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Is the U.S. Endangered Species Act Itself Now Threatened or Endangered?

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On August 12, 2019, the U.S. Department of the Interior (DOI) unveiled three final rulemakings that will have a significant impact on the future implementation of certain portions of the **Endangered Species Act** (ESA). According to DOI, the new regulations are "designed to increase transparency and effectiveness and bring the administration of the [ESA] into the 21st century." On the other hand, numerous environmental advocacy groups voiced swift and strong opposition to what they commonly see as "dramatic rollbacks" that will "weaken the critical and popular environmental law." And, it appears that the final rules still face an uphill climb as Democrats in Congress, such as U.S. Senator Tom Udall (D-N.M.), vowed to "block this dangerous rollback" and "consider stopping these regulations by any means."

The three new regulations primarily affect Section 4 and Section 7 of the ESA. In general, Section 4 addresses adding and delisting threatened and endangered species and designating critical habitat, and Section 7 addresses interagency consultation. All three regulations will become effective thirty (30) days after publication in the *Federal Register*, which is expected imminently.

One of the new regulations modifies the authority of the U.S. Fish and Wildlife Service (FWS) to provide the same protections for threatened species as for endangered species. Known as the "blanket rule" under Section 4(d) of the ESA, FWS could, by default, extend to threatened species most of the prohibitions for activities involving and affecting endangered species. For species already listed as threatened, Section 4(d) remains in place. Under the new regulation, however, FWS will now have to determine what protections are appropriate for species added to or reclassified on the threatened species list without the option of simply defaulting to those protections specific to endangered species. According to FWS, this regulation "align[s] its practice with NOAA Fisheries so the two agencies are consistent in their application" of Section 4(d).

A second regulation also changes how Section 4 will be implemented moving forward by revising procedures and criteria for listing or removing species from the endangered and threatened lists as well as designating critical habitat. For example, with respect to listing determinations, the new regulation removes the phrase "without reference to possible economic or other impacts of such determination," so that listing determinations will now be made solely on the basis of the best scientific and commercial data available. The new regulation also provides that the same five factors that are considered for listing or reclassifying a species as threatened or endangered must also now

be considered for delisting a species. In addition, the new regulation revises the definition of, and heightens the standard for, the "foreseeable future" evidentiary factor that FWS may rely on when deciding whether or not to list, delist or reclassify a species. The new definition provides, in part, that the term foreseeable future "extends only so far into the future as [FWS] can reasonably determine that both the future threats and the species' responses to those threats are likely." The proposed rule used the word "probable" instead of "likely"; and FWS has further clarified that, here, "likely" means "more likely than not." This new regulation also imposes a heightened standard for unoccupied areas to be designated as critical habitat. Before the new regulation, an unoccupied area had to be essential to the conservation of a species to be designated critical habitat. Once the new regulation goes into effect, at the time of designation as critical habitat an unoccupied area must contain one or more "physical or biological features" essential to the conservation of the listed species. This rule change is in direct response to the ongoing dusky gopher frog litigation, where the U.S. Supreme Court recently held in Weyerhaeuser Co. v. U.S. Fish & Wildlife Service that an area must be habitat before such area could be "critical habitat," regardless of being occupied or unoccupied. In *Weyerhaeuser*, the Supreme Court ultimately remanded to the U.S. Court of Appeals for the Fifth Circuit to further interpret the term "habitat."

The third new regulation revises requirements related to interagency consultation under Section 7. In particular, the new regulation codifies alternative consultation mechanisms that agencies may now utilize and establishes a 60-day deadline for informal consultations. According to the FWS in the new rule, "[t]he intent of the 60-day . . . deadline is to increase regulatory certainty and timeliness for Federal agencies and applicants." Lastly, the new regulation revises the definitions for the following factors that agencies consider as part of the interagency consultation process: "destruction or adverse modification," "effects of the action" and "environmental baseline."

So, is the EAS now threatened or endangered? While many procedures will change under these new rules, the underlying and stated goals of the ESA have not been changed. That said, while some of the procedural changes will provide for more transparency and efficiency, others may arguably heighten standards for imposing the ESA in the first place. Taken together though, the new rules further clarify a number of definitions in the ESA and directly respond to numerous recent judicial decisions. One thing that is clear, however, is that these new rules are likely to be challenged in court, and soon.

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