Ninth Circuit Rulings yield changes to Endangered Species Act rules and policies

R. Todd Silliman and Stefanie Warren

R. Todd Silliman is a partner in the Environment and Natural Resources Practice of Dentons US LLP. His practice includes litigation and regulatory counseling on endangered species, water quality, contaminated property, and other environmental matters. Stefanie Warren is counsel in the Litigation and Dispute Resolution Practice of Dentons US LLP. Her practice covers both environmental and commercial litigation including CERCLA, Proposition 65, TSCA, RCRA, CEQA, and class action defense.

Rulings of the U.S. Court of Appeals for the Ninth Circuit have resulted in recent changes to federal Endangered Species Act (ESA) regulations and policy. These changes concern the listing of threatened and endangered species and the conditions under which the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) will authorize incidental take of ESA-listed species.

Defining "a significant portion of its range"

The first recent change concerns the ESA's definition of a term impacting FWS's and NMFS's methodology for deciding whether a species should be listed under the ESA. The ESA defines a species as "endangered" or "threatened" according to whether the species is endangered or threatened, respectively, "throughout all or a significant portion of its range."16 U.S.C. § 1532(6), (20). FWS and NMFS finalized their policy last year that seeks to provide greater clarity on how they will define and apply the phrase "significant portion of its range" (SPR). 79 Fed. Reg. 37,578 (July 1, 2014); see also 76 Fed. Reg. 76,987 (Dec. 9, 2011) (draft policy). The policy clarifies that FWS and NMFS will first analyze whether a species is threatened or endangered throughout "all" of its range. If it is not, FWS and NMFS will then consider whether that species is endangered or threatened in an SPR. If it is, then all individuals of the species, not only those found in the SPR, are to be protected. The agencies reasoned that this interpretation is necessary to give independent, "operational meaning" to the words "all" and "significant portion of its range" within the SPR phrase. The policy change grew out of the decision in *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (2001). In *Defenders of Wildlife*, the Ninth Circuit reversed the Secretary of the Interior's decision not to designate a species for failure to consider the species' viability in an SPR.

The policy also revises the definition of "significant" for purposes of determining whether a portion of a species' range qualifies as an SPR. The new test for "significant" is whether, without the members in the given portion of the range, the species is endangered or threatened, *or likely to become in danger of extinction in the foreseeable future*. This is a lower bar than the Department of the Interior Office of the Solicitor had proposed in 2007 in what the agencies label the "clarification interpretation." That interpretation was at issue in Defenders of Wildlife. According to FWS and NMFS, the clarification interpretation rendered the SPR phrase redundant. FWS and NMFS reason that the prior interpretation would

consider a portion of a species' range "significant" only if without the individuals in that portion the entire species was imperiled. The agencies maintain that this is merely another way of saying that the species is imperiled throughout its range. FWS and NMFS clarified that they will determine whether a portion of a species' range is significant based on of principles of conservation biology. To determine if a portion of a species' range is significant, FWS or NMFS would ask whether, without that portion, the representation, redundancy, or resiliency of the species—or the four similar metrics used more commonly by NMFS—would be so impaired that the species' vulnerability to threats would be increased to the point that the overall species would be in danger of extinction. If so, the portion is significant. 76 Fed. Reg. at 76,994.

The new policy is years in the making and follows a process through which the agencies received approximately 42,000 comments. Some in the regulated community have voiced concerns about a more expansive policy leading to more listings. No reported federal court decision has yet addressed the new policy.

Changes to rules for incidental take statements

FWS and NMFS also recently published a final rule clarifying in several respects the instances under which the agencies will issue an incidental take statement (ITS) and the conditions that they may impose in an ITS. See 80 Fed. Reg. 26,832 (May 11, 2015). Under the ESA, action agencies such as the U.S. Forest Service or Bureau of Land Management consult formally or informally with FWS or NMFS. In formal consultation, FWS or NMFS issues what is known as a biological opinion analyzing the effects of an agency's action on a listed species. An ITS is an element of a biological opinion. Its purpose is to allow "take" of a listed species where the take is incidental to, and not the purpose of, the federal agency action and will not jeopardize the continued existence of the species or adversely modify its critical habitat. The regulations previously stated that an ITS was appropriate to address situations where take "may occur." The new rule restricts this further to situations where "take is *reasonably certain* to occur."

Under the rule, ITSs will not be issued in conjunction with section 7 consultations of "framework programmatic actions" that themselves will not cause take. An example of a "framework programmatic action" is the U.S. Army Corps of Engineers' issuance of nationwide permits under section 404 of the Clean Water Act. The rule clarifies that the appropriate time for an ITS to be issued is when the agency prepares to undertake a particular action pursuant to the programmatic framework that is reasonably certain to result in take.

This curtailment of ITSs is the result of court rulings, most notably *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001). In *Arizona Cattle Growers*, the Ninth Circuit overturned an ITS that was issued without any finding that the listed species even existed in the area that would be affected by the federal action; thus, there was no basis for concluding that take would occur.

The new rule also clarifies when FWS and NMFS may use "surrogates" in ITSs. A surrogate is a measurable impact to a "similarly-affected species or habitat or ecological conditions" that is used when FWS or NMFS is unable to measure an impact to a specific number of individuals of a listed species. The rule provides that a surrogate may be used only when the ITS articulates: (i) the "causal link" between the surrogate and the take, (ii) why impact to a number of individuals of the listed species cannot be specified or monitored, and (iii) a clear trigger for when the acceptable level of anticipated take has occurred and further consultation is necessary. The new rule on surrogates is the result of another ruling of the Ninth Circuit, *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031 (2007), which invalidated use of a surrogate when there was no finding by the agency that a limit on a specific number of the listed species could not be used and where the trigger for further consultation was vague.

Practitioners would be wise to familiarize themselves with this new policy and rule, which may be at issue in cases within the Ninth Circuit or elsewhere in the coming years.