

Frequently Asked Questions and Responses

Endangered Species Act Sections 4 & 7 Regulation

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ESA Section 4 Regulation Revisions.....	1
50 CFR part 17 - Section 4(d): Changes to protections for threatened species (Fish and Wildlife Service-only).....	2
50 CFR part 17 - Section 4(b)(2): Revises the process for consideration of impacts of critical habitat designations and critical habitat exclusions (Fish and Wildlife Service-only).....	5

ESA Section 4 Regulation Revisions

What actions are the U.S. Fish and Wildlife Service taking?

The U.S. Fish and Wildlife Service (FWS) is revising portions of Section 4 of the Endangered Species Act (ESA).

These revisions span two rules.

- **Threatened species protections (Section 4(d)):** Removes the future application of the “blanket rule” option under section 4(d) of the Endangered Species Act for threatened species. The blanket rules provided an option to extend endangered species prohibitions and additional exceptions to threatened species unless a species-specific 4(d) rule was published.
- **Critical habitat exclusions (Section 4(b)(2)):** Revises the process for the consideration of the economic impact, the impact on national security, and any other relevant impacts of designating any particular area as critical habitat, and revises the process for excluding areas from critical habitat.

What prompted the Service to revise the regulations of the ESA?

On January 20, 2025, President Donald J. Trump issued Executive Order (E.O.) 14154, “Unleashing American Energy.” The E.O. directed all departments and agencies to review agency actions that impose an undue burden on the identification, development, or use of domestic energy resources, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with this national objective. Additionally, E.O. 14219, “Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative” directs all departments and agencies to review and rescind regulations that are “based on anything other than the best reading of the underlying statutory authority.” *See also Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

To implement provisions of E.O. 14154, the Secretary of the Interior subsequently issued Secretary’s Order 3418. S.O. 3418 directed assistant secretaries to take steps, as appropriate, to

suspend, revise, or rescind multiple actions that had been finalized under the prior administration.

The Secretary's Order directed the need for revisions to the Service's rule related to Section 4(d).

In response to these executive and secretary's orders, and considering recent case law and ongoing litigation, the Service and NOAA Fisheries have carefully reviewed their respective rules, evaluated the specific regulatory revisions issued in 2024, and have revised the relevant regulations.

Where can I find additional information?

The rules and additional information are available on the Service's Endangered Species Act Regulations [website](#) and are published in the *Federal Register* at <https://www.federalregister.gov> and <https://www.regulations.gov>. Search for the regulations using the following docket numbers:

- FWS-HQ-ES-2025-0029 - Regulations Pertaining to Endangered and Threatened Wildlife and Plants
- FWS-HQ-ES-2025-0048 - Regulations for Designating Critical Habitat

50 CFR part 17 - Section 4(d): Changes to protections for threatened species (Fish and Wildlife Service-only)

What are the changes to threatened species protections (50 CFR 17)?

The revisions to the Service-only regulations in 50 CFR part 17 are to remove the future use of the "blanket rule" option for protecting threatened species under Section 4(d) of the ESA. The Service also added a new paragraph at 17.31(d) and 17.71(d) to explain that whenever the Service proposes a species-specific 4(d) rule, the Service will ensure that each rule includes a necessary and advisable determination, including consideration of conservation and economic impacts, and will seek public comment on that determination.

What is a 4(d) rule?

A 4(d) rule is one of many tools in the ESA for protecting threatened species. These rules get their name from Section 4(d) of the ESA, which directs the secretaries of the Interior and Commerce to issue protective regulations deemed "necessary and advisable to provide for the conservation of" threatened species.

Why is a 4(d) rule needed?

Section 9(a) of the ESA provides a specific list of prohibitions for endangered species but does not provide these same prohibitions for threatened species.

For example, relating to any endangered wildlife species, it is illegal without a permit or authorization, to commit, attempt to commit, solicit another to commit, or cause to be committed, any of the following acts:

- Import any such species into, or export any such species from, the United States.

- Take, which is defined in section 3(19) of the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct, 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 in violation of the ESA.
- Deliver, receive, carry, transport, or ship, in interstate or foreign commerce, by any means whatsoever, and during commercial activity, any such species.
- Sell or offer for sale, in interstate or foreign commerce, any such species.

Without a 4(d) rule, threatened species do not receive any of these protections, although federal agency ESA Section 7 consultation requirements, recovery requirements, etc., still apply for domestic species.

What are the “blanket rules”?

Between 1975 and 2019, and again in 2024, the Service applied all endangered species prohibitions and several exceptions to those prohibitions to threatened species unless the Service issued a species-specific 4(d) rule (50 CFR 17.31(a), 17.71(a)).

Why is the U.S. Fish and Wildlife Service removing future use of the “blanket rules”?

Removing the future use of the “blanket rule” option responds to Executive Order 14154, combined with the specific provision in Secretary’s Order 3418 directing the Service to suspend, revise, or rescind the 2024 rule. Species-specific 4(d) rules can incentivize known beneficial actions for the species by removing or reducing regulatory burden associated with those actions. Species-specific 4(d) rules can also remove or reduce regulatory burden associated with permitting of otherwise prohibited actions or forms or amounts of “take” considered inconsequential to the conservation of the species. Species-specific 4(d) rules should apply protections that will both prevent the species from becoming endangered and promote the recovery of the species.

Can the Service and NOAA Fisheries issue a 4(d) rule for an endangered species?

No. The statutory authority to issue protective regulations under Section 4(d) is limited to species that are listed as threatened. The protections in ESA Section 9(a) also apply automatically to endangered species upon listing. The Services have regulations and permitting mechanisms that may authorize actions that are prohibited under Section 9(a) and 4(d).

Do the regulations of 50 CFR part 17 affect currently listed threatened species protections?

No. Species that were listed as threatened species before the effective date of the final rule retain their same 4(d) protections, whether that was under a “blanket rule” or a species-specific 4(d) rule.

The Service intends to review protective regulations for each threatened species in conjunction with required status reviews pursuant to section 4(c)(2) of the ESA. The Service may find during a status review that revising protective regulations for the threatened species is necessary and advisable for the conservation of that species. Depending upon other listing, delisting, and

reclassification priorities, the Service will determine when to pursue rulemaking for any changes in protective regulations, which would include public notice and comment.

What is the relationship between the 4(d) rules, “take,” and Section 10 of the ESA?

Section 10 of the ESA allows the Service and NOAA Fisheries to permit otherwise prohibited acts or forms of “take.” Section 10 permits may be associated with recovery actions, conservation benefit agreements, (previously called candidate conservation agreements with assurances and safe harbor agreements), or habitat conservation plans.

4(d) rules explain what is prohibited for a threatened species, thus requiring an ESA permit or authorization unless otherwise excepted in the 4(d) rule. Therefore, 4(d) rules are directly related to identifying what actions may require Section 10 permits in the future. There are two categories of exceptions for otherwise prohibited actions or forms, or amounts of “take” that the Service frequently include in 4(d) rules:

- Unavoidable while conducting beneficial actions for the species; or
- Considered inconsequential (de minimis) to the conservation of the species.

Generally, 4(d) rules should not except “take” that is related to the primary or cumulative factors affecting the species’ status, or for which the exception would require project-specific information to develop appropriate measures to offset impacts. In addition, excepting activities or forms of “take” for recovery purposes in 4(d) rules is most appropriate when the Service would not need to review the qualifications or methods of those conducting the activities because this oversight should occur under Section 10(a)(1)(A) permit procedures.

Do federal agencies still need to consult with the Service and NOAA Fisheries under Section 7 of the ESA for threatened species with species-specific 4(d) rules?

Yes. Section 7(a)(2) of the ESA requires federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify their critical habitat. Before a federal agency takes an action, including authorizing, funding, or carrying out the action, that may affect a threatened species, consultation is required. A 4(d) rule does not remove that requirement.

A 4(d) rule does not change the process and criteria for informal or formal consultations and does not alter the analytical process used for biological opinions or concurrence letters. However, a 4(d) rule may assist with streamlining future Section 7 consultations, as the Service and NOAA Fisheries recognize that in most situations it would be unlikely that additional measures would be required to further minimize take that is excepted in a 4(d) rule.

Additionally, if project activities could be tailored to avoid forms of take prohibited by the 4(d) rule, consultation should be more straightforward and predictable. The Service and NOAA Fisheries may consider developing tools to streamline future intra-Service and interagency consultations for actions that result in forms of take that are excepted, or not prohibited, by the 4(d) rule, but that still require consultation. These tools may include, but are not limited to, consultation guidance, template language for biological opinions, and programmatic consultations.

50 CFR part 17 - Section 4(b)(2): Revises the process for consideration of impacts of critical habitat designations and critical habitat exclusions (Fish and Wildlife Service-only)

What are the changes to the Section 4(b)(2) regulations (50 CFR part 17)?

The revisions clarify, interpret, and improve Section 4(b)(2) of the ESA through consideration of the economic impact, the impact on national security, and any other relevant impact of designating any particular area as critical habitat. They also clarify the authority to exclude areas from critical habitat if the benefits of excluding the area outweigh the benefits of designating it as critical habitat. Further, this rule provides greater transparency and certainty for the public and stakeholders regarding the process of when and how the Service determines whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat (4(b)(2) exclusion analysis).

How do these changes differ from current practices?

The Service, jointly with NOAA Fisheries, currently has regulations that describe the standards and procedures for exclusions of areas of critical habitat (50 CFR 424.19). In addition, the Service and NOAA Fisheries developed the joint policy regarding Section 4(b)(2) of the ESA that provided direction regarding how to exercise discretion to exclude areas from critical habitat designations (“2016 policy”).

On December 18, 2020, the Service finalized regulations at 50 CFR 17.90 that set forth a process for excluding areas of critical habitat under Section 4(b)(2) of the ESA. On July 21, 2022, the Service rescinded those regulations. The Service has now revised the regulations for exclusion of areas of critical habitat under Section 4(b)(2) of the ESA. The revisions revert the regulations to their 2020 form and reinstate regulations at 50 CFR 17.90.

The Service has concluded that adding elements of the 2016 policy into regulations is more effective in guiding agency activities and provides greater transparency and certainty to the public and stakeholders. The regulations, however, put into effect some differences in the Service’s approach relative to what was outlined in the 2016 policy.

These differences from the 2016 policy include an information standard for when the Service enters a discretionary weighing analysis, a clarification of how considerations for exclusions will be conducted for federal lands, and an approach to assigning the weight of the benefits of inclusion or exclusion of any areas designated as critical habitat.

The revisions to the regulations may result in additional areas being considered for exclusions. This may reduce the amount of areas designated as critical habitat.

What is critical habitat?

Critical habitat is defined under the ESA. It includes the specific areas, within the geographical area occupied by the species at the time it was listed under the ESA, that contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Critical habitat also includes specific areas outside the geographical area occupied by the species at the time it was listed that are essential

for the conservation of the species. (16 U.S.C. 1532(5).) Critical habitat is only designated within the United States. It cannot be designated within foreign countries or in other areas outside of U.S. jurisdiction.

Critical habitat is a regulatory tool designed to further the conservation of a listed species, to help the endangered or threatened species recover to the point at which protections under the ESA are no longer necessary. More broadly, designation of critical habitat also serves as a tool for meeting one of the ESA's stated purposes: providing a means for conserving the ecosystems upon which endangered and threatened species depend. Once critical habitat is designated, federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to result in destruction or adverse modification of the critical habitat (16 U.S.C. 1536(a)(2)).

Critical habitat designations allow the Service and partners to support the continued conservation of imperiled species by guiding cooperation within the federal government. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness reserve, preserve, or other special conservation area. Critical habitat designations also do not mandate government or public access to private lands. Critical habitat designations affect only federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities by private landowners if there is no federal "nexus" — that is, no federal funding or authorization. However, designations may affect development or other actions that involve federal agencies in planning, permitting, or implementation of those actions.

How does the Service designate critical habitat?

When evaluating what areas qualify as critical habitat for a species, the Service evaluates the best scientific data available to determine what physical or biological features are essential to support the life-history needs of the species within the geographical area occupied by the species at the time of listing. These features may include water characteristics, soil type, geological features, sites, prey, vegetation, or symbiotic species, among other features. The Service also considers whether any specific areas outside the geographical area occupied by the species at the time of listing are essential for the conservation of that species.

The Service then considers the probable economic, national security, and other relevant impacts of designating areas as critical habitat. If the benefits of excluding any area from a designation are found to outweigh the conservation benefits of designating the area, then the Service may propose to exclude that area from the designation. Areas owned or controlled by the U.S. Department of War that are covered by a signed Integrated Natural Resources Management Plan (INRMP), which is required by the Sikes Act, are exempt from a critical habitat designation if the Service determines that the INRMP provides a benefit to the species.

More information and answers to frequently asked questions related to critical habitat can be found on the [Service website](#).

Why does the U.S. Fish and Wildlife Service consider the probable economic, national security, and other relevant impacts of designating areas as critical habitat?

Section 4(b)(2) of the ESA requires consideration of the economic impact, the impact on national security, and any other relevant impact of designating any area as critical habitat. Section 4(b)(2)

also provides the Secretary with the authority to exclude any 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 regulations revisions do not change the requirement to comply with Section 4(b)(2) of the ESA.

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

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

The regulation describes the two circumstances in which the Service would conduct an exclusion analysis for a particular area:

1. when a proponent of excluding the area has presented credible information regarding meaningful economic or other relevant impacts in support of their 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 rule also describes how the Service will assign weights to the benefits of inclusion or exclusion based on whether the impacts are outside or within the scope of the Service's expertise.

The regulation makes clear that proposed critical habitat rules will identify known relevant impacts of the proposed designation and will identify any areas the Secretary is considering for exclusion and why. The regulation includes a non-exhaustive list of categories of potential impacts that the Secretary will identify, when known, at the proposed rule stage. Including this list of categories for consideration provides greater transparency and clarity to the public and stakeholders.

The regulations explain that economic impacts may, for example, include the economy of a particular area, productivity, creation or elimination of jobs, opportunity costs potentially arising from critical habitat designation, and potential benefits from a designation, such as outdoor recreation or ecosystem services.

The regulations also explain that the Secretary will consider impacts on a scale that he or she determines to be appropriate and that impacts may be qualitatively or quantitatively described.

How does the rule change the Service's consideration of partnerships when designating critical habitat?

The regulations generally follow practices from the 2016 policy. The Service frequently excludes specific areas from critical habitat designations based on private or other non-federal conservation plans or agreements and their related partnerships, when the benefits of exclusion outweigh the benefits of inclusion.

How does the rule change the Service's consideration of excluding federal lands from the designation of critical habitat?

The revisions are not substantially different from the Service's current practice in considering the benefits of including or excluding certain areas as critical habitat. However, this regulation revision alters the current practice of generally not excluding federal lands from the designation of critical habitat, except for instances of national security.

Specifically, this revision addresses nonbiological impacts identified by non-federal entities that have a permit, lease, contract, or other authorization for use on federal lands. The Service will now consider the avoidance of the administrative or transactional costs as a benefit of the exclusion of a particular area of federal land. The Service will also consider the extent to which Section 7 consultation would produce economic outcomes or other impacts, such as requiring project modifications and additional conservation measures by the federal agency or other affected parties. While the Service acknowledges that federal lands are important areas for the conservation of species habitat, they do not wish to foreclose the potential to exclude areas under federal ownership.

There is nothing in the ESA that states that lands cannot be excluded from designation of critical habitat simply because that land is managed by the federal government. In some instances, the benefits of excluding federal lands from a critical habitat designation may outweigh the benefits of including them.

Federal land managers will continue to have unique obligations under the ESA, and Congress declared as its policy that "all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act" (Section 2(c)(1)). Further, all federal agencies have responsibilities under Section 7 of the ESA to carry out programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of listed species.