

E&E Greenwire

Endangered species regulations clear White House hurdle

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GREENWIRE | Some Endangered Species Act rule change proposals have cleared White House review, setting the stage for the Fish and Wildlife Service to start reversing controversial Trump administration policies.

Following several months of scrutiny, the White House's powerful Office of Information and Regulatory Affairs last week completed its assessment of proposed ESA rules governing the listing of species and designation of critical habitat.

The green light by OIRA, part of the Office of Management and Budget, means FWS could formally propose the long-awaited critical habitat rule changes within a matter of weeks. The rule changes for ESA listings are expected to take longer, but they appear to be on the way ([E&E News PM](#), June 4).

The OIRA gatekeepers received the rule changes about 3 1/2 months ago.

“The U.S. Fish and Wildlife Service is committed to working with diverse federal, Tribal, state and industry partners to not only protect and recover America's imperiled wildlife but to ensure cornerstone laws like the Endangered Species Act are helping us meet 21st century challenges,” FWS Principal Deputy Director Martha Williams said earlier this year.

The agency, along with NOAA Fisheries in some cases, has said it intends, among other things, to:

- Rescind Trump regulations that revised FWS's process for considering exclusions from critical habitat designations.
- Rescind a regulatory definition of habitat.
- Reinstate prior language affirming that ESA listing determinations are made “without reference to possible economic or other impacts of such determination,” along with other potential revisions.

- Put back in place the FWS "blanket 4(d) rule," which establishes the default of automatically extending protections provided to endangered species to those listed as threatened, unless the agency adopts a species-specific 4(d) rule.

The White House review included meetings with a wide range of interest groups.

On Sept. 30, OIRA records show multiple agency officials met with representatives of the U.S. Chamber of Commerce, American Petroleum Institute and other industry groups. The business groups presented regulators with several studies showing the costs of permit delays, a perennial concern cited during ESA debates.

A 2016 study by the Texas Department of Transportation and Federal Highway Administration, for instance, examined several projects including a \$10.6 million reconstruction of a four-lane roadway project in a rural setting.

"The project's 6-month delay produced an additional cost of \$570,000, or a cost of \$87,000 for every month of delay," the study asserted.

In an Aug. 25 meeting, representatives of the Montana-based Property and Environment Research Center presented papers that urged FWS to "improve the rules where possible rather than discard them without replacement" and to consider "improving the rules to enhance incentives for landowners to maintain and restore habitat features."

Environmental groups including Defenders of Wildlife and the American Bird Conservancy met with officials earlier in August.

"The Trump administration did all it could to undermine implementation of the Endangered Species Act. The Biden administration is now eliminating two rules that were intended to limit the reach and effectiveness of critical habitat designations," Jason Rylander, senior counsel for Defenders of Wildlife, told E&E News in an email today. "Those rules minimized the goal of species conservation and recovery. They narrowly defined what kind of habitat could be protected and required agencies to heavily weigh industry and landowner concerns in the designation process."

Under the ESA, critical habitat is considered "essential for the conservation of the species."

Any federal agency seeking to authorize, fund or carry out an action on designated land must first consult with FWS to ensure the action is not likely to destroy or damage a critical habitat.

The ESA further states that critical habitat is to be designated "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."

The law allows exclusion of areas if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless the exclusion "will result in the extinction of the species concerned."

The Trump-era regulations imposed last December allowed that "other relevant impacts" may be considered, including public health and safety and risk of wildfire or pest and invasive species management ([Greenwire](#), Dec. 17, 2020).

The ESA required listing decisions to be made "solely on the basis of the best scientific and commercial data available" and "without reference to possible economic or other impacts of such determination." The Trump rule eliminated the latter phrase.

This could mean, for instance, that cost-benefit analyses may be presented when an ESA listing is proposed, potentially tilting the outcome.

"The regulation being rescinded would have made it easier [for] public lands to be excluded from critical habitat, a result that would be particularly harmful to listed birds that depend heavily on federal forest lands such as [the] northern spotted owl or marbled murrelet," said Steve Holmer, vice president at the American Bird Conservancy.