ESA Regulation Final Revisions – Sections 4 & 7
Frequently Asked Questions
June 2024

What actions are the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service taking?
Following public review and comment on the 2023 proposed Endangered Species Act regulation revisions, the U.S. Fish and Wildlife Service (FWS) and NOAA's National Marine Fisheries Service (NOAA Fisheries) have finalized changes to three rules that address responsibilities the Services share under sections 4 and 7 of the Endangered Species Act (ESA).

One rule clarifies and improves the Services' joint regulations regarding listing, delisting, and reclassification decisions and improves certain aspects of critical habitat designation under section 4. A second rule focused on section 7 clarifies and improves the interagency consultation process. The third rule is specific to the FWS and reinstates the 4(d) "blanket rule" options that were in place before 2019 for protecting threatened species.

What prompted the Department of the Interior and Department of Commerce to propose and ultimately finalize these revisions to the implementing regulations of the Endangered Species Act?
On January 20, 2021, President Biden issued an Executive Order (E.O. 13990) directing federal agencies to review and consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting the public health and environment and to commence work to confront the climate crisis immediately.

Following a careful review, the Interior and Commerce Departments proposed revisions to three rules issued in 2019 (Section 4, 4(d), Section 7) that address responsibilities the Services share under sections 4 and 7 of the ESA.

What do the final revisions address?
One final rule revises regulations for listing, delisting, and reclassifying species and the designation of critical habitat. Another final rule addresses interagency cooperation (consultation) under section 7 of the ESA. The third final rule is specific to the FWS and revises regulations for protecting endangered and threatened species, primarily by reinstating certain regulatory options for protecting threatened species, referred to as "blanket 4(d) rules."

What is the overall intent of these revisions?
The ESA is the nation's foremost conservation law whose ultimate goals include preventing the extinction of species and providing for their recovery. The purposes of the ESA include providing a program for the conservation of endangered and threatened species and a means for conserving the ecosystems upon which those species depend (16 U.S.C. 1531(c)). These final rules are intended to improve the regulations that guide the Services' implementation of the ESA by making the regulations addressing section 7 consultations, species classifications, and critical habitat more clear, straightforward, and more in line with the conservation purposes of the ESA. These rules reaffirm the Services' commitment to meeting the ESA's goals of recovering listed species and protecting critical habitats such that species can be removed from the list.

Where can I find additional information and when will these final rules go into effect?
The final rules and additional information are available on the U.S. Fish and Wildlife Service's Endangered Species Act Regulations website and are published in the *Federal Register* at https://www.regulations.gov/ by searching Docket No. FWS-HQ-ES-2021-0104, Docket No. FWS-HQ-ES-2021-0107, and Docket No. FWS-HQ-ES-2023-0018. The rules are effective as of May 6, 2024.

Final rule to clarify standards for listing, delisting, and reclassifying species, and revising some criteria for critical habitat designations under section 4 of the ESA.

What are the final changes to ESA section 4 regulations (50 CFR 424)?
The Services' revisions to their joint regulations in 50 CFR 424 clarify, interpret, and improve the implementation of their ESA's authorities concerning listing, reclassifying, and delisting species, and designating critical habitat.

Key changes in the final rule include:

- Restoration of the phrase "without reference to possible economic or other impacts of such determination" to 50 CFR 424.11(b) to make clear that any economic (costs or benefits) or other impacts stemming from the listing, reclassifying, or delisting of a species cannot be considered when making classification decisions. The ESA requires that such decisions be made based on the best scientific data available concerning the biological status of the species.
- Revisions of the foreseeable future regulation to better align the regulation with the interpretation of this statutory term as provided by the analysis in a Department of the Interior Solicitor's opinion, which the Services have been relying on since 2009. The term "foreseeable future" is included in the ESA's definition of a *"threatened species"* and is the period over which the Services evaluate the threats to and responses of a species to inform an ESA status determination. The final revisions indicate that the foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats.
- Reinsertion of the concept of "recovery" to the delisting regulations to explicitly acknowledge this fundamental goal of the ESA and recognize it as a reason for delisting species. Removal of the reference to recovery in 2019 from this section of the Services' implementing regulations generated concerns that the Services might begin to delist species before they are recovered or were otherwise undermining the value of recovery plans, which are required for listed species under section 4(f) of the ESA.
- Revision of the set of circumstances when designation of critical habitat may not be prudent, in particular by removing the circumstance of when threats to habitat cannot be addressed through management actions taken through section 7(a)(2) consultation – a consideration that required speculation on the part of the Services regarding the outcome of future section 7 consultations and inadvertently implied that section 7(a)(2) consultation is the only benefit of a critical habitat designation.
- Revision of the requirements for identifying unoccupied critical habitat by removing criteria that were newly added to this regulation in 2019 and that unnecessarily eroded the statutory distinction between occupied and unoccupied critical habitat. Final revisions include:

- Removal of the strict requirement to first make a finding that occupied areas are inadequate to conserve the species before the Services can contemplate designating unoccupied areas. The final revisions, however, indicate that the Services will continue to identify areas that are occupied by the species as a logical initial step before evaluating areas that are unoccupied by the species.
- Removal of the requirements that, for an unoccupied area to be considered *"*essential*,"* the Secretary determine, with reasonable certainty, that the area will contribute to the conservation of the species and that it contains one or more of the physical or biological features essential to the conservation of the species.

Will the final revisions change the number or frequency of listings and delistings?
No. The Services do not anticipate any change in the number or frequency of listings and delistings as a result of the revised regulations because the revisions clarify but do not alter, the standards and requirements for making listing and delisting decisions. For instance, the final revisions reinstate language that was removed from the regulations in 2019 indicating that the Services will not consider economic or other impacts of a listing, reclassification, or delisting when making these decisions - something that the Services never intended to do, and which is prohibited under the ESA. The revisions also recognize recovery as an express circumstance in which delisting is appropriate. The removal of explicit mention of recovery from the regulations in 2019 had the unintended consequence of generating concerns that the Services were downplaying or undermining the role of recovery and federal recovery plans. The final revisions to the foreseeable future regulation also align with the DOI M-Opinion which has long guided the Services' interpretation of this term and clarifies that the foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats.

What is critical habitat?
Critical habitat 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 may also include 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. Critical habitat is only designated within the U.S.; 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, i.e., to help bring the endangered or threatened species 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 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.

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

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

The Services may propose to designate critical habitat concurrently with a proposal to list the species; however, if critical habitat is not yet determinable, the ESA also allows the Services up to one additional year after the date of the species listing to designate critical habitat for that species. The Services propose a critical habitat designation by publishing it in the *Federal Register* and requesting public comments over a minimum of 60 days. After reviewing the public comments and any relevant information received, the Services consider whether any changes to the proposed rule are appropriate, and then develop a final rule that includes a summary of, and responses to, the public comments; a detailed description of the final critical habitat; and maps of the designated area. The final rule is then published in the *Federal Register* and codified in the *Code of Federal Regulations*.

More information and answers to frequently asked questions related to critical habitat can be found on our website here: . For more information on critical habitats designated by NOAA Fisheries, please visit their website at https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat.

Will the final revisions affect the amount of critical habitat designated?
The final revisions will not automatically lead to an increase or decrease in the total amount or area of critical habitat designated by either Service. Because critical habitat designations are highly fact-specific and must be determined based on the best scientific data available for the particular species, the areas ultimately designated as critical habitat are dictated primarily by the information available and the life history needs of the species. Although the revisions to the implementing regulations regarding unoccupied critical habitat remove criteria for designating "unoccupied" critical habitat (*i.e.*, specific areas where the species did not occur at the time it was listed under the ESA) that had been added to the regulations in 2019, any increase in designation of unoccupied critical habitat is unlikely because the Services are still required to base their designations on the best available science, make a finding that the areas are habitats that are "essential for the conservation of the species," and consider the relevant impacts of designating the areas.

Do the final revisions allow the Services to designate critical habitat areas that are not habitat for a species?
No. The final revisions do not allow the Services to designate critical habitat areas that are not "habitat" for the particular species. In other words, the final revisions do not affect the applicability of the Supreme Court's opinion in *Weyerhaeuser Co. v. U.S.F.W.S.*, 139 S. Ct. 361 (2018) that an area must be "habitat" to qualify as "critical habitat." As part of developing their critical habitat designations, the Services will ensure there is a basis and a record to support why any unoccupied areas are habitat for the species.

Final changes to protections for endangered and threatened species – Fish and Wildlife Service only

What are the changes to Endangered and Threatened Species Protections (50 CFR 17)?
The FWS is reinstating the 4(d) "blanket rule" option that was in place before 2019 for protecting threatened species. This allows the FWS to apply all of the section 9 prohibitions to threatened species and allow for greater efficiencies when the FWS finds the "blanket rule" protections are appropriate. The FWS will continue to have the option to customize individual species protections with species-specific 4(d) rules. For every newly listed threatened species, the Service will determine what protections are appropriate.

In addition, the final revisions extend to federally recognized Tribes the exceptions to prohibitions that the regulations currently provide to the employees or agents of the FWS and other Federal and State agencies to aid, salvage, or dispose of threatened species. The changes to the threatened species protective regulations are a recognition that Tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources.

The FWS also updated endangered plant regulations at 50 CFR 17.61(c)(1) to match language in amendments to the ESA enacted in 1988 and made minor edits to improve clarity and consistency among sections.

How do the final regulations of 50 CFR part 17 affect currently listed threatened species protections?
Species that were listed as threatened prior to the effective of this date of this final rule will retain their same type of 4(d) protections, whether that was under previous versions of the "blanket rule" or under species-specific 4(d) rules.

However, species that were protected under prior versions of the "blanket rules" or under species-specific 4(d) rules that refer to any of the revised regulatory sections will receive the updated protections. Applying the revised prohibitions and exceptions makes only two substantive changes to the protections for those previously listed threatened species. First, the FWS has added federally recognized Tribes to the entities authorized to aid, salvage, or dispose of threatened species. Second, as a result of updating endangered plant regulations at 50 CFR 17.61(c)(1) to match amendments to the ESA that Congress enacted in 1988, threatened plants protected under the previous ''blanket rule'' are now protected from being maliciously damaged or destroyed on areas under Federal jurisdiction, or being removed, cut, dug up, or damaged or

destroyed 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.

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 of the ESA provides a specific list of prohibitions for endangered animals but does not provide these same prohibitions for plants or threatened animals. For example, it is illegal (without permit or authorization), concerning any endangered wildlife 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 in violation of the ESA.
- Deliver, receive, carry transport, or ship in interstate or foreign commerce and the course of commercial activity.
- 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).

Can the Services issue a 4(d) rule for an endangered species?

No. The protections in ESA section 9 apply to endangered species. The Services have regulations and permitting mechanisms that may authorize actions that are prohibited under section 9.

Do "blanket rules" treat threatened species the same as endangered species?

No. While the "blanket rules" include all of the section 9 prohibitions that protect endangered species, there are additional exceptions to those prohibitions in the "blanket rules."

For example, additional entities are authorized take without an ESA permit for a broader range of activities under the "blanket rules" for threatened wildlife than our regulations allow for endangered wildlife.

The regulatory text for one exception associated with "take" of endangered wildlife species reads:

> "…any qualified employee or agent of a **State conservation agency** that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by their agency for such purposes may, when acting in the course of their official duties take those endangered species that are covered by an approved cooperative agreement for conservation programs in accordance with the cooperative agreement, provided that such taking is not reasonably anticipated to result in:

(i) The **death or permanent disabling** of the specimen;
(ii) The **removal** of the specimen **from the State** where the taking occurred;
(iii) The **introduction** of the specimen so taken, or of any progeny derived from such a specimen, into an area **beyond the historical range** of the species; or
(iv) The **holding** of the specimen **in captivity** for a period of **more than 45 consecutive days**."

50 CFR 17.21(c)(5) (emphasis added).

Whereas, for threatened species:

> …any employee or agent of the **Service, of the National Marine Fisheries Service, or of a State conservation agency** that is operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of wildlife in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of their official duties, **take those species**.

50 CFR 17.31(b) (emphasis added).

Why is the FWS reinstating the "blanket rules"?
It is more straightforward and transparent to have species-specific 4(d) rules in one place in the Code of Federal Regulations and "blanket rule" protections described in another, as the FWS had done for 40 years before September 26, 2019. This approach will result in less confusion, less duplication of regulatory text in the *Code of Federal Regulations*, a lower risk of error in transposing regulatory text, and reduced administrative costs associated with developing and publishing a rule in the *Federal Register* and *Code of Federal Regulations*. This is because whenever it's determined that the standard suite of protections is appropriate, the FWS will not need to develop any additional regulatory text to codify a species-specific 4(d) rule.

Reinstating the "blanket rule" option also ensures there is never a lapse in threatened species protections. If the FWS does not promulgate a species-specific 4(d) rule at the time of listing, the "blanket rule" protections will be in place to provide for the conservation of that threatened species. The FWS is simply providing a streamlined option for protecting threatened species in situations in which they do not promulgate species-specific 4(d) rules.

Will FWS continue to issue species-specific 4(d) rules after reinstating the "blanket rules"?
Yes. As the FWS did before revising regulations in 2019, FWS will maintain the ability to issue species-specific rules. FWS continues to recognize the benefit of species-specific 4(d) rules and anticipates regularly issuing them, where appropriate. Species-specific 4(d) rules can incentivize known beneficial actions for the species by removing or reducing regulatory burden associated with those actions and 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 species.

What is the relationship between 4(d) rules and section 10 of the ESA?

Section 10 of the ESA provides the Services the ability to permit otherwise prohibited acts or forms of "take." Section 10 permits may be associated with recovery actions, conservation benefit agreements (previously candidate conservation agreements with assurances and safe harbor agreements), or habitat conservation plans.

"Blanket rules" and species-specific 4(d) rules explain what is prohibited for a threatened species (thus requiring some sort of ESA permit or authorization unless otherwise excepted in the 4(d) rule). Therefore, 4(d) rules are directly related to what actions may require section 10 permits in the future.

The Services may also except otherwise prohibited activities through 4(d) rules, in which case section 10 permits would not be required for those activities. There are two categories of exceptions that FWS frequently include in 4(d) rules, and these are for otherwise prohibited actions or forms or amounts of "take" that are:

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

The "blanket rules" include multiple exceptions to the requirement for obtaining section 10 permits, and under the 2024 final rule, some of these same exceptions are included automatically in species-specific 4(d) rules unless the rule explicitly states otherwise (e.g., conservation efforts conducted by the FWS, NOAA Fisheries, or State natural resource agencies).

As a general rule, 4(d) rules should not except incidental 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 minimization measures and mitigation to offset its impacts. In addition, excepting activities or forms of "take" for recovery purposes in 4(d) rules is appropriate when the FWS 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 Services 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 its critical habitat. If 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. Regardless of whether take related to certain proposed activities is excepted (or not prohibited) by a 4(d) rule, those activities, and thus the proposed action, may still affect threatened species, triggering the requirement for consultation under section 7 of the ESA.

A 4(d) rule (whether a species is protected under a "blanket rule" or species-specific 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. For example, as with an endangered species, if a Federal agency determines that an action is "not likely to adversely affect" a threatened species, this will require the Service's written concurrence (50 CFR 402.13(c)). Similarly, if a Federal agency determinates that an action is "likely to adversely

affect" a threatened species, the action will require formal consultation with the Service and the formulation of a biological opinion (50 CFR 402.14(a)).

Because consultation obligations and processes are unaffected by 4(d) rules, the Services may consider developing tools to streamline future intra-Service and inter-Agency 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 consultation guidance, Information for Planning and Consultation effects determination keys, template language for biological opinions, or programmatic consultations.

Final revisions to language, definitions, and responsibilities to further clarify and improve the federal interagency consultation processes under section 7 of the ESA.

What are the final changes to the ESA section 7 regulations (50 CFR 402)?
The final rule revises the definitions of *"environmental baseline"* and *"effects of the action,"* eliminates the section titled *"Other Provisions,"* clarifies responsibilities regarding reinitiating consultation, and revises reasonable and prudent measures in an incidental take statement to adhere more closely to the statute by including the use of offsetting measures inside or outside the action area, in addition to avoidance and measures.

How do these revisions change the number or frequency of consultations?
The revisions to the ESA section 7 regulations (50 CFR 402) provide clarity, consistency, and align more closely with the statute; the Services do not anticipate any change in the rate or frequency of consultation under section 7.

How do the final revisions regarding reasonable and prudent measures affect consultations?
Under these final regulatory revisions, the Services clarify that after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion reasonable and prudent measures that offset any remaining impacts of incidental take that cannot feasibly be avoided. This change will not affect most consultations under section 7(a)(2) of the ESA. This is because most consultations are completed informally, and this change will apply only to formal consultations that require an incidental take statement containing reasonable and prudent measures. Even among formal consultations that require an incidental take statement containing reasonable and prudent measures, some of these consultations will be able to adequately address the impacts of incidental take through measures that avoid or reduce incidental take within the action area, and the change will not apply to those consultations.

Importantly, the use of offsetting measures in reasonable and prudent measures will not be required in every consultation. Additionally, as with all reasonable and prudent measures, these offsetting measures must be commensurate with the scale of the impact, subject to the existing "minor change rule," be reasonable and prudent, and be necessary or appropriate to minimize the impact of the incidental taking on the species.

What are the purposes and benefits of these revisions regarding reasonable and prudent measures?

These revisions will change the Services' implementation of the ESA so that it better reflects congressional intent and better serves the conservation goals of the ESA. Minimizing impacts of incidental take on species through the use of offsetting measures can result in improved conservation outcomes for species incidentally taken due to proposed actions and may reduce the accumulation of adverse impacts. In addition, by allowing the Services to specify offsets outside the action area as reasonable and prudent measures, conservation efforts can be focused on where they will be most beneficial to the species. For example, in some circumstances, offsetting measures applied outside the action area will more effectively minimize the impact of the action on the subject species.

What are reasonable and prudent measures and how are reasonable and prudent measures that offset impacts different?

Reasonable and prudent measures (RPMs) refer to those actions the Services considers necessary or appropriate to minimize the impact of the incidental take on the species (50 CFR 402.02). RPMs do not prescribe measures necessary to avoid the likelihood of jeopardizing the continued existence of the listed species or the destruction or adverse modification of critical habitat. The purpose of RPMs is to minimize the impact of the take on the species and as such, they are limited by the amount or extent of incidental take, which establishes the maximum limit of RPM offsets. They are also limited to listed animals; they do not apply to listed plants or designated critical habitat. RPMs avoid, reduce or offset the impact of incidental take to the species. RPMs that offset impacts may include replacing or providing substitute resources or environments through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. The three most common mechanisms available to deliver offsets include purchasing credits through conservation banks, in-lieu fee programs, and proponent-responsible mitigation devices established previously by project proponents.

Will completed section 7 consultations now be required to go back and reconsider RPM offsets?

No. These revisions do not apply prospectively. Thus, section 7(a)(2) consultations completed prior to the effective date of May 6, 2024, do not require reevaluation.

When will the Services' Consultation Handbook be updated?

The Services are actively working on revising the 1998 Section 7 Consultation Handbook now that the regulatory revisions have been finalized. Our target date for publication in the Federal Register, with an opportunity for public comment, is December 2024.