

**ESA: See You Later Alligator**  
**Texas Environmental Superconference 2024**  
**Brooke Marcus, Nossaman LLP**  
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In the last year, the implementing regulations for nearly every major section of the Endangered Species Act (ESA) have been revised. In Texas, species that have been in the listing workplan have reached the end of the listing process and will receive protections. Additionally, courts continue to consider how the agencies assert their authority under the ESA. Even with all of this activity, several regulatory actions, listings, and rulings are anticipated in the coming months. Taken together, Texas practitioners have plenty to keep track of where species may be involved.

This paper (1) provides an overview of the regulatory activity that has occurred in the last year; (2) identifies Texas species and their ESA-status; (3) discusses notable court rulings that may affect ESA implementation; and (4) forecasts anticipated ESA actions.

**I. Recent ESA Regulatory Activity**

During the first months of the Biden Administration, the U.S. Fish and Wildlife Service (USFWS) signaled its intent to revisit, and in some cases, wholly rescind regulations promulgated during the previous administration. USFWS also announced its intent to undertake rulemakings related to ESA section 10, governing incidental take permitting. While the Biden Administration took some of these actions quickly—like the rescission of the rule defining “habitat”<sup>1</sup>—other revisions were not proposed and finalized until this past year. An overview of the most recent regulatory activity is provided here.

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<sup>1</sup> 87 Fed. Reg. 37,757 (June 24, 2022).

**a. ESA Section 4 Regulations – Listings and Critical Habitat**

On April 5, 2024, the USFWS and National Marine Fisheries Service (NMFS) published a final rule (Section 4 Rule) revising portions of regulations that implement ESA section 4 (Section 4).<sup>2</sup> It took effect May 6, 2024. Section 4 governs how a species may be listed as endangered or threatened and how critical habitat is designated for species, and its implementing regulations are codified at 50 C.F.R. Part 424.

The Section 4 Rule makes several changes to the existing regulations, including changes to the definition of “foreseeable future” as it relates to listing species as threatened, the standards for delisting species, the appropriate circumstances for determining that designating critical habitat is not prudent, and the requirements for designating unoccupied areas as critical habitat. The use of “foreseeable future” to support listings and the treatment of unoccupied critical habitat have been frequently litigated.

**b. ESA Section 4(d) – Threatened Species**

On April 5, 2024, the USFWS issued a final rule (Section 4(d) Rule) reinstating the USFWS’s longstanding practice of applying “blanket rule” protection for newly listed threatened species of wildlife pursuant to ESA section 4(d).<sup>3</sup> The rule also adopts a blanket rule for newly listed threatened plant species. This rule took effect on May 6, 2024. The “take” prohibition of ESA section 9 (Section 9) applies only to species listed as endangered. Under current regulations, which have been in place since 2019, when the USFWS lists species of wildlife as “threatened,” the take prohibition does not apply unless the USFWS issues a species-specific rule. The rule revises the regulations at 50 C.F.R. § 17.31(a), to extend the Section 9 take prohibition automatically to

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<sup>2</sup> 89 Fed. Reg. 24,300 (Apr. 5, 2024).

<sup>3</sup> 89 Fed. Reg. 23,919 (Apr. 5, 2024).

species of fish and wildlife listed as threatened unless the USFWS promulgates a species-specific Section 4(d) rule. The Section 4(d) Rule also revises the regulations at 50 C.F.R. § 17.71(a)(4) to clarify that most prohibitions that apply to endangered plant species will automatically apply to plant species listed as threatened unless a species-specific Section 4(d) rule is promulgated.

### **c. ESA Section 7 – Consultations**

On April 5, 2024, the USFWS and NMFS published a final rule (Section 7 Rule) updating the ESA section 7 (Section 7) implementing regulations concerning interagency consultations at 50 C.F.R. Part 402 (Consultation Regulations), which govern federal agency obligations under the ESA.<sup>4</sup> The Section 7 Rule took effect on May 6, 2024.

The new regulations update the definitions of “effects of the action” and “environmental baseline,” remove language relevant for determining if a consequence is reasonably certain to occur, and clarify the agencies’ responsibilities to reinitiate consultation. The most discussed element of this rulemaking was the revision to the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). The revisions expressly allow for the use of offsetting measures inside or outside the action area, for the first time incorporating the concept of compensatory mitigation into the Consultation Regulations.

### **d. ESA Section 10 – Incidental Take Permits and Enhancement of Survival Permits**

On April 12, 2024, the USFWS published a final rule (Section 10 Rule) revising portions of regulations implementing ESA section 10 (Section 10).<sup>5</sup> Section 10 and its implementing regulations address the agency’s issuance of enhancement of survival (EOS) permits and incidental take permits (ITP). The Section 10 Rule took effect on May 13, 2024 and applies to EOS

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<sup>4</sup> 89 Fed. Reg. 24,268 (Apr. 5, 2024).

<sup>5</sup> 89 Fed. Reg. 26, 070 (Apr. 12, 2024).

permit and ITP applications that have not yet been processed and published in the Federal Register by the effective date.

These regulations make several changes and clarifications to the Section 10 permits, including:

- Combining Candidate Conservation Agreements and Safe Harbor Agreements into a single Conservation Benefit Agreement;
- Adding language to clarify that the scope of a Habitat Conservation Plan (HCP) compliance monitoring program must be commensurate with the project impacts and scope of conservation program;
- Revising the definition of “net conservation benefit”;
- Recognizing that research as mitigation may be appropriate in certain circumstances;
- Clarifying when to use an EOS permit and when to use an ITP.

The USFWS also noted its intent to update its 2016 Habitat Conservation Planning and Incidental Take Permitting Handbook (HCP Handbook) to incorporate the new regulations.

## **II. Texas-related Listing Activity**

The USFWS has made headway on listing several species known to occur in Texas. In May 2024, the USFWS updated its five-year listing workplan (Workplan).<sup>6</sup> In July, the Office of Information and Regulatory Affairs (OIRA) published its Spring 2024 Unified Agenda.<sup>7</sup> Both the Workplan and the Unified Agenda provide insights into USFWS’s anticipated timing for pending listings. The list below captures some of the more potentially impactful listings to the Texas regulated community.

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<sup>6</sup> *National Listing Workplan*, USFWS (May 23, 2024), <https://www.fws.gov/project/national-listing-workplan>.

<sup>7</sup> *Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions*, OIRA, <https://www.reginfo.gov/public/do/eAgendaMain> (last visited July 17, 2024).

### a. Texas Mussels

On June 4, 2024, the USFWS published a final rule to list six Texas mussel species.<sup>8</sup> These listings became effective July 5, 2024. The listing lists as endangered the Texas fatmucket (*Lampsilis bracteate*), Guadalupe fatmucket (*Lampsilis bergmanni*), Texas pimpleback (*Cyclonaias (= Quadrula) petrina*), and Guadalupe orb (*Cyclonaias necki*) and False spike (*Fusconaia (= Quincuncina) mitchelli*). The rule also lists as threatened the Texas fawnsfoot (*Truncilla macrodon*). Additionally, the USFWS promulgated a Section 4(d) rule for the Texas fawnsfoot and designated 1,577.5 river miles as critical habitat.

On July 25, 2023, the USFWS published a proposed rule to list two mussel species, the Salina mucket (*Potamilus metnecktayi*) and Mexican fawnsfoot (*Truncilla cognata*), as endangered under the ESA.<sup>9</sup> The USFWS also proposed to designate critical habitat for these species under the ESA. The proposed critical habitat for the Salina mucket totals approximately 200 river miles in the Texan counties of Brewster, Terrell, and Val Verde, and the proposed critical habitat for the Mexican fawnsfoot totals approximately 185 river miles in the Texan counties of Maverick, Webb, and Zapata.

On May 17, 2024, the USFWS sent a final rule designating critical habitat for the endangered Texas hornshell to OIRA.<sup>10</sup> Once OIRA has completed its review, it will likely be sent to the Federal Register and will become effective shortly thereafter.

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<sup>8</sup> 89 Fed. Reg. 48, 034 (June 4, 2024).

<sup>9</sup> 88 Fed. Reg. 47,952 (July 25, 2023).

<sup>10</sup> *Endangered and Threatened Wildlife and Plants; Critical Habitat Designation for the Texas Hornshell*, OIRA (May 17, 2024), <https://www.reginfo.gov/public/do/eoDetails?rrid=322812>.

**b. Dunes Sagebrush Lizard**

On May 20, 2024, the USFWS published a final rule listing the dunes sagebrush lizard (*Scleroperus arenicolus*) (DSL) as endangered under the ESA, which became effective June 20, 2024.<sup>11</sup> Previous determinations by the USFWS not to list the DSL have been challenged in court. This listing arose from a renewed petition submitted by Center for Biological Diversity (CBD) in 2018.

**c. Tricolored Bat**

On September 14, 2022, the USFWS published a proposed rule to list the tricolored bat (*Perimyotis subflavus*) (TRBA) as an endangered species.<sup>12</sup> The TRBA is known to occur in all or portions of 39 states across the northeast, as far south as southern Texas and Florida and as far west as Wyoming. On April 1, 2024, the USFWS released draft documents to provide direction to the USFWS and regulated community on how to assess the risk of take of the TRBA and how to evaluate TRBA for purposes of ESA section 7.<sup>13</sup> The USFWS also released draft guidance specific to wind energy. The final listing rule and finalized guidance documents are anticipated to be published in summer 2024.

**a. Cactus Ferruginous Pygmy Owl**

On July 20, 2023, the USFWS issued a final rule listing the cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) (Owl) as a threatened subspecies with a 4(d) rule.<sup>14</sup> The Section 4(d) rule prohibits the same activities prohibited for endangered species, but allows exemptions for certain education and outreach activities permitted under a Migratory Bird Treaty Act permit, surveying and monitoring in Arizona under a state scientific activity permit, and habitat restoration and enhancement activities that improve the subspecies' habitat conditions. The

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<sup>11</sup> 89 Fed. Reg. 43,748 (May 20, 2024).

<sup>12</sup> 87 Fed. Reg. 56,381 (Sept. 14, 2022).

<sup>13</sup> *Tricolored Bat*, USFWS, <https://www.fws.gov/species/tricolored-bat-perimyotis-subflavus> (last visited July 17, 2024).

<sup>14</sup> 88 Fed. Reg. 46,910 (July 20, 2023).

USFWS is also planning to designate critical habitat for the Owl, but will do so in a separate rulemaking.

**b. Alligator Snapping Turtle**

On November 9, 2021, the USFWS published a proposed rule to list the alligator snapping turtle (*Macrochelys temminckii*) as a threatened species.<sup>15</sup> The proposed rule included a proposed 4(d) rule exempting incidental take resulting from certain activities including construction, operation, and maintenance activities using appropriate best management practices, pesticide and herbicide use, and silviculture practices and forestry activities that use state-approved best management practices. The USFWS has signaled it intends to publish a final rule in December 2024.<sup>16</sup>

**c. Monarch**

On December 17, 2020, the USFWS published its determination that listing the monarch (*Danaus plexippus*) was warranted, but precluded by other higher priorities.<sup>17</sup> The CBD challenged this determination, and the parties entered into a settlement agreement establishing deadline by which the USFWS will revisit its proposed listing determination. In March 2024, the parties agreed to extend the deadline to December 4, 2024. Thus, the USFWS's new proposed determination is anticipated in December 2024.

**d. Red-cockaded woodpecker.**

On October 8, 2020, the USFWS published a proposed rule to downlist the red-cockaded woodpecker (*Picoides borealis*) from endangered to threatened with a species-specific Section 4(d) rule.<sup>18</sup> The proposed Section 4(d) rule provided few exemptions from the ESA section 9 take

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<sup>15</sup> 86 Fed. Reg. 62,434 (Nov. 9, 2021).

<sup>16</sup> *Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Alligator Snapping Turtle*, OIRA, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1018-BG00> (last visited July 17, 2024).

<sup>17</sup> 85 Fed. Reg. 81, 813 (Dec. 17, 2020).

<sup>18</sup> 85 Fed. Reg. 63,474 (Oct. 8, 2020).

prohibition. In 2022, the USFWS published a proposed revised Section 4(d) rule and reopened the comment period for the Section 4(d) rule.<sup>19</sup> The USFWS anticipates publishing a final rule in July 2024.<sup>20</sup>

### III. Notable ESA Case Law

In the last year there were a number of judicial rulings involving the ESA. The cases below are noteworthy for ESA practitioners, particularly in Texas.

#### a. *Maine Lobstermen Ass'n v. Nat'l Marine Fisheries Serv.*<sup>21</sup>

On June 16, 2023, the United States Court of Appeal for the D.C. Circuit set aside a biological opinion regarding the effects of the federal lobster fishery on the North Atlantic right whale (*Eubalaena glacialis*). The NMFS issued a biological opinion analyzing the effects of several fisheries on listed species, including effects on the right whale. A number of uncertainties plagued the NMFS analysis given the paucity of data and low populations. In writing its biological opinion, NMFS resolved uncertainties in favor of the species, providing the benefit of the doubt to the species. The court held that a presumption in favor of an endangered species is not required by the ESA and, further, that such a presumption can distort the agency's scientific judgment and did so here. The court held NMFS "must strive to resolve or characterize the uncertainty through accepted scientific techniques, not jump to a substantive presumption that distorts the analysis of effects and creates false positives."<sup>22</sup> Given the uncertainties inherent in evaluating species, particularly those with cryptic populations, this case discourages the common USFWS and NMFS practice of erring on the side of the species in making its decisions.

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<sup>19</sup> 87 Fed. Reg. 6,118 (Feb. 3, 2022).

<sup>20</sup> *Endangered and Threatened Wildlife and Plants; Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With Section 4(d) Rule*, OIRA, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1018-BE09> (last visited July 17, 2024).

<sup>21</sup> 70 F.4th 582 (D.C. Cir. 2023).

<sup>22</sup> *Id.* at 600.



### **b. The ITP cases**

Two courts recently ruled in cases involving stagnant ITP applications. In the first case, *Leander Independent School District v. U.S. Department of the Interior*, the USFWS refused to process an ITP application alleging that the applicant did not have requisite land control over the areas proposed to be permitted because the applicant had not yet exercised its eminent domain authority. The U.S. District Court for the Western District of Texas ruled in favor of USFWS finding its refusal to process the ITP application proper.<sup>23</sup> The other, *Allegheny Wood Product, Inc. v. U.S. Fish and Wildlife Service*, involved an ITP application that had been pending for 16 years. There the U.S. District Court for the Northern District of West Virginia granted summary judgment to USFWS concluding that the record supported USFWS's assertion that it could not process the ITP application because the application and draft HCP were incomplete.<sup>24</sup> These rulings are frustrating to ITP applicants where the USFWS refuses to approve, deny, or otherwise process an ITP application.

### **c. Lesser Prairie Chicken**

On January 24, 2023, the USFWS finalized its decision to split the lesser prairie chicken (*Tympanuchus pallidicinctus*) (LEPC) population into two distinct population segments (DPS) and listed the northern DPS as endangered and the southern DPS as threatened.<sup>25</sup> This is the second time the USFWS has listed the LEPC. The first listing was invalidated by the U.S. District Court for the Western District of Texas in September 2015.<sup>26</sup> The second time around, parties again have challenged the USFWS's decision to list the LEPC. On March 21, 2023, the States of Texas, Oklahoma, and Kansas, the Kansas Independent Oil & Gas Association, Permian Basin Petroleum

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<sup>23</sup> *Leander Independent School Dist. v. U.S. Dep't of the Interior*, 1:22-CV-310-RP, at \*1 (W.D. Tex. Dec. 21, 2022).

<sup>24</sup> *Allegheny Wood Product, Inc. v. U.S. Fish and Wildlife Serv.*, 2:22-CV-007, at \*1 (N.D. W.Va. Feb. 12, 2024)

<sup>25</sup> 87 Fed. Reg. 72,674 (Jan. 24, 2023).

<sup>26</sup> *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015).

Association, the Petroleum Alliance of Oklahoma, the National Cattlemens Beef Association, Texas Cattle Feeders Association, Kansas Livestock Association, New Mexico Cattle Growers Association, and Oklahoma Cattlemens Association filed lawsuits in the U.S. District Court for the Western District of Texas. These cases have since been consolidated. Currently, the parties are working through administrative record issues and once those issues are resolved will continue briefing the court.

#### **IV. Anticipated ESA Activity**

Despite the torrent of ESA activity occurred, a number of regulatory actions remain. Given the back and forth that has occurred in the regulatory sphere over the last couple of decades, it is possible, and perhaps likely, that several of the rulemakings described in Section I and II above will be revisited, either by the agencies or the courts.

##### **a. Significant Portion of its Range Policy**

When determining whether to list a species, the USFWS must look at whether the species meets the definition of “endangered” or “threatened” throughout its range or through a significant portion of its range (SPOR). To guide its analysis of SPOR, the USFWS developed a policy in 2014 (SPOR Policy).<sup>27</sup> Since then, courts have invalidated portions of the SPOR Policy, and the USFWS has included revisions to its existing policy on its regulatory calendar for several years. The latest anticipated date for releasing a proposed updated SPOR Policy is December 2024.<sup>28</sup>

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<sup>27</sup> 79 Fed. Reg. 37,578 (July 1, 2014).

<sup>28</sup> *Revised Policy on Interpretation of the Phrase “Significant Portion of its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species”*, OIRA, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1018-BE27> (last visited July 17, 2024).

### **b. Compensatory Mitigation Rulemaking**

On July 27, 2022, the USFWS published an Advance Notice of Proposed Rulemaking in anticipation of a rulemaking focused on species compensatory mitigation mechanisms.<sup>29</sup> The rulemaking arose from a directive in section 329 of the National Defense Authorization Act for Fiscal Year 2021. Currently, the USFWS anticipates publishing a proposed rulemaking in December 2024.

### **c. HCP Handbook Update**

As noted above, the USFWS has signaled its intent to update its HCP Handbook. However, no timing or details have been provided.

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<sup>29</sup> *Wildlife and Fisheries, Compensatory Mitigation Mechanisms*, OIRA, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1018-BF63> (last visited July 17, 2024).