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ESA Rule Changes Less Drastic Than Critics Claim

By **Rebecca Barho and Brooke Wahlberg** (August 29, 2019, 3:02 PM EDT)

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On Aug. 27, more than a year after the U.S. Fish and Wildlife Service and National Marine Fisheries Service published proposals to revise several Endangered Species Act implementing regulations, the two services published final versions of the rules in the Federal Register. The final rules include the USFWS' removal of its blanket prohibition on "take" of species listed as threatened — the blanket 4(d) rule; the services' joint amended regulations governing species listings and delistings and designation of critical habitat — the listing rules; and regulations governing interagency coordination under ESA Section 7 — the consultation rules.

The proposed rules were first published on July 25, 2018, and were widely predicted to strip the protections provided to species by the ESA.[1] The services received more than 200,000 comments on the regulatory reform package, and the proposed revisions have been under review with the Office of Information and Regulatory Affairs, or OIRA, pursuant to Executive Order 12866 since December 2018.

In early August, OIRA completed its EO 12866 review of the final regulations, which represented the last hurdle to publication of the final rules. The rules will take effect Sept. 26, and will not be retroactively applied.

The ESA regulatory reform package arguably represents the most significant update to ESA implementation in recent memory. Many initial media headlines and statements from the environmental community have decried the final rules as "gutting" the ESA. Upon closer examination, however, while the rules do change a handful of substantive aspects of ESA implementation, the changes are in large part administrative in nature, and consistent with many of the services' long-standing policies and practices.

Of course, the degree to which these changes will impact the regulated community and species alike remains to be seen. Notably, the final rules do not amend the ESA itself, only the regulations governing implementation of Sections 4 and 7 of the ESA.

Regulations implementing the ESA Section 9 prohibition on "take" — the heart of the ESA's protections for listed wildlife species — have not been amended, nor have regulations implementing ESA Section 10 (providing authority for non-federal entities to obtain take authorization) or ESA Section 11 (authorizing

citizens to sue any person, including the United States, for violating the provisions of the ESA, and to sue the services for failure to perform certain obligations thereunder).

By and large, the amendments do not change the core programs that exist for the preservation of endangered species. Many of the changes consist primarily of technical revisions to regulations that have been in place for many years and through multiple administrations, and amplify or clarify long-standing policies and practices of the services administering the ESA.

These changes are important to regulated and conservation communities alike, as the new rules provide a practical, systematic approach to listing, delisting, critical habitat designation, take prohibitions and interagency coordination that can be applied consistently among the services' regions and the many field offices. A small handful of the revisions do, however, represent a more substantive change.

Below we take a closer look at some of the notable changes created by the amendments.

The Removal of the Blanket 4(d) Rule

The USFWS removed its long-standing practice of affording threatened species with the same ESA Section 9 take protections that apply to endangered species. Under the USFWS's former blanket 4(d) rule, a threatened species was automatically protected by the ESA Section 9 take prohibition unless the USFWS promulgated a species-specific rule exempting certain activities from the take prohibition.

In contrast, for over 40 years, the NMFS has not automatically applied the take prohibition to threatened species under its jurisdiction. Instead, the NMFS promulgates species-specific rules outlining how the Section 9 take prohibition will apply to a given threatened species. By removing the blanket 4(d) rule and requiring species-specific 4(d) rules, the USFWS now will approach threatened species similarly to the NMFS.

As a result, species listed as threatened by the USFWS after the effective date of the rule will no longer be subject to the take prohibition, unless the USFWS promulgates a species-specific rule specifying how the take prohibition applies. While this is a departure from the previous practice of the USFWS, it is not a new concept, as evidenced by over four decades of NMFS administration, and some would argue the treatment aligns more closely with the intent of Congress in providing two categories of species under the ESA.

The USFWS reiterates throughout the preamble to the final rule that it intends to issue species-specific rules concurrently with the species' threatened determination. Whether this revision will result in more threatened species with or without species-specific rules, or whether it will result in more endangered species listings (to avoid the burden of two rulemakings), remains to be seen.

A Return to Form on Critical Habitat

ESA Section 3 defines critical habitat differently for occupied and unoccupied habitat; requiring the NMFS and the USFWS to meet a higher standard for the designation of unoccupied critical habitat. In February 2016, the Obama administration finalized rules that effectively equalized the standards for designating occupied and unoccupied critical habitat. Multiple parties (including many states) sued the services upon finalization of the 2016 critical habitat rules, and the parties settled the litigation in March 2018 when the Trump administration agreed to reconsider the 2016 rules.

In the meantime, the question of designating unoccupied critical habitat recently was taken up at the United States Supreme Court. In Weyerhaeuser v. U.S. Fish and Wildlife Service, the high court overturned the USFWS's designation of critical habitat for the dusky gopher frog. In that case, the USFWS designated as critical habitat an area that not only did not contain the species, but also contained no actual habitat.

The USFWS' rationale was that even though the area did not contain habitat for the frog, the area could be managed in a way that habitat could be reestablished. The timber company that owned the land, however, had no plans to undertake such management. The Supreme Court ultimately held that in order for the services to designate habitat as critical, the area must first contain habitat.

The changes to the critical habitat rules represent a return to pre-Obama practices, and address the Supreme Court's holding in Weyerhaeuser. Many environmental groups have expressed concerns that the heightened standards on the designation of unoccupied critical habitat will constrain the ability of the NMFS and the USFWS to plan for habitat loss due to climate change. Arguably, the changes more closely track the ESA statutory language defining critical habitat.

The listing rules leave one issues unresolved from the Weyerhaeuser holding: What is the definition of "habitat"? A rulemaking establishing such a definition is likely to be proposed in the future.

The Foreseeability Factor in Listing and Critical Habitat Decisions

The environmental community has focused on the regulatory changes to the definition of "foreseeable future." Over the last few years, several listings have ended up in court over the use of climate change modeling to provide the basis for a finding that the "species is likely to become an endangered species within the foreseeable future."

The listing rules amend the definition of "foreseeable future," seeking to emphasize the use of best available science and data, and remove decisions based on speculative decision-making. The preamble to the listing rules is clear that certainty is not required to demonstrate climate change threats in the foreseeable future. Moreover, the NMFS and the USFWS noted that they would not dismiss reliable aspects of climate change projections such as directionality of a climate trend or impact even where other aspects, such as the rate of change, were less certain.

Many environmental groups have expressed concerns that the amended definition will impinge on the services' ability to make listing determinations based on future climate change considerations. It is safe to say that all eyes will be on upcoming listings, to see how the definition is applied in practice.

Consideration of Economic Interests

There has been much focus on how the rules govern the information the NMFS and the USFWS may consider when making decisions on whether to list, delist or reclassify a species as threatened or endangered under the ESA.

Previously, the regulations stated explicitly that listing decisions must be based "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." The new listing rules remove the phrase "without reference to possible economic or other impacts of such determination."

The concern has been that this change allows the services to consider economic impacts when making listing decisions. However, the services repeat throughout the preamble to the listing rules that they can only rely on the best available scientific and commercial information available, looking at the factors set forth in the statutory language of ESA Section 4.

These statutory factors do not include economic interest as a factor by which the services can base a listing. Therefore, while this amendment removes a barrier to the services providing information on the economic impacts of a listing, it does not allow the services to base a listing determination on that economic information.

Because the new listing rules do not require the services to compile or distribute data on the economic impacts of a listing decision, it is not clear whether or how often such data will be made available, and whether an uptick in litigation activity will result.

Time Frame for Informal Consultation

From a process standpoint, the consultation rules made several changes to expedite or specify the length of consultations. One such change is to establish time frames by which a service must complete informal consultation (i.e. the time in which the services must concur, or not, with a federal agency determination that formal consultation is not required).

ESA Section 7 regulations have long established a 135-day time frame for completing formal consultations. Now, informal consultations too will have a mandated regulatory timeline. Informal consultations must be completed within 60 days, unless the parties mutually agree to an extension, in which case the informal consultation period can be extended up to 120 days.

Consolidation and Clarification of the Effects Analysis in Consultations

The services also amended the consultation rules to clarify and simplify how the effects analysis should be conducted as part of the Section 7 consultation process. First, the consultation rules remove the various "types" of effects (direct, indirect, interrelated and interdependent) that must be considered by federal agencies and the services, and retain only the terms "effects" and "cumulative effects."

Second, the services clarify that to determine whether a federal action has an effect, a two prong test must be used: (1) "but-for" and (2) reasonable certainty. That is, an effect would only happen but for the federal action, and that effect must be reasonably certain to occur.

The preamble to the Section 7 amendments provides examples of how this two-prong test is to be applied, and the consultation rules now contain a separate section providing a definition of "activities that are reasonably certain to occur," along with three factors the services may use in making that determination. The stated intent of these changes is to simplify and clarify how the services and federal agencies conduct their effects analysis to produce more consistent and predictable outcomes.

Regulatory Room for Expedited Consultations

The ESA prescribes a mandatory 135-day deadline to complete formal consultation. However, this deadline often is missed, even where effects of a regulated activity on the relevant species are well-known or easily predictable.

The new consultation rules provide for "expedited" consultations, the purpose of which is to streamline ESA Section 7 consultations for actions that have minimal adverse effects to listed species or critical habitat, or where effects on species are predictable based on the services' previous consultation experience. Under the new consultation rules, federal action agencies and the services may agree to use an expedited consultation process, and jointly establish expedited time frames for completing consultation and conclude consultation within those time frames.

While the amendments to the ESA regulations do include some significant changes to the old regulations, many of the changes simply adopt what already occurs in practice. It is premature to declare that the ESA will be gutted by these changes. Congress alone may change the ESA, and has done so only four times since the law was enacted many decades ago.

Ultimately, the real impact of the changes on the regulated community and listed species will be dictated by how the services apply these changes in practice. As is the case with most every regulatory action, there may be growing pains, yet those too remain to be seen.

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[1] See, e.g., Endangered Species Act stripped of key provisions in Trump Administration proposal, Washington Post (July 19, 2017), found at https://www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/.