

## History of the ESA

Congress passed the Endangered Species Preservation Act in 1966. The act allowed listing of native animal species as endangered and provided limited means for their protection. The Departments of Interior, Agriculture, and Defense were directed to seek to protect listed species, and insofar as consistent with their primary purposes, preserve the habitats of such species. Land acquisition for protection of endangered species was also authorized. The Endangered Species Conservation Act of 1969 was passed to provide additional protection to species in danger of "worldwide extinction". Import of such species was prohibited, as was their subsequent sale within the U.S. This Act called for an international ministerial meeting to adopt a convention on the conservation of endangered species.

A 1973 conference in Washington led to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which restricted international commerce in plant and animal species believed to be actually or potentially harmed by trade. Later that year, the Endangered Species Act of 1973 was passed, which combined and considerably strengthened the provisions of its predecessors. Important provisions of the 1973 Act include:

- U.S. and foreign species lists were combined, with uniform provisions applied to both [section 4].
- Categories of "endangered" and "threatened" were defined [section 3].
- Plants and all classes of invertebrates were made eligible for protection [section 3].
- All Federal agencies were required to undertake programs for the conservation of endangered and threatened species, and were prohibited from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its "critical habitat" [section 7].
- Broad taking prohibitions were applied to all endangered animal species, which could apply to threatened animals by special regulation [section 9].
- Matching Federal funds became available for States with cooperative agreements [section 6].
- Authority was provided to acquire land for listed plants and animals [section 5].
- U.S. implementation of CITES was provided [section 8].

Significant amendments have been enacted in 1978, 1982, and 1988, while the overall framework of the 1973 Act has remained essentially unchanged. The funding levels in the present Act were authorized through Fiscal Year 1992. Principal amendments are listed below:

### **1978:**

- Provisions were added to Section 7, allowing Federal agencies to undertake an action that would jeopardize listed species if the action were exempted by a cabinet-level committee convened for this purpose;

- Critical habitat was required to be designated concurrently with the listing of a species, when prudent, and economic and other impacts of designation were required to be considered in deciding on boundaries [section 4];
- The Secretaries of Interior and Agriculture (for the Forest Service) were directed to develop a program for conserving fish, wildlife and plants, including listed species, and land acquisition authority was extended to such species [section 5];
- The definition of "species" with respect to "populations" was restricted to vertebrates; otherwise, any species, subspecies or variety of plant, or species or subspecies of animal remained listable under the Act [section 3].

**1982:**

- Determinations of the status of species were required to be made solely on the basis of biological and trade information, without any consideration of possible economic or other effects [section 4];
- A final rule to determine the status of a species was required to follow within one year of its proposal unless withdrawn for cause [section 4];
- Provision was made for designation of experimental populations of listed species that could be subject to different treatment under section 4 , for critical habitat, and section 7 [section 10]; and
- A prohibition was inserted against removing listed plants from land under Federal jurisdiction and reducing them to possession [section 9].

**1988:**

- Monitoring of candidate and recovered species was required, with adoption of emergency listing when there is evidence of significant risk [section 4].
- Several amendments dealt with recovery matters: 1) recovery plans will undergo public notice and review, and affected Federal agencies must give consideration to those comments; 2) section 4(g) requires five years of monitoring of species that have recovered; and 3) biennial reports are required on the development and implementation of recovery plans and on the status of all species with plans.
- A new section 18 requires a report of all reasonably identifiable expenditures on a species-by-species basis be made on the recovery of endangered or threatened species by the States and the Federal government [see last page].
- Protection for endangered plants was extended to include destruction on Federal land and other taking when it violates State law [section 9].

## **Administration of the ESA**

The Fish and Wildlife Service, in the Department of the Interior, and the National Marine Fisheries Service, in the Department of Commerce, share responsibility for administration of the Endangered Species Act. Generally, the National Marine Fisheries deals with those species occurring in marine environments and anadromous fish, while the Fish and Wildlife Service is responsible for terrestrial and freshwater species and migratory birds. Additionally, the Animal and Plant Health Inspection Service, in the Department of Agriculture, oversees importation and exportation of listed terrestrial plants.

## **Listing Definitions**

A species (see below) may be classified for protection as "endangered" when it is in danger of extinction within the foreseeable future throughout all or a significant portion of its range. A "threatened" classification is provided to those animals and plants likely to become endangered within the foreseeable future throughout all or a significant portion of their ranges. [section 3]

A "species" includes any species or subspecies of fish, wildlife, or plant; any variety of plant; and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man. [section 3]

### **How do species get listed?**

As with most other Federal regulations, a species is proposed for addition to the lists (50 CFR Part 17) in the Federal Register. The public is offered an opportunity to comment, and the rule is finalized (or withdrawn). Species are selected by the Service for proposed rules from a list of candidates. To become a candidate, the Service relies largely upon petitions, Service and other agencies' surveys, and other substantiated reports on field studies. The Act provides very specific procedures on how species are to be placed on the list (e.g., listing criteria, public comment periods, hearings, notifications, time limit for final action). These latter requirements are found in the regulations at 50 CFR Part 424. Selection from the list of candidates for a proposed rule is based upon a priority system (September 23, 1983, Federal Register).

Species may be active candidates from a number of sources. The Service has its own biologists who are monitoring the status of some species. Other agencies have similar staffs that can report when a species seems to be at some risk to its continued existence. Informal letters and various reports are also submitted to the Service from the States and private groups and individuals. There is also a formal petition process available under the Act.

## **Petition process**

Anyone may petition the Service to have a species listed or reclassified as endangered or threatened, or removed from the list. Findings are required before any proposal is published in the Federal Register.

## **90-day finding**

Within 90 days of receiving a petition, the Service must make a finding as to whether the petition presents substantial information that the listing may be warranted.

## **1-year Finding**

Within 1 year of receipt, a finding is required that the listing is either warranted or not warranted.

A finding of warranted must lead directly to an immediate (<30 days) proposed listing, or the Service can find that such an immediate proposal is precluded by other listing activities such that the proposal may not be made for several additional weeks, months or even years. In order to make this secondary finding of warranted but precluded the Service must also be making expeditious progress in its overall listing program (e.g., candidates of higher priority are taken first).

Any warranted but precluded finding must be re-examined on each successive anniversary of the petition's receipt until the listing is either proposed or the petition is turned down as not warranted.

## **Judicial review**

Negative 90-day findings, not warranted findings, and warranted but precluded 1-year findings are subject to judicial review.

## **Selecting candidates for listing**

In general, species to be listed in a given year are selected from among those recognized as candidates in accordance with the Service's listing priority system.

Under the priority system, species facing the greatest threat are assigned highest priority, further criteria account for the immediacy of the threat and the genetic distinctness of the species as reflected by the taxonomic level at which it is recognized. The Service maintains a list of "candidates" from all the accepted petitions and other sources.

Candidate species are those for which the Service has substantial information to support the proposal to list.

## **Criteria for listing**

A species is only determined to be an endangered species or a threatened species because of any one or more of the following factors (economics or others not listed here are not permissible under the Act):

- the present or threatened destruction, modification, or curtailment of its habitat or range;
- overutilization for commercial, recreational, scientific, or educational purposes;

- disease or predation;
- the inadequacy of existing regulatory mechanisms; or
- other natural or man-made factors affecting its continued existence.

## **Proposed and Final Rules**

The Fish and Wildlife Service must publish a proposed rule in the Federal Register not less than 90 days before the effective date of the listing of a species. The complete text of the proposed regulation is published and all interested parties are encouraged to comment and provide additional information on the proposal (generally a 60 day comment period) and to submit statements at any public hearings that are held. Any person may file a written request for such a hearing within 45 days after the date of publication of the general notice.

- Within one year of the date a listing proposal is published, one of three possible courses of action must be taken:
  - (1) a final listing rule is published (either as proposed, or revised);
  - (2) the proposal is withdrawn; or
  - (3) the proposal may be extended, but only for an additional 6 months.
- If approved, the final listing rule takes effect 30 days after publication in the Federal Register.

## **Recovery**

The ultimate purpose of the Act is to save species from extinction. The Service's goal is to recover listed species and remove them from the list. This is accomplished through a variety of tools, including recovery planning, consultation, and scientific and incidental take permits.

## **Recovery Planning**

### **Why is recovery difficult?**

Even experts initially may have an incomplete understanding of the cause of a species' decline, which makes it difficult to design an effective plan for recovering the species. Research can usually identify the problem, but this takes time.

Once the causes of decline have been correctly identified, and a recovery plan prepared, recovery may not begin for years because of social or economic obstacles that need to be overcome, including lack of sufficient funding.

Once consensus is reached on necessary recovery tasks, the unpredictable nature of ecological systems may produce unanticipated recovery task results, and new or modified approaches may be developed to achieve the intended result.

Typically, species recovery is a gradual process, taking several generations of successful reproduction to achieve before a sufficient number of individuals are present to comprise one or more viable (self-perpetuating) populations. This may take years, or even decades in many cases, as it is often difficult to reverse all the threats affecting the species for the past decades, if not centuries.

### **Who prepares recovery plans?**

Depending on the species, plans are either prepared by a panel of recognized experts under the direction of a Service employee, or they are contracted to an appropriate consultant on the species. In either case, Regional Directors are responsible for approving recovery plans for listed species occurring in their Region.

### **When are they needed after listing?**

Within 60 days of listing, the responsible Region prepare a one-page outline of the major recovery actions needed for the species. The recovery plan is usually begun soon after listing, depending on the state of knowledge of the recovery needs of the species, and available funds.

### **Do all species need a recovery plan?**

Foreign species do not require recovery plans because the United States Government has no means for implementation of management options. Some domestic species do not have recovery plans because their nesting habitat is unknown (e.g., Eskimo curlew), they are in such low numbers that they cannot be found with regularity (ivory-billed woodpecker, Bachman's warbler), or the management options are so limited or the species has such a low priority that a plan is not justified at this time.

### **What are recovery tasks within a recovery plan?**

Recovery tasks are actions needed to reduce or resolve the threats or limiting factors that contributed to the status of the species. These tasks are designed to assist accomplishment of recovery objectives.

### **What is the priority system used for tasks?**

Recovery tasks are assigned a priority number associated with one of the three priority levels. They are tasks necessary to prevent extinction (priority 1), avoid significant further decline (priority 2), or other activities necessary to achieve recovery (priority 3).

### **What provision is made for public review of recovery plans?**

Guidance has been provided to the Regions on involving the public in plan development, including direction to notify other agencies of the need to consider public comments. Regions publish notices in the Federal Register requesting public comment on recovery plan drafts.

### **How will recovered species be monitored?**

Monitoring recovered species has been incorporated under State programs funded by section 6. The Service's Regions compile annual reports of monitoring activities.

# Consultation

## When and what form of consultation is appropriate?

All Federal agencies must consult with the appropriate Service when any activity permitted, funded or conducted by that agency may affect a listed species or designated critical habitat, or is likely to jeopardize proposed species or adversely modify proposed critical habitat.

The Service conducts several types of consultations on Federal agency activities, including informal, formal, early and emergency consultations for listed species or designated critical habitats, and informal and formal conferences for proposed species or proposed critical habitats.

- **Informal consultations** precede formal consultation and may be requested by the Federal agency, an applicant, or a designated non-Federal representative. Discussions during this phase may include whether and which species may occur in the proposed action area, and what effect the action may have on listed species or critical habitats.
- **Informal consultation** often conclude with the Service's written concurrence with the Federal agency's determination that its action is not likely to adversely affect listed species or their critical habitat, i.e., an exception to formal consultation.
- **Formal consultation** is conducted when the Federal agency determines its action may affect a listed species or its critical habitat and submits a written request to initiate formal consultation. These consultations follow statutory and regulatory timeframes and procedures, and result in a written biological opinion of whether the proposed action is likely to result in jeopardy to a listed species or adverse modification of designated critical habitat. An incidental take statement is also provided. Formal consultations must be completed within 90 days of initiation and delivered within 45 days of completion, unless an extension is mutually agreed to by the agency and applicants, if any.
- Early consultations are held before an application is actually filed with a Federal agency to determine at an early planning stage what effect a proposed action may have on a species or critical habitat and what modifications may be needed to remove or minimize those effects. Timeframes are the same as for formal consultation and formal conferences.
- Emergency consultations are held when an agency must respond quickly to a natural disaster or other calamity. These are followed up with a written formal consultation.
- Conferences are conducted when the Federal agency determines that a Federal action is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat. During conference, the Service makes advisory recommendations to the Federal agency on ways to minimize or avoid adverse impacts. If the proposed species or proposed critical habitat becomes listed or designated, respectively, during the life of a project that retains Federal involvement, the Federal agency must then determine whether consultation is required.

## **How is jeopardy or adverse modification of critical habitat determined?**

In determining jeopardy, the Service must first look at the environmental baseline, i.e., the present status of the species. Added to the baseline is the direct, indirect, interrelated, and interdependent effects of the Federal action undergoing consultation. The final factor is cumulative effects, which are those State and private actions reasonably certain to occur.

This analysis is then measured against the definition of jeopardy, which is an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

## **What are reasonable and prudent alternatives?**

These are alternative actions issued with a jeopardy biological opinion that 1) can be implemented in a manner consistent with the intended purpose of the action, 2) are consistent with the scope of the Federal agency's legal authority and jurisdiction, 3) are economically and technologically feasible, and 4) the Service believes would avoid jeopardy to the listed species or adverse modification of critical habitat.

## **What is incidental take and how is it determined?**

Incidental take is a taking that results from the Federal action, but is not the purpose of the otherwise lawful activity.

Through the analysis of the effects of the action on listed species and critical habitat, the Service may recognize that some individuals or a certain amount of habitat may be taken. An incidental take statement is provided with the biological opinion, and 1) includes the amount (number) or extent (habitat) of anticipated take, if any; 2) reasonable and prudent measures to minimize the take; and 3) nondiscretionary terms and conditions to implement the reasonable and prudent measures, including the procedures used to handle or dispose of any individuals of the species actually taken.

## **What are the responsibilities of an action agency when it receives a biological opinion?**

Under section 7(a)(2) of the ESA, the Federal agency must insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

Following the issuance of a biological opinion, the Federal agency determines whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

If, after consultation, the Federal agency cannot comply with the requirements of section 7(a)(2), it may apply for an exemption (50 CFR Part 451). Likewise, exemptions may be requested by the

Governor of the State affected or the applicant for a Federal permit. Exemptions are administered by the Assistant Secretary for Policy, Budget, and Analysis.

## **Recovery and CITES Permits**

The Service has the responsibility of reviewing trading programs and practices of States and other countries, and ensuring they are not harming endangered, threatened and CITES-listed species. The Service also regulates taking, commerce and import/export of these species through a permitting program.

### **What is a CITES permit and where do I get one?**

A CITES permit is required for import/export and commerce in species listed on the Appendices to the Convention on International Trade in Endangered Species. The application requirements are complex and applicants (e.g., commercial businesses, zoos, circuses, plant nurseries, sportsmen with trophies, individual pet owners) frequently need specialized, individualized assistance on understanding and interpreting these requirements.

If you have questions about whether you need a permit call toll free 1-800-358-2104 or write the Office of Management Authority, U.S. Fish and Wildlife Service, ARLSQ 420, 4401 N. Fairfax Drive, Arlington, VA, 22203.

### **What is a recovery permit?**

Recovery permits are issued under section 10(a)(1)(A) of the ESA for scientific research and other activities benefitting the recovery of U.S. listed species. Frequently these permits authorize needed activities identified in a species' recovery plan. For example, a permit is needed to examine the effect of grazing on a prairie grassland plant, to study diseases of the desert tortoise, or to capture and mark a species for a study of the species's movements throughout a season or year. These permits are available from the Service's Regional Offices.

## **Incidental Take Permits**

### **What is an incidental take permit?**

Section 9 of the ESA prohibits take of federally listed animals without appropriate authorization. Take is defined under the ESA, in part, as "killing, harming, or harassment" of a federally listed species, while incidental take is take that is "incidental to, and not the purpose of, otherwise lawful activities."

In 1988, Congress passed amendments to section 10 to provide a means for non-Federal projects resulting in take of listed animals to be permitted subject to carefully prescribed conditions. These "incidental take" permits also provide a means to balance, or integrate, orderly economic development with endangered species conservation, and for the public and private sector to develop creative partnerships to accomplish these goals.

## **What is required for an incidental take permit?**

Application for an incidental take permit is subject to a number of requirements, including preparation by the permit applicant of a conservation plan--generally known as a "Habitat Conservation Plan," or an "HCP." An HCP must specify:

- Impacts likely to result from proposed taking of federally listed species;
- Measures the applicant will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances;
- Alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized; and
- Additional measures the Service may require as necessary or appropriate for the purposes of the conservation plan, such as an Implementing Agreement that spells out the roles and responsibilities of all parties.

## **How are HCPs developed?**

Development of an HCP and application for an incidental take permit are voluntary; however, in the absence of appropriate authorization, no take can lawfully occur.

In scope, HCPs can cover an area as small as a few acres or as large as hundreds of thousands of acres; for purposes of processing permit applications, the Service recognizes three types: "large-scale" or "regional" HCPs, "medium-scale" HCPs, and "small-scale" HCPs.

Steering Committees are often established to facilitate regional HCP planning efforts. Typically, Steering Committees are made up of representatives from Federal, State, and local government agencies, affected private interests, and environmental groups; the function of Steering Committees is to define the issues, negotiate the HCP, and generally oversee the HCP process.

HCPs are funded in a variety of ways. For small-scale HCPs funding is typically provided solely by the applicant. For regional planning efforts funding may be provided through a variety of mechanisms, including fees assessed against development activities occurring in the HCP area.

The Service encourages permit applicants to address unlisted species in HCPs. The advantages of this are two-fold: a) the HCP results in an ecosystem-based approach to conservation planning, may protect candidate species prior to listing, and may preclude the need to list them; and b) it can simplify the permit amendment process should an unlisted species that occurs in the HCP area be listed subsequent to issuance of the permit.

## **How are section 10 permits processed?**

In processing an incidental take permit application, the Service must comply with appropriate environmental laws, including the National Environmental Policy Act (NEPA) and the ESA.

Typically, the NEPA document is either an Environmental Assessment or an Environmental Impact Statement. Review of the application under section 7 of the ESA is required to ensure that permit issuance is not likely to jeopardize listed species. The ESA also requires a Federal Register publication of the application's receipt with a 30-day public comment period.

Section 10 issuance criteria require the Service to issue an incidental take permit if, after opportunity for public comment, it finds that:

- the taking will be incidental;
- the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;
- the applicant will ensure that adequate funding and means to deal with unforeseen circumstances will be provided;
- the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- the applicant will ensure that other measures that the FWS may require as being necessary or appropriate will be provided

## **State Grant Programs**

### **How does a State get grants under the ESA?**

Funding may be provided to State agencies through the Cooperative Endangered Species Conservation Fund [section 6]. "States" include the District of Columbia, and the Commonwealths and Territories of the U.S. Following passage of State legislation to enable one or more State agencies to conduct conservation activities for listed and candidate plants and animals, the Service enters into agreements with those State agencies. Thirty eight States and Puerto Rico have both plant and animal agreements, while 12 States and 2 Territories have only agreements for animals.

### **What do the States do with these grants?**

Section 6 grants provide States with the resources to participate in a wide array of recovery activities ranging from population assessment and habitat restoration, to propagation and reintroduction of listed species. States may use section 6 grants to initiate conservation actions before a species is listed. Stabilization of candidate species and their habitat can often be accomplished in a more cost effective manner than through the process of listing, recovery planning and implementation. These grants also can be used to monitor the status of recovered species.