On July 21, the U.S. Fish and Wildlife Service (FWS) rescinded regulations from 2020 that changed the process for excluding areas from critical habitat designations under Section 4(b)(2) of the Endangered Species Act (ESA). Per the agency, this action restores the Secretary of the Interior’s discretion to determine how and when to exclude areas from critical habitat designations and FWS’s role as the expert agency responsible for administering the ESA. The final rule takes effect on August 22, 2022.

Under the final rule, FWS will resume its previous approach to exclusions. That previous approach, which is currently used by the National Marine Fisheries Service (NMFS) and outlined in a 2016 policy on 4(b)(2) exclusions, requires FWS to consider the economic impacts of a proposed critical habitat designation and publishes the
economic analysis concurrent with the proposed designation. In addition, FWS must consider the exclusion of areas covered by a permitted voluntary conservation plan, tribal lands, and areas for which a federal agency has asserted national security concerns.

Critical habitat designations identify areas and habitat features that are essential to conserve listed species. FWS may exclude areas from designations after considering economics, national security, and other factors (such as conservation activities). Federal agencies must ensure actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitats. Critical habitat designations do not affect actions on private lands unless the actions involve the authorization or funding of a federal agency. Further details can be found here.

**FERC Issues Proposed Rule Expanding Duty of Candor**

On July 28, 2022, FERC issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM22-20-000 to broaden the duty of candor requirements for all entities communicating with FERC on matters subject to its jurisdiction. The NOPR explains that FERC relies extensively upon the accuracy of information provided to it for effective decision making. While FERC has adopted a variety of regulations imposing a duty of candor, there are no generally applicable requirements. The NOPR aims to fill the gaps by proposing a broad duty of candor on all communications from regulated and other entities to FERC, as well as to other specified organizations upon which FERC relies. The latter would include FERC-approved market monitors, regional transmission organizations (RTO) and independent system operators (ISO), jurisdictional transmission or transportation providers, and the Electric Reliability Organization and its associated Regional Entities. If adopted, the proposed rule would expand FERC’s Office of Enforcement’s purview to investigate potential violations of the duty of candor.

Specifically, the NOPR proposes to revise 18 C.F.R. Part 1 of FERC’s regulations to require that all entities communicating with FERC on a matter within FERC’s jurisdiction: (1) submit accurate and factual information, (2) not submit false or misleading information, and (3) not omit material information. However, the NOPR proposes that exercising due diligence to prevent inaccurate information would be an affirmative defense to violations of the requirement. The NOPR also clarifies that it is not intended to impose a duty of disclosure.

The NOPR would limit the duty of candor to communications related to a matter subject to FERC’s oversight. Communications that are tangential or unrelated to matters subject to FERC regulation are not covered by the proposed regulation (e.g., employer/employee disputes). The duty of candor would apply to all entities, including both organizations and individuals, that either make such communications or are responsible for making such communications.

Commissioner Danly in a dissenting opinion expressed grave concerns about the sweeping nature of the proposed duty of candor. For example, he noted the threat of enforcement actions based on communications between employees of one electric utility and employees of another electric utility could dampen cooperation within the industry and raise the stakes for legal departments to monitor those interactions.
He also noted that the public, who are being encouraged in other contexts to engage more with FERC, could be subject to liability for weighing in on matters of political, social, and community concern, and that this could have the unintended effect of deterring public involvement as well as infringing on speech at the core of First Amendment protections.

Comments on the proposed rule will be due 60 days from the date of publication in the Federal Register. The NOPR invites comments on a number of issues including whether the scope of communications subject to the proposed rule is adequate or should be expanded. Commissioner Danly’s dissent encourages comments on whether the NOPR creates Constitutional due process concerns by being impermissibly vague, whether the proposed rule would chill public engagement with FERC, whether FERC has statutory authority to enact the rule, whether the proposed rule should be modified to exclude unintentional violations, and whether the rule should include a materiality requirement. Commissioner Danly noted that the regulated community may be reticent to comment unfavorably on the NOPR and encouraged companies to speak out candidly anyway.

Proposed WRRDA Amendment Would Streamline Permitting at Corps Dams

On July 14, 2022, Senators Daines (R-MT) and Feinstein (D-CA), along with Representative Kuster (D-NH) introduced bipartisan legislation to expedite hydropower at U.S. Army Corps of Engineers (Corps) facilities. The companion bills, S. 4540 and H.R. 8383, would amend the 2014 Water Resources Reform and Development Act (WRRDA) to require the Secretary of the Army to assess opportunities to: (1) increase the development of hydroelectric power at existing Corps hydroelectric dams, and (2) develop new hydroelectric power at nonpowered Corps dams.

This would be accomplished with the help of a newly created Corps position of program manager for non-federal hydroelectric power development. The program manager would be located at the Corps headquarters office and be responsible to: (1) ensure timely and consistent review of applications for Corps permits across Corps districts and levels; (2) answer questions within the Corps and facilitating communication between developers and the Corps concerning Corps permits; (3) answer question from developers regarding the Corps permitting process; (4) coordinate with FERC on licensing matters; (5) facilitate timely action on all aspects of federal permitting required for hydropower development and (6) ensure that new hydropower projects are designed and operated with environmentally sustainable technologies and management plans.

The proposed legislation appears intended to address long-standing concerns among hydropower developers that the Corps permitting process is outdated, inconsistent among Corps district offices, time-consuming, and not well coordinated with FERC’s license process.