

# Guidance for Development of Species-Specific 4(d) Rules Under the Endangered Species Act

July 2021

## Table of Contents

- Introduction .....2
- Statutory Provisions and Legal Overview .....3
- Practical Considerations for Drafting a Proposed Species-Specific 4(d) Rule.....5
  - Information Sources for Development of Species-Specific 4(d) Rules .....7
    - Species Status Assessments (SSA) .....7
    - 5-Year Reviews.....7
    - Recovery Outlines and Plans .....8
    - State, Tribal, and Federal Partners .....8
    - Conservation Plans/Efforts .....9
  - Service Staff to Consult When Developing a 4(d) Rule..... 10
- Section 10(a)(1)(A) Permits for Scientific Purposes (Recovery Permits) ..... 11
- Section 10(a)(1)(B) Incidental Take Permits ..... 12
- Section 7 Consultations ..... 13
- Special Cases of 4(d) Application ..... 15
  - 10(j) Rules (Experimental Populations)..... 15
  - 4(d) Rules for 4(e) Rules (Similarity of Appearance)..... 16
- 4(d) Rule Examples ..... 16
- Drafting the 4(d) Provisions..... 18
  - Plants..... 18
  - Referencing Other Conservation Laws for the Species in the 4(d) Rule ..... 18
- Species-specific 4(d) Rule Development Tool .....20

# Introduction

This document provides internal guidance for U.S. Fish and Wildlife Service (Service) personnel on the development of species-specific 4(d) rules for threatened species. The guidance reflects encouragement of creative thinking and emphasizes the breadth of discretion afforded in developing the provisions of each species-specific 4(d) rule. The guidance provides best practices and considerations for 4(d) rules, and similar to all guidance, any substantial deviation warrants further coordination with Headquarters. The guidance may be revised and refined as we learn from our experiences in developing and implementing species-specific 4(d) rules.

Early in the administration of the Endangered Species Act (Act), the Service promulgated “blanket rules,” which by default extended to threatened species the majority of the prohibitions that apply to endangered species under section 9 (43 FR 18180 (Apr. 28, 1978) for wildlife and 50 FR 39687 (Sept. 30, 1985) for plants). In 2019 we revised these regulations at 50 CFR 17.31 and 17.71 to no longer apply the “blanket rules” to species that get listed as, or reclassified as, threatened species after the revisions (84 FR 44753). Because the revised regulations do not extend automatic protections or prohibitions to species listed as “threatened species,” we must now issue species-specific 4(d) rules to establish appropriate protective regulations or take prohibitions under section 4(d) of the Act concurrent with every determination listing or reclassifying a species as a threatened species. Should we reinstate the blanket rules, this document will still apply to the development of species-specific 4(d) rules.

The purpose of a species-specific 4(d) rule is to establish regulations to provide for the conservation of a threatened species. Recognizing that we may have data gaps when we newly list species, we should focus our efforts on development of species-specific 4(d) rules that incentivize known beneficial actions for the species, as well as rules that remove the regulatory burden on forms of take that are considered inconsequential to the conservation of the species. We should put in place protections that will both prevent the species from becoming endangered and promote the recovery of species. This guidance offers considerations for crafting prohibitions, exceptions to prohibitions, and other protective regulations as appropriate, regardless of whether the prohibitions of the blanket 4(d) rules previously found at 50 CFR 17.31 and 17.71 are applicable to newly listed or reclassified as threatened species.

The Act provides a specific list of prohibitions for endangered species under section 9, but the Act does not automatically provide these same prohibitions to threatened species. The Act instructs the Secretary to issue protective regulations for threatened species under section 4(d). However, section 4(d) does not specify any particular activities that are prohibited with respect to threatened species or any exceptions to prohibitions for threatened species. Section 4(d) of the Act states:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such

regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

Section 4(d) provides two separate but interlocking sources of authority. First, the Secretary “shall” issue whatever regulations he or she deems necessary and advisable for the conservation of any threatened species. Second, the Secretary “may” choose to prohibit for a threatened species any of the activities that section 9 prohibits for endangered species.

**It is our intent to propose a species-specific 4(d) rule concurrently with any proposed rule classifying a species as a threatened species, and to finalize a 4(d) rule concurrently with any final rule that classifies a species as a threatened species.** There are several reasons for this approach. First, it ensures that the species receives appropriate protections immediately upon listing to provide for the conservation of the species. Second, this approach adds efficiency because the same up-to-date threats analysis can inform both the listing determination and the 4(d) rule. Third, this approach maximizes procedural efficiency; in the event a species-specific 4(d) rule is finalized after the final classification rule for the same species, we may need to comply with other statutes and processes, which do not apply to listing and their concurrent 4(d) rules, such as the National Environmental Policy Act, Paperwork Reduction Act, and Executive Order 12866 interagency review processes. If you are working on a 4(d) rule that is not concurrent with a listing or reclassification decision, ensure that you coordinate with Headquarters and the DOI Solicitor’s Office.

This guidance was developed by a team of career staff from field, regional, and Headquarters Service offices and the DOI Solicitor’s Office. This guidance represents collective experiences of Service personnel from many years of developing and implementing conservation mechanisms for threatened species.

If you have questions about developing species-specific 4(d) rules, please contact your Species Assessment Team (SAT) project manager or your Regional Listing liaison.

## Statutory Provisions and Legal Overview

In promulgating regulations under section 4(d) of the Act, we have broad discretion to select appropriate provisions tailored to the specific conservation needs of the threatened species. As introduced above, section 4(d) of the Act has two separate sentences granting authority to issue regulations for threatened species. The first sentence states that the “Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation” of species listed as threatened species. That sentence has two components: a requirement (to issue regulations for threatened species, if there are any that meet the standard) and a standard (that the regulations be necessary and advisable to provide for the conservation of the species). Thus, we must determine what regulations, if any, are necessary and advisable to provide for the conservation of the species, and if so, promulgate them.

Conservation is defined in the Act to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” The definition in the Act goes on to explain, “Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.”

The second sentence of section 4(d) states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants.” The use of the word “may,” along with the absence of any specific standards, in the second sentence grants us particularly broad discretion to put in place prohibitions with respect to threatened species that section 9 prohibits with respect to endangered species. As noted in *Sweet Home*, this “second sentence gives [the Service] discretion to apply any or all of the [section 9] prohibitions to threatened species without obliging it to support such actions with findings of necessity,” because “[o]nly the first sentence [] contains the ‘necessary and advisable’ language and mandates formal individualized findings.” *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), *modified on other grounds on reh’g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d on other grounds*, 515 U.S. 687 (1995). Although the statute does not require us to find that any individual prohibition under section 9 is “necessary and advisable,” making a finding that the 4(d) regulation as a whole is necessary and advisable to provide for the conservation of the species is recommended to demonstrate the rational basis for the rule. Accordingly, we should make a finding that the species-specific 4(d) regulation **as a whole** is necessary and advisable to provide for the conservation of the species, including explanation as to how any specific provisions that go beyond the section 9 prohibitions assist the regulation in meeting that standard.

Taking both sentences together, the courts have recognized our discretion to tailor regulations for the conservation of a threatened species. In addition, at least one Court has found that a species-specific 4(d) rule need not address all the threats to the species. *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988). For a threatened species, the Secretary may decide not to include a taking prohibition or to include a limited taking prohibition. The following are examples of 4(d) rules putting in place partial prohibitions that the courts have upheld as reasonable:

- A 4(d) rule that prohibited taking of natural or hatchery salmon with intact fins, but not of hatchery salmon with clipped fins (*Trout Unltd. v. Lohn*, 559 F.3d 946 (9th Cir. 2009));
- A 4(d) rule that set out two exceptions to the prohibition against take of salmonids—for municipal, residential, and industrial developments; and for certain non-Federal forestry activities (*Washington Environmental Council v. National Marine Fisheries Service*, 2002 WL 511479 (W.D. Wash. 2002)); and
- A 4(d) rule that established a complementary management regime encompassing the Marine Mammal Protection Act (MMPA), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Act because we determined that it was necessary and advisable to extend section 9 take prohibitions to the

species but that it was not necessary for the conservation of the species to apply section 9 prohibitions to activities that are currently authorized or exempted under the MMPA or CITES, or to activities that may incidentally affect the species and that occur outside the range of the species (*In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 230-233 (D.D.C. 2011) (“the relevant question before the Court is whether the Service reasonably concluded that the specific prohibitions and exceptions set forth in its [4(d)] Rule are necessary and advisable to provide for the conservation of the polar bear”).

As with any rulemaking, a guiding principle in promulgating a 4(d) rule is to demonstrate a rational basis for the choices made in the rule. To accomplish this, each proposed and final species-specific 4(d) rule is accompanied by preamble text that explains and provides scientific or logical support for how the rule provides for the conservation of the species. The preamble is an opportunity to demonstrate that the 4(d) rule, taken as a whole, is necessary and advisable for the conservation of the species. The justification for the 4(d) rule should flow from the analysis and conclusions in the documents supporting the listing or downlisting determination or outlining conservation needs, such as the species status assessment (SSA) report or recent recovery document such as a 5-year review, recovery plan, or recovery outline (see Information Sources for Development of Species-Specific 4(d) Rules). Those analyses, like the listing determination, use the best available science to consider key demographic, habitat, and conservation needs of the species. In addition, for newly proposed threatened species, notes from meetings of the core team and recommendation team should outline initial thoughts on an overall conservation strategy for the species. Those discussions will help inform proposed 4(d) rules, as well as any proposed critical habitat, recovery outlines, and outreach strategies.

In supporting the determination that the rule is necessary and advisable for the conservation of the species, the preamble should focus on the entirety of the rule and should not make “necessary and advisable” determinations for each provision within the rule. In addition to explaining how the 4(d) rule as a whole is necessary and advisable for the conservation of the species, the rule should clearly provide a short explanation of the connection between each of the provisions and the conservation of the species. As explained further below, we have determined that in most cases, all of the prohibitions for endangered species will apply to a threatened species. Therefore, the justifications in species-specific 4(d) rules will generally be focused on explaining the basis for specific exceptions to the section 9 prohibitions—such as that each exception would either be *de minimis* (too small or insignificant to be of importance) or encourage conservation. If you are using prohibitions other than those articulated in section 9 or using other protective regulations, the preamble should contain a more-detailed explanation as to the need for those provisions.

## Practical Considerations for Drafting a Proposed Species-Specific 4(d) Rule

We recommend starting to develop a species-specific 4(d) rule beginning with a review of the prohibitions found in section 9 of the Act. Section 9(a)(1) lists prohibitions for endangered

wildlife (50 CFR 17.21) and section 9(a)(2) lists prohibitions for endangered plants (50 CFR 17.61).

Section 4(d) grants particularly broad discretion to us to determine which prohibitions should be included in a species-specific 4(d) rule. A species-specific 4(d) rule could include none of the section 9 prohibitions, some subset of the section 9 prohibitions, unique prohibitions tailored to the needs of the species, or exceptions to any of the prohibitions included in the rule. As a general practice, we recommend including in the species-specific 4(d) rule all of the prohibitions that apply to endangered species under section 9 and then tailoring exceptions to those prohibitions to address the specific conservation needs of the species. This is for two primary reasons. The first is a biological reason. We often lack a complete understanding of the cause of a species' decline, and affording a threatened species protections that are similar to the protections for an endangered species should help provide the necessary tools over time as we learn more about the species' status and threats. Initially listing a species may also bring new attention to the species, and that attention may increase the risk of collection or sale. The second is a practical implementation reason. We have found that it is easier to explain and comprehend the rule for implementation and enforcement if the rule is modeled after the section 9 prohibitions—with which agency staff and the public are widely familiar—and then modified as appropriate for the needs of the species (generally through exceptions to the prohibitions).

Additionally, the first sentence of section 4(d) provides authority to promulgate any other protective regulations (novel/innovative approaches to species conservation) necessary and advisable for the conservation of the species. For example, the National Marine Fisheries Service (NMFS) has published rules requiring turtle excluder devices to reduce incidental bycatch and mortality of sea turtles, and to aid in the protection and recovery of listed sea turtle populations (see 50 CFR 223.207).

When crafting 4(d) rule provisions, be mindful of the balance between specificity and flexibility. It is helpful to provide information that is specific enough to make clear what is expected and when (for example, providing date ranges to protect sensitive life stages such as eggs). However, overly specific rules can result in a loss of flexibility when we learn new information or industries develop new technologies. Focus on the intended results of the measures rather than specific methods that could change over time. For example, specific herbicides should generally not be required, as chemical formulations may change or scientists may develop similar herbicides that meet the desired outcomes in a similar or more species-friendly manner. Too much specificity means that we would need to revise the 4(d) rule in the future if circumstances change. It is often best to build flexibility into the 4(d) rule by describing the intended outcome and general methods and requiring coordination with the lead or local field office for instructions on the latest best-management practices.

Finally, be aware that the regulations require Federal agencies to consult under section 7 for any action that “may affect listed species or critical habitat,” regardless of the prohibitions and exceptions in a 4(d) rule (50 CFR 402.14(a)). For that reason, it may cause confusion with other Federal agencies if a species-specific 4(d) rule includes exceptions to the take prohibitions for forms of take that we know would result only from Federal actions or involvement. (That said,

see the Interagency Consultation section below for how to harmonize 4(d) with section 7 via a programmatic consultation on the 4(d) rule for other Federal agencies.)

## Information Sources for Development of Species-Specific 4(d) Rules

### Species Status Assessments (SSA)

Much of the information discussed in the SSA report—including the species’ needs, stressors or risk factors the species is facing, and ongoing conservation actions that may protect the species—will assist in identifying the appropriate prohibitions, exceptions to prohibitions, or other protective regulations for the species. The SSA should provide information to make connections between demographic and habitat needs and the factors that are affecting current and future condition of the species. For species with a high level of uncertainty regarding the underlying causes of decline in species viability or what the relative importance of various threats are in contributing to the declines, it is a best practice to provide those species with all the protections that section 9 affords to endangered species. We recommend reviewing the following types of information from an SSA:

- Population or Resource Needs Tables
  - The key demographic and habitat needs of the species
- Conceptual/Influence Diagrams
  - The relationships between risk factors and life stages and/or populations of the species
- Factors Affecting the Viability/Stressors Section (including individual, population, species needs tables, or cause and effects tables)
  - The risk factors that are influencing multiple populations, key populations, or the species; consider whether there are synergistic or additive effects among risk factors such that it may be important to regulate factors that are not the primary drivers, but are important to allow the species to recover
- Uncertainties/Assumptions
  - Whether we understand the primary drivers of species status or have we identified this as a key source of uncertainty
- Conservation Actions/Efforts Section
  - Any conservation efforts that are beneficial to the species and/or habitat
- Future Condition Section
  - The primary risk factors/drivers used to predict future condition

### 5-Year Reviews

The 5-year review is a required, periodic status review used to ensure that a species is appropriately classified on the Federal Lists of Endangered and Threatened Wildlife and Plants 50 CFR 17.11 (wildlife) and 50 CFR 17.12 (plants). A 5-year review may recommend reclassifying a species from an endangered species to a threatened species, and prompt or inform the preparation of a downlisting rule and accompanying species-specific 4(d) rule. Regardless of whether a 5-year review recommends reclassification, it provides an updated assessment of the species’ status, threats, and recovery progress. A 5-year review may identify new stressors that have arisen or increased since the species was listed or determine that some stressors are no longer acting on a species. The review also provides an assessment of whether recovery criteria

specified in a recovery plan or outline are still adequate and up-to-date, and whether they have been met. This review of recovery criteria can assist in determining how a potential 4(d) rule could provide for the conservation of the species (e.g., contribute to achieving recovery criteria, increase the success of conservation actions, etc.). A 5-year review may also identify high-priority conservation actions that we may consider facilitating through a 4(d) rule. We recommend reviewing the following types of information from a 5-year review:

- Updated Species Biology and Needs
- Assessment of Threats/Stressors to the Species
- Ongoing Conservation Actions
- Review of Adequacy of Recovery Criteria and Recovery Implementation
- Recommendations for Future Conservation Actions

### Recovery Outlines and Plans

Recovery outlines and plans provide guidance on strategies and actions needed for the conservation of the species. The recovery strategies included in a recovery outline and recovery criteria detailed in a recovery plan may assist in determining how prohibitions and exceptions to prohibitions could assist in addressing the threats and provide for the conservation of the species. Additionally, the recovery plan may inform consideration of other protective regulations to implement, encourage, or facilitate ongoing and future recovery actions. Consider whether 4(d) rules could be structured geographically based on recovery units or other areas identified in the recovery plan (e.g., areas with different management strategies, with different threats, or that support different life-history needs). Consider the extent to which criteria have been met, and consider whether existing provisions and/or new provisions are needed. Consider also the extent to which criteria have been met only in some areas and whether the provisions could be structured accordingly. We recommend reviewing the following sections of recovery outlines or plans (as applicable):

- Recovery Strategy and Criteria
- Recovery Units
- Actions Identified as Necessary to Meet Recovery
- Ongoing and Potential Future Conservation Actions

### State, Tribal, and Federal Partners

We recognize the special and unique relationships with State natural resource agencies, Tribes and Federal agency partners in contributing to conservation of listed species. These partners often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, candidate, and at-risk species of wildlife and plants. We strongly encourage coordination with State and Federal partners to solicit their views on specific activities to prohibit or allow. This coordination could be done while an SSA report is sent out for review. We could request input on whether, if the species was listed or reclassified (as appropriate), the partner has any recommendations on what may be most important to prohibit or incentivize. Another option might be to hold a webinar with State, Tribal, or other partners to discuss potential provisions of a 4(d) rule. Where State, Tribal, and Federal actions provide a conservation benefit for the species, consider developing appropriate exceptions to prohibited take that would help incentivize these actions by reducing administrative actions and

streamlining consultations. If a State or Tribe has a conservation plan for the species, consider allowing forms of take or actions consistent with the conservation plan. These partners also might have helpful input on de minimis forms of take that do not need to be prohibited to recover the species [**NOTE:** you may share specific language (e.g., specific regulation text that may be applicable to that agency) within the Federal family, but take appropriate caution with pre-decisional information to guard against premature release.]

## Conservation Plans/Efforts

We recommend reviewing the following information (as appropriate) for the species:

- Ongoing Conservation Plans/Efforts
  - How any conservation plans or efforts address the threats to the species and its habitat (include consideration of implementation success and track record of the plan) and advance the conservation of the species; consider how to facilitate them with a 4(d) rule
  - Whether any Safe Harbor Agreements, Candidate Conservation Agreements with Assurances, or other ongoing or existing conservation plans may provide models for crafting a 4(d) rule or may help identify conservation actions that we anticipate would benefit the species
- Future Conservation Plans/Efforts
  - Whether it may aid in the recovery of the species or incentivize development of future conservation plans if the species-specific rule includes exceptions to the prohibition of take that is incidental to a conservation effort addressed in a Service-approved plan that is under development but not yet completed; if so, consider including provisions pertaining to future conservation plans approved by the Service, providing for activities conducted pursuant to the conservation plan to be excepted from the take prohibitions in the 4(d) rule
  - Whether including such provisions may involve additional complexity and considerations—to evaluate this, you should consult specifically with your management and solicitors prior to proposing or finalizing a 4(d) rule of this type
  - Whether the 4(d) rule would be incorporating provisions of an ongoing or future regulatory or enforcement mechanism by simply noting that the “other mechanism” applies in part or whole, which is called “incorporating by reference”; in most cases we do not advise doing this because the Federal Register prohibits it, unless the agency completes additional particular legal analyses and coordinates with the Federal Register, but there may be specific instances where this would be allowable and could work
- State Regulations (sport fishing and game management, endangered species, etc.)
- State Cooperative Agreements
  - Whether there are any cooperative agreements with States that establish and maintain an “adequate and active” program for the conservation of endangered species and threatened species of fish, wildlife, and plants that are resident in the States, in accordance with section 6 of the Act; section 6 provides a mechanism for the Service to enter into cooperative agreements with the States for conserving threatened species, endangered species, and candidate species

- Whether to except take of threatened species by State resource agencies associated with their management of the species—the “blanket” rules included an exception to take for the State wildlife or plant management authority to conduct conservation activities or research for the benefit of threatened species, and as a matter of practice we plan to include this exception in every species-specific 4(d) rule
- Whether the species is already covered under a State cooperative agreement—even if it’s not, include the exception to prohibited take for State management agency actions anyway to ensure that when the State includes the species in its cooperative agreement, the 4(d) rule will not need to be amended to include the State management agency exception
- Integrated Natural Resources Management Plans (INRMPs)
  - Whether there are any INRMPs with provisions that could serve as a model for crafting 4(d) rules to incentivize conservation actions conducted by our partners (in this case the Department of Defense, but other partners may be implementing the same actions)
  - The form that an INRMP reference should take
    - Because INRMPs are frequently updated, we recommend crafting exceptions based on a general reference to Service-approved INRMPs that are in effect, rather than by referring directly to specific INRMPs and incorporating them by reference
    - Alternatively, for some species it may be appropriate to consider the information within the INRMP and use it as a model to craft exceptions for a suite of activities regardless of the plan that contained the exception or the party implementing the plan
  - The consequences of incorporating any DoD exceptions to the take prohibition—as a reminder, Section 7 consultation is still required for DoD actions that may affect the species, even if the 4(d) rule includes a DoD exception to the take prohibition

## Service Staff to Consult When Developing a 4(d) Rule

While drafting the proposed 4(d) rule, we recommend coordinating with the following Service staff, as appropriate for the species:

- Biologists with Expertise in Sections 7, 10, and Recovery
  - Can help ensure the draft 4(d) rule provisions are crafted with anticipated consultation, permitting, and recovery activities in mind; can also provide information about existing section 7 consultations and section 10 permits for species that are already listed
  - May help inform best management practices for excepted activities and types of actions that are likely occurring
  - Should provide information on how actions have or have not resulted in population-level impacts to the species
- Law Enforcement Staff

- Staff from the Service’s Office of Law Enforcement—can provide input on enforceability of 4(d) rules, which can help us meet our conservation goals for the species
- Senior Wildlife Inspectors at Headquarters—can provide input on import/export and foreign-commerce considerations
- International Affairs (Division of Management Authority and Division of Scientific Authority) Staff
  - Can help ensure the proposed rule appropriately addresses import/export permitting, CITES considerations, and other international wildlife considerations, particularly for foreign species, cross-boundary species, or domestic species that may be in international trade or covered by an international agreement, as well as interstate and foreign commerce considerations for foreign species and cross-boundary species
  - Can also discuss permitting considerations for species covered by the MMPA, Lacey Act injurious species provisions, Wild Bird Conservation Act (WBCA), or other wildlife conservation permitting provisions administered by International Affairs
  - These discussions can be coordinated through the Branch of Delisting and Foreign Species
- Refuge Biologists—if the species occurs on Refuge lands
- Fisheries or Migratory Birds Program Staff—as applicable
- Tribal Liaison—As applicable

Coordination with the DOI Office of the Solicitor during the drafting process is essential, so working with a SAT project manager, field supervisor, or regional office to help facilitate this coordination is imperative.

A summary table of the draft proposed 4(d) provisions is a helpful internal and external communications tool, especially if the regulatory text is particularly complex. However, consult with your SAT project manager and the Solicitor’s Office before making a summary table publicly available to ensure that we are accurately explaining the regulatory meaning of each provision.

## Section 10(a)(1)(A) Permits for Scientific Purposes (Recovery Permits)

In accordance with our regulations found at 50 CFR 17.32(a), we may issue a permit for take (e.g., capture of individuals for monitoring and associated accidental injury or mortality) associated with particular purposes—scientific purposes, the enhancement of propagation or survival, economic hardship, zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act. A species-specific 4(d) rule could except take from actions that would otherwise need a recovery permit. However, we discourage the use of 4(d) rules as work-arounds for section 10(a)(1)(A) permits because 10(a)(1)(A) provides an established process to ensure that researchers conducting such work are qualified, that study

designs are appropriate and consistent across the range of a species, and that we receive scientific information resulting from such studies.

By excepting take from prohibitions in a 4(d) rule, rather than permitting take through a 10(a)(1)(A) recovery permit, the Service may miss an opportunity to gain insights into a species' distribution, habitat condition, abundance, or other metric that can be obtained through the permitting process and used to track the species' status and its road to recovery. It may be advisable to accompany a recovery permit with a species-specific 4(d) rule that prohibits take resulting from actions that are complex or otherwise require specialized expertise or critical coordination in their design and/or implementation.

We recommend excepting take for scientific purposes from the prohibitions in a 4(d) rule only when we can justify that we would not need to review the qualifications of researchers and study-plan designs or ensure that critical coordination will take place because those types of oversight should occur under 10(a)(1)(A) permit procedures. For example, if we are working with partners who have the scientific expertise to design research or habitat-management activities for a species that is now proposed for listing, we may use a species-specific 4(d) rule to except take associated with these activities from the prohibitions, as requiring a permit would not accomplish additional objectives (e.g., confirming partners' expertise or obtaining partners' submission of reports) or incur any additional oversight benefits. In making your decision, remember that we are not required to provide a 30-day notice in the Federal Register for 10(a)(1)(A) permits for threatened species, as is required for endangered species. Further, there is an exception to take associated with recovery actions conducted by any employee or agent of the Service, of the NMFS, or of a State conservation agency that we recommend including in the every species-specific rules (50 CFR 17.31(b)).

## Section 10(a)(1)(B) Incidental Take Permits

In accordance with our regulations found at 50 CFR 17.32 and the Service's Habitat Conservation Planning Handbook, non-Federal project sponsors may develop a habitat conservation plan (HCP) and apply for an incidental take permit (ITP) that would permit otherwise-prohibited take if it is incidental to activities that are otherwise lawful. As a general rule, we should not use a 4(d) rule to exempt incidental take that is related to the primary or cumulative factors affecting the species' status or for which the exemption would require project-specific information to develop appropriate minimization measures and/or compensatory mitigation to offset its impacts. It is more appropriate for a 4(d) rule to leave in place the prohibition against such incidental take and for the Service to issue a permit authorizing incidental take through the section 10(a)(1)(B) process. This depends on the species at hand, as incidental take may not be driving the status of the species or be anticipated to hinder recovery efforts.

HCPs and associated ITPs would generally not be applicable at all for a given species if the 4(d) rule does not include prohibitions against the forms of take anticipated to result from the activity (e.g., if the only take reasonably certain to occur is of a form not considered consequential to recovery of the species and thus excepted in a 4(d) rule). However, project sponsors that are concerned about the potential future change in status of a threatened species when take is

anticipated as a result of an exception to prohibitions incorporated in a 4(d) rule may consider including that species as a “covered species” in an HCP and ITP to benefit from “No Surprises” assurances.

For additional information on section 10 permitting, please go to the Service’s Permits page (<https://www.fws.gov/endangered/permits/index.html>).

## Section 7 Consultations

### Intra-Service Conferencing/Consulting on Issuance of 4(d) Rules

While the listing of a species as threatened under the Act is not a discretionary Federal action, the issuance of a 4(d) rule is, and is therefore subject to the requirements of section 7 of the Act. The effects of the action are based on a comparison between a future with the action versus a future without the action. In general, we do not expect that we will be required to undertake formal conferencing or consultation procedures when we issue protective regulations under section 4(d). Although 4(d) rules “may affect” the species or its critical habitat, those effects are not likely to adversely affect the species or its critical habitat, and therefore we do not expect that the trigger for formal consultation or conferencing will be met.

This expectation is because the nature of a 4(d) rule is such that effects to the subject species, its habitat, or other species for which listing or critical habitat has been proposed are either wholly beneficial or has a discountable likelihood of occurring . A 4(d) rule may establish prohibitions and exceptions to prohibitions for a threatened species, or result in changes to permit requirements (e.g., under section 10(a)(1)(B)) for what may be considered a violation of the Act, but would not compel or require any action on the ground to be undertaken at any time. Moreover, the standard for issuance of a 4(d) rule is that it must establish protections that are “necessary and advisable to provide for the conservation of” the species. Therefore, 4(d) rules are inherently unlikely to adversely affect the species or its critical habitat. This principle applies to both stand-alone 4(d) rules and 4(d) rules issued concurrently with listing or reclassification decisions. The outcome of the intra-Service consultation on the issuance of a 4(d) rule should be documented in our files.

#### For 4(d) rules developed concurrent with a listing determination:

- Section 7(a)(4) applies to proposed species. Therefore, we must ensure and document for the decisional record that the 7(a)(4) conferencing trigger has not been met (i.e., the issuance of the 4(d) rule is not likely to jeopardize the continued existence of the species). As discussed above, we do not expect the conferencing trigger will be met for 4(d) rules.
- In addition, we must confirm that because of the nature of the 4(d) rule (described above), the issuance of the rule will not cause effects to any other listed species or designated critical habitat.
- As a reminder, a 4(d) rule does not modify any permitting or section 7 responsibilities associated with any other federally listed or proposed species.
- We must ensure any considerations regarding section 7 compliance on a 4(d) are sequestered from the listing decision, which must be based solely on the best scientific and commercial data available.

For 4(d) rules for species already listed as threatened or associated with a downlisting from endangered to threatened:

- Section 7(a)(2) on the issuance of the 4(d) rule applies in these instances, as the species is already listed.
- For any action for which we make a "may affect" determination, formal consultation is required unless through informal consultation we determine that the effects are "not likely to adversely affect" the listed species or critical habitat. During consultation, the Federal agency must "use the best scientific and commercial data available" to determine the effects of its action.
- We must conduct an intra-Service informal consultation to determine whether the issuance of the 4(d) rule (proposed prohibitions, and proposed exceptions to those prohibitions) is likely to adversely affect the subject species.
  - As discussed above, we expect that most consultations would find the 4(d) rule will not adversely affect the subject species on the basis that putting into place protections is wholly beneficial.
  - Also as discussed above, it is important to ensure that any considerations incorporated into a consultation on the 4(d) rule are sequestered from the downlisting decision, which must be based solely on the best scientific and commercial data available.
  - In the cases where the species is already listed as threatened and we are revising the 4(d) rule, we still must keep in mind that the issuance of a 4(d) rule does not result in any actual physical changes on the ground.
- In addition, similar to 4(d) rules for newly listed species, we must confirm that because of the nature of the 4(d) rule (described above), the issuance of the rule will not cause effects to any other listed species or designated critical habitat, while ensuring that those considerations are sequestered from any concurrent listing or reclassification decision.

## Inter-Agency or Intra-Service Consultations on Federal Actions Consistent with 4(d) Rules

Section 7 consultation is required for Federal actions that "may affect" a listed species regardless of whether take caused by the activity is prohibited by a 4(d) rule or not. Therefore, we recommend developing additional tools to streamline future intra-Service and inter-Agency consultations for actions that result in forms of take that are not prohibited by the 4(d) rule (but that still require consultation). These tools may include programmatic consultations, Information for Planning and Consultation (IPaC) effects determination keys, consultation guidance, template language for biological opinions, FAQs, and summary tables for Service biologists and Federal partners. After a proposed rule is published for a threatened species, it may be helpful to develop streamlined informal conferencing tools as well.

Programmatic consultations can streamline consultation workload for both the Service and our Federal partners. Programmatic consultations can be completed to address the needs of one or more action agency. Multiple Federal agencies can initially be part of the programmatic consultation, or the Service can develop options for Federal agencies to sign onto the consultation in the future.

Forms can be developed to help the Service, Federal agencies, and the regulated public easily understand whether a given action complies with the 4(d) rule and programmatic consultation or not. While work is required up front to complete this kind of consultation, significant streamlining should result once the consultation is completed.

In addition, for projects that have been addressed by some form of programmatic consultation, IPaC offers an online *endangered species review process*. This streamlined approach helps prepare action agencies for consultation with the Service and, in some cases, allows them to complete the consultation process online without the need for direct contact with a Service office. IPaC also provides official documentation reflecting whether or not consultation is necessary and/or the consultation results. For Service field offices, this saves personnel time and effort by automatically handling many of the simpler and more routine projects that frequently come into field offices. IPaC also logs the projects in the Service's database for tracking consultations automatically.

If programmatic consultations are not the preferred approach for the species, species-specific consultation guidance is another option that may improve consistency among Service biologists and help our Federal partners understand which actions “may affect” the species (and therefore require consultation) and which subset of those actions are addressed by the 4(d) rule but still require consultation. Regardless of the preferred approach for future consultations (individual or programmatic), consider drafting FAQs or creating tables that summarize the species-specific 4(d) rule to make it clear when incidental take authorization may be needed or not. When crafting FAQs and/or this kind of table, it may be helpful to also include summaries of the type of activities/situations that would require an action agency to consult (i.e., what kinds of actions “may affect” the species). This differentiation can help reduce confusion regarding the “may affect” standard for consultation vs. the later determination of whether incidental take authorization may be needed.

## Special Cases of 4(d) Application

### 10(j) Rules (Experimental Populations)

The application of 4(d) to experimental populations results in what we call 10(j) rules. Section 10(j) provides for a special application of section 4(d) to facilitate reintroducing species to contribute to their conservation. Section 10(j) allows us to designate a population as an experimental population prior to its reintroduction. Members of experimental populations are generally treated as threatened species for the purpose of establishing protective regulations under section 4(d) of the Act (see 50 CFR 17.82), but unlike threatened species, special provisions in section 10(j) of the Act and at 50 CFR 17.83 govern when and where section 7 of the Act applies to these populations. Each 10(j) rule contains applicable prohibitions and exemptions for a specific experimental population. There may be multiple 10(j) designations for a species across multiple geographic areas, and the prohibitions and exemptions may differ to address threats that vary geographically, or to address specific stakeholder concerns.

The Act and our experimental population regulations require specific findings regarding how the experimental population will further the conservation of the species (see 50 CFR 17.81).

In crafting the 10(j) rule associated with the experimental population designation, we should consider excepting forms of take that are necessary to ensure a successful reintroduction. Additionally, we consider those activities that are likely to occur in the experimental population area and whether prohibitions, exceptions to prohibitions, or other protective regulations related to those activities would be appropriate to assist in establishing or managing the experimental population. Regulations promulgated under 10(j) shall, to the maximum extent practicable, represent an agreement between us and State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population. In accordance with 50 CFR 17.81(c)(1), we shall provide an explanation of how the experimental population will be identified and distinguished from non-experimental populations, as this will be the basis for where and how exemptions from the take prohibitions will apply.

Examples:

- Oregon silverspot butterfly (50 CFR 17.85(d); <https://www.gpo.gov/fdsys/pkg/FR-2017-06-23/pdf/2017-13163.pdf>)
- Black-footed ferret (50 CFR 17.84(g); <https://www.gpo.gov/fdsys/pkg/FR-2015-10-30/pdf/2015-27639.pdf>)

#### 4(d) Rules for 4(e) Rules (Similarity of Appearance)

Treating a species as an endangered species or a threatened species under the similarity of appearance provision of the Act extends subparts C (Endangered Wildlife), D (Threatened Wildlife), F (Endangered Plants) or G (Threatened Plants) of 50 CFR part 17, as appropriate to the species. However, a treatment of an endangered species or a threatened species due to similarity of appearance under section 4(e) of the Act does not extend other protections of the Act, such as consultation requirements for Federal agencies under section 7 and the recovery planning provisions under section 4(f). All applicable prohibitions, exceptions to prohibitions, or other protective regulations for nonlisted species treated as threatened species under section 4(e) of the Act will be set forth in a species-specific 4(d) rule.

Examples:

- Blue butterflies (50 CFR 17.47(a); <https://www.gpo.gov/fdsys/pkg/FR-2012-04-06/pdf/2012-8088.pdf>)
- Shovelnose sturgeon 50 CFR 17.44(aa); <https://www.gpo.gov/fdsys/pkg/FR-2010-09-01/pdf/2010-21861.pdf#page=1>)
- Southern white rhino (recent example of a 4(e) threatened listing, using an interim final rule and blanket 4(d) rule; <https://www.gpo.gov/fdsys/pkg/FR-2013-09-11/pdf/2013-22132.pdf>; <https://www.gpo.gov/fdsys/pkg/FR-2014-05-20/pdf/2014-11537.pdf>)

#### 4(d) Rule Examples

Current species-specific 4(d) rules are found at 50 CFR 17.40–17.48 (species-specific 4(d) rules for threatened wildlife); 50 CFR 17.73–17.78 (species-specific 4(d) rules for threatened plants).

Also see ECOS reports for examples: <https://ecos.fws.gov/ecp0/reports/populations-with-four-special-rules-report>; <https://ecos.fws.gov/ecp0/reports/populations-with-special-rules-report>) Although examples pre-date this guidance for developing 4(d) rules, they illustrate various ways to tailor the prohibitions, exceptions to prohibitions, and other protective regulations to the conservation needs of the species.

**Reference to prospective conservation plans/efforts:**

- Southern DPS of North American green sturgeon (<https://www.federalregister.gov/documents/2010/06/02/2010-13233/endangered-and-threatened-wildlife-and-plants-final-rulemaking-to-establish-take-prohibitions-for>)
- West coast salmon (<https://www.federalregister.gov/documents/2005/06/28/05-12351/endangered-and-threatened-species-final-listing-determinations-for-16-esus-of-west-coast-salmon-and>)
- lesser prairie-chicken (conservation plan; <https://www.gpo.gov/fdsys/pkg/FR-2013-05-06/pdf/2013-10497.pdf>)
- Georgetown salamander (city development code; <https://www.gpo.gov/fdsys/pkg/FR-2015-04-09/pdf/2015-08093.pdf>)
- Coastal California gnatcatcher (short-term bridge while developing a State conservation plan; [https://ecos.fws.gov/docs/federal\\_register/fr2254.pdf](https://ecos.fws.gov/docs/federal_register/fr2254.pdf))

**Application of different exceptions to different geographic areas:** The Louisiana pinesnake occurs in Louisiana and Texas. For incidental take exceptions, the rule identifies an ‘estimated occupied habitat area’ for the pinesnake and the exceptions vary depending on whether activities are within or outside of these habitat areas. (50 CFR 17.42(i); <https://www.govinfo.gov/content/pkg/FR-2020-02-27/pdf/2020-03545.pdf>)

**Import/Export, existing 4(d) rule for similar species, considerations of other laws/treaties:** The golden conure is a yellow parrot that occurs in Brazil. We reclassified the golden conure from endangered to threatened in April 2020. We had an existing 4(d) rule for other parrot species at 17.41(c), so we extended the regulations at 17.41(c) to the golden conure. Further, the import and export of certain golden conures into and from the United States and certain acts in interstate commerce will be allowed without a permit under the Act. In this case, the 4(d) rule adopts the existing conservation regulatory requirements of CITES and the WBCA for the import and export of golden conure specimens. (50 CFR 17.41(c); <https://www.govinfo.gov/content/pkg/FR-2020-04-23/pdf/2020-07571.pdf>)

**Import/Export:** The argali (largest species of wild sheep) is listed as a threatened species in Mongolia, Tajikistan, and Kyrgyzstan. This species is a popular sport-hunted species. The 4(d) rule for argali allows for the import of sport-hunted trophies of the sheep without a threatened species permit if we are provided with the proper documentation from the country of export. Otherwise, imports require a threatened species permit. (50 CFR 17.40(j); [https://ecos.fws.gov/docs/federal\\_register/fr2077.pdf](https://ecos.fws.gov/docs/federal_register/fr2077.pdf))

**Human safety:** The 4(d) rule for grizzly bears allows for the take of grizzly bears in self-defense or in defense of others. The take needs to be reported within 5 days to the appropriate Service Law Enforcement office. (50 CFR 17.40(b); [https://ecos.fws.gov/docs/federal\\_register/fr1179.pdf](https://ecos.fws.gov/docs/federal_register/fr1179.pdf))

**Special provisions for captive-bred animals and animals held in captivity prior to listing under the Act or prior to listing under other conservation laws:** The 4(d) rule for the yellow-billed parrot and hyacinth macaw provides an exception to captive-bred specimens and specimens held in captivity prior to a certain date. (50 CFR 17.41(c); <https://www.gpo.gov/fdsys/pkg/FR-2013-03-12/pdf/2013-05504.pdf> (yellow-billed parrot and correcting 4(d) rule for salmon-crested cockatoo); <https://www.gpo.gov/fdsys/pkg/FR-2018-08-13/pdf/2018-17319.pdf> (hyacinth macaw))

## Drafting the 4(d) Provisions

After reviewing the relevant materials for the species, start making connections between the species' needs and risk factors affecting the current and future condition of the species. Think critically about provisions that should be included in the proposed species-specific 4(d) rule. We provide below some specific guidance for plants and for referencing other conservation laws, as well as a tool for practitioners to use when drafting a 4(d) rule. We recommend using the tool in conjunction with the most up-to-date templates managed by the SAT.

### Plants

Section 9(a)(2) of the Act and 50 CFR 17.61 describe prohibitions for endangered plants, and sections 6(g)(2) and 10 of the Act and 50 CFR 17.61 in the regulations describe exceptions to those prohibitions. Note that the Act has additional prohibitions for plants at 9(a)(2)(B) that are not contained in the regulations but that may be used for the species; therefore, we do not simply cite the regulations for plants. While take does not apply to plants, a variety of other prohibitions may be appropriate for the proposed 4(d) rule. As a general practice, we recommend including all of the prohibitions for endangered plants.

There are no final species-specific 4(d) rules for plants as of February 2021. However, several proposed 4(d) rules for plants include all of the protections and exceptions afforded to endangered plants. The whitebark pine proposed 4(d) rule also includes an exception for forest management, restoration, or research-related activities conducted or authorized by the Federal agency with jurisdiction over the land where the activities occur (<https://www.govinfo.gov/content/pkg/FR-2020-12-02/pdf/2020-25331.pdf>).

### Referencing Other Conservation Laws for the Species in the 4(d) Rule

the conservation of the species. A 4(d) rule may also be used to support the conservation purposes of such laws or international agreements for the species. When we harmonize our 4(d) rules with the provisions of other laws, we should craft the rule to ensure that a violation of the other law or treaty would also be a violation of the Act.

**Examples:**

- Polar bear (MMPA and CITES) (50 CFR 17.40(q); <https://www.gpo.gov/fdsys/pkg/FR-2013-02-20/pdf/2013-03136.pdf>)
- Northern sea otter (MMPA) (50 CFR 17.40(p); <https://www.gpo.gov/fdsys/pkg/FR-2006-08-15/pdf/E6-13322.pdf#page=1>)
- Vicuña (CITES) (50 CFR 17.40(m); <https://www.gpo.gov/fdsys/pkg/FR-2002-05-30/pdf/02-13342.pdf>; <https://www.gpo.gov/fdsys/pkg/FR-2005-03-29/pdf/05-6152.pdf>; <https://www.gpo.gov/fdsys/pkg/FR-2014-05-27/pdf/2014-11329.pdf>)
- Beluga sturgeon (CITES and other laws) (50 CFR 17.44(y); <https://www.gpo.gov/fdsys/pkg/FR-2005-03-04/pdf/05-4278.pdf>; <https://www.gpo.gov/fdsys/pkg/FR-2014-05-27/pdf/2014-11329.pdf>)

# Species-specific 4(d) Rule Development Tool

June 2021

In conjunction with the 4(d) rule guidance, the below questions for development of 4(d) rules are designed to assist Service staff when thinking critically about drafting provisions that should be included in the proposed species-specific 4(d) rule. These should not be considered an exhaustive list of potential questions and should be viewed as one available 4(d) rule development tool. The questions below include some that apply to all species and some that raise specific considerations for wildlife or plants.

## Preliminary Considerations for Crafting 4(d) Provisions

These considerations are primarily focused on how we might craft exceptions to prohibitions.

- Are the primary and/or additive stressors well known?
  - Consider whether there are recovery actions and responses to those actions that address these stressors and that we want to make sure the species-specific 4(d) rule facilitates, or at least does not preclude.
  - Are there existing best-management practices that could be put into regulation to minimize future impacts from an activity (e.g., distance from a breeding location, tower height for wind energy)?
- Are there specific species needs (demographic or habitat) or life-history stages that may either be limited by risk factors or benefit from conservation actions and that can help focus the exceptions to prohibitions?
  - Timing
    - Are there any life-history differences (e.g., flight periods, emergence from hibernation, nesting/spawning periods) across the range that would call for different timing of conservation measures?
    - Are there important management actions that could be timed to avoid impacts or reduce unavoidable impacts to the species?
    - If you know that certain periods of time are most important to the species and other periods less so, you could craft exceptions to take outside of the most-important time periods (e.g., activities conducted during September 1 to October 1 are excepted from the take prohibition).
  - Geographic areas
    - Do some areas have a track record of meeting conservation targets/recovery goals, such that reduced regulation in those areas is appropriate?
    - Does the threat already exist across the entire range of the species, or is the threat spreading across a portion of the landscape (e.g., disease, invasive species), or is the level of threat different based on any existing management or conservation efforts in a specific geographic area?
    - Is the threat evenly distributed across the species' range?
      - If not, consider how to tailor the exceptions to prohibitions in areas where the threat does not occur but ensure that allowing activities

in these areas does not reduce the resiliency of these populations to the extent that the species' status as a whole is further degraded.

- If the species is highly concentrated in certain areas and take occurring outside of those area would be considered de minimis, exceptions to prohibitions could be crafted to ensure that the exceptions focus on areas outside of the areas with the high concentration levels (e.g., take is excepted unless within X miles of caves, headwaters).
- Important life stages
  - If there are certain life stages most important to the species and take of other life stages would be considered de minimis, exceptions to prohibitions could focus around the other life stages (e.g., if the species is always present within the habitat, habitat restoration is an essential recovery action, and take of adults is the greatest concern, you could craft an exception to the prohibitions for take of eggs, pupae, or larvae associated with habitat restoration).
- Important recovery actions
  - Consider exceptions to prohibitions of take associated with actions identified in the recovery plan.
- Caution: 4(d) rule exceptions should not be written so specifically that we need to revise the rules on a regular basis to meet their intent. Focus on the intended results of the measures rather than specific methods that could change over time. For example, specific herbicides generally should not be required, as chemical formulations may change or similar herbicides may be developed that meet the desired outcomes.
- If purposeful take would be needed in some instances to address interactions with commercial interests, agricultural interests, human health and safety, and/or cultural issues, consider including specific exceptions to prohibitions
  - Examples - grizzly bear, Columbian white-tailed deer
- Are there provisions in the species-specific 4(d) rule that can benefit from a definitions section?
  - For example, can we better define take for particular species?

## QUESTIONS FOR ALL SPECIES

All questions should be considered in this section for any proposed 4(d) rules.

1. Is there an existing species-specific 4(d) rule that could be modeled or applied to your species (for example, consider similar species, same geographic area, same threats)? See 50 CFR 17.40–17.48 (species-specific 4(d) rules for threatened wildlife); 50 CFR 17.73–17.78 (species-specific 4(d) rules for threatened plants); see also the ECOS report of species with species-specific 4(d) rules.

If Yes, consider whether the 4(d) rule for your species should be modeled on or added to that existing regulation, along with any additional provisions for your species, if any. See examples for threatened parrots (50 CFR 17.41(c)), threatened crocodylians (50 CFR § 17.42(c)) and threatened primates (50 CFR 17.40(c)). See also a number of examples for threatened fishes (50 CFR 17.44(c), 17.44(h), 17.44(j)) and an example for threatened insects (50 CFR 17.47(a)).

2. Are you listing or downlisting several species with the same life-history needs and/or similar threats?

If Yes, consider proposing a batched species-specific 4(d) rule applicable to all of the species. The preamble should clearly articulate why the rule is necessary and advisable to provide for the conservation of each individual species.

3. If a downlisting rule: What activities are occurring on the landscape now that contributed to downlisting and should be considered in developing the species-specific 4(d) rule?

Think about what and how those activities have contributed to the improvement in status and if they could or should be incorporated in the species-specific 4(d) rule to facilitate continued implementation. Examples include ongoing conservation/management plans (see Okaloosa darter 4(d) rule at 50 CFR 17.44(bb) (final rule was published at 76 FR 18087 (Apr. 1, 2011)).

4. Would any existing Federal laws or international agreements for the conservation of the species be supported (including through penalties and enforcement actions) through adoption of appropriate provisions in a species-specific 4(d) rule? Or, could the protections of the Endangered Species Act (Act) for a species be synchronized with the protections under an existing law (for example where prohibitions or permitting obligations under existing law address the same activity, consider whether or not added conservation benefit may be provided through additional protections under a 4(d) rule for the same activity under the same or different standards)? **NOTE:** International agreements may include species found entirely outside of the United States, species native to the United States, and non-native species found in the United States.

- E.g., Marine Mammal Protection Act, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Wild Bird Conservation Act, African Elephant Conservation Act, Specially Protected Areas and Wildlife Protocol, Western Hemisphere Convention, other treaties and conventions in the Act section 2(a)(4), or other international agreements to which the United States is a Party and that includes the species.

5. Are there existing conservation plans to refer to in the species-specific 4(d) rule?

If Yes, consider:

- Can we achieve streamlining of the regulatory and permitting system by allowing any activities consistent with the conservation plans?
- Do the plans address the primary/additive threats to the species?
- Do the plans include key conservation actions to address those threats?
- What are the practical/realistic expectations of implementation of the plan?
- Are there ways that the 4(d) rule can support the plan by ensuring that any actions inconsistent with the plan could result in a violation of the Act as well?

6. Are there any primary or additive factors (threats or important conservation actions) that cannot be addressed by prohibitions or exceptions to the prohibitions?

If Yes, consider innovative ideas for regulatory provisions that would support conservation of the species and whether there would be support from partners and affected parties for including those provisions in the species-specific 4(d) rule.

## **WILDLIFE prohibitions**

In most cases, it makes sense to include most of the prohibitions that we currently apply to endangered species and tailor the exceptions to those prohibitions. Therefore, our default should be to include each of the prohibitions unless we have information that indicates that a particular prohibition is not necessary for addressing a threat to the species. When evaluating the necessity of each prohibition, consider the possibility that the listing itself could change the likelihood of any threat that the prohibition is designed to address. For example, if collection is not currently considered a threat/stressor on the species, consider whether the listing itself will result in an increased risk of collection or sale. Therefore, as a general practice include each of the prohibitions listed below (the text in *italics* is regulatory text that can be used as rule text for the species-specific 4(d) rule).

However, there may be some instances in which only a few prohibitions may be necessary. In this case, you can write the species-specific 4(d) rule starting with no prohibitions and then limit the rule to those few prohibitions (e.g., trapping is prohibited and import/export is prohibited). If a prohibition is necessary but only at specific times or during specific activities, then you can write the rule by specifying exceptions to that prohibition (e.g., all forms of take are prohibited except the take caused by instream restoration actions—“instream restoration actions” could then be clearly defined by the rule).

### Regulatory Language:

*It is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:*

*Import or export, as set forth at § 17.21(b) for endangered wildlife.*

*Take, as set forth at § 17.21(c)(1) for endangered wildlife.*

*Possession and other acts with unlawfully taken specimens are prohibited, as set forth at § 17.21(d)(1) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.*

*Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.*

**NOTE:** Possession/collection, interstate or foreign commerce, and sale should be addressed in all species-specific 4(d) rules where any take is prohibited. If take is not prohibited, consider whether the listing itself will result in an increased risk of these activities.

If your species is a foreign species, consider whether § 17.21(g) applies. **Note** that this is the captive-bred wildlife registration regulation and primarily applies to foreign species. This is a lengthy section of the regulations, and we are not copying and pasting specific language to insert here.

Consider if other ‘custom’ prohibitions would be appropriate.

## **WILDLIFE exceptions to prohibitions**

Exceptions to prohibitions may help facilitate recovery actions or avoid regulating de minimis take. Again, the text below in italics is regulatory text to be used in the section identifying exceptions to the prohibitions in the species-specific 4(d) rule. There are some exceptions that should always be included in species-specific 4(d) rules, and there are other exceptions you may want to consider.

### Exceptions That Should Always Be Included in Species-Specific 4(d) Rules

1. Exceptions for take resulting from otherwise-prohibited activities where the take will be authorized by a § 17.32 permit (recovery or incidental take) that covers the species.

Regulatory Language:

*Conduct activities as authorized by permit under § 17.32.*

2. Exceptions that allow take of federally listed wildlife in defense of life and take by Service and State agencies for salvage and to conduct recovery actions for threatened species.

Regulatory Language:

*Take, as set forth at § 17.21(c)(2) through (c)(4)*

*Take, as set forth at § 17.31(b)*

Alternative Regulatory Language for Migratory Bird Species:

*Take, as set forth at § 17.21(c)(2) through (c)(4), (c)(6), and (c)(7)*

*Take, as set forth at § 17.31(b)*

**NOTE:** We should include provisions for State employees or their agents working with threatened species similar to those provided under the regulations for endangered species and those that have generally been provided for threatened species (for example, 50 CFR § 17.31(b)). Review the existing cooperative agreements for the States within the species’ range to see if they are up-to-date and would include the species. Even if the species is not yet covered under a State cooperative agreement, include the exception to the take prohibition for State management-agency actions anyway. This is to ensure that when the State includes the species in its cooperative agreement, the 4(d) rule will not need to be amended to include the exception for State management actions. The 4(d) guidance document has further information about State agencies with cooperative agreements.

3. Exceptions that allow Federal and State law enforcement officers and migratory bird rehabilitators to possess, etc. when possession/collection is prohibited in the species-specific 4(d) rule.

Regulatory Language:

*Possess and engage in other acts with unlawfully taken wildlife, as set forth at §17.21(d)(2)*

Alternative Regulatory Language for Migratory Bird Species:

*Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2-(4)).*

Other Exceptions You May Want to Consider

4. Is your species a **foreign species**?

If Yes, consider including an exception for activities authorized by a captive-bred wildlife registration.

Regulatory Language:

*Conduct activities as authorized by a captive-bred wildlife registration under § 17.21(g).*

5. Does your species need custom exceptions from prohibited take?

If yes, consider a heading for those custom exceptions.

Regulatory Language:

*Take incidental to any of the following activities [NOTE: this will be nested under a header of Exceptions from the Prohibitions so what you include here would be excepted take.]*

and/or

*Purposeful take associated with XX conducted in the following manner [NOTE: this should be rarely used, as most forms of purposeful take will still likely require 10(a)(1)(A) permits.]*

## **PLANTS prohibitions**

In most cases, it makes sense to include most of the prohibitions that we currently apply to endangered species and tailor the exceptions to those prohibitions. Therefore, our default should be to include each of the prohibitions unless we have information that indicates that a particular prohibition is not necessary for addressing a threat to the species. When evaluating the necessity of each prohibition, consider the possibility that the listing itself could change the likelihood of any threat that the prohibition is designed to address. For example, if collection is not currently considered a threat/stressor on the species, consider whether the listing itself will result in an increased risk of collection or sale. Therefore, as a general practice include each of the prohibitions listed (the text in *italics* is regulatory text that can be used as rule text for the species-specific 4(d) rule).

However, there may be some instances in which only a few prohibitions may be necessary. In this case you can write the species-specific 4(d) rule starting with no prohibition and then limit

the rule to those prohibitions (e.g., sale/commerce and import/export is prohibited). If a prohibition is necessary but only at specific times or during specific activities, then you can write the rule by specifying exceptions to that prohibition (e.g., an exception to the prohibition from ‘remove and reduce to possession from areas under Federal jurisdiction’).

Regulatory Language:

*It is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:*

*Import or export, as set forth at § 17.61(b) for endangered plants.*

*Remove and reduce to possession the species from areas under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.*

*Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.61(d) for endangered plants.*

*Sell or offer for sale, as set forth at § 17.61(e) for endangered plants.*

Consider if other ‘custom’ prohibitions would be appropriate.

## **PLANTS exceptions to prohibitions**

Exceptions from prohibitions may help facilitate recovery actions. Again, the text below in italics is regulatory text to be used in the regulation promulgation section of the species-specific 4(d) rule. There are some exceptions that should always be included in species-specific 4(d) rules, and there are other exceptions that you may want to consider.

### Exceptions That Should Always Be Included in Species-Specific 4(d) Rules

1. Exceptions for otherwise-prohibited activities where the activity will be authorized by a § 17.72 permit that covers the species.

Regulatory Language:

*Conduct activities as authorized by permit under § 17.72.*

2. Exceptions for Service and State agencies to remove and reduce to possession federally listed plants that would otherwise be prohibited in the species-specific 4(d) rule.

Regulatory Language:

*Remove and reduce to possession from areas under Federal jurisdiction, as set forth at § 17.71(b).*

*Remove, cut, dig up, damage or destroy on areas not under Federal jurisdiction as a result of action that is taken by any qualified employee or agent of the Service or State*

*conservation agency in accordance with a Cooperative Agreement with the Service under section 6(c) of the Act, where the species is covered by the approved Cooperative Agreement and the employee or agent is designated by that agency for such purposes and is acting in the course of official duties.*

**NOTE:** We should include provisions for State employees or their agents working with threatened species similar to those provided under the regulations for endangered species and those that have generally been provided for threatened species (for example, 50 CFR 17.71(b)). Review the existing cooperative agreements for the States within the species' range to see if they are up-to-date and would include the species. Even if the species is not yet covered under a State cooperative agreement, include the exception to the take prohibition for State management-agency actions anyway. This is to ensure that when the State includes the species in its cooperative agreement, the 4(d) rule will not need to be amended to include the exception for State management actions. The 4(d) guidance document has further information about State agencies with cooperative agreements.

#### Other Exceptions You May Want to Consider

4. Is this species cultivated and are seeds of cultivated origin not of concern?

If yes, consider including the following exception and match to the numbering in the *Prohibitions* paragraph:

*Engage in any act prohibited under paragraph (?) of this section with seeds of cultivated specimens, provided that a statement that the seeds are of "cultivated origin" accompanies the seeds or their container.*