

## Proposed Changes to Endangered Species Act Regulations

By: Kenneth J. Warren, *The Legal Intelligencer*

On July 25, the U.S. Fish and Wildlife Service (FWS) published several proposed amendments to its regulations implementing the Endangered Species Act (ESA). Some of these changes, if adopted, would make it easier for public and private projects to proceed notwithstanding the risks they pose to endangered and threatened species. FWS is accepting comments on its proposed amendments until Sept. 24.

To place these proposals in context, some background is helpful. Congress enacted the ESA in 1973 to conserve endangered and threatened species and the ecosystems upon which they depend, and to satisfy certain treaties and conventions. An endangered species is any species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Section 9 of the ESA declares it unlawful for any person to harass, harm or kill (termed “take”) any endangered species of fish or wildlife. But the prohibition in Section 9 of the ESA by its terms applies only to endangered species. Threatened species are separately addressed in Section 4(d) of the ESA which requires the secretary of the interior or the secretary of commerce (for marine species) to issue such regulations as it deems necessary and advisable to provide for the conservation of threatened species. The FWS and the National Marine Fisheries Service (NMFS) issue these regulations pursuant to their delegated authorities.

But until now, the distinction between endangered and threatened species under the jurisdiction of the FWS has not been consequential. Under regulations adopted by the FWS, the prohibitions against taking endangered species apply equally to taking threatened species, except in those few instances where the FWS has adopted a species-specific regulations, see 50 C.F.R. 17.21 (wildlife) and 17.71 (plants).

If the proposed regulatory changes are adopted, Section 9’s prohibitions on takings would no longer apply to threatened species. Instead, when in the future species are listed as threatened, limitations on taking these species would be governed only by species-specific rules. The FWS has stated that it intends to issue these rules at the time it lists the species as threatened, and has requested comment on whether a binding regulatory requirement to that effect is needed.

The FWS explains that this change would align FWS regulations with current regulations of the NMFS and tailor protections to the conservation needs of the species. But under current regulations, the FWS retains and at times has exercised its authority to adopt a species-specific regulation. The existing regulation extending Section 9’s prohibitions to threatened species affords FWS the time to gather the data and evaluate the science to determine whether developing a species-specific regulation is appropriate. Revoking the existing regulation would increase the risk that a species listed in the future as threatened would not be adequately protected, or that its listing as a threatened species would be delayed while the FWS develops a species-specific regulation.

The proposed regulations would also alter implementation of Section 7 of the ESA. This section requires each federal agency, in consultation with the FWS or NMFS, to ensure that any action that the agency authorizes, funds or carries out is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. After consultation, the services may issue an incidental take statement identifying reasonable and prudent measures to minimize impact to endangered or threatened species. Any take incidental to the agency action is lawful if the agency implements these measures.

In 2016, the services defined destruction or adverse modification to include: “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” The proposed rule would add the phrase “as a whole” following “critical habitat” to focus the scale of the analysis on the entire critical habitat.

While not a new concept, this proposed change highlights that a development project that eliminates portions of a listed species’ critical habitat in a given geographic area may be allowed, as long as the FWS concludes that the conservation value of the critical habitat as a whole is not appreciably diminished. The proposed emphasis on habitat “as a whole” may signal a willingness to allow more projects modifying portions of critical habitat to proceed. This message conflicts with Congress’ decision to give endangered species priority over federal agency actions.

Critical habitat may include the areas currently occupied by a listed species and unoccupied areas that are essential for its conservation. The services state that in determining whether alterations to unoccupied habitat will appreciably diminish its value, the reasons why the habitat is essential for the conservation of the species should be examined. While this principle is sensible in concept, no guidance is offered on whether and how to consider unoccupied habitat that is likely to become critical to the survival and recovery of a species in light of changing climate conditions.

The proposed regulations also reject case law holding that when a species is already in jeopardy or peril before a federal agency action occurs, any additional adverse impacts from the agency action necessarily may jeopardize the continued existence of the species, or destroy or adversely modify its critical habitat. Instead, the services would not treat these hazardous baseline conditions as conclusive evidence that an action causing additional adverse effects is unlawful. But the services’ proposed approach creates confusion by failing to describe the circumstances under which an action causing further adverse effects would be permissible.

The proposed regulations also address the necessary causal connection between the proposed agency action and its effect on listed species or critical habitat. Under the proposed rule, the only “effects of the action” examined by the services will be those that satisfy two criteria—they would not have occurred “but for” the proposed action and they are reasonably certain to occur. This standard would apply to both the direct and indirect effects of the action.

The services suggest that this causal requirement would eliminate consideration of speculative effects. But the existence of some scientific uncertainties often does not mean that a predicted effect is speculative. This issue arises frequently in litigation where a party’s expert must testify “to a reasonable degree of scientific certainty.” If the services require this degree of rigor, in

many instances the services will disregard effects that in practice will prevent a species' recovery or survival.

The proposed rules include various provisions to increase the efficiency of the ESA's implementation, such as the opportunity for programmatic consultations with the services to address an entire proposed program, plan, policy or regulation, and for expedited consultations and prompt informal consultations. If properly implemented, these are positive proposals.

Although the proposed rules will purportedly be implemented through use of sound science, they fail to account for a significant body of scientific work. Most scientists agree that much of the peril faced by many species today results from habitat modifications caused by climate change. How to utilize the tools the ESA affords to conserve species and protect critical habitat in the face of changing conditions is a key challenge. Yet neither the proposed regulations themselves, nor the FWS's explanation of them, recognizes and confronts this elephant in the room.

For example, fortifying barriers to designating currently unoccupied areas as critical habitat seems more suitable to an era where conditions were stationary. Today, species migrate to new locations due to changing conditions in their historic habitats. Affording protections to these new habitats may be critical to the conservation of the species. Modernizing ESA regulations without accounting for climate change ignores the best scientific predictions of the future needs of endangered and threatened species. How we implement the ESA will be one test of our nation's commitment to biodiversity and preservation of the natural world in the face of a changing climate.

**Kenneth J. Warren** is a founding partner of Warren Environmental Counsel and has been practicing environmental law for more than 35 years. He is a former chair of the American Bar Association section of environment, energy and resources, where he led the section's 10,000 members. Contact him at [kwarren@warrenenvcounsel.com](mailto:kwarren@warrenenvcounsel.com).

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