Endangered Species Act: U.S. Fish & Wildlife Service Finalizes Rule to Rescind Revisions for Designating and Excluding Critical Habitat



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On Thursday July 21, 2022, the U.S. Fish & Wildlife Service (the Service) finalized a rule rescinding revisions to the Service's regulations for excluding areas of critical habitat under section 4(b)(2) of the Endangered Species Act. 87 Fed. Reg. 43,433 (July 21, 2022). The rule rescinding the amendments becomes final and effective on August 22, 2022.

We previously reported on the Service's revisions to the designation of critical habitat and, specifically, the exclusions under 4(b)(2), as published 85 Fed. Reg. 82,376 (Dec. 18, 2020). A link to the prior post on the rulemaking can be found HERE.

Background

A keystone element of the Service's protection of threatened or endangered species under the ESA is the designation, conservation, and protection of "critical habitat." Section 3(5)(A) of the ESA defines "critical habitat" to include:

1. the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
2. specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A); see also, 50 CFR 424.12.

When listing a species as endangered, the Service must also designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact" of designating an area as habitat. 16 U.S.C. § 1533(b)(2). Once designated as critical habitat, an area is protected from Federal actions that would result in the "destruction" or "adverse modification" of the critical habitat. 16 U.S.C. § 1536.

The Service may, however, "exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it]

determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concern." 16 U.S.C. § 1533(b)(2).

In December 2020, the Service finalized revisions to the regulations implementing Section 4(b)(2) of the ESA, specifically the portions that (i) describe the Service's analysis of a potential designation's economic impacts, impacts on national security, and any other relevant impacts; (ii) clarify the Service's discretion and basis for entering into an exclusion analysis; and (iii) outline the process and documentation for excluding areas of critical habitat.

Rescinding the Rule Changes

On January 20, 2021, President Biden issued Executive Order (E.O.) 13990, requiring a review of all Federal regulations and actions taken by the previous executive administration. This included the Service's 2020 changes to the way section 4(b)(2) of the Act was implemented. On October 27, 2021, following a review of the changes to section 4(b)(2), the Service published a proposal to rescind the December rule changes. See 86 Fed. Reg. 59,346 (Oct. 27, 2021). The Service received nearly 29,000 public comment submissions by the time the comment period, extended twice, closed in mid-December 2021.

On July 21st the Service finalized its proposal to rescind the amendments. The Service articulated three distinct reasons for rescinding the 2020 revisions:

First, the 2020 change potentially "limits or undermines the Service's role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations." 87 Fed. Reg. at 43,435.

Second, the 2020 change "decreas[es] the agency's ability to further the conservation of endangered and threatened species through designation of habitat" by implementing a rigid framework "in all situations regardless of the specific facts." *Id.*

Third, the Service found the 2020 change would "not accomplish the goal of providing clarity and transparency." *Id.*

To sum up, the Service determined that existing policy and regulations "already provided sufficient detail regarding analyses [they] undertake when considering and conducting exclusions" and, therefore, "concluded that the [2020 change] was unnecessary and that it increased confusion and decreased clarity." *Id*. at 43,436

The Service will now revert to and apply prospectively the "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act" and the regulations at 50 CF.R. 424.19. *Id.*

A copy of the final rule rescinding the 2020 revisions to the designation and exclusion of critical habitat can be found HERE.