California likes to portray itself as an environmental leader, and in many ways it is. But in the context of one of the most important areas of environmental law – protecting endangered species – California is on the verge of eliminating most of its protections for the habitat of endangered species. That is the result of the double-punch of retrenchment by the Trump Administration on the federal Endangered Species Act (ESA), and the impacts of the likely passage of Proposition 45 this fall.

First, why habitat protections for endangered species matters. There are many different threats to endangered species globally, in the US, and in California. Climate change, invasive species, overhunting or over collection. But one of the most important ones is the destruction of endangered species habitat. While many laws, including California's Endangered Species Act (CESA) protect against hunting and harvesting of endangered plants and animals, protecting individual plants and animals from direct take is only of limited benefit of those plants and animals do not have habitat to occupy. And that is what is under threat right now.

I'll begin at the federal level. As I noted in prior blog posts the Trump Administration is trying to repeal the definition of harm in the regulations implementing the ESA – that matters because it is that regulatory definition that extends protections under Section 9 of the ESA to endangered species habitat. Section 9 applies to federal, state, local, and private actors, and prohibits "take" of endangered species, which the statute defines to include "harm." This regulatory definition has been in place since the early 1980s, so the changes are a big deal.

There are other protections for endangered species habitat under the ESA, but those too have been, or are being, trimmed back substantially. Section 7 of the ESA prohibits federal agencies from "adversely modifying" areas designated as "critical habitat" for endangered species. As part of the regulatory revisions by the Trump Administration, the Administration is also trying to make it easier to exclude areas from critical habitat based on economic or other factors. That would substantially narrow the application of Section 7's protections.

On top of that, since Section 7 and the adverse modification prohibition only apply to federal actions, Section 7 does not cover private development activity unless there is a federal permit. Historically one of the federal permit requirements most likely to trigger Section 7 and ensure endangered species habitat protection was wetlands protection under Section 404 of the Clean Water Act. That mattered in part because we have lost a lot of wetlands in the United States. But the Supreme Court in *Sackett* dramatically cut back on the scope of wetlands protection a few

years ago, and the Trump Administration is seeking to aggressively extend those restrictions on wetlands protection.

But surely California, being at the forefront of environmental law, can fill the breach. Won't California's own Endangered Species Act (CESA) protect that habitat?

The answer to that question is . . . very unclear. As I've noted before, CESA on its face does not explicitly protect habitat of endangered species – it only explicitly prohibits killing or injuring individual members of listed species. Whether that includes habitat modification has long been contested, and probably varies in practice with the specific activity and particular species at issue in any given case.

But there is a different California law that does provide stringent protections for endangered species habitat in California: the California Environmental Quality Act (CEQA). It applies to all government actions in California, and because of the ubiquity of land-use regulation in California, that covers most private development as well. CEQA requires analysis and feasible mitigation for significant impacts to endangered species habitat. So we're all good?

Not so fast. As I've also written about, Proposition 45 will likely pass in November, and it would likely eliminate protections for endangered species habitat under CEQA for a wide range of projects, including housing, freeways, clean energy, mass transit, dams, irrigation projects, timber harvesting, and potentially any development activity that converts natural habitat in California (because that might reduce fire risk). So the backstop of CEQA protections may well be gone after November.

What will be left? Some protections, but they will be much more patchwork, and uncertain as to the extent to which they cover individual species.

First, protected areas remain, like parks, wildlife refuges, and areas managed by land trusts. But those are uneven in the extent to which they cover endangered species. For instance, high-altitude mountain habitats are well covered with federal land in wilderness protections in the Sierra Nevada, but grassland habitats in the Central Valley have very little protected areas.

Second, the adverse modification provisions of Section 7 will still apply for federally listed species with critical habitat. But that is only some listed species (a significant

proportion still have no designated critical habitat) and a lot of private development activity in California may not be covered by Section 7 post-Sackett.

Third, there are other state laws that protect habitat for some particular species, such as Joshua trees, but that is only a fraction of all endangered species in the state.

Fourth, there are other state laws that limit development on certain kinds of lands – for instance, California has broader wetlands protections than under the Clean Water Act, and also has a regulatory program restricting development that affects state waterways. But it will be happenstance whether those laws protect the habitat for a particular endangered species.

Fifth, it's possible CESA might be interpreted by state agencies and the courts as generally applying to habitat destruction for CESA-listed species. (Note that this would not help the many species listed only under the ESA, but not under CESA.) And even short of that, state agencies and the courts might interpret the prohibition on killing or injuring CESA-listed species as including unintentional killing or injury, such as habitat development that also directly kills or injures a member of a CESA-listed species. (Consider bulldozing endangered plant species to construct a development project – the bulldozing would kill or injure the plants, but not intentionally (i.e., the intent was to develop the project, not kill the plants).) That would provide protections for relatively immobile species (think plants or shellfish), but would provide much less protection for mobile, large-range species (think mountain lions).

Finally, as I've noted, the Trump Administration's attempt to repeal the harm definition is legally vulnerable, and could be overturned in court.

Come 2027, the state that claims to be a leader in environmental law may have ended up gutting a core component of its environmental law protections for endangered species.

And I'm not particularly optimistic that the legislature will step in. The CEQA reforms in 2025 that exempted some housing projects from CEQA review allowed those exemptions to apply for projects on endangered species habitat, and the Assembly Appropriations Committee (chaired by East Bay Democrat Buffy Wicks) blocked an effort to change that this year.