



36th Annual Texas Environmental SuperConference | Endangered Species Act

Brooke Marcus and Rebecca Barho | Nossaman LLP



ESA Regulatory Activity

- ESA section 4 regulations – listing, delisting and critical habitat
- ESA section 4(d) regulations -- threatened species
- ESA section 7 regulations -- consultation
- ESA section 10 regulations -- permitting





ESA Regulatory Activity – Section 4

- ESA section 4 regulations (listing and critical habitat)
 - [89 Fed. Reg. 24,300 \(April 5, 2024\)](#)
 - Reinstate Obama-era approach to designating unoccupied critical habitat
 - Adjust definition of “foreseeable future” for purposes of listing threatened species
- ESA section 4(d) regulations (threatened species)
 - [89 Fed. Reg. 23,919 \(April 5, 2024\)](#)
 - Return to historical USFWS approach to automatically extending take prohibition to threatened species unless species-specific rule dictates otherwise

ESA Regulatory Activity – Section 7

- ESA section 7 regulations (consultation)
 - [89 Fed. Reg. 24,268 \(April 5, 2024\)](#)
 - Establish USFWS has authority to require offsets as a reasonable and prudent measure
 - Update definition of “environmental baseline” for jeopardy purposes
 - Update definition of “effects of the action”

ESA Regulatory Activity – Section 10

- ESA section 10 regulations
 - [89 Fed. Reg. 26,070 \(April 12, 2024\)](#)
 - Consolidate Candidate Conservation Agreement with Assurances and Safe Harbor Agreements into a “Conservation Benefit Agreement”
 - Incorporate Five-Point Policy concepts into regulations directly (e.g. monitoring should be commensurate with impacts of the take)
 - Continue position that non-listed species can be covered by HCP without lead species
 - Continue position discouraging use of CBAs by energy industry sector

Listing Activity in Texas

- Texas Mussels
- Cactus ferruginous pygmy owl
- Dunes sagebrush lizard
- Monarch
- Tricolored bat
- Texas kangaroo rat
- Alligator Snapping Turtle
- Red-cockaded woodpecker



Notable ESA Litigation

- *Maine Lobstermen's Ass'n. v. Nat'l Marine Fisheries Serv.*, 626 F.Supp.3d 46 (2023).
- *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).
- *Allegheny Wood Product, Inc. v. U.S. Fish and Wildlife Serv.*, 2:22-CV-007, at *1 (N.D. W.Va. Feb. 12, 2024).
- Golden-cheeked Warbler litigation (ongoing)
- Lesser Prairie Chicken litigation (ongoing)



Congressional Activity

- ESA reform bill expected by Rep. Westerman
- Several other ESA reform bills have been filed but none have moved.
- Several other riders and Congressional Review Act (CRA) resolutions have been introduced
 - 10 CRA resolutions introduced in 2024 focused on disapproving the ESA regulatory revisions for Section 4, 4(d), and 7.
 - CRA resolutions have been filed disapproving of the listing of Texas mussels and dune sagebrush lizard
- No movement on bills delisting dunes sagebrush lizard and lesser prairie chicken



What's next?

- Potential revamp of the Significant Portion of its Range Policy
- Potential proposed Compensatory Mitigation Mechanism Regulations
- Proposed updates to HCP Handbook
- Between *Loper*, *Corner Post*, and an election year, plenty of potential for litigation, rollbacks, or legislative changes



Your Presenters



Brooke Marcus

Partner | Environment & Land Use Group
Nossaman LLP

bmarcus@nossaman.com
512.651.0660



Rebecca Barho

Partner | Environment & Land Use Group
Nossaman LLP

rbarho@nossaman.com
512.651.0660