

Court Vacatur of Comprehensive 2019 Endangered Species Act Rules Raises Big Questions

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This week the US District Court for the Northern District of California overturned three Endangered Species Act (ESA) rules issued in 2019 that address: (1) listing species and designating critical habitat, (2) extending take prohibitions to threatened species, and (3) § 7 interagency consultation. *Center for Biological Diversity v. Bernhardt*, 19-05206 (N.D. Cal. July 5, 2022). The three rules were issued by the US Fish and Wildlife Service and National Marine Fisheries Service (together, the Services) in August 2019 and together represented the first comprehensive revisions to the ESA regulations in 33 years. The order has a number of important regulatory and caselaw implications.

First, the order is an immediate vacatur of three rules that have been in place for nearly three years. Second, the vacatur was ordered just as the Services were preparing to conduct further rulemaking on the three rules, effectively resetting the table on any rulemaking that may now be conducted by the Services. Third, in an approach that may be viewed as in tension with recent Supreme Court and another federal district court order, the court ordered the vacatur without a finding on the merits that the rules were unlawful. As a result of this decision, the Services are likely to return to implementing the pre-2019 regulations, which could result in broader listing and critical habitat determinations, automatic take prohibitions for threatened species, and confusion about how to conduct § 7 consultations.

Key Aspects of 2019 ESA Rules

- **§ 7 Interagency Consultation Rule**

- Federal agencies must consult with the Services when an agency action (e.g., permit issuance) may affect either a threatened or endangered species or their designated critical habitat.
- The 2019 consultation rule clarified and streamlined the consultation provisions,

including:

- Defining “effects of the action” to attribute effects to an agency action if those effects would not occur but for the action and are reasonably certain to occur.
- Clarifying that adverse modification determinations must be made at the scale of the entire critical habitat designation.
- New definition of “environmental baseline” to include ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify.

- **§ 4 Rule on Listing Species and Designating Critical Habitat**

- The 2019 rule made clarifications regarding species listing, including:
 - Clarifying the Services can reference economic and other factors in listing determinations.
 - Requiring that a “threatened” species listing is based on actual (not potential) threats that are more likely than not to occur.
 - The 2019 rule also made clarifications regarding designation of critical habitat, including:
 - Reinstating the requirement that Services first evaluate whether critical habitat designation of areas *occupied* by a species is sufficient to support recovery before designating *unoccupied* areas.

- **§ 4(d) Rule on Extension of Take Prohibition to Threatened Species**

- The ESA prohibits “take” of *endangered* species but does not extend that same take prohibition to *threatened* species. Prior to the 2019 rule, USFWS automatically extended the ESA § 9 take prohibition to threatened species under what was known as the “blanket § 4(d) rule.”
- The final rule removed the blanket § 4(d) rule and instead required USFWS to issue species-specific regulations for threatened species tailored specifically to the species as warranted.

Overview of *Center for Biological Diversity v. Bernhardt* Proceedings

After their promulgation in 2019, the three rules were challenged by eNGOs led by the Center for Biological Diversity, 17 states led by California, and the Animal Legal Defense Fund. Industry groups and a group of states led by Alabama intervened to defend the rules. After the 2021 change in Administration, the Services announced plans to rescind the 2019 4(d) rule and revise the other two 2019 rules.

After summary judgment briefing began, the Services moved for remand without vacatur, asking the court to leave the rules in place while they conducted rulemaking. Plaintiffs asked the court to vacate the 2019 rules.

The judge recognized the threshold question of whether a court can vacate rules without the normal Administrative Procedure Act (APA) judicial review of the administrative record and a finding that the rules were unlawful. The judge found he had the authority to vacate the rules based on equity jurisdiction because the APA “does not expressly preclude the exercise of equity jurisdiction” as the order briefly acknowledges, the Supreme Court recently stayed a similar vacatur of a CWA § 401 rule, see *Louisiana, et al. v. American Rivers, et al.*, 596 U.S. (2022), and a May 2022, decision by the District Court of Alaska in the same circuit (Ninth Circuit) expressly declined to assert such authority, *Alaska Wildlife Alliance v. Haaland*, No. 3:20-cv-00209 (D. Alaska. May 17, 2022).

Accordingly, the regulations that implement the ESA were changed without applying either of the two traditional procedures provided by the APA – public notice and comment rulemaking, or a judicial finding based on a review of the administrative record that the rule is unlawful. 5 U.S.C. §§ 553, 706.

The Road Ahead

The order may be appealed by the state or industry defendants, particularly in light of the Supreme Court’s recent stay of a similar order vacating the recent CWA § 401 rule without a finding on the merits.

The Services were planning to conduct a new rulemaking on the three rules, but based on yesterday’s vacatur order they will likely regroup on how to proceed. There will likely be some confusion by Service staff and others about how to proceed, particularly in § 7 consultations, until the Services determine how they intend to proceed. The Services are likely to return to implementing the pre-2019 regulations, which could result in broader listing and critical habitat determinations, automatic take prohibitions for threatened species, and confusion about how to conduct § 7 consultations.

The public should stay abreast of developments related to these ESA rulemakings, which could have important implications for critical infrastructure projects and other industrial activities.

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