

# Client Alert

March 2016

## Major Changes to Endangered Species Act Critical Habitat Rules Will Cause Substantial Impacts to Land Use

The US Fish & Wildlife Service and National Marine Fisheries Service (the “Services”) have promulgated major changes to their critical habitat regulations. The result will be more designation of state, local and private land as critical habitat, and increased regulatory burdens and costs on land activities. Effects will be felt by a wide range of public and private sector entities across government and industry sectors, including energy, land and mineral development, real estate, banking, commercial transactions and agriculture. The changes take effect on March 14, 2016.

The Endangered Species Act directs the Services, at the time they list a threatened or endangered species, to designate “any habitat of such species which is then considered to be critical habitat” where prudent and determinable, and based on the best scientific data available.<sup>1</sup> Congress designed critical habitat to play a more modest role than the listing of a species. Specifically, the prohibition on “destruction or adverse modification” of critical habitat does not apply to private activities generally, but instead is implemented through application of ESA Section 7 consultation on federal agency actions, including the issuance of federal permits. Federal agencies are required, through Section 7 consultation, to “insure” that any activity funded, carried out or authorized by that agency is not likely to “result in the destruction or adverse modification” of designated critical habitat.<sup>2</sup>

The Services issued two rules and a policy that significantly reshape decades-old regulations governing the designation of — and Section 7 consultation on — critical habitat. First, the Services issued a rule to revise the criteria for designation of critical habitat, 81 Fed. Reg. 7,414 (Feb. 11, 2016). Second, the Services promulgated a revised definition of “destruction or adverse modification” of critical habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016). Finally, the Services adopted a final policy regarding the implementation of ESA Section 4(b)(2) for exclusion of areas from critical habitat designation, 81 Fed. Reg. 7,226 (Feb. 11, 2016).

Taken together, the rules increase the likelihood that the Services will make adverse modification findings (the equivalent of a jeopardy finding and prohibited by the ESA), and could make it more likely that the Services will designate critical habitat and do so across larger areas of land than in the past, impacting landowners and project proponents alike. These changes will lead to increased costs for project proponents who require federal permit authorizations or licenses, and significant restrictions on land use and activities.

### Final Rule Defining “Destruction or Adverse Modification”

ESA Section 7(a)(2) requires every federal agency to insure that actions “authorized, funded, or carried out” by the agency do not “jeopardize the continued existence of” listed species or destroy or adversely

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<sup>1</sup> *Id.* §§ 1533(a)(3)(A), (b)(1)(B)(2).

<sup>2</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

modify designated critical habitat. A wide range of projects require federal authorization and can trigger the consultation requirement.

The final rule broadens the definition of “destruction or adverse modification,” raising the concern that the Services will be more likely to determine that a federal agency action will destroy or adversely modify critical habitat. The final rule defines “destruction or adverse modification” as “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 that preclude or significantly delay development of such features.” The final rule also broadens its interpretation of the term “appreciably diminish,” thus allowing the Services to find adverse modification based on any measurable effect.<sup>3</sup> While the Services state that they will exclude minor adverse effects, their broad interpretation of “appreciably diminish” will afford themselves significant discretion.

### **Final Rule Amending Criteria for Critical Habitat Designations**

The ESA defines “critical habitat” as “the specific 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 considerations or protection.*”<sup>4</sup> As a further limitation, the statute states that “critical habitat shall not include the entire geographical area which can be occupied” by the species, “[e]xcept in those circumstances determined by” the Services to be appropriate.<sup>5</sup>

The final rule amends and broadens the Services’ regulations governing the designation of critical habitat, and includes three major changes from the previous designation process:

- The final rule broadly defines “geographic area occupied by the species” (a term not defined in the current regulations) to include a wider area around the species’ occurrences at the time of listing and areas that are used only periodically or temporarily by the species. The Services’ definition allows for designation of habitat as occupied “even if *not used on a regular basis.*” See 79 Fed. Reg. at 27,069 (emphasis added). This would include areas not (and which may never be) occupied by the species.
- The final rule eliminates the concept of “primary constituent elements” in determining whether to designate critical habitat. Instead, the Services will now use a broader, more subjective requirement to identify “physical and biological features essential to the conservation of the species,” which can include “ephemeral or dynamic” habitat features and features that allow for *development* of habitat characteristics usable by the species.
- The final rule departs from the Services’ prior approach to unoccupied habitat, which required the Service to first determine it could not recover the species with the inclusion of only the “geographical area presently occupied” by the species. The final rule removes this step and allows the Services to consider occupied and unoccupied areas concurrently.

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<sup>3</sup> Previously, “appreciably diminish” meant “to *considerably reduce* the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.” FWS and NMFS, Joint Consultation Handbook at 4-36 (March 1998) (emphasis added). In the final rule, however, the Services “clarify” that the term “appreciably diminish” means “worthy of consideration” or that the Services “can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat.”

<sup>4</sup> 16 U.S.C. § 1532(5)(A)(i) (emphasis added).

<sup>5</sup> *Id.* § 1532(5)(C).

These new provisions provide an especially broad basis for designating critical habitat, potentially leading to much larger critical habitat designations. More landowners could have their land designated as critical habitat, and the Services could be more likely to find, during their review of a permit application, that the proposed activity or project will result in a prohibited destruction or adverse modification of critical habitat.

### **Final Critical Habitat Exclusions Policy**

The Act provides that the Services may exclude an area from critical habitat designation if the benefits of such exclusion outweigh the benefits of designation, i.e., on economic or other public interest grounds.<sup>6</sup> The Services' final policy, which they emphasize is "nonbinding," sets forth how the Services will consider partnerships and conservation plans, conservation plans permitted under ESA Section 10, tribal lands, national-security and homeland-security impacts and military lands, federal lands and economic impacts in the critical habitat exclusion process. The policy indicates that areas subject to permitted conservation agreements and plans will generally be excluded from critical habitat designation.

### **Implications**

Taken together, the final rules and policy will reshape and complicate the critical habitat designation process and adverse modification determinations.

Designation of critical habitat can cause immediate and significant restrictions on otherwise lawful uses of the land, create expensive and time-consuming new procedural requirements on ongoing and future projects, increase litigation risk and cause significant diminution in the value of property. If critical habitat designations increase, and additional swaths of land become too expensive or otherwise too difficult to use for commercial or other productive activities, affected entities are likely to find fewer comparable sites available for their projects, particularly if numerous regulatory constraints bear on site selection. Where federal authorization or funding is required for projects and activities, the potential for a prohibited "adverse modification" determination can result in substantial costs, delays and restrictions.

Litigation over these rules is likely.

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<sup>6</sup> 16 U.S.C. § 1533(b)(2).

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