



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–HQ–ES–2018–0007; 4500030113]**

**RIN 1018–BC97**

### **Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service or FWS), revise our regulations related to threatened species to remove the prior default extension of most of the prohibitions for activities involving endangered species to threatened species. For species already listed as a threatened species, the revised regulations do not alter the

applicable prohibitions. The revised regulations provide that the Service, pursuant to section 4(d) of the Endangered Species Act (“ESA” or the “Act”), will determine what protective regulations are appropriate for species added to or reclassified on the lists of threatened species.

**DATES:** This final regulation is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** This final regulation is available on the Internet at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0007. Comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are also available at the same website.

**FOR FURTHER INFORMATION CONTACT:** Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800/877–8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

On July 25, 2018, the Service published proposed regulation revisions in the *Federal Register* (83 FR 35174) regarding section 4(d) of the Act and its implementing regulations in title 50 of the Code of Federal Regulations at 50 CFR part 17 setting forth

the prohibitions for species listed as threatened on the Federal Lists of Endangered and Threatened Wildlife and Plants (lists). In the July 25, 2018, *Federal Register* document, we provided the background for our proposed regulation revisions in terms of the statute, legislative history, and case law.

The regulations that implement the ESA are located in title 50 of the Code of Federal Regulations. This final rule revises regulations found in part 17 of title 50, particularly in subpart D, which pertains to threatened wildlife, and subpart G, which pertains to threatened plants.

In this final rule, we amend §§ 17.31 and 17.71. Among other changes, language is added in both sections to paragraph (a) to specify that its provisions apply only to species listed as threatened species on or before the effective date of this rule. Species listed or reclassified as a threatened species after the effective date of this rule would have protective regulations only if the Service promulgates a species-specific rule (also referred to as a special rule). In those cases, we intend to finalize the species-specific rule concurrent with the final listing or reclassification determination. Notwithstanding our intention, we have discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination.

This change makes our regulatory approach for threatened species similar to the approach that the National Marine Fisheries Service (NMFS) has taken since Congress added section 4(d) to the Act, as discussed below. The protective regulations that currently apply to threatened species would not change, unless the Service adopts a species-specific rule in the future. As of the date of this final rule, there are species-specific protective regulations for threatened wildlife in subpart D of part 17, but the

Service has not adopted any species-specific protective regulations for plants. These final regulations do not affect the consultation obligations of Federal agencies pursuant to section 7 of the Act. These final regulations do not change permitting pursuant to 50 CFR 17.32.

The prohibitions set forth in ESA section 9 expressly apply only to species listed as endangered under the Act, as opposed to threatened. 16 U.S.C. 1538(a). ESA section 4(d), however, provides that the Secretaries of the Interior and Commerce may by regulation extend some or all of the section 9 prohibitions to any species listed as threatened. *Id.* section 1533(d). 16 U.S.C. 1533(d). *See, also* S. Rep. 93-307 (July 1, 1973) (in amending the ESA to include the protection of threatened species and creating “two levels of protection” for endangered species and threatened species, “regulatory mechanisms may more easily be tailored to the needs of the” species). Our existing regulations in §§ 17.31 and 17.71, extending most of the prohibitions for endangered species to threatened species unless altered by a specific regulation, is one reasonable approach to exercising the discretion granted to the Service by section 4(d) of the Act. *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 7 (D.C. Cir. 1993) (“regardless of the ESA’s overall design, § 1533(d) arguably grants the FWS the discretion to extend the maximum protection to all threatened species at once, if guided by its expertise in the field of wildlife protection, it finds it expeditious to do so”), *altered on other grounds in rehearing*, 17 F.3d 1463 (D.C. Cir. 1994).

Another reasonable approach is the one that the Department of Commerce, through NMFS, has taken in regard to the species under its purview. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to

threatened species as we did. Rather, for each species that they list as threatened, NMFS promulgates the appropriate regulations to put in place prohibitions, protections, or restrictions tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

Moreover, we have gained considerable experience in developing species-specific rules over the years. Where we have developed species-specific 4(d) rules, we have seen many benefits, including removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species. This final rule will allow us to capitalize on these benefits in tailoring the regulations to the needs of threatened species.

For example, we finalized a species-specific 4(d) rule for the coastal California gnatcatcher (*Polioptila californica californica*) on December 10, 1993 (58 FR 65088). In that 4(d) rule, we determined that activities that met the requirements of the State of California's Natural Communities Conservation Plan for the protection of coastal sage scrub habitat would not constitute violations of section 9 of the Act. Similarly, in 2016, we finalized the listing of the Kentucky arrow darter (*Etheostoma spilotum*) with a species-specific 4(d) rule that exempts take as a result of beneficial in-stream habitat enhancement projects, bridge and culvert replacement, and maintenance of stream crossings on lands managed by the U.S. Forest Service in habitats occupied by the species (81 FR 68963, October 5, 2016). As with both of these examples, if the proposed rule is finalized, we would continue our practice of explaining in the preamble

the rationale for the species-specific prohibitions included in each 4(d) rule.

These final regulations would remove the references to subpart A in §§ 17.31 and 17.71. In § 17.31, we specify which sections apply to wildlife, to be more transparent as to which provisions contain exceptions to the prohibitions. In § 17.71, we remove all reference to subpart A, because none of those exceptions apply to plants.

In finalizing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Service is establishing prospective standards only. Nothing in these final revised regulations is intended to require (now or at such time as these regulations may become final) that any previous listing or reclassification determinations or species-specific protective regulations be reevaluated on the basis of any final regulations. The existing protections for currently listed threatened species are within the discretion expressly delegated to the Secretaries by Congress.

Pursuant to section 10(j) of the Act, members of experimental populations are generally treated as threatened species and, pursuant to 50 CFR 17.81, populations are designated through population-specific regulation found in §§ 17.84–17.86. As under our existing practice, each such population-specific regulation will contain all of the applicable prohibitions, along with any exceptions to prohibitions, for that experimental population. None of the changes associated with this rulemaking will change existing special rules for experimental populations. Any 10(j) rules promulgated after the effective date of this rule that make applicable to a nonessential experimental population some or all of the prohibitions that statutorily apply to endangered species will not refer

to 50 CFR 17.31(a); rather, they will instead independently articulate those prohibitions or refer to 50 CFR 17.21.

We are finalizing the revised regulations as proposed without further changes. In these final regulation revisions, we focus our discussion on significant and substantive comments we received during the comment period. For additional background on the statutory language, legislative history, and case law relevant to these regulations, please see our proposed regulation revision, which is available at <http://www.regulations.gov> under Docket No. FWS–HQ–ES–2018–0007.

This final rule is one of three related final rules that we are publishing in this issue of the *Federal Register*. All of these documents finalize revisions to various regulations that implement the Act. The revisions to the regulations in this rule are prospective; they are not intended to require that any previous listing or reclassification determination under section 4 of the Act be reevaluated.

## **Final Regulatory Revisions**

### **Summary of Comments and Recommendations**

In our proposed rule published on July 25, 2018 (83 FR 35174), we requested public comments on our specific proposed changes to 50 CFR part 17. We received several requests for public hearings and requests for extensions to the public comment period. However, we elected not to hold public hearings or extend the public comment period beyond the original 60-day public comment period. We received more than 69,000 submissions representing hundreds of thousands of individual commenters by the deadline on September 24, 2018. Many comments were nonsubstantive in nature,

expressing either general support for or opposition to provisions of the proposed rule with no supporting information or analysis or expressing opinions regarding topics not covered within the proposed regulation. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed rule. Below, we summarize and respond to the significant, substantive comments sent by the September 24, 2018, deadline and provide responses to those comments.

*Comment 1:* Many commenters stated that rescinding the previous regulation, referred to as the “blanket rules,” will leave threatened species with no protections or prohibitions in place, which will result in their status declining even more and the Service being unable to conserve them.

*Our Response:* In the proposed rule, we stated our intention to finalize species-specific 4(d) rules concurrent with final threatened listing or reclassification determinations. In this final rule, we restate our intention to finalize species-specific section 4(d) rules concurrently with final listing or reclassification determinations. Finalizing a species-specific 4(d) rule concurrent with a listing or reclassification determination ensures that the species receives appropriate protections at the time it is added to the list as a threatened species (e.g., we anticipate that foreign species 4(d) rules will generally include prohibitions of import and export and species-specific 4(d) rules for marine mammals will generally incorporate applicable provisions of the Marine Mammal Protection Act). This approach also adds efficiency, predictability, and transparency to the rulemaking process because it correlates the Service’s analysis of threats impacting the species (as discussed in the final listing or reclassification rule) to

its analysis of protective regulations for the species. The publication of *Federal Register* documents that propose and finalize both listing and 4(d) rules simultaneously adds administrative efficiencies and cost-savings to the listing process relative to the time and cost of conducting those two processes sequentially.

We expect this concurrent process to promote transparency and predictability in the rulemaking process for the regulated community. Publishing species-specific 4(d) rules concurrent with the classification rules provides the public knowledge of the primary drivers to the species' status. The 4(d) rule includes specific actions or activities that can be undertaken that would or would not impair species' conservation. In turn, this information may assist with streamlining future section 7 consultations. For example, if project activities could be tailored to avoid forms of take prohibited by the 4(d) rule, consultation on those activities should be more straightforward and predictable. Furthermore, we anticipate landowners would be incentivized to take actions that would improve the status of endangered species with the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule. As a result, we believe these measures to increase public awareness, transparency, and predictability will enhance and expedite conservation.

*Comment 2:* Several commenters stated that rescinding the blanket rules will allow for political interference and industry pressure on the Service to reduce protections and prohibitions of threatened species at the detriment of species conservation.

*Our Response:* As explained in the preamble to the proposed regulation, the intent of this regulation is to focus prohibitions on the stressors contributing to the threatened status of the species and to facilitate the implementation of beneficial

conservation efforts. This practice of tailoring regulations to individual threatened species is guided by the Service's extensive history of implementing the Act. Our determinations about which prohibitions, exceptions to the prohibitions, or protective regulations should be applied to threatened species have consistently been, and will continue to be, based upon the best available scientific and commercial information available to us at the time of listing.

*Comment 3:* Many commenters stated that FWS has a substantial listing and reclassification workload and lacks the additional resources necessary to promulgate species-specific 4(d) rules for every species added to the list as threatened. They stated that the additional resources necessary to promulgate additional rules will impact FWS' ability to put into place the protections necessary and species will be left unprotected.

*Our Response:* Promulgating species-specific 4(d) rules for every threatened species may require additional resources at the time of listing relative to our prior practice of defaulting to invoking the blanket rules. If historical percentages of threatened species and endangered species determinations were to continue into the future, we estimate that each year approximately four species would be listed as threatened species; therefore, we would develop four species-specific 4(d) rules per year. Historically, we finalized an average of 2 species-specific 4(d) rules per year (37 species-specific 4(d) rules over 21 years (Service 2019). However, in the past 10 years, we have promulgated 17 domestic and 6 foreign species-specific rules (2.3 per year) as compared to 12 domestic and 2 foreign species-specific rules in the 11 years prior (1.3 per year) (Service 2019). We expect to continue with an increased rate of issuing species-specific rules in the coming years. Therefore, we expect that we would

promulgate species-specific rules for most or all species listed as threatened even if the blanket rule were to remain in place.

Developing species-specific 4(d) rules is a prudent and efficient use of our resources because of the benefits gained from tailoring protections specific to the needs of the species. When we tailor regulations by limiting the prohibitions to those activities that are causing the threat of extinction, we save the public and FWS resources by reducing the need for section 10 permits. Likewise, tailored regulations will encourage actions compatible with, or supportive of, a species' conservation. Tailored prohibitions may also assist the Service and other Federal agencies in streamlining the section 7 consultation processes for actions that result in forms of take that are not prohibited by a 4(d) rule. For example, the Services would have already determined that forms of take not prohibited by a 4(d) rule were compatible with the species' conservation, which should streamline our analysis on whether an action would jeopardize the continued existence of the species and would streamline the incidental take statement, if required. Species-specific regulations will also allow the Service to facilitate and promote conservation actions that will aid in the conservation of threatened species. In addition, because we intend to put in place species-specific rules at the time of listing (as noted in our response to comment (1), we will continue to rely on our analysis of stressors to the species from the listing determination, including forms of "take," that are acting on a species. Because of this concurrent analysis of all factors influencing the species carrying over from the listing determination, we anticipate the development of species-specific protective regulations will be more efficient than if done in separate rulemakings.

In general, the provisions of a 4(d) rule should be closely tied to the species' needs and primary factors influencing the biological status identified in the Species Status Assessment (SSA) report or other analysis of the species' biological status. Determining which protective regulations or section 9 prohibitions or exceptions to prohibitions a species requires to address the stressors leading to threatened species status logically flows from our analyses at the time of listing. Furthermore, when developing new species-specific 4(d) rules, we intend to review existing species-specific 4(d) rules that could be used as a model or applied to the species in question. This approach would be beneficial when there are species with similar threats or that occur in a similar geographic area, or species with similar life histories or similar biological needs. For example, the Service has an existing species-specific 4(d) rule for threatened species within the parrot family, which is found at 50 CFR 17.41(c), that includes protective regulations for four different species. Where appropriate, the Service adds additional listed members of the parrot family to this rule. In this fashion, developing species-specific regulations will not be as time consuming or burdensome as the commenters predict because the Service will be able to rely on existing regulatory language and analysis. Similar examples are the Service's existing species-specific 4(d) rules for threatened primates (50 CFR 17.40(c)), crocodylians (50 CFR 17.42(c)), certain fish (50 CFR 17.44(c), (h), and (j)), and certain butterflies (50 CFR 17.47(a)).

*Comment 4:* Several commenters stated that the prior regulations for threatened species have been working to conserve threatened species for the last 40 years and FWS should not rescind them.

*Our Response:* We are required to develop regulations as described in section 4(d) of the Act that are necessary and advisable for the conservation of threatened species. Additionally, section 4(d) of the Act provides us the authority to prohibit specific forms of take. Developing species-specific 4(d) rules will enhance transparency to the regulated public because particular forms of incidental take that are prohibited or excepted will be enumerated in the species-specific 4(d) rule. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now by necessity be in the form of promulgating a species-specific rule.

Although the blanket rules have worked, and will continue to work, to conserve already-listed threatened species, we believe that species-specific 4(d) rules for threatened species tailor species' protection with appropriate regulations that may incentivize conservation, reduce unneeded permitting, or streamline section 7 consultation processes as described above. In practice, the FWS has been promulgating more species-specific 4(d) rules in the last decade. The Service has finalized 22 species-specific 4(d) rules in the last decade (2009–2018) compared to finalizing 13 species-specific rules in the 12 years prior (1997–2008). Consequently, we have found significant benefits from developing and implementing species-specific 4(d) rules, such as removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species.

This rule will facilitate beneficial conservation actions. For example, the species-specific 4(d) rule for the elfin-woods warbler (81 FR 40547, June 22, 2016) sets

forth a comprehensive set of conservation measures regarding otherwise lawful activities for conversion of sun-grown to shade-grown coffee plantations, riparian buffer establishment, and reforestation and forested habitat enhancement. The 4(d) rule provides details on the timing and acceptable methods by which these activities can occur such that any incidental take would not be a violation of the Act. Thus, projects that meet the conservation measures for the elfin-woods warbler outlined in the species-specific 4(d) rule do not need an incidental take permit from the Service in order to proceed. Likewise, the species-specific 4(d) rule for the Kentucky arrow darter (81 FR 68984, October 5, 2016) contains recommended conservation measures that, when conducted in accordance with the 4(d) rule, ensure that incidental take would not be considered a violation of the Act. The species-specific 4(d) rule details activities such as in-stream restoration or reconfiguration, bank stabilization, bridge and culvert replacement or removal that must be conducted in accordance with conservation measures that maintain connectivity of habitat, minimize instream disturbance, and maximize the amount of in-stream cover. Therefore, projects that are conducted in accordance with the conservation measures in the species-specific 4(d) rule for the Kentucky arrow darter do not require an incidental take permit from the Service.

*Comment 5:* Several commenters stated that FWS did not provide enough justification or logical rationale for why the change is necessary.

*Our Response:* Our preamble to the proposed rule provides an explanation of why we proposed to change our prior practice of the blanket rules. This regulatory change to emphasize the creation of species-specific 4(d) rules is within the discretion provided by the Act. We recognize that our prior “blanket rules” were also considered

“reasonable and permissible” constructions of section 4(d) of the Act. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), *modified on other grounds on reh’g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d on other grounds*, 515 U.S. 687 (1995). For this reason, we are not altering the existence of the “blanket rules” for species already listed as threatened. However, we conclude that moving to an emphasis on species-specific regulations is also a reasonable and permissible interpretation of the discretion found in section 4(d) of the Act. As explained elsewhere, we believe this change will aid in the conservation of species. We also consider this change to further highlight the statutory distinction between species meeting the definitions of “endangered species” and “threatened species.” This change would make our regulatory approach for threatened species similar to the approach that NMFS has taken since Congress added section 4(d) to the Act. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, when putting into place protections for threatened species, NMFS promulgates the appropriate regulations regarding section 9 prohibitions, exceptions to prohibitions, or other regulatory protections tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

Moreover, the Service has gained considerable experience in developing species-specific rules over the past decade. As noted elsewhere in this response to comments, we have found species-specific 4(d) rules beneficial in removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the

stressors contributing to the threatened status of the species. For instance, some species-specific 4(d) rules would not require a Federal permit for incidental take resulting from activities that are conducted under a State permit if the permit was issued pursuant to a State program that furthers the goals of the Act. Other species-specific 4(d) rules may set forth exceptions to take prohibitions for activities that are de minimis in their effect on the species, or beneficial when conducted in adherence to certain timeframes or using certain protocols (e.g., elfin woods warbler species-specific 4(d) rule; 81 FR 40547, June 22, 2016). This regulatory revision allows us to capitalize on these benefits in tailoring section 9 prohibitions, exceptions to prohibitions, or other regulatory protections to the conservation needs of the species.

We conclude that, while the prior “blanket rules” were one possible means of implementing section 4(d) of the Act, the changes finalized in this document will better tailor protections to the needs of the threatened species while also providing meaning to the statutory distinction between species meeting the definitions of “endangered species” and “threatened species.”

*Comment 6:* Some commenters stated that this change is not actually aligning the Service’s practice with NMFS, because NMFS does not consistently promulgate species-specific 4(d) rules for threatened species.

*Our Response:* NMFS does not have a default blanket rule for threatened plants and animals but rather approaches each species on a case-by-case basis on the basis of the discretion afforded under section 4(d). Therefore, rescinding the Service’s blanket rules will closely align the two agencies’ regulatory approaches. Although we have indicated that our intention is to promulgate species-specific 4(d) rules at the time of

listing, we do not read the Act to require that we promulgate a 4(d) rule whenever we list a species as a threatened species.

*Comment 7:* Some commenters stated that if a threatened species did not have section 9 prohibitions, private landowners would not have an incentive to conserve species and landowners may be unlikely to enter into partnership agreements to conserve threatened species.

*Our Response:* We intend for each species listed or reclassified as a threatened species to have a species-specific 4(d) rule that outlines section 9 prohibitions, exceptions to prohibitions, or other regulatory protections as appropriate. Any species-specific 4(d) will follow the Service's standard rulemaking process, which by law includes an opportunity for public comment on a proposed rule. As a result, private landowners will be aware of proposed regulations and have an opportunity to proactively engage in voluntary conservation efforts. By meaningfully recognizing the differences in the regulatory framework between endangered species and threatened species, we believe that crafting species-specific 4(d) rules will incentivize conservation for both endangered species and threatened species. Private landowners and other stakeholders may see more of an incentive to work on recovery actions for endangered species, with an eventual goal of downlisting to threatened species status with a species-specific 4(d) rule that might result in reduced regulation.

For threatened species, 4(d) rules can limit the scope of prohibitions so that they do not apply to certain activities conducted pursuant to conservation efforts contained in conservation plans or agreements. We anticipate that private parties, including landowners, will be incentivized to participate in conservation efforts identified in the

4(d) rule that protect the species. In these instances, specified activities would be able to continue without Federal regulation because of participation in the identified conservation plan. At the same time, the plan will provide conservation to the threatened species. In addition, tailoring the prohibitions applicable to a threatened species identifies for the public the specific actions or activities that are driving the species to a threatened status. Developing species-specific 4(d) rules will incentivize positive conservation efforts to improve the species' status such that it no longer warrants listing.

*Comment 8:* Several commenters stated that the Service should include binding timeframes in the regulatory text as to when the final 4(d) rule would be promulgated. Some of these included the suggestion that it be within 90 days of the final listing, others stated that it should be concurrent with listing, and others did not provide a specific time period but stated that a set timeframe would be most transparent to the public.

*Our Response:* As stated above, we intend to finalize species-specific 4(d) rules concurrently with final listing or reclassification determinations. We believe this approach will be most efficient and will also ensure that threatened species have in place the protective regulations supporting their recovery. We considered including a regulatory timeframe to reflect our intention to promulgate 4(d) rules at the time of listing, but ultimately determined that creating a binding requirement was not needed. The Act does not mandate a specific requirement to implement protective regulations concurrently with threatened determinations.

*Comment 9:* We received many comments on topics that were not specifically addressed in our proposed regulatory amendment, but, instead, focus on issues that may

arise during implementation of this rulemaking. These included recommendations on which existing species-specific 4(d) rules would provide a good model for future rules, opinions as to the scope of the Service's discretion in extending section 9 prohibitions in future rules, views on how the Service should interpret the terms "necessary and advisable" in the Act, and suggestions of approaches to take in future guidance documents on how to develop species-specific 4(d) rules.

*Our Response:* The Service appreciates the many insightful comments and suggestions we received on developing species-specific 4(d) rules. While that input may inform the development of future species-specific 4(d) rules, policies, or guidance, in the interests of efficiency we are finalizing the revisions for which we specifically proposed regulatory text. The Service considered those comments, but is required only to respond to "significant" comments—those "comments which, if true, ... would require a change in [the] proposed rule," *Am. Mining Cong. v. United States EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (quoting *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)). Comments that either were outside the scope of the issues we specifically addressed in our proposed regulatory amendments, or that raise questions that may arise during future implementation of this rulemaking, are not "significant" in the context of the proposed rule. *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988). We therefore will not respond to them at this time. However, to the extent commenters raised questions about the substance of future species-specific 4(d) regulations that have not been proposed, we urge commenters to provide this feedback when a proposed species-

specific 4(d) regulation raises these concerns. Any species-specific 4(d) regulation will be proposed and subject to public comment prior to adoption by the Service.

After a review and careful consideration of all of the public comments received during the open public comment period, we have finalized this rule as proposed.

### **Required Determinations**

#### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This final rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

### *Executive Order 13771*

This final rule is an Executive Order 13771 deregulatory action.

### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises the regulations for 4(d) rules for species determined to meet the definition of a “threatened species” under the Act. This final rule is fundamentally a procedural change for the Service that affects only the form of the Service’s decisions with respect to regulations that provide for the conservation of threatened species. The Service is therefore the only entity that is directly affected by this final regulation change at 50 CFR part 17. The statute states, “Whenever any species is listed as a threatened species . . . , the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” This

provision requires the Secretary to make a decision about what protections to apply to threatened species. The blanket rules established that, as a general principle, the protections that the statute prescribes for endangered species are also necessary and advisable to provide for the conservation of threatened species. But even with the blanket rules in place, it fell to the Secretary to decide, upon listing or classifying individual species as threatened, what protections to put in place for the species. That decision was in the form of whether to allow the relevant blanket rule to apply or to promulgate a species-specific rule. The need for that decision is even enshrined in the blanket rules themselves—they expressly contemplate that the Secretary could choose to promulgate a “special rule” that would replace the blanket rule and “contain all the applicable prohibitions and exceptions.” 50 CFR 17.31(c) and 17.71(c).

With promulgation of this rule, when species get listed in the future, the blanket rules will no longer be in place, but the Secretary will still be required to make a decision about what regulations to put in place for that species. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now necessarily be in the form of promulgating a species-specific rule. To the extent that any regulations that provide for the conservation of threatened species affect external entities, those effects result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species’ conservation, not from this rulemaking, which affects only the form of that decision. As a result, no external entities—including any small businesses, small organizations, or small governments—will experience any economic impacts from this rule. We certify

that this final rule will not have a significant economic effect on a substantial number of small entities.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the *Regulatory Flexibility Act* section above, this final rule will not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the final rule will not place additional requirements on any city, county, or other local municipalities.

(b) This final rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This final rule will not impose obligations on State, local, or tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, this final rule will not have significant takings implications. This final rule will not pertain to “taking” of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final

rule will substantially advance a legitimate government interest (conservation and recovery of threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this final rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This final rule pertains only to prohibitions for activities pertaining to threatened species under the Endangered Species Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*Civil Justice Reform (E.O. 12988)*

This final rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This final rule will clarify the prohibitions to threatened species under the Endangered Species Act.

*Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments” and the Department of the Interior’s manual at 512 DM 2, we have considered effects of this final rule on federally recognized Indian Tribes. Two informational webinars were held on July 31 and August 7, 2018, to provide additional information to interested Tribes regarding the proposed regulations. After the opening of the public comment period, we received multiple requests for coordination or

Government-to-Government consultation from multiple tribes: Cowlitz Indian Tribe; Swinomish Indian Tribal Community; The Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of Warm Springs, Oregon; Quinault Indian Nation; Makah Tribe; Confederated Tribes of the Umatilla Indian Reservation; and the Suquamish Tribe. We subsequently hosted a conference call on November 15, 2018, to listen to Tribal concerns and answer questions about the proposed regulations. On March 6, 2019, Service representatives attended the Natural Resources Committee Meeting of the United and South and Eastern Tribes' Impact Week conference in Arlington (Crystal City), VA. At this meeting, we presented information, answered questions, and held discussion regarding the regulatory changes.

The Service concludes that the changes to these implementing regulations make general changes to the ESA implementing regulations and do not directly affect specific species or Tribal lands or interests. As explained earlier, the only thing that this rulemaking will change is that the decision about what regulations to put in place to provide for the conservation of threatened species will now necessarily be in the form of promulgating a species-specific rule. To the extent that any regulations that provide for the conservation of threatened species affect federally recognized Indian Tribes, those effects will result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, we conclude that this regulation does not have "tribal implications" under section 1(a) of E.O. 13175 and formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior. We will continue to collaborate with

Tribes on issues related to federally listed species and work with them as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

#### *Paperwork Reduction Act*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act (NEPA)*

We analyzed this final rule in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). We have determined that, to the extent that the proposed action would result in reasonably foreseeable effects to the human environment, the final regulation is categorically excluded from further NEPA review and that no extraordinary circumstances are present. The rule qualifies for two categorical exclusions listed at 43 CFR 46.210(i). First, the amendments are of a legal, technical, or procedural nature. Second, any potential impacts of this rule are too broad, speculative, and conjectural to lend themselves to meaningful analysis and will be examined as part of any NEPA analysis, if applicable, in stand-alone species-specific 4(d) rules. The revisions finalized in this action are intended to clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for

determining what protective regulations are appropriate for species added to or reclassified as threatened species on the Lists of Endangered and Threatened Wildlife and Plants.

These revisions are an example of an action that is fundamentally administrative, technical, or procedural in nature. As explained with respect to the Regulatory Flexibility Act, this final rule is fundamentally a procedural change for the Service that affects only the form of the Service's decisions with respect to regulations that provide for the conservation of threatened species. The Service is, therefore, the only entity that is directly affected by this final regulation change at 50 CFR part 17. The statute states, "Whenever any species is listed as a threatened species . . ., the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." This provision requires the Secretary to make a decision about what protections to apply to threatened species. When species get listed in the future, the blanket rules will no longer be in place, but the Secretary will still be required to make a decision about what regulations to put in place for that species. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now necessarily be in the form of promulgating a species-specific rule. To the extent any regulations that provide for the conservation of threatened species significantly affect the environment, those effects result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, this final rule falls within the categorical exclusion for rulemakings that are administrative, procedural, or technical in nature.

We completed an environmental action statement for the categorical exclusion for the revised regulations in 50 CFR part 17. The environmental action statement is available at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0007.

*Energy Supply, Distribution or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule is not expected to affect energy supplies, distribution, and use. As explained earlier, the only thing that this rulemaking will change is that the decision about what regulations to put in place to provide for the conservation of threatened species will now necessarily be in the form of promulgating a species-specific rule. To the extent any regulations that provide for the conservation of threatened species affect energy supply, distribution, or use, those effects will result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## **PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Revise § 17.31 to read as follows:

### **§ 17.31 Prohibitions.**

(a) Except as provided in §§ 17.4 through 17.8, or in a permit issued under this subpart, all of the provisions of § 17.21, except § 17.21(c)(5), shall apply to threatened species of wildlife that were added to the List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section).

(b) In addition to any other provisions of this part, 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 a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.40 through 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The species-specific rule will contain all the applicable prohibitions and exceptions.

3. Revise § 17.71 to read as follows:

**§ 17.71 Prohibitions.**

(a) Except as provided in a permit issued under this subpart, all of the provisions of § 17.61 shall apply to threatened species of plants that were added to the List of Endangered and Threatened Plants in § 17.12(h) on or prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], with the following exception: Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of § 17.61, provided that a statement that the seeds are of “cultivated origin” accompanies the seeds or their container during the course of any activity otherwise subject to the regulations in this subpart.

(b) In addition to any provisions of this part, any employee or agent of the Service or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those threatened species of plants that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.73 through 17.78 applies to a threatened species, the species-specific rule will contain all the applicable prohibitions and exceptions.

Dated: August 12, 2019.

David L. Bernhardt,

*Secretary.*

*Department of the Interior.*

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