



## News & Publications

### New Endangered Species Act Regulations on the Horizon

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#### **NEW ENDANGERED SPECIES ACT REGULATIONS ON THE HORIZON**

By **Scott B. Birkey** and **Clark Morrison**


Since President Trump took office in 2016, change is the new norm when it comes to environmental law. Within a month of taking office, the President proposed a dramatic narrowing of federal wetland protections under the Clean Water Act, resulting in a regulation that is now being finalized. The Trump Administration also issued an opinion limiting the scope of the Migratory Bird Treaty Act, narrowed the requirements for environmental impact statements under the National Environmental Policy Act, and rejected principle elements of the Obama Administration’s climate plan as well as the Paris Climate Accord. Now, the Trump Administration has issued numerous revisions to the regulations used by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to implement the Endangered Species Act.

On August 12, 2019, the Administration issued final rules for three separate rulemaking efforts to change certain key elements of the regulations used to implement the ESA. In our view, and contrary to the media firestorm surrounding the new regulations, these changes don’t amount to a “gutting” of the ESA. In fact, these rules don’t change the Endangered Species Act at all. Rather, they modify regulations which implement the ESA and which were adopted under previous administrations. Regulations are subject to change from time to time and, quite often, change with the political winds.

#### Related Professionals

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Inevitably, what for some will be seen as harsh changes, others will perceive as needed reform. From our perspective as practitioners, the new regulations clarify a few procedural ambiguities and streamline some clunky aspects of the ESA's regulations that we have been dealing with for years.

The new regulations are quite detailed. But in summary, below are some of the highlights:

- Restrictions on Listing of Species and Designation of Critical Habitat. The ESA prescribes certain standards for the listing of threatened and endangered species. Although the statute requires that listings must be based upon the best available scientific information, the new regulations allow the introduction of economic data into some listing decisions, but only for informational purposes. The new rules also narrow the “forward look” employed by the USFWS to determine whether a species is threatened with future endangerment. This change could, among other things, limit the agency's need to consider the impacts of climate change in some listing decisions.

In addition, the ESA requires USFWS to designate “critical habitat” for a listed species at the time of listing “to the maximum extent prudent.” In many ways, a critical habitat designation increases the level of protection afforded a listed species. The new rules clarify the circumstances under which the USFWS can decline to designate habitat as “critical habitat.” More significantly, they limit USFWS' ability to designate as critical habitat areas that are not currently occupied by a listed species. Under the new regulations, unoccupied habitat will be designated as critical habitat only if the USFWS determines that occupied critical habitat is inadequate for the conservation of the species.

Other notable revisions to the concept of critical habitat include changes that address the United States Supreme Court's recent decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*. This case held that an area must actually be habitat before that area could meet the definition of “critical habitat” regardless of whether the area is occupied or unoccupied. In other words, and perhaps to state the obvious, “critical habitat” must actually be habitat for the species before it can be considered “critical habitat.” The USFWS added a requirement in the new regulations specifying that, at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat.

- Section 7 Consultation Reforms. The final rules change a number of definitions and procedural steps associated with Section 7 consultations, including “Adverse Modification of Critical Habitat,” “Effects of the Action,” “Environmental Baseline,” and “Programmatic Consultations.” Many of these changes are procedural and either helpful or relatively benign. A good example of this is the new definition of “Effects of the Action,” which collapses into a single concept the often confusing interplay of “direct,” “indirect,” “interrelated,” and “interdependent” effects required for analysis under the prior regulations. Now, the “effects of the action” is driven less by labels or semantics and more simply by the “consequences” to the species or critical habitat caused by the proposed action. These changes to the definition of “effects” provide a clearer and more streamlined mechanism for analysis of a project's impacts to a listed species.
- Rescission of Automatic “Blanket” Protection for Threatened Species under ESA Section 4(d). The ESA prohibits the take of species listed as “endangered.” “Take” is broadly defined under the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any of these activities. The take prohibition does not apply to “threatened” species unless USFWS (or NMFS relative to aquatic species) adopts a rule extending



that protection to threatened species. USFWS relies on a “blanket” 4(d) rule automatically extending protections to threatened species. The new regulations rescind the blanket 4(d) rule and permit USFWS to extend protection on a species-by-species basis (e.g., similar to the special 4(d) rules for California coastal gnatcatcher and California tiger salamander). The new regulations do not alter any prohibitions for species already listed as threatened. They apply only to species added to or reclassified on the lists of threatened species.

The effective date of the new regulations will be 30 days after publication in the Federal Register. We understand that the State of California and perhaps other states have vowed to challenge the final rules, which may mean that the new regulations are likely to get tied up in litigation.