared, the Services may only include an unoccupied area in a designation if "there is a reasonable certainty" **both** that the area will contribute to the species' conservation **and** that the area contains one or more of the physical or biological features essential to the species' conservation. This change relies on the U.S. Supreme Court's recent decision in [\*Weyerhaeuser Co. v. U.S. Fish & Wildlife Service\*](#), 139 S. Ct. 361 (2018), which held that an area is eligible for designation as critical habitat under the ESA only if it is also "habitat" for the species within the meaning of the statute.
- *Not prudent determinations*: The new rule also provides a non-exhaustive list of circumstances where the Services may find that designating critical habitat for a species would not be prudent. This includes situations where the identification of critical habitat would exacerbate the risks posed to the species; where destruction or modification of the species' habitat is not a threat to the species or such threats stem solely from causes that cannot be addressed through applicable management actions; where areas within the jurisdiction of the United States provide only negligible conservation value for a species occurring primarily outside the United States; where no area meets the definition of critical habitat; or where it is otherwise determined that the designation of critical habitat would not be prudent based on the best scientific data available.

## Section 7 Rule

The [third new rule](#) would make a broad set of changes to the ESA's interagency consultation process. Under Section 7 of the ESA, when a federal agency undertakes, funds or approves an action that may affect a listed species or its designated critical habitat, that agency must consult with FWS or NMFS (depending on the species) to ensure that the action is not likely to jeopardize the species' continued existence or result in the destruction or adverse modification of the species' designated critical habitat.

Perhaps the most significant aspect of the new Section 7 rule is that it embraces a "jeopardy" standard that applies only where the federal action causes "appreciable" harm to a listed species or its critical habitat. This is an important point, as several recent court cases have ruled that when a species already is jeopardized by degraded baseline conditions, any additional measurable adverse impact is prohibited. But the new rule rejects

this "baseline jeopardy" or "tipping point" notion, explaining that the ESA does not contain these terms or establish any requirement to use or apply them. According to the rule's preamble, the jeopardy requirement under the statute only "applies prospectively to the effects of Federal actions, not to the pre-action status of the species."

The new rule also changes the definitions of several key terms under Section 7:

- "*Destruction or adverse modification*" of critical habitat: The rule adds "as a whole" to the end of the definition, such that this term now means "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole*." The rule also eliminates the second sentence of the definition, which previously provided examples of prohibited habitat alterations ("Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.").
- "*Effects of the action*": The rule eliminates the prior references to "indirect effects" and the effects of "interrelated or interdependent" actions, such that the term is now simplified to mean "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." Causation is based on a "but for" test, under which "[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 rule further explains that the effects of the action "may occur later in time and may include consequences occurring outside the immediate area involved in the action."
- "*Environmental baseline*": The rule creates a new standalone definition of this term, which previously was included within the definition of the "effects of the action." Under the new definition, the "environmental baseline" refers "to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action." Consistent with the prior definition, 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."

The Services also added a new sentence to the definition to clarify that "[t]he consequences to listed species or 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." The preamble explains that this new definition is designed "to make it clear that 'environmental baseline' is a separate consideration from the effects of the action." In practice, "the environmental baseline should be used to compare the condition of the species and the designated critical habitat in the action area with and without the effects of the proposed action, which can inform the detailed evaluation of the effects of the action..."

- "*Programmatic consultation*": This definition codifies an optional process designed to improve efficiency. This process can be used to evaluate multiple actions within a particular geographic area, or broad agency programs that guide the implementation of future actions by establishing standards, guidelines or governing criteria for such future actions. Note that the preexisting regulations already include a definition of "framework programmatic action," and thus contemplate programmatic consultation, which—although not specifically defined previously—is done in practice today.

In addition to these definitional changes, the Section 7 rule establishes the following new standards, criteria and procedures:

- "*Activities that are reasonably certain to occur*" and "*Consequences caused by the proposed action*": A conclusion that either of these two conditions is met "must be based on clear and substantial information,

using the best scientific and commercial data available." Factors for determining whether an activity is reasonably certain to occur include: (1) past experiences with activities that have resulted from actions that are similar in scope, nature and magnitude to the proposed action; (2) existing plans for the activity; and (3) any remaining economic, administrative or legal requirements necessary for the activity to proceed. A consequence may be found *not* to be caused by the proposed action if it is: (1) remote in time from the proposed action; (2) geographically remote from the immediate area involved in the proposed action; or (3) only reached "through a lengthy causal chain" involving "many steps."

- *Initiation of formal consultation*: The rule specifies what is necessary to initiate the formal consultations process by outlining the information—commonly called the "initiation package"—that the federal "action agency" (the agency undertaking, funding or approving the action that triggers the consultation) must provide to FWS or NMFS, as applicable. In turn, the rule allows the Services to adopt all or part of the initiation package—which can include any environmental review of the proposed action completed under the National Environmental Policy Act—in the biological opinion.
- *Reasonable and prudent alternatives*: The rule establishes that reasonable and prudent alternatives included in a biological opinion to avoid, minimize or offset the adverse effects of the proposed action "are considered like other portions of the action and do not require any additional demonstration of binding plans."
- *Expedited consultation*: The rule establishes a new "expedited consultation" process, which provides opportunities to streamline consultation for actions that have minimal or predictable effects based on previous consultation experience. This process is intended to apply to projects ranging from those with a minimal impact to those that have a potentially broad range of effects that are known and predictable, but unlikely to cause jeopardy or adverse modification.
- *Reinitiation of consultation*: With regard to the reinitiation of consultation based on new circumstances or information, the new Section 7 rule does not strictly require that such a reinitiation lead to a new *formal* consultation process, thus providing potential opportunities for less formal reinitiation procedures. Also, the rule establishes that the duty to reinitiate does not apply, under specified circumstances, to an existing programmatic land management plan when a new species is listed or new critical habitat is designated.
- *Informal consultation*: The rule codifies the requirements for initiating informal consultation and establishes a 60-day time limit (which can be extended to 120 days) for completing the informal consultation.

Lastly, while the proposed rule asked for comment on whether to restrict the need for interagency consultation under certain circumstances, the final rule defers any action on this issue, which the Services may address at a future time. Specifically, the proposed rule presented the situation where "the Federal agency does not anticipate take and the proposed action" will: (1) not affect a listed species or designated critical habitat; (2) have effects that are manifested through global processes; or (3) result in wholly beneficial effects or effects that cannot be measured or detected in a meaningful way.

## **Impacts of the New Rules**

As explained in our 2018 update on the proposed rules, the first two rules (under Section 4 of the ESA) may have greater significance over the long term—especially as they may affect the number of species that are listed and the extent to which the act's "take" prohibition will apply to "threatened" species. But these changes may not have as great an impact in the near term, because they mostly relate to future decisions to list, delist or reclassify a species.

By contrast, the Section 7 rule could pose more immediate impacts because it changes the way interagency consultations are conducted. Some of the changes reflected in the Section 7 rule are more technical in nature, such as simplifying the language and clarifying existing requirements, rather than altering or removing such

requirements. But other changes may have more of an impact, such as drawing a clear dividing line between the environmental baseline and the effects of the action and rejecting the notion of a pre-existing "baseline jeopardy"; cabining the definitions of causation, foreseeability and reasonable certainty; specifying that mitigation actions need not be definite or binding; and imposing a timeline on informal consultations.

As noted above, however, litigation challenging the new rules is certain. The ultimate fate of the new rules is far from clear at this juncture. We will continue to provide updates as new developments emerge, although it may be several years before the matter reaches a final judicial resolution.

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## Authors



### [Marc R. Bruner](#)

Partner

[MBruner@perkinscoie.com](mailto:MBruner@perkinscoie.com)   [415.344.7171](tel:415.344.7171)



### [Christian Termyn](#)

Counsel

[CTermyn@perkinscoie.com](mailto:CTermyn@perkinscoie.com)   [415.344.7018](tel:415.344.7018)

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