



Climate Change to Impact the ESA Consultation Process

By: [Julia Jones](#)

The short-lived Endangered Species Act (“ESA”) consultation regulation issued by the Bush Administration in December 2008 will be revoked by May 10, 2009. This rule briefly streamlined the ESA consultation process for federal agencies authorizing, funding, conducting or permitting projects. On April 28, 2009, the Secretary of Commerce Gary Locke and the Secretary of the Interior Ken Salazar jointly announced the withdrawal of this rule, known as the “Consultation Rule.”

For a brief period, the Consultation Rule eliminated the need under certain circumstances to have concurrence by the Fish and Wildlife Service (“FWS”) or the National Oceanic and Atmospheric Administration (“NOAA”) that a particular project was not likely to adversely affect species or designated critical habitat. During the rulemaking process, the FWS emphasized that greenhouse gas emissions would not trigger the consultation requirement. This no longer holds true, and we can expect to see climate change play a role in ESA consultation on a going-forward basis. As soon as the Consultation Rule is officially rescinded, the ESA consultation process will revert to the prior regulations, and the FWS and NOAA will again review decisions by agencies regarding the effects of projects on ESA species, and these reviews will likely include climate change.



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