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Energy in the Law

FWS Proposes to Expand its Critical Habitat Designation Authority

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Recent notices regarding the U.S. Fish and Wildlife Service's (FWS) process for designating critical habitat stand to broaden FWS's reach and irreparably change the way the agency determines what lands constitute critical habitat for a threatened or endangered species pursuant to the Endangered Species Act. These proposed changes could adversely affect industry's access to occupied *and unoccupied* habitat for threatened or endangered species on federal and private lands.

FWS's unstated goals with these proposals are to provide FWS with regulatory authority to reduce the ability for private, local and state entities to receive exemptions from critical habitat designations, re-define the term "adverse modification," and revise the process and factors for designation of critical habitat. Ultimately, the FWS proposals, if finalized as proposed, will significantly reduce industry's ability to develop its mineral interests.

FWS proposes to broaden its reach by expanding its authority to designate critical habitat through a draft policy and two proposed federal rulemakings:

- Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 79 Fed. Reg. 27051 (May 12, 2014) (available [here](#));
- Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27060 (May 12, 2014) (available [here](#)); and
- Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27066 (May 12, 2014) (available [here](#)).

The draft policy proposes to severely reduce the ability for private, local and state entities to receive exemptions from critical habitat designations based on a new framework for making such determinations. What is proposed as a clarification will, in practice, introduce additional obstacles for state, local and private entities to receive exclusions from critical habitat designation where general conservation measures are already in place.

FWS proposes to re-define the term “adverse modification,” broadening its interpretation to include a recovery function in addition to an existing jeopardy analysis. The notice proposes to allow an adverse modification determination where an action delays development or restoration of physical or biological features that could lead to recovery of the species.

FWS also proposes to revise the factors it considers in determining what lands are designated as critical habitat. Instead of limiting such designation to occupied habitat necessary for the species survival, FWS’s proposed rulemaking intends to lower the standard for designation of unoccupied habitat. As a basis for decision-making, FWS proposes that unoccupied habitat should only need to have potential to support the species at a future time.

Throughout the three notices, FWS makes clear that it is shifting from a jeopardy consideration to a recovery standard when designating critical habitat. These proposed rules and policy should not be disregarded by industry as they will have far-reaching impacts on operations throughout the West.

These proposals should be considered together, and must be responded to by industry, either individually or through coalitions. Comments are due July 11, 2014.

For further information on the FWS proposals, please contact [Theresa Sauer](#).

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