

US Agencies Propose Sweeping Changes to Endangered Species Act Implementing Regulations

Article By:

Weslynn P. Reed

The US Fish and Wildlife Service (FWS) and the National Oceanic Atmospheric Administration (NOAA) Fisheries, two federal agencies charged with administering the Endangered Species Act (ESA or Act), recently [announced](#) major revisions to the regulations implementing the Act. The proposed rules were published in the Federal Register on July 25, 2018 and have already garnered significant attention, including strong criticism from environmental groups.

The agencies propose revisions to the regulations implementing the three different sections of ESA, Section 4, Section 4(d), and Section 7.

ESA Section 4 addresses procedures for listing species, recovery, and designating critical habitat. The [proposed rule](#) contains multiple changes to the implementing regulations. Among other things, the rule would remove the requirement that the agencies list, delist, or reclassify species “without reference to possible economic or other impacts of such determination.” [FSW explained](#) that the language was removed to more closely align the regulation with the Act’s requirement that the Secretary make determinations on the basis of the best-available scientific and commercial data. The proposed rule would also clarify that the factors to consider for delisting a species are the same as those for listing a species—whether a species meets the definition of a threatened or endangered species. Thus, “the standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance.” The Section 4 rule would also revise the procedures for designating critical habitat, requiring that the agencies first evaluate areas currently occupied by the threatened or endangered species before considering unoccupied areas and providing a non-exhaustive list of circumstances in which the agencies may find it is not prudent to designate critical habitat.

ESA Section 4(d) deals with protective regulations for species listed as threatened. The [proposed rule](#) would revise only the FWS regulations, and rescind the current blanket rule which automatically conveys the same protections for threatened species as for endangered species unless otherwise specified. While it would not affect the protections of currently designated threatened species, the new rule requires species-specific protective regulations for newly designated threatened species. FWS explains that the change will more closely align the agency with the NOAA Fisheries, which does not employ a blanket rule.

Under ESA Section 7, other federal agencies must consult with FWS and NOAA Fisheries to ensure agency actions will not jeopardize endangered or threatened species or result in “destruction or adverse modification” of critical habitat. The [proposed rule](#) encompasses a number of changes to the regulations regarding agency consultation, including clarifying the definition of “destruction or adverse modification,” proposing a 60 day deadline for informal consultations, clarifying the information necessary from the federal agency to initiate a formal consultation, and explicitly delineating the FWS and NOAA Fisheries’ responsibilities during a formal consultation.

FSW Principal Deputy Director Greg Sheehan [explained](#) that the changes are designed to clarify the regulations and create consistency across agencies. “One thing we heard over and over again was that ESA implementation was not consistent and often times very confusing to navigate. We are proposing these improvements to produce the best conservation results for the species while reducing the regulatory burden on the American people.”

Response to the proposed rules has been mixed. Daren Bakst, Senior Research Fellow for conservative think tank the [Heritage Foundation](#), [stated](#) the “common-sense” changes are welcome news.

Protecting endangered species is an important cause, but we should not allow that goal to be confused with protecting a 45-year-old law that has failed in terms of conserving species While it is not a complete fix, a better ESA regulatory scheme will help protect endangered species, while respecting private property rights.

By contrast, environmental groups argue the changes will wreak havoc on implementation of the ESA. The [Center for Biological Diversity describes](#) the proposed rules as a “wrecking ball” aimed at the ESA, that would “severely weaken protections for hundreds of endangered animals and plants across the country [and] ensure that hundreds of imperiled species awaiting protection – like the monarch butterfly and the American wolverine – either never get safeguards or face additional, extinction-threatening delays.” Brett Hartl, Government Affairs Director at the Center for Biological Diversity explains “[i]f these regulations had been in place in the 1970’s, the bald eagle and the gray whale would be extinct today. If they’re finalized now, Zinke will go down in history as the extinction secretary.”

The [Defenders of Wildlife similarly argue](#) that the proposed rules will actually endanger wildlife. The group argues that the proposed changes open the door for the economic impacts of a listing to be evaluated alongside the impacts to endangered species and their habitats. The rule regarding threatened species protections increases the risk threatened species will be deprived of needed protection while species-specific rules are drafted. And, the agency consultation rule will “unreasonably narrow the effects of agency actions required to undergo” ESA consultations. In a statement, Jamie Rappaport Clark, president and CEO of Defenders of Wildlife and Director of the FWS during the Clinton Administration, denounced the proposed rules:

[T]he sweeping changes being proposed by the Trump administration include provisions that would undercut the effectiveness of the ESA and put species at risk of extinction. . . . The signal being sent by the Trump administration, here and everywhere, is clear: protecting America’s wildlife and wild lands is simply not on their agenda.

Comments for each of the proposed rules are due on September 24, 2018.

© Copyright 2025 Squire Patton Boggs (US) LLP

National Law Review, Volume VIII, Number 214

Source URL: <https://natlawreview.com/article/us-agencies-propose-sweeping-changes-to-endangered-species-act-implementing>