CRITICAL HABITAT AND THE ENDANGERED SPECIES ACT: NEWLY ENACTED REGULATIONS THREATEN TO EXPAND THE GOVERNMENT'S ROLE AND DISCRETION IN THE PERMITTING PROCESS

Date: 1 March 2016

Environmental, Land and Natural Resources Alert

By: Ankur K. Tohan, Benjamin A. Mayer, James M. Lynch

In the summer of 2014, we reported on the U.S. Fish and Wildlife Service's and the National Marine Fisheries Service's (collectively, the "Services") proposed changes to regulations implementing the Endangered Species Act ("ESA"). As we indicated then, the proposals had the potential to expand the need to consult with the Services under the ESA, thereby making it possibly more difficult, time-consuming, and expensive to obtain permits from federal agencies such as the U.S. Army Corps of Engineers. Among the proposed changes was an amendment to the definition of "destruction or adverse modification" of critical habit.

Not quite two years later, on February 11, 2016, the Services issued a final rule adopting a new definition of "destruction or adverse modification" under the ESA. The new rule takes effect on March 14, 2016. According to the Services, it should not alter the ESA consultation process and does not require the reevaluation of "previously completed biological opinions."[1] As we foreshadowed in summer 2014, however, the new rule could impact the amount and substantive results of future consultations with the Services.

The prior rule defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival *and* recovery of a listed species."[2] Federal courts found this definition set too high a threshold for destruction or modification, i.e., that the definition should include alterations that diminish the value of habitat crucial to the survival *or* recovery of a protected species.[3] As stated by the Ninth Circuit Court of Appeals, "the purpose of establishing critical habitat is for the government to carve out territory that is *not only necessary for the species survival but also essential for the species recovery*."[4] Because the ESA puts an emphasis on the conservation of protected species, courts held that the "survival *and* recovery" language of the prior rule set a higher bar for finding destruction or adverse modification of critical habit than the ESA allowed.

The new rule purports to address the courts' concerns by "align[ing] the regulatory definition of destruction or adverse modification with the conservation purposes of the [ESA] and the [ESA's] definition of critical habitat."[5] According to the Services, it is designed to focus on the role critical habitat plays in the conservation of a protected species and acknowledge that the development of geographic features supports species' recovery.[6] The new definition reads:

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alternations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.[7]

The new rule's focus on conservation potentially gives the Services more leeway in determining whether a project threatens to destroy or adversely modify the critical habitat of a protected species. The shift away from evaluating whether a project poses a threat to both the survival and recovery of a species implies that, under the new rule, the Services will review a project application for threats to survival or recovery. As a result, proposed projects could get tied up in longer, more costly regulatory review processes, where critical habitat has been designated for a listed species. And these reviews could result in more determinations of destruction or adverse modification. It will be important to follow the Services' implementation of the new rule, and how courts interpret it, to fully grasp its impacts. Indeed, industry and environmental groups alike have already indicated they will challenge the rule.

Notes:

[1] 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016).

[2] *Id.* at 7215 (emphasis added).

[3] *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441–43 (5th Cir. 2001); *see also Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004) (finding the definition does not adequately take into consideration the conservation of listed species).

[4] *Gifford Pinochet Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004), *amended on other grounds*, 387 F.3d 968 (9th Cir. 2004) (international quotations omitted) (emphasis added).

[5] 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016) (internal quotations omitted).

[6] *Id.*

[7] *Id.* at 7226 (to be codified at 50 C.F.R. § 402.02).

KEY CONTACTS

ANKUR K. TOHAN
PARTNER

SEATTLE
+1.206.370.7658
ANKUR.TOHAN@KLGATES.COM

BENJAMIN A. MAYER
PARTNER

SEATTLE
+1.206.370.8074
BEN.MAYER@KLGATES.COM

