

Proposed Policy for Section 4(b)(2) of the ESA

Questions and Answers

Q: What action are you taking?

A: The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (the Services), the two federal agencies responsible for administering the Endangered Species Act (ESA), are proposing to clarify their implementation of section 4(b)(2) of the ESA. Section 4(b)(2) states that the Secretary must designate critical habitat based on the best scientific 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: Why are you proposing this policy?

A: Our draft policy on implementation of section 4(b)(2) of the ESA is intended to provide clarity, consistency and predictability regarding the critical habitat exclusion process.

Q: What is in the proposed policy?

A: The proposed 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) national security and homeland security impacts, and military lands 4) tribal lands 5) federal lands and 6) economic impacts.

- **Partnerships and conservation plans:** As a general practice, we will give great weight and consideration to 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, we will always consider 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, "Critical 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 Act to propose areas that meet the definition of critical habitat for a species. The Services will, when undertaking a balancing analysis, always consider exclusions of tribal lands under section 4(b)(2) of the Act prior to finalizing a designation

of critical habitat, and 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 another 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.
- **Federal lands:** Federal agencies have responsibilities under section 7 of the ESA to not jeopardize a listed species' existence 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 proposed policy affect me?

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

Q: Can I provide comments on this proposed policy?

A: Yes. The Services will be accepting public comments electronically or by postal mail for 60 days immediately following publication of the proposed rule in the Federal Register. Guidance on how to provide comment is provided in the *Addresses section* of the proposed rule. Please visit www.regulations.gov to view all Federal Register notices, and to submit an electronic comment.