



Administration Proposes Changes to Endangered Species Act Critical Habitat Designations and “Adverse Modification” Definition

Proposed Rules and Policy Changes May Shift the Landscape for ESA Implementation

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The U.S. Fish and Wildlife Service (“FWS”) and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”) (together, the “Services”) recently announced a significant set of proposed regulatory changes and policies relating to critical habitat under the Endangered Species Act (“ESA”). The proposed rules and policies increase the discretion of the Services to designate broad areas of occupied and unoccupied habitat as critical habitat, and increase the likelihood that federal actions will be determined to adversely modify designated critical habitat.

The Services have established a short, sixty (60) day, comment period on the proposed rules and draft policy, which currently will close on **July 11, 2014**.

Overview

Section 4 of the ESA directs that the Services, concurrent with a designation of a threatened or endangered species, and where prudent and determinable, also designate “any habitat of such species which is then considered to be critical habitat.” For over three decades, the Services have designated critical habitat based on the presence, within the designated area, of certain physical and biological features referred to as “primary constituent elements.” The Services’ regulations currently provide that unoccupied areas only should be designated as critical habitat where a designation limited to areas within the species’ present, occupied range would be inadequate to ensure the recovery of the species. Further, the Services typically have limited critical habitat designations in areas occupied by endangered or threatened species to those lands in need of “additional” special management measures.

A key element of critical habitat designations is the subsequent application of a requirement that other federal agencies consult with NMFS and FWS regarding whether a proposed federal agency action would destroy or adversely modify such designated critical habitat. This consultation requirement applies to discretionary federal agency actions, including issuance of a permit or authorization, granting of funds and initiation of an agency’s own projects. If an action is determined to result in adverse modification of critical habitat, the federal action agency must adopt changes to the proposed action to avoid such adverse modification. These changes are often quite extensive and can affect the size, scope and even the feasibility of a project moving forward.

Proposed Changes

The Services are proposing three actions: (i) changes to existing regulations and new definitions used in the identification and designation of critical habitat; (ii) adoption of a new definition of “adverse modification” as used in consultations on the effects of federal agency actions under ESA, Section 7; and (iii) a formal policy on when to exclude lands or waters from a critical habitat designation pursuant to ESA, Section 4(b)(2). These proposals cover almost all aspects of the critical habitat process, including proposals that reshape the process for designating critical habitat and how the “adverse modification”

inquiry is conducted in the consultation process under Section 7 of the ESA. Among the notable changes are:

- Adopting the use of “physical and biological features” as the basis for designation of critical habitat, and, in turn, defining physical and biological features as those features that support the “life-history needs” essential to recovery of the species.
- Clarifying that intermittent or seasonal presence or use of an area by a species is sufficient for consideration of such area as occupied habitat.
- Removing conditions in the existing regulations that disfavored the designation of unoccupied habitat.
- Clarifying that the mere potential to support physical or biological features, rather than the actual presence of such features, is sufficient for designation of an area as critical habitat.
- Adopting a presumption that, where physical and biological features occur, they may require special management, and that the presence of existing management measures for such habitat does not exclude an area from designation as critical habitat.
- Proposing a new definition of “adverse modification” that prohibits the direct or indirect alteration of habitat that appreciably diminishes the “conservation value” of critical habitat, with the consideration of “conservation value” intended to capture the role that critical habitat should play for the recovery of listed species.
- Proposing that “adverse modification” can include alterations that preclude or significantly delay the establishment or development of biological or physical features that would support the recovery of the species.
- Emphasizing that Section 7 consultation inquiries into whether a federal action would result in (i) jeopardy to the species’ continued existence or (ii) destruction or adverse modification of critical habitat have independent standards. The Services stress that, while the two inquiries are related, the review of “jeopardy” to a species has a primary focus of examining threats to the species population, while the adverse modification rule looks to the longer-term effects of the action on habitat needed to support recovery of the species.
- Establishing policies and conditions for exclusion of land or water from a critical habitat designation under ESA, Section 4(b)(2), with more detailed and restrictive conditions placed on the exclusion of lands or water based on non-ESA conservation plans, as compared to lands or waters for which a habitat conservation plan, safe harbor agreement or candidate conservation agreement has been adopted under the ESA.
- Announcing that the Services will place a priority for recovery of species on federal lands and, consequently, adopting a presumption against exclusion of federal lands from critical habitat designations.

Taken as a whole, these regulatory changes, interpretations and policies will have the effect of granting the Services greater leeway in making broad-scale designations of critical habitat. Further, by focusing the adverse modification inquiry on analyzing the effects of habitat alterations on the timing and ability to recover a species, the proposed rules will increase the likelihood of adverse modification determinations. In turn, where an adverse modification determination is made, significant project changes could be necessary to meet the recovery goals and objectives for that species.

Implications

An underlying theme throughout the proposed rules and draft policy is the Services’ intent to emphasize that the focal point of a critical habitat designation is to provide a means by which habitat is available and protected for the purpose of achieving conservation, i.e., recovery, of a listed species. This is most

evident in the series of changes removing prior limitations on the designation of areas that are unoccupied by the species and further clarifying that even areas that have no physical or biological features at present, but merely have the “potential” to provide habitat necessary to recover a species, can be designated as critical habitat.

The Services’ proposed rules also expressly anticipate changing habitat needs from global climate change. In its proposed rule reshaping the critical habitat process, the Services note that “[a]s the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important.” The Services’ broader focus on potential habitat needs supporting a species’ recovery introduces an element of “adaptability” into the framework of the critical habitat designation process itself.

The timing and effect of these proposed changes should not be underestimated. The Services are statutorily obligated to consider the designation of critical habitat concurrent with the designation of a species as threatened or endangered. As of May 1, 2014, the FWS alone, has 44 species proposed for listing as either threatened or endangered. Further, pursuant to two 2011 listing settlements, the FWS has an additional 107 candidate species subject to listing review through September 2016 and another 240 species that are reported to be the subject of either 90-day or 12-month reviews pursuant to listing petitions filed by environmental groups. Every state within the U.S. has at least one species, if not significantly more, under these categories of listing review. Of the 1,527 species listed by both FWS and NMFS within the U.S., only 688 species presently have critical habitat designations. While not every species under review will be listed, and not all listed species presently without critical habitat designations will have later proposals for critical habitat designation, the potential number of new critical habitat designations within the next three to four years easily could exceed 150 species. Many of these determinations would be made under the newly proposed rules and draft policy, if they are finalized. Further, the Services explicitly provide for the application of the new critical habitat designation factors to any subsequent reviews of existing critical habitat designations.

Keeping Informed

Van Ness Feldman will be developing further analysis of the proposed rules and tracking developments in the rulemaking docket. If you would like to receive further updates on this matter, please send an email to [Joe Nelson](mailto:jbn@vnf.com) at: jbn@vnf.com.

Van Ness Feldman closely monitors and counsels clients on compliance with the Endangered Species Act as well as other water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Endangered Species Act or other environmental laws, please contact [Joe Nelson](#), [Jonathan Simon](#), [Matt Love](#), [Jordan Smith](#) or any member of the firm’s [Land, Water & Natural Resources](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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