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USFWS and NMFS Propose Changes to Restore Endangered Species Act Regulations Promulgated during the First Trump Administration

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On November 21, 2025, the U.S. Fish and Wildlife Service ("USFWS") issued four proposed rules—two of which the National Marine Fisheries Service ("NMFS") joined—that, if finalized, will revise the regulations for listing and delisting species and designating critical habitat under Section 4 and the procedures for interagency consultation under Section 7 of the Endangered Species Act ("ESA"). These proposed rules, which would largely restore regulations issued during the first Trump Administration, reflect the ongoing trend of ESA regulatory oscillation as each recent Administration seeks to revise implementation of the Act. For each of these proposed rules, any promulgated regulations would only apply on a prospective basis. Members of the public can comment on the proposed rules until December 22.

Background

In 2019, during the first Trump Administration, USFWS and NMFS (collectively, "the Services") finalized revisions to the ESA regulations that modified the procedures for listing and delisting species and designating critical habitat under Section 4 and for interagency consultation under Section 7. USFWS also removed its Section 4(d) "blanket rule" that automatically applied the ESA's take prohibitions to threatened species. In 2020, USFWS finalized regulations for weighing and balancing the impacts and benefits when determining whether to exclude areas from critical habitat designations.

Under the Biden Administration, in 2022, USFWS rescinded the 2020 rule regarding exclusions from critical habitat designations. And, in 2024, USFWS and NMFS finalized ESA regulations that amended or rescinded components of the three 2019 ESA final rules (Section 4, Section 7, and Section 4(d) regulations). Some of these actions were challenged in lawsuits that are still pending today.

On January 20, 2025, the White House issued Executive Order 14154 titled "Unleashing American Energy," which directed all agencies to immediately review and identify agency actions that potentially impose an undue burden on the identification, development, or use of domestic energy resources and consider suspending, revising, or rescinding agency actions identified as unduly burdensome that conflict with this national objective. To administer provisions of Executive Order 14154, the Secretary of the Interior subsequently issued Secretary's Order 3418, which indicated that USFWS would work with NMFS to suspend, revise, or rescind the Biden-era ESA regulations that had been issued in 2024.

Listings and Critical Habitat Under Section 4

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 reinstates the following regulatory provisions from the 2019 final rule:

- **Economic impacts of listing species**: The proposed rule would remove the prohibition on the Services including information on economic impacts when making a listing, delisting, or reclassification decision.
- **Duration of the "foreseeable future":** For determining whether to list a species as threatened, the phrase "foreseeable future" will extend only so far as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely and will be determined on a case-by-case basis.
- **Delisting a species**: The proposed rule would reinstate the following criteria for species delisting: (1) the species is extinct, (2) the species does not meet the definition of an endangered or threatened species, or (3) the listed entity does not meet the statutory definition of a species.
- **"Not prudent" determinations for designating critical habitat:** The proposed rule would reinstate the following circumstances for when a not prudent determination could be made: (1) "when threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from section 7 consultations," and (2) when the "Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available."
- **Two-step process for designating critical habitat:** The proposed rule would restore a two-step process for critical habitat designations that prioritizes the designation of occupied over unoccupied areas. Additionally, to designate unoccupied areas as critical habitat, the Services must make a determination that there is reasonable certainty both that the area will contribute to the conservation of the species and that it contains one or more of the physical or biological features essential to the conservation of the species.

Exclusion of Areas from Critical Habitat Designations under Section 4(b)(2)

Pursuant to ESA Section 4(b)(2), the Services must consider the economic, national security, and other impacts of designating any particular area as critical habitat. The Services also may exclude an area from a critical habitat designation when the benefits of exclusion outweigh the benefits of including that area, so long as the exclusion will not result in the extinction of the species. In 2020, USFWS promulgated regulations to clarify how the agency would consider and evaluate particular areas for exclusion from a critical habitat designation. In 2022, USFWS rescinded these regulations. In reinstating the 2020 regulations at 50 C.F.R. § 17.90, the proposed rule would:

- **Provide a framework for considering an exclusion:** At the time of publication of a proposed critical habitat designation, USFWS would identify and provide information on the economic, national security, and other impacts along with areas that are being considered for exclusion.
- **Mandatory consideration of relevant impacts:** The regulations would reflect USFWS's mandatory obligation to consider the economic impacts, impact on national security, and other relevant impacts prior to finalizing a critical habitat designation.

- **Determination whether to conduct an exclusion analysis:** The regulations would clarify that USFWS will exercise its discretion to conduct an exclusion analysis when: (1) the proponent of excluding an area provides credible information of a meaningful impact supporting a benefit of exclusion; or (2) USFWS otherwise decides to evaluate any area for possible exclusion.
- **Approach to conducting the exclusion analysis:** The regulations would provide several principles to guide USFWS's weighing of the benefits of including or excluding particular areas in the designation of critical habitat.
- **Approach to excluding areas:** If USFWS determines that the benefits of excluding an area outweigh the benefits of designating that area, the regulations would require USFWS to exclude that area, unless the failure to designate it as critical habitat will result in the extinction of the species.

Section 7 Interagency Consultation

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 may adversely affect a listed species or designated critical habitat must undergo a formal 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 largely revert back to the 2019 regulations with several additional changes:

- **Rescind the option for offsetting reasonable and prudent measures:** The 2024 final rule expanded the scope of reasonable and prudent measures that can be included in an incidental take statement to allow the Services to "offset" any remaining impacts of incidental take of a listed species that cannot be avoided. The Services now propose to remove this option, having determined that the terms "offset" and "mitigation" are not used in the statutory text and are not consistent with the best reading of the ESA.
- **Revise the definition of "environmental baseline":** The proposed rule would revise the first sentence of the definition to emphasize that the Services look to the best available science at the time of consultation to inform the "current" condition of the species or its critical habitat for purposes of analyzing the consequences of the proposed action. The Services also propose to reinstate text from the 2019 definition to clarify that the environmental baseline includes consequences from "ongoing" non-discretionary agency actions.
- **Reinstate the "reasonably certain to occur" provision:** The proposed rule would reinstate the 2019 provisions that were added at 50 C.F.R. § 402.17, which provide factors for when a consequence or activity is "reasonably certain to occur." The proposed rule would add an additional factor—consideration of the amount of administrative discretion remaining to be exercised—when evaluating whether an activity is reasonably certain to occur. When assessing whether a consequence is not caused by the proposed action, the proposed rule would add two additional factors: (1) "the agency has no ability to prevent the consequence due to its limited

statutory authority"; and (2) "if the consequence would occur regardless of whether the proposed action goes forward."

Removal of "Blanket" 4(d) Rule Applicable to Threatened Species

Section 9 of the ESA provides a specific list of prohibitions that are applicable automatically at the time of listing for *endangered* species but not for *threatened* species. However, ESA Section 4(d) requires that, whenever a species is listed as threatened, the Secretary shall issue regulations that are necessary and advisable to provide for the conservation of the species and also may by regulation prohibit any act prohibited under Section 9 for an endangered species; these are referred to as "4(d) rules." In the past, USFWS relied on a "blanket" 4(d) rule that automatically extended nearly all ESA Section 9 prohibitions to a newly listed threatened species unless a species-specific rule was otherwise adopted. USFWS rescinded the blanket 4(d) rule in 2019, and reinstated it in 2024. The proposed rule would:

- **Remove "blanket" option:** Instead of automatically getting protection under a blanket 4(d) rule, for newly listed threatened species and those reclassified in the future, USFWS would issue species-specific protective regulations that are necessary and advisable to provide for the conservation of that species. This species-specific, rather than "blanket," approach brings USFWS back in line with NMFS's longstanding practice.
- **Grandfather protection for currently threatened species:** All threatened species currently receiving protections under the "blanket" rule would continue to do so until USFWS promulgates species-specific rules for those species.
- **Require a "necessary and advisable" determination:** Going forward, in conformity with recent case law, whenever USFWS proposes a species-specific 4(d) rule, it would make a "necessary and advisable" determination, including consideration of conservation and economic impacts, and seek public comment on that determination.

For More Information

Van Ness Feldman counsels clients on ESA compliance, advocates for clients' interests by submitting comments on their behalf and, when necessary, litigates to protect those interests. If you would like more information about the implementation of the ESA or other environmental laws, please contact Tyson Kade, Jordan Smith, Jenna Mandell-Rice, Joe Nelson 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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