

ENVIRONMENTAL

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— Reporters —

The ESA's Shifting Regulatory Framework

Introduction

In 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the "Service"), engaged in rulemaking to promulgate new regulations for the implementation of sections 4 and 7 of the Endangered Species Act (ESA). See Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 402); Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424). The resulting rules were immediately challenged under assertions that they were arbitrary and capricious under the Administrative Procedure Act (APA) and in violation of the ESA and the National Environmental Policy Act (NEPA). As such, the 2019 regulations never went into effect.

In 2024, the Service revisited the challenged 2019 regulations, promulgating new regulations that incorporated certain provisions from the 2019 rulemaking while also adopting newly drafted provisions. See Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (Apr. 5, 2024) (to be codified at 50 C.F.R. pt. 402); Regulations for Listing Species and Designating Critical Habitat, 89 Fed. Reg. 24,300 (Apr. 5, 2024) (to be codified at 50 C.F.R. pt. 424). The 2024 regulations were again challenged.

On March 30, 2026, the U.S. District Court for the Northern District of California issued a decision upholding the two challenged provisions of the regulations dealing with section 4 of the ESA, thereby permitting these regulations to take effect, and vacating the four challenged provisions of the regulations dealing with section 7 of the ESA, reinstating the prior versions. See *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, No. 4:24-cv-04651, 2026 WL 898264, at *1, *3–4, *24–25 (N.D. Cal. Mar. 30, 2026) (describing the procedural history and holding).

Until a new rule is finalized, the operative ESA framework remains a hybrid resulting from the court's vacatur, creating a regulatory landscape that may be difficult for agencies and regulated entities to navigate consistently. Notably, in October 2025—prior to the court's decision—the Service announced its intent to engage in rulemaking to revise the section 4 and 7 regulations. See *id.* at *4; Regulations for Interagency Cooperation, 90 Fed. Reg. 52,600 (proposed Nov. 21, 2025) (to

be codified at 50 C.F.R. pt. 402); Regulations for Listing Species and Designating Critical Habitat, 90 Fed. Reg. 52,607 (proposed Nov. 21, 2025) (to be codified at 50 C.F.R. pt. 424). This report examines the affected regulations and summarizes the court's reasoning, which will likely shape the Service's ongoing rulemaking.

Section 7 Regulations

The court reviewed four regulatory provisions relating to section 7 of the ESA, 16 U.S.C. § 1536. Section 7 requires agencies seeking to undertake or approve an action to consult with the Service regarding the impacts of that action on listed species or critical habitat. The court found the regulations promulgated for section 7 violated the ESA's statutory text or were arbitrary and capricious and vacated the regulations, reinstating older versions of the rule. *See Ctr. for Biological Diversity*, 2026 WL 898264, at *24–25. Below is a summary of each of the section 7 regulations with an explanation for the court's vacatur.

Reasonably Certain to Occur, 50 C.F.R. § 402.02

Under section 7, action agencies must evaluate the effects of the action during the consultation. Under the pre-2019 regulation the definition of "effects of the action" referred to "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). "Indirect effects" were further defined as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.*; *see also Ctr. for Biological Diversity*, 2026 WL 898264, at *11. If the effects of the action are likely to affect a listed species or critical habitat, the consultation provisions of section 7 are triggered. *See* 16 U.S.C. § 1536(a)(3).

Under the 2024 rule, which left in place the 2019 definition, "effects of the action" was revised, no longer separately defining direct and indirect effects while further providing that "[a] consequence is caused by the proposed action if it would not occur but for the proposed action and it is *reasonably certain to occur*." 50 C.F.R. § 402.02 (2019) (emphasis added); *see also Ctr. for Biological Diversity*, 2026 WL 898264, at *11.

The court found that the revised definition of "effects of the action" and its reasonably certain to occur standard violated the ESA's requirement that the best available data be considered and that the rule was impermissibly more stringent than the ESA's requirements that effects be likely. In addition, the court determined the Service had failed to adequately explain the reasoning for its departure from its prior position, making the "reasonably certain" standard arbitrary and capricious. *See Ctr. for Biological Diversity*, 2026 WL 898264, at *11–15. Following the court's vacatur, the pre-2019 version of 50 C.F.R. § 402.02 is once again in effect. *See id.* at *25.

Consideration of Non-Binding Mitigation Measures, 50 C.F.R. § 402.14(g)(8)

When consulting with an action agency the Service is required to consider the beneficial actions of the proposed undertaking. *See id.* at *16. The pre-2019 regulation provided that the Service "will give appropriate consideration to any beneficial actions taken" 50 C.F.R. § 402.14(g)(8) (2018). Apart from giving "appropriate consideration," the regulation did not contemplate whether the beneficial action was binding.

Under the new rules, the regulation was revised, allowing agencies to consider non-binding mitigation measures as part of the cost-benefit analysis when determining project effects. *See Ctr. for Biological Diversity*, 2026 WL 898264, at *16; *see also* 50 C.F.R. § 402.14(g)(8) (2025). However, the court found that “an agency does not satisfy its obligation under Section 7 to insure against harm to species or habitat by resting its conclusions on ‘plans’ that are merely proposed and non-binding.” *Ctr. for Biological Diversity*, 2026 WL 898264, at *16; *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008) (requiring firm assurances that mitigation measures will be undertaken); *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1258 (9th Cir. 2017) (same).

The court therefore vacated the challenged rule, allowing the pre-2019 version to go back into effect. *See Ctr. for Biological Diversity*, 2026 WL 898264, at *16, *25.

Definition of “Destruction or Adverse Modification,” 50 C.F.R. § 402.02

Section 7 consultation requires ensuring the agency action will not cause “destruction or adverse modification” to critical habitats. Prior to the challenged rulemaking, “destruction or adverse modification” was defined as an action that “appreciably diminishes the value of critical habitat for the conservation of a listed species.” *Id.* at *17 (quoting 50 C.F.R. § 402.02 (2018)).

The 2019 rule revised this definition to an action that “appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species.” *Id.* (quoting 50 C.F.R. § 402.02 (2019)).

The court found that the use of a large-scale analysis impermissibly overlooked the importance of local effects and that “use of the modifier ‘as a whole’ contradicts the statute because it allows ‘adverse modification’ to critical habitat as long as the modification does not ‘appreciably diminish[] the overall value’ of the habitat.” *Id.* at *18 (alteration in original) (quoting 50 C.F.R. § 402.02). As such, the court vacated the challenged rule, allowing its prior version to go back into effect. *See id.* at *25.

While the plaintiffs also challenged the Service’s decision to not separately define “destruction” or “adverse modification,” the court held that the regulatory definition adequately encapsulated both terms. *See id.* at *18–19.

Duty to Request Reinitiation of Consultation, 50 C.F.R. § 402.16(a)

Historically, both the Service and action agency were under a regulatory duty to request reinitiation of consultation. The 2024 rule removed reference to the Service such that only the action agency was subject to the duty to request reinitiation of consultation. *See id.* at *19.

The court found that while no statutory duty existed, the Service had been under a long-standing regulatory duty to request reinitiation of consultation. For failing to provide a rationale for removing the regulatory duty, the court found the rule to be arbitrary and capricious, in violation of the APA. *See id.* at *19–20. On these grounds, the court vacated the rule, allowing the Service as well as the action agency to request reinitiation of consultation. *See id.* at *25.

Section 4 Regulations

The plaintiffs also challenged two regulations promulgated under section 4 of the ESA, 16 U.S.C. § 1533. Section 4 requires the Service to list species as endangered or threatened along with designating critical habitat. The court found that the Service had complied with the ESA, NEPA, and APA when it promulgated the regulations for section 4. Below is a summary of each of the challenged section 4 regulations with an explanation for the court's decision to uphold the regulation.

Foreseeable Threats, 50 C.F.R. § 424.11(d)

During the 2024 revision of "foreseeable future," the Service exchanged "reasonably determine" and "likely" with "reasonably reliable predictions." *See Ctr. for Biological Diversity, 2026 WL 898264, at *20.*

While the plaintiffs argued this violated the ESA's best available evidence standard and imposed a stricter standard for warranting a listing of species, the court found the revised definition to be synonymous and in compliance with the best available evidence requirements of the ESA. *See id.* at *20–21. As such, the court upheld the 2024 rule.

Concurrent Designation of Critical Habitat, 50 C.F.R. § 424.12(a)(1)

Revised both in 2019 and 2024, the challenged regulation added language to the conditions for concurrently designating critical habitat and species listing. *See id.* at *21. The court found that the new conditions were not an exclusive encapsulation of all permissible conditions for concurrent designation, that it did not necessarily allow the Service to reach a not-prudent finding solely on the basis of a no-threat determination, and that any failure to designate habitat with negligible conservation value cannot result in more than a negligible harm to the species. On these grounds, the court found the challenged regulation complied with the ESA and NEPA, and as such, this regulation remains in effect. *See id.* at *22–24.

Conclusion

Given the shifting regulatory landscape of the ESA, including the ongoing rulemaking, it is important for regulated agencies and regulated entities to ensure they are complying with the regulatory framework as in effect. While the rulemaking remains at the proposed stage, allowing the Service time to incorporate the court's analysis in *Center for Biological Diversity*, a high likelihood of continued litigation regarding these regulations remains and practitioners in this area should monitor for challenges to the forthcoming rules.

Editor's Note: The reporters represent various ESA-regulated entities.