

# Endangered Species Act: U.S. Fish & Wildlife Service Finalizes Regulations for Designating Critical Habitat



**Jordan Wimpy**  
jwimpy@mwlaw.com  
(501) 688-8872

12/23/2020

On Friday, December 18, 2020, the U.S. Fish & Wildlife Service (the “Service”) published a final rule amending the Service’s regulations for excluding areas of critical habitat under section 4(b)(2) of the Endangered Species Act. 85 Fed. Reg. 82,376 (Dec. 18, 2020). The Service published the proposed changes in September. *See* 85 Fed. Reg. 55,398 (Sept. 8, 2020).

After considering the various information supplied by the public and by interested parties during the proposed rule’s public comment period, the Service decided to finalize the rule as proposed. The final regulation goes into effect on January 19, 2021.

## Background

A keystone element of the Service’s protection of threatened or endangered species under the ESA is the designation, conservation, and protection of “critical habitat.” Section 3(5)(A) of the ESA defines “critical habitat” to include:

1. the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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
2. specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A); see also, 50 CFR 424.12).

When listing a species as endangered, the Service must also designate critical habitat “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 designating an area as habitat. 16 U.S.C. § 1533(b)(2). Once designated as critical habitat, an area is protected from Federal actions that would result in the “destruction” or “adverse modification” of the critical habitat. 16 U.S.C. § 1536.

The Service may, however, “exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] 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 concern.” 16 U.S.C. § 1533(b)(2).

Friday's announcement finalizes changes to the Service's regulations for implementing Section 4(b)(2) of the ESA, specifically the portions that (i) describe the Service's analysis of a potential designation's economic impacts, impact on national security, and any other relevant impacts; (ii) clarify the Service's discretion and basis for entering into an exclusion analysis; and (iii) outline the process and documentation for excluding areas of critical habitat.

### **Final Rule**

As noted above, the Service finalized the rule as proposed in September without any changes. Among other changes to the existing regulations, the final rule:

- clarifies that, in addition to summarizing the draft economic analysis, rules designating or excluding critical habitat will identify the known national security and other relevant impacts of a proposed designation;
- requires the Service to identify areas that the Service has reason to consider for exclusion;
- clarifies that the Service may still consider additional exclusions at any point in the process, including areas not identified in a proposed rule to designate critical habitat (i.e., codifying a practice that allows commenters to provide information specific to areas under consideration for designation that may be appropriate for exclusion);
- includes a nonexhaustive list of categories of potential impacts that the Service will identify, when known, when proposing a rule to designate or excluded critical habitat;
- reiterates and codifies that the Service has discretion whether to enter into an exclusion analysis under section 4(b)(2);
- describes the two circumstances in which the Service will conduct an exclusion analysis for a particular area (i.e., (1) when a proponent of exclusion presents credible evidence in support or (2) the Service exercises its own discretion)
- requires the Service to document the basis for decisions to not undertake an exclusionary analysis that is compliant with the procedures mandated required by the ESA and procedural requirements of the Administrative Procedure Act;
- assigns weights of benefits of inclusion and exclusion based on relevant expertise;
- describes factors the Service considers with respect to conservation plans or agreements, tribal implications, national security implications, and Federal lands; and
- establishes a principle that the Service will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the species.

*See, generally*, 85 Fed. Reg. at 55,400 (describing the proposed amendments). The Service was clear in both the proposed and final rule that the changes apply prospectively only to those proposed critical habitat designations published after the rule's effective date.

The Preamble to the final rule is almost exclusively a response to comments document. It is helpful in providing additional clarifications to questions and concerns raised during the comment period.

A copy of the Proposed Rule can be found [HERE](#).

A copy of the Final Rule can be found [HERE](#).