

Trump Administration Regulations Undermine Species Conservation

On July 25, 2018, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service published three proposed rules in the Federal Register that would drastically alter the implementation of the Endangered Species Act (ESA). Many of the proposed regulations would undermine the conservation of imperiled species, and as a result, the FWS received over 871,000 public comments in opposition. The Trump administration's proposed regulations were submitted to the Office of Budget and Management for regulatory review and could be finalized and published any day. At a time when our nation and our planet are facing an extinction crisis of epic proportion, we should be working to strengthen, not weaken our best tool for saving endangered species.

Proposed Regulations

*Proposed Revisions to Section 4 Regulations for Listing Species and Designating Critical Habitat.*¹

The Trump administration proposes numerous amendments to the ESA's Section 4 implementation regulations. First, the proposal to remove regulatory language that prohibits consideration of the possible economic impacts when listing a species as endangered or threatened is a radical departure from past practice and is not in keeping with the intent of the Act. The ESA requires listing determinations to be based "*solely* on the basis of the best scientific and commercial data available. . . ." because a species' conservation status is fundamentally a biological question.² The administration's proposal to remove the regulatory phrase "without reference to possible economic or other impacts" opens the door to burdensome and inappropriate cost-benefit analyses that risk politicizing the wholly-scientific listing process.

The administration also proposes to define the term "foreseeable future," which is not currently defined in the ESA, but extensively analyzed in an M-Opinion issued by the Solicitor of the Department of the Interior in 2009. Under the ESA, species may be listed as either "endangered" or "threatened." A threatened species is one that is "likely to become endangered within the foreseeable future."³ In the M-Opinion, the Solicitor concluded that "Congress intended the term 'foreseeable future' to describe the extent to which the [agency] can reasonably rely on predictions about the future in making determinations about the future conservation status of [] species."⁴ The proposed definition departs from the M-Opinion by requiring that the Service "reasonably determine" that the threats to the species are "probable," potentially limiting foreseeable analyses for many species, including those threatened by climate change.

The single largest driver of extinction is habitat loss, but the Trump administration is proposing new exemptions to the ESA's requirement that critical habitat be designated at the time of listing except when the designation would not be prudent.⁵ Current regulations make clear that critical habitat "shall" be designated unless it "would not be beneficial to the species."⁶ Under the proposed regulation, habitat would not be designated if the primary threat to a species derived from disease or climate change, or when designation would provide "negligible" benefits. None of these provisions will aid in the conservation of species and will likely contribute to loss of habitat that is vital to survival and recovery. This automatic exemption runs counter to the ESA and congressional intent.

¹ *Revision of the Regulations for Listing Species and Designating Critical Habitat*, 83 Fed. Reg. 35,193 (July 25, 2018).

² 16 U.S.C. § 1533(b)(1)(A) (emphasis added).

³ 16 U.S.C. § 1532 (20).

⁴ Department of the Interior, Office of the Solicitor, Opinion M-37021, *The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act* (Jan. 16, 2009).

⁵ 16 U.S.C. § 1533(a)(3)(A).

⁶ 50 C.F.R. § 424.12(a)(1)(ii).

The proposal also clarifies that the ESA's five listing factors apply equally to listing and delisting decisions. While the proposal essentially restates current law, delisting decisions must necessarily consider what constitutes recovery. Species should not be delisted until threats to their survival are abated and their recovery is assured.

Lastly, this proposed regulation would restrict the designation of unoccupied habitat and reinstate a rigid "step-wise" approach to designating critical habitat—by which unoccupied areas may only be considered after the Services determine that occupied areas are insufficient to conserve the species. Instituting a presumption against designating unoccupied critical habitat places political and cost considerations above best available science. If adopted, these changes would undermine the conservation of endangered and threatened species, weaken their critical habitat protections, and make recovery of endangered animals and plants costlier and more difficult.

Proposed Revisions to Section 7 Regulations for Consultation⁷

Section 7 consultation has been described as the "heart of the ESA" because it requires federal agencies to ensure that their actions will not (1) jeopardize species' survival and recovery and (2) destroy or degrade critical habitat. The proposed changes would exempt ongoing effects of federal projects from consideration in consultation and limit Section 7 consultation to actions within the jurisdiction of the regulatory agency—leaving out actual, concrete harms directly or indirectly caused by a proposed action. The changes would also allow the Services to ignore harm caused by federal actions if those harms are manifested through "global processes," yet another attempt to eliminate the need to consider the impacts of climate change on imperiled species. The Trump administration's proposal also seeks to undermine mitigation measures to offset harmful impacts. By proposing to add language that mitigation measures require "no specific binding plans or a clear, definite commitment of resources," vague, undefined, and uncertain promises of mitigation could outweigh admitted adverse impacts.

To address habitat loss, Congress prohibited federal agencies from taking action that would result in the "destruction or adverse modification" of critical habitat. The administration's proposal would only restrict federal agency actions that "diminish[] the value of critical habitat as a whole," potentially excluding the vast majority of actions that harm critical habitat. Lastly, it would impose an arbitrary 60-day deadline on informal consultations. If implemented, this regulation would diminish the importance of the consultation process and place endangered species at substantially greater risk.

Proposed Rescission of the Blanket Section 4(d) Rule for Protection of Threatened Species⁸

The Trump Administration proposes to rescind a FWS regulation that automatically extends the protections afforded to endangered species to threatened species under Section 4(d) of the ESA. For nearly 40 years, the FWS has provided protections to threatened species as a default, unless it adopts a species-specific regulation. The proposal will increase the burden on the FWS to develop individualized rules for threatened species, straining the agency's limited budget, and making conservation of such species less efficient and effective. Unless FWS can issue special 4(d) rules for every threatened species, this rule will deprive threatened species of protections against take, potentially impairing their recovery or even pushing them further towards extinction.

⁷ *Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,178 (July 25, 2018).

⁸ *Revision of Regulations for Prohibitions to Threatened Wildlife and Plants*, 83 Fed. Reg. 35,174 (July 25, 2018).