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Key Takeaways from Final Revisions to Endangered Species Act Regulations

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Insight — April 15, 2024

On April 5, 2024, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) finalized three sets of revisions to the regulations implementing the Endangered Species Act (ESA). These revisions will become effective on May 5. One pertains to Section 7 interagency consultation, one addresses protections afforded to threatened species, and one addresses species listing and critical habitat designation under Section 4.[1]

The most significant changes include:

- Revisions to the ESA Section 7 regulations reversing the Services' long-held position that they could not impose compensatory mitigation obligations in the consultation process. These revisions may draw the most attention in terms of a legal challenge.
- Revisions to the critical habitat designation approach in the Section 4 regulations providing that the Services, after identifying areas occupied by the species at the time of listing, will identify unoccupied habitat "that the [Services] determine[] are essential for the conservation of the species." This change backs away from the sequencing or prioritization approach previously used that required the Services to first determine that occupied habitat is inadequate to conserve the species before considering the designation of unoccupied habitat as critical. Given the Services' propensities to designate critical habitat areas of multiple-state-sized proportions, this is another area of likely litigation activity.

The remainder of the new regulatory changes are largely fine-tuning around the margins and seem unlikely to significantly affect either on-the-ground conservation or regulatory activities. Overall, the revisions are emblematic of the continual pendulum of wildlife conservation policy that has occurred over the last several administrations. These latest changes swing more in favor of species conservation. In this update, we explain and analyze the key changes and provide bottom-line summaries of how they may affect the regulated community.

I. Revisions to the Section 7 Consultation Regulations

ESA Section 7 requires federal agencies to ensure, in consultation with USFWS or NMFS, that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. [2] While

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most of the revisions to the Section 7 consultation regulations are minor clarifications or small tweaks, the final Section 7 Rule includes a significant change that reverses the Services' long-held position that they could not impose compensatory mitigation obligations in the consultation process. Each of these revisions is summarized below.

A. Offsets as Reasonable and Prudent Measures

When a proposed federal action is likely to adversely affect listed species or critical habitat, formal consultation is required. At the conclusion of formal consultation, USFWS or NMFS issues a biological opinion and, if take of listed species is reasonably certain to occur, an incidental take statement that specifies the reasonable and prudent measures (RPMs) necessary or appropriate to minimize the impact of the incidental take and terms and conditions to implement those RPMs.[3] Prior to these revisions, the Services expressly recognized that "*Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take*."[4]

In an astonishing about-face, the Services have revised the regulations regarding incidental take statements to provide that RPMs "may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take."[5] The regulations will also now state that,

> Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.[6]

This means that, for the first time, the Services may require applicants for federal authorizations to implement compensatory mitigation, i.e., offsets, as part of the Section 7 consultation process. The Services do not indicate the types of circumstances in which they might choose to exercise this discretion to require "additional reasonable and prudent measures" to address incidental take, which suggests that compensatory mitigation will likely become a default requirement whenever any incidental take is expected. The Services also provide few sideboards on how much compensatory mitigation will be imposed, beyond assuring the regulated community that it will be "proportional to the impact of incidental take that cannot be avoided or reduced" and that the amount or extent of take described in the incidental take statement will serve as "the upper limit on the scale of any offsetting measures."[7] They have also promised to update

their Consultation Handbook to provide additional guidance on this issue. [8]

Because it represents such a departure from established practice and an expansion of the Services' authority, this revision will almost certainly be the subject of a legal challenge. And it is vulnerable to such a challenge for being inconsistent with the plain language of the ESA. Under ESA Section 10, Congress specified that applicants for an incidental take permit must "to the maximum extent practicable, ***minimize and mitigate*** the impacts of such taking."[9] By contrast, Section 7 directs the Services to issue an incidental take statement that "specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to ***minimize*** such impact."[10] Under the final rule, the Services are interpreting Section 7's reference to "minimize" as including "mitigate." Under that interpretation, Section 10's requirement that an applicant "mitigate" the impacts of the take would be superfluous since it already requires the applicant to "minimize" such impacts. Courts strive to interpret statutes in a way that does not render any language superfluous.[11] Thus, it is questionable whether this expansion of the Services' authority to compel compensatory mitigation obligations through Section 7 consultation will survive.

Bottom Line: This revision, if it is not enjoined, will cause significant uncertainty and impose additional administrative and financial burden on applicants for federal authorizations.

B. Elimination of Section 402.17 on Effects of the Action

In the 2019 revisions to the Section 7 consultation regulations, the Services simplified the test for what constitutes an effect of the proposed federal action by eliminating the distinctions between direct effects, indirect effects, and effects of actions that were interrelated or interdependent with the proposed action. The 2019 rule defined "effects of the action" as:

> all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).[12]

This definition codified a two-part test that was already used in practice prior to 2019 to identify the effects of the action: (1) there must be "but for" causation, i.e., the consequence would not occur but for the proposed action, and (2) the consequence must be reasonably certain to occur. The 2019 rule also added 50 C.F.R. § 402.17, cross-referenced in the above definition, in which the Services provided additional guidance as to factors that should be considered in this two-part test, including a

requirement that a "conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available."[13]

In the new Section 7 Rule, the Services have struck the cross-reference to Section 402.17 at the end of the "effects of the action" definition because they have eliminated that section altogether. The Services indicated several reasons for eliminating that provision, including their objection to the "clear and substantial information" language and the fact that it is more appropriate to describe such factors through guidance documents, such as the forthcoming update to the Consultation Handbook.[14]

Bottom Line: The two-part test for identifying the effects of the action remains in place, but some of the guidance as to what to consider in that test will no longer be available in the regulations. Whether this makes a material difference in the how the effects of the action are defined remains to be seen.

C. Revision to Environmental Baseline Definition

During formal consultation, the Services must identify the environmental baseline, which is "the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action."[15] The effects of the action are then added to this environmental baseline, as well as cumulative effects, in the jeopardy analysis.[16]

In most instances, identifying the environmental baseline is not difficult. But when the consultation involves an ongoing federal activity, such as the operation of a dam where the federal agency has no discretion to remove or modify the dam, determining whether the effects of the ongoing activity are part of the environmental baseline or an effect of the action can be more complicated.

With respect to this issue, the definition as revised in 2019 states: "The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline."[17] The new Section 7 Rule changes this language to state: "The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline."[18] The Services indicated that this change was intended to focus on agency discretion rather than whether the federal activities were "ongoing."[19]

Bottom Line: This revision will have little impact on most Section 7 consultations as few actions are proposed in the context of existing federal activities where the federal agency lacks discretion to modify those activities.

D. Reinitiation of Consultation

The Section 7 regulations specify certain conditions that will trigger the need to reinitiate consultation for the proposed action, such as exceeding the take limit or when a new species is listed that may be affected by the action.[20] The current regulations further indicate that, when one of those conditions is met, reinitiation "is required and shall be requested by the Federal agency or by the Service."[21] Courts have relied on this language to impose a reinitiation obligation on the Services.[22]

Because the Services have no authority to compel an action agency to engage in Section 7 consultation,[23] they have revised this regulation to eliminate the reference to the Service and clarify that the obligation to reinitiate consultation lies solely with the action agency. The Services are likely making this change in an attempt to insulate the Services from ESA citizen suits against them for failure to reinitiate consultation.

Bottom Line: This revision is likely to have little impact on most projects since the Services can still notify the action agency when they believe reinitiation is required.

II. Reinstatement of the "Blanket 4(d) Rule"

The ESA's statutory prohibition on unauthorized take applies only to species of fish and wildlife listed as "endangered."[24] With respect to threatened species, Section 4(d) directs the Services to issue regulations that are "necessary and advisable" for the conservation of such species and recognizes that such regulations may, but do not have to, provide the same protections as provided in the statute for endangered species.[25] This means that the Services may provide species-specific rules for threatened species that are tailored to the threats to those species and provide more flexibility as to what is deemed to constitute prohibited take.

For several decades prior to 2019, USFWS had operated under a so-called "Blanket 4(d) Rule" in which the full statutory protections afforded to endangered species automatically applied to threatened species unless USFWS issued a species-specific rule to the contrary.[26] In 2019, USFWS repealed the Blanket 4(d) Rule, which had the effect of requiring the agency to issue species-specific regulations outlining the protections for each threatened species listed after the effective date of the repeal.[27]

In the Blanket 4(d) Reinstatement Rule, USFWS is now reverting to the prior practice in which a threatened species will, by default, receive the same statutory protections that endangered species receive unless USFWS elects to issue a species-specific 4(d) rule for a particular threatened species.[28] The Blanket 4(d) Reinstatement rule differs from the prior version of the Blanket 4(d) Rule in two minor ways.

First, under the Blanket 4(d) Reinstatement Rule, any employee or agent of a federally recognized Tribe, who is designated by the Tribe for such purpose, may provide aid to injured or diseased wildlife or plants or dispose of dead individuals without permits. This change reflects the Biden administration's focus on Tribal communities but is likely to have little

practical impact on the regulated community.[29]

Second, the previous version of USFWS's endangered plant regulations was not fully co-extensive with the ESA's statutory protections for such plants.[30] Thus, USFWS has used this rulemaking to revise the endangered plant regulations to be consistent with the statute. In doing so, the Blanket 4(d) Reinstatement Rule will now provide a presumption that threatened plants receive the full suite of protections afforded to endangered plants under the statute, rather than those that were just included in the previous endangered plant regulations.[31] This revision is unlikely to have a significant impact on the regulated community in light of the fact that incidental take of listed plants is not prohibited.

Bottom Line: The reversion to the pre-2019 Blanket 4(d) Rule means that it is less likely that USFWS will issue tailored 4(d) rules for threatened species of wildlife that provide additional flexibility in terms of what constitutes prohibited take. In other words, more newly listed threatened species will likely be afforded the full suite of protections provided to endangered species under the statute.

III. Revisions to the Section 4 Listing and Critical Habitat Regulations

A. Elimination of Reference to Economic Impacts

The Services have now also reversed earlier Trump administration-era changes to the regulations governing the factors for listing, delisting, or reclassifying species as threatened or endangered. Prior to the Trump administration, 50 C.F.R. § 424.11(b) provided that the Services would make their listing determinations "solely on the basis of the available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination."[32]

In 2019, the Services revised Section 424.11(b) to eliminate the words "without reference to possible or other impacts of such determination."[33] Consequently, the Services were permitted to compile and identify the economic impacts of listing determinations, even though they acknowledged that, under ESA Section 4(b)(1), such information could not influence the listing determination.[34] For example, the Services could identify the economic consequences of prohibiting logging in areas where a proposed endangered or threatened species was present. Environmental groups cautioned that calculating the costs of protecting species and making these calculations public could influence, even subconsciously, whether Service officials would list a species.[35]

Bottom Line: The Section 4 Rule reinstates the "without reference to possible economic or other impacts of such determination" language. This revision will be viewed by many in the conservation community as a return to the statutory listing approach and a confirmation of the current administration's commitment to biodiversity.[36]

B. Definition of "Foreseeable Future"

The ESA defines a threatened species as "any species which is

likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[37] This statutory definition incorporates both (i) some forecasting by the Services about the status of the species "within the foreseeable future" and (ii) the definition of an endangered species, which is "any species which is in danger of extinction throughout all or a significant portion of its range."[38] Thus, the determination of threatened status requires the Services to predict whether, at some point in the foreseeable future, the species would satisfy the definition of an endangered species, i.e., be in danger of extinction in all or a significant portion of its range.

The ESA does not contain any definition or direction on the term "foreseeable future," and until 2019 the Services did not have any regulatory definition or considerations for the term. In 2013, in the polar bear listing litigation, the D.C. Circuit upheld USFWS's approach in which it explained that "[t]he timeframe over which the best available scientific data allows us to reliably assess the effect of threats on the species is the critical component for determining the foreseeable future."[39] This explanation summarized the approach USFWS generally used in the absence of any regulatory guidance on the issue.

In 2019, for the first time the Services adopted a description of "foreseeable future" considerations in the Section 4 listing regulations. That provision provided:

> The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.[40]

In the new Section 4 Rule, the Services have revised that provision slightly to replace "reasonably determine that both the future threats and the species' responses to those threats are likely" with "make *reasonably reliable predictions* about the threats to the species and the species' responses to those threats."[41] The rest of the determination of a threatened species guidance in 50 C.F.R. § 424.11(d) remains essentially unchanged.

Bottom Line: As a plain-language analysis of these minor regulatory changes shows, the Services have now made it incrementally easier to list a species as threatened because they only have to make "reasonable predictions" about the effects in the foreseeable future rather than a reasonable "determination" that the future threats and response to those threats are "likely." Still, these are small changes at the edges, and within the broad band of agency discretion previously recognized by the

courts in cases like the polar bear listing litigation.

Overall, this nibbling around the edges of the Section 4 species listing/delisting rules seems intended to allow the Services greater discretion and flexibility to apply Section 4 in a way that, consistent with other current administration priorities, supports biodiversity conservation.

C. Clarification of Standards for Delisting Species

Delisting occurs when NMFS or USFWS removes a species from the list of threatened or endangered species, which means it no longer subject to the ESA's protections. When the Services decide to list or reclassify (i.e., downlisting or uplisting) a species as threatened or endangered, they determine whether the species meets the definition of threatened or endangered based on any one or combination of the following factors:

- The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting its continued existence.[42]

This determination is made "on the basis of the best scientific and commercial data available."[43] These same factors also pertain to determining when a species should be delisted, downlisted (i.e., changed from an endangered to a threatened species), or uplisted (reclassified from threatened to endangered).

In 2019, the Services revised 50 C.F.R. § 424.11(e) to specify that, after a status review based on the best scientific and commercial data available, the "Secretary shall delist a species if the Secretary finds that . . . (1) The species is extinct; (2) The species does not meet the definition of an endangered species or a threatened species. . . .; or (3) The listed entity does not meet the statutory definition of a species."[44] When determining that a species did "not meet the definition of an endangered or a threatened species," the Secretary was to use the listing and reclassification standards outlined above.[45]

The delisting standards under the new Section 4 Rule reflect the same concepts, which is not surprising as those are statutorily required factors, with some slight clarifications. The Services have revised this regulation to state that a species will be delisted if:

> (1) The species is extinct;
>
> (2) The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened

> species;
>
> (3) New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or
>
> (4) New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.[46]

The Services explain that these changes were made to add substance to sections that were "potentially confusing" or "vague."[47] During the scoping phase, some commenters were concerned by the Services inserting the concept of "recovery" into the regulation, noting that delisting could be dependent upon the existence of a recovery plan or that delisting could be contingent upon meeting recovery plan criteria.[48] The Services clarified that instead "'recovery' must be assessed against the definitions of an endangered or threatened species" and that delisting is "not exclusively or inextricably linked to any recovery plan criteria."[49]

Bottom Line: Based on the Services' clarification, these revisions are unlikely to substantially change species delisting efforts.

D. Revisions to When Designation of Critical Habitat May Not Be Prudent

The ESA requires that "to the maximum extent prudent and determinable," the Service must designate critical habitat at the time the species is listed or within one year if the critical habitat is not determinable at the time of listing.[50] The 2019 revisions to the Section 4 regulations added provisions to the regulatory list of circumstances in which the Secretary "may, but is not required to, determine that a designation would not be prudent."[51] The new Section 4 Rule modifies the list yet again.[52]

The only substantive change is the removal of part of the one circumstance related to climate change. In the preamble to the proposed rule, the Services explained that the 2019 regulations stated "that designation of critical habitat would not be prudent if threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2)."[53] This was understood to refer specifically to climate change because the preamble provided climate-change scenarios, such as "melting glaciers, sea-level rise, or reduced snowpack and no other habitat-related threats" as examples of circumstances that cannot be addressed by management actions.[54]

The new Section 4 Rule removes that language because the Services assert it "require[d] that the Services presuppose the scope and outcomes of future section 7 consultations" and because the public interpreted the "language as allowing the Services to regularly decline to

designate critical habitat for species threatened by climate change, which was not [their] intent."[55]

Bottom Line: This change is not likely to have a significant impact on critical habitat designations because "not prudent" determinations—for any reason—are rare.[56]

E. Revisions to Criteria for Designation of Unoccupied Critical Habitat

The ESA's definition of critical habitat distinguishes between "occupied" and "un-occupied" areas.[57] Occupied critical habitat is defined as "the specific areas within the geographic area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[58] Unoccupied critical habitat is defined as "specific areas outside the geographic area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."[59] The new Section 4 Rule changes the order in which occupied and unoccupied critical habitat is considered and the standard to determine whether unoccupied areas qualify as critical habitat.

The regulation governing the designation of unoccupied areas as critical habitat, 50 C.F.R. § 424.12(b)(2), has been changed multiple times in recent years. Prior to 2016, the regulation contained a "two-step" approach that "prioritized the designation of occupied areas over unoccupied areas by allowing the Services to designate unoccupied areas as critical habitat only if a critical habitat designation limited to occupied areas would be inadequate to ensure the conservation of the species."[60] The 2016 changes to the regulations removed the two-step analysis and allowed for simultaneous consideration of occupied and unoccupied areas.[61] In 2019, the Services changed the regulation again to "reinstate[] the two-step 'sequencing' or 'exhaustion' prioritization process," to respond to concerns that the lack of the two-step process would allow the Services to "inappropriately designate overly expansive areas of unoccupied critical habitat."[62]

The Services characterize the most recent change as a softening of the "rigid" two-step process in the 2019 regulations.[63] The Services claim they will continue their "long-standing" practice of evaluating occupied habitat first. The regulatory change provides that they will address potential unoccupied critical habitat "after identifying areas occupied by the species at the time of listing" and are not prohibited from considering unoccupied areas absent a determination that the occupied areas would be inadequate to ensure the conservation of the species.[64]

The new Section 4 Rule also deletes the final sentence from the 2019 regulation, which had provided that "for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."[65] The

Services explain that the elements in this sentence are not included in the statutory definition of unoccupied critical habitat and "blurred the clean distinction between the two types of critical habitat."[66]

Commenters raised serious concerns with these changes when proposed, questioning whether the changes are consistent with case law holding that the standard to designate unoccupied critical habitat is "more onerous" than occupied habitat and, in particular, with the Supreme Court's recent decision in *Weyerhaeuser v. U.S. Fish & Wildlife Service*[67] that either type of critical habitat must first be "habitat." The Services acknowledge these concerns and agree with the commenters' assessment of the case law.[68]

The Services further make assurances that they will abide by the statutory requirement that unoccupied critical habitat be "essential" to the conservation of the species.[69] In response to commenters' calls for some kind of guardrails or guidance on key concepts such as "habitat," "habitability," and "essential," the Services repeatedly assert that these concepts must be determined on a case-by-case, fact-specific basis.[70] In short, the Services appear to be trying to retain maximum flexibility under the statute to make case-specific determinations of unoccupied critical habitat.

One point of significant concern for commenters is the lack of any temporal restrictions on determining that unoccupied habitat is essential, particularly unoccupied habitat that is not habitable at the time of designation. The Services' response is less than reassuring:

> [W]e do not find it necessary or appropriate to add any additional regulatory requirements regarding the timing of when certain essential features would be present in the area, or when a species may occupy or use the area. A specific unoccupied area may remain inaccessible to the listed species (*e.g.,* blocked historical spawning habitat), or may require some form of natural recovery or reasonable restoration to support the listed species over the long term (*e.g.,* upgrading old culverts), but may still be considered habitat for that species and may still be considered essential for that species' conservation if the record supports such conclusions at the time of designation.[71]

With respect to commenters' concern that unhabitable areas could be designated, the Services claim that "neither Congress nor the *Weyerhaeuser* ruling established any prohibition on designating areas as critical habitat if those areas may require some reasonable restoration to become accessible, habitable, or capable of supporting the species" but assure the public that the Services "will not designate areas that are wholly unsuitable for the given listed species or that require extreme intervention

or modification to support the species."[72] The Services provide no further guidance about what how to distinguish between "reasonable restoration" and "extreme intervention or modification." They do, however, plainly acknowledge that they lack the statutory authority to require any kind of restoration or modification as part of the section 7(a)(2) consultation process, stating that "the requirement for Federal agencies to ensure their actions are not likely to destroy or adversely modify critical habitat is a prohibitory standard only."[73]

Bottom Line: Because this regulatory change pushes off the determination of almost all substantive decisions to specific critical habitat designations, individual critical habitat designations—and litigation over those designations—are likely to be where the law on "habitat," "habitability," and "essential" will be made.

IV. Conclusion

For the first 35 years of its statutory existence, the regulations implementing the ESA were relatively stable. The original interagency consultation regulations promulgated during the Reagan administration largely remained in place until revised by the Trump administration in 2019.[74] Some observers note the Clinton administration was a time of expansive ESA administrative reform without congressional action,[75] but the whiplash effect of each administration revising the ESA-implementing regulations to forward its own views on biodiversity conservation and resource development policy began at the close of the George W. Bush administration in 2008. That was a time also marked also by increasing use of the ESA to try to address climate change and climate change-affected species. Over the last 15 years, the result has been the present tug-of-war manifest in the current administration's revised ESA regulations.

While the revised regulations on the surface are broad in scope, the provisions with potentially meaningful on-the-ground effects for regulated entities are much narrower. Beyond those few regulatory changes with real anticipated effects (the Section 7 compensatory mitigation provisions and the changes to Section 4 critical habitat designation processes), the remaining changes are largely a signaling of the administration's ESA priorities and intentions to its core constituencies. The practical implications of those remaining incremental changes for actual species listing and conservation are likely less important than the rhetorical and political significance of the phrasing adjustments.

With decades of congressional inaction on any substantive ESA revisions, the battles are now fought over these regulatory changes. Until, if ever, the situation in Congress changes, the most recent ESA regulatory revisions foretell a continued back-and-forth swing in ESA regulatory emphases, if not approaches, with each future administration shift.

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[1] *See* Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (April 5, 2024) ("Section 7 Rule") (amending 50 C.F.R. Part 402 regarding interagency consultation); Regulations Pertaining to Endangered and

Threatened Wildlife and Plants, 89 Fed. Reg. 23,919 (April 5, 2024) ("Blanket 4(d) Reinstatement Rule") (amending 50 C.F.R. Part 17); Listing Endangered and Threatened Species and Designating Critical Habitat, 89 Fed. Reg. 24,300 (April 5, 2024) ("Section 4 Rule") (amending 50 C.F.R. Part 424 regarding classifying species and designating critical habitat).

[2]16 U.S.C. § 1536(a)(2). USFWS is responsible for terrestrial and freshwater species, while NMFS is responsible for marine and anadromous species.

[3] *Id*. § 1536(b)(4). Incidental take that occurs in compliance with an incidental take statement's terms and conditions is not considered prohibited take. *Id*. § 1536(o)(2). Note that for ESA-listed species that are also marine mammals, the Services cannot issue an incidental take statement unless a Marine Mammal Protection Act incidental take authorization has been issued. *Id*. § 1536(b)(4)(C).

[4] The Services, ESA Consultation Handbook, at 4-53 (March 1998), https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.

[5] 89 Fed. Reg. at 24,298 (to be codified at 50 C.F.R. § 402.14(i)(2)).

[6] *Id.* (to be codified at 50 C.F.R. § 402.14(i)(3)).

[7] *Id.* at 24,283. The Services have also revised the "minor change" rule—which previously stated that RPMs "cannot alter the basic design, location, scope, duration, or timing of the action" and "may involve only minor changes"—to expressly recognize that RPMs "may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take." *Id.* (to be codified at 50 C.F.R. § 402.14(i)(2)).

[8]*Id.* at 24,269.

[9] 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added).

[10] *Id*. § 1536(b)(4) (emphasis added).

[11] *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2309 (2019) ("[C]ourts should, to the extent possible, read statutes so that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citation omitted).

[12] 50 C.F.R. § 402.02 (2019).

[13] 50 C.F.R. § 402.17 (2019).

[14] 89 Fed. Reg. at 24,281.

[15] 50 C.F.R. § 402.02 (2019).

[16] 50 C.F.R. § 402.14(g)(4) (2019).

[17] 50 C.F.R. § 402.02 (2019).

[18] 89 Fed. Reg. at 24,297 (to be codified at 50 C.F.R. § 402.02).

[19] *Id*. at 24,276.

[20] 50 C.F.R. § 402.16(a) (2019).

[21] *Id.*

[22] *See, e.g., Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) ("The duty to reinitiate consultation lies with both the action agency and the consulting agency.").

[23] *Sierra Club v. Marsh,* 816 F.2d 1376, 1386 (9th Cir. 1987); *Defs. of Wildlife v. Flowers,* 414 F.3d 1066, 1070 (9th Cir. 2005).

[24] 16 U.S.C. § 1538(a).

[25] *Id*. § 1533(d).

[26] NMFS has never issued a blanket rule under Section 4(d) and always issues species-specific regulations for threatened species under its jurisdiction.

[27] *See* Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (revising 50 C.F.R. § 17.31(a)).

[28] 89 Fed. Reg. at 23,939 (to be codified at 50 C.F.R. § 17.31(a)).

[29] *Id.*

[30] *Compare* 16 U.S.C. § 1538(a)(2) *with* 50 C.F.R. § 17.61 (2019).

[31] 89 Fed. Reg. at 23,940 (to be codified at 50 C.F.R. § 17.71).

[32] 50 C.F.R. § 424.11(b) (2018).

[33] *See* Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019).

[34] *Id*. at 45,024.

[35] Gretchen Frazee, What is an endangered species worth? Trump rule sparks debate (August 22, 2019), https://www.pbs.org/newshour/economy/what-is-an-endangered-species-worth-trump-rule-sparks-debate.

[36] *See, e.g.*, Press Release, Biden-Harris Administration, Conservation Leaders Affirm Commitment to Protecting America's Endangered Species (Feb. 12, 2024), https://www.doi.gov/pressreleases/biden-harris-administration-conservation-leaders-affirm-commitment-protecting.

[37] 16 U.S.C. § 1532(20).

[38] *Id*. § 1532(6).

[39] *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 709 F.3d 1, 15 (D.C. Cir. 2013) (quoting the polar bear Listing Rule at 73 Fed. Reg. 28,212, 28,253 (May 15, 2008)).

[40] 84 Fed. Reg. at 45,052 (codified at 50 C.F.R. § 424.11(d)).

[41] 89 Fed. Reg. at 24,335 (emphasis added).

[42] 16 U.S.C. § 1533(a)(1).

[43] *Id*. § 1533(b)(1)(A).

[44] 50 C.F.R. § 424.11(e) (2019). With respect to the third factor, the ESA states that "[t]he term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). Only entities that meet this definition of species can be listed.

[45] 50 C.F.R. § 424.11(e)(2) (2019).

[46] 89 Fed. Reg. at 24,335 (to be codified 50 C.F.R. § 424.11(e)).

[47] *Id*. at 24,304.

[48] *Id.* at 24,303.

[49] *Id.*

[50] 16 U.S.C. § 1533(a)(1)(3)(A).

[51] 50 C.F.R. § 424.14(a)(1); 84 Fed. Reg. at 45,040-43.

[52] The Section 4 Rule also removes the last circumstance in the 2019 rule, which had provided that the Secretary may determine that designating critical habitat would not be prudent based on the best scientific data available. 89 Fed. Reg. at 24,335. The Services explained that this circumstance could leave to the impression that the Services might make a "not prudent" determination for reasons inconsistent with the ESA. *Id*. at 24,317. The Services also added language to the opening sentence of the section to clarify that the list of circumstances is non-exhaustive. *Id*.

[53] 88 Fed. Reg. 40,764, 40,768 (June 22, 2023).

[54] *Id.*

[55] 89 Fed. Reg. at 24,315.

[56] *Id*. at 24,316.

[57] 16 U.S.C. § 1532(5)(A).

[58] *Id*. § 1532(5)(A)(i).

[59] *Id*. § 1532(5)(A)(ii).

[60] 89 Fed. Reg. at 24,322.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 24,321.

[64] 88 Fed. Reg. 40764, 40769 (June 22, 2023).

[65] 50 C.F.R. 424.12(b)(2) (2019).

[66] 89 Fed. Reg. at 24,323, 24,327.

[67] 139 S. Ct. 361 (2018).

[68] 89 Fed. Reg. at 24,322-23, 24,325.

[69] *Id.* at 24,328.

[70] *See, e.g., id.* at 24,325, 24,326.

[71] *Id.* at 24,327.

[72] *Id.* at 24,326-27.

[73] *Id.* at 24,327.

[74] The consultation regulations were revised at the end of the George W. Bush administration in December 2008. But in March 2009, Congress authorized the Secretaries of the Interior and Commerce to withdraw those regulations, which the Secretaries did. The prior original consultation regulations were then reinstated in May 2009.

[75] J.B. Ruhl, *Who Needs Congress?—An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. Envtl. L.J. 367 (1998).

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seek the advice of your legal counsel.