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Protected Wildlife Regulations in Flux: What You Need to Know

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Over the last year, the changes in the regulation of protected wildlife have been so fast and furious that it is difficult to keep track of them all. This article summarizes significant developments under protected-wildlife statutes in one convenient location.¹

Endangered Species Act (ESA)

Rescission of the “Harm” Definition

In a final rule published on July 14, 2026, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) rescinded the definition of “harm” for purposes of “take” under ESA. As a result of this rescission, starting on the effective date of September 14, the Services will no longer deem habitat degradation or modification to be a form of “take” under the ESA. But the Services’ justification for rescinding the rule suggests that they are significantly narrowing of the scope of the ESA’s take prohibition well beyond the habitat context. See here for a more in-depth analysis. This rule is already the subject of at least six legal challenges.

Removal of the Blanket 4(d) Rule

On July 21, 2026, USFWS issued a final rule removing the “blanket rule” option for protecting newly listed threatened species under ESA Section 4(d). ESA Section 9 specifies protections for endangered species,² while ESA Section 4(d) directs the Services to issue regulations as “necessary and advisable to provide for the conservation of such species,” which may include the full protections afforded to endangered species.³ For decades, USFWS had a “blanket 4(d) rule” that automatically provided threatened species with the same protections as endangered species in the absence of species-specific rule identifying different protections.⁴ USFWS removed the blanket 4(d) rule in the first Trump administration, reinstated it in the Biden administration, and has now removed it once again. This means that, for species listed on or after the effective date of August 20, USFWS, like NMFS, will provide a specific 4(d) rule for each species listed as threatened.

Critical Habitat Exclusion Rule

On July 21, 2026, USFWS issued a final rule revising its regulations regarding the process for excluding areas from designation as critical habitat under ESA Section 4(b)(2).⁵ The rule, effective on August 20, supersedes the 2016 joint policy on exclusions and largely reinstates the 2020 critical habitat exclusion rule, which was rescinded in 2022. Similar to

the 2020 rule, the 2026 rule provides a meaningful role for proponents of critical habitat exclusions, requiring USFWS to conduct an exclusion analysis when proponents provide credible information regarding meaningful economic or other impacts that would support exclusion and to give weight to information from experts or those with firsthand knowledge in areas outside USFWS's expertise. In a change from prior practice, USFWS will now consider impacts on federal lands the same as on non-federal lands. Whereas exclusion decisions under the current regulations are entirely discretionary, the revised regulations require USFWS to exclude areas from the designation where it concludes the benefits of exclusion outweigh the benefits of inclusion. The 2026 rule is already the subject of a legal challenge.

Vacatur of Certain Section 7 Regulations

On March 30, 2026, a federal district court in California vacated four provisions of the 2019 and 2024 revisions to ESA Section 7 regulations.⁶ First, the court held that the “reasonably certain to occur” standard in the 2019 definition of “effects of the action”⁷ is inconsistent with federal agencies’ obligation under ESA Section 7 to ensure jeopardy is not “likely” to occur. It also found it to be inconsistent with the ESA’s “best available data” requirement because it excludes relevant scientific evidence.

The second vacated regulation is also found in the definition section, namely the 2019 definition of “destruction or adverse modification”⁸ for purposes of the critical habitat analysis. The court concluded that definition’s consideration of impacts to critical habitat “as a whole” impermissibly narrows the statutory prohibition by allowing piecemeal destruction of critical habitat.

The court also vacated the 2019 revision to the formal consultation regulation that indicates that measures included in the proposed action that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.⁹ The court held this language contradicts the ESA’s requirement that agencies ensure against jeopardy and conflicts with Ninth Circuit precedent requiring binding mitigation commitments.

Finally, the court vacated the 2024 revision that removed the Services’ duty to request reinitiation of consultation in enumerated circumstances and placed any reinitiation obligation on the action agency.¹⁰ The court found that the Services did not adequately explain their rationale for the revision or the departure from decades of prior practice.

The government has appealed this decision. However, as described below, additional revisions to the Section 7 regulations are anticipated this fall, which would likely moot the need to pursue that appeal.

Proposed Revisions to Section 7 Regulations

On November 21, 2025, the Services issued a proposed rule to revise portions of the Section 7 consultation regulations. It is largely focused on

undoing several of the 2024 revisions, which were the subject of a number of legal challenges. In particular, the Services have proposed to (1) rescind the ability of the Services to impose offsets (i.e., compensatory mitigation) as a reasonable and prudent measure, (2) clarify the definition of “environmental baseline,” largely reverting to the 2019 version of the definition, (3) reinstate the provision regarding when a consequence is reasonably certain to occur to be considered an effect of the proposed action, and (4) revert to the 2019 definition of “effects of the action.” As some of these proposed changes were at issue in the subsequent vacatur decision described above, the final rule, which is expected before the end of the year, will likely look somewhat different than the proposed rule.

Proposed Revisions to Listing and Critical Habitat Regulations

Also on November 21, 2025, the Services published a proposed rule to revise portions of the Section 4 regulations that provide procedures for listing, reclassifying, and delisting species and for designating critical habitat by reverting to the 2019 version of the regulations, which were amended in 2024.

With respect to the listing regulations, the Services are proposing to (1) remove the phrase “without reference to possible economic or other impacts of such determination” to align more closely with the statutory text, (2) interpret “foreseeable future” as extending “only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely,” and (3) limiting the delisting circumstances to when the species is extinct, the species no longer meets the definition of endangered or threatened, or the listed entity does not meet the statutory definition of a species, eliminating the separate “recovery” criterion.

For critical habitat designations, the Services are proposing to reinsert language, removed in 2024, that recognizes critical habitat designation may not be prudent when threats to a species’ habitat stem solely from causes that cannot be addressed through section 7(a)(2) consultations. They also intend to reinstate the two-step prioritization process that requires occupied areas to be evaluated first, with unoccupied areas to be designated only upon a determination that a designation limited to occupied areas would be “inadequate to ensure the conservation of the species.” Like the proposed Section 7 regulatory revisions, the final rule for these Section 4 regulations is anticipated before the end of this year.

National Security Exemption by the God Squad

On March 31, 2026, for the first time in history, the Endangered Species Committee, commonly referred to as the “God Squad,” granted a national security exemption under Section 7 for specific oil and gas activities in the Gulf of America.¹¹ This exemption has been challenged in various venues, some of which appear to be contrary to statutory requirements.¹² Prior to this exemption, the God Squad had only considered a handful of requests under the non-national-security exemption process under Section 7(h). It denied the request for Tellico Dam in 1979; granted the request for the Grayrocks dam in 1979 (with specific congressional direction for the

process); and granted an exemption for 13 timber sales in Oregon, but the underlying exemption request was subsequently withdrawn.¹³

Listing Actions Over the Last Year¹⁴

The following table describes the listing actions that the Services have taken over the last year or so.

Action	Date of Federal Register Notice
Negative 90-day finding on petition to revise North Atlantic right whale critical habitat	July 22, 2026
Final rule listing the Florida Keys mole skink as endangered	July 21, 2026
Final rule listing the Key ring-necked snake and the rim rock crowned snake as endangered	July 21, 2026
12-month “warranted but precluded” finding for the San Francisco Estuary distinct population segment of white sturgeon	July 21, 2026
Reclassification of the Hawaiian stilt from endangered to threatened with a Section 4(d) rule	July 20, 2026
Reclassification of the razorback sucker from endangered to threatened with a Section 4(d) rule	July 17, 2026
Revised proposed grizzly bear Section 4(d) rule	July 17, 2026
Final rule revising critical habitat for Canada lynx	July 16, 2026
Positive 90-day finding on petitions to list seven species (Cascade red fox, diamondback terrapin, Goose Lake lamprey, Goose Lake sucker, Goose Lake tui chub, loopy five firefly, and plains spotted skunk) and initiation of status reviews; negative 90-day finding on petitions to list three species (Ellett Valley millipede, long-tailed macaque, and Louisiana black bear)	July 14, 2026
Final rule delisting the northeastern bulrush	June 10, 2026
Initiation of a status review for the Rice's whale	May 5, 2026

12-month “not warranted” finding for the Temblor legless lizard	May 4, 2026
Final rule designating critical habitat for the rayed bean, sheepnose, snuffbox, and spectaclecase mussels	April 27, 2026
Proposed rule to list the Jamaican kite swallowtail as endangered	April 17, 2026
Proposed rule to list two distinct population segments of the tope shark as threatened	April 15, 2026
Request for information on implementation of the gray wolf nonessential experimental population rule in Colorado	April 6, 2026
Proposed rule designating critical habitat for 22 species in the Commonwealth of the Northern Mariana Islands and the Territory of Guam	March 24, 2026
12-month “not warranted” finding for the Washington Coast Chinook Salmon Evolutionarily Significant Unit	February 19, 2026
Negative 90-day finding on two petitions to list the Atlantic horseshoe crab	February 18, 2026
Positive 90-day finding on petitions to list 10 species (Alvord chub, Donner und Blitzen pebblesnail, gray cat's-eye, Mount Pinos sooty grouse, mysterious lantern firefly, Olympic marmot, San Joaquin tiger beetle, stippled studfish, Wilson's phalarope, and wonder caddisfly) and initiation of status reviews	January 26, 2026
12-month “not warranted” finding for the Olympic Peninsula distinct population segment of steelhead	January 14, 2026
12-month “not warranted” finding for Oregon Coast and Southern Oregon and Northern California Coastal Chinook salmon Evolutionarily Significant Units	December 9, 2025
12-month “not warranted” finding for the Okinawa woodpecker	November 11, 2025
Proposed rule to revise or remove regulations concerning taking or commerce in 11 similarity-of-	September 26,

appearance species (Alabama map turtle, Barbour's map turtle, Escambia map turtle, Pascagoula map turtle, bog turtle (southern DPS), cassius blue butterfly, ceraunus blue butterfly, nickerbean blue butterfly, desert tortoise (Sonoran population), puma (all subspecies except <i>coryi</i>)), and shovelnose sturgeon).	2025
12-month "not warranted" finding for five species (Jackson Prairie crayfish, Ozark shiner, speckled burrowing crayfish, spiny scale crayfish, and spotted turtle)	September 4, 2025
Proposed rule listing the southern hognose snake as threatened with a 4(d) rule	August 29, 2025 (comment period reopened on June 8, 2026)
12-month "not warranted" finding for Northern California-Southern Oregon distinct population segment of fisher	August 25, 2025
Positive 90-day finding on petitions to list six species (cinnamon juga, Great Basin ramshorn, montane peaclam, painted woolly bat, Southern Cascades population of the Sierra Nevada red fox, and Sulawesi forest turtle) and initiation of status reviews; positive 90-day finding on petition to revise critical habitat for the leatherback sea turtle; negative 90-day finding on petitions to list the Alaskan glacier buttercup and eastern population of the golden eagle	August 25, 2025
Proposed rule to list the Borneo earless monitor as a threatened species with a 4(d) rule	August 14, 2025
Proposed rule to delist the Virginia sneezeweed	August 5, 2025

Bald and Golden Eagle Protection Act (BGEPA)

Over the last year and a half, the Trump administration has taken several actions that have created significant uncertainty regarding the ability of the wind energy industry to obtain BGEPA permits. Pursuant to a January 20, 2025 presidential memorandum, USFWS previously instituted a ban on issuance of BGEPA permits for wind projects and disabled the general permit e-permitting system. However, after a federal district court issued an order declaring the presidential memo to be unlawful, USFWS lifted that ban in January 2026 and resumed issuing general eagle take permits for

wind projects through the e-permitting system.

However, the ability of wind projects to obtain specific BGEPA permits is still limited due to the July 15, 2025 memo on *Departmental Review Procedures for Decisions, Actions, Consultations, and Other Undertakings Related to Wind and Solar Energy Facilities*. This memo created a de facto permitting freeze by requiring approvals for wind and solar projects, including BGEPA permits, to be reviewed at the Secretarial level. In April 2026, a federal district court judge in issued a preliminary injunction blocking implementation of five agency actions directed at the renewable energy industry, including the July 15 Memo. But the preliminary injunction only applies to members of the plaintiff organizations.¹⁵ Other non-member applicants for BGEPA specific permits are likely going to continue to face significant permitting difficulties.

Civil Penalty Increases

Pursuant to Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, each federal agency must issue regulations adjusting for inflation the statutory civil monetary penalties (civil penalties) that can be imposed under the laws administered by that agency.¹⁶ USFWS issued its most recent increases on August 18, 2025, which are as follows for violations of the ESA and BGEPA.¹⁷

Statute	Type of Violation	Maximum Civil Monetary Penalty
Endangered Species Act	Knowing violation of Section 9's take prohibition	\$65,653
	Other knowing violation	\$31,513
	Any other violation	\$1,659
Bald and Golden Eagle Protection Act	Any violation	\$16,590

The timing of the 2025 increases suggests that increases for 2026 are likely to be issued soon.

Conclusion

As this summary demonstrates, many changes in the regulation of protected wildlife have already occurred, and more are guaranteed to occur in the future. Holland & Hart is tracking these developments and is well positioned to help you navigate this complicated legal landscape.

¹ Note that many of these changes also affect the regulation of protected

plant species.

² 16 U.S.C. § 1538(a), (b).

³ *Id.* § 1533(d).

⁴ See Final Rule, Protection of Threatened Species of Wildlife, 43 Fed. Reg. 18,180 (April 28, 1978). NMFS has never had such a blanket rule and has always issued species-specific 4(d) rules for threatened species.

⁵ The current regulations for the exclusion process are found in the Services' joint regulations at 50 C.F.R. § 424.19. The final rule creates a new section in the regulations that are specific to USFWS, to be codified at 50 C.F.R. § 17.90.

⁶ The court rejected one of plaintiffs' arguments regarding the Section 7 regulations and two regarding the Section 4 listing and critical habitat regulations. Specifically, it found no fault with defining “destruction or adverse modification” together rather than as separate terms. It also upheld the standard for what constitutes the foreseeable future (50 C.F.R. 424.11(d)) and considerations for when concurrent designation of critical habitat is not prudent (50 C.F.R. § 424.12(a)(1)).

⁷ 50 C.F.R. § 402.02.

⁸ *Id.*

⁹ *Id.* § 402.14(g)(8).

¹⁰ *Id.* § 402.16(a).

¹¹ ESA Section 7(j) provides “Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of [War] finds that such exemption is necessary for reasons of national security.” 16 U.S.C. § 1536(j).

¹² ESA Section 7(n) specifies that requests for judicial review of decisions by the Endangered Species Committee must be filed “in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia.” 16 U.S.C. § 1536(n). Some of the challenges were filed in the federal district court for the District of Columbia. Others that were filed in various circuit courts have been consolidated in the Fifth Circuit.

¹³ This information is summarized from the Congressional Research Service report on Endangered Species Act (ESA): The Exemption Process (January 2017).

¹⁴ Note that this table does not include reopening of comment periods on prior proposed rules.

¹⁵ The plaintiff organizations are Renew Northeast, Alliance for Clean Energy New York, Renewable Northwest, Southern Renewable Energy

Association, Interwest Energy Alliance, Mid-Atlantic Renewable Energy Coalition Action, Clean Grid Alliance, Carolinas Clean Energy Business Association, and Green Energy Consumers Alliance, Inc.

¹⁶ 28 U.S.C. § 2461 note.

¹⁷ NMFS last issued its adjustments on December 30, 2024. The ESA increases match USFWS's except that the maximum penalty for "any other violation" is \$2,158.

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