

**JULY 30, 2018**

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Trump Administration Solicits Comment on Proposed Endangered Species Act Reforms

On July 25, 2018, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration (the “Services”) published three proposed rules to reform implementation of the Endangered Species Act.¹ The publication opens a 60-day comment period ending September 24, 2018. The proposed reforms merit serious attention from companies affected by the Endangered Species Act, including but not limited to those in the energy, transportation, water, infrastructure, and land development sectors.

The July 25 *Federal Register* includes three separate notices for three separate proposed rules. One proposes to reform the interagency consultation process under Section 7 of the Act, which is a significant source of delay for many federal permits. Another seeks to clarify the criteria for listing and delisting protected species and for designating critical habitat. The third would remove default protections now afforded “threatened” species regulated by the U.S. Fish and Wildlife Service, which currently receive the same level of protection as “endangered” species.

All three proposals have generated wide-spread coverage and controversy, but they should be viewed by stakeholders as a serious effort to enact long-sought reforms that can be accomplished by rulemaking. In addition to soliciting comment on the specific proposed rules, the *Federal Register* notices also invite stakeholders to suggest other potential reforms. Companies potentially affected by the Endangered Species Act are thus advised to evaluate the proposed reforms, and either support them or propose alternatives.

Section 7 Reforms. The proposed Section 7 consultation reforms include:

- Clarifying that “baseline jeopardy” is not a bar to federal action. The preamble notes that “baseline jeopardy” is not a concept recognized by the Endangered Species Act. Therefore, federal actions that affect species already in peril may *still* proceed, so long as the proposed federal action does not “appreciably reduce” the species’ chances of survival.



- Revising the definition of “*effects of the action*” and providing a new definition of the “*environmental baseline*.” These are key concepts that stakeholders argue have been misinterpreted by many courts, causing significant problems for project proponents.
- Revising the definition of “destruction or adverse modification” of critical habitat to clarify that effects to critical habitat must be evaluated at the scale of the entire area designated as critical habitat, thus emphasizing that adverse *local* effects to critical habitat may be permissible if they do not appreciably diminish the value of the critical habitat as a whole.
- Streamlining the consultation process by clarifying and adding to the circumstances in which consultation is not required. For example, the proposal suggests agencies should **not** be required to consult on actions whose effects on listed species will be “manifested through global processes and cannot be reliably predicted or measured at the scale of a listed species’ current range,” or where the potential harm is removed.
- Adding a 60-day deadline for any “informal consultations,” subject to extension by mutual consent.
- Creating a new “expedited consultation” procedure for actions with minimal or predictable adverse effects.
- Expediting all consultations (including expedited consultations, informal consultations, and formal consultations) by clarifying roles, procedures, and requirements.

Listing and Critical Habitat Reforms. Changes to the rules governing listing and delisting decisions and the designation of critical habitat include:

- Deleting regulatory language requiring that listing decisions be made “without reference to possible economic or other impacts.” Contrary to what has been reported by some media outlets, the proposed change would not affect the criteria for listing decisions—which must by statute be based solely on ecological criteria—but would allow the Services to “refer to” economic impacts for information only.
- Establishing a framework to define the “*foreseeable future*” for purposes of determining if species are “likely to become endangered within the foreseeable future,” which is the listing criterion for “threatened” species.
- Clarifying that the decision criteria for listing decisions are the same as those for delisting decisions, and thus that a species should be delisted if the listing criteria are not currently met. This is a significant clarification that may inspire numerous delisting petitions.
- Clarifying the procedures and criteria for including unoccupied areas in a designation of critical habitat.

Reduced Protection for Threatened Species. Finally, the Services propose to eliminate the U.S. Fish and Wildlife Service’s current practice of automatically extending statutory protections for “endangered species” (including the “take” prohibition) to “threatened species.” Rather than extending such protections by default, as under the current rule, the proposed rule would provide for species-specific protections to be developed for newly-designated threatened species at the time of listing. Protections applicable to threatened species that have already been listed would not be affected.

The proposals include more than can be summarized in this alert. Clients interested in learning more, in evaluating and commenting on these proposals, or in developing and proposing alternatives, are invited to contact any of the attorneys listed on the first page of this alert, who have extensive experience with the Endangered Species Act from a litigation, project planning, and permitting perspective, and who also assist clients in the legislative and rulemaking process.



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¹ See U.S. Fish and Wildlife Serv. and Nat'l Oceanic and Atmospheric Admin., Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018); U.S. Fish and Wildlife Serv., Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018); U.S. Fish and Wildlife Serv. and Nat'l Oceanic and Atmospheric Admin., Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018).