



Feds Spawn New Rules and Policies for Protected Species Habitat and Mitigation

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Federal agencies charged under the Endangered Species Act (“ESA”) with species protection have recently hatched revisions to regulations and policies that change substantially the determination and protection of habitat for protected species and mitigation of adverse impacts on protected species.

On February 11, 2016, the U.S. Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) jointly amended current rules for critical habitat designation at 50 C.F.R. Part 424. The Services explicitly define for the first time “geographical area occupied by the species” and require an accounting for climate change, both operating to expand the scope of land areas eligible for designation as critical habitat. This includes areas only temporarily or periodically occupied, even if such areas are not occupied at the time of the listing of the species for protection as the ESA states. However, not “every square inch, yard, acre or even mile independently meets the definition of critical habitat.” In the end, the Services have retained great discretion to review each critical habitat designation on a case-specific basis, though any determination must be based on the best available scientific data. The revisions took effect March 14 but only apply to specific critical habitat designations proposed after that date.

Also on February 11, the Services modified the definition of “destruction or adverse modification” of critical habitat at 40 C.F.R. § 402.02 to comply with a court ruling holding that the previous definition was inconsistent with the ESA. In so doing, the Services arguably expand the scope of “adverse modification” to critical habitat, which now means a “direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” It includes, but is not limited to, actions that “alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.” Nature of the impact, not its size, controls, and the agencies reserve much discretion to make the call. Almost any land disturbing activity arguably could now be an adverse modification. Also, the forward-looking perspective in the definition suggests potential speculation as to whether relevant features may be impacted in the future.

Regardless, this aspect dovetails greatly with the new regulation for critical habitat designation and USFWS’s proposed draft mitigation policy. The new definition took effect on March 14.

The Services also have finalized their “non-binding” policy for exclusion of certain areas from

designation as critical habitat, effective March 14. Accounting for economic and national security issues is mandatory under the ESA, whereas consideration of species conservation areas is discretionary. In their discretionary review, an area would be excluded from critical habitat designation only if the benefits of exclusion outweigh the benefits of inclusion. In any event, no area will be excluded if doing so would facilitate the extinction of the species in question.

On March 8, 2016, the USFWS issued a new draft policy concerning mitigation of adverse impacts to protected species, making major changes to the existing agency Mitigation Policy developed in 1981. The draft policy adjusts the mitigation perspective to a “landscape-scale” to achieve a “broader ecological context” in pursuing a net gain, where possible, but at worst a “no net loss,” conservation of species. Driving the revisions in the draft policy are factors such as climate change, improvements in fish and wildlife science, and legal authority revisions. It integrates all legal authorities for mitigation during development activities and is intended to be the “umbrella” policy for species protection mitigation. ESA mitigation authority is incorporated for the first time, though the draft policy “encourages [use of] a broader definition of mitigation where allowed by law.” Public comments are due by May 9, 2016.

The final rules and final and draft agency policies collectively raise major concerns and questions for both private and public sector entities with projects that may impinge on protected species habitat. Some argue the Services have exceeded their authority under the ESA with these actions. Others believe the Services have not gone far enough to set standards for species habitat protection and for mitigation. It would seem that litigation is likely, so these issues will, in turn, almost certainly continue to evolve as well.

81 Fed. Reg. 7414 (February 11, 2016); 81 Fed. Reg. 7214 (February 11, 2016); 81 Fed. Reg. 7226 (February 11, 2016); 81 Fed. Reg. 12380 (March 8, 2016).

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