



Changes on the Horizon for U.S. Fish & Wildlife Service's Regulations on Take of Threatened Species

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On Monday, April 2, 2018, multiple news outlets reported that the U.S. Fish and Wildlife Service (FWS) submitted a proposal to change its existing policy regarding the prohibition on take for species listed as threatened under the Endangered Species Act (ESA). The proposed policy would mark a change in FWS rules and policy providing a blanket prohibition on take of most threatened species under FWS jurisdiction. Under the proposed rule blanket application of the take prohibition would not apply to newly-listed threatened species, although those species listed prior to the effective date of a final rule would retain protection under the blanket prohibition on take of threatened species.

Section 9 of the ESA prohibits take of species of wildlife listed as endangered. In 1978, FWS promulgated a regulation, currently at 50 C.F.R. § 17.31, automatically extending the take prohibition to most species of wildlife listed as threatened. A similar regulation extended this blanket prohibition to plant species listed as threatened, making threatened plant species automatically subject to the same protections as endangered plant species unless a species-specific rule is adopted. See 50 C.F.R. § 17.71. The automatic prohibition on take of threatened species and plants applies unless FWS issues a species-specific take regulation under ESA Section 4(d) (4(d) Rule), thereby allowing some level of take without separate authorization under ESA Sections 7 or 10.

As currently proposed, the change to FWS regulations would more closely align the FWS's practice for establishing protections for threatened species with those of the National Marine Fisheries Service (NMFS), which has jurisdiction over the ESA for certain marine and freshwater species, including certain anadromous fish species. NMFS's practice is to propose a 4(d) Rule with each decision to list a species as threatened. NMFS, however, has not issued a 4(d) Rule for the lone ESA-listed marine plant species within NMFS

jurisdiction, Johnson's seagrass (*Halophila johnsonii*).

While some wildlife species within FWS jurisdiction do have species-specific 4(d) Rules, which are reflected in 50 C.F.R. Part 17, Subpart D, this change would require that FWS adopt a species-specific 4(d) Rule for *all* newly-listed threatened species. As the proposed changes to sections 17.31 and 17.71 would apply only to future listings, they would not impact the protections for currently-listed threatened species for which there is no 4(d) Rule. The most notable impact of the proposed changes would likely be on plant species listed as threatened because there are currently no species-specific 4(d) Rules for threatened plant species within FWS jurisdiction. Similarly, there are no 4(d) Rules for threatened plant species under NMFS jurisdiction, although NMFS regularly adopts 4(d) Rules for non-plant species at the time of listing. FWS has demonstrated its ability to promulgate 4(d) Rules with respect to wildlife species that are ESA-listed, but has never done so for a plant species.

In the draft rule, FWS proposes to remove all references to specific exceptions to the blanket 4(d) Rule currently found at 50 C.F.R. § 17.31 and the provisions currently found in § 17.71. Additionally, the proposed revisions would streamline the language regarding 4(d) Rules, and would make non-substantive changes to existing 4(d) Rules to mirror changes to sections 17.31 and 17.71.

FWS's shift from a blanket 4(d) Rule for threatened species to a case-by-case, species-specific determination is similar to the proposal made by the Pacific Legal Foundation and Washington Cattlemen's Association in an August 2016 petition. Environmental groups have expressed concern over the anticipated reversal of the blanket 4(d) Rule; however, the FWS has attempted to assuage concerns. In a statement on April 4, 2018, a FWS spokesman clarified that the anticipated rule is intended to improve implementation of the ESA and to improve consistency of regulations between FWS and NMFS, is not intended to impact any existing listing, delisting, or reclassification determinations, and is not intended to require that existing species-specific protections be reevaluated. Going forward, should this rule become final, any FWS decision to list a threatened species will need to provide a species-specific 4(d) Rule, or there will be no take prohibitions that apply to the species. FWS can also opt to adopt new species-specific 4(d) Rules for species that are currently listed as threatened, as it has previously done for at least two species (the coastal California gnatcatcher and the Kentucky arrow darter), although the currently-proposed rule would not require FWS to do so.

The White House and the Office of Information and Regulatory Affairs are currently reviewing the FWS proposal. It is expected that the Proposed Rule will be published in the Federal Register in the next 30 days