

U.S. Fish and Wildlife Service proposes significant reform to regulations implementing the Endangered Species Act

25 July 2018

Today, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) proposed in the *Federal Register* the first major regulatory reforms to the Endangered Species Act (ESA or Act) under the Trump administration. Specifically, in three proposed rules first announced last Thursday (Proposed Rules), the Services unveiled a suite of revisions to the procedures and parameters for listing species as threatened or endangered, for designating critical habitat and the procedures for inter-agency (Section 7) consultation, among others. Publication of the Proposed Rules starts a 60-day public comment period ending on September 24, 2018. Below are four of the most important, and potentially controversial, components of the Proposed Rules:

1. Consideration of economic impacts in listing decisions. The ESA requires that the Services make listing decisions based “solely” on the “best scientific and commercial data” related to the status of the species. As a result, the Services do not consider economic factors—such as the cost of lost development opportunity, loss of property value, or expense of mitigation—when making decisions whether to list a species as threatened or endangered. The Proposed Rules, however, would allow the Services to include in listing decisions a recitation of economic data which may—in the judgment of the Services—be of interest to the public. The proposal notes that biological considerations will remain the sole basis for listing determinations.

2. Definition of “Foreseeable Future” in listing decisions. The ESA defines a “threatened species” as “any species which is likely to become endangered within the *foreseeable future* throughout all or a significant portion of its range.” The Services do not currently define the term “foreseeable future.” There has been much debate about the meaning of “foreseeable,” including whether climate change is a valid part of the equation. The proposed definition will limit the Services’ consideration to a time horizon in which the Services can “reasonably determine” “probable” threats to the species. Consequently, the Services could be expected to focus on impacts which can be reliably predicted when making listing decisions.

3. Distinction between endangered and threatened species. Perhaps the most fundamental change contained in the Proposed Rules affects the Services' treatment of threatened species under the Act. The ESA does not impose specific prohibitions to protect *threatened* species, as in the case of *endangered* species, such as an absolute prohibition against "take." Rather, the Secretary is authorized to "issue such regulations as he deems necessary and advisable for the conservation of such species." Nonetheless, the Services have adopted as their "default" under section 4(d) the same suite of prohibitions as are applicable to endangered species. Although such rules are sometimes modified to reflect particular circumstances, the blanket prohibitions are thought by some to be overly broad. The proposed rule would accordingly reverse this blanket application of endangered species prohibitions, and instead, authorize the treatment of threatened species on a case-by-case basis. This approach is consistent with the National Marine Fisheries Service's historic interpretation of the Act.

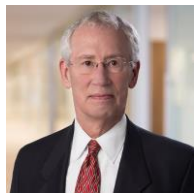
4. Designation of critical habitat. Another significant revision contained in the Proposed Rules relates to the procedures and parameters for designating critical habitat under the Act. For each species listed as threatened or endangered under the ESA, the Services must identify that habitat which is essential to the species' survival, unless they determine that a critical habitat designation is not "prudent." Critical habitat may consist both of that which is occupied by the target species and that which is unoccupied. In the Proposed Rules, the Services propose to narrow the opportunity for designation of unoccupied habitat by specifying a suite of factors to be considered, including whether such habitat is essential to a species' survival. Notably, the extent of the Services' authority to designate unoccupied critical habitat is also at issue in a Supreme Court case set to be argued next term, which we previously discussed [here](#).

In addition to the four major revisions described above, the Services' Proposed Rules contain a number of other modifications that also warrant consideration and the submission of comment during the 60-day review period. We strongly encourage affected stakeholders to review each of these and to submit comments for the record in support of their positions.

ESA legislative proposals

These proposed regulatory revisions come on the heels of a number of legislative proposals which are currently under consideration by Congress. Most notable among these is the recent discussion draft introduced by Wyoming Senator John Barrasso, the "Endangered Species Act Amendments of 2018." The bill would reauthorize the Act for the first time since 1992 and also effect a number of reforms aimed at modernizing the Act, with a particular focus on an expansion of states' roles. Sen. Barrasso worked with the Western Governors' Association (WGA) in drafting the bill and it is largely premised on policy recommendations derived from the WGA's recent "Species Conservation and Endangered Species Act Initiative." Our team played an active role in the non-partisan WGA initiative and you can find a description of those efforts [here](#). Accordingly, we are well suited to help with efforts related to this and other pending legislative efforts related to ESA reform.

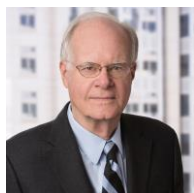
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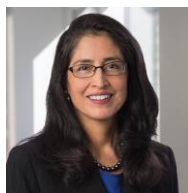
Jim Banks
Partner, Washington, D.C.
T +1 202 637 5802
james.banks@hoganlovells.com



Jennifer Biever
Partner, Denver
T +1 303 454 2410
jennifer.biever@hoganlovells.com



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



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



Dale Ratliff
Associate, Denver
T +1 303 454 2477
dale.ratliff@hoganlovells.com

www.hoganlovells.com

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