



## **New Endangered Species Act Regulations Aim to Provide Regulatory Certainty and Transparency**

By [Nicole Blevins](#)

On Tuesday, August 27, 2019, the U.S. Fish and Wildlife Service (FWS) published its final revisions to Endangered Species Act (ESA) regulations to provide clear and consistent outcomes and regulatory certainty. The new rules, [84 FR 44976](#), [84 FR 44753](#), and [84 FR 45020](#), will take effect on September 26, 2019.

A few of the most significant revisions address: (1) the designation of unoccupied critical habitat; (2) the withdrawal of the blanket Section 4(d) protections for threatened species; and (3) the FWS' ability to reference economic information in connection with listing decisions.

### Critical Habitat

The revisions restore the requirement for the FWS to first evaluate occupied areas for critical habitat designation before considering unoccupied areas. Under the new regulations, the FWS may consider unoccupied areas only if occupied areas would be inadequate to conserve the species. Further, to designate an unoccupied area as critical habitat, the FWS must be reasonably certain that the unoccupied area will both contribute to the conservation of the species, and that the area contains one or more the biological features essential to the conservation of the species. Designations of unoccupied areas cannot be based on upon mere potential or speculation. This change responds to the U.S. Supreme Court's decision that only habitat is eligible for designation as critical habitat. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service et al.*, 139 S. Ct. 361 (2018).

### Threatened Species

The FWS exercised its discretion to withdraw longstanding blanket Section 4(d) protections for threatened species. Previously, the agency automatically extended the Section 4(d) protections for endangered species to threatened species. Under the new rule, FWS must promulgate species-specific rules to extend Section 4(d) protections to threatened species. The FWS confirmed it intends create species-specific rules but did not set a specific timeframe to do so. This revision aligns the FWS' approach to threatened species with that of its sister agency, the National Marine Fisheries Service.

### Economic Information for Listing Decisions

The FWS removed the phrase, "without reference to possible economic or other impacts of such determination" in the regulations governing the factors for listing species. The ESA requires listing decisions to be solely based on the best scientific and commercial data available;

however, the FWS is not prohibited from compiling and providing economic information to the public when appropriate. This revision responds to the growing desire for increased transparency regarding the economic impacts of regulations.

### Legal Challenges

Prior to publication of the final rule, environmental groups sued in U.S. District Court in San Francisco. They allege that the rules: (1) violate the ESA statutory text and requirements for consultation; (2) are arbitrary and capricious; and (3) do not adequately protect species. They also allege that violated NEPA by failing to consider and disclose the environmental impacts the rules will have on the environment.

For more information regarding the revised regulations, please contact [Nicole Blevins](#).