Hogan Lovells

ESA revised regulations: what to expect

September 9, 2019

There has been much coverage and misinformation in the public discourse regarding Interior's recently-announced revisions of regulations to implement the Endangered Species Act (ESA). Doug Wheeler and Hilary Tompkins bring their extensive knowledge as former Interior officials and natural resources practitioners to describe the likely real-world effect of these regulations.

The revised regulations affect three important provisions of the ESA: (1) the statutory distinction between species which are listed as "endangered" or "threatened"; (2) Section 4 procedures for listing and de-listing species, and designation of critical habitat; and (3) Section 7 consultation between the Fish and Wildlife Service (Service or FWS) and federal agencies whose actions might affect listed species and their habitat. Not surprisingly, environmental advocates have already sued the U.S. Department of the Interior and Commerce Department, which share responsibility for administration of the ESA, alleging that the regulatory changes violate the ESA and the National Environmental Policy Act. Below is a summary of these changes and potential implications for the regulated community.

Threatened or Endangered?

Although the statute distinguishes between species which are in danger of extinction ("endangered") and those which are likely to become endangered ("threatened"), the FWS (but not the National Marine Fisheries Service (NMFS)) has long conflated these definitions, applying the same stringent protections to both, such as blanket "take" restrictions under Section 9 of the ESA. In roughly 50 percent of cases, however, the FWS has modified the level of protection for threatened species by providing specific exemptions from these blanket prohibitions under authority of Section 4(d), usually in recognition of prescribed conservation measures. In light of criticism that, by default, the FWS had extended Section 9 prohibitions to all species, whether endangered or threatened, the Agency will now be required – in the first instance – to write tailored protection and recovery plans for threatened species. This change brings FWS' approach in line with the NMFS' existing practice, and arguably reduces its leverage in negotiating the content of future 4(d) rules. It does not affect existing 4(d) rules, or impair FWS' authority to write rigorous 4(d) rules, if circumstances warrant, on a case-by-case basis. The FWS will also now be required to issue any 4(d) rule at the time of listing to ensure timely species protection. One potential positive effect is that contemporaneous prescription of 4(d) rules may expedite the Section 7 consultation process. Consulting parties will have a clear, early understanding of species-specific Section 9 prohibitions and exemptions. Moreover, FWS estimates that only approximately four species will be listed as threatened annually, so the changes will be applicable in only these few instances.

Listing Decisions

A) Consideration of economic or other impacts from listing decisions

While affirming the statutory mandate that listing decisions can be made only in reliance on the "best scientific and commercial data available," the revised regulations no longer require that listing decisions be made "without reference to possible economic or other impacts of such determination." Apparently, the FWS anticipates the occasional preparation of economic impacts analyses, if only because "the Act does not prohibit the Services from compiling economic information or presenting that information to the public." It remains to be seen whether the Services will routinely undertake the costly and time-consuming preparation of such studies, and whether the results of such studies will, in fact, influence the listing process. Since the ESA does not permit reliance on economic impacts in listing decisions, complainants must somehow demonstrate that a given listing decision was influenced by the publication of economic data.

B) Foreseeable Future

The ESA provides that a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Since 2009, Interior has abided by a Solicitor's Opinion which interprets "foreseeable future" to mean that period in which it can be reasonably determined that threats and responses to threats are "likely" to occur. The revised regulations do not depart from this general formulation, except where change is needed to achieve uniformity of language between the Services. The amended definition thus reaffirms Interior's approach of considering a limited time horizon when analyzing the likelihood of foreseeable threats. The key words are "threats," implicating explicit evidence of a threat (as opposed to an unspecified condition), and "likely," which is meant to mean "more likely than not."

Critics will argue that the regulation disfavors the Solicitor's Opinion by imposing a requirement of near-certainty ("likely") in predicting future events, as opposed to dependence on merely reliable evidence. In assessing the future effects of climate change, therefore, it will be necessary to demonstrate the likelihood of impact, and a debilitating response by species to such threats. The Services will continue to make these determinations on a case-by-case basis, guided by the five factors of the ESA. In the event of a legal challenge, the fact the revised regulation largely comports with a prior, long standing Solicitor's Opinion will weigh in Interior's favor.

Designation of Critical Habitat

A) Not Be Prudent to Designate

Under the ESA, the Services may decline to designate critical habitat when designation would not be in the interest of species protection (i.e., directing the Secretary to designate critical habitat for listed species concurrent with listing "to the maximum extent prudent and determinable"). This "not prudent" standard has been typically viewed as applying when the designation would not be beneficial to the species or is otherwise counterproductive. While generally preserving these exceptions, the revised regulation is permissive rather than mandatory, and expands the circumstances under which designation could be excused. These circumstances now include the designation of areas within U.S. jurisdiction that would provide only negligible conservation value to a species that occurs primarily outside the jurisdiction of the United States or where threats to the species stem solely from causes that cannot be addressed by management actions identified through Section 7 consultations.

The FWS notes that it still requires consideration of the applicable science in making a "not prudent" determination and does not broaden FWS' authority to consider factors other than those contemplated by the statute. It also notes that "not prudent" determinations would likely be rare and are distinct from the "exclusion" analysis under Section 4(b)(2), where the FWS can exclude an area from critical habitat when the benefits of exclusion outweigh the benefits of inclusion.

B) Unoccupied Critical Habitat

The FWS also adopted new regulatory language which reflects the Supreme Court's *Weyerhaeuser Co. v. U.S. FWS, 139 S. Ct. 361 (2018)* ruling which limits the designation of unoccupied habitat as critical habitat. Grappling with the essential meaning of "habitat," the FWS now requires that an unoccupied area must be "essential for the conservation of the species," meaning that "there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."
Moreover, the FWS will only designate unoccupied habitat as critical if it determines that occupied critical habitat is inadequate for the conservation of the species and that the addition of unoccupied habitat is necessary for the species' wellbeing. Unoccupied habitat must also be found to possess "one or more of those physical or biological features" which are essential to conservation of the species.

Section 7 Consultation

A) Effects of the action

Under Section 7 of the ESA, an agency must consult with the FWS to determine if its proposed action is likely to either jeopardize the survival and recovery of a listed species or destroy or adversely modify a species' designated critical habitat. In the first instance, this analysis must include an assessment of the proposed action's effects on the listed species or designated habitat. The revisions change the definition of "effects of the action" to include the causal reference to "consequence" and a "but for" connection between the consequence and the proposed action. This revision is intended to clarify the meaning of "effects" and to preclude separate analyses of multiple but unrelated effects and activities (e.g., direct or indirect effect, or interdependent or interrelated activity).
The FWS states that the change is intended to further clarify that "effects of the action" will now include all consequences of a proposed action, including consequences of any ancillary disruption which may be caused by the proposed action. In the FWS' view, a consequence results from the proposed action if (1) it would not occur but for the proposed action and (2) it is reasonably certain to occur (referred to as the "two part" test). The FWS further notes that the effects of the action may occur later in time and may include consequences occurring outside the immediate area of the action. The FWS notes that it has long used these "but for" and "reasonably certain to occur" standards and wants now to provide greater clarity of this practice in its regulations.
The practical result of these revisions may be that fewer projects trigger Section 7 consultation if "effects of the action" appear to be too remote or do not evince a causal connection. An affected agency could more readily conclude that its actions are "not likely to adversely affect" endangered species or their habitat, thus avoiding the necessity of Section 7 consultation. This change also permits the acting agency to exclude from its consideration of effects those impacts which are attributable to non-federal activities, even when associated with a federal project.

B) Commitment to Mitigation

Another amendment by the FWS is viewed as weakening the former requirement that an agency's proposal to minimize the adverse effects of its actions must be certain to occur. While requiring that consideration be given by FWS to such "beneficial actions," the revised regulations do not require "any additional demonstration of binding plans."

C) Ongoing actions part of the baseline

The revisions also conclude that ongoing, mandatory agency actions are part of the "environmental baseline," thereby excluding such projects from the effects analysis for new federal agency actions which are subject to Section 7 consultations. This proposal received criticism that it will excuse from analysis potentially harmful, ongoing actions or slightly modified actions, contrary to the ESA's overarching goals and the requirement of Section 7 consultation on

potentially harmful federal "actions." The FWS responds that this amendment comports with case law (e.g., an existing dam's operations are mandatory and are therefore appropriately considered to be part of the baseline condition).

D) Miscellaneous changes

Other significant revisions include a requirement that destruction or adverse modification of critical habitat be determined by looking at the entirety of affected habitat, i.e., "as a whole," and not segments thereof; that re-initiation of Section 7 consultation need not be required for recent land management plans (created under FLPMA for energy development projects) upon a new listing of species or designation of critical habitat, and that the ESA cannot be read to require an assessment of the "tipping point" beyond which the species cannot recover from any additional adverse effect as part of its Section 7 consultation (i.e., rejecting the notion of "baseline jeopardy.")

CONCLUSION

These revisions are an outgrowth of the current administration's efforts to streamline and deregulate but also contain changes that have been long under consideration at Interior and which are supported by past practice and court decisions. The real test of their validity will occur through the exercise of discretion by administrators in their application and when challenged in the courts. Ultimately, of course, they will be measured against the Act itself, whose language, purpose and effect can be modified only by Congress.

Contacts

Hilary Tompkins
Partner, Washington, D.C.
T +1 202 637 5617
hilary.tompkins@hoganlovells.com

Doug Wheeler
Senior Counsel, Washington, D.C.
T +1 202 637 5556
douglas.wheeler@hoganlovells.com