

# Proposed Revisions to Federal Endangered Species Act Regulations: The Next Chapter in the Trump Regulatory Reform Agenda

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The Trump administration recently published notice of proposed revisions to regulations that implement portions of the Endangered Species Act (“ESA” or “Act”), which is administered by the U.S. Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”) (collectively referred to as “the Services”).<sup>1</sup> Public comments on the proposed rules were due on September 24, 2018.<sup>2</sup> Although these proposed regulatory changes are certainly not as sweeping as the ESA modernization legislation that has been introduced in Congress, they are nonetheless significant.

The federal government’s large presence in the West presents unique challenges. This is particularly true with respect to the reach of the ESA. Implementation of the Act impacts the management of land and water throughout the West, including in Idaho. Accordingly, this article focuses on proposed revisions to the regulations that: (1) extend most of the ESA’s prohibitions for activities involving endangered species to threatened species; (2) implement section 7 of the ESA (regarding agency consultation on potential impacts of proposed activities); and (3) implement section 4 of the ESA (regarding species and critical habitat listings).

## Take prohibition for threatened species

The USFWS proposes to revise the regulations that extend most of the prohibitions for activities involving endangered species to threatened species.<sup>3</sup> The proposed regulations would require the USFWS, pursuant

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to section 4(d) of the ESA, to determine whether protective regulations are appropriate for species that the USFWS determines to be threatened. Key among these provisions is the Act’s prohibition against “take” of endangered species, defined as actions “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>4</sup>

The plain language of the Act provides that section 9 take prohibitions only apply to threatened species if determined appropriate, based on a case-by-case review. Section 4(d) provides that “[w]henver any species is listed as a threatened species” the Secretary of the Interior (“Secretary”) may adopt protective regulations to prohibit take of the threatened species. The USFWS’s current “blanket” rule automatically applies the take prohibitions to all threatened species unless decided otherwise. The proposed rule would change that default setting and require a specific determination.

The Act contemplates differentiation between endangered and threatened species due to the immediacy of the threat of extinction. The flexibility built into the Act with respect to threatened species has the

potential to yield net conservation benefits for such species, as practitioners have recognized.<sup>5</sup> While a command-and-control regulatory approach has been deemed necessary for endangered species, such an approach would be employed more sparingly for threatened species under the proposed rule, consistent with Congressional intent.

The proposed rule would also eliminate an inconsistency between the regulations of USFWS and NMFS. Currently, NMFS’s approach affords more flexibility – for species, agencies, and the regulated community – by allowing a case-by-case determination. The proposed rule recognizes that there is no reason the ESA should apply differently to one species than to another based merely on the agency with jurisdiction.

## ESA Section 7: Interagency Cooperation and Consultations

The Services propose to amend portions of regulations that implement section 7 of the ESA. The agencies propose these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent, as described on the following pages.

rights by the federal government's contribution to the GHGs causing climate change, and seek an order requiring the defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excessive atmospheric CO<sub>2</sub> ... to stabilize the climate system and protect the vital resources on which the Plaintiffs now and in the future will depend."<sup>28</sup>

Idahoans deserve no less from our state government.

## Endnotes

1. IPCC special report issued October 8, 2018, "Summary for Policy Makers" - [http://report.ipcc.ch/sr15/pdf/sr15\\_spm\\_final.pdf](http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf).
2. When the Industrial Revolution began around 1750, CO<sub>2</sub> in the atmosphere was approximately 280 ppm (parts per million.) It now measures approximately 410 ppm, an amount not experienced previously by humans. <https://www.noaa.gov/news/carbon-dioxide-levels-breach-another-threshold-at-maunaloa>.
3. Damian Carrington, "Humanity has wiped out 60% of animal populations since 1970, report finds." THE GUARDIAN, Oct. 29, 2018. <https://www.theguardian.com/environment/2018/oct/30/humanity-wiped-out-animals-since-1970-major-report-finds>.
4. Naomi Oreskes & Erik M. Conway, "Fixing the Climate Requires More than Technology," N. Y. TIMES, Oct. 16, 2018. <https://www.roundtheuniverse.com/2018/10/fixing-climate-requires-more-than.html>.
5. Juliet Eilperin et al. "Trump Administration predicts a 7-degree global temperature rise. Its policies assume planet's fate is sealed." CHI. TRIB., Sept. 28, 2018.
6. NASA: Global Climate Change, "Scientific Consensus: Earth's climate is warming," <https://climate.nasa.gov/scientific-consensus/>.
7. <https://www.epa.gov/climate-indicators/greenhouse-gases>.
8. Duncan Clark, "How long do greenhouse gases stay in the air?" THE GUARDIAN, Jan. 16, 2012.
9. *Massachusetts v. EPA*, 549 U.S. 497, was decided in 2007, wherein the Court held *inter alia* that the Clean Air Act authorizes the EPA to regulate GHGs because they qualify as air pollutants.
10. [https://gov.idaho.gov/mediacenter/execorders/eo07/eo\\_2007\\_05.html](https://gov.idaho.gov/mediacenter/execorders/eo07/eo_2007_05.html).
11. [http://www.deq.idaho.gov/media/345475-ghg\\_inventory\\_idaho\\_sp08.pdf](http://www.deq.idaho.gov/media/345475-ghg_inventory_idaho_sp08.pdf).
12. Source: Conversations with DEQ Deputy Director Jess Byrne in early November 2018.
13. [https://oemr.idaho.gov/wp-content/uploads/2016/06/2012\\_idaho\\_energy\\_plan\\_final\\_2.pdf](https://oemr.idaho.gov/wp-content/uploads/2016/06/2012_idaho_energy_plan_final_2.pdf) (hereinafter "IEP").
14. IEP p. 102.
15. IEP p. 126.
16. The list includes: Implementing smart growth policies that promote construction of energy efficient buildings, deployment of fuel-efficient vehicles, and reduced vehicle miles traveled; supporting development of additional low carbon resources such as geothermal, bioelectricity, wind, solar, distributed hydropower, and biomethane; encouraging deployment of geothermal heating and cooling when applicable as an alternative to electricity and natural gas for homes and commercial buildings; promoting resolution of the carbon flux of Idaho's forests, developing quantitative models of forest and agriculture carbon response, and identifying best carbon management practices; and developing additional policy incentives that stimulate builders to build energy efficient buildings, and current owners to conduct efficiency retrofits.
17. IEP pp. 131-132.
18. <https://oemr.idaho.gov/loan-program/>.
19. Idaho Code § 63-3022C(1) allows an individual taxpayer to deduct from taxable income up to \$5k in one taxable year for installation of an "alternative energy device" (wind, solar, geothermal) on a residence; Idaho Code § 63-602JJ exempts from taxation real estate, fixtures, or personal property for certain producers of electricity by means of wind, solar or geothermal energy.
20. Public Utility Regulatory Policies Act, Pub. L. No. 95-617, enacted Nov. 9, 1978 to promote energy conservation and greater use of domestic energy and renewable energy.
21. Robert Walton, "Idaho regulators reduce PURPA contracts from 20 to 2 years," UTILITY DIVE, Aug. 25, 2015, <https://www.utilitydive.com/news/idaho-regulators-reduce-purpa-contracts-from-20-to-2-years/404518/>.
22. Livia Albeck-Ripka, "Idaho Stripped Climate Change from School Guidelines. Now It's a Battle." N.Y. TIMES, Feb. 6, 2018. <https://www.nytimes.com/2018/02/06/climate/idaho-schools-climate-change.html>.
23. David Goins, "Idaho Dems in Forefront in Climate Change Event." IDAHO NEWS SERVICE, Mar. 20, 2017 [https://www.rexburgstandardjournal.com/new/ag\\_biz/idaho-democrats-at-the-forefront-at-climate-change-hearing/article\\_04d33456-0d8e-11e7-a341-f353e77cff99.html](https://www.rexburgstandardjournal.com/new/ag_biz/idaho-democrats-at-the-forefront-at-climate-change-hearing/article_04d33456-0d8e-11e7-a341-f353e77cff99.html).
24. <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/HCR031.pdf>.
25. <http://www.puc.idaho.gov/press/180509%20IPC%20net%20metering.pdf>.
26. <https://insideclimatenews.org/news/14122016/agriculture-methane-emissions-climate-change>.
27. <https://phys.org/news/2017-01-effect-methane-climate-greater-thought.html>.
28. <http://climatecasechart.com/case/juliana-v-united-states/>.

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and the Service (and any applicant) into the resulting initiation package.

**Expedited Consultations.** The Services propose a new provision to streamline consultation, particularly for actions that have minimal adverse effects or predictable effects based on previous consultation experience.

**Reinitiation of Consultation.** The Services propose clarifying that the duty to reinitiate ESA consultation does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy and Management Act of 1976 (“FLPMA”) or National Forest Management Act of 1976 (“NFMA”) when a new species is listed, or new critical habitat is designated. Only affirmative discretionary actions would be subject to reinitiation.

#### **Section 4: Listing species and designating critical habitat**

The Services propose revised regulations to clarify, interpret, and implement portions of the ESA concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

**Economic Impacts.** The Services propose removing the phrase “without reference to possible economic or other impacts of such determination.” Although the listing decisions must be made based “solely on the basis of the best scientific and commercial data available,” the ESA does not prohibit the presentation of information on economic and other impacts to the public. In the past, the agencies have conflated the listing decision (which does not consider economic impacts) and other ESA-related decisions (which may consider economic impacts).

**Determining the “Foreseeable Future.”** The Services propose includ-

ing a framework that sets out how they will determine what constitutes the “foreseeable future” when determining the status of a species. Under the proposed revisions, the term would extend only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable, on a case-by-case basis. The Services will avoid speculating as to what is hypothetically possible.

**Factors Considered in Delisting Species.** The Services propose clarifying that they determine whether a species is threatened or endangered using the same standards regardless of whether a species is or is not listed at the time of that determination. 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 proposed rule seeks to make this clearer.

**Designating Unoccupied Areas.** The Services propose restoring the requirement that the Secretary will first evaluate areas occupied by the species. Under the proposed amendments, the Services could only consider unoccupied areas as critical habitat if occupied areas would: (1) be inadequate to ensure the conservation of the species; or (2) result in less-efficient conservation for the species. Further, the Secretary would also need to conclude that there is a reasonable likelihood that the unoc-

cupied area will contribute to the conservation of the species.

#### **Conclusion**

It will be interesting to see what the Services ultimately decide to adopt in their proposed revisions. Efforts to reform the ESA and its implementing regulations to provide clearer direction to the agencies in applying and enforcing the law will no doubt continue. This federal rule-making is but the latest chapter and one that warrants careful review and consideration by those of us who practice in the arena of environmental and natural resources law.

#### **Endnotes**

1. Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174–35,201 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 17).
2. All comments are available at <http://www.regulations.gov>.
3. For species already listed as a threatened species, the proposed regulations would not alter the applicable prohibitions.
4. 16 U.S.C. § 1532.
5. P. Henson, R. White, & S.P. Thompson, *Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense*, *BioSCIENCE*, Nov. 1, 2018, <https://doi.org/10.1093/biosci/biy093>.
6. 83 Fed. Reg. at 35,182.
7. 16 U.S.C. § 1536(a)(2).

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**Definition of “Destruction or Adverse Modification.”** The Services propose adding the phrase “as a whole” to the definition of “destruction or adverse modification,” as this definition applies to critical habitat designated for listed species. In doing so, the Services explain that it is improper to assert that a species may already be “in a status of being ‘in jeopardy,’ ‘in peril,’ or ‘jeopardized’ by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for ‘jeopardize the continued existence of’ or ‘destruction or adverse modification.’”<sup>6</sup> Such a position seems inconsistent with the plain language of the ESA, which requires a federal agency to insure that “any *action* authorized, funded, or carried out by such agency ... is not likely to *jeopardize* the continued existence of” a listed species (emphasis added).<sup>7</sup>

In applying the revised definition to the designation of areas currently unoccupied by the listed species, the Services propose applying “as a whole” in determining whether unoccupied habitat is “essential to the conservation of the species.” This evaluation must be based on the totality of the circumstances. Under the proposed rule, an adverse modification determination would likely be reserved for those rare circumstances where harm to critical habitat is so extensive that it is likely to lead to the species’ extinction.

**Definition of “Effects of the Action.”** The Services propose requiring that an effect be both “but for” and “reasonably certain to occur.” The Services also propose to consolidate the concepts of direct and indirect effects, and the effects of inter-related and interdependent actions, into the new definition of “effects of the action.” The goal here seems to be helping federal agencies focus on assessing the effects of a proposed action, rather than spending time cat-

egorizing the effects of a proposed action.

**Definition of “Environmental Baseline.”** The Services have identified a potential stand-alone definition of “environmental baseline.” The notice goes further, however, and discusses the issue of ongoing agency activities. The notice invites comment as to whether an alternative amendment of the definition is appropriate. The ESA is a prospective limitation on discretionary federal agency actions. It does not punish

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the federal agency or applicants (or others reliant on the federal agency action) for the mere existence of infrastructure or prior activities. Nor does it require remediation of past impacts or change from already-occurring activities that are not the subject of the consultation.

This definition is particularly important in circumstances where either Service makes a jeopardy (or adverse modification) determination. In such circumstances, the Service is then obliged to propose a reasonable and prudent alternative to the proposed action that it believes is

not likely to jeopardize the species (or result in adverse modification). Absent clear differentiation between the effects of the action and the baseline, the Services cannot fulfill their obligation. Under the proposed rule, pre-existing infrastructure (including the then-present operation of that infrastructure) would likely be considered part of the environmental baseline. This includes the continuing operation of Reclamation water projects, administration of the National Flood Insurance Program, and implementation of resource management plans by the Forest Service, among other activities.

**Definition of “Programmatic Consultation.”** The Services’ proposed definition includes: (1) Programmatic consultations that address multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas (“batched” consultations); and (2) programmatic consultations that address a proposed program, plan, policy, or regulation providing a framework for future actions (e.g., land management plans). By conducting programmatic consultations, the Services can reduce the number of single, project-by-project consultations, streamline the consultation process, and increase predictability and consistency for action agencies.

**Biological Opinions.** The Services propose to be allowed to adopt all or part of a Federal agency’s initiation package in its biological opinion (adoption or incorporation by reference). This is the information from the Federal agency which is necessary to begin the consultation process. It must be provided with sufficient detail to ensure that the Service has enough information to understand the action as proposed. The Services propose a collaborative process to bring the information and expertise of both the federal agency