Holland & Hart

Murray Feldman

Partner
208.383.3921
Boise
mfeldman@hollandhart.com

Sandra Snodgrass

Partner
303.295.8326
Denver
ssnodgrass@hollandhart.com

Federal Wildlife Agencies Finalize Revisions to Critical Habitat Rules

Insight — February 11, 2016

On February 11, 2016, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the "Services") published in the Federal Register two rules and a final policy implementing the critical habitat provisions in the Endangered Species Act (the "ESA"). The first rule revises the definition of the term "critical habitat" and the process for designating critical habitat. The second rule redefines the phrase "destruction or adverse modification" in response to court rulings. The policy explains the process by which the Services may exclude critical habitat from designation.

These changes effectively expand the types of habitat that may be designated as critical and may increase the likelihood of the Services concluding that a proposed action will destroy or adversely modify that habitat. As a result, they may impact natural resources projects and stakeholders interested in activities that may affect designated or proposed critical habitat. Section 7 of the ESA prohibits federal agencies from engaging in activities—including permitting, licensing, and funding—that are likely to destroy or adversely modify critical habitat.[1] The Services have designated critical habitat for almost half of the more than 1,500 listed species, already covering millions of acres of private and public land.[2] In coming years, the Services will continue with the designation process for many of the remaining and newly listed species for which such designation is prudent, which will likely further limit the use and development of natural resources. These new rules will shape that process.

Designating Critical Habitat

The ESA defines "critical habitat" as "areas within the geographical area occupied by the species, at the time it is listed . . . 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," as well as areas outside this occupied area that are determined by the Secretaries to be "essential for the conservation of the species."[3]

One of the most significant changes the Services made to the rule involves the designation of areas unoccupied by the species as critical habitat. Under earlier regulations, the Services only considered designating "areas outside this occupied area" if a designation of occupied habitat would be inadequate for species' conservation.[4] Under the new rule, the Services abandon this requirement as "unnecessary and unintentionally limiting."[5] Now, all that is required is that the unoccupied area be "essential" to the species' conservation. [6]

The Services suggest that this change will allow them to more efficiently and effectively identify valuable critical habitat and to "develop more precise designations."[7] That said, it also seems possible that, by eliminating this requirement, the Services will now have greater discretion to designate larger areas of unoccupied land as critical habitat.

In the new rule, the Services also define for the first time the phrase "geographical area occupied by the species." It is "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 individuals)." [8]

Notably, this definition includes areas where a species is not continuously found, so long as there is "evidence of regular periodic use" during the species' life history.[9] As a result, the area occupied by the species is the "broader, coarser-scale area that encompasses the occurrences."[10] The Services will rely on the best available science to determine occupancy, including indirect or circumstantial evidence.[11] Additionally, under the rule, when the Services make critical habitat determinations after listing, the Services can utilize information acquired since the listing decision, so long as this information indicates whether the habitat was actually occupied at that time.[12]

The Services also define the phrase "physical or biological features" for the first time to mean "the features that support the life-history needs of the species," which might include water characteristics, geological features, prey, and vegetation.[13] The definition may include "characteristics that support ephemeral or dynamic habitat conditions."[14] Thus, habitat may be designated as critical even if it only possesses the requisite features periodically or if there is a "reasonable expectation" that such characteristics will exist again in the future.[15] Similarly, degraded habitat might be designated as critical if it has at least one qualifying feature.[16]

The Services made minor changes to the term "special management considerations or protections," specifying that the Services will independently evaluate whether physical or biological features require special management even if that area is already under some kind of management, such as a federal land management plan, special area designation, or habitat conservation plan for non-federal land.[17] The Services will presume that special management is necessary where significant habitat threats were the reason for a listing decision.[18]

Redefining "Destruction or Adverse Modification"

The second rule redefines the term "destruction or adverse modification" to incorporate the ESA's broader conservation concept, according to the Services. Section 7(a)(2) of the ESA requires federal agencies to ensure that federal actions are not likely to "result in the destruction or adverse modification" of critical habitat of species listed as endangered or threatened.[19] The Services previously defined the term "destruction or adverse modification" to mean alteration, direct or indirect, that

"appreciably diminishes the values of critical habitat for both the survival and recovery of a listed species."[20] Under this earlier definition, a destruction or adverse modification only arose if an action impacted both the recovery and the survival of the species.

The Fifth and Ninth Circuit Courts of Appeals invalidated this definition as inconsistent with the statute.[21] The ESA defines critical habitat as that habitat essential for the conservation of the species, and the courts interpreted "conservation," based on the term's statutory definition in the ESA, as encompassing both survival and recovery.[22] Because under the prior regulatory definition the Services would only determine that an action's effects were likely to destroy or adversely modify critical habitat if they appreciably diminished the value of the habitat for both survival and recovery, the courts held that the term allowed for more destruction or adverse modification than the statute permitted. Instead, the ESA proscribes actions that appreciably diminish the value of critical habitat for either the species' survival or recovery.

The new rule redefines the term "destruction or adverse modification" to mean a "direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." [23] Absent from the new definition are the terms "survival" or "recovery." Instead, the Services uses the broader term "conservation" to capture both of those concepts, as the prior Fifth and Ninth Circuit decisions held that it did.

Notably, the Services recognize that critical habitat may include already-degraded habitat that has the potential to support recovery of listed species if developed and improved and that such degraded habitat will generally be considered destroyed or adversely modified if an action "alters it to prevent it from improving over time relative to its pre-action condition."[24] This new approach to considering delayed development of habitat features appears to expand the instances in which the Services may make a finding of destruction or adverse modification compared to the agencies' previous practice.

The final rule also includes a few changes from the proposed rule. The Services omit undefined terms it considered ambiguous - "conservation values" and "life-history needs."[25] The Services also changed the final definition to address concerns from commenters that the proposed rule could be interpreted to allow actions that alter physical biological features.[26] In response to these concerns, the Services include language in the final rule explicitly including in the definition actions that alter physical or biological features essential to the survival of the species.[27]

Policy on Excluding Critical Habitat

Under Section 4(b)(2), the Secretary may "exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he 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 concerned."[28]

The new policy clarifies how the Services will consider excluding critical habitat that is covered by partnerships and conservation plans.[29] The factors the Services will consider in an exclusion analysis include whether a critical habitat designation of the area already covered by a plan will impair the realization of expected benefits of that plan, how much the public participated in the development of the plan, the degree of agency review, and the degree to which the plan protects essential physical or biological features for the species.[30]

When considering conservation plans permitted under Section 10 of the ESA, including habitat conservation plans, safe harbor agreements, and candidate conservation agreements with assurances, the Services will look to whether the sponsors are properly implementing the plans, whether the plan covers the species or, if not, whether the species has similar habitat to the species covered by the plan, and whether the plan specifically addresses the habitat of and meets the conservation needs for the species for which the critical habitat is being designated.[31]

The policy change also addresses how particular types of land ownership will affect the exclusion analysis. Tribal land will generally be excluded from critical habitat designation unless such designation is critical to the conservation of the species, and the Services will invite the Tribes to participate fully in the determination process.[32] Lands under control of the U.S. Department of the Defense will be ineligible for a critical habitat designation if they are covered by an integrated natural resources management plan that provides a benefit to the species.[33] Federal lands will, in contrast, be "prioritized as sources of support in the recovery of listed species" and will only be excluded from critical habitat designation in rare instances when national-security or homeland-security concerns exist.[34]

Conclusion

These rule changes and new policy may affect all aspects of critical habitat management, including the initial designation or exclusion decision, consultation over potential impacts to critical habitat, and discussions over minimization and voluntary mitigation of those impacts. By removing the requirement that the Services first consider occupied areas for critical habitat designation before looking to unoccupied lands, and by redefining phrases used in the designation of critical habitat, the Services have expanded the kinds of habitat that may be set aside as critical. Additionally, the Services' broader definition of "destruction or adverse modification" has the potential to increase findings of such impacts.

Stakeholders with operations that may affect critical habitat, or who are interested in critical habitat issues, will want to be aware of these new rules and framework, and monitor and participate in critical habitat designations for particular species and Section 7 evaluations of critical habitat to make sure that the Services have accurate and meaningful information to apply

in these processes, and that they are applying the new rules appropriately.

---

[1] 16 U.S.C. § 1536(a)(2).
[2] U.S. Fish and Wildlife Services, U.S. Department of the Interior, Listing and Critical Habitat, Critical Habitat, Frequently Asked Questions (Jan. 12, 2015), available at http://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html.
[3] 16 U.S.C. § 1532(5)(A)(i).
[4] 50 C.F.R. § 424.12(e).
[5] Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7,413, 7,434 (Feb. 11, 2016) (to be codified at 50 C.F.R. Part 424).
[6] *Id.* at 7,434.
[7] *Id.* at 7,416.
[8] *Id.* at 7,439.
[9] *Id.* at 7,430.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 7,439.
[14] *Id.*
[15] *Id.* at 7,430.
[16] *Id.*
[17] *Id.* at 7,431.
[18] *Id.*
[19] 16 U.S.C. § 1536(a)(2).
[20] 50 C.F.R. § 402.02.
[21] *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).
[22] 16 U.S.C. § 1532(5)(A)(i).
[23] Interagency Cooperation - Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214, 7,226 (Feb. 11, 2016) (to be codified at 50 C.F.R. Part 402).
[24] *Id.* at 7,216.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] 15 U.S.C. § 1533.
[29] Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016) (to be codified at 50 C.F.R. Part 424).
[30] *Id.* at 7,229.
[31] *Id.* at 7,230.
[32] *Id.* at 7,230-31.
[33] *Id.* at 7,321.
[34] *Id.*