Critical Habitat and the Endangered Species Act: Proposed Revisions to Fundamental Regulatory Concepts

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On May 12, 2014, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (collectively, the “Services”) issued notices of proposed rules and a proposed policy related to the designation of critical habitat under the Endangered Species Act (“ESA”). If enacted, the proposed rules and draft policy will expand the need to consult with the Services under the ESA, thereby making it potentially more difficult, time consuming, and costly to obtain permits from federal agencies such as the U.S. Army Corps of Engineers (the “Corps”). Some of the more significant proposals include:

• Amending the definition of “destruction or adverse modification” of critical habitat;

• Amending the procedures for designating critical habit; and

• Implementing a policy for determining exclusions from critical habitat.

If enacted, the proposed regulatory revisions and policy interpretations would provide the Services more flexibility and fewer constraints when designating critical habitat.

Comments on the proposed rules and the proposed policy are due October 9, 2014. You can access the proposed rules and policy, as well as instructions for submitting comments on either, by clicking here.

A. Overview of ESA Critical Habitat Designation

The ESA requires the Services to determine whether species are endangered or threatened and to provide those species certain protections.1 For example, when the Services list a species as threatened or endangered, the ESA requires that the Services designate for protection “any habitat of such species which is then considered to be critical habitat.”2

Critical habitat includes specific areas within a species’ range, known as “primary constituent elements,”3 that have “physical [or] biological features that are essential to the conservation of [the] species and that may require special management considerations or protection.”4 The Service’s current regulations expressly provide that critical habitat areas outside the

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3 Note that because the Services propose to define the term “physical or biological features” and because the term “primary constituent elements” does not appear in the ESA, the Services propose to remove the term “primary constituent elements” from the regulations. 79 Fed. Reg. 27066, 27070 (May 12, 2014).
4 50 C.F.R. § 424.12(b).
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geographical area presently occupied by a species may only be designated when the present range of that species would be inadequate to ensure its conservation.5

The ESA requires federal agencies to consult with the Services to ensure that agency actions will not “jeopardize the continued existence of any endangered species or threatened species.”6 In addition, once critical habitat is designated, the ESA requires federal agencies to consult with the Services to determine whether agency actions could destroy or adversely modify that critical habitat.7

For example, if the Corps plans to issue a Clean Water Act (“CWA”) permit to fill a wetland for the construction of an export facility, the ESA requires that the Corps consult with the Services to assess whether the proposed development will jeopardize the existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. If so, the Corps would have to modify its CWA permit to avoid either outcome.8 Depending on the species and habitat involved, revisions to an agency action can be significant—impacting the timing, scope, cost, and configuration of a project. For that reason, avoiding unwarranted determinations of jeopardy and/or adverse modification, e.g., where it is not necessary for the conservation and survival of a species, can be crucial to the success of a project.

B. The Services’ Proposed Revisions

1. Destruction or Adverse Modification

The Services propose to revise the definition of “destruction or adverse modification” of critical habitat. “Destruction of adverse modification” is currently defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”9 An “alteration” includes, but is not limited to, adverse modifications of “any of those physical or biological features that were the basis for determining the habitat to be critical.”10

This definition was held invalid in Sierra Club v. U.S. Fish & Wildlife Service.11 In Sierra Club, the court found that the definition set a higher threshold than the statute permits, i.e., the definition requires consultation “where an action affects the value of critical habitat to both the recovery and survival of a species” as opposed to consultation where an action affects either recovery or survival.12 Under the proposed definition, the Services plan to refocus their consultation obligation to federal actions that “would affect the designated

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5 Id. § 424.12(e).
7 Id. § 1536(a).
8 Id. § 1536(b).
9 50 C.F.R. § 402.02.
10 Id.
11 245 F.3d 434, 441-43 (5th Cir. 2001).
12 Id. at 442; see also Gifford Pinchot 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) (“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”); 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).
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critical habitat’s ability to support recovery of species protected by the ESA.”13 Moreover, under the new definition, the Services put an emphasis on conservation value to a species as opposed to the recovery or survival of a species.

The proposed definition is:

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.14

2. Designating Critical Habitat

The Services also propose changes to the procedures for designating critical habitat. The proposed changes include: (i) revisions to the scope and purpose section of the regulations for critical habitat designation to emphasize species recovery; (ii) revisions to the criteria for designating critical habitat; and (iii) revised definitions for “geographical area occupied by the species,” “physical or biological features,” and “special management considerations or protection.” Some of the more important definitional changes are discussed below.

The term “geographical area occupied by the species” is defined as:

An area which may generally be delineated around species’ occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).15

The ESA defines “critical habitat” as “specific areas within the geographical area occupied by the species” at the time of listing.16 The Services note that critical habitat may be designated or revised years after a species is listed, and that information on a species distribution at the time of listing may be limited.17 Consequently, where changes in a species distribution reflect changes in the quality of the Services’ information a “determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed.”18 Notably, the agency still must base its determination on the “best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”19

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18 Id. (citing Otay Mesa Prop. L.P. v. U.S. Dep’t of Interior, 714 F. Supp. 2d 73 (D.D.C 2010), rev’d on other grounds, 646 F.3d 914 (D.C. Cir. 2011) (noting that a post-listing determination may be based on an understanding of a species’ distribution developed post-listing).
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The Services rely on Arizona Cattle Growers’ Association v. Salazar\(^{20}\) to support their proposal that critical habitat may encompass those “areas used throughout all or part of the species’ life cycle, even if not used on a regular basis.” In Arizona Cattle Growers, the court concluded that the FWS reasonably interpreted the ESA term “occupied” to include areas where a species—the Mexican spotted owl—was likely to be present.\(^ {21}\) Noting the contextual and fact-dependent nature of an “occupied” determination,\(^ {22}\) the court held that the FWS could designate an area as “occupied” based on a species sufficiently regular use of the area—but that the FWS could not designate an area solely based on its suitability for future use.\(^ {23}\) While the proposed rules rely on the holding from Arizona Cattle Growers, the revisions to critical habitat designation potentially push the limits of that holding and the Services’ authority.

The term “physical or biological features” is defined as:

> The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions.\(^ {24}\) Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.\(^ {25}\)

The term “special management considerations or protection” is defined as:

> Methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.\(^ {26}\)

The FWS’s previous position was that special management was only required if current management “was inadequate and that additional special management was needed.”\(^ {27}\) That position was rejected in Center for Biological Diversity v. Norton.\(^ {28}\) Under the proposed rules, the Services clarify that when they make a determination about essential features that may require special management considerations or protection, the Services will not base their decision on whether management is currently in place or whether that management is adequate.\(^ {29}\) In addition, the Services clarify that “it is not necessary that a feature currently

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\(^{20}\) 606 F.3d 1160 (9th Cir. 2010).

\(^{21}\) Id. at 1163.

\(^{22}\) Id. at 1164 (citation omitted). “Relevant factors may include how often the area is used, how the species uses the area, the necessity of the area for the species’ conservation, species characteristics such as degree of mobility or migration, and any other factors that may bear on the inquiry.” Id. at 1164-65.

\(^{23}\) Id. at 1165, 1167.

\(^{24}\) In Cape Hatteras Access Pres. Alliance v. U.S. Dept of Interior, 344 F. Supp. 2d 108, 123 n.4 (D.D.C. 2004), the court rejected FWS’s designation of critical habitat for the wintering piper plover but expressly did “not address whether dynamic land capable of supporting plover habitat can itself be one of the ‘physical or biological features’ essential to conservation.” The Services now propose to include “dynamic habitat conditions” within the definition of “physical or biological features.”


\(^{26}\) Id.

\(^{27}\) Id. at 27070.


\(^{29}\) 79 Fed. Reg. at 27070.
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require special management considerations or protection, only that it may require special management to meet the definition of ‘critical habitat.’\[^{30}\]

3. Implementation of ESA Section 4(b)(2)

Under the Services’ draft policy on how to implement ESA Section 4(b)(2),\[^{31}\] the Services could exclude an area from critical habitat if they determine that the benefits of exclusion outweigh the benefits of critical habitat designation.\[^{32}\] The draft policy elaborates on how the Services would consider private and non-federal conservation agreements, such as partnerships, habitat conservation plans, candidate conservation agreements, and safe harbor agreements, in the critical habitat designation process;\[^{33}\] how critical habitat would be excluded on tribal, military, and federal lands; and how impacts to national security, homeland security, and economic development would affect the critical habitat designation and exclusion process. The Services specify that any decision to exclude an area from critical habitat would remain discretionary.

C. Impacts of the Proposed Rules

There are many potentially significant impacts if the Services adopt the proposed rules. These include:

- A species’ intermittent or seasonal use of an area may be adequate to consider the area occupied;
- Critical habitat could be designated on the basis of the potential for physical or biological features to exist in an area, rather than their actual presence;
- Physical or biological features could be fluid and/or short term;
- The presence of existing management measures in an area would not necessarily exclude that area from designation;
- When evaluating whether a federal action may result in “jeopardy” to a species, the Services could consider long-term impacts of an action on critical habitat and recovery of the species;
- The Services would likely have significant discretion to exclude (or not exclude) areas from critical habitat on a case-by-case basis; and
- A priority to designate critical habitat on federal lands, as the proposed rules establish a presumption against excluding such lands from designation under the ESA.


\[^{33}\] Analyzing how a conservation agreement could impact the Services’ habitat designation and exclusion determinations is a fact-intensive and dependent process. Factors include: (i) how designation could impact the benefits of an agreement; (ii) public participation in an agreement; (iii) agency involvement in an agreement; (iv) an agreement’s compliance with the National Environmental Policy Act; (v) demonstrated implementation and success of an agreement; (vi) how an agreement provides for conservation of a species and its habitat; (vii) the likelihood of agreement implementation; and (viii) how agreement implementation is monitored. See 79 Fed. Reg. 27052, 27054.
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The Services’ proposed revisions would provide the Services greater flexibility in designating critical habitat with the potential to expand the Services’ oversight role for projects that require federal permits and approvals. Notably, if implemented, the revisions would authorize the Services to account for climate change in assessing a habitat’s ability to support species’ recovery. The Services specifically state that “[a]s the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important.”34

The Services have traditionally focused their attention on listing determinations, i.e., decisions about which species should be afforded ESA protection. The emphasis and flexibility described in the proposed rules suggest that the Services will focus greater attention on designating habitat needed to support species’ survival or recovery. The Services also propose to retain wide latitude in determining how to factor in habitat conservation and similar agreements when making critical habitat determinations.

If implemented, we anticipate that the proposed regulations could have significant, though at this time not readily identifiable, economic impacts. The Services note that in making critical habitat designations under the proposed rules they would weigh economic impacts, including benefits of exclusion.35 Importantly, the Services revised the regulations for impact analyses for critical habitat designations in 2013.36 Those regulations require the Services to make available for public comment the draft economic analysis of a proposed critical habitat designation.37 The regulations also require that the Services consider, among other things, probable economic impacts of a proposed designation.38 The proposed rules’ economic impacts will become clearer as the Services start making critical habitat designations under the rules, if enacted, on a case-by-case basis.

It will be important to follow promulgation, implementation, and enforcement of the proposed rules to ensure their compliance with caselaw and the language and intent of the ESA.

Further information on the proposed rules and policy will be provided as the rulemaking progresses.

37 50 C.F.R. § 424.19(a).
38 Id. § 424.19(b).
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