

August 2019 Regulatory Update

Endangered Species Act Implementing Regulation Changes of August 2019



On August 12, 2019, the U.S. Fish and Wildlife Service and National Marine Fisheries Service issued three new final rules that revise the implementing regulations of the Endangered Species Act.

Overview

The Endangered Species Act (ESA or Act) requires the U.S. Fish and Wildlife Service (FWS), along with the National Marine Fisheries Service (NMFS - together, the “Services”), to identify and protect species facing the risk of extinction. Protections are typically accomplished by assigning a protected status (e.g., threatened or endangered) to a species and, in some cases designating critical habitat.

On August 12, 2019, the Services issued three new final rules that revise ESA implementing regulations. According to the Services, the revised rules will:

- remove the prior default extension of most of the prohibitions for activities involving endangered species to threatened species under the jurisdiction of the USFWS (known as the “blanket rule”),
- clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat, and
- clarify, interpret, and implement portions of the Act concerning the interagency cooperation procedures.



Background

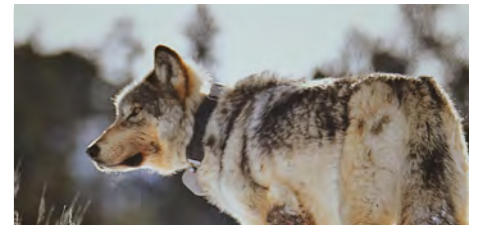
The ESA is widely recognized as the benchmark for species conservation in the U.S. and has been credited with recovery of some of America’s most iconic species. There have been no comprehensive amendments to the ESA since 1988, and no comprehensive amendments to the implementing regulations since 1986.

In 2017, the Services sought public input on how they could improve the existing regulatory framework and incorporated their responses to “tens of thousands” of public comments in the preamble to the final rules. According to the Services, the rules revisions were designed to “increase transparency and effectiveness and bring the administration of the Act into the 21st century.”

The new rules provide many changes to Sections 4 and 7, not all of which are controversial or significant. This discussion focuses on the most significant changes.

Threatened Species Protections

Since 1977, endangered and threatened plant and animal species under the jurisdiction of the USFWS have received the same level of protection, except when a special 4(d) rule was issued to address specific conservation needs of the individual species. An example of this is the current 4(d) rule for northern-long eared bat. The new rule reverses this position for species listed as threatened in the future. Moving forward, species listed as threatened will have a 4(d) rule issued to specify protections and allowable activities. There would be no change for marine species as NMFS has never had a blanket rule to protect threatened species.



Importantly, this rule applies only to future decisions to list a species as threatened or to downlist a listed species from endangered to threatened. This means that species that are currently listed as threatened will continue to receive the same protections as endangered species, unless a specific 4(d) rule is promulgated.

Listing – Economic Impacts

The new rules removed language that explicitly prohibited the consideration of the economic impacts of listing a species. This change allows the Services to collect and provide economic data related to a species listing. However, the Services state that listing determinations will continue to be based on the “best available scientific and commercial data”, as specified in the ESA, and that the economic data are not allowed to be considered when making a listing determination.

Listing – Foreseeable Future

The new rules refine the definition of the term “foreseeable future” to extend “only so far into the Future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.” This means that the Services now have more leeway to determine what comprises the foreseeable future for a particular species and then only consider threats that are “likely” to occur.

Climate Change

The original proposed rule would have exempted from consultation under the ESA any proposed federal action with “effects that are manifested through global processes”. This language was excluded from the final rule, but was replaced with new language that describes how

consequences to a species or critical habitat can be determined to be “not caused by the proposed action”. The three considerations in the new rules, combined with a new definition of “reasonably certain to occur” give the Services latitude to reject consequences that are “so remote in time”, “geographically remote”, or “reached through a lengthy causal chain.” Since these consequences can be characteristics of climate change, these changes have potential to allow the Services to exclude climate change from effects analysis.

Delisting

The Services must “consider the same factors and apply the same standards” used in the listing decision when considering delisting. The new rule specifies a species may be delisted if it is extinct, does not meet the definition of a species or does not meet the standards for being listed as endangered or threatened.

Critical Habitat

The new rules clarify a process for the Services to determine that designation of critical habitat is not prudent. The process now includes five non-exhaustive factors, instead of two, and a factor that allows the Services to use “best available data” to make a “Non-prudent” determination. Also included are revisions that make it more difficult to designate a currently unoccupied area as critical habitat, even if it has the requisite habitat characteristics.

Jeopardy Analysis

The new rules disallow the previously used “tipping point” and “baseline” arguments when making a jeopardy determination. The new jeopardy standard would only apply where a proposed action causes “appreciable” harm to a listed species or its critical habitat, and would not consider the existing baseline data or the current recovery status of the species. Since the Services do not have a national system to track the amount of incidental take they have authorized, this could make it difficult to know if a species with a broad range is at or near the tipping point, resulting in a non-jeopardy determination that does not sufficiently protect an at-risk species.

Other Changes

- The Services now have a 60-day deadline for concurrence in informal consultation.
- Section 7 conservation measures do not require binding plans, such as specific resource commitments.
- A new, expedited consultation process was created for projects that have minimal adverse impact on species, but still require a biological opinion and incidental take

statement and for projects where the effects are either known or are predictable and unlikely to cause jeopardy or destruction or adverse modification.

- The Services now allow a single, concurrent initiation of consultation for similar individual actions in a given geographical area.

Implications

These new rules will introduce a period of uncertainty during consultation regarding protected species while the Services develop their implementation strategy and address any ongoing and future legal challenges.

In the short-term, this may mean more time to achieve a similar result. In the longer-term, the new rules may result in fewer species and critical habitat areas for which consultation is required. This is expected to lead to a reduced amount of effort to achieve the same result, and may result in the approval of more projects. These changes in federal regulations do not change states’ rights, so any state-specific species protection regulations will still be in place.

Many other approvals and permits are often required for a project, of which consultation with the Services is only one. Provided that the Services maintain their required consultation timeframes, Jacobs anticipates the short- and longer-term results noted above, and no major change in the overall permitting timeline for a project. However, the potential ripple effects of the new rules on other federal and state permitting authorities are not yet known and may also result in changes in permitting timeframes.

Many infrastructure and development projects are considered major federal actions and must also comply with the National Environmental Policy Act (NEPA), which often disclose a project’s socioeconomic impacts (often positive impacts) and may disclose other economic and natural capital valuation data. Therefore, this change may encourage consistent data transparency and analysis among the various federal, state, and local regulatory agency partners who review and make decisions for infrastructure and development projects.

Takeaways

The new rules become effective on September 26, 2019. Any species that is listed as threatened or downlisted to threatened on or after this date will only have “take” protection after and if a specific 4(d) rule is issued (typically with the listing action). The FWS states that they will

“craft species-specific 4(d) rules for each future threatened species determination as deemed necessary and advisable for the conservation of the species, as has been common practice for many species listed as threatened in recent years”.

These new rules do not affect the requirements of the Migratory Bird Treaty Act (MBTA), which also limits take of migratory birds, although there is current legislation proposed that would codify the “M-Opinion” and allow take of migratory birds provided that it was not the purpose of a project and occurred during an “otherwise lawful activity”.

While the changes now allow the federal government to determine the economic cost of listing a species, it is not yet known how this would be implemented. The Services specifically state that the information about economic impacts will be compiled but not used to make a listing determination. It is not certain whether including economic impacts as an additional data set would influence or affect listing determinations.

On December 15, 2017, CH2M was acquired by Jacobs, creating one of the largest and most diverse global providers of technical, professional and construction services. Jacobs has ESA specialists across the country and is ready to assist you with your questions and concerns about the new ESA Rules and how they might affect your projects.

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