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New rules may affect scope of the ESA

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One of the key initiatives of Donald Trump's presidency has been the reduction of regulatory burdens for infrastructure and domestic energy production projects. On Aug. 12, this initiative reached the Endangered Species Act with the U.S. Fish Wildlife Service and National Marine Fisheries Service releasing prepublication versions of three final rules that could significantly affect the scope and implementation of the Endangered Species Act.

The rules were issued more than a year after they were initially proposed, and after the Services received an average of 65,000 comments per proposal. Despite the voluminous comments received, the rules largely mirror the proposals, addressing species listings (including designating critical habitat), protections for threatened species, and the Section 7 consultation process.

The rules are intended to narrow the reach of the ESA by reducing the number of species listed and the scope of habitat designated as critical habitat, and by making it easier for the Services to narrowly tailor the protections for threatened species. For example, the rules add a definition for "foreseeable future" -- which affects whether a species should be listed as threatened; the Services must determine the species "is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. Section 1532(20). Previously, the Services have interpreted the term to reach up to 100 years in the future to account for climate change impacts. See, e.g., *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016).

The rules narrowly define "foreseeable future" as extending only so far in the future as "the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." While the preamble states that the Services will "not arbitrarily dismiss reliable aspects of various climate change predictions or projections ... even if other aspects ... have greater levels of uncertainty," by using the terms "likely" and "reliable," the rules seek to give the Services the ammunition to refuse to list a species in the face of the many uncertainties associated with the impacts of climate change.

In addition to listing a species, the Services may also designate its critical habitat, which will receive protection under the ESA. Instead of considering unoccupied and occupied habitat concurrently, the rules now require the Services to first determine that occupied habitat is not sufficient to conserve a species before designating unoccupied habitat and demonstrate that the unoccupied habitat contains at least one physical or biological feature necessary for the species' conservation. Notably, the requirement to include at least one of the needed features was added in the final rules in direct response to the 2018 Supreme Court decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). In *Weyerhaeuser*, the Supreme Court held that "critical habitat" must first be habitat for the listed species, but refused to define "habitat," instead remanding the case to the lower courts to determine the meaning of the term. The Services have indicated they plan to undertake additional rulemaking to further address the meaning of habitat, which could further limit the ability to designate unoccupied habitat.

Finally, the USFWS has removed a long-standing "blanket" rule protecting threatened species to the same extent as endangered species. The statute only prohibits killing, capturing, or otherwise taking species listed as endangered. 16 U.S.C. Section 1538(a)(1). In 1978, the USFWS finalized a rule extending these protections to species listed as threatened. Here, the USFWS repeals the blanket extension and will determine what protections, if any, are appropriate for threatened species on a species-specific, case-by-case basis.

The rules are also expected to ease the burden of the ESA by streamlining the consultation process required between federal agencies and the Services under ESA Section 7. This process requires federal agencies to consult with the Services to ensure that projects they permit, fund or carry out will not jeopardize listed species or adversely modify their critical habitat. The rules make a number of changes to the consultation process to expedite the process, including codifying the ability to use alternative consultation methods and the use of portions of other federal agencies' documents to support the consultation process. Additionally, the rules support the use of programmatic consultations to reduce the number of project-by-project consultations, and impose time limits for informal consultations, with the Services only allotted 60 days to make a determination, which may be extended upon mutual consent for up to an additional 60 days.

Finally, the rules make a number of definitional changes to clarify the scope of the ESA and ensure consistent application by regional offices. For example, the rules amend the definition of "environmental baseline" in an effort to clarify which effects must be evaluated as part of a proposed action and streamline the definition of "effects" that must be considered at all.

Notably, one of the most high-profile changes the Services made -- to include an evaluation of economic impacts of species listings in conjunction with listing determinations -- should, in theory, have the least impact on the Services' decisions; by statute, the Services are prohibited from accounting for economic impacts when making listing determinations. As a result, the primary ramification of identifying these impacts without accounting for them is likely to be increased scrutiny of determinations not to list a species due a skeptical public.

California, Massachusetts and numerous environmental groups are already preparing to challenge the rules once published in the Federal Register. Nevertheless, the rules may not have the significance attributed to them. While the rules are intended to give the Services the authority to streamline and narrow the scope of the ESA, the regulations, even once the rules become final, still provide the Services with significant discretion and authority to regulate listed species and add additional protections for at-risk species and their habitats. As a result, the true impact of these rules will turn in large part on the intentions of the sitting administration. □