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Comparison of Existing and Draft Bush Administration Endangered Species Act Regulations

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Kieran Suckling, Center for Biological Diversity, (520) 275-5960

Daniel Patterson, Public Employees for Environment Responsibility, (520) 906-2159

Removes recovery as a protection standard; allows damaging projects to proceed even after they have been determined to threaten species with extinction.

Allows destruction of all restored habitat within critical habitat areas; prevents critical habitat areas from being used to protect against disturbance, pesticides, exotic species, and disease.

Severely limits the listing of new endangered species by excluding analysis of historic range loss and limiting extinction projection to 20 years.

Removes the U.S. Fish and Wildlife Service from its independent oversight function by allowing “alternative” review processes.

Allows states to veto endangered species introductions and take over critical functions such as listing species, setting recovery goals, overseeing federal agencies, and issuing habitat conservation plans.

Removes recovery as a protection standard; allows damaging projects to proceed even after they have been determined to threaten species with extinction.

CURRENT REGULATIONS	DRAFT REGULATIONS	IMPLICATION
<p>“Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”</p>	<p>“Jeopardize the continued existence of a species” means, to engage in an action that appreciably increases the risk of extinction of any listed species, considered in context with the temporal and spatial nature of the effects, the status of the species, and the species’ biology.</p>	<p>The existing regulation prohibits any action which will reduce a species’ population size enough to appreciably lessen its likelihood of survival and recovery. This covers pre-existing impacts like dams, forest plans and highways which are currently harming endangered species and will continue to so in the future. It is often the case that such projects are slightly improved, but continue to cause substantial population declines. This would not be permitted under the current regulations.</p> <p>The draft regulation only prohibits projects that increase extinction risk beyond the current risk, regardless of how pressing the current risk is. Thus a dam or forest plan which is currently driving a species extinct is permitted to continue as long it is not made worse.</p> <p>This policy codifies the administration’s previous asserting that existing dams are part of the environmental “baseline” and thus are excluded from jeopardy analyses and reform actions. This approach was struck down by the courts. The policy resurrects it in a slightly different form by inserting it into the jeopardy definition; the effect is exactly the same.</p>
<p>The Endangered Species Act states:</p> <p>“After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).”</p>	<p>“During the course of any reinitiation of consultation, the existing biological opinion and incidental take statement remains valid and in effect until replaced by a new biological opinion and incidental take statement.”</p>	<p>If the past approval of a project (= the “consultation”) is later deemed invalid because the negative impacts are greater than expected, consultation must be reinitiated and a new approval issued. The Endangered Species Act requires that while the new approval is being sought, the project must cease any actions which irreversibly harm species in a manner that precludes the development of necessary mitigation measures. Otherwise options to prevent extinction may be foreclosed.</p> <p>The draft regulation allows projects to proceed during reconsultation even if doing so will irreversibly harm endangered species and make necessary mitigation measures impossible to implement.</p> <p>This regulation addresses a long-standing complaint of the Bush administration that once a project is approved, it should never have to stop, even if new information indicates that its impacts are more harmful than previously thought.</p>

<p>(no regulations)</p>	<p>“Programmatic consultations for ongoing actions. Notwithstanding the provisions of (a) [i.e. the reconsultation requirement], when the Services have issued a biological opinion on programmatic planning documents, an action agency is not required to reinifiate consultation on those documents until the agency revises the documents under its normal course of review. Provided that, individual actions within the program that may affect a listed species will themselves undergo consultation.”</p>	<p>The Endangered Species Act and current regulations do not distinguish between consultations on individual projects like timber sales and dams, and consultations on programs like National Forest plans which guide the management of entire landscapes. Reconsultation must be done on either if they are found to have more damaging impacts that thought during the first consultation.</p> <p>The draft regulation completely exempts landscape-level programs from reconsultation even if they are found to be driving species extinct. They do not have to be reviewed until they expire which is typically 15 to 50 years. This provision directly contradicts numerous court orders that have blocked logging, grazing and mining at the landscape in the Southwest and Northern Rockies during the reconsultation process.</p>
<p><i>Allows destruction of all restored habitat within critical habitat areas; prevents critical habitat areas from being used to protect against disturbance, pesticides, exotic species, and disease.</i></p>		
<p>CURRENT REGULATIONS</p>	<p>DRAFT REGULATIONS</p>	<p>IMPLICATION</p>
<p>“Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.”</p>	<p>“Adversely modify” means to engage in a discretionary action or discretionary portion of an action that significantly alters:</p> <p style="padding-left: 40px;">(a) The physical or biological features essential to the conservation of the species existing at the time of designation that were the basis of the critical habitat designation; and</p> <p style="padding-left: 40px;">(b) The designated critical habitat to such an extent as to preclude its ability to fulfill its role in the conservation of the species.</p> <p>For unoccupied habitat, only subparagraph (b) applies.</p>	<p>The current regulation protects all important features within a critical habitat area regardless of when those features developed. Thus if critical habitat resulted in a stream being restored, the new trees and river banks are fully protected.</p> <p>The draft regulation only protects the features which existed at the time of designation. This allows the destruction of all new features which develop over time due to habitat restoration and protection. This contradicts the very purpose of critical habitat designation which is to identify essential areas and improve them to help the species recover.</p>

<p>(no regulations)</p>	<p>“(1) Pursuant to § 4(a)(3) a designation of critical habitat shall be considered not prudent when any of the following situations exist:</p> <p>(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or</p> <p>(ii) Such designation of critical habitat would not be beneficial to the species because:</p> <p>(A) Habitat is not a limiting factor; or</p> <p>(B) Threats are not habitat-based; or</p> <p>(C) No areas meet the definition of critical habitat”</p>	<p>The Endangered Species Act allows critical habitat to be omitted for species if the designation is “not prudent”. The courts have unanimously determined that the congress intended to exemption to only apply to species threatened by hunting or vandalism. It is believed that publishing maps of the species habitat would threaten such species my leading vandals and hunters to them.</p> <p>The draft regulation extends the exemption to include species not threatened by habitat loss. Many species are threatened by pesticides, exotic species, air pollution, disease and disturbance. None of these are considered habitat loss, but all have been substantially controlled by banning them within critical habitat areas. In a recent example, the Bush administration was sued for allowing pesticides to harm the California red-legged frog. It settled the case by agreeing to limit pesticide use within the frog’s designated critical habitat area. In another case, the Bush administration was threatened with a suit for allowing domestic sheep to transmit diseases to endangered bighorn sheep. It avoided the suit by agreeing to ban domestic sheep within the critical habitat areas while continuing to allow sheep outside the critical habitat.</p> <p>The desire to allow non-habitat based threats to occur within critical habitat areas has been a major goal of the administration.</p>
<p><i>Severely limits the listing of new endangered species by excluding analysis of historic range loss and limiting extinction projection to 20 years.</i></p>		
<p>CURRENT REGULATIONS</p>	<p>DRAFT REGULATIONS</p>	<p>IMPLICATION</p>
<p>(no regulation)</p>	<p>““Foreseeable future” means 10 generations or 20 years, at the discretion of the Service, unless specified otherwise in a determination made pursuant to Section 4.”</p>	<p>Current regulations do not define “foreseeable” because it is self-defining: the length of time for which the species’ population trend can be reasonable estimated. Depending on the type information available (models depicting sea ice melt, length of time for tree to regrow after logging, etc.), the Fish and Wildlife Service typically settles on a 50 to 100 year horizon. The recent polar bear listing proposal used 45 years.</p> <p>The Bush administration has repeatedly sought to shrink the “foreseeable future” in order to avoid analysis of well-established long-term impacts. The courts have frustrated this effort. In the case of the slickspot peppergrass, expert assembled by the Fish and Wildlife Service determined the species had a 66% chance of extinction in 80 years and an 82% chance in 100 years. To avoid protecting the species, the administration simply reduced its concept of foreseeable future until it was certain the species would survive that long. The courts struck down the decision.</p>

<p>(no regulation)</p>	<p>““Significant portion of its range” means a portion of a species’ current range in which the threats to the species can imperil the viability of the species as a whole, even if some portions of the range of the species are not directly subject to those threats. The Service determines whether a portion of the species’ range is “significant” based on the biological needs of the species and the nature of the threats to that species.”</p> <p>““range” means the geographical area currently occupied by the species.”</p>	<p>“Range” is critical concept of the Endangered Species Act. If it is defined in a historical sense, as scientists do, species are more likely to be listed as endangered, conservation and restoration actions will required in larger areas, and recovery strategies will require reintroduction to currently extirpated zones. If it is defined in a narrow sense, there will be fewer listings, less conservation actions/requirements, and more delistings.</p> <p>The Endangered Species Act requires that species be listed as endangered in whatever portion of their “range” where they are imperiled. Traditionally, the Fish and Wildlife Service has interpreted “range” to mean the historic, natural range of the species. Thus although the black-footed ferret occurred only in one population in South Dakota when listed as endangered, it was protected throughout its entire historic range in the Rocky Mountains and Southwest. When the Mexican gray wolf was listed as an endangered species it did not occur in the United States at all, but was listed throughout its historic range in Arizona and New Mexico. When the California condor was listed as endangered it occurred only in one California population, but was listed throughout its vast historic range in the U.S. When the bald eagle was listed as endangered, it was absent from most states, but was listed in all lower 48 states. The recovery efforts for all these species required and succeeded in introducing new populations to areas far outside the tiny zone occupied at the time of listing.</p> <p>The draft regulation’s excludes the vast portion of most species historic range by limiting to only the small zone they currently occupy. Under this interpretation, the condor would have only have been listed in a tiny area and never reintroduced beyond that. The Mexican gray wolf, bald eagle and grizzly bear would never have been listed as endangered at all.</p> <p>As explained in a recent legal opinion by the Interior Solicitor, the courts have repeatedly struck down attempts by the Bush administration to dismiss endangerment and conservation needs in a species’ historic range.</p>
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Removes the U.S. Fish and Wildlife Service from its independent oversight function by allowing “alternative” review processes.

CURRENT REGULATIONS	DRAFT REGULATIONS	IMPLICATION
(Does not allow alternative consultation procedures.)	“The consultation procedures set forth in this part have general applicability but may be superseded for any Federal agency by agreement or joint counterpart regulations among the agency, the Fish and Wildlife Service, and/or the National Marine Fisheries Service.”	<p>The current regulation mirrors the Endangered Species Act in establishing that all federal agencies must “consult” with and obtain the approval of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service before conducting a timber sale, issuing a development permit, approving a mine, etc. The Fish and Wildlife Service is established as the independent, objective overseer of the agency which conducts and benefits from the project.</p> <p>The draft regulation allows the administration to eliminate the oversight role of the Fish and Wildlife Service. Under “counterpart” regulations, the Forest Service would review and approve its own logging projects and the Bureau of Reclamation would review and approve its own dams. This regulation codifies a program the Bush administration put in place several years ago to increase logging by eliminating Fish and Wildlife Service oversight of logging under the national fire plan. That lack of oversight led to massive levels of illegal logging.</p>

Allows states to veto endangered species introductions and take over critical functions such as listing species, setting recovery goals, overseeing federal agencies, and issuing habitat conservation plans.

CURRENT REGULATIONS	DRAFT REGULATIONS	IMPLICATION
(no regulations)	“The Director shall not establish an experimental population or part thereof in any state without the concurrence of the Governor of the state. Failing such concurrence, the Secretary may establish such a population if the Secretary finds that it is essential to the continued existence of the species in the wild.”	<p>The Endangered Species Act does not give the state or any other entity veto power over the reintroduction of endangered species. The caveat that the Governor can be ignored if reintroduction essential to the species survival is meaningless since every reintroduction in the past decade has been expressly deemed “non-essential.” Reintroductions are primarily done as a recovery strategy, not an existence strategy.</p> <p>The reintroduction of the Mexican gray wolf and the Northern Rockies gray wolf was done over the objections of New Mexico, Idaho and Wyoming. While governor of Idaho, Secretary Kempthorne opposed reintroduction of the grizzly bear.</p>

<p>Regulations encourage state participation in federal decision-making processes, but maintain the integrity of the federal process.</p>	<p>"States, may request and be given the lead role in almost every aspect of the Act, including, but not limited to, Section 4, Section 7, and Section 10 of the Act."</p> <p>Section 4 is listing, critical habitat designation, and recovery plans Section 7 is oversight of federal projects Section 10 is habitat conservation plans.</p>	<p>States are encouraged to participate in recovery planning, listing decisions and critical habitat designations, but the U.S. Fish and Wildlife Service maintains the ultimate responsibility and authority to make a scientifically-based, non-political decisions. It often does so over the objections of state agencies which are more beholden to local political pressure.</p> <p>The U.S. Fish and Wildlife Service recently listed the California tiger salamander as an endangered species over the objections of the state of California. It adopted recovery goals for wolves and grizzly bears opposed by state agencies.</p>
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