

## ESA Rules Redux: Services Plan a Second (and, in Some Cases, Third) Look at the ESA Regulations

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Consistent with President Biden's Executive Order (EO) 13990, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the "Services") recently announced that they "will initiate rulemaking in the coming months to revise, rescind, or reinstate five [Endangered Species Act] regulations finalized by the prior administration." The Biden Administration is the third consecutive administration to undertake revisions to the Services' Endangered Species Act ("ESA") regulations.

Certain of the Trump-era ESA regulations are currently subject to challenge. See, e.g., *Center for Biological Diversity v. Haaland*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019); *California v. Haaland*, No. 4:19-cv-06013 (N.D. Cal. Sept. 25, 2019); and *Animal Legal Def. Fund v. Haaland*, No. 4:19-cv-06812 (N.D. Cal. Oct. 21, 2019). While the Administration determined its path forward, these actions were stayed. Although the Services have now indicated their plans to propose new rules, little detail has been provided on the scope of these rulemakings. The Administration's Spring 2021 Unified Agenda provides general timeframes for the proposed actions, each of which will go through a notice and comment rulemaking process. The Services plan to:

- **Rescind the 2020 regulations that revised FWS's process for considering exclusions from critical habitat designations.** On December 18, 2020, FWS revised the process it would follow when considering whether to exclude areas from designation as critical habitat pursuant to ESA § 4(b)(2). 85 Fed. Reg. 82, 376 (Dec. 18, 2020). This regulation became effective on January 19, 2021. FWS has announced that it will propose to rescind this regulation in its entirety and revert to implementation of the Services' regulations, 50 C.F.R. § 424.19 and the Services' 2016 policy on § 4(b)(2) exclusions.
- **Rescind the regulatory definition of habitat.** The Services will propose to rescind the final rule that defined the term "habitat" for the purposes of critical habitat designation. 85 Fed. Reg. 81,411 (Dec. 16, 2020). The Services take the position that a regulatory definition of "habitat" is not required for designations of critical habitat in compliance with the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 138 S. Ct. 361 (2018).

- **Revise the regulations for listing species and designating critical habitat.** The Services will propose revisions to the prior Administration's ESA § 4 rulemaking, 84 Fed. Reg. 45,020 (Aug. 27, 2019). The Services will propose to reinstate prior language affirming that listing determinations are made "without reference to possible economic or other impacts of such determination." Other potential revisions, including provisions governing adding and removing species from the Lists of Endangered and Threatened Wildlife and Plants and clarifying the procedures for designation of critical habitat are also under discussion. According to the Spring Regulatory Agenda, a Notice of Proposed Rulemaking is slated for September 2021.
- **Revise the regulations for interagency cooperation.** The Services will propose revisions to the final rule promulgated by the prior Administration, which revised the procedural regulations governing interagency cooperation under ESA § 7. 84 Fed. Reg. 44,976 (Aug. 27, 2019). The Services will propose to revise the definition of "effects of the action," and other potential revisions are under discussion, including rescinding the 2019 rule. According to the Spring Regulatory Agenda, a Notice of Proposed Rulemaking is slated for December 2021.
- **Reinstate FWS "blanket 4(d) rule."** FWS's "blanket 4(d) rule" establishes the default of automatically extending protections provided to endangered species to those listed as threatened, unless FWS adopts a species-specific 4(d) rule. This rule was withdrawn by the prior Administration, 84 Fed. Reg. 44753 (Aug. 27, 2019), and FWS plans to propose to reinstate it. According to the Spring Regulatory Agenda, a Notice of Proposed Rulemaking is slated for July 2021.

In the meantime, there may be months of uncertainty regarding the exact details of these proposed actions, the timing of any changes, and the implications for listings and designations of critical habitat and consultation and other ESA requirements for projects.

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