# A Closer Look at the New Endangered Species Act Regulations

## Controversial, but How Consequential?

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### Overview

Last month the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS," and collectively with the USFWS, the "Services") finalized the first set of comprehensive revisions to the Endangered Species Act's ("ESA") implementing regulations in decades. Because the ESA is one of the nation's most cherished environmental laws, the rules received considerable attention in the mainstream media. As is often the case, many in the conservation community have criticized the new rules as a rollback of the ESA, while the regulated community has generally welcomed the new rules. The Services assert that the purpose of the new rules is to improve the functioning of the statute by facilitating more efficient engagement between federal agencies, encouraging communities to support conservation, and improving regulatory predictability for the business community.

In this article we briefly review the most significant aspects of the new rules and examine the real-world impact they are likely to have on project developers, landowners and other members of the regulated community. We conclude that while the new rules may narrow the reach and alter the Services' implementation of the ESA, the practical impact of those changes on individual energy and infrastructure projects is likely to be minimal. The new rules do not address those aspects of the ESA that have the most direct impact on individual projects – aspects that also serve as a practical barrier to the implementation of meaningful conservation efforts for listed species.

The final rule package consists of three separate rules, each addressing a different aspect of ESA implementation: (i) regulations for protection of threatened species, (ii) criteria for listing and delisting of species and designation of critical habitat, and (iii) process and timing for internal consultations with other federal agencies. Each of these rules is addressed below.

### Prohibitions Applicable to Threatened Wildlife and Plants

One of the most controversial elements of the new rules is the lifting of the USFWS's "blanket 4(d) rule." The prohibitions set forth in Section 9 of the ESA, including the ESA's broad "take" prohibition, expressly apply only to those species listed as endangered, not threatened. However, Section 4(d) of the ESA provides that the Service may, through regulation, extend some or all of the Section 9 protections to threatened species. In its original ESA implementing regulations in 50 C.F.R. Part 17, the USFWS automatically extended the Section 9 take prohibition to all threatened species unless the Service promulgated a species-specific 4(d) rule limiting its application. This was known as the "blanket 4(d) rule," and its application was limited to species subject to USFWS jurisdiction. The newly announced final rule rescinds the USFWS's blanket 4(d) rule. As a result, species listed as threatened after the final rule's effective date will only receive protections under the ESA to the extent the Service promulgates a species-specific 4(d) rule establishing such protections. A species-specific 4(d) rule could be adopted at the time of the listing, or at any time thereafter in response to the Service's assessment of the need for such protection.

This new approach by USFWS to management of threatened species is consistent with the approach long used by the NMFS, which never adopted a blanket 4(d) rule of its own. In an op-ed written by Interior Secretary David Bernhardt and Commerce Secretary Wilbur Ross, the Services explained that the revised regulations are intended to eliminate the "one-size-fits-all" approach to species protections, and instead follow the two-tiered classification system that Congress devised to ensure that the most stringent protections are reserved for species whose status requires it, while providing the Services with discretion to tailor unique rules to help recover threatened species.

Because the lifting of the blanket 4(d) rule is prospective only and does not apply to any species already listed as threatened, the immediate impact of this change is minimal. Looking ahead, however, its impact could be significant. Rescission of the blanket 4(d) rule means the USFWS can list a species that may need certain protections of the ESA such as those in Section 7, but not the full take prohibition of Section 9, without the need devise a species-specific 4(d) rule. This makes the use of threatened listings a less daunting regulatory proposition for the USFWS, and could enable the USFWS to begin clearing its backlog of hundreds of overdue listing decisions resulting from several recent litigation settlements with conservation groups. From that perspective, this change could result in more species receiving ESA protections and recovery resources more quickly. Meanwhile those species that require protection from unauthorized take but do not meet the standard for an endangered listing could still be listed as threatened, with a species-specific 4(d) rule extending the take prohibition of Section 9 to those species.

## Revisions to Regulations for Listing and Delisting Species and Designation of Critical Habitat

### Listing and Delisting of Species

Section 4(b)(1)(A) of the ESA requires the Services to make listing determinations based "solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species." Historically, the ESA's implementing regulations stipulated that these listing decisions were to be made "without reference to possible economic or other impacts of such determination." The second of the three new rules deletes this language, giving the Services the ability to include information on economic or other impacts in their listing decisions. In support of this revision, the Services emphasized that all listing determinations will continue to be based solely on biological considerations. However, the Services also indicated that they believe there may be certain circumstances where referencing economic or other impacts will be "informative to the public." Even if this economic information is not used in the listing determination, the concern in the conservation community is that presenting such data could significantly influence the public's perception of the listing decision at issue, which could lead to the imposition of significant political pressure on elected officials to intervene.

In addition to removing the prohibition against inclusion of economic information in listing decisions, this new rule also clarifies the criteria that must be met in the delisting of a species. Future decisions for delisting or reclassifying species must now be based on the same five statutory factors as initial listing decisions. This revision essentially brings the rule in line with the Services' current practice. Secretaries Bernhardt and Ross observed in their op-ed that population recovery successes should be recognized and celebrated, not used to keep species on the list in perpetuity. Delisting or reclassification allows conservation and management efforts for recovered species to be turned over to the states so the Services can focus federal resources on those species still in need of critical support.

The policy of entrusting states with the management of recently recovered species is a source of great concern for many in the conservation community, who question both the will and the ability of states to invest resources in conservation efforts that might limit opportunities for economic development within their borders. In their view, the removal of federal protections on a recovered species is likely to undermine their continued recovery, placing them back in jeopardy. Whether this concern proves to be valid will be an issue worth watching in the years to come.

### Designation of Critical Habitat

In addition to revising regulations for listing and delisting species, the second of the three new rules also seeks to eliminate some of the ambiguity related to designating critical habitat under the ESA. Critical habitat is not designated for every listed species, and is not included within the Section 9 take prohibition. However, the Services must consider critical habitat during the Section 7 consultation process, which requires them to determine whether a proposed federal action will result in the destruction or adverse modification of designated critical habitat. The new rule identifies additional circumstances under which designation of critical habitat should not occur because such designation would not be "prudent." The additional "non-prudent" circumstances include situations where the Services determine that the threats to a listed species' habitat are of a nature that cannot be addressed through the designation of critical habitat and any subsequent Section 7 consultations, such as sea-level rise, reduced snowpack, or other effects of climate change.

One of the most controversial issues surrounding critical habitat designations, and the Services' implementation of the ESA in general, involves critical habitat designations for areas outside the geographic range currently occupied by the species in question. This was the issue in the controversial recent dusky gopher frog litigation in the Fifth Circuit and Supreme Court. Prior to a 2016 rule change the USFWS could only make such a designation if the present range of the species was "inadequate to ensure the conservation of the species." The 2016 rule revision eliminated the requirement to exhaust occupied habitat before considering whether any currently unoccupied habitat may be essential. The new rule reinstates the previous standard, and requires the Services to use a two-step process for determining when unoccupied areas may be designated as critical habitat. First, the Services must evaluate whether areas that are already occupied by the species are adequate to support recovery. If not, then unoccupied habitat can be considered for designation, but only if the Services determine that the unoccupied habitat currently contains one or more physical or biological features "essential to the conservation of the species." This revision seeks to resolve an issue that has led to significant controversy and claims of regulatory overreach and made the ESA a major target of efforts at deregulation.

### Revisions to Expedite the Interagency Consultation Process

Section 7 of the ESA requires agencies undertaking federal actions that may adversely affect a listed species or designated critical habitat to undergo a formal consultation process with the USFWS or NMFS. The Section 7 consultation process requires the Services to evaluate whether the proposed federal action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat. Under the previous rules this process could often take years to complete. The third of the three new rules seeks to streamline the Section 7 process by clarifying the standards used to evaluate actions that may affect species, and by providing alternative consultation mechanisms. Some of the key provisions in this new rule include the following:

- Alternative Consultation Mechanisms – The new rule codifies the use of "programmatic consultations" to evaluate the effects of multiple agency actions that are carried out or planned on a program-wide, regional, or other basis, with increased consistency and predictability.
- Deadlines for Informal Consultations – The new rule establishes a 60 day deadline for completing the informal consultation process, where previously there was no deadline. Informal consultations with the Service are often used to assist in determining whether formal consultation is required or to identify changes to the proposed action to avoid the need for formal consultation. The lack of a deadline on informal consultations often led to long delays that undermined their intended purpose.
- Destruction or Adverse Modification – The new rule revises this definition to clarify that the modification must diminish the value of critical habitat "as a whole" for the Services to make a finding of "destruction or adverse modification." This change was made to clarify existing Services practice that the determination is made at the scale of the entire critical habitat designation.
- Revisions to Other Key Definitions – The final rule also revises the definitions of "environmental baseline" and "effects of the action" in an attempt to improve clarity and consistency in the consultation process.

## Hitting the Target, but Missing the Mark?

It would be difficult to argue that after three decades with no major changes, the ESA implementing regulations were not in need of some fine-tuning. The Services adopted these new rules in an effort not just to update and streamline the statute's implementation, but to rein in some of the policy and practice that has given rise to considerable public controversy over the broad scope and applicability of the ESA. While some may consider it surprising that the current administration did not attempt a more extensive rollback of the ESA's substantive protections, it certainly is not surprising that any revisions to the regulations would draw strident opposition from the conservation community. Indeed, a coalition of environmental organizations represented by Earthjustice and including the Sierra Club, Defenders of Wildlife, Natural Resources Defense Council and others, has already filed a notice of intent to sue the Services over the new rules.

All of this controversy notwithstanding, the reality is that the new rules will likely change little for energy and infrastructure developers seeking to permit and build new projects or expand existing projects. For those developers, the greatest challenges lie in the unpredictability of individual consultations with and guidance from the Services, and the lack of consistency and regulatory accountability in the Section 10 incidental take permitting process. It has become increasingly apparent that the Section 10 process is not functioning effectively, and suffers from as many if not more delays as the Section 7 process, with less accountability on the part of the Services or recourse for the regulated community.

As energy and infrastructure development continues to expand to meet the nation's ever-increasing demand for energy, mobility, and connectivity, there has been increasing overlap with the habitat, migratory corridors and occurrence of many listed species. These intersections take on increasing significance as more species decline in the face of habitat loss due to agriculture, development or climate change, or disease epidemics such as white-nose syndrome in bats. Developers must make a critical determination as to whether their project is likely to require a Section 10 incidental take permit ("ITP"). The decision is typically made through consultation with the Services. As a decentralized agency staffed by biologists rather than bureaucrats, the USFWS Field Offices provide important biological and technical guidance to developers. While site-specific considerations will always require individualized feedback, there can be a troubling lack of consistency between different Field Offices and different Regional Offices. On the other hand, when the USFWS or one of its Regional Offices attempts to inject some consistency on important issues, it often does so through informal guidance or internal policy that has not been subjected to formal public comment or even peer review, leaving the regulated community with no ability to push back against unwarranted or impractical requirements.

## Burdensome Policies

The Section 10 permitting process is emblematic of this issue. When project developers seek to obtain an ITP for a project they must develop a habitat conservation plan ("HCP") that meets several issuance criteria set forth in the statute. Among other things, the HCP must estimate the take that is predicted to occur and describe how the applicant will minimize and mitigate the impact of the taking to the maximum extent practicable. The USFWS has issued a detailed "Habitat Conservation Planning Handbook" ("Handbook") providing guidance on the various elements of an HCP and how the Service will evaluate them. But many of the policies set forth in the Handbook are overly burdensome or limiting and appear to have little legitimate legal or scientific basis behind them. Moreover, available options for meeting those criteria or conditions are lacking in many key areas, making it impractical if not impossible to demonstrate compliance with the standard. In some cases, the Service has developed biological or statistical models which are not included in the Handbook and have not been peer reviewed but are treated as mandatory by Service Regions and Field Offices, despite being incredibly burdensome or unnecessarily restrictive. This ad hoc approach to regulation has created a lack of accountability on the part of the Services, since they rarely take a final action — such as issuance of a regulation or formal action on a permit application — that can be challenged judicially.

The end result is that companies developing similar projects in different regions can be subject to significant differences in regulatory requirements, creating an unlevel playing field between companies and projects. For those that choose to pursue an ITP, the process of developing an approved HCP can take upwards of four to five years or more, even when the level of take is predicted to be minimal. While it may be tempting to view this state of affairs as one that effectively protects listed species by limiting the issuance of ITPs and thereby preventing take from occurring, the reality is that it discourages some developers from consulting or monitoring for potential take at all while still pursuing their projects. Among those that do seek to ensure compliance, it increases costs for both the developer and its customers, while directing a substantial amount of money to development costs or excessive monitoring that could otherwise be spent on meaningful conservation actions or research.

## Missed Opportunity

The procedural benefits they provide in terms of species listings, Section 7 consultations, and critical habitat designations notwithstanding, the new rules adopted by the Services make no effort to address these issues, ignoring the Section 10 process entirely. While the decision not to address Section 10 was a conscious one on the part of the Services, it is a significant missed opportunity as major new ESA regulatory initiatives generally occur only every several decades. The most significant problems with the Section 10 process can only be alleviated with a thoughtful effort by the Services to formalize their regulatory approach and adopt carefully considered new rules that clarify the applicable standards while making conservation, and not regulation, the central focus.

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