

# Endangered Species Act

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April 3, 2019

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## Overview of Presentation

- Describe structure of ESA
- Summarize ways in which ESA can affect activities and actions
- Describe practical pointers to resolve ESA concerns

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## ESA Purpose

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“To conserve threatened and endangered species and the ecosystems on which they depend” 16 USC § 1531(b)

“The most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” TVA v. Hill, 437 U.S. 153, 180 (1978)

Administered by the U.S. Fish and Wildlife Service (Pennsylvania Field Office in State College) and NOAA Fisheries

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## Structure of ESA

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- Species are considered for listing under the ESA (Section 4). Can be:
  - Endangered – danger of extinction
  - Threatened – likely to become endangered within foreseeable future
  - Candidate Species – waiting for further study and determination
- “Jeopardy” Prohibition and Requirements for Federal Agencies to Undertake “Consultation” (Section 7)
- “Take” Prohibition (Section 9)
- “Take” Authorization (Section 10)

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## ESA Section 4 – Listing a Species

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- May be initiated by USFWS or concerned citizens
- Using “best scientific and commercial information available,” species evaluated on five factors
  - Present or threatened destruction of habitat
  - Over-utilization
  - Disease or predation
  - Inadequacy of existing regulatory protections
  - Other natural or man-made factors

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## ESA Section 4 – Listing a Species

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### Other Important ESA Concepts

Different level of protection can be afforded to threatened species.

- Listing activities are prioritized
- Critical Habitat Designation
- Significant portion of its range

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## ESA Section 7 – “Jeopardy Prohibition”

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- Requirement that all federal agencies must “utilize their authorities in furtherance of the purposes of the ESA, by carrying out programs for the conservation of threatened and endangered species.”
- A federal agency cannot take any action which may “jeopardize” the continued existence of a threatened or endangered species or adversely modify or destroy designated critical habitat.
- “Actions” are broadly defined to include permits, approvals, and funding. 50 CFR §402.2

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## ESA Section 7 – Federal Agency “Consultation”

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- Federal agencies whose “actions” “may affect” listed species or their critical habitat must consult with USFWS. 16 USC § 1536(a)(2)
- Consultation can take several forms:
  - Informal consultation
  - Formal consultation
  - Conferencing
- Purpose of consultation process is to standardize a procedure to identify affects to listed species and critical habitats, and then avoid affects or receive approval to affect

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## **Informal Consultation Pursuant to Section 7 – The First Step**

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- To determine whether a listed or candidate species exists in action area, federal agency requests species list from USFWS.  
16 USC § 1536(c)
- If species present, federal agency (or designated non-federal representative) prepares a biological assessment.  
50 CFR § 402.12
- EA or EIS may serve as a BA if it includes the necessary information

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## **Outcomes of Informal Consultation as Set Forth in Biological Assessment**

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- Action or Project has no effect on species
  - Consultation is concluded
- Action or Project “not likely to adversely effect” species
  - If written concurrence from USFWS, consultation is concluded
- Action or Project “likely to adversely effect”
  - Formal consultation required

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## Formal Consultation Pursuant to Section 7

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- Consultation between federal agency and USFWS
- Results in a Biological Opinion which assesses impact of proposed action or activity to listed species and critical habitat

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## Biological Opinion

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- Formal, written opinion of USFWS whether the proposed federal action will “jeopardize” the continued existence of a listed species or result in the “destruction or adverse modification” of critical habitat. 50 CFR § 402.02

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## Biological Opinion Terms

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- Jeopardy – to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of species. 50 CFR § 402.02
- Destruction or adverse modification of critical habitat alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of the species. 50 CFR § 402.02

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## Biological Opinion Outcomes

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- No Jeopardy/No Destruction or Adverse Modification of Critical Habitat
  - Consultation process concludes
- Jeopardy/Destruction or Adverse Modification of Critical Habitat
  - USFWS identifies “Reasonable and Prudent Alternatives” – if these alternatives are not taken, action not permitted

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## Prohibitions on “Takes” from Private Actions – Section 9

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- Unlawful to “take” a listed species. 16 USC § 1538(a)(1)
- “Take” – to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 USC § 1532(19)
- “Harm” – an act which actually injures or kills wildlife. Such 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. 50 CFR § 17.3

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## Prohibitions on “Takes” from Private Actions – Section 9

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- “Harass” – the 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 and sheltering. 50 CFR § 17.3

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## “Incidental Take” Permits (Section 10)

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- Allows USFWS to issue “Incidental Take” permits if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 USC § 1539(a)(1)(B)
- The “take” must be “incidental” to the lawful activity.
- Requires the preparation and implementation of a Habitat Conservation Plan.

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## Habitat Conservation Plans

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### Contents Include:

- The impact that will result from the taking.
- Steps to be taken to minimize and mitigate impacts, and procedures to deal with unforeseen circumstances
- Other measures specified by USFWS  
50 CFR §§ 17.22(b)(1)(iii)
- Must be followed in order to receive Incidental Take Permit

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## **Practical Pointers to Resolve ESA Concerns**

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- Identify ESA concerns as early in the development of the project as possible. Resolution of conflicts take time.
- Use reputable and reliable consultants. Agencies have developed lists of qualified consultants.
- Section 7 process may expedite resolution of ESA conflicts faster than the Section 10 process

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## **Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, 139 S.Ct. 361 (2018)**

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- Can USFWS designate critical habitat when it is not presently habitat for endangered species?
- Is agency's consideration of economic impact of critical habitat designation reviewable by the Court?

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## Weyerhaeuser

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- Involved dusky gopher frog, living in only four locations in Mississippi.
- USFWS also designated 1,544 acre timber farm in Louisiana as “critical habitat,” but frogs not found there since 1965, and site would need some modification to become habitat.
- Louisiana site had potential to be habitat and was located at a distance from occupied sites to be a refuge from disease.

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## Weyerhaeuser

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- District Court upheld determination of critical habitat, and approved consideration of economical impact.
- Fifth Circuit affirmed. Found no “habitability requirement” and concluded that economic impact analysis was committed to agency discretion and therefore unreviewable.

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## Weyerhaeuser

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- Supreme Court vacated and remanded both determinations.
- ESA “does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species”
- Secretary’s determination of economic impact is reviewable under an abuse of discretion standard.

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## USFWS issues three proposed revisions to the implementation of ESA. 83 Fed. Reg. 35174-35201 (July 25, 2018)

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- Listing process can allow for economic information to be provided in listing process.
- Proposes framework for “foreseeable future” determinations when used in species listing.
- Critical habitat designations – additional factors considered before unoccupied areas evaluated.
- Eliminate automatic take prohibitions to threatened species.

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# THE END

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