



## Administration Rescinds ESA Regulatory Procedures for Exclusions from Critical Habitat

JULY 28, 2022

[Melinda Meade Meyers](#) and [Tyson Kade](#)

On July 21, 2022, the U.S. Fish and Wildlife Service (“FWS”) rescinded its 2020 final rule that clarified how the agency would consider and evaluate particular areas for exclusion from a critical habitat designation pursuant to Section 4(b)(2) of the Endangered Species Act (“ESA”). [87 Fed. Reg. 43,433 \(“Final Rule”\)](#). The rescission takes effect on August 22, 2022, at which point FWS will revert back to considering exclusions from critical habitat pursuant to the regulations at 50 C.F.R. § 424.19 and a joint 2016 Policy with the National Marine Fisheries Service (“NMFS”). FWS notes one important distinction—discretionary decisions not to exclude an area from critical habitat are judicially reviewable.

### Background on Promulgation of Critical Habitat Exclusion Procedures

In February 2016, FWS and NMFS (collectively, the “Services”) issued a joint policy describing how they implement their authority to exclude areas from critical habitat (“[2016 Policy](#)”). Following the Supreme Court’s conclusion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018), that decisions not to exclude areas from critical habitat are judicially reviewable, FWS issued a final rule on December 18, 2020, expanding on the joint 2016 Policy and seeking to provide “transparency, clarity, and certainty to the public and other stakeholders” on how FWS conducts its discretionary exclusion analysis pursuant to ESA section 4(b)(2) due to economic, national security, and other relevant impacts. [85 Fed. Reg. 82,376](#).

During President Biden’s first week in office, he issued [Executive Order 13990](#), which required the Services to review certain agency actions for consistency with the new Administration’s policy objectives. As a result of this review, the Services [identified several ESA regulations](#) promulgated in 2019 and 2020 to be rescinded, revised, or reinstated by the current Administration, including the 2020 final rule revising the FWS process for considering exclusions from critical habitat designations.

FWS expressed concern that the 2020 final rule “unduly constrains the Service’s discretion in administering the [ESA], potentially limiting or undermining the Service’s role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats.” In October 2021, FWS issued a proposed rule to rescind these regulations. See VNF’s prior alert on the proposed rule [here](#).

### Rescission of FWS’s Critical Habitat Exclusion Procedures

In the Final Rule, as justification for the rescission, FWS states that its 2020 final rule is “problematic” for three reasons. First, it limits or undermines FWS’s role as the expert agency responsible for administering the ESA because it potentially gives undue weight to outside parties in guiding the Secretary’s statutory authority to exclude areas from critical habitat designations. Second, the ruleset established by the 2020 final rule, as to when and how the Secretary will exercise the discretion to exclude areas from critical habitat designations, constrains FWS’s discretion and decreases the ability to further the conservation of endangered and threatened species through designation of their critical habitats. Finally, FWS found that the 2020 final rule did not accomplish the goal of providing clarity and transparency because implementing different section 4(b)(2) regulations from those that NMFS applies (*i.e.*, 50 C.F.R. § 424.19) could result in different outcomes in analogous circumstances or multiple possible analyses for species over which the Services share jurisdiction (*e.g.*, sea turtle species, Atlantic salmon). Finding that these reasons applied to all portions of the regulation, FWS declined to retain any of the promulgated procedures.

After the rescission goes into effect on August 22, 2022, FWS will revert to applying the joint 2016 Policy and the regulations at 50 C.F.R. § 424.19 to address exclusions from critical habitat designations. Recognizing the Supreme Court’s holding in *Weyerhaeuser* that decisions not to exclude areas under section 4(b)(2) are judicially reviewable, FWS states that it will always explain its decisions not to exclude particular areas for which exclusion has been requested. FWS claims that this explanation will consider

the best scientific data available, including the strength of the information provided by the proponent in support of the designation. Based on prior practices, this assurance is not likely to provide the regulated community with needed certainty or transparency, as the decisions on whether to exclude a particular area from a critical habitat designation have frequently been made with little insight, consistency, or explanation.

### **For More Information**

Van Ness Feldman counsels clients on ESA compliance and, when necessary, litigates to protect clients' interests. If you would like more information about the implementation of the ESA, please contact [Tyson Kade](#), [Joe Nelson](#), or any member of the firm's [Endangered Species & Wildlife Practice](#).

Follow us on Twitter [@VanNessFeldman](#)

© 2022 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.