Endangered Species Act of 1973

The Endangered Species Act of 1973, 16 U.S.C. ch. 35 § 1531 et seq., was designed to protect critically imperiled species from extinction as a "consequence of economic growth and development untempered by adequate concern and conservation". The U.S. Supreme Court called it “the most comprehensive legislation for the preservation of endangered species enacted by any nation.” The purposes of the ESA are two-fold: to prevent extinction and to recover species to the point where the law's protections are not needed. It therefore “protect[s] species and the ecosystems upon which they depend" through different mechanisms. For example, section 4 requires the agencies overseeing the Act to designate imperiled species as threatened or endangered. Section 9 prohibits unlawful ‘take,’ of such species, which means to “harass, harm, hunt...” Section 7 directs federal agencies to use their authorities to help conserve listed species. The Act also serves as the enacting legislation to carry out the provisions outlined in The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The U.S. Supreme Court found that "the plain intent of Congress in enacting" the ESA "was to halt and reverse the trend toward species extinction, whatever the cost." The Act is administered by two federal agencies, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). FWS and NMFS have been delegated the authority to promulgate rules in the Code of Federal Regulations to implement the provisions of the Act. Authority to manage the MMPA was divided between the Secretary of the Interior through the U.S. Fish and Wildlife Service (FWS), and the Secretary of Commerce, which is delegated to the National Oceanic and Atmospheric Administration (NOAA). Subsequently, a third federal agency, the Marine Mammal Commission (MMC), was established to review existing policies and make recommendations to the FWS and the NOAA better implement the MMPA. Coordination between these three federal agencies is necessary in order to provide the best management practices for marine mammals.

The stated purpose of the Endangered Species Act is to protect species and also "the ecosystems upon which they depend." California historian Kevin Starr was more emphatic when he said: "The Endangered Species Act of 1972 is the Magna Carta of the environmental movement."[25]

The ESA is administered by two federal agencies, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). NMFS handles marine species, and the FWS has responsibility over freshwater fish and all other species. Species that occur in both habitats (e.g. sea turtles and Atlantic sturgeon) are jointly managed.

In 2014, the House of Representatives passed the 21st Century Endangered Species Transparency Act, which would require the government to disclose the data it uses to determine species classification.

Content of the ESA

The ESA consists of 17 sections. Key legal requirements of the ESA include:

The federal government must determine whether species are endangered or threatened. If so, they must list the species for protection under the ESA (Section 4).

If determinable, critical habitat must be designated for listed species (Section 4).

Absent certain limited situations (Section 10), it is illegal to “take” an endangered species (Section 9). “Take” can mean kill, harm, or harass (Section 3).

Federal agencies will Section 7 of the U.S. Endangered Species Act (ESA) requires cooperation among federal agencies to conserve endangered or threatened species. Section 7(a)(1) directs the Secretary of the Interior and all federal agencies to proactively use their authorities to conserve such species. This directive is often referred to as an ‘affirmative requirement.’ Section 7(a)(2) of the Act requires federal agencies to ensure their actions do not jeopardize listed species or adversely modify critical habitat. Federal agencies (referred to as “action agencies”) must consult with the Secretary of the Interior before taking any action which may affect listed species. Section 7(a)(2) is often referred to as the consultation process. use their authorities to conserve endangered species and threatened species (Section 7).

Federal agencies cannot jeopardize listed species' existence or destroy critical habitat (Section 7).

Any import, export, interstate, and foreign commerce of listed species is generally prohibited (Section 9).

Endangered fish or wildlife cannot be taken without a take permit. This also applies to certain threatened animals with section 4(d) rules (Section 10).

Listing process

After receiving a petition to list a species, the two federal agencies take the following steps, or rulemaking procedures, with each step being published in the Federal Register, the US government's official journal of proposed or adopted rules and regulations:

1. If a petition presents information that the species may be imperiled, a screening period of 90 days begins (interested persons and/or organization petitions only). If the petition does not present substantial information to support listing, it is denied.

2. If the information is substantial, a status review is started, which is a comprehensive assessment of a species' biological status and threats, with a result of : "warranted", "not warranted," or "warranted but precluded."

A finding of not warranted, the listing process ends.

Warranted finding means the agencies publish a 12-month finding (a proposed rule) within one year of the date of the petition, proposing to list the species as threatened or endangered. Comments are solicited from the public, and one or more public hearings may be held. Three expert opinions from appropriate and independent specialists may be included, but this is voluntary.

A "warranted but precluded" finding is automatically recycled back through the 12-month process indefinitely until a result of either "not warranted" or "warranted" is determined. The agencies monitor the status of any "warranted but precluded" species.

Essentially the "warranted but precluded" finding is a deferral added by the 1982 amendment to the ESA. It means other, higher-priority actions will take precedence. For example, an emergency listing of a rare plant growing in a wetland that is scheduled to be filled in for housing construction would be a "higher-priority".

3. Within another year, a final determination (a final rule) must be made on whether to list the species. The final rule time limit may be extended for 6 months and listings may be grouped together according to similar geography, threats, habitat or taxonomy.

Critical habitat

The provision of the law in Section 4 that establishes critical habitat is a regulatory link between habitat protection and recovery goals, requiring the identification and protection of all lands, water and air necessary to recover endangered species. To determine what exactly is critical habitat, the needs of open space for individual and population growth, food, water, light or other nutritional requirements, breeding sites, seed germination and dispersal needs, and lack of disturbances are considered.

As habitat loss is the primary threat to most imperiled species, the Endangered Species Act of 1973 allowed the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) to designate specific areas as protected "critical habitat" zones. In 1978, Congress amended the law to make critical habitat designation a mandatory requirement for all threatened and endangered species.

Critical habitats are required to contain "all areas essential to the conservation" of the imperiled species, and may be on private or public lands. The Fish and Wildlife Service has a policy limiting designation to lands and waters within the U.S. and both federal agencies may exclude essential areas if they determine that economic or other costs exceed the benefit. The ESA is mute about how such costs and benefits are to be determined.

All federal agencies are prohibited from authorizing, funding or carrying out actions that "destroy or adversely modify" critical habitats (Section 7(a) (2)). While the regulatory aspect of critical habitat does not apply directly to private and other non-federal landowners, large-scale development, logging and mining projects on private and state land typically require a federal permit and thus become subject to critical habitat regulations. Outside or in parallel with regulatory processes, critical habitats also focus and encourage voluntary actions such as land purchases, grant making, restoration, and establishment of reserves.

The ESA requires that critical habitat be designated at the time of or within one year of a species being placed on the endangered list. In practice, most designations occur several years after listing. Between 1978 and 1986 the FWS regularly designated critical habitat. In 1986 the Reagan Administration issued a regulation limiting the protective status of critical habitat. As a result, few critical habitats were designated between 1986 and the late 1990s. In the late 1990s and early 2000s, a series of court orders invalidated the Reagan regulations and forced the FWS and NMFS to designate several hundred critical habitats, especially in Hawaii, California and

other western states. Midwest and Eastern states received less critical habitat, primarily on rivers and coastlines.

Recovery plan

Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are required to create an Endangered Species Recovery Plan outlining the goals, tasks required, likely costs, and estimated timeline to recover endangered species (i.e., increase their numbers and improve their management to the point where they can be removed from the endangered list). The ESA does not specify when a recovery plan must be completed. The FWS has a policy specifying completion within three years of the species being listed, but the average time to completion is approximately six years.