



New U.S. Fish & Wildlife Service Regulations for Critical Habitat Designations

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The U.S. Fish and Wildlife Service (FWS) issued [new regulations](#) governing the designation of critical habitat under the Endangered Species Act (ESA), effective on January 19, 2021. These regulations formalize the FWS' process for excluding areas from critical habitat designation. They will also increase transparency and provide greater regulatory certainty for the public and stakeholders following the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018), which held that decisions not to exclude a particular area from a critical habitat designation are judicially reviewable.

The new regulations clarify a path for the public to provide information on the economic and other impacts of a proposed critical habitat designation to trigger an exclusion analysis.

Background

Section 4(2)(b) of the ESA requires the Secretary of the Interior to designate critical habitat for listed species on the basis of the best available scientific and commercial data and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of designating any particular area as critical habitat. The Secretary may exclude areas from designation if the benefits of exclusion outweigh the benefits of inclusion unless the Secretary determines that the exclusion will result in the extinction of the species concerned.

Previously, the FWS relied on a February 11, 2016 policy to implement its authority to exclude areas from critical habitat designations.

Overview of New FWS Regulations

The new regulations specify when FWS will conduct an exclusion analysis and provide a non-exhaustive list of categories of potential impacts for the FWS to consider. Specifically, the FWS will conduct an exclusion analysis when there is credible information, *i.e.*, a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion of a particular area. Credible information may be provided through public comment on the proposed critical habitat designation and draft economic analysis.

Alternatively, the Secretary may exercise his or her discretion to conduct an exclusion analysis.

The FWS will base critical habitat designations on the best available information, evaluate the information provided from outside entities on a case-by-case basis, and give weight to the benefits of inclusion or exclusion based on who has the relevant expertise and consistent with the available information from experts, firsthand knowledge, and the best available information the Secretary may have to rebut that information. Quantification of the weight given to the benefits of inclusion and exclusion, if appropriate and feasible, will be explained on a case-by-case basis. The FWS does not consider speculative or unsupported information to be the best available information. The agency will use its best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis.

Exclusions Based on Conservation Plans

The new regulations allow for the FWS to exclude areas based on the existence of a private conservation agreement or ESA Section 10 conservation plan. To further incentivize voluntary conservation plans, the FWS anticipates that areas covered by ESA Section 10 conservation plans will be consistently excluded from critical habitat designation if they meet the following conditions: (1) the permittee is properly implementing the plan; (2) the species for which critical habitat is being designated is covered by the plan, or very similar in its habitat requirements to a covered species; and (3) the plan specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

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