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Proposed ESA Revisions—Implications for Energy and Natural Resource Interests

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On July 19, 2018, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS, and collectively with FWS, the Services) announced several proposed changes to the regulations implementing the Endangered Species Act (ESA). Some of the proposed rules will undo Obama-era regulatory revisions. But in a few key areas—including species delisting, Section 4(d) special rules, and the consultation provisions—the Services are proposing watershed changes that will significantly alter how key provisions of the ESA are implemented. The Services are soliciting public comments through September 24, 2018.

The changes are within three proposed rulemakings. The Services propose Revisions of Regulations for Interagency Cooperation (i.e., the Section 7 consultation regulations) and Revisions to Regulations for Listing Species and Designating Critical Habitat. FWS is also proposing a Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants. The salient changes are discussed below.

Proposed Revisions of Regulations for Interagency Cooperation

The ESA requires federal agencies to consult with the appropriate Service (generally FWS for terrestrial species and NMFS for marine species) prior to taking or approving actions that could affect listed species or their designated critical habitat. ESA consultation is a long-standing part of the approval process for almost all federal permits and approvals. The Services now propose several important changes to the consultation substance, scope, and process. According to the proposal, these changes are only the beginning of a "comprehensive" evaluation of the consultation regulations, and the public is encouraged to provide comments on the process generally, in addition to the changes specifically proposed.

Proposed Changes to the Scope of Consultation

Exemptions from Consultation. The Services propose to affirmatively exempt from consultation certain activities that, in the Services' experience, are "far removed from any potential for jeopardy or adverse modification of critical habitat."[1] The Services would exempt three categories of activities, two of which—those that will not affect listed species and those that result in effects to listed species that are either entirely beneficial or not capable of being "measured or detected in a manner that permits meaningful evaluation"[2] —are relatively non-controversial. The third, however, is likely to generate opposition from

environmental groups and, if adopted and then relied upon to exempt a project approval from ESA consultation, would likely be challenged.

The third proposed exemption would exclude activities that "have effects that are manifested through global processes" (i.e., climate change) if those effects (i) cannot be reliably predicted or measured at the scale of the species' current range, or (ii) would result in very small or insignificant impact on the species or critical habitat, or (iii) "are such that the risk of harm to a listed species or critical habitat is remote."[3] If adopted and upheld, such an exclusion could decrease the regulatory burden of ESA listings that are driven by climate change because the consultation obligation would be triggered by the impacts of the proposed action, not the overall impacts of climate change. This proposal follows, but builds further upon, initial agency guidance and policy adopted with the initial ESA listing of climate-affected species such as the polar bear and other arctic and sub-arctic species.

Treatment of Land Management Plans. In a separate section, the Services assert discretionary authority to exclude another type of activity from the reinitiation of consultation.[4] Where the federal action agency retains discretionary control over a project, it has an ongoing ESA obligation such that, if certain changes occur, it must "reinitiate" consultation with the Services after the project has begun. The Services assert that federal land management plans developed under the Federal Land Policy and Management Act and the National Forest Management Act are not "affirmative discretionary actions" and thus should not be considered ongoing actions that are open to reinitiation.[5] The Services explain that federal land use plans developed under these statutes are required to be regularly updated and that any on-the-ground actions approved under these plans are subject to separate ESA consultation; thus, the Services argue that reinitiation of consultation on these plans "does little to further" the goals of the ESA and "often results in impractical and disruptive burdens."[6]

The Services' position appears at some level to be potentially inconsistent with established Ninth Circuit case law in this area holding that such federal public lands plans are ongoing agency actions subject to the ESA's consultation requirement.[7] If the proposed regulation is adopted and upheld, it will reduce the regulatory burden on the federal agencies because they would not have to reinitiate plan-level consultations when a new species is listed or critical habitat designated in the plan area. This streamlining could also be beneficial to project applicants in those areas, although project-specific ESA consultations would still be required. However, as with the climate-change exclusion, this position will likely be challenged, and environmental groups may challenge projects approved under land management plans that they believe should have been subject to reinitiated consultation.

Proposed Changes to the Process of Consultation

The Services propose several changes to the consultation process. These changes, some of the first substantial revisions since the consultation regulations were adopted during the Reagan administration (other than

those issued at the end of the George W. Bush administration that were soon thereafter withdrawn by the Obama administration), should reduce the administrative burden on regulated entities and provide the Services with greater flexibility in consultation approaches. Many of these changes, such as establishing a deadline to complete informal consultation, may streamline consultation without significant controversy.

Initiation of Consultation. The Services propose to revise the regulations "to clarify what is necessary to initiate formal consultation."[8] These new regulations would establish what the action agency must provide in the "initiation package," clarify that the contents of the initiation package may be provided in another document (such as an environmental analysis under NEPA), and expressly allow for a summary of information from the applicant. Similarly, the new regulations would allow the Services to streamline the production of a biological opinion by adopting by reference parts of the initiation package. The Services go so far as to "propose a collaborative process to facilitate" the development of the initiation package "that could be used as all or part of the Service's biological opinion."[9] This approach would also apply when the Service is undertaking "intra-Service" consultation on the issuance of Incidental Take Permits to individual applicants under Section 10 of the ESA. If implemented as proposed, these revisions have the potential to streamline the consultation process and reduce the need for extensive correspondence between the action agency and the Service to get the process started, which could result in significant time savings for the regulated community.

Alternative Consultation Approaches. The Services also propose two alternative kinds of consultation that could reduce the time needed for consultations. First, the Services propose to codify their existing practice of conducting programmatic consultations.[10] They explain that these broader consultations have been and could continue to be used to address multiple similar, frequently occurring or routine actions within a geographic area (often currently referred to as "batched" consultations) or for an agency's proposed program, plan, policy, or regulation providing a framework for future actions (which currently provide the basis for "tiered" consultations). Either type of programmatic consultation—if properly and promptly carried out—can provide significant time savings and certainty to the regulated community because most of the analysis is done at the front-end with the broad consultation, with little, if any, additional consultation needed for specific projects. However, applicants should bear in mind that their specific projects will be vulnerable if the programmatic consultation is incomplete or flawed, and the programmatic consultation may provide a larger and more attractive target for environmental groups or others to challenge than specific project approvals.

Second, the Services propose a regulation that would authorize "expedited consultations."[11] This is intended to "provide an efficient means to complete formal consultation on projects ranging from those that have a minimal impact to those with a potentially broad range of effects that are known and predictable, but that are unlikely to cause jeopardy or adverse modification of critical habitat."[12] This is a new procedural mechanism, and it will remain to be seen if the Services and action agencies can develop it

into the cost- and time-saving approach that the Services intend.

Proposed Changes to the Substance of Consultation

The ESA requires federal agencies to consult with FWS and NMFS to answer one question: whether the proposed action will "jeopardize" a listed species or result in "adverse modification or destruction" of critical habitat for a listed species. The Services propose two significant changes that will affect how they analyze that question.

Destruction or Adverse Modification. *First*, the proposal revises the definition of "destruction or adverse modification" to remove language suggesting that presently unsuitable but potential future critical habitat could be considered in the destruction or adverse modification determination.[13] This is a reaction to the Obama Administration's decision to broaden the analysis of critical habitat impacts beyond current habitat into areas that are currently unsuitable for the species. Even with the new rules, it may still be possible for the Services to consider such areas, but under the proposed definition the inquiry is supposed to consider the conservation value of critical habitat as a whole and a particular consulted-upon action's effects on that overall critical habitat value. This restriction should make the consideration of unoccupied areas more reasonable and more consistent with the Services' prior practice before the Obama Administration's change.

The Services also push back on Ninth Circuit case law by explicitly narrowing the analysis in jeopardy and adverse modification determinations. They assert, arguably contrary to case law from that court, that jeopardy and adverse modification determinations are made "about the effects of Federal agency actions" and not "about the environmental baseline."[14] Thus, the pre-action conditions are not relevant to these determinations.[15] The Services further disagree with Ninth Circuit case law by asserting that neither the ESA nor the regulations require the Services to identify a "tipping point" as part of the jeopardy/adverse modification determinations.[16]

Second, the Services propose to formalize and codify the consideration of beneficial actions proposed by or taken by either the federal agency or the applicant, including those taken prior to consultation, in the formulation of a biological opinion and any reasonable and prudent alternatives or reasonable and prudent measures.[17] Specifically, if an agency submits a "description of the proposed action, including available information about any measures intended to avoid, minimize, or offset effects of the proposed action" with "sufficient detail," the Services will "take into consideration the effects of the action as proposed, both beneficial and adverse."[18] Further, in contrast to Ninth Circuit case law,[19] such beneficial actions need not be established by specific binding plans or a clear, definite commitment of resources.

Proposed Revisions to Regulations for Listing Species and Designating Critical Habitat

Section 4 of the ESA establishes specific criteria to be considered when

evaluating whether a species should be listed, reclassified (i.e., from threatened to endangered or vice versa), delisted, or critical habitat designated. As with the consultation procedures, the Services explain that they are initiating a "comprehensive" evaluation of their regulations implementing Section 4 and invite comment on all aspects of the regulations. In this proposal, they address potential economic effects, the definition of foreseeable future, the analysis for delisting species, and the factors to be considered when designating critical habitat.

Economic Effects

The Services propose to delete regulatory language that expressly prohibited "reference" to economic impacts in a listing decision.[20] The Services note that the ESA prohibits the Services from *considering* factors outside of the statutory listing factors, but does not prohibit *reference* to economic factors. The Services believe that doing so in some cases would be consistent with Congress's intent to inform the public about listing determinations, but the Services state they do not expect economic analyses would accompany every listing rule. Further, they are quite clear that, consistent with the statute, economic impacts will not be considered when evaluating a proposed listing. Note that even with the clear disclaimer language, environmental or other groups may likely challenge references to economic impacts in listing decisions as implying that the Services improperly *considered* economic factors.

Foreseeable Future

The ESA defines a "threatened species" as one that is "likely to become endangered within the foreseeable future throughout all or a significant part of its range."[21] The statute does not define "foreseeable future." The question of how to define the "foreseeable future" has been contentious, especially in listings driven by climate change. For much of the past decade, the Services have applied agency guidance on the methodology to make foreseeability determinations. This general approach was upheld in litigation challenging the listing of the polar bear[22] and in subsequent litigation challenging the listings of the bearded seal and ringed seal.[23]

The Services now propose to codify past practice.[24] The new rule addresses "foreseeability" on a species-by-species basis by extending the "foreseeable future" for a given species "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable."[25] This analysis depends on the particular species, the relevant threats, and the data available. Thus, where the "foreseeable future" is an issue in a listing, the analysis will be, as it has been since the adoption of the Department of the Interior's policy on the "foreseeable future," highly fact specific.

Delisting

Although the nominal goal of the ESA is species recovery such that species no longer need the protections of the Act, in practice, few species have been delisted. That may, in part, be due to the standards for delisting in the current regulations that are narrower and more constrained than the

statutory listing factors. The Services now propose to revise the standards for delisting to better track the statute.[26] Under the new proposal, a species can be delisted if (1) it is extinct, (2) it no longer meets the definition of being threatened or endangered (e.g., recovered to the extent that it no longer meets the statutory definitions), or (3) the listed entity does not meet the statutory definition of a species.[27] These changes are consistent with a recent D.C. Circuit decision that held that the Services must apply the statutory listing factors when considering both listing and delisting.[28]

These changes should give more flexibility to the Services in delisting species. This will be of use to those in the regulated community who have taken a page out of the environmental groups' playbooks and are pursuing delisting petitions. The delisting of the eastern distinct population segment of Steller sea lion is an example of NMFS previously granting a delisting petition (in that instance based on the recovery of the species), an action that may become even more common and available should the proposed rule change be finalized.

Critical Habitat Designation

The Services propose a significant change to how critical habitat will be designated.[29] The Obama Administration had adopted regulations that made it significantly easier for the Services to designate lands or waters as "critical habitat" that were not currently occupied, or perhaps even habitable, by the species. This change was controversial, and the question of exactly when unoccupied habitat may be designated as critical habitat is currently being reviewed by the Supreme Court.[30]

The Services now propose to return to the pre-Obama-era standard by emphasizing that the designation of critical habitat initially should be limited to the areas occupied by the species at the time of listing, with unoccupied areas considered for designation as critical habitat "only upon a determination that such areas are essential for the conservation of the species." Also, unoccupied areas will be considered only if an area limited to the occupied area "would be inadequate" or "less efficient."[31] "Efficient conservation" is described as "situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species."[32]

While the changes to the approach on unoccupied areas appear beneficial to regulated entities and resource development interests, there is enough room in the language for the Services to continue to designate unoccupied areas (although this flexibility may be affected by the pending Supreme Court case). Also, the Obama administration had adopted an expansive interpretation of "geographical area occupied by the species" to include occasional, seasonal, or even periodic (e.g., briefly in a period of 10 or more years) use by a species. Applying that similar definition, which the Service's proposed rules do not alter, the Services may continue to designate wide swaths of actually unoccupied habitat under the guise of being "occupied" or "periodically used" habitat even under the revised proposal.

Revision of the Regulations for Prohibitions to Threatened Wildlife

and Plants

Historically, FWS and NMFS differed on their default approach on protections for threatened species. Although the ESA mandates certain protections for endangered species, it tasks the Services with defining the appropriate protection for threatened species, which may include the full suite of protections for endangered species. The FWS currently applies a default rule whereby, unless specified otherwise in a species-specific rule (called a “4(d) rule” after the applicable provision of the ESA), all of the protections applicable by statute to endangered species (including the take prohibition) are automatically extended to threatened species for those species under FWS jurisdiction. This “blanket rule” may reduce the agency's workload at the listing stage, but it substantially increases the regulatory burden to affected landowners, states, and resource development interests. It also deprives FWS of the incentive in some instances to tailor specific appropriate protections for threatened species, instead of simply relying on the fallback blanket rule. NMFS has not had such a rule and has designated protection to threatened species in special rules on a species-by-species basis.

FWS now proposes to remove its default rule and make species-specific determinations as NMFS does. FWS states that doing so will “better tailor protections to the needs of the threatened species while still providing meaning to the statutory distinction between 'endangered species' and 'threatened species.'”[33]

Under the new rule, the take prohibition and other protections the ESA provides to endangered species will be applied to threatened species only if the FWS extends those protections in a species-specific rule. This change is prospective and will not affect the protections afforded to currently listed species under the “blanket” rule. FWS explains that this approach is beneficial because it removes “redundant permitting requirements,” facilitates “implementation of beneficial conservation actions,” and makes better use of agency resources by “focusing prohibitions on the stressors contributing to the threatened status of the species.”[34]

Note, however, that this rule provides no guidance on what standards FWS will apply when fashioning a 4(d) rule. While the upshot should be perhaps more flexible approaches in the listing of threatened species, with the special rule for the polar bear being just one of the relatively recent examples of such types of approaches, it will also likely spawn litigation as interested parties challenge the scope of individual 4(d) rules (as they did in the polar bear example). FWS commits to explain its rationale for each given rule in the preamble, as it has done in past 4(d) rules, and those explanations will likely be targets of litigation challenges.

Conclusions

Some of the Services' regulatory proposals seek merely to codify existing policies or provide incremental changes or improvements. On balance, however, the overall proposed revisions—if implemented—would be the most sweeping changes to the ESA regulations to be applied since the

Services' adoption of the joint consultation regulations in 1986 during the Reagan Administration. These proposals are sure to draw substantial attention from environmental and conservation NGOs seeking to maintain the status quo of the current ESA regulations.

The ongoing public comment period on the three separate regulatory proposals provides an opportunity for landowners, resource-development interest, states, and others that might benefit from the proposed revisions to provide information to the Services indicating how the proposed changes would be useful to those parties, assist in the efficient implementation of the ESA, and support the ESA's overall conservation goals. The comment period also provides an opportunity to provide additional suggestions to the Services for further revisions to the ESA-implementing regulations, either as part of the current effort or in subsequent rulemakings. Finally, it is an opportunity to help build and make the administrative record on which the new regulations will be reviewed in court if the proposals are adopted by the Services and subsequently challenged.

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[1]83 Fed. Reg. 35,178, 35,185 (July 25, 2018).
[2]*Id.*
[3]*Id.*
[4]*Id.* at 35,188-89.
[5]*Id.* at 35,189.
[6]Id.
[7]*Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015).
[8]83 Fed. Reg. at 35,186.
[9]*Id.* at 35,188.
[10]*Id.* at 35,184-85.
[11]*Id.* at 35,188.
[12]*Id.*
[13]*Id.* at 35,179-82.
[14]*Id.* at 35,182. On a related note, the Services are soliciting comment on how it should apply the definition of “environmental baseline” to on-going actions and beneficial actions. This would be particularly relevant to programmatic consultations in which the Services are evaluating the impacts of ongoing activities.
[15]*But see Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (where baseline conditions “already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm”); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 737 (9th Cir. 2017) (same).
[16]83 Fed. Reg. at 35,183; *but see Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, 705 F. App'x 577, 580 (9th Cir. 2017) (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008)); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010)).
[17]83 Fed. Reg. at 35,187.
[18]*Id.*
[19]*See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

[20]83 Fed. Reg. 35,193, 35,194 (July 25, 2018).
[21]16 U.S.C. § 1532(20).
[22]*See In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig.*, 709 F.3d 1, 15-16 (D.C. Cir. 2013).
[23]*Alaska Oil & Gas Ass'n v Pritzker*, 840 F.3d 671, 681-82 (9th Cir. 2016); Alaska Oil & Gas Ass'n v. Ross, 722 F. App'x 666, 669 (9th Cir. 2018).
[24]83 Fed. Reg. at 35,195.
[25]*Id.*
[26]*Id.* at 35,196.
[27]*Id.*
[28]*Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012).
[29]83 Fed. Reg. at 35,197-98.
[30]*Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71 (reply brief of petitioner Markle Interests, LLC due Aug. 13, 2018).
[31]83 Fed. Reg. at 35,198.
[32]*Id.*
[33]83 Fed. Reg. 35,174, 35,175 (July 25, 2018).
[34]*Id.*
