



Endangered Species Act Special Rules

Questions and Answers

Introduction

The U.S. Fish and Wildlife Service (Service) under the Endangered Species Act (ESA), has broad authority to issue regulations for the conservation of threatened species. Although the ESA prohibits take (section 9) of species as endangered, the special rules pursuant to 4(d) of the Act state that it must be “necessary and advisable to provide for the conservation of such species.” Thus, section 4(d) of the ESA allows the Service to establish special regulations for threatened species.

Using this authority, the Service extended the prohibition of take to all threatened species by regulation in 1978 (often referred to as the “blanket 4(d) rule”). Therefore the take (“... harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”) of threatened species is prohibited by regulation. However, this blanket 4(d) rule for threatened species can be modified by a species-specific 4(d) rule. These “4(d) rules” take the place of the normal protections of the ESA and



Grizzly bear / USFWS

typically target the protections offered by the 1978 “blanket” 4(d) rule. The Service primarily uses 4(d) rules for two purposes. First, we use these rules to incentivize proactive conservation efforts, by streamlining ESA compliance for actions that have long-term benefits but might result in “take” in the short term. Secondly, we use 4(d) rules to target the take prohibitions to streamline ESA compliance for actions that result in low levels of take but do not contribute to the threats facing a species’ continued existence. This streamlining can reduce ESA conflicts allowing some “de minimis” activities to continue to occur, while focusing our attention on the threats that make a difference to the species’ recovery.

Frequently asked questions about 4(d) rules:

What is a 4(d) rule?

A “4(d) Rule” is one of many tools found within the Endangered Species Act (ESA) for protecting species listed as “threatened.” This rule gets its name from section 4(d) of the ESA, which directs the Service to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.”

Typically the Service uses 4(d) rules to incentivize positive conservation actions and streamline the regulatory process for minor impacts. As a part of those goals, the rule is often used to clarify or simplify what forms of take of a threatened species are and are not prohibited.

Without a 4(d) special rule, threatened species get all of the protections that



Western snowy plover / USFWS

endangered species automatically get through section 9. The 4(d) special rule for a threatened species may change some or all of the section 9 protections that automatically apply to species listed as endangered.

What protections do endangered species automatically get under section 9 of the ESA?

Under section 9 it is illegal, with respect to any endangered species to:

- Import any such species into, or export any such species from the United States
- Take any such species within the U.S. or the territorial sea of the U.S.
- Take any such species on the high seas
- Possess, sell, deliver, carry, transport, or ship, by any means whatsoever any such species taken
- Deliver, receive, carry transport, or ship in interstate or foreign commerce and in the course of commercial activity
- Sell or offer for sale in interstate or foreign commerce any such species



Gray wolf / USFWS

How does the Service determine which regulations are “necessary and advisable?”

The Service uses the best available information to determine which regulations are needed to conserve threatened species. This information may come in the form of published scientific papers, input from species’ experts, or other written materials. Public involvement during the rulemaking process can help us identify those activities and programs that may affect the species as well as potential changes to the prohibitions. The Service must determine if section 9 prohibitions are necessary to provide for the conservation of the species. The information collected during this process is used to develop a proposed 4(d) rule. Additional public comments (e.g., public hearings and formal comment periods) may be solicited.

What does a 4(d) rule do?

The intent of any 4(d) rule is to provide for the conservation of a threatened species by allowing regulatory flexibility under the ESA. A 4(d) rule allows the Service the flexibility to customize prohibitions and regulate activities to provide for the conservation of threatened species, potentially without involving all of the restrictions that apply to endangered species. The exact requirements depend on the species’ biology, conservation needs, and threats being managed.

How does a 4(d) rule clarify the issue of take?

A 4(d) rule typically explains that certain expected activities are consistent with or contribute to a species’ overall conservation; therefore, even if those activities result in take of a threatened species, that take is not prohibited. If that take is not prohibited, then it does not require an exemption from the take prohibitions of section 9. Additionally, it would not need a permit under section 10 of the 4(d) rule.

What’s an example of a 4(d) rule aiding in the conservation of a threatened species?

In 2002, the Service revised and finalized a 4(d) rule to establish protective regulations pursuant to section 9 of the ESA. It prohibited actions that threaten the Preble’s Meadow Jumping Mouse (Preble’s) to the extent necessary to provide for the conservation of the Preble’s and also provided flexibility to private landowners for ongoing activities that would not impede the conservation of the species. A list of the allowable activities under the 4(d) rule for Preble’s follows:

- Limited rodent control
- Ongoing agricultural activities (except for new agricultural practices, which affect Preble’s habitat)
- Maintenance and replacement of existing landscaping and related structures and improvements

- Existing uses of water associated with the exercise of perfected water rights under state law and interstate compacts and decrees
- Noxious weed control activities according to existing State laws and Federal regulations regarding herbicide labeling
- Ongoing (normal and customary) ditch maintenance activities only to man-made ditches

Various 4(d) rules have also been tailored to best conserve the grizzly bears (*Ursus arctos horribilis*), Utah prairie dogs (*Cynomys parvidens*), Canada lynx (*Lynx canadensis*), western snowy plovers (*Charadrius nivosus ssp. nivosus*), wolverines (*Gulo gulo luscus*), and wolves (*Canis lupus*), among others.



Wolverine / © Steve Kroschel

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