

Groundhog Day: Proposed Revisions to ESA Regulations (Mostly) Reinstate the 2019 Rules

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Late last week, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) proposed revisions to the Endangered Species Act (ESA) regulations that, if finalized, will generally restore the regulations adopted in 2019, during President Trump's first term. The proposed regulations were published in the *Federal Register* on November 21, 2025, starting a 30-day public comment period that ends on December 21, 2025.

The Services' proposal consists of four separate rules covering the following topics: (1) protections for threatened species; (2) standards for species listings; (3) critical habitat designations; and (4) interagency consultations under Section 7 of the ESA. Notably, the Services are *not* proposing to reinstate the part of the 2019 rules that required economic impacts to be analyzed in the listing of new species. However, they do crack the door open for such considerations.

1. Rescission of the Blanket 4(d) Rule: The FWS is proposing to rescind the "blanket 4(d) Rule," which provides that species listed by the FWS as threatened automatically receive the same protections as species that are listed as endangered. Instead, the protections for threatened species will be determined on a case-by-case basis, consistent with NMFS' species listings process. This will not affect species previously listed by the FWS as threatened.

2. Species Listings: The Services propose to reinstate the 2019 standards in 50 C.F.R. § 424.11 for determining "foreseeable future" in listing threatened species and for delisting species. The proposal would also remove the current regulatory statement in 50 C.F.R. § 424.11(b) that listing decisions are made "without reference to possible economic or other impacts of such determination," but does not go so far as to reinstate the 2019 requirement that listings include an economic impact analysis solely for informational purposes.

3. Critical Habitat Designations: The Services propose to reinstate the two-part analysis for critical habitat that was adopted in 2019: (1) identify any occupied areas that serve as critical habitat; and then (2) determine whether any unoccupied habitat is essential for the species' conservation.

In a separate rule, the FWS is also proposing to clarify how economic and national security impacts are considered in critical habitat designations, and how certain areas can be excluded from critical habitat

designations based on these considerations.

4. Interagency Cooperation / Section 7 Consultation: The Services propose largely reinstating the Section 7 consultation process adopted in 2019, but with several notable additions. First, the proposed regulations define the “environmental baseline” to clarify that existing infrastructure is excluded from the scope of the action under review. The proposed regulations would also modify how the Services address the “effects of the action” subject to consultation by clarifying the terms “reasonably certain to occur” and “consequences caused by the proposed action.” Additionally, the proposal narrows the scope of “effects of the action” by limiting the term to effects that the Services have the authority to regulate. This change is based in large part on the Supreme Court’s recent decisions in *Loper Bright* and *Seven County Infrastructure Coalition*. Another proposed change reinstates the 2019 rules by removing any reference to mitigation as a reasonable and prudent measure (RPM), with the Services explaining that they cannot require mitigation as a RPM because the statute does not include the terms “offset” or “mitigation.” Finally, the proposal indicates that “[t]he Services are still working on a revised Handbook” to replace the operative 1998 Consultation Handbook.

The preambles to all four proposed rules emphasize that these changes are intended to make the regulations more consistent with the plain language of the statute and current legal principles, and to remove extraneous regulations consistent with Executive Orders 14154 and 14219 and Secretarial Order 3418. According to the Services, the changes are consistent with recent U.S. Supreme Court rulings regarding the scope of federal agency authorities, including *Loper Bright* and *Seven County Infrastructure Coalition*, and will address legal uncertainties associated with pending challenges to the ESA regulations the Services adopted in 2024. Notably, none of these proposals touch on the FWS’ recent proposal to rescind the ESA’s definition of “harm.”

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