



## DOI Proposed Regulations Changes to the Endangered Species Act Brief Summary

[Revision of the Regulations for Listing Species and Designating Critical Habitat](#) Docket Number: FWS-HQ-ES-2018-0006

[Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants](#) Docket Number: FWS-HQ-ES-2018-0007

[Revision of Regulations for Interagency Cooperation](#) – Docket Number: FWS-HQ-ES-2018-0009

### **Overview**

- Bias listing decisions with unreliable economic analyses
- Make it much more difficult to protect species impacted by climate change
- Make it more difficult to list a new species and easier to remove those now on the list
- Make it harder to designate critical habitat for threatened and endangered wildlife
- Reduce protections for threatened species
- Reduce voluntary conservation incentives
- Make it more difficult to protect critical habitat
- Weaken the consultation process

### **Listing Species and Designating Critical Habitat**

- This rule proposes changes to the regulations promulgated to carry out Section 4 of the Endangered Species Act, which details listing, critical habitat, and recovery.
- It would remove the phrase, “without reference to possible economic or other impacts” for listing determinations. The Act dictates that listing be decided on science alone. *This change encourages the services to do economic analyses at the time of listing, which would easily allow economic considerations to cloud listing decisions.* Economic analyses can have a very broad range (e.g., from zero to tens of millions of dollars). Therefore, they can be misleading and uninformative, serving only the purpose of increasing the controversy surrounding the listing. Furthermore, there is nothing that currently prevents the services from producing an economic analysis at any point; the new language is not needed.
- *The new rule seeks to define “foreseeable future” in such a way that that climate change could be virtually exempted from threatened listing and critical habitat decisions.* The Act itself does not define “foreseeable future.” The new rule would add the word “probable” to the services’ current regulatory definition of “foreseeable future,” as set out in a solicitor’s opinion in 2015. The word “probable” however is not defined and provides the services with much leeway to ignore climate change impacts.

- The new rule would essentially decouple delisting from the recovery plan, stating that the recovery plan could be used for predictions on species recovery. *The goals in the recovery plan would not need to be met before delisting occurs.* Despite claims that changes are to better recover species, nothing was done to make recovery plans timelier for species. Species with recovery plans tend to recover at a faster pace than those without.
- *The new rule reduces critical habitat by carving out climate change threats to critical habitat.* For instance, if a species is reliant on habitat that is solely under threat from climate change impacts due to melting glaciers, sea level rise, or reduced snowpack, then services would deem it “not prudent” to designate it as critical habitat. Clearly, however, the habitat should be protected as critical habitat, as long as it exists, to give species time to expand their range to safer habitat.
- *The new rule would limit the services’ discretion in designating critical habitat in areas not already occupied by an endangered species.* This rule would set new bars for designating unoccupied habitat as critical. As species are driven toward threatened and endangered status, they become extinct in areas of their historic habitat. Some declines are happening so rapidly that from the time a species is petitioned for listing to the time that a listing occurs, it could be wiped out from an entire state. If implemented, this proposed rule would make it quite possible that whole states that had recently had populations would be carved out for newly listed species that are undergoing significant and fast-paced declines. For instance, the Rusty patched bumblebee was last seen in Virginia in 2015. Furthermore, designating unoccupied habitat as critical habitat might be imperative for species suffering from climate change impacts. Placing restrictions on the services in designating unoccupied habitat as critical habitat will make it more difficult to recover species in the way that Congress envisioned.

#### **Threatened Species: Section 4 (d)**

- This rule seeks to amend the regulations that implement Section 4 (d) of the Endangered Species Act, which details protections for threatened species. The Act does not expressly prohibit the “take” (“... harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct”) of threatened species. Instead, it directs the Secretary to “issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”
- Currently, under FWS regulations, threatened species receive a blanket 4 (d) rule—they automatically receive the same protections as an endangered species, which prevents “take.” The services may currently lower that protection, entirely at their discretion. *The new regulation rescinds the blanket 4 (d) rule that protects threatened species from take. It essentially allows the services to treat threatened species like candidate species, i.e., they would receive no protections until a 4 (d) rule was issued.* Up until a 4 (d) rule is issued for a threatened species, there could even be a hunting season on that species.

- NMFS sometimes issues individual 4 (d) rules on its own initiative. NMFS oversees only a small fraction of the number of species that FWS oversees. Even so there can be a significant lag time between the listing of a species and the issuance of a 4 (d) rule, because the act does not mandate a timeline. For instance, corals and ice seals were listed six years ago and still do not have 4 (d) rules.
- *A private party will not need a Habitat Conservation Plan under Section 10. There will be no incentive to do voluntary conservation.* In fact, a private landowner could exterminate the species from his/her lands in an effort to eliminate the prospect of one day having an endangered species on his/her lands.
- *The practical result of this new regulation will be that fewer species will receive adequate and timely protections.* The FWS listing budget has a cap. Every rule takes time and funds. Now FWS will be required to follow two steps in order to issue two rules: a listing rule and a 4d rule, meaning fewer species will be listed each year, causing more extinctions.
- Where listing a species could have potential political ramifications, *FWS would be incentivized to list the species as threatened instead of endangered.* Court challenges over whether species are listed as threatened versus endangered are difficult—given the wide discretion that court’s give to the agencies. So FWS can simply list a species, but do nothing to protect it rather than be challenged in court for not listing it at all. The Northern Long Eared Bat is an example of a controversial species that was proposed for listing as endangered, but then was listed as threatened in the final rule.

#### **Interagency Cooperation: Section 7**

- Section 7 of the Act requires agencies to consult with FWS and NMFS before carrying any action that could jeopardize the existence of a threatened or endangered species or that would result in the destruction or adverse modification of the critical habitat of the species. It is the primary way through which the Act is implemented; yet the proposed regulations greatly weaken the consultation process and the designation of critical habitat.
- The services already cut out much habitat when designating “critical habitat.” Even so the services very rarely find that another agency’s actions will adversely modify the habitat.
- Yet, *the proposed rule would ignore impacts to a species’ critical habitat unless it essentially impacts the species’ entire habitat, which would lead to a death by a thousand cuts for the species.* It does this by redefining “adverse modification” to include the phrase “as a whole.” Under the new regulations, the services would allow actions to go forward even if they jeopardize a population unit of the species, as long as that one action wouldn’t impact the species “as a whole.” This will not protect the species, *because the services do not keep a running tally of the “take” that is allowed.*

*They do not look at the cumulative impact of separate actions on a single species.* Therefore, a species could be easily driven much closer to extinction under this new proposal. For instance, the vernal pool fairy shrimp has 600,000 acres of designated critical habitat. But some population units cover as little as 14 acres. Whole units could be wiped out under this new definition. When NMFS consults on sea turtles, they can have nine separate biological opinions on nine separate fisheries decisions happening at once, but they will not look at the aggregated effects of those. *It is very possible that “adverse modification” would not be found until it is potentially too late to save a species.*

- *The proposed rules would also limit consultations* by eliminating and narrowing the agency actions that must undergo consultation. The rule seeks comment on a) excluding the effects of *all ongoing federal activities from consultation*, b) preventing consultation on any effects that are “manifested through global processes,” and c) restricting consultation to the activities within a federal agency’s regulatory authority.
- “Global processes” includes climate change, *so climate change impacts would no longer be subject to consultation.*
- Any project requires some development and currently the project’s overall impacts are included in the consultation. *The new rule would allow the agency to ignore all of the immediate and surrounding impacts of a project.* For instance, the Forest Service would only need to consult on the logging itself, not the impact of the construction of a new road or the increased number of trucks on a road. These types of impacts can be significant. In the case of the Florida panther, for instance, car and truck collisions are their primary threat.