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FWS and NMFS Return to Stricter ESA Rules and Reverse Recent Streamlining Measures

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The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together the Services) have issued three final rules effective May 6, 2024:

1. Revised Regulations Protecting Endangered and Threatened Species (50 CFR 17) (The "Blanket 4(d) Rule");
2. Revised Regulation for Classifying Species and Designating Critical Habitat (50 CFR 424); and
3. Revised Regulations for Interagency Cooperation (50 CFR 402).

The final rules mainly undo regulatory amendments implementing Sections 4 and 7 of the Endangered Species Act (ESA), promulgated in August 2019. These sections streamlined and harmonized the Services' processes for listing species as threatened and endangered and designating critical habitat as well as modernized the Section 7 consultation process for activities requiring federal authorization or funding. The Services issued the final rules after receiving more than 400,000 comments on the proposed rules issued in June 2023.

Takeaways

The final rules largely reflect those proposed, with two notable changes:

- Revising the phrase "foreseeable future" in analyzing species for potential listing as threatened. The proposed rule stated that "[t]he term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats." The final rule states, "[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 these threats." The Services

intended these changes to address concerns expressed by commenters that the "foreseeable future" timeframe would otherwise be limitless. However, the remaining language still lacks any meaningful time horizon, leaving the Services with broad discretion.
- Modifying the text of the Services' delisting regulations. The Services had proposed that "[i]t is appropriate to delist a species if the Secretary finds, after conducting a status review based on the best scientific and commercial data available, that: (1) The species is extinct; (2) The species is recovered or otherwise does not meet the definition of a threatened or endangered species.; or (3) The listed entity does not meet the statutory definition of a species." The final rules are more straightforward, stating that "species *will* be delisted" (emphasis added) in one of the specified circumstances, and indicating that the best available data must "substantiate that" one of the listed circumstances for delisting has been met, including new information available after the original listing decision.

Key Changes from the Proposed Rules

The final rules retain the proposed rules' key changes to existing regulations implementing the ESA, as shown/outlined in the following:

ESA Section 4(d) and Section 9: Programmatic Protections for FWS's Threatened Listings, Increased Tribal Involvement, and Clarified Plant Protections

- Reinstating FWS's "blanket 4(d) rule" that expands the ESA's endangered species protections to threatened species as well, unless FWS develops a species-specific "special 4(d) rule" relaxing those protections.
- Expanding certain take coverage to federally recognized tribes that was previously provided only to other government entities and their employees and agents. These protections allow the entity in handling a threatened (but not endangered) species to: "(i) Aid a sick, injured, or orphaned specimen; or (ii) Dispose of a dead specimen; or (iii) Salvage a dead specimen that may be useful for scientific study; or (iv) remove specimens that constitute a demonstrable but nonimmediate threat to human safety [under specific conditions]." As a result, the final rules provide for greater tribal involvement in threatened species conservation.
- Clarifying protections for endangered plants: "[i]t is unlawful to remove and reduce to possession any endangered plant from an area under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other are in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law."

ESA Section 4: Species Listing and Critical Habitat Designations

- Restoring the phrase "without reference to possible economic or other impacts of such determination," which had been deleted in the 2019 rules, to clarify that economic or other impacts stemming from the listing, reclassifying, or delisting of a species cannot be considered when making the listing decision.
- Revising the requirements for identifying unoccupied critical habitat by removing the requirement in the 2019 regulations that the Services "will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species." This change substantially expands the Services' ability to designate far-ranging critical habitat, even where the species is not present.

- Expanding the scope of “reasonable and prudent measures” (RPMs) to “those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species.” The Services now “may include measures implemented *inside or outside* of the action area that avoid, reduce, or offset the impact of incidental take” (emphasis added). Most notably, the rules newly allow for offsite “offsets” as RPMs to mitigate the impact of incidental taking on the species.
- Expanding the definition of “effects of the action” for analysis by adding the underlined text: “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 but that are not part of the action.”
- Revising the “environmental baseline” definition to include 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.” The Services removed the word “ongoing” and now “decline to universally state that all ‘ongoing’ facilities or activities are in the ‘environmental baseline.’”
- Removing “other provisions” originally intended to clarify aspects of the process of determining whether an activity or consequence is “reasonably certain” to occur.
- Clarifying that the obligation to reinitiate consultation belongs to the federal agency that retains discretionary involvement or control over its action.

The following key provisions from the 2019 rules, however, remain unchanged:

- Applying the same standards to delisting or listing a species as threatened or endangered.
- Clarifying information necessary to initiate formal consultation or request concurrence in informal consultation, such as a document prepared for other purposes, like NEPA.
- Requiring that the Services during Section 7 consultation take into account mitigation and minimization measures included in the proposed action like other aspects of the proposed action.
- Providing expressly that the Services’ biological opinions may adopt all or part of an action agency’s ESA Section 7 consultation initiation package.

Conclusion

The Services’ return to many pre-2019 standards and processes for implementing the ESA is unwelcome news for the regulated community. The new rules are expected to cause significant delays in completing agency reviews and add new substantive requirements to obtain ESA incidental take coverage. These regulatory changes, in turn, could prolong project timelines and add to project development costs, both on federal and non-federal lands across the country. They are also likely to embolden the Services to place more aggressive limits on project activities and opponents to use the ESA as a tool to delay or stop projects they dislike. Like their predecessors, these final rules are almost certain to face swift legal challenges.

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