

The Endangered Species Act Overview

December 2023





Topics

These slides will be made available to participants

- Outline of the ESA
- Listing & Classification Process and Definitions [Sec. 4]
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- More Conservation Tools



Outline of the ESA





Listing & Classification Process [Sec. 4]

Andy Ford

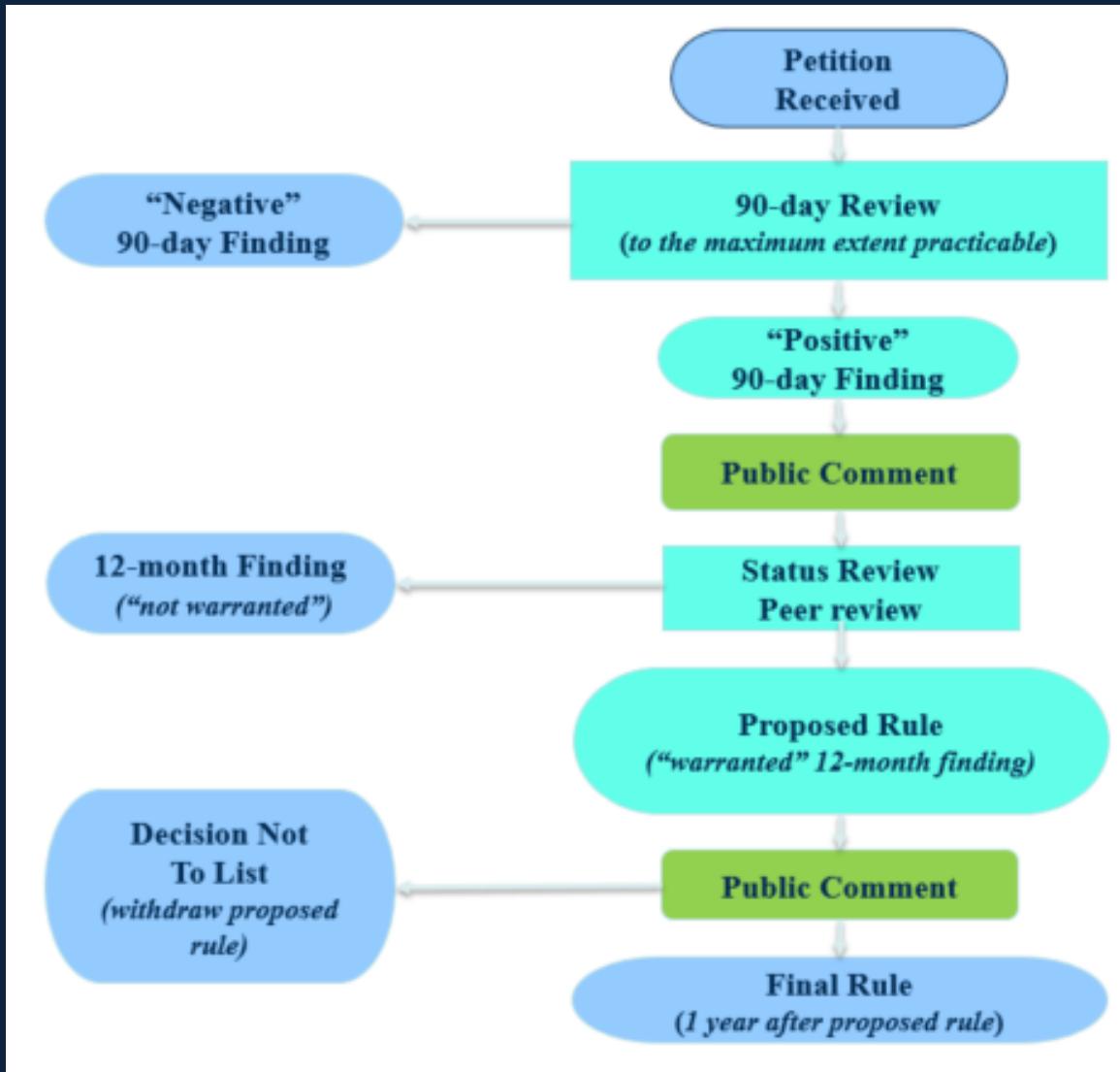
anthony_ford@fws.gov

Kerri Dikun

kerri_dikun@fws.gov

The steps we take to evaluate a petition to list, delist, or reclassify a species.

Public comment is always sought on a proposal to list or delist species under the ESA.





Listing & Classification Definitions [Sec. 4]

- **Endangered species:** any species which is **in danger of extinction** throughout all or a significant portion of its range.
- **Threatened species:** any species which is **likely to become an endangered species** within the foreseeable future throughout all or a significant portion of its range.
- **Proposed species:** one that is found to **warrant listing** as either threatened or endangered, or delisting, after completion of a status review and consideration of other protective conservation measures.
- **Candidate species:** any species **warranted for listing** but for which development of a proposed listing regulation is **precluded by other higher priority** listing activities.
- **Designated Critical Habitat:** the specific areas within the geographic area, occupied by the species at the time it was listed, that **contain the physical or biological features that are essential to the conservation of endangered and threatened species** and that may need special management or protection. Critical habitat may also include areas that were not occupied by the species at the time of listing but are essential to its conservation.
- **Experimental Population:** a special designation for a group of plants or animals that will be reintroduced in an area that is geographically isolated from other populations of the species. **Essential populations are treated as threatened species.** Non-essential populations (not on National Park Lands or the National Wildlife Refuge System) are treated as proposed for listing.



Listing & Classification Process [Sec. 4]

Sec. 4(d) Rule

Background: This rule gets its name from section 4(d) of the ESA, which [directs the Service to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.”](#) Using this authority, the Service extended the prohibition of take (applied to endangered species in Sec. 9 of the ESA) to all threatened species by regulation in 1978 (often referred to as the “blanket 4(d) rule”).

- This blanket 4(d) rule for threatened species can be modified by a species-specific 4(d) rule. [These “4\(d\) rules” take the place of the normal protections of the ESA](#) and typically target the protections offered by the 1978 “blanket” 4(d) rule.
- The intent of any 4(d) rule is to provide for the conservation of a threatened species by allowing regulatory flexibility under the ESA. A 4(d) rule allows the Service the flexibility to customize prohibitions and regulate activities to provide for the conservation of threatened species, potentially without involving all of the restrictions that apply to endangered species. The exact requirements depend on the species’ biology, conservation needs, and threats being managed.



Land Acquisition [Sec. 5]



The Secretary...shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species..." and "shall utilize land acquisition and other authority under the Fish and Wildlife Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

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- Is authorized to acquire...
 - Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters or interests therein...
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- Primarily for FWS National Wildlife Refuges and National Fish Hatcheries
 - Other authorities are used for FWS Recovery and HCP Land Acquisition Grants to States engaged in Section 6...
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Grants & Cooperative Agreements [Sec. 6]

Santiago Martin
santiago_martin@fws.gov

- Under section 6, USFWS is authorized to enter into agreements with any State that establishes and maintains an adequate and active program for the conservation of endangered and threatened species.
 - Once a State enters into such an agreement, USFWS is authorized to assist in, and provide Federal funding for, implementation of the State's conservation program.
 - TNFO provides financial assistance to TDEC and TWRA for implementation of State programs.
 - Tools:
 - Traditional Conservation Grants
 - Non-traditional Grants
 - HCP Planning Assistance Grants
 - HCP Land Acquisition Grants
 - Recovery Land Acquisition Grants
- Competitive Grants to State agencies with cooperative agreements



Grants & Cooperative Agreements [Sec. 6]



Traditional Cooperative Agreements usually focus on:

- Introduction of species into suitable habitats within their historic range
- Enhancement or restoration of habitat
- Surveys and inventories of habitats
- Species status surveys
- Propagation of animals and plants
- Research such as genetic analysis to determine genetic health and population structure
- Public education and outreach tools such as website development or coordination workshops with local landowners to address a specific threat to a species
- Monitoring of candidate, at-risk, and recently recovered species



Grants & Cooperative Agreements [Sec. 6]



Competitive Grants to State agencies with Sec. 6 cooperative agreements

- Funding may only be awarded to States – local governments such as counties or groups such as conservation organizations may work in partnership with a State.
- Multi-species, multi-partner, multi-state applications are more competitive

Conservation Planning Assistance Grants:

- Support the development and amendments of Habitat Conservation Plans (HCPs), Safe Harbor Agreements (SHAs), and Candidate Conservation Agreements with Assurances (CCAs)

Recovery Land Acquisition Grants:

- Loss of habitat is the primary threat to most listed species
- Land acquisition is identified in the Recovery Plan as the most effective and immediate need

Habitat Conservation Land Acquisition Grants:

- Funding to acquire land associated with approved and permitted HCPs.
- Grants do not fund the mitigation required of an HCP permittee; instead, they support land acquisition by the State or subrecipients that complement mitigation requirements



Federal Agency Conservation Mandate [Sec. 7(a)(1)]

All Federal agencies shall, in consultation with and with the assistance of the (Service), utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant of section 4 of this Act.

- Enables agencies to leverage additional funds for conservation measures by identifying them proactively.
- Decreases the probability of listing of species.
- Creates regulatory predictability through a conservation program that minimizes effects (reducing the need for additional RPMs) and allows for opportunities for compensatory mitigation to offset take.



Prohibition of Take [Sec. 9]



Except as provided for in other sections of the ESA, it is unlawful for any person to:

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- **Fish & Wildlife** (all members of the Animal Kingdom):
 - Take, meaning “to **harass**, **harm**, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
 - Possess, sell, deliver, carry, transport, or ship by any means.
 - **Plants:**
 - Remove or reduce to possession on **Federal property/jurisdiction**.
 - Maliciously damage endangered plants in Federal jurisdiction or **in violation of any State laws** (e.g., **trespassing**).
 - Possess, sell, deliver, carry, transport, or ship by any means.
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Prohibition of Take [Sec. 9]



Harass: an **intentional or negligent act or omission** which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

Example, a listed bird is intentionally chased away from an airport but is not actually injured or killed (if the chasing is **likely to actually injure or kill**, then it would be categorized as harm).

Harm: an act which **actually kills or injures** wildlife. Such an act may include **significant habitat modification or degradation where it actually kills or injures** wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering



Federal Agency Consultation Mandate [Sec. 7(a)(2)]



All Federal agencies shall, in consultation with and with the assistance of the Services, ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.

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- **Examples of Federal Nexus:**
 - TVA's Sec. 26a Regulations Permits,
 - USACE Regulatory Permits,
 - EPA's WIFIA Program,
 - TVA's operations of Normandy Dam
 - Consultations result in either a **USFWS concurrence on actions not likely to adversely affect listed species; or**
 - a **formal Biological Opinion** with an Incidental Take Statement exempting take from Section 9 prohibitions on harm.
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Federal Agency Consultation Mandate [Sec. 7(a)(2)]

Key Definitions

Action Area – all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

No Effect – the appropriate conclusion when the federal agency determines its proposed action will not affect a listed species or designated critical habitat.

May Affect – the appropriate conclusion when a proposed action may pose any effects, as defined by the regulations, on listed species or designated critical habitat. When the federal agency proposing the action determines that a "may affect" situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action "is not likely to adversely affect" listed species.

Effects of the Action – are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.



Scientific Research and Enhancement Permits [Sec. 10(a)(1)(A)]

SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

- (A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to (recovery).

Karen Marlowe
karen_marlowe@fws.gov

- **Scientific Research (aka Recovery) permits** are issued to allow for take as part of activities intended to foster the recovery of listed species. A typical use of a recovery permit is to allow for scientific research on a listed species in order to understand better the species' long-term survival needs.
 - Required when handling listed species for the purpose of monitoring or relocating outside of the scope of a Biological Opinion – Incidental Take Statement. For plants, only required if removing plants from Federal lands.



Enhancement of Survival Permits [Sec. 10(a)(1)(A)]

Safe Harbor Agreements

- Voluntary agreements with non-Federal property owners
- Contribute to the recovery of a particular species listed
- Address property owner's concerns about having a listed species listed on their land
- Property owners receive:
 - Enhancement of survival permit - covers conservation actions and on-going land management; and
 - Assurance that they will not be required to take additional conservation actions
 - Additionally, the permit authorizes a specific level of incidental take should the landowner choose to bring the property to its baseline condition

Candidate Conservation Agreements with Assurances

- Voluntary agreements with non-Federal property owners
- Addresses key threats to a particular unlisted at-risk species for a specific number of years – to provide a net conservation benefit
- Property owners receive:
 - Enhancement of survival permit that goes into effect if the species is listed
 - Assurance that they will not be required to take additional conservation actions should the species be listed
 - Additionally, the permit authorizes a specific level of incidental take of the covered species, should listing occur



SHAs and CCAAs



- FWS field office staff work with non-Federal landowners to develop CCAAs and SHAs.
- Each agreement includes monitoring requirements to track implementation and effectiveness of the conservation measures; progress reports are sent to field offices.
- Participants are motivated by the assurances they receive through these agreements and by the desire to benefit the species.



Incidental Take Permits for non-federal activities [Sec. 10(a)(1)(B)]

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- ✓ Do not have a Federal Nexus
 - ✓ Likely to result in Harm

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- To obtain an ITP for such take under this provision, an applicant must develop a **Habitat Conservation Plan (HCP)** that meets specific requirements identified in section 10(a)(2)(A) of the ESA and its implementing regulations
 - Voluntary and Applicant-Driven
 - listed and at-risk species in an ecosystem context
 - opportunity to establish creative partnerships between the public and private sectors
 - landscape level planning for a community, county, or even a State. It can set the future path for development.
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Non-federal Incidental Take Permits [Sec. 10(a)(1)(B)]

Jennifer Garland

(Jennifer_garland@fws.gov)

Getting Started with an HCP Questionnaire:

- What are the applicant's broad goals for the HCP?
- What are the general conservation goals of the Service for the HCP?
- What is the general area the plan will cover?
- What species are being considered for coverage?
- What types of activities may have effects on species?
- What types of conservation activities are being considered?
- What key information may be needed, but is unavailable?
- How will plan development be funded?
- How might plan implementation be funded?
- What permit duration is being sought and why?
- Who are the key stakeholders that should be included in the development process?
- How will key stakeholders be included in the development process?
- Etc.
 - HCP Handbook (2016) and HCP Planning Assistance Grants available.



Tools Available for At-Risk and Listed Species

- CCAAs
- SHAs
- HCPs
- Recovery Outlines and Plans
- 5-Year Reviews
- Traditional Section 6 Funding
- Conservation Planning Assistance Grants
- HCP Land Acquisition Grants
- Recovery Land Acquisition Grants
- Recovery Challenge Grants Funding }
- Recovery Implementation Funding }
- State of the Birds Funding

Santiago Martin
santiago_martin@fws.gov

Geoff Call
geoff_call@fws.gov



Recovery Funding



- Recovery Challenge
 - Congressional appropriations in FY23 (\$9.9M) and FY24 (\$9.2M) provides funding to partners
 - enhance and increase longstanding and new partnerships (e.g., States, academia, non-profits, etc.)
 - implement highest priority recovery actions for listed species and in particular for genetically-sound breeding, rearing, and reintroduction programs
- Recovery Implementation
 - available funding varies by Region, FY23 (\$12M) and FY24 (\$12M) overall
 - fund projects with States, academia, non-profits, private landowners, and others
 - implement high priority recovery tasks for listed species so known threats can be reduced or eliminated
- State of the Birds
 - Congressional appropriations approx. \$1.25M annually
 - majority to support Hawaiian birds, but a portion is awarded competitively for birds across the nation



Questions?