

Endangered Species Act 101

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November 16, 2010



Endangered Species Act: Overview

- **Passed in 1973, during the heyday of American environmental legislation.**
- **ESA, and a variety of other environmental laws, like NEPA, Clean Air Act, today are still the key statutes governing many issues affecting development.**
- **ESA is prescriptive and overarching – presenting hurdles not envisioned when enacted more than 35 years ago.**

ENDANGERED SPECIES ACT OF 1973

AN ACT To provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act of 1973".

Section 3(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species...

Endangered Species Act: Overview

- **Act's three purposes (16 U.S.C. Section 1531 (b)):**
 - (1) To preserve ecosystems,
 - (2) To provide programs for conservation, and
 - (3) To achieve the purposes of treaties and conventions
- **Act is comprehensive conservation legislation**
- **One lofty goal: Bring imperiled species back to the point where they no longer need protection – then delist them**
- **Congress saw Act as means to address untempered economic growth and development leading to extinction**

Federal-State Roles

- Pre-ESA federal legislation was aimed primarily at species conservation on federal lands.
- ESA established pervasive federal role in species protection extending to “any person subject to the jurisdiction of the United States.”
- During the Congressional debates, question was whether to give the states primary responsibility for managing recovery plans and jurisdiction.
- State authority rejected in favor of the federal government having primary responsibility (with states encouraged to develop parallel conservation plans of their own).

Endangered Species Act: History

“Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed....[I]t forms a vital part of the heritage we all share as Americans.”



President Nixon

Good or Bad?

- Clearly, the Act's purposes were not bad idea as a matter of principle
- However, the Act's breadth and its impact on the management and use of public and private lands and waters has become increasingly controversial
- Some would argue that Congress did not provide enough tools to make the Act effective and seek to strengthen it



Results/Successes

Success of ESA depends on what measurements are used:

- Anecdotal evidence
- Species delisting
- Preventing extinction
- Population trend data
- Meeting recovery timelines



Results/Successes

According to a 2006 report by the Center for Biological Diversity concerning recovery trends in Northeastern U.S.:

- The Act has been 100 % successful in preventing extinction,
- 93% successful in stabilizing and moving species toward recovery, and
- Approximately 82% successful in meeting recovery timelines.

Measuring the Success of the Endangered Species Act,
Available at <http://www.esasuccess.org/reports/northeast/default.html>

Results/Successes

- Evidence of Success
 - Gray whales
 - Wolves in the Great Lakes
 - Grizzly bears in the Yellowstone ecosystem
 - Bald eagles
 - Alaska Examples– Aleutian Canada goose (listed 1967, recovered 2001), Arctic peregrine falcon (listed 1970, recovered 1994), American peregrine falcon (listed 1970, recovered 1999)



What kinds of measures?

Case study of the Aleutian Canada goose recovery:

- i) Removal of introduced Arctic foxes and red foxes from nesting island;
- ii) Release of birds to fox-free island to establish new breeding colonies;
- iii) Protection through its range from mortality due to hunting and disease; and
- iv) Protection and management of migration and wintering habitat



Administration

- Authority over marine species (including anadromous fish, salmon and beluga) – National Marine Fisheries Service (NMFS), Commerce Dept.
- Authority over fresh water fish and all other terrestrial species (including sea otter, polar bear and walrus) – U.S. Fish and Wildlife Service (FWS), Dept. of Interior



How does the Act Work?

Primary Elements of ESA conservation:

- Listing Threatened and Endangered Species (Section 4)
- Critical Habitat Designations (Section 4)
- Recovery Plans for Listed Species (Section 4)
- Coordination Between Federal and State Officials (Section 6)
- Federal Consultation Requirements (including Biological Opinions) (Section 7)
- Prohibition on Unauthorized “Takes” (Section 9)
- Incidental Take and Habitat Conservation Plans (Section 10)
- Enforcement and Citizen Suit Provisions (Section 11)

Listing under Section 4

Table 8.11.2. Mussels and Freshwater Snails Observed in the Hanford Reach of the Columbia River in 2003 and 2004

Common Name	Scientific Name	Status
Mussels		
California floater	<i>Anadonta californiensis</i>	State Candidate/Federal Species of Concern
Kennerly floater	<i>Anadonta kennerlyi</i>	
Oregon floater	<i>Anadonta oregonensis</i>	
Asiatic clam	<i>Corbicula fluminea</i>	
Western pearl mussel	<i>Margaritopsis falcata</i>	
Freshwater Snails		
Creeping ancyloid	<i>Ferrissia rivularis</i>	
Giant Columbia River limpet	<i>Fisherola (Lanx) nuttalli</i>	State Candidate
Giant Columbia River spire snail ^(a)	<i>Fluminicola (Lithoglyphus) columbiana</i>	State Candidate/Federal Species of Concern
Pebblesnail	<i>Fluminicola</i> sp.	
Olympia pebblesnail	<i>Fluminicola virens</i>	
Prairie fossaria	<i>Fossaria bulimoides</i>	
Golden fossaria	<i>Fossaria obtusa</i>	
Ash gyro	<i>Gyraulus parvus</i>	
Button sprite	<i>Menetus cvalliogyptus</i>	
Physa	<i>Physella</i> sp.	
Springsnail	<i>Pyrgulopsis</i> sp.	
Abbreviate pondsnail	<i>Stagnicola apicina</i>	
Artemesian rams-horn	<i>Vorticifex effusus effusus</i>	

(a) Not found during 2003-2004 surveys; found previously in the 1990s.

Section 4 Listing

- Section 4 (listing procedures) is the keystone of the Act
- Listing due to almost any natural or human-caused factors affecting a specie's existence
- During the first 20 years of the Act, issues typically arose around the effects of listing
- Since then, controversy is whether listing should occur in the first place
- Substantive (e.g., insufficient biological support) and procedural challenges (e.g., failure to disclose and comply with deadlines)

Section 4 Listing

Five criteria for listing decisions:

- The present or threatened destruction, modification, or curtailment of the species' habitat or range;
- Over-utilization of the species for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting the species' continued existence.



Definitions – Endangered or Threatened

- “*endangered*” means the species are “in danger of extinction throughout all or a significant portion of [their] range”
- “*threatened*” means the species that is “likely to become an endangered species within the foreseeable future through all or a portion of its range.”

Section 4 Listing

- Decisions to list are to be made “solely on the basis of the best scientific and commercial data available.”
- Data on economic impact is excluded -- “[E]conomic considerations have no relevance to determinations regarding the status of the species.” H.R. Conf. Rep. No. 97-8356 at 20.

Ways that Species are Listed

Two approaches:

- (1) Citizen petition (see below)
 - (2) Secretary's initiative (FWS or NMFS by formal agency rulemaking)
- A valid citizen petition must:
 - Clearly indicate the measure sought.
 - Give the scientific and common names of the species involved.
 - Contain a detailed narrative that justifies that recommended measures based on available information.
 - Provide information regarding status of the species in its range or significant portion thereof.
 - Provide supporting documentation in the form of scientific publications, letters, reports, etc.

Time Limits on Listing Decisions

Decisions on listings are made according to specified time periods.

- Once an agency receives a valid petition, “to the maximum extent practicable” the agency must make a finding within 90 days whether the petition presents “substantial scientific or commercial information” indicating that the petitioned action may be warranted.
- A finding that the petitioned action may be warranted triggers the 12-month finding process.
- Once the 90-day finding is made, the agency must determine whether (1) the petitioned action is warranted, (2) the petitioned action is not warranted, or (3) the petitioned action is warranted but precluded.

Emergency Listings

- The ESA also provides for emergency listing procedures that allow the FWS and NMFS to bypass the normal listing procedures.
- Can apply where there is a significant risk to the well-being of any species.
- Emergency rules expire 240 days after their effective date unless the agency complies with normal listing requirements in the interim.
- Emergency listing has been utilized sparingly.



Listing Priority Guidelines

- In 1979, Congress amended the ESA to require the listing agencies to establish “a ranking system” to identify species that would receive priority review in listing decisions.
- In 1983, FWS published its Listing Priority Guidelines establishing three criteria for prioritizing listing actions:
 - (1) The magnitude of the threat faced by the species.
 - (2) The immediacy of the threat faced by the species.
 - (3) The taxonomic distinctiveness of the species.

Administrative Steps for Listing

- Rulemaking process – propose and adopt regulations that have the effect of law
- “Candidate” species – before actual listing, seek biological information to assist with reviews
- Listing can be avoided with the adoption of conservation agreements

Critical Habitat



Section 4 Critical Habitat Designation and Protection

- Critical habitat is to be designated at the time of listing or within one year
- Critical habitat is the specific geographic area that contain the physical and biological features **essential** to a species' conservation
- Greatest threat to species is destruction of “natural habitats” -- *Tenn. Valley Authority v. Hill*



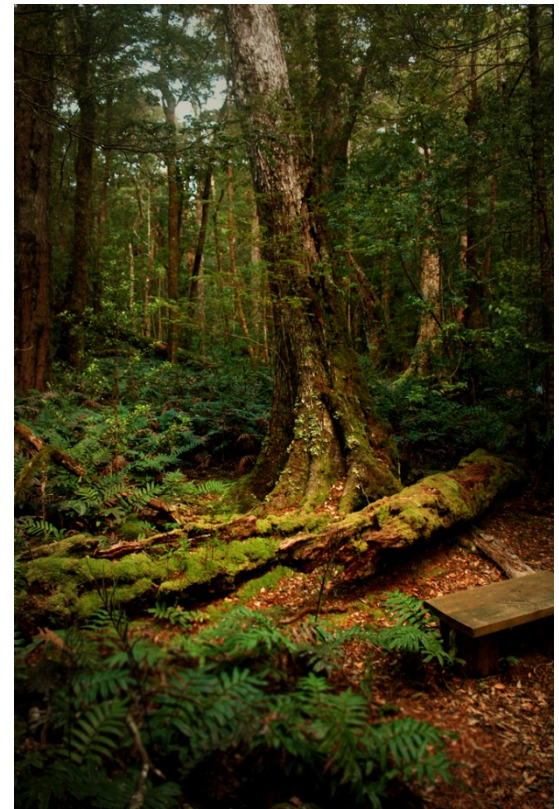
Section 4 Critical Habitat Designation and Protection

- Critical habitat designation must be based on best available scientific data and take into account the economic impact of the designation
- Only part of the Act that allows for consideration of economic impacts

Section 4 Critical Habitat Criteria

In making a critical habitat designation, the listing agency considers:

- (1) Space;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Breeding and nesting sites; and
- (5) Habitats protected due to their historical geographic or ecological distribution of the species.



Critical Habitat

- Agencies have broad discretion in excluding areas from critical habitat (Office of Solicitor Memo on Secretary's Authority to Exclude Areas under ESA (Section 4(b)(2)))
- Failure to designate CH does not invalidate a listing

Section 4 Critical Habitat Designation and Protection

- Agencies have shown an aversion to critical habitat
- Courts have stepped up to address these issues, renewed focus
- Future of CH designation is in state of flux
- Case-by-case Section 7 consultations
- Presents litigation risks

Recovery Plans



Recovery Plans for Listed Species

- Section 4(f) requires the adoption and implementation of “recovery plans” for each listed species (unless a finding is made that such plans will not benefit the species).
 - Agencies must give priority to species facing immediate threat from construction projects or other economic activities.
 - FWS and NMFS have issued joint regulations defining recovery as meaning improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in the Act.



Recovery Plans for Listed Species

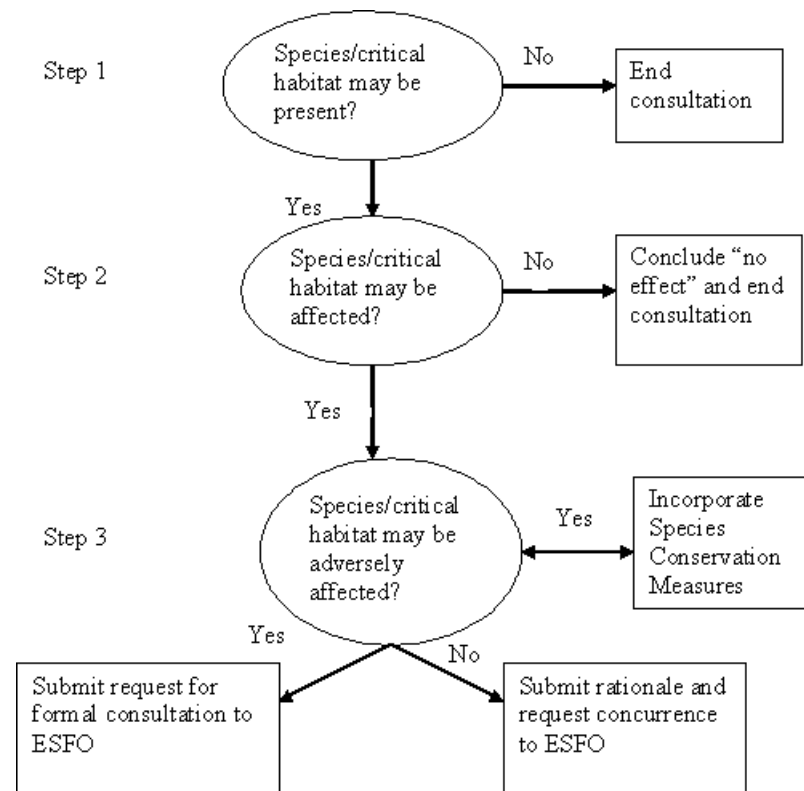
- Under the ESA, recovery plans must:
 - Describe any site-specific management actions necessary to conserve and ensure survival of the species;
 - Identify objective and measurable criteria that should result in the delisting of the species; and
 - Set time and cost estimates for the carrying out of the plan measures.
- Courts have given agencies significant flexibility in determining when recovery plans are created, and how they are designed.



What is the effect of Listing?

- Once listed, protective measures apply to the species and habitat -- such as recovery plans, cooperative agreements with federal state authorities
- Triggers Section 7 consultation requirement and conservation to limit adverse effects

Section 7 Consultation Requirements



Section 7 Consultation: What is it?

- Each federal agency has a duty not to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify critical habitat
- Applies to listed species as well as species proposed for listing
- Applies to discretionary actions that are “authorized, funded or carried out” by lead agency
- Applies to a wide range of public and private activities

Section 7 Consultation: What is the process?

Section 7 also establishes procedures for “consultation” by federal agencies with FWS and NMFS regarding agency actions.

- Whether formal or informal consultation is required depends on whether species may be present in the area affected by the agency action and whether or not the action may affect the species, based on initial analysis

Section 7 Consultation Process -- Informal

- If a listed species is present, then you need to determine whether your project will affect the species.
- If so, next step is consultation between the lead agency and the NMFS/FWS to determine if the project is likely to affect (or not affect) a listed species or critical habitat.
- If no, informal consultation is done.

Section 7 – Informal to Formal

- If adverse affects to species or critical habitat, you have a formal consultation.
- Formal consultation is begun by providing information about the nature of the anticipated effects.
- Time period for consultation is 90 days, with additional 45 days for the preparation of a Biological Opinion (BO).
- The BO expresses the agency's views on whether or not the action is likely to jeopardize the continued existence of the species or adversely modify critical habitat.
- A “jeopardy” BO must identify any reasonable and prudent alternatives, if they exist, to allow the project to move forward.

Section 7 Formal Consultation –Incidental Take

- If the proposed action leads to an incidental take (and no jeopardy of listed species will occur), a take can be authorized.
- Incidental take statement shields project proponent from liability under the ESA.
- It is designed to reduce the impact of the take.
- Lead federal agency has to carry out the terms and conditions.

Creative Solutions under Section 7

Agencies are open to solutions – case of short-tailed albatross and longline fisheries

- Birds hooked by longline vessel and died
- NMFS and FWS funded studies to evaluate seabird avoidance measures
- Proactive approach by industry to the development of a solution and regulations
- Inexpensive streamer lines were effective - reduced bycatch by 90 to 100%



Strategies for Effective Section 7 Consultation

- Engage in early coordination.
 - Helps to streamline consultation
 - Reduces the need to make project modifications
 - Enhance Section 7's role as recovery tool
 - Ideally, integrate proposed activities with the conservation needs before the proposed action is fully designed
- Define the proposed action appropriately
 - FWS or NMFS evaluate only the proposed action.
 - Defining/designing action in a way to avoid jeopardy determinations.
- For applicants, prepare a strong biological assessment
 - Present best available scientific evidence
 - Helps ensure biological opinion is legally sufficient.
- Reviewing the Biological Opinion
 - Regulations allow applicant/action agency to request draft biological opinion and provide comments. 50 C.F.R. § 402.14(g)(5).
 - Allows applicants to participate in ensuring adequate biological opinion.

Federal and State Cooperation



Federal-State Cooperation – Section 6

- States still play important cooperation role in implementation of ESA
 - Section 6 of ESA requires FWS and NMFS to cooperate with states in carrying out purposes and policies of ESA
 - Requires consultation between FWS/NMFS and state before any federal acquisition of land for species conservation
- Conflicts between ESA and State laws—ESA preempts inconsistent or less restrictive state laws regarding species conservation
 - Section 6(f) provides “any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemption or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.”

Section 9 Prohibition of Unauthorized Takes

- Section 9 of the ESA makes it illegal to “take” listed species within the United States, in the territorial seas of the United States, or upon the high seas.



Section 9 Prohibition of Unauthorized Takes

- “Take” is broadly defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”
 - The Department of the Interior has interpreted this definition as forbidding “significant habitat modification or degradation where it actually kills or injures wildlife.”
 - Definition of take has hindered public and private development and can result in restrictions on habitat modification.
 - Take prohibition does not apply to subsistence use by Alaska Natives or non-native permanent residents of Alaska Native villages.

Enforcement of ESA

- ESA has strong enforcement provisions and provides for citizen suit authority under §11.
- Tiered System of Penalties for Violation
- 1978 Amendment lowered intent requirement from willfully committed to “knowingly” committed.
- Take of listed species is allowed if done in self-defense.



Citizen Suits under the ESA

- Section 11(g) of ESA authorizes citizens to sue as “private attorneys general.”
 - Any person may commence a civil suit on his own behalf—
 - (1) To enjoin any person, including the United States . . . Who is alleged to be in violation of any provision of the ESA; or
 - (2) To compel the Secretary to apply section 4(d) or 9 prohibitions with respect to the taking of any resident endangered or threatened species; or
 - (3) Against the Secretary where there is alleged a failure to perform an act or duty under section 4 of the ESA which is not discretionary.
- Citizen suits must be preceded by 60-day notice of intent to file an ESA suit.

The Future of the Endangered Species Act

- What will future Congresses do with the Act?
- Amendments to ESA– nothing of significance in the last two decades.
- Controversy, partisanship, and conflict over application of the Act – can those tensions be harmonized to bring forth a common sense approach?
- Funding pressures may force changes to the structure of the ESA.

Alaska is Unique

- Relatively low number of listed species (compared to lower 48)
- But high visibility, complex issues
- Challenges lie ahead
 - Climate change
 - Lack of Data
 - Need to support subsistence lifestyle
 - Remote and broad range of habitat
 - High costs associated with recovery





Kathryn Kusske Floyd

- ❑ Lead environmental/regulatory counsel on infrastructure and resource development projects in Alaska, throughout the U.S. and cross-border
- ❑ Development of new rail lines, mining and energy projects, surface transportation corridors (including new truck-only tunnels and bridge crossings between the U.S. and Canada) and expansion of port, aviation and intermodal facilities
- ❑ Successful strategies for federal, state and local approvals and permits, streamlined National Environmental Policy Act (NEPA) compliance, ESA, Clean Water Act and historic preservation issues
- ❑ None of Kathryn's projects has ever been successfully challenged in court.

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