

## ENVIRONMENTAL ALERT

August 18, 2014

### READY FOR COMMENT: FWS PROPOSAL ENCOURAGES VOLUNTARY CONSERVATION MEASURES FOR AT-RISK SPECIES

The U.S. Fish and Wildlife Service (FWS) recently proposed a new policy – the *Policy Regarding Voluntary Prelisting Conservation Actions* – that would give landowners credit for undertaking voluntary conservation measures for imperiled species prior to their listing under the Endangered Species Act (ESA). The proposed policy was **published** in the *Federal Register* on July 22, 2014. Interested parties may provide comments to the FWS during the 60-day comment period which ends September 22, 2014.

**Why does this matter?** The ESA has a wide and growing reach. The FWS has a long list of species that it is considering for ESA protection. As the agency lists and designates critical habitat for more species, the potential restrictions on landowners will increase.

**Why Comment?** The FWS has a few ways for landowners to obtain protection from ESA prohibitions by undertaking voluntary measures, but they are cumbersome and have not offered sufficient benefits. With this proposed policy, FWS is trying to expand the benefits and the ways that landowners can obtain such benefits. However, the policy only goes so far, and commenters can provide changes to improve the approach.

Your Venable attorney or the authors of this alert can assist you in understanding how this policy could affect you and your property.

#### Additional Information

The purpose of the policy is to encourage and reward early voluntary conservation actions taken to protect at-risk species. According to the FWS, "[b]y incentivizing early voluntary conservation efforts before they reach the point of endangerment, the proposed policy will help protect at-risk wildlife from habitat loss, competition from non-native species, and other threats from the action for which the credit is later redeemed, providing an overall benefit for the species." At-risk species are those that are in decline but have not yet been listed as threatened or endangered under the Endangered Species Act. This means the policy covers more than species that are already awaiting listing, known as candidate species.

The proposed policy allows landowners to earn credits for current efforts that benefit at-risk species. Landowners can include any landowning entity such as states, tribes, corporations, private individuals, and federal agencies. If the species is ultimately listed as threatened or endangered under the ESA, the landowner may redeem earned credits to offset or mitigate other actions it takes that are detrimental to the species. Landowners who earn credits may also trade or sell them to a third party. The proposed policy, however, provides no guarantees that there will be no further restrictions on the landowner's actions if the species is ultimately listed. This is a very important reservation of rights, which should be clarified before the policy is finalized.

Some of the significant requirements for the landowner's actions to receive credit include:

- The benefit of the action must be greater than the detriment from the action for which the credit is later redeemed;
- The conservation action must provide an overall benefit for the species;
- Credit may only be earned before the species is listed as threatened or endangered under the ESA;
- Credit may not be earned for actions that are otherwise mandated by federal, state, or local law (or that are part of an existing Candidate Conservation Agreement).

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The proposed policy also sets forth specific provisions for states and federal agencies. The policy is intended to engage states in designing and implementing their own programs to encourage voluntary prelisting conservation actions. States may choose to work with the FWS to administer a program and the FWS will provide assistance when it is needed.

Federal agencies may also take voluntary conservation actions in order to earn credits. The federal agencies may have these conservation actions, and any credits earned, taken into consideration during **ESA section 7** consultations with the FWS.

### **Contrasting the Proposed Policy with Existing FWS Policies**

Landowners may be interested to know how the proposed new policy differs from other voluntary conservation actions permitted by the FWS. Currently, landowners and the FWS may enter into Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs).

Unlike the agreements in the proposed policy which may apply to species that have not yet been declared candidate species by the FWS, CCAs and CCAAs may only be used for conservation of candidate species. Additionally, similar to CCAs – which may be entered into by federal agencies, states, local governments, tribes, private property owners, and others – any type of landowner may take advantage of the agreements in the proposed policy. CCAAs, on the other hand, are restricted to non-federal landowners.

A landowner in a CCAA receives a permit containing assurances that he will not be required to later implement conservation measures beyond those in the CCAA. This permit also guarantees that additional resource and land use limitations will not be imposed if or when the species is eventually listed. Meanwhile, a landowner in a CCA – and a landowner under the proposed policy – will receive no assurances or protections from the FWS. As mentioned above, this is a significant reservation of rights which landowners may find important.

Of course, the final difference between the proposed policy and existing CCA and CCAAs – and the reason the FWS hopes it will encourage more voluntary landowner actions – is the ability to earn credits for those actions. This additional incentive is designed to encourage more landowners to proactively take actions to conserve at-risk species so that listing the species is ultimately unnecessary.

Interested parties should take note that the public comment period began on July 22, 2014 and parties will have until September 22, 2014 to submit comments on the proposed policy. Venable attorneys can assist you with the public comment process and can help clients ensure their concerns or comments are submitted to the FWS.