

ENDANGERED SPECIES

New Regulation Would Lessen Influence of Fish and Wildlife Experts

For much of the past 35 years, the U.S. Endangered Species Act (ESA) has been at the center of some of the fiercest environmental battles in the United States. It has been the means by which tiny fish have held up big dams, helped bring iconic species such as the bald eagle back from the brink, and pitted environmentalists against loggers over the protection of old-growth forests in the Pacific Northwest. Now, with just 5 months left in office, the Bush Administration has proposed controversial rules that would exempt many projects from what the Administration says are unnecessary reviews by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). But the plan has left environmentalists sputtering. "This is a way to allow destructive projects to go forward without the check of Fish and Wildlife Service biologists," says Defenders of Wildlife's Jamie Rappaport Clark, who headed the service during the Clinton Administration.

In proposing the rule last week, the departments of the Interior and Commerce listed two main goals. The first is to prevent the ESA from being used to regulate carbon dioxide (CO₂) emissions. That became a possibility after FWS listed the polar bear as a threatened species in May (*Science*, 23 May, p. 1000). The second is to reduce the number of so-called informal consultations, which have delayed many proposed projects for months or years, according to a 2004 report by the U.S. Government Accountability Office.

Currently, when an agency is considering a proposed action (or giving a permit to a member of the public), it must first determine whether a listed species or its critical habitat might be affected. If so, then it must informally consult with biologists at the relevant service, generally FWS for terrestrial species or NMFS for marine organisms. More often than not, the agency thinks the project is unlikely to cause harm. The FWS or NMFS biologists usually agree, and the agency can proceed. But if agency or service biologists determine that harm is likely, a more involved, formal consultation takes place, and the service decides how the damage could be minimized or avoided.

Under the proposed rule, agencies have to consult the services only if indirect or

direct effects of their actions are an "essential cause" of and "significant contributor" to the likely harm. This would mean that the Department of Transportation, for example, would not have to consider the impact of greenhouse gas emissions from cars on polar bears or any other listed species. The reason? Emissions from any single highway do not make a significant contribution to the melting sea ice that harms the bears, argue officials at the departments of Interior and Commerce.

Beyond CO₂, the proposed changes are sweeping as well. Under the new rule, if the agencies determine that their projects



Undercut? Under a proposed rule, some logging and other federal activities might not require a review of possible harm to endangered species, such as the marbled murrelet.

are not likely to harm a species, they would not need to seek an expert opinion from the services at all. (If the agencies suspect harm to a species, however, they still must formally consult.) Officials at the departments of Interior and Commerce argue that agencies are "fully qualified" to decide on their own whether their projects will harm a species or its habitat.

Not so, say experts familiar with the ESA. Holly Doremus of the University of California, Davis, law school cites an analysis by FWS and NFMS, released in January, of similar regulations under the National Fire Plan, a federal program to reduce the risk of forest fires and restore burned ecosystems. Issued in 2003, these regulations allow the U.S. Forest Service and the Bureau of Land Management (BLM) to decide whether to consult about prescribed burning and other fire-related actions. NFMS found that the agencies failed to use the best available science in 10 out of 10 cases; FWS found other flaws in 25 out of 43 cases. "That's a very discouraging piece of evidence about how seriously the action agencies will take this job," says Doremus. A BLM spokesperson says the agency now has more expertise and expects "improved outcomes" in the future. The Forest Service has also increased training.

Although it's difficult to know exactly how well the existing system protects species, proponents say the process helps. "It's where most of the protection for endangered species occurs," says Noah Greenwald of the Center for Biological Diversity, an advocacy group in Tucson, Arizona. Without a requirement to check in with the services, Clark warns, agencies will have an incentive to put their mission—such as flood control or energy projects—ahead of protecting endangered species. According to J. B. Ruhl of Florida State University's College of Law in Tallahassee, the new rules "surely could be manipulated and abused." U.S. Department of the Interior spokesperson Chris Paolino calls those concerns unfounded. "All the penalties for harming an endangered species remain in effect," he says. "It's still in an agency's best interest to err on the side of caution."

The future of the rule, which is open for public comment until 15 September, is uncertain. A spokesperson for Senator Barack Obama (IL), the presumptive Democratic nominee for president, told the Associated Press that Obama would toss out the rule if he's elected; Senator John McCain's (R-AZ) campaign has not commented. Meanwhile, Congress could prevent any Administration from spending funds to implement it; Barbara Boxer (D-CA), who chairs the Senate Environment and Public Works Committee and opposes the rule, plans to hold a hearing 24 September. And then there are the courts. "Our biggest hope is that the rule will not be finalized," says Greenwald. "But if it is, it's likely we'll challenge it." —ERIK STOKSTAD