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December 18, 2020

US Fish and Wildlife Service Adopts New Regulation for Critical Habitat Exclusions

The U.S. Fish & Wildlife Service [adopted a final regulation](#) on December 18, 2020, to establish a process and the criteria for excluding areas from critical habitat designations under the Endangered Species Act. The final regulation is unchanged from [the proposed rule](#) published on September 8, 2020. The FWS adopted the new rule to provide clarity on the exclusion process in light of agency experience and current practices, and to respond to the U.S. Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018), which ruled that decisions not to grant an exclusion—like decisions to grant an exclusion—are subject to judicial review. The rule applies prospectively and only to critical habitat designations by the FWS; designations by the National Marine Fisheries Service will continue to rely on existing rules and policies.

Background

When a species is listed under the ESA as threatened or endangered, there is a statutory requirement to designate "critical habitat" for the species. This designation generally includes, and is designed to protect, the areas that contain the biological and physical features that are essential to the species' conservation. However, [Section 4\(b\)\(2\) of the ESA](#) provides that the FWS "may" exclude an area from a critical habitat designation—"after taking into consideration the economic impact, the impact on national security, and any other relevant impact" of including the area in the designation—if the FWS determines that the benefits of the exclusion outweigh the benefits of inclusion. An area qualifying as critical habitat may not be excluded from a designation if the failure to designate the area will result in the species' extinction. 16 U.S.C. § 1533(b)(2).

The New Final Regulation

The final regulation provides that, when the FWS publishes a proposed rule designating critical habitat for a species, the FWS will at the same time also publish and make available for public review and comment a draft analysis of the economic and other relevant impacts of the designation. "Economic impacts" may include effects on the economy of a particular area, productivity, or jobs, and any opportunity costs arising from the designation as well as the possible benefits. "Other relevant impacts" may include effects on tribes, states, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), federal lands, and conservation plans, agreements, or partnerships.

The FWS will consider impacts at a scale that it determines to be appropriate and will compare the impacts with and without the designation. Impacts may be described qualitatively or quantitatively. Prior to finalizing the designation of critical habitat, the FWS will consider the probable economic, national security, and other relevant impacts of the designation.

With respect to excluding an area from a critical habitat designation, the FWS has discretion to consider an exclusion on its own initiative, and it must consider an exclusion when a proponent presents "credible information regarding the existence of a meaningful economic or other relevant impact" that would result from designation of that area. The proposed critical habitat designation must identify any areas being considered for exclusion and explain why.

When analyzing the benefits of including or excluding an area based on impacts that are "identified by experts in, or by sources with firsthand knowledge of, areas outside of the [FWS] expertise," the FWS must give weight

to the expert or firsthand information, unless there is "material evidence that rebuts that information." Impacts that are outside of the FWS' expertise include (1) nonbiological impacts identified by federally recognized Indian tribes, state or local governments, or a permittee, lessee, or applicant for a permit, lease, or contract on federal lands; and (2) impacts based on national security identified by the U.S. Department of Defense, Department of Homeland Security, or any other federal agency responsible for national or homeland security.

When analyzing the benefits of including or excluding an area that is covered by a conservation plan, agreement, or partnership authorized by an Incidental Take Permit issued under Section 10 of the ESA, the FWS will consider: (1) whether the permittee is properly implementing the conservation plan or agreement; (2) whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and (3) whether the conservation plan or agreement specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

When analyzing the benefits of including or excluding an area that is covered by a conservation plan, agreement, or partnership that is not authorized by an ESA Incidental Take Permit, the FWS may consider a host factors, including: (1) the degree to which the record of the plan, or information provided by proponents of an exclusion, supports a conclusion that a critical habitat designation would impair the realization of the benefits expected from the plan, agreement, or partnership; (2) the extent of public participation in the development of the conservation plan; (3) the degree to which agency review and required determinations (e.g., state regulatory requirements) have been completed, as necessary and appropriate; (4) whether National Environmental Policy Act reviews or similar reviews occurred, and the nature of any such reviews; (5) the demonstrated implementation and success of the chosen mechanism; (6) the degree to which the plan or agreement provides for the conservation of the physical or biological features that are essential to the conservation of the species; (7) whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and (8) whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

If the FWS conducts an exclusion analysis, then it is required to exclude the areas considered for exclusion if it determines that the benefits of exclusion outweigh the benefits of inclusion, unless the FWS finds that exclusion will result in the species' extinction.

Next Steps

The final regulation will take effect on January 19, 2021. However, as with many recent environmental regulations, litigation is anticipated, as environmental groups claim that the regulation will decrease the amount of land designated as critical habitat for economic reasons as compared to current practice. In addition, it remains to be seen whether the new rule will be targeted by the new administration for a regulatory repeal effort.

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