



# What You Need to Know About the Endangered Species Act

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The Endangered Species Act of 1973 (ESA) was passed by the U.S. Congress to protect and conserve threatened and endangered plants, animals, and the ecosystems that support them. The ESA's over-arching goal is to prevent species from becoming extinct. Congress deemed that threatened and endangered wildlife species need protection and "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

This legislation was prompted by concern from the people of the United States regarding loss of biological diversity and degradation of the environment. While the ESA has been fiercely debated and its merits challenged over the years, frequent public opinion polls reveal strong support from various segments of society for the goals of the ESA.

The emphasis of the ESA is three-fold and includes: 1) conserving imperiled species; 2) recovering ESA listed species; and 3) assisting federal, state, and local governments in conserving listed species, while meeting their social and economic objectives. The ESA is implemented by the Interior Department's United States Fish and Wildlife Service (USFWS) and the Commerce Department's National Marine Fisheries Service. As of 2012, there are approximately 1,400 species protected by the ESA in the United States.

Under the ESA there are two different categories for a species to be listed: threatened or endangered. A *threatened species*<sup>1</sup> is a species that is likely to be endangered in the foreseeable future, and an *endangered species*<sup>2</sup> is a species that is in danger of becoming extinct throughout all or a significant portion of its range. Under the ESA, a species is defined to include subspecies, varieties, and distinct populations<sup>3</sup>.

Additionally, a *candidate species*<sup>4</sup> is a species that meets the definition for threatened or endangered but higher priority species prohibit the USFWS from preparing a listing proposal. The USFWS uses a prioritization scheme, accounting for the distinctiveness of the species and threats to that species, to assign listing priorities. Further, for these candidate species, there is a candidate conservation program that is used to manage them so they do not require listing under the ESA.

## The Listing Process

Listing under the ESA is based on a species' status and threats to that species. Economic and social impacts are not allowed by law to be considered when making a listing decision (although economic impacts are considered when critical habitat is being proposed)<sup>5</sup>. The USFWS uses five different factors to assess whether or not to list a species. If any **one** of the following five factors is deemed to threaten the existence of a species, the USFWS is required by law to take action. The five factors are:

1. damage or destruction of habitat;
2. overutilization of the species for commercial, recreational, scientific, or educational purposes;
3. disease or predation causing major population declines,
4. inadequacy of existing protection; and
5. other natural or manmade factors causing population loss<sup>6</sup>.

While the USFWS is considering whether to list a species under the ESA, a formal peer-review process and at least one public comment period takes place<sup>7</sup>. The comment period is at least 60 days in length and the USFWS must make a final decision regarding the listing of a species within 12 months after announcing the proposed listing<sup>8</sup>. Additionally, the USFWS is required to use the best available science when making any listing decision.

## The Recovery Process

A species listed as threatened or endangered under the ESA is protected against "take." To take a listed species is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct."<sup>9</sup> Within take, "harm" is a broad term that includes habitat modification and degradation if it "kills or injures individuals of a listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."<sup>10</sup> As defined, harm can include habitat modification if it impacts the breeding, feeding, or sheltering of a listed species. It is important to avoid any actions that could constitute the taking of a listed species, as the ESA provides strong penalties for such takings. Violating the ESA can lead to civil and criminal penalties of up to \$50,000 and/or a year in prison<sup>11</sup>.

The recovery of a listed species is the process that stops its decline by reducing threats to enable the species to

persist in the wild. A recovery plan, which details the efforts needed to reverse population declines, is developed for each listed species. Recovery plans are generally created with the help of multiple partners and stakeholders. One of the more important aspects of a recovery plan is that it establishes a goal population for a species to become recovered, and a timeline for these actions to take place<sup>12</sup>. Restoration efforts may include actions such as the removal of invasive and or exotic species impacting the listed species and re-establishing natural processes that maintain habitat. In almost all cases, active research by biologists with USFWS or other organizations is conducted to monitor population status and recovery. Recovery plans outline actions that are believed necessary to conserve listed species. However, carrying out the actions detailed in a recovery plan is not mandatory. Further, a recovery plan does not commit resources for recovery. Thus, a recovery plan is only a roadmap, and actual recovery will require further actions.

The USFWS is also required to designate “critical habitat” for a listed species when it is considered necessary or when critical habitat can be determined<sup>13</sup>. Critical habitat identifies specific geographic areas and may include areas not currently occupied, but deemed necessary to conserve and recover a listed species<sup>14</sup>. Federal agencies are not allowed to take any actions that would result in the destruction or adverse modification of critical habitat. Additionally, a Federal agency cannot approve a permit or provide funding for private activities that would destroy or adversely impact critical habitat<sup>15</sup>. Thus, while critical habitat designations may not directly impact private landowners, they can still create restrictions on private activities that require government permits or for which landowners might receive government funds. There is a process through which restrictions from the ESA may be exempted if a Federal committee determines the benefits of the proposed action outweigh any impacts to the listed species, although this is rarely carried out<sup>16</sup>.

## Working with Stakeholders

The recovery of each listed species is a collaborative effort that involves numerous partners. Some of the partners involved in the ESA include federal, state, and local agencies; tribal governments; businesses and industry; and conservation groups. USFWS employees work closely with land managers to achieve goals that benefit species’ recoveries while meeting other management objectives. Additionally, landowners and scientists provide valuable information based on observations and research.

Often when a species is listed or proposed for listing under the ESA, the public has concerns about how a listing will impact them. Yet many programs and policies are in place to ensure a landowner’s well-being, while also benefiting listed species. Some of these include *candidate conservation agreement*, *candidate conservation agreement with assurances*, *safe harbor agreement*, *habitat conservation planning*, *the no surprises policy*, and *conservation banking*.

## Candidate Conservation Agreement

A voluntary conservation agreement between the USFWS and public or private parties to identify threats to candidate species (those species proposed for listing as threatened or endangered) and to develop a plan of action to improve conditions so that listing the species is not necessary. If actions

and monitoring efforts are a success, it may allow removal of the species from the candidate list (<http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf>).

## Candidate Conservation Agreement with Assurances<sup>17</sup>

This is similar to traditional conservation agreements, but expanded by creating incentives for non-federal landowners that are proactive and engage in conservation efforts. As a result of their efforts, landowners are given assurances from the USFWS that detail what will be expected in the future. The primary goal of this policy is to encourage landowner involvement in conservation, while reducing the worry of increased regulations if the species was ever to become listed—this policy removes the uncertainty of future regulatory restrictions to private landowners. This policy only applies to non-federal parties on non-federal land (<http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf>).

## Safe Harbor Agreement

This is a voluntary agreement between a landowner, group of landowners, or other parties that encourages management for listed species to promote recovery on non-Federal lands by providing assurances to property owners that the USFWS will not require any additional or different management from what is detailed in the safe harbor agreement without their prior consent. This is very similar to the candidate conservation agreement with assurances, but is used for species that have officially been listed as threatened or endangered. Additionally, at the end of the agreement enrollees can return the land to baseline conditions (those that were present at the beginning of the agreement) without consequence (<http://www.fws.gov/endangered/esa-library/pdf/harborqa.pdf>).

## Habitat Conservation Planning

Habitat Conservation Plans (HCP) provide for partnerships with non-Federal parties to conserve and recover listed species. An HCP is a required document as part of the application for an incidental take permit for listed species. Incidental take is any action that directly or indirectly impacts the survival of a listed species, but is incidental to an activity and not the purpose of that activity<sup>18</sup>. Anyone who will cause incidental take of a listed species needs a permit to do so. The HCP plan specifies how parties will reduce impacts to a listed species from their actions and why other actions were not applied that might have had less impact. Further, incidental take permits are not issued for take that is not truly incidental or when the impacts of taking are not minimized, and incidental take is not allowed if it will “appreciably” reduce the survival and recovery of the species<sup>19</sup>. Overall, the incidental take permit and resulting habitat conservation plan benefit parties by allowing them to proceed with an activity with some caveats. While individuals may create an HCP, the plans are usually created by groups of individuals or by industry in consultation with the USFWS as it is a significant effort to complete the plan (<http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>).

## The No Surprises Policy

This is an assurance that parties following an HCP will have no additional requirements imposed on them beyond that which is agreed to in their HCP (<http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>).

## Conservation Banks

These are designated private or public areas that are under permanent protection and are managed for listed species. Conservation banks act to off-set actions that have occurred in other parts of a listed species range and help to mitigate habitat loss. USFWS assigns “credits” for conservation banks that can be sold to developers or others that degrade existing habitat. The policy detailing how credits are determined is specific to each listed species and is detailed in the recovery plan for that listed species. Credits that are sold exist as a free market enterprise based on demand. These credits can create a significant economic incentive to conserve listed species ([http://www.fws.gov/endangered/esalibrary/pdf/conservation\\_banking.pdf](http://www.fws.gov/endangered/esalibrary/pdf/conservation_banking.pdf)).

## Conclusion

Obviously, the recovery process for a listed species is often not quick or easy as the circumstances leading to a species decline is likely complex and took many years to develop. Species that occur over a broad geographic area and are impacted primarily by habitat-related issues are perhaps most difficult to recover. In these cases, regulation alone is not sufficient for recovery, yet many species that have been listed under the ESA have experienced dramatic recoveries. This is particularly true for species impacted by pollution, overharvest, or had limited distributions. One of the most publicized successes of the ESA is the recovery of the bald eagle after DDT nearly led to its extinction. Other notable recoveries include the gray wolf and grizzly bear. Some species are not yet recovered, but are making significant progress, such as the Hawaiian duck and the whooping crane. Once these species meet the recovery objectives outlined in their recovery plan, the process of delisting can begin.

Unfortunately, even when some species have met their target objectives, the species have not been quickly delisted. In some cases, this is due to political or special interest group intervention for various reasons. This is obviously frustrating to many stakeholder groups and not particularly conducive to conservation as it often causes parties to cease cooperating. To overcome this, it is important to use the best available science in decision making and to temper emotions so the best decisions for society can be made.

Similar to any law or policy, the ESA has tradeoffs associated with it. It can impede business if actions that are considered to be taken are related to business, and it can

create a sense of distrust and fear among some stakeholders, which can impact their quality of life. This fear can alter their behavior in ways that actually do harm to the recovery of a listed species. Additionally, when a species is listed, states must yield some control over the management of that species to the federal government. This is not always desirable for state agencies and government. Carrying out the ESA, as with any law, also costs money. In some cases, this has been significant, in other cases, very little funding has been applied to species recovery. As you might imagine, circumstances between any two species vary widely; therefore, so do costs, conflict, impacts, and outcomes.

Despite the potential negatives of an ESA listing, high public support exists for the conservation of biological diversity. Yet the actual application and implementation of the ESA is continually debated. To successfully carry out the ESA and recover species, the USFWS will need cooperation from many stakeholders. With this cooperation and with an open and constructive dialogue, many misunderstandings regarding the ESA can be avoided. Additionally, a balance between ecological and economic considerations is possible. If you would like further information regarding the ESA, the USFWS has a web site that provides information (<http://www.fws.gov/endangered>). You might also contact your state wildlife agency with questions.

## References

- 1 16 U.S.C. § 1532(20)
- 2 16 U.S.C. § 1532(6)
- 3 16 U.S.C. § 1532(16)
- 4 16 U.S.C. 1533(b)(3)
- 5 16 U.S.C. § 1533(b)(1)(A), (b)(2)
- 6 16 U.S.C. § 1533(a)(1)(A)-(E)
- 7 16 U.S.C. § 1533(3)(D)(5)
- 8 16 U.S.C. § 1533(3)(D)(5)
- 9 16 U.S.C. § 1532(19)
- 10 50 C.F.R. 17.3
- 11 16 U.S.C. § 1540(b)
- 12 16 U.S.C. 1533(f)(1)(B)(i)-(iii)
- 13 16 U.S.C. § 1533 (a)(3)
- 14 16 U.S.C. § 1532(5)(A)
- 15 16 U.S.C. 1536(a)(2)
- 16 16 U.S.C. § 1536(a)(2), (e), (h)
- 17 50 C.F.R. § 17.22
- 18 16 U.S.C. § 1539(a)(2)(A)
- 19 16 U.S.C. § 1539(a)(1)(B) and (a)(2)(B)

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- It utilizes research from university, government, and other sources to help people make their own decisions.
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Issued in furtherance of Cooperative Extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Director of Cooperative Extension Service, Oklahoma State University, Stillwater, Oklahoma. This publication is printed and issued by Oklahoma State University as authorized by the Vice President, Dean, and Director of the Division of Agricultural Sciences and Natural Resources and has been prepared and distributed at a cost of 20 cents per copy. 0912 GH