Endangered Species Act: U.S. Fish & Wildlife Service Finalizes Rule to Revise Criteria for Designating and Delisting Species and Designating Critical Habitats

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04/23/2024

On Friday, April 5, 2024, the U.S. Fish & Wildlife Service (the "Service") finalized a rule clarifying the procedures and criteria for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants, as well as the designations of critical habitats under section 4 of the Endangered Species Act. See 89 Fed. Reg. 24,300 (April 5, 2024). The final rule becomes effective on May 6, 2024.

Background

Part of the Service's authority includes regulating and interpreting aspects of the listing of species and the designation of critical habitats. The Service most recently revised regulations interpreting aspects of the listing and critical habitat designations under section 4 in the fall of 2019, as published in 84 Fed. Reg. 45,020 (August 27, 2019). Referred to as the 2019 rule, the revised regulations went into effect in late September 2019. Following the transition to the Biden Administration in January 2021, the 2019 rule was among a host of federal regulations considered for review and rescinding. A federal court later remanded the 2019 rule and the Service published draft replacement rule. Earlier this month, the Service finalized the rules with a couple of notable revisions.

On June 22, 2023, the Service solicited public opinions on its revised version of the 50 CFR part 424. See 84 Fed. Reg. 440764 (June 22, 2023). Based on comments received on the proposed rule, the Service clarified 50 CFR 424.11(d) and its use of "foreseeable future," as well as its use of factors to consider when delisting species.

Changes from the Proposed Rule

Foreseeable Future

The Endangered Species Act (ESA) defines a threatened species as "any species that is likely to become an endangered species in the foreseeable future." 16 U.S.C. § 1532(2). In conjunction with the 2019 rule, the Service issued a regulation clarifying how the foreseeable future language should be applied. See 50 CFR 424.11(d). The proposed rule, the Service sought to revise the rule to read as follows: "The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats." 88 Fed. Reg. 440764.

The Service received comments that the revised meaning of foreseeable future was vague, potentially leading to limitless timeframes or lower standards to list species. Based on these comments, the Service revised this sentence to state, "The foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 CFR 424.11(d).

The revised language clarifies that foreseeable future is not an independent substantive standard, but instead articulates how the Service determines the appropriate timeframe to evaluate scientific and commercial data when determining whether a species meets the substantive standard in the ESA's definition of a threatened species. The changes are intended to provide clarity and transparency to the public regarding the Service's interpretation of the foreseeable future.

Many comments also suggested the Service adopt a more thorough discussion of the M-Opinion to further explain its guidance in Service determinations. The M-Opinion refers to a 2009 Memorandum Opinion on foreseeable future from the U.S. Department of the Interior, Office of the Solicitor (M-37012) (Jan. 16, 2009. While the Service did not add an additional discussion of the M-Opinion to the final rule, it clarified that it will continue to consider the following when it determines the extent of the foreseeable future in the context of classification decisions:

1. Foreseeable future is based on the facts applicable to the species considered for listing;
2. The Secretary has broad discretion as to the length of foreseeable future, as long as they articulate the rationale for their analysis;
3. The Secretary's discretion must be consistent with the ordinary meaning of the statutory language and context in which the phrase is used;
4. The Secretary's analysis for foreseeable future must be rooted in the best available data that allow prediction into the future, and such foreseeable future may only extend so far as those predictions are reliable;
5. Because predictions relate to the status of the species, the relevant data to a foreseeable future analysis is that that concerns the future population trends, threats to the species, and likely consequences of those threats and trends;
6. The Secretary will likely find varying degrees of foreseeability, as foreseeable future is unique to population, status, trends, and threats for each species;
7. The Secretary must make the determination of "threatened status" based on the best scientific and commercial data available;
8. The Secretary need not identify the foreseeable future in terms of a specific period of time and instead must use information and data that is reliable for the purpose of making predictions respective to a specific threat;
9. Impacts or trends concerning a particular threat are not within foreseeable future when they are based on speculation and not reliable predictions;
10. The administrative record for a decision under section 4(a)(1) must include man explanation of how the Secretary reached the conclusion and an explanation as to what is foreseeable given the data.

Factors Considered in Delisting Species

In the proposed rule, the Service intended to clarify aspects of the regulation for delisting species. The proposed rule listed three factors for delisting a specifies, including: (1) The species is extinct; (2) The species is recovered or no longer meets the definition of a threatened or endangered species, when

considering the factors set out in paragraph (c) of this section regarding listing and reclassification; or (3) The listed entity does not meet the statutory definition of a species.

Some commenters requested additional revisions to the proposed rule in order to further clarify the intent of the revisions to better ensure that listing decisions would be based on sufficient data and review of that data. The final version of the rule reads:

(e) Species will be delisted if the Secretary determines, based on consideration of the factors and standards set forth in paragraph (c) of this section, that the best scientific and commercial data available substantiate that:

1. The species is extinct;
2. The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species;
3. New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or
4. New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.

50 CFR 424.11(e).

The revisions address commenter concerns that the Service could apply novel factors and standards to delisting decisions, base a decision on insufficient scientific evidence, delist species automatically if a factor is met, or purposely delay delisting species even when an identified circumstances is met. With the revised final rule, the Service is restricted in its considerations and application of factors when evaluating a species for delisting.

A copy of the Service's final rule can be found here.