

Questions and Answers

Proposed regulations for exclusions from critical habitat under Section 4(b)(2) of the Endangered Species Act (ESA)

Q: Why is the Service taking this action?

A: The proposed rule, in part, addresses a 2018 Supreme Court ruling in a case regarding dusky gopher frog critical habitat (*Weyerhaeuser Co. v USFWS*). It also reflects agency experience, codifies some current agency practices, and make some modifications to current agency practice. This proposed rule also carries out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” and is part of a larger effort by DOI to identify regulations for repeal, replacement, or modification. The intended effect of this proposed rule is to provide greater transparency and certainty for the public and stakeholders.

Q: How is this proposal related to the proposed regulations on the Endangered Species Act (ESA) definition of habitat and other changes to endangered species-related regulations?

A: Nearly three years ago, the Department of the Interior and the Department of Commerce began considering improvements to regulations the federal government uses to implement the ESA to make them more efficient and effective. Last year, the Service finalized regulatory changes to section 4 of the ESA dealing with the listing, delisting, and critical habitat, and to section 7 consultation processes.

On August 5, 2020, the Service announced a proposed definition of habitat in its effort to continue to improve implementation of the ESA. Today’s announcement regarding proposed critical habitat exclusion regulations provides the next necessary step to ensure these improvements are made throughout the full critical habitat designation process.

Q: What does the proposed rule do?

A: The proposed rule provides the framework for how the Service will take into consideration the economic impact, impact on national security, and any other relevant impacts when designating critical habitat. The proposed rule would not affect how the Service administers the ESA within the areas that currently are designated as critical habitat.

Q: How is critical habitat defined, and how does the Service make exclusion determinations?

A: One of the tools the ESA provides to conserve species is the designation of critical habitat. The purpose of critical habitat designation is to identify areas that are essential to a species’ conservation and recovery. When the Service lists a species, the ESA requires that, to the maximum extent prudent and determinable, the Secretary of the Interior, acting through the Service, designate critical habitat after taking into consideration the economic impact, the impact on national security, and any other relevant impact. However, the Act’s language is clear that biological considerations drive the initial step of identifying critical habitat.

The ESA defines critical habitat as: “(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.”

Q: How does the proposed rule change and/or clarify the Secretary of the Interior’s role in determining critical habitat exclusions?

A: Under the proposed rule, the Secretary is demonstrating his responsiveness to public concerns about the impacts of critical habitat by committing to always undertake an analysis when a proponent of an exclusion presents credible information supporting their case.

The ESA provides the Secretary the authority to exclude any particular area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion for that area, so long as excluding it will not result in the extinction of the species: “The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.”

The proposed regulation describes the two circumstances in which the Service would conduct an exclusion analysis for a particular area: either (1) when a proponent of excluding the area has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area in support of the request; or (2) where such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion. The proposed rule also describes the weight that the Secretary would provide to expert information.

Q: What are “other relevant impacts?”

A: The proposed rule codifies the Service’s current practice by specifying that “community interests” are among other relevant impacts considered for critical habitat exclusion. Adding community interests would ensure that the designation of critical habitat would not disrupt activities being undertaken for the benefit of a community (e.g., schools or hospitals). The proposed regulations identify a non-exhaustive list of categories of impacts that are outside the scope of the Service’s expertise, and the Service recognizes that many outside sources have information regarding biological impacts. Consideration of the other categories of impacts in the definition also is consistent with current Service policy.

The proposed regulations would provide categories of “other relevant impacts” the Service may consider, including: public health and safety, community interests, and the environment (such as increased risk of wildfire or pest and invasive species management). This list is not an exhaustive list of the types of impacts that may be relevant in a particular case.

The proposed rule also addresses specific considerations related to tribes, states, and local governments; national security; conservation plans, agreements, or partnerships; and federal lands.

Q: How would the proposed rules impact critical habitat and partnerships?

A: The proposed rule, if finalized, describes how the Service considers exclusions from critical habitat designation of lands with CCAAs, SHAs, or properly implemented HCPs that have been permitted under section 10 of the act. This approach provides relief to landowners, communities, and counties from additional regulatory burdens that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential plan participants, including states, counties, local jurisdictions, conservation organizations, and private landowners.

Together, these entities can implement conservation actions that the Service would be unable to accomplish without their participation.

Q: What about critical habitat and other federal agencies?

A: The proposed rule allows for consideration of an exclusion analysis on lands managed by the federal government, reversing a 2016 policy. Although we acknowledge that federal lands are important areas to the conservation of species habitat, we do not wish to foreclose the potential to exclude areas under federal ownership. Therefore, we will now consider whether to exclude federal lands on which nonfederal entities have a permit, lease, contract or other authorization for use.