
THE LEADER IN ENERGY & ENVIRONMENTAL POLICY NEWS

1. ENDANGERED SPECIES:**Obama admin unveils rewrite of key habitat rules**

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The Obama administration today released two new proposed rules and a new policy designed to clarify how it designates and protects critical habitat for threatened and endangered species, a key bulwark against extinction.

The proposals mark one of the most significant updates in many years to how the government sets aside and protects critical habitat, and they will be closely watched by wildlife advocates and land users.

The rules include a more expansive definition for when projects such as mines, roads, pipelines and drilling harm or destroy critical habitat -- a chief litmus test for whether projects can be approved.

The administration is also proposing new policy designed to clarify how agencies decide to exclude certain lands from critical habitat designations. Private lands, particularly those where landowners have agreed to voluntarily protect species, would be given priority for habitat exclusions, according to the proposal.

A third proposed **regulation** -- which administration officials describe as mostly housekeeping -- would clarify the procedures and standards agencies use for designating critical habitat, including defining the scope and purpose of habitat.

The proposals from the Fish and Wildlife Service and the National Marine Fisheries Service are designed to make critical habitat decisions under the Endangered Species Act more efficient and transparent, but they would also factor heavily in determining how lands that aid species' recovery may be used.

But experts say it's too early to predict whether they will result in greater protections for wildlife.

"Our goal in proposing these revisions is to make the process of designating and consulting on critical habitat more predictable, more efficient, and more easily understood," said a statement by Gary Frazer, FWS's assistant director for ecological services. "These common-sense changes, reflecting lessons learned over the years, will improve conservation of species that need help and reduce the potential for conflicts and litigation."

The proposals are being closely scrutinized by environmentalists as well as the oil and gas industry, livestock groups, timber companies and homebuilders.

"This rulemaking is one of the best opportunities in recent years to improve the ESA's effectiveness," Ya-Wei Li, director of endangered species conservation at Defenders of Wildlife, said this morning in an email. "The services have historically underused critical habitat when conserving listed species."

Brett Hartl of the Center for Biological Diversity said that at first blush, the rules do not appear to go far enough to prevent the "death by a thousand cuts" to habitat that drives species declines.

The National Association of Home Builders did not reply to an email for comment, and other stakeholders said they would need time to review the proposals.

Of particular interest to environmentalists is the proposed **rule** to expand the definition of what constitutes "destruction or adverse modification" of critical habitat. That language is the Endangered Species Act's only prohibition against habitat loss, which is a leading cause of species decline.

ESA prohibits federal agencies from approving or funding an activity that destroys or adversely modifies critical habitat, but those terms are inherently ambiguous and susceptible to litigation.

The Reagan administration in 1986 defined "adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."

But separate federal appeals courts in 2001 and 2004 found that definition set too high a threshold for triggering adverse modification by shortchanging the need for habitat to support species recovery.

Environmental groups for years have argued that the definition should be changed to read "survival or recovery," which would give species recovery independent meaning.

The agencies appear to have chosen a middle ground. They proposed defining destruction or adverse modification as: "A direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery."

The new definition would not require approved activities within critical habitat to contribute to recovery, but it would prohibit activities that "significantly delay" the habitat from developing the characteristics necessary to support species recovery.

Notably, the agencies do not anticipate the new definition will result in any more or fewer findings of "adverse modification" than in recent years. It merely codifies existing internal guidance issued in 2004 by FWS and 2005 by NMFS.

"The reality is, this definition, in our view, is unlikely to be any more or less protective," Frazer said in an interview.

The new definition is expected to provide environmentalists and developers more certainty about how the agencies protect habitat, thus reducing the amount of conflict, Frazer said.

"This is a complex responsibility Congress gave us," he said. "We looked at every word and combination of words in the dictionary before coming to this."

The new definition is consistent with the intent of Congress and federal courts that critical habitat be established for more than species survival, the agencies said.

"It is clear that any definition of 'destruction or adverse modification' must reflect the purpose for which the critical habitat was designated -- the recovery of the species," the agencies said in a notice to the *Federal Register*.

The proposed rule also clarifies that "adverse modification" of habitat is different from a separate mandate in ESA that federal action not "jeopardize the continued existence of threatened and endangered species." The former refers to the quantity and quality of habitat, while the latter refers to species reproduction, numbers or distribution, according to the proposed rule.

Li of Defenders of Wildlife said it is important that the rule create "meaningful prohibitions" on harming habitat because it is often much easier to protect lands that host a species than it is to protect individual animals, which are often difficult to find or study.

New policy for excluding habitat

The agencies also want to offer greater predictability, transparency and consistency in how they decide which lands to exclude from critical habitat, Frazer said.

ESA allows the agencies to exclude lands if the benefits of exclusion -- either to the economy or to national security, for example -- would outweigh the benefits of protecting the lands. But that discretion has proved extremely controversial in the case of species including the northern spotted owl and bull trout in the Pacific Northwest, among others.

In particular, designating critical habitat on private lands is seen by some as a taking of private property due to fears that it could reduce property values. It means federally permitted or funded actions are subject to time-consuming consultations, and they theoretically can be halted if found to trigger "adverse modification."

The agencies' proposed new **policy** says the agencies will generally exclude from critical habitat those private lands covered by voluntary conservation plans, including candidate conservation agreements with assurances (CCAAs), safe harbor agreements and habitat conservation plans (HCPs).

In deciding what lands to exclude, the agencies will explore, among other criteria:

- To what extent designating critical habitat would hamper the successful implementation of the conservation plan.
- The degree to which the public participated in crafting the conservation plan.
- The plan's demonstrated implementation and success.
- Whether the plan or agreement contains a monitoring program and adaptive management.

The proposal is aimed at assuring landowners and industry that voluntary conservation commitments will not go unnoticed.

For example, some parties have committed to implementing habitat conservation plans -- which require mitigation for the unintentional "take" of an endangered species -- only to later see their lands designated as critical habitat.

"It was seen as a breach of trust," Frazer said.

The new policy would formalize the agency's current practice of giving private lands with voluntary conservation plans greater weight for exclusions.

"Our objective here is to provide incentive -- or remove any disincentive -- to undertake voluntary conservation actions," he said.

Such a move would provide a boost to existing conservation plans while encouraging new conservation partnerships with local governments, conservation organizations and private landowners, the agencies said in their *Federal Register* notice.

"Together, these entities can implement conservation actions that the services would be unable to accomplish without private landowners," they said.

Such was the case with conservation of the lesser prairie chicken, a member of the grouse family that roams tens of millions of acres of mostly private lands in five southern Great Plains states, according to Fish and Wildlife. Voluntary conservation agreements with the oil and gas industry, including CCAAs, have been a cornerstone of the agency's conservation efforts for the bird, which has been listed as "threatened."

The agency has declined to designate critical habitat for the lesser prairie chicken, for now.

Similar conservation plans are being explored for the greater sage grouse in 11 Western states.

The new exclusion policy also makes it clear that the agencies will give "great weight" to tribes in designating critical habitat, while also emphasizing that exclusions will be focused on non-federal lands, Frazer said.

Li, of Defenders, said both FWS and NMFS have historically underused critical habitat as a tool for conserving listed species.

"The rulemaking should also create a clear role for critical habitat to protect areas that are unoccupied but essential for recovery," he said. "This is especially important to helping species adapt to climate change. While the proposed rules address both of these issues, we see opportunities to improve the language, including by clarifying certain phrases that could be interpreted in multiple ways."

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