



Administration Finalizes Revised Endangered Species Act Regulations

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On March 28, 2024, the Biden Administration released three final rules that significantly revise regulations, previously promulgated in 2019, that implement several sections of the Endangered Species Act (“ESA”). The U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) finalized regulations that amend or reverse several components of the ESA regulations implementing [Section 4](#) (listing of species as threatened or endangered and the designation of critical habitat) and [Section 7](#) (consultation procedures). Additionally, FWS finalized regulations reinstating its “blanket rule” under [Section 4\(d\)](#) (application of the ESA’s “take” prohibitions to threatened species). The final rules are scheduled to be published in the Federal Register on April 5, 2024, and should become effective May 6, 2024.

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.

Pursuant to President Biden’s [Executive Order 13990](#), the Services reviewed certain agency actions taken under the prior administration and identified [five final rules](#) related to ESA implementation that should be reconsidered. In 2022, the Services rescinded two of those final rules—the regulatory [definition](#) of “habitat” for the purpose of designating critical habitat and the regulatory [procedures](#) for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 the three final rules released on March 28 reflect the consummation of that initial effort, the Services are currently preparing additional revisions to other ESA regulations and policies.

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 final rule makes several targeted revisions to these procedures. Notable changes include:

- **Evaluation of the “foreseeable future” for threatened species:** The final rule revises the applicable regulatory framework to state that “[t]he foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the

species' responses to those threats." The Services decline to set a predetermined number of years or period of time and will evaluate the foreseeable future on a species-by-species basis.

- **Designation of unoccupied critical habitat:** The final rule revises the process for determining when unoccupied areas may be designated as critical habitat. The Services 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 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 final rule removes 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 final rule clarifies that a species will be delisted if it has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species. A species also will be delisted if it is extinct or new information since the original listing decision shows that the listed entity does not meet the definition of a species, an endangered species, or a threatened species.
- **Economic impacts in classification process:** The Services restore the regulatory condition that a species listing determination is to be made "without reference to possible economic or other impacts of such determination."

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 final rule makes the following notable changes to the applicable regulations:

- **Expanded scope of reasonable and prudent measures (RPMs):** The final rule revises and expands the scope of RPMs that can 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 can 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 allow RPMs, and their implementing terms and conditions, to occur inside or outside of the action area. Any offsetting measures are 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 final rule adds 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 final rule removes 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 final rule revises 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. For ongoing actions, in the preamble, the Services state that past impacts would be included in the environmental baseline, and the future consequences of the proposed federal action would be the subject of the consultation’s effects of the action analysis—i.e., “an effects analysis may need to assess the future and extended life of a structure yet the past existence and impacts of the structure are included in the environmental baseline.”
- **Clarification of obligation to reinitiate consultation:** The final rule removes the phrase “or by the Service” to clarify that it is the federal action agency, and not the Services, that has the obligation to request reinitiation of consultation when one or more of the triggering criteria have been met (and discretionary involvement or control over the action is retained).

The Services state that they intend to provide additional guidance in an updated ESA Section 7 Consultation Handbook (last revised in 1998) that is anticipated to be made available for public comment.

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 final rule makes the following changes to FWS's approach under Section 4(d):

- **Reinstate blanket 4(d) rule:** FWS reinstates the general application of the "blanket 4(d) rule" to newly listed threatened species. As before, FWS retains the option to promulgate species-specific rules that revise the scope or application of the prohibitions that would apply to threatened species.
- **New exception for Tribes:** The final rule extends to federally recognized Tribes the ability currently afforded to FWS and other federal and state agencies to aid, salvage, or dispose of threatened species.

Implications

These final rules perpetuate the ongoing fluctuation that has become prevalent with respect to the ESA regulatory landscape as each Administration reevaluates and revises the ESA policies and priorities of prior Administrations. In addition, the durability of these regulations will likely be tested through litigation, as both environmental and industry groups have signaled likely legal challenges.

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 and/or the implications of these final rules, please contact [Tyson Kade](#), [Joe Nelson](#), [Jordan Smith](#), [Jenna Mandell-Rice](#) 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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