



Agencies & Lawmakers Seek ESA Reform

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In recent weeks, the Trump Administration and Congress have proposed changes to the Endangered Species Act (ESA) and its implementing regulations. Lawmakers from the Congressional Western Caucus introduced nine bills that would, according to the 15 legislators that introduced the bills, amend and modernize the ESA. The lawmakers assert that the bills would also incentivize voluntary conservation efforts, let states enter into cooperative agreements for recovery, and prioritize data from local communities in making scientific decisions about conservation.

The bills include H.R. 6346, introduced by Rep. Mike Johnson (R-LA), which would require federal agencies to consider current and proposed conservation measures elsewhere when analyzing a project that may jeopardize the continued existence of an endangered or threatened species.

The legislative package, which was introduced between July 12 and July 20, 2018, would accomplish numerous longstanding Republican goals for amending the ESA, including making it easier for the government to remove species from the list of endangered or threatened species and preventing non-governmental organizations from suing to try to obtain ESA protection for species.

As we reported here, the package comes less than two weeks after Sen. John Barrasso (R-Wyo.), chairman of the Senate Environment and Public Works Committee, introduced a comprehensive measure also intended to overhaul the ESA.

In addition, on July 19, 2018, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services) proposed revisions to the regulations that implement portions of the ESA. Key aspects of the Services' proposal involve changes to section 4 and section 7 of the ESA, as set forth below. Revisions to the blanket 4(d) rule are proposed only by FWS, while revisions to the processes governing listing, delisting, and designation of critical habitat, and interagency consultation are proposed jointly by the Services.

Section 7—Consultation

- Procedures for an alternative consultation mechanism, which includes programmatic consultations.
- New procedures regarding incidental take permits intended to streamline the Services' development of biological opinions.
- Procedures that allow for expedited consultation where actions have minimal adverse or predictable effects, based on the Services' experience in previous consultations.

Section 4—Listing, delisting, and designation of critical habitat

- Codifying the definition of foreseeable future with respect to listing decisions, such that it extends only so far as the Services can reasonably determine that conditions posing danger of extinction are probable.
- Codifying the fact that standards for listing and delisting are the same. Specifically, the Services propose to clarify that the standard for removing a species from the list of threatened and endangered species is not heightened.
- Removing listing in error from the reasons the Services may delist a species.
- With respect to critical habitat, clarifying that the Services will only designate unoccupied areas as critical habitat when occupied areas are inadequate to ensure recovery, or under certain other circumstances, such as where including unoccupied habitat would minimize societal conflict.

Section 4(d)—Blanket prohibition on take

- Rescission of the blanket section 4(d) rule. This change will not apply retroactively. Species already listed as threatened will continue to be subject to the existing blanket prohibition on take.
- FWS seeks specific feedback concerning whether FWS should include binding language in its final regulations that would require FWS to propose a special 4(d) rule concurrent with listing a species as threatened. FWS also seeks feedback regarding whether it should establish a timeframe in which FWS must finalize any such special rule after a listing or reclassification.

The proposed rules, available at the links below, will be published in the Federal Register on July 25, 2018. The Services have indicated that they will receive public comments regarding the proposed rules through September 24, 2018.

Revision to regulations for listing species and designating critical habitat
Revision to regulations governing prohibitions to threatened wildlife and plants
Revision to regulations governing section 7 consultations