



Proposed Critical Habitat Rules Expand Reach of Critical Habitat Protections Under the Endangered Species Act

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On May 12, 2014, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service proposed two important new rules (50 CFR Part 402 and 50 CFR Part 424) implementing the critical habitat provisions of the Endangered Species Act (ESA). The proposed rules expand the regulatory definition of "critical habitat" and "adverse modification" – key ESA terms governing federal agency actions on tens of millions of acres of public and private land throughout the nation. The federal wildlife agencies also proposed a new policy governing the exclusion of areas from critical habitat based on economic and other impacts. Collectively, the proposed rules and policy constitute the most significant regulatory interpretations of the ESA in the last two decades. They will almost certainly trigger significant public controversy.

With limited exceptions, the ESA requires the wildlife agencies to designate critical habitat for every threatened and endangered species. The ESA prohibits federal agency actions that "adversely modify" critical habitat. 16 U.S.C. § 1536(a)(2). The ESA also requires the wildlife agencies to weigh and balance the economic and other impacts of designating critical habitat and authorizes the exclusion of areas from critical habitat based on these impacts. 16 U.S.C. § 1533(b)(2). The critical habitat provisions of the ESA have stimulated a tsunami of litigation by the environmental and regulated communities resulting in the reevaluation of dozens of critical habitat designations.

Important components of the proposed rules include the following:

1. Elimination of restrictions on the designation of critical habitat in areas that are not occupied by the species;
2. Broad discretion to designate critical habitat in degraded and sub-optimal habitat areas and in areas that do not presently contain features essential to the conservation of the species;

3. Interpretation of "adverse modification" to include actions that affect the value of critical habitat for the recovery of the species;
4. Interpretation of "adverse modification" to include activities that significantly delay habitat features supporting recovery of the species; and
5. Establishment of an "adverse modification" standard based on impacts to the conservation value of the critical habitat areas as a whole.

The proposed policy describes an approach for excluding areas from critical habitat based on economic and other impacts. Congress amended the ESA in 1978 to authorize the agencies to exclude areas from critical habitat "if the benefits of . . . exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). Since 1978, the agencies' policy governing the use of the exclusion authority has varied widely. For many years the U.S. Fish and Wildlife Service (Service) routinely excluded tribal lands and areas within approved habitat conservation plans (HCPs), candidate conservation agreements and safe harbor agreements from critical habitat. In recent years, however, the Service has designated critical habitat on tribal lands and within areas with approved HCPs and other conservation agreements.

While the proposed new policy reserves significant discretion to the agencies to determine whether to include or exclude tribal lands and HCP areas from the designation of critical habitat, it also states that the agencies will give "great weight" to tribal concerns and will "generally" exclude HCP and other similar conservation agreements that meet identified criteria.

The public comment period on the proposed rules and policy closes on July 11, 2014.