

Reprising the First Trump Administration's Endangered Species Regulations

By Kenneth J. Warren*

Congress enacted the Endangered Species Act (ESA) to conserve endangered and threatened species and the ecosystems upon which they depend. The ESA process involves listing a species as endangered or threatened based upon its risk of extinction and designating its critical habitat. Thereafter, no person may take (harm) a listed species, and no federal agency may take actions that would jeopardize a listed species or adversely modify its critical habitat.

The ESA delegates the task of administering the statute to two administrative agencies. The U.S. Fish and Wildlife Service (FWS) has authority over terrestrial and freshwater listed species and the National Marine Fisheries Service (NMFS, and collectively the Services) maintains jurisdiction over most marine and anadromous species. To date, the Services have extended the ESA's protections to almost 1700 domestic species and several hundred foreign species.

The Services' regulations have vacillated based on the policies of the Administration in power. In 2019, the first Trump Administration issued modified regulations bending the ESA in favor of economic interests by limiting situations in which the Services would list species and designate their critical habitat. The Biden Administration reversed many of these changes. Most recently, on November 21, 2025, the Trump Administration published four proposed rules designed to reinstate most of the 2019 regulations with certain clarifications. The Services are accepting comments until December 22, 2025 on their respective proposals.

Interagency Cooperation: Section 7 Consultations

Section 7 of the ESA requires each federal agency to consult with the Services to ensure that the agency's actions would not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its designated critical habitat. In one of their jointly proposed regulations, the Services advocate limiting the scope of cognizable harm.

Under the Services' proposal, non-discretionary actions would not be considered regardless of the harm they may cause to listed species and their critical habitat. Instead, the environmental baseline reflecting the current condition of the species and its critical habitat would include those activities or facilities over which the agency has no discretion.

In addition, the Services would limit their consideration to the effects of the proposed agency action that are "reasonably certain to occur," a standard not appearing in the ESA. Temporal and geographic remoteness, a complex causal chain, or the inability of the agency to prevent the effect may exclude it from being considered. Significantly, a demonstration that an effect is reasonably certain to occur must be supported by "clear and substantial information, using the best scientific and commercial data available." Although the proposal asserts that adding the requirement to use "clear and substantial information" is not in conflict with the ESA's standard of "best scientific and commercial data available," the proposed standard would prohibit consideration of some data upon which scientists commonly rely.

Regulations for Listing Species and Designating their Critical Habitat

The Services also jointly propose restricting how they list species and designate their critical habitat. The regulation would no longer mandate listing "without reference to possible economic or other impacts of such determination." This phrase currently ensures that only

biological impacts, not economic impacts, are considered during a listing determination. The Services deletion of this language raises the possibility that the Services will consider the economic effects of listing, a factor which seems precluded by the ESA.

In addition, the proposal would restrict listing of a threatened species, *i.e.*, species likely to become endangered in the foreseeable future. The Services would consider the “foreseeable future” to be the period in which both the future threats and the species’ responses to those threats are likely. In the guise of defining the timeframe for review, this change has the potential to require reevaluation of the condition of the species.

The ESA further requires the Services to designate critical habitat concurrently with the listing determination “to the maximum extent prudent and determinable.” The proposal would expand the enumerated circumstances under which the Services may find designating critical habitat to not be “prudent.” For example, the proposal would reinstate the provision of the 2019 rule stating that designation of critical habitat may not be prudent when the only threats to the habitat arise from causes that an agency cannot address by management actions identified in a Section 7 consultation. This may be read to exclude the effects of climate change which is having a dramatic effect on species and their habitats.

The Services’ proposal also limits the circumstances in which habitat not currently occupied by a species will be classified as critical habitat. The proposal would reinstate the 2019 two-step process by which the Services will first designate critical habitat occupied by the species at the time of listing. The Services would next evaluate and potentially designate unoccupied areas as critical habitat only where occupied areas alone are inadequate to ensure the conservation of the species.

Even then, an unoccupied area will be deemed essential only if the Services determine both that there is reasonable certainty 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. Overall, these restrictions on critical habitat designation may seriously impair conservation efforts.

Critical Habitat Exclusions

Pursuant to section 4(b)(2) of the ESA, the FWS may exclude an area from critical habitat if the benefits of excluding the area outweigh the benefits of designating it as critical habitat, provided that the exclusion will not result in the extinction of the species. Economic impact and effect on national security as among the statutory factors the FWS may consider when performing this exclusion analysis.

Under the proposal, a proponent of an exclusion need only present “credible information” to trigger an economic analysis. In response to this information, or at its initiative, FWS would evaluate economic impacts of potential critical habitat designation such as productivity, employment, and opportunity costs. Administrative costs such as those associated with the Section 7 consultation process, the costs of project modifications necessary to avoid destruction or adverse modification of critical habitat, project opportunity costs, public health and safety, community interests and the environment would also be considered. If the “benefits” of excluding an area from critical habitat designation outweigh the conservation benefits of including it, FWS may exclude the area unless doing so would result in the species’ extinction. Likewise, areas with conservation plans or conservation agreements and partnerships may be excluded from critical habitat designation if the benefits of exclusion outweigh the conservation benefits of designation.

Protections for Threatened Species

The prohibitions in Section 9 of the ESA provide powerful tools for protecting endangered species. Most prominent of these protections is the prohibition on the take of an endangered species, including any act that may harm the species. For threatened species, section 4(d) of the ESA requires the FWS to issue regulations that FWS deems “necessary and advisable” for the protection of threatened species, which may include Section 9 protections.

FWS’ current blanket 4(d) rule automatically affords newly listed threatened species the same protection as Section 9 gives to listed endangered species. FWS proposes replacing the blanket coverage for threatened species with a requirement for a species-specific assessment. This assessment would consider both economic and conservation impacts as “necessary and advisable” considerations. In practice, a newly designated threatened species would be excluded from Section 9 coverage unless and until FWS makes a species-specific determination requiring such coverage. Viewed cumulatively, the Services’ proposed changes would elevate consideration of economic impacts, reduce ESA protection for species and their ecosystems, and make conservation of endangered and threatened species more challenging.

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