



Critical Habitat Rules Expand FWS Reach over Public and Private Habitat

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On February 11, 2016, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) issued two final rules and a final policy modifying the way the Services address critical habitat under the Endangered Species Act (ESA). These significant and far-reaching final rules expand critical habitat designations and restrict activities in critical habitat areas.

Specifically, the rules revise the definition of “destruction or adverse modification” of critical habitat and amend regulations governing the designation of critical habitat under Section 4 of the ESA. The policy gives guidance on exclusions from critical habitat.

Definition of Destruction or Adverse Modification of Critical Habitat

The first rule revises the definition of ‘destruction or adverse modification,’ a term not defined in the ESA but defined through rules promulgated by the FWS. Under the ESA, federal actions, including permitting and leasing decisions relating to oil and gas development, require “consultation” with FWS or NMFS on the effects of the proposed federal action on threatened and endangered species as well as designated critical habitat. A key element of this consultation is whether the proposed action will result in the destruction or adverse modification of designated critical habitat.

The new rule expands the type of activities that rise to the level of destruction or adverse modification. As described in the preamble of the proposed rule, critical habitat can be designated in areas where physical or biological features may not be present or are present in sub-optimal quality or quantity, can be unoccupied habitat, or can be an area that has the potential to develop and eventually support physical and biological features needed for conservation and recovery of a listed species. 79 Fed. Reg. 27060, 27061 (proposed May 12, 2014) (to be codified at 50 C.F.R. pt. 402). Any action that precludes or significantly delays the habitat regeneration or natural successional processes to the extent it appreciably diminishes the conservation value of critical habitat constitutes ‘destruction or adverse modification.’ *Id.*

The FWS abandoned its previous definition of “destruction or adverse modification” after the Fifth Circuit found the definition exceeded the FWS’s discretion and the Ninth Circuit found portions of the definition to be invalid. *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

In an attempt to address the courts’ rulings and create a definition that aligns with the conservation purposes of the ESA, the new rule defines “destruction or adverse modification” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alternations may include, but are not limited to, those that alter the physical or biological features deemed essential to the conservation of a species or that preclude or significantly delay development of such features.” 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 402). As stated above, this new definition will expand the range of activities that fall under “destructive and adverse modification” and will allow the Service to have more discretion in its consultations.

Designation of Critical Habitat

The second rule amends the regulations governing the designation of critical habitat under the ESA. The most significant changes include the addition of two new definitions for terms found within the ESA’s definition of critical habitat: “geographical area occupied by the species” and “physical or biological features.” Notably, these definitions allow designation of critical habitat even if they are only used for a portion of the species’ life cycle.

Both definitions allow the Services to designate large areas as critical habitat and significantly expand the type of areas that can be designated at critical habitat. For example, if an area does not contain suitable vegetation but could have such vegetation again in the future, the Services can still conclude that essential physical or biological features exist in the area based on this potential. 81 Fed. Reg. 7414, 7431 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424).

In the new rule, “geographical area occupied by the species” is defined as “the geographical area which may generally be delineated around the species’ occurrences, as determined by the Secretary (i.e. range). Such areas may include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis (e.g. migratory corridors, seasonal habitats, and habitats used periodically but not solely by vagrant individuals).” 81 Fed. Reg. at 7429.

This definition allows the FWS to designate as critical habitat areas that are not regularly occupied by a listed species but rather used periodically throughout the life cycle of the species.

The second definition found within the second rule is for “physical or biological features” which is defined as “the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geologic features, sites, prey, vegetation, symbiotic

species, and other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.” 81 Fed. Reg. at 7430. The Services state the purpose of the new definition is to clarify that biological and physical features can support the occurrence of ephemeral or dynamic habitat conditions.

Exclusions from Critical Habitat Designation

The policy issued by the Services gives guidance on what areas to exclude from critical habitat designation under section 4(b)(2) of the ESA. Notably, under the final policy, the Services will consider areas covered by a candidate conservation agreement (CCA), safe harbor agreement (SHA), or habitat conservation plan (HCP) and will generally exclude such areas if three conditions are met: (1) the agreement is properly implemented by the permittee and will continue to be properly implemented for the term of the agreement, (2) the HCP, SHA, or CCA covers the species for which critical habitat is being designated or is similar in its habitat requirements to a covered species, and (3) the species’ habitat is specifically addressed in the conservation agreement and meets the conservation needs of the species. 81 Fed. Reg. 7226, 7230 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424). However, if a CCA, SHA, or HCP is still under development, the area covered by the agreement will not be excluded from a designation of critical habitat. *Id.* Under this provision, conservation plans will be considered on a case by case basis by the Service, and if found to meet the conditions above, the areas covered by the plans may be excluded from critical habitat designation.

For more information on the final critical habitat rules and policy just released, please contact [Theresa Sauer](#).