

Trump Rollback of Endangered Species Act Regulations

On August 12, 2019, the Trump Administration finalized three regulatory rollbacks that drastically weaken the Endangered Species Act (“ESA”) nationwide, setting back the recovery of virtually every endangered and threatened species and making it considerably harder for species to gain protections in the first place. In addition, the changes eliminate virtually all prohibitions on the take – injury, killing or harm – of newly listed threatened wildlife. The final rules contain numerous egregious procedural violations with the final rules deviating widely from the proposed rules and skirting the public’s ability to meaningfully comment. Despite their “deregulatory” status, the administration rejected the clear requirement to comply with the National Environmental Policy Act and failed to take a hard look at the devastating environmental consequences of these rollbacks.

I. Changes to Section 7 Consultations 50 C.F.R. Part 402 Regulations

The final rule deviates significantly from the proposed rule. Key areas where the regulations have been weakened include:

- Limiting determinations of “adverse modification” of critical habitat to circumstances where the “whole” critical habitat is degraded at once – this almost never occurs in the real world and ignores cumulative impacts, or “death-from-a-thousand-cuts” scenarios.
- Determining that agency actions must be “reasonably certain” based on “clear and substantial” evidence before the Services may take action to limit harm. In essence, this adopts the tobacco industry approach to science, and gives polluters the benefit of doubt in consultations rather than the species.
- Redefining “environmental baseline” in a way to allow the Services to ignore the majority of harm caused by action agencies.
- Requiring informal consultations to be completed in 60 days even if the action agency is the reason for delay in completing the consultation.

II. Changes to Section 4 Listing and Critical Habitat 50 C.F.R. Part 424 Regulations

The final rule makes relatively minor changes to the proposed rule. Key areas where the regulations have been weakened include:

- The Services will now include information on the economic impacts of listing – something Congress expressly forbid in 1982 to limit political interference in the listing process
- The Services will not designate critical habitat if a species is threatened by climate change or any other “non-habitat based” threat, whenever the Secretary deems it not prudent, or if a private landowner is unwilling to conserve unoccupied habitat essential for the survival of the species.
- The Services are limiting threatened listings’ definition of “foreseeable future” by requiring that only “likely” threats be considered. This would effectively preclude listings based on the threat from climate change as not “likely.”

III. Repeal of 4(d) “blanket” rule – U.S. Fish and Wildlife Service Only

Unchanged from the proposed rule. All threatened wildlife that is listed in the future (e.g. monarch butterfly or wolverine) would receive no protections at all from take (being harmed or killed) by private parties or federal agencies.