



Administration Continues Overhaul of Endangered Species Act Regulations

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On June 22, 2023, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) published three proposed rules that would significantly revise their regulations implementing several sections of the Endangered Species Act (“ESA”). Primarily, the Services’ proposals focus on amending or reversing several components of the ESA regulations promulgated in 2019 by the prior Administration, including the implementation of Section 4 (listing of species as threatened or endangered and the designation of critical habitat), Section 7 (consultation procedures); and Section 4(d) (application of the “take” prohibitions to threatened species). In addition, and beyond the scope of the 2019 final rules, the Services are proposing revisions to the Section 7 regulations regarding the scope and application of reasonable and prudent measures (“RPM”) and to the Section 4(d) regulations to include certain exceptions for federally recognized Tribes. Comments on the three proposed rules are due by [August 21, 2023](#).

Background

The species and habitat protected under the ESA extend to all aspects of our communities, lands, and waters. There are almost 2,400 species listed as threatened or endangered pursuant to ESA Section 4. Critical habitat for one or more species has been designated in all regions of the U.S. and its territories. Through the Section 7 consultation process and “take” prohibitions under Sections 9 and 4(d), the ESA imposes species and habitat protection measures on the use and management of private, federal, and state lands and waters and, consequently, on governmental and private activities.

These proposed rules reflect the Biden Administration’s continuing efforts to reform and revise the Services’ approach to ESA implementation that was adopted by the prior Administration. Pursuant to President Biden’s [Executive Order 13990](#), the Services reviewed certain agency actions for consistency with the new Administration’s policy objectives. As part of that review, the Services identified [five final rules](#) related to ESA implementation that should be reconsidered. Previously, in 2022, the Services rescinded two of those final rules—the regulatory [definition](#) of “habitat” for the purpose of designating critical habitat and the regulatory [procedures](#) for excluding areas from critical habitat designations. While these proposed rules reflect the consummation of that initial effort, the Services are currently contemplating additional revisions to other ESA regulations and policies.

Proposed Revisions to the Regulations for Listing Species and Designating Critical Habitat

Section 4 of the ESA dictates how the Services list species as threatened or endangered, delist or reclassify species, and designate areas as critical habitat. The proposed rule would make several targeted revisions to these procedures. Notable changes would include:

- **Evaluation of the “foreseeable future” for threatened species:** The proposed rule would revise the applicable regulatory framework to state that “[t]he term foreseeable future extends as far into the future as the Services can reasonably rely on information about threats to the species and the species’ responses to those threats.” The Services note that this revision is intended to reflect that absolute certainty about utilized information is not necessary, just a reasonable degree of confidence in the prediction. The Services are also considering whether to rescind the framework for interpreting and implementing the “foreseeable future” in its entirety.
- **Designation of unoccupied critical habitat:** The proposed rule would revise the two-step process for determining when unoccupied areas may be designated as critical habitat. proposed rule addresses how specific areas that are unoccupied critical habitats are designated. In part, the Services would remove the requirement that they “will only consider” unoccupied areas to

be essential when a designation limited to occupied critical habitat would be inadequate for the conservation of the species. The Services also would remove the provision that an unoccupied area is considered essential when there is reasonable certainty both that the area will contribute to the conservation of the species and that it contains one or more physical or biological features essential to the conservation of the species.

- **Not prudent determinations for critical habitat designation:** The proposed rule would remove the justification for making a not prudent determination when threats to a species' habitat are from causes that cannot be addressed through management actions in a Section 7 consultation. The Services note that this is intended to address the misperception that a designation of critical habitat could be declined for species impacted by climate change.
- **Factors for delisting species:** The proposed rule would restore language that delisting is appropriate when the species "is recovered." The Services would also clarify that the delisting analysis is not limited to the same specific factors or threats that led to the listing of the species.
- **Economic impacts in classification process:** The proposed rule would restore the regulatory condition that a species listing determination is to be made "without reference to possible economic or other impacts of such determination."

Proposed Revisions to the Consultation Regulations

The ESA Section 7 consultation requirement applies to discretionary federal agency actions—including federal permits, licenses and authorizations, management of federal lands, and other federal programs. Federal actions that are likely to adversely affect a listed species or designated critical habitat must undergo a formal consultation review and issuance of a biological opinion evaluating whether the action is likely to jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. The biological opinion also evaluates the extent to which "take" of a listed species may occur as a result of the action and quantifies the level of incidental take that is authorized. The proposed rule would make the following notable changes to the applicable regulations:

- **Expanded scope of reasonable and prudent measures:** The proposed rule would revise and expand the scope of RPMs that could be included as part of an incidental take statement in a biological opinion. In a change from their prior interpretation, and in addition to measures that avoid or minimize impacts of take, the Services would have discretion to include measures as an RPM that offset any remaining impacts of incidental take that cannot be avoided (e.g., for certain impacts, offsetting measures could include restoring or protecting suitable habitat). The Services also would allow RPMs, and their implementing terms and conditions, to occur inside or outside of the action area. Any offsetting measures would be subject to the requirement that RPMs may only involve "minor changes" to the action, must be commensurate with the scale of the impact, and must be within the authority and discretion of the action agency or applicant to carry out.
- **Revised definition of "effects of the action":** In an effort to clarify that the consequences to listed species or critical habitat that are included within effects of the action relate to both the proposed action and activities that are caused by the proposed action, the proposed rule would add a phrase to the definition to note that it includes "the consequences of other activities that are caused by the proposed action but that are not part of the action." In addition, the proposed rule would remove provisions at 50 C.F.R. § 402.17, added in 2019, which provide the factors used to determine whether an activity or a consequence is "reasonably certain to occur."
- **Revised definition of "environmental baseline":** The proposed rule would revise the definition in an effort to more clearly address the question of a federal agency's discretion over its own activities and facilities when determining what is included within the environmental baseline. The Services note that it is the federal action agency's discretion to modify the activity or facility that is the determining factor when deciding which impacts of an action agency's activity or facility should be included in the environmental baseline, as opposed to the effects of the action. The Services also would remove the term "ongoing" from the definition in an effort to clarify that any continuation of a past and present discretionary practice or operation would be in the environmental baseline.

- **Clarification of obligation to reinitiate consultation:** The proposed rule would remove the phrase “or by the Service” to clarify that it is the federal agency, and not the Services, that has the obligation to request reinitiating of consultation when one or more of the triggering criteria have been met (and discretionary involvement or control over the action is retained).

Proposed Reinstatement of Blanket Protections for FWS Species Listed as Threatened

Pursuant to the ESA, threatened and endangered species are treated differently with respect to what are often called the “take” prohibitions of the Act. In part, ESA Section 9(a)(1) prohibits the unauthorized take—which is defined as an act “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”—of an endangered species. In contrast, under Section 4(d) of the ESA, the Secretary may issue a regulation applying any prohibition set forth in Section 9(a)(1) to a threatened species. Historically, FWS applied a “blanket 4(d) rule” that automatically extended all ESA Section 9(a)(1) prohibitions to a threatened species unless a species-specific rule was otherwise adopted. In 2019, FWS revised its approach to align with NMFS’s long-standing practice, which only applies the ESA prohibitions to threatened species on a species-specific basis. The proposed rule would make the following notable changes to FWS’s approach under Section 4(d):

- **Reinstate blanket 4(d) rule:** The proposed rule would reinstate the general application of the “blanket 4(d) rule” to newly listed threatened species. As before, FWS would retain the option to promulgate species-specific rules that revise the scope or application of the prohibitions that would apply to threatened species.
- **New exceptions for Tribes:** The proposed rule proposed rule would extend to federally recognized Tribes the ability currently afforded to FWS and other federal and state agencies to aid, salvage, or dispose of threatened species. FWS is also considering an additional revision that would extend exceptions to the prohibitions to certain individuals from a federally recognized Tribe’s natural resource agency for take associated with conservation activities pursuant to an approved cooperative agreement that covers the threatened species.

For More Information

Van Ness Feldman counsels clients on ESA compliance and, when necessary, litigates to protect clients’ interests. If you would like more information about the implementation of the ESA or other environmental laws, please contact [Tyson Kade](#), [Jenna Mandell-Rice](#), [Joe Nelson](#), [Jordan Smith](#) or any member of the firm’s Land, Water & Natural Resources Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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