Major Changes to Endangered Species Act Regulations Proposed

Thursday, July 26, 2018

On July 25, 2018, the Department of the Interior’s Fish and Wildlife Service (“FWS”) and the Department of Commerce’s National Marine Fisheries Service (“NMFS”) (collectively “the Services”) issued three proposed rules that would modify key aspects of their Endangered Species Act (“ESA”) regulations. The proposals respond in part to stakeholder comments submitted to FWS last year as a result of Executive Order 13777, “Enforcing the Regulatory Reform Agenda.”

As proposed, the revised regulations would streamline and harmonize the Services’ processes for listing species as threatened and endangered and for designating critical habitat, require species-specific rulemaking to extend the ESA’s protections to new species listed as “threatened,” and simplify and modernize the Section 7 consultation process for activities requiring federal authorization or funding. These proposed changes aim to address increasing uncertainty and litigation stemming from the Services’ implementation of these provisions.

The Services will accept public comments for 60 days, until September 24, 2018.

Section 4 - Species Listing and Critical Habitat Designation

The Services propose important modifications to their regulations governing Section 4 of the ESA. Section 4 prescribes the standards for listing, delisting, and reclassifying species as threatened or endangered and for designating critical habitat for listed species.

The draft regulations propose four major changes to the Services’ processes for carrying out their responsibilities under Section 4:

- The proposal would remove the prohibition on the Services describing economic factors when listing, delisting, or reclassifying species as threatened or endangered. While the Services may not consider economics as a basis for a listing decision, the proposal would require the Services to disclose the anticipated economic impact to the public.

- For the first time, the Services would define when a species is likely to become endangered within the “foreseeable future” to warrant a “threatened” listing. As proposed, the regulations would define “foreseeable future” as extending only so far as the threat to a species is probable, thereby addressing criticisms that listing decisions premised on long-term models are overly speculative.

- The proposal would incorporate measures for ensuring that evaluations of potential species delistings under the ESA receive similar time and attention as evaluations of potential species listings.

- The proposed rule would require the Services, when designating an area as “critical habitat” for a listed species, to first consider all areas occupied by the species at the time of listing before considering whether any unoccupied areas are necessary for the survival or recovery of the species. The Services would need to determine that “there is a reasonable likelihood that the area will contribute to the conservation of the species” before designating any unoccupied area as critical habitat. Furthermore, the
regulation would expand the non-exhaustive list of circumstances in which the Services may find that they cannot designate critical habitat for a species. Designated habitat is a salient issue that the U.S. Supreme Court will consider in the 2018 term.

Section 4(d) - Protective Regulations for Threatened Species

Section 9 of the ESA extends most of the statute’s protections, including the prohibition on unauthorized take, only to endangered species. For years, however, FWS has automatically extended those protections to all species listed as threatened through a broad regulation known as the “blanket 4(d) rule.” FWS now proposes to rescind its “blanket 4(d) rule” for all species listed as “threatened” in the future. If adopted, FWS would be required to extend the ESA’s prohibition on unauthorized take to threatened species on a case-by-case basis, which is consistent with the longstanding practice of NMFS. The proposed rescission would not affect the blanket 4(d) rule’s applicability to species that FWS previously listed as “threatened,” however. FWS would be required to promulgate a species-specific rule to remove heightened protections for those threatened species.

Section 7 - Interagency Consultation

FWS and NMFS jointly propose revisions to their regulations under Section 7 of the ESA, which requires federal agencies to consult with the Services before taking any discretionary action that could jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

The proposal seeks to make the consultation process more efficient by excluding from consultation discretionary actions which should result in no appreciable impact on listed species or critical habitat or where the anticipated impact is small or inevitable. Also, the proposal would eliminate specific examples of when consultation is required. In addition, when evaluating “destruction or adverse modification” of critical habitat, the Services would only consider alterations impacting the value of the land “as a whole.” The Services also propose to refocus their interpretation of the “effects of the action” by eliminating references to “indirect effects” and effects of “interrelated and interdependent” actions and instead analyzing only impacts that would not happen “but for” the action being taken. They similarly would clarify the “reasonably certain to occur” standard for analyzing impacts of proposed actions to “avoid inclusion of activities whose occurrences would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur.” These changes would result in fewer low-impact activities triggering Section 7 consultation, freeing up agency resources to focus specifically on actions that pose a risk to listed species and protected habitat.

In instances when consultation is triggered, the draft rule would make several notable changes. First, the proposal would clarify the submissions necessary to initiate consultation. Using those submissions, it would decrease the processing time by expressly allowing the Services to adopt much of the consultation initiation package into their biological opinions. It also would create an “expedited consultation” process that would be available for proposed actions that, based on the Services’ experience with other similar activities, would have minor or predictable effects. And it would make clear that the Services may only block activities using Section 7’s jeopardy standard if those activities themselves would appreciably harm listed species.

Finally, the Services request feedback on three additional Section 7 issues currently under evaluation:

- Whether to adopt a deadline on completing informal consultations (e.g., 60 days);
- Whether to further identify specific situations in which Section 7 consultation is not triggered, such as when the proposed action (1) will not affect listed species or critical habitat, (2) will only result in impacts that arise through natural/global processes, and (3) will cause only beneficial effects or those that are insignificant or discountable; and
- Whether to clarify that the “environmental baseline” for purposes of evaluating ongoing Federal actions “is the state of the world absent the action under review,” including “ongoing impacts of all past and ongoing” activities in the relevant area.

Conclusions and Implications

The Services’ proposed changes to their ESA implementing regulations are a positive development for the regulated community. Under the existing regulatory regime, the ESA has become an administrative roadblock to critical projects and activities. Its implementation has been marred by inefficiency and inconsistency that increase costs and drain budgets. If promulgated, the Services’ new draft rules would help to address many of these problems and serve as a good first step towards improving the ESA while maintaining protection of at-risk species.

The Section 4 Proposed Rule, Listing Species and Designating Critical Habitat, can be found [here](#).
The Section 4(d) Proposed Rule, Prohibitions to Threatened Wildlife and Plants, can be found here.

The Section 7 Proposed Rule, Interagency Cooperation, can be found here.

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