

Endangered Species Act Section 4: Listing and Critical Habitat Designation

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



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Congress passed the Endangered Species Act (ESA) in 1973 to protect both imperiled species and their ecosystems. The ESA is administered by the U.S. Fish & Wildlife Service (FWS) for terrestrial species and the National Marine Fisheries Service (NMFS) for designated marine species. Section 4 of the ESA lays out how a species can be listed as either endangered or threatened under the Act, as well as how critical habitat is designated for listed species.

When considering whether to list a species, the agency has 3 choices:

- 1) list the species as endangered or threatened;
- 2) find that a listing is warranted but precluded;
- 3) find that listing is not warranted.

If the agency finds that the listing is warranted but precluded, the species goes on what is known as the candidate species list. A species can be listed either by the action of the agency on its own or pursuant to a public petition. (16 U.S.C. § 1533).

Once a species is listed, Section 4 of the ESA Act directs either FWS or NMFS to designate critical habitat, which are areas that are “essential for the conservation of the species,” but usually does “not include the entire geographical area” that the species could occupy. (16 U.S.C. § 1532(5)). Critical habitat can be either currently occupied or unoccupied by the species. Further, although the plain language of the ESA mandates the designation of critical habitat by FWS or NMFS, there are many species protected by the ESA for which critical habitat has not been designated.

In recent history, conservation groups have been using what have been termed “mega-petitions.” For instance, WildEarth Guardians (WEG) has submitted mega-petitions for 81 marine species, 206 mountain-prairie species, and 475 Southwestern species. Similarly, in 2010 the Center for Biological Diversity (CBD) led a group that submitted a petition for 404 Southeastern species. If petitioned, FWS or NMFS must meet certain statutory deadlines. The agency has 90 days to see if the petition contains substantial information and whether listing may be warranted. If the answer to this question is yes, the agency has 12 months to decide whether listing is warranted. (16 U.S.C. § 1533(b)(3)).

If the agency misses one of these deadlines, it leaves the agency open to a lawsuit. According to a 2017 U.S. Government Accountability Office report, the agencies were subject to 141 deadline suits from 2005-2015, most of which dealt with listing petitions. In 2011, the FWS entered into a mega-settlement with CBD and WEG that reconciled 85 legal actions and covered 779 species. In the settlement agreement, the FWS agreed to take action on the petitions of 757 species over a 7-year period, and CBD and WEG agreed to limit lawsuits against FWS to allow the agency to focus on the species covered by the agreement.

Section 4

Listing	Critical Habitat
Definitions	
<p>The term “endangered species” means “any species which is in danger of extinction throughout all or a significant portion of its range.” (16 U.S.C. § 1532(6)).</p> <p>The term “threatened species” means “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)).</p>	<p>The term “critical habitat” means:</p> <ul style="list-style-type: none"> • Current habitat with “those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection” and • Unoccupied habitat that is determined to be “essential for the conservation of the species.” (16 U.S.C. § 1532(5)).
Economics a Factor?	
<p>No- the agency must make listing determinations “solely on the basis of the best scientific and commercial data.” (16 U.S.C. § 1533(b)(1)(A)).</p>	<p>Yes- the designation must be based on the best scientific data, but the agency is required to consider the economic impacts of the designation. (16 U.S.C. § 1533(b)(2)).</p>
Other Factors for Determination	
<p>A species may be listed under the ESA based on a number of factors, including:</p> <ul style="list-style-type: none"> • The species’ habitat or range is presently or threatened to be destroyed, modified, or curtailed; • The species is overused for commercial, recreational, scientific, or educational purposes; • Disease or predation; • Inadequate existing regulatory mechanisms; • Other natural or manmade factors affecting the species’ continued existence. (16 U.S.C. § 1533(a)). 	<p>The agency must also consider any impact on national security and any other relevant impact.</p> <p>The agency also has the authority to exclude an area from critical habitat if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat,” unless the exclusion “will result in the extinction of the species concerned.” (16 U.S.C. § 1533(b)(2)).</p>
Effect of Designation	
<p>Once a species is listed, the agency can designate critical habitat and must develop and implement a recovery plan.</p> <p>Section 7 consultation applies by statute to all endangered and threatened species.</p> <p>The take prohibition under Section 9 applies to endangered animals by statute, and can be applied to threatened animals by regulation.</p>	<p>When critical habitat is designated on private property, it does not directly limit the landowner’s use of the property.</p> <p>However, critical habitat is subject to Section 7 consultation. Thus, if a landowner seeks federal funding or a federal permit (such as a Clean Water Act permit) for an action that may affect designated critical habitat, the landowner would have to work with the agency through the Section 7 consultation process.</p>