

Final Policy for Section 4(b)(2) of the ESA Questions and Answers

Q: What actions are the U.S. Fish and Wildlife Service and National Oceanic Atmospheric Administration's National Marine Fisheries Service taking?

A: The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (together, the Services) are finalizing a policy to clarify their implementation of section 4(b)(2) of the Endangered Species Act (ESA). Section 4(b)(2) states that the Secretary must designate critical habitat based on the best scientific and commercial data available after considering the economic impact, the impact on national security and any other relevant impact. Additionally, this section of the ESA states that the Secretary may exclude an area from critical habitat if the benefits of excluding the area outweigh the benefits of including the area so long as the exclusion will not result in the extinction of the species concerned.

Q: What is critical habitat?

A: Under the ESA, critical habitat is generally defined as a specific geographic area(s) that contains features essential to the conservation of a threatened or endangered species and that may require special management considerations and protection. In other words, critical habitat represents the habitat essential for the species' recovery. Critical habitat may include areas that are not currently occupied by the species but that will be needed for its recovery. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness reserve, preserve or other special conservation area. It does not mandate government or public access to private lands. A critical habitat designation has no effect in situations that do not involve a federal agency—for example, a private landowner undertaking a project that involves no federal funding or permitting.

Q: What is the intent of the final policy?

A: Our final policy on implementation of section 4(b)(2) of the ESA is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

Q: What is in the final policy?

A: The final policy consists of six elements that the Services consider when determining whether to exclude any areas from critical habitat: (1) partnerships and conservation plans, (2) conservation plans permitted under section 10 of the ESA, (3) tribal lands, (4) national security and homeland security impacts, and military lands, (5) federal lands, and (6) economic impacts.

- **Partnerships and conservation plans:** As a general practice, when we undertake a discretionary exclusion analysis, we will take into consideration the conservation benefits provided through conservation plans, programs and partnerships. We will generally exclude areas covered by approved and implemented plans or programs, and demonstrated partnerships that provide a benefit to the species and its habitat.
- **Section 10 permitted conservation plans:** As a general practice, when we undertake a discretionary exclusion analysis, we will always consider exclusion of areas covered by an approved Candidate Conservation Agreement with Assurances/Safe Harbor Agreement/Habitat Conservation Plan that provides a benefit to the species and its habitat, and generally exclude such areas from a designation of critical habitat.
- **Tribal lands:** Secretarial Order 3206 states, “[c]ritical habitat shall not be designated in [tribal] areas unless it is determined essential to conserve a listed species.” However, we are still

required by the ESA to propose areas that meet the definition of critical habitat for a species. The Services will, when undertaking a discretionary exclusion analysis, always consider, and generally exclude tribal lands under section 4(b)(2) of the ESA prior to finalizing a designation of critical habitat. We will give great weight to Tribal concerns in analyzing the benefits of exclusion.

- **Impacts on national security and homeland security:** While we will not automatically exclude Department of Defense or other national security-related agency lands from critical habitat, we will give great weight and consideration to an agency's expert judgment as to the impact of critical habitat on national security. Installations that have an approved Integrated Natural Resources Management Plan (INRMP) and cover the species in question are exempt from critical habitat designation.
- **Federal lands:** Federal agencies have responsibilities under section 7 of the ESA to not jeopardize a listed species' existence or destroy or adversely modify its critical habitat. Therefore, we will generally focus exclusions on non-federal lands.
- **Economic impacts:** When the Services undertake a balancing analysis with respect to a particular area, they will weigh the economic and other benefits of exclusion against any benefits of inclusion (primarily the conservation value of designating the area).

Q: How will this final policy affect me?

The elements outlined in the final policy will codify current practice for the Services. Hence there will be no additional impact on stakeholders.

Q. Did the Services seek public comment on the proposed policy?

A. Yes. The Services opened a public comment period on May 12, 2014, for 60 days until July 11, 2014, and on June 26, 2014, we extended the comment period for an additional 90 days until October 9, 2014, for a total of 150 days. We received comments from 183 individuals representing private individuals, state entities, Tribes and federal interests. We have provided a summary of these comments and our responses in the final rule.

A: For more information, including the final rule submitted to the *Federal Register*, visit www.fws.gov/endangered/improving_esa/reg_reform.html.