

Proposed Changes to ESA Listing Process Could Affect Landowners and Permit Applicants

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A recently proposed rule to increase state involvement in the process for the listing of new species under the Endangered Species Act (ESA) could reshape how the listing process affects farmers, landowners, and environmental permit applicants. On Monday, May 18th, the Secretary of the Interior, Sally Jewell, announced that the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) would propose new rules governing how outside groups petition the federal government to review the listing status of plants and animals under the ESA. These proposed changes in the listing process would provide a greater role for state wildlife agencies by requiring petitioners (usually environmental advocates) to obtain state officials' views before asking the Services to review the status of a given species.

Background on the Listing Process

Since its enactment in 1973, the ESA has been successful in protecting many species from extinction. But protections apply only after a species is listed as endangered or threatened. For this reason, Congress referred to the listing of species as the "keystone" of the ESA. The listing of a species as endangered (in danger of extinction throughout all or a significant portion of its range) or threatened (likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range) triggers the two primary ESA protections:

1. Section 7 requires that federal agencies consult with the Services before taking any federal action that may affect a

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listed species or its habitat (ranging from federal use of natural resources to mere provision of funding or issuance of a license to a private party); and

2. Section 9 imposes potential liability on any person who harms a listed species or its habitat.

The Services can list species on their own initiative. More frequently, however, an outside group petitions either of the Services to list a species. Those outside-group petitions are the subject of the recently proposed rule.

In deciding whether to list a species, the Services is prohibited from considering economic factors. Instead—ever since a 1982 amendment—decisions must be “based solely on the best scientific and commercial data available.” 16 U.S.C. §1355(b)(1)(A).

The Proposed Regulations

Published in the Federal Register on May 21, 2015, 80 Fed. Reg. 29,286, the public has until July 20, 2015, to offer its views on proposed changes to the listing process. According to a statement by Secretary Jewell announcing the proposal, “[t]hese actions will make an effective and robust law even more successful, and will also reinforce the importance of states, landowners and sound science in that effort.”

If approved, the proposed Service regulations would add a new requirement to the listing process and shape future listing outcomes by requiring environmental advocates to work with or at least consult state officials as a condition of petitioning the Services. Adoption of these proposed changes could refocus the strategies of environmental activists and alter the legal risks and uncertainties associated with undertaking any land or resource development, environmental permitting action, or natural resource use or extraction.

The proposed changes to the listing process were quickly criticized by the Center for Biological Diversity (CBD), which is an active and frequent petitioner under the existing rules. CBD claimed the new regulations, if approved, would burden concerned citizen groups and make it less likely that “wildlife on the brink of extinction” would be protected. By contrast, some fish and wildlife professionals were more receptive and welcomed the use of data and information from state fish and wildlife agencies in shaping listing petitions.

The ESA has been the subject of many controversies over the last 20 years. In the current Congress, for instance, House and Senate Republicans have introduced dozens of measures and amendments packed with legislative changes to the ESA to improve the law, emphasize state participation, protect landowners, shape the listing process, restrict, or repeal the law. Thus far, the Obama Administration has not supported legislative changes to the ESA. But these new proposed policies might help assuage Republican concerns while averting wholesale changes to the ESA.