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Client Alert Commentary

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Agencies Consider 16 Key Reforms to the Endangered Species Act Regulations

FWS and NMFS propose significant changes to the Endangered Species Act regulations as part of the Trump administration's regulatory reform agenda.

Key Points:

The three proposed rules would:

- Amend parts of the Services' regulations implementing Section 7 of the ESA concerning interagency consultations.
- Rescind the FWS' so-called blanket rule, which currently extends regulatory prohibitions under Section 9 of the ESA for endangered species to threatened species.
- Amend certain procedures under Section 4 of the ESA relating to the listing of species and the designation of critical habitat.

Background

The United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) recently announced three related proposed rules that together represent the most significant proposed changes to the Endangered Species Act's (ESA) implementing regulations in nearly 30 years. The Services announced the proposed rules on July 19 in response to the Trump administration's Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which directed federal agencies to identify ways in which to streamline regulatory processes and reduce regulatory burdens.

The proposed rules are certain to be controversial, with some early comments describing these proposals as an attempt by the Trump administration to dismantle species and habitat conservation under the ESA. However, many of these proposed regulatory changes present opportunities to clarify and streamline the Section 7 consultation process for projects requiring federal approvals, as well as to alleviate regulatory restrictions under certain circumstances. Accordingly, these proposed rules are consistent with other actions the Trump administration has taken to streamline and accelerate the federal environmental review and permitting processes for energy and other infrastructure projects, including Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"; Secretarial Order 3355, "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807"; and Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807.

This *Client Alert* discusses 16 key reforms reflected in the proposed rules.

Reforms to Clarify Standards in Section 7 Consultations

Section 7 of the ESA requires federal agencies to consult with the FWS or NMFS regarding any action they authorize, fund, or carry out to ensure that the action "is not likely to jeopardize" the continued existence of threatened or endangered species or "result in the destruction or adverse modification" of designated critical habitat.[1] These actions include permitting infrastructure, energy, and other projects.

The Services' application of certain standards under the ESA during Section 7 consultations has been the subject of controversy and litigation. These issues include the extent to which the Services engage in "speculation" (or stray from their statutory or regulatory authority) when making "may affect," jeopardy, and adverse modification determinations. These proposed changes would clarify and arguably narrow the scope of the effects analysis.

The most significant of these proposals include:

1. **Simplifying the definition of "effects of the action."** The proposed rule seeks to simplify the definition of "effects of the action" by clarifying and consolidating some categories of effects — such as "direct" and "indirect effects", and by eliminating others — such as "interrelated" or "independent" activities — that are present in the current regulations.[2] The proposed rule would capture "all" effects of an agency action, and would clarify that both of the following two tests must be satisfied:

   - The effect would not occur "but for" the proposed action.
   - The effect is "reasonably certain to occur."[3]

   The Services' intent is to "increase consistency and avoid confusion and speculation" by applying the same causation standard to all potential effects of the proposed agency action, including regardless of whether the potential effect is adverse or beneficial.[4] Notably, the proposed rule includes a new section that expressly underscores that activities "cannot be speculative," listing factors for consideration in making that determination.[5]

2. **Seeking comment on the definitions of "environmental baseline" and "ongoing actions."** The proposed rule would simply move the definition of environmental baseline to a stand-alone definition without change. However, in the preamble, the Services specifically ask for comment on a new definition of environmental baseline that expressly includes "past, present and ongoing impacts of all past and ongoing" Federal, State, or private actions, along with a new definition of "ongoing".[6] Under the logical outgrowth doctrine, the Services may adopt these provisions or similar requirements in a final rule. These proposals presumably act in concert to address certain court cases, including those related to ongoing actions that the agencies have lost, as discussed immediately below.

3. **Clarifying application of the term "appreciably" in evaluating effects.** The rule's preamble clarifies that the Services apply the term "appreciably" in evaluating both whether an action might jeopardize the continued existence of a species (appreciably reduce) or cause the destruction or adverse modification of critical habitat (appreciably diminish). Moreover, impacts of the agency action must be appreciable even "where a species already faces severe threats prior to the action."[7] This has been a key issue in a number of recent court cases, including those related to ongoing actions. For example, the Ninth Circuit Court of Appeals has found against the FWS and held that, if baseline conditions are such that the species already faces severe threats, an agency may not take any action

that could cause additional harm.[8] The Services take the opportunity in the proposed rule preamble to state that jeopardy and destruction or adverse modification determinations "are made about the effects of the Federal agency actions" and are "not determinations made about the environmental baseline."[9] Thus, actions that lessen impacts to listed species would not be viewed as causing jeopardy, even if ongoing conditions are severe.

4. **Defining the "destruction or adverse modification" of critical habitat to mean "as a whole."** The proposed rule would revise the definition of destruction or adverse modification to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole*" (emphasis added). The rule would also eliminate language adopted in 2016 focused on alterations to physical or biological features essential to species conservation or that preclude or significantly delay development of these features (and which could be arguably found in smaller areas).[10] This change is intended to clarify that the Services' destruction or adverse modification determinations must be made "at the scale of the entire critical habitat designation."[11] The proposed rule's preamble explains that "[e]ven if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced."[12]

5. **Clarifying that "specific binding plans" for mitigation measures are not required in biological opinions.** In response to judicial decisions, the proposed rule includes a new provision providing that measures taken to avoid, minimize, or offset the effects of an action "do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources."[13] The Services state that judicial decisions have created confusion regarding the level of certainty required before a Service can consider these measures in a biological opinion.[14] Instead, the Services state that their role is to assume that the action will be implemented as proposed, and to analyze the effects of the action on listed species and designated critical habitat.[15] If the measures are not implemented, this would result in changed circumstances possibly requiring reinitiation of consultation.[16]

6. **Creating an exception regarding reinitiation of consultation for land management plans.** The Services propose to carve out an exception to the rule for reinitiating consultation, if a new species is listed or new critical habitat is designated, for approved land management plans under the Federal Land Policy and Management Act or the National Forest Management Act.[17] This exception appears to have been proposed in light of limited administrative resources to codify existing agency practice that occurs in certain cases. The Services note that land use plans are periodically updated (*e.g.*, every 15 years and sometimes longer), and that site-specific actions are required to undergo consultation.[18] Bureau of Land Management and US Forest Service actions, however, must be consistent with their land use plans, and the practical effect could limit opportunities for tiering programmatic biological opinions to site-specific actions and other streamlining.

Reforms to Streamline the Section 7 Consultation Process

The proposed rule includes a number of changes to the Section 7 consultation process that are designed to help streamline ESA consultations and provide opportunities to save time in the permitting of projects. These proposals would provide project proponents with additional options to work with the Services to meaningfully improve and expedite the Section 7 consultation process and timelines.

The proposals include:

7. **Defining "programmatic consultations."** The proposed rule would introduce a definition for programmatic consultations, which the Services believe can "reduce the number of single, project-by-

project consultations, streamline the consultation process, and increase predictability and consistency for action agencies."[19] The Services suggest that programmatic consultations can be used more frequently to cover multiple similar, frequently occurring, or routine actions as "batched" consultations and provide frameworks for future actions that can be tiered for specific permits.[20] These provisions codify long-existing practice.

8. **Allowing "expedited consultations."** The Services propose a new optional provision allowing for expedited consultations for "actions that have minimal adverse effects or predictable effects based on previous consultation experience." These actions include "projects with a potentially broad range of effects that are known and predictable, but that are unlikely to cause jeopardy or destruction or adverse modification,"[21] such as conservation actions with beneficial actions.[22] The provision also includes regulatory language to complete consultations within agreed-upon timeframes — a sore spot for any project proponent with Section 7 experience.[23]

9. **Precluding the need for consultation in certain situations.** The proposed rule preamble seeks comment on whether to revise the rules to preclude the need to consult if a federal agency does not anticipate take and the action will:

   - Not affect a listed species or critical habitat,

   - Have effects that are "manifested through global processes" that cannot be reliably predicted or measured at the species scale, or the impact or risk of harm to a listed species or critical habitat is small or remote, or

   - Result in effects on species or habitat that are wholly beneficial or not capable of being measured in a meaningful way.[24]

   While the first proposal is already well recognized in the Services' Section 7 Handbook and federal case law, the latter two proposals are new. If a final rule adopts the latter two scenarios, the Services would not need to consult under those circumstances, thereby providing action agencies with a greater role.

10. **Seeking comment on limiting consultations based on jurisdictional area.** The preamble also seeks comment on whether consultations should be limited to those activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.[25] This reflects the typical "small handle" issues common in US Army Corps of Engineers consultations — a desire on the part of action agencies to keep consultations and subsequent enforcement oversight narrow. This type of approach, however, can limit flexibility to obtain Section 7 coverage in certain areas. Moreover, in some situations this approach may require a project proponent to undergo multiple ESA processes unnecessarily, defeating streamlining goals.

11. **Streamlining, "adoption," and "substitution" of "initiation packages" for formal consultations and biological opinions.** In the proposed rule's preamble, the Services observe that "valuable time is lost due to lack of clarity in what information the Services need to initiate consultation," which has led to "inefficiencies" and "frustration."[26] Accordingly, the Services propose revising the regulations to clarify the information to be included in initiation packages and expand the use of other documents as initiation packages, such as documents prepared under the National Environmental Policy Act (NEPA) and grant or permit applications.[27] The proposed rule also would provide the Services with specific authority to adopt a federal agency's initiation package or the Services' analyses related to a

Section 10(a) incidental take permit in their biological opinions. The Services would also have specific authority to substitute NEPA or other reports for the initiation package.[28]

Species-Specific Protections for Threatened Species

12. **Withdrawing automatic protections for threatened species.** Under the FWS' proposed revision to its Section 4(d) regulations, FWS would withdraw its "blanket rule" that automatically extends Section 9 statutory take prohibitions for endangered species to threatened species.[29] This change would align the FWS' regulatory approach to threatened species with that of NMFS, and would apply only prospectively to new listings.[30] Under the revision, the FWS would determine, on a case-by-case basis, "what, if any, protective regulations are appropriate" for threatened species under Rule 4(d).[31] Importantly, unless the FWS issues a Section 4(d) rule establishing protections necessary for the conservation of the species at the time of a threatened listing (including a down listing), no Section 9 take prohibitions or other non-statutory protections will apply with respect to the newly listed, threatened species until a rule is issued.[32] While the implications of this potential regulatory change will be the subject of a great deal of commentary, the proposed rule is intended to encourage the FWS to design tailored conservation programs addressing the threats specific to a threatened species, rather than relying on default prohibitions under Section 9.

Reforms to the Species Listing and Critical Habitat Designation Processes

The Services propose a number of reforms to the processes under Section 4 for listing species and designating critical habitat, some of which became immediately controversial. The most significant of these changes include:

13. **Limiting the consideration of unoccupied areas.** The rule proposes restoring the pre-2016 requirement that the Services "first evaluate areas occupied by the species" when designating critical habitat," and to consider unoccupied areas only when the unoccupied areas are essential because either:

    - Occupied areas are inadequate to ensure the conservation of the species, or
    - The result would be a less efficient conservation of the species.[33]

    The designation of unoccupied areas as critical habitat has been a contentious issue. Notably, a case challenging the FWS' designation of critical habitat on private land in the historically occupied range of the endangered dusky gopher frog is currently before the US Supreme Court and set for argument on October 1, 2018.[34]

14. **Allowing references to economic impact analysis in listing determinations.** While the Services would continue to make listing determinations based "solely on biological considerations" as required by the ESA, the Services propose revising their regulations to allow *referencing* "economic, or other impacts" that may be "informative to the public."[35] This proposal may add to the public's understanding of the potential effects of a listing as a regulatory action. However, the proposal already has become a lightning rod for opposition from environmental groups because it remains unclear how the Services would prevent economic impact analyses from influencing listing determinations — an express prohibition in the statute.

15. **Limiting the Services' analysis of threatened status to the "foreseeable future."** The rule proposes a regulatory framework through which the Services would analyze whether a species

qualifies as threatened because the species likely will become endangered "within the foreseeable future."[36] Under this framework, "foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction ... are probable."[37] This framework is intended to limit the Services to extending the foreseeable future only so far as they can depend on available data to formulate a reliable prediction while avoiding "speculation and preconception."[38]

16. **Establishing circumstances in which designating a critical habitat is "not prudent."** The Services propose revising the regulations to set forth a "non-exhaustive list" of circumstances in which the agencies may find it is "not prudent to designate critical habitat."[39] These circumstances would include instances in which no areas meet the definition of critical habitat. The list would also include instances in which critical habitat under the jurisdiction of the United States would provide negligible conservation value for a species that primarily occurs outside of the United States.[40]

    The not prudent criteria that may provide the Services with the most ability to avoid critical habitat designations is the "lack of habitat-based threats to the species."[41] The preamble of the proposed rule discusses examples in which the lack of habitat-based threats might mean a critical habitat designation is not prudent. These examples include when the species is threatened primarily by disease, but its habitat remains intact; or when threats stem from climate-related effects such as "melting glaciers, sea-level rise, or reduced snowpack" because critical habitat designation cannot affect those conditions.[42]

Next Steps

Each of these proposed rules is subject to a 60-day comment period that currently closes on September 24, 2018. Comments can be submitted via:

- The Federal eRulemaking Portal, by searching FWS–HQ–ES–2018–0006
- Mail, by sending hard copies to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0006; US Fish & Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910

After the public comment period closes, the Services will review the comments before issuing any final rules. Lawyers in Latham & Watkins' Environment, Land & Resources Department will continue to track and report back on the implementation of the revised rules.

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Endnotes

1 16 U.S.C. § 1536(a).

2 Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178, 35,183 (proposed Jul. 25, 2018) (to be codified at 50 C.F.R. pt. 402); *see also* 83 Fed. Reg. at 35,191 (revised § 402.02).

3 *Id*.

4 *Id*. at 35,183.

5 *Id*. at 35,193.

6 *Id*. at 35,184; *see also id*. at 35,191 (revised § 402.02).

7 *Id*. at 35,182.

8 83 Fed. Reg. at 35,182 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017)).

9 *Id*. at 35,182.

[10] *Id*. at 35,180; *see also id*. at 35,191 (revised § 402.02).

[11] *Id*. at 35,180-35,181.

[12] *Id*. at 35,181.

[13] *Id*. at 35,192 (revised § 402.14(g)(8)).

[14] 83 Fed. Reg. at 35,187.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 35,189; *see also id*. at 35,193 (revised § 402.16).

[18] *Id*.

[19] *Id*. at 35,179; *see also id*. at 35,191-35,192 (revised § 402.02).

[20] 83 Fed. Reg. at 35,185.

[21] *Id*. at 35,188; *see also id*. at 35,192-35,193 (revised § 402.14(l)).

[22] *Id*.

[23] *Id*.

[24] *Id*. at 35,185.

[25] *Id*.

[26] 83 Fed. Reg. at 35,186.

[27] *Id*.

[28] *Id*. at 35,187.

[29] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174, 35175 (proposed Jul. 25, 2018) (to be codified at 50 C.F.R. pt. 17); *see also* 83 Fed. Reg. at 35177-35178 (revised §§ 17.31, 17.71).

[30] *Id*. at 35,175.

[31] *Id*. at 35,174.

[32] *Id*. at 35,175.

[33] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193, 35,198 (proposed Jul. 25, 2018) (to be codified at 50 C.F.R. pt. 424); *see also* 83 Fed. Reg. at 35,201 (revised § 424.12).

[34] Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., No. 17-71.

[35] 83 Fed. Reg. at 35,194; *see also* 83 Fed. Reg. at 35,200 (revised § 424.11(b)).

[36] *Id*. at 35,195.

[37] *Id*.

[38] *Id*. at 35,195-35,196.

[39] *Id*. at 35,196-35,197.

[40] *Id*. at 35,197; *see also id*. at 35,201 (revised § 424.12).

[41] 83 Fed. Reg. at 35,197.

[42] *Id*.