

Endangered Species Act Overview

This fact sheet was prepared by the National Sea Grant Law Center as part of the Agricultural and Food Law Consortium.



The Agricultural & Food Law Consortium, led by the National Agricultural Law Center, is a national, multi-institutional collaboration designed to enhance and expand the development and delivery of authoritative, timely, and objective agricultural and food law research and information.



This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.



Congress passed the Endangered Species Act (ESA) in 1973 to protect both imperiled species and their ecosystems, declaring that the Act's purpose is to provide a framework that conserves "the ecosystems upon which endangered species and threatened species depend" and establish "a program for the conservation of such endangered species and threatened species." (16 U.S.C. §1531). Further, the goal of the Act is to recover a species to the point where the protections of the Act are no longer necessary. (16 U.S.C. §1532(3)).

The ESA can present a regulatory hurdle for both new and established agriculture operations. If a species is already listed in the area, a prospective farmer may have trouble securing the necessary permits and approvals needed to get a farm up and running due to the potential impact on the species in question. The ESA can also have implications for established operations if a species is newly listed in the area. A broad overview of the Act's main provisions is given below.

Endangered Species Act

Primary federal law for species and habitat protection administered by the U.S. Fish & Wildlife Service (FWS) for terrestrial species and the National Marine Fisheries Service (NMFS) for designated marine species. The following five sections make up the main core of the ESA:

- Section 4 (listing, critical habitat designation, and recovery plans)
- Section 7 (federal agency consultation)
- Section 9 (take)
- Section 10 (exemptions, permits, and exceptions)
- Section 11 (penalties)

Section 4 listing, Section 9 take, and Section 7 consultation are discussed in more detail below.

Section 4 Listing

Two categories of species are eligible for ESA protection:

- An *endangered* species is “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).
- A *threatened* species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

FWS or NMFS may list a species as endangered or threatened on its own initiative or following a petition by an interested party. Factors the agency must consider in its listing determinations include whether the species’ habitat or range is presently or threatened to be destroyed, modified, or curtailed or if the species is being overutilized. Listing determinations must use “the best scientific and commercial data available.”

Section 9 Take

The ESA prohibits the “take” of listed species. Take means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

- Protects against actions by *any person*, including businesses and governmental entities.
- Protects *individual* members of fish or wildlife species.
- Applies to *endangered* species by statute. *Threatened* species can be protected by regulations.
- Includes both *lethal* and *non-lethal* actions. “Harass” and “harm” both include activities that interrupt a creature’s essential life functions of breeding, feeding, or sheltering.

Under the ESA there can be what are known as “incidental takings” – that is, the take is an unintended consequence of an otherwise legal activity.

- When the action has a federal governmental nexus, such as where an agency issues a permit for an activity, an Incidental Take Statement is required.
- Where the activity is private, an Incidental Take Permit under Section 10 of the ESA is required.

Section 7 Consultation

Section 7 Consultation is an administrative process when the federal agency proposing the action, known as the “action agency,” must consult with the “expert agency”- either FWS or NMFS- to assess the impact of its proposed action on the listed species or its critical habitat.

- Consultation protects against *jeopardy or adverse modification* – its aim is to ensure a federal agency through its proposed action does not jeopardize a species as a whole or destroy or adversely modify its critical habitat.
- Only applies to *federal actions*- any action *authorized, funded, or carried out* by a federal agency.

Consultation is a two-step process: informal and formal consultation.

Informal consultation:

- Optional process used to determine whether formal consultation is needed.
- Asks whether listed species are present in the area of the proposed action.

If yes, asks if it is possible that the proposed action “may adversely affect” listed species or its critical habitat.

If yes, then formal consultation is required.

Formal consultation:

- Expert agency produces a Biological Opinion (BiOp) based on the “best scientific and commercial data” provided by the action agency.
- BiOp considers if the action and its cumulative effects will result in *jeopardy or adverse modification*.
- The scope of the BiOp is limited to the proposed agency action – the BiOp can only address actions under the control of the permitting agency, and not other stressors to the species.
- If the activity will result in some take of the species, the BiOp might include an Incidental Take Statement.

Case Study: Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)

In this case, the snail darter, a tiny fish that can fit in the palm of one’s hand, was listed under the ESA as endangered in the middle of the Tellico Dam’s authorization, funding, and construction. The snail darter was listed in 1975, and in 1976, the dam was about 85% complete. The dam’s completion, according to the FWS, would totally destroy the snail darter’s habitat, leading to the species’ extinction.

In the decision, the Court emphasized that any federal action that can jeopardize a species can be stopped, including an almost complete dam. The Court stated:

“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”