



## Federal Judge Vacates Three Trump-Era Endangered Species Act Rules

JULY 12, 2022

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On July 5, 2022, a federal district court judge in the U.S. District Court for the Northern District of California vacated and remanded three major rules promulgated by the Trump Administration in 2019 that had significantly revised regulations of the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) that implement the Endangered Species Act (“ESA”). The three vacated final rules are:

- 1) Regulations for Listing Species and Designating Critical Habitat ([84 Fed. Reg. 45,020](#), Aug. 27, 2019), which modified the procedures under ESA Section 4 for listing and delisting species and designating occupied and unoccupied areas as critical habitat;
- 2) Regulations for Interagency Cooperation under ESA Section 7 ([84 Fed. Reg. 44,976](#), Aug. 27, 2019), which revised the regulations governing the Services’ consultation process under ESA Section 7; and
- 3) Regulations for Prohibitions to Threatened Wildlife and Plants ([84 Fed. Reg. 44,753](#), Aug. 27, 2019), which required FWS to adopt species-specific rules for the identification of prohibited “take” of a threatened species.

In general, vacatur of the three final rules will return the regulatory frameworks for ESA listing/delisting decisions, critical habitat designations, Section 7 consultations and Section 4(d) “take” prohibitions for threatened species to their pre-August 2019 rules.

### Background

On August 27, 2019, the Services published three final rules that significantly revised their regulations implementing the ESA (see VNF’s previous alert [here](#)). Specifically, the final rules:

- **Modified the procedures under ESA Section 4 for listing and delisting species and designating occupied and unoccupied areas as critical habitat, including:**
  - Clarifying the duration of the “foreseeable future” when determining whether to list a species as threatened;
  - Restoring and clarifying a two-step process for determining when unoccupied areas may be designated as critical habitat;
  - Adopting more expansive circumstances for when it would not be prudent to designate critical habitat;
  - Clarifying the process for delisting and reclassifying species; and
  - Allowing the inclusion of, but not reliance on, economic information in species listing decisions.
- **Revised and updated the regulations governing the Section 7 consultation process, including:**
  - Adopting a 60-day deadline for the Services to respond to an agency’s request for concurrence on its determination as to whether a proposed activity is/is not likely to adversely affect a listed species or critical habitat;
  - Revising and clarifying key terms regarding the identification of environmental baseline conditions, the analytical components comprising the effects of an action, and the level of causation and certainty required when assessing the effects of an action on listed species and critical habitat;
  - Clarifying what constitutes destruction or adverse modification of critical habitat; and
  - Promoting the use of programmatic consultations and accommodating expedited consultations.

- **Removed FWS’s “blanket 4(d) rule”:**
  - Requires FWS to adopt species-specific Section 4(d) rules for the application of the ESA’s prohibitions to threatened species (similar to NMFS’s long-standing practice).

These final rules were challenged shortly after issuance. Subsequently, during President Biden’s first week in office, he issued [Executive Order 13990](#), which required the Services to review certain agency actions for consistency with the new Administration’s policy objectives. As a result of this review, the Services [identified several ESA regulations](#) promulgated in 2019 and 2020 to be rescinded, revised, or reinstated by the current Administration, including the ESA regulations subject to the litigation. Consequently, the Services requested remand of the final rules without vacatur to allow for reconsideration and revisions through the typical administrative rulemaking process. However, federal district court Judge Jon Tigar vacated the three 2019 ESA final rules without opining on the substantive merits of plaintiffs’ claims and directed remand actions by the Services to reinstitute the prior regulations.

### Implications

The vacatur order unilaterally removes a number of provisions that sought to clarify, modernize, and streamline implementation of the Act. Though the Services had previously announced that they anticipated making revisions to—or rescission of—these final rules, the timing and nature of Judge Tigar’s order adds uncertainty to this process and creates considerable confusion and implications for the regulated community. Notably, the decision will complicate listing decisions, critical habitat designations, and Section 7 consultations that are currently in progress. Furthermore, there is now some uncertainty as to whether the Services will contemplate additional revisions to these regulatory provisions as part of their own pending ESA rulemaking activities.

### For More Information

Van Ness Feldman counsels clients on ESA compliance and, when necessary, litigates to protect clients’ interests. If you would like more information about the implementation of the ESA, please contact [Tyson Kade](#), [Joe Nelson](#), or any member of the firm’s [Endangered Species & Wildlife Practice](#).

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