

Creatures of Habitat: Endangered Species Act Overview & Legal Developments



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Endangered Species Act (ESA) , 16 U.S.C. §§ 1531-1544.



The ESA (12/28/73) is intended to conserve threatened and endangered species and the ecosystems upon which they depend and to provide a program for the conservation of the designated species

- Administered by the US Department of Interior, Fish and Wildlife Service (USFW), and the Commerce Department's National Marine Fisheries Service (NMFS), under NOAA
 - USFW is responsible for terrestrial & freshwater organisms (1300)
 - NMFS is responsible for marine life and marine mammals (Marine Mammal Protection Act) (82)
- USFW maintains a “candidate” list of species that meet factor(s) for listing, but proposal is “warranted but precluded” by higher priority listing actions (initiated by USFW, or by public petition). USFW assigns each candidate a “LPN” priority number between 1-12

Endangered Species Act (ESA) , 16 U.S.C. §§ 1531 *et. seq.* – **Listing Requirements**



- ESA Section 4: Listing required for “threatened” or “endangered” species
- Endangered – any species in danger of extinction now throughout all or a significant portion of its range
- Threatened – any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range
 - Factors:
 - ▶ Present/Threatened damage to or destruction of habitat or curtailment of range
 - ▶ Overutilization for commercial, recreational, scientific, or educational purposes
 - ▶ Disease or predation
 - ▶ Inadequacy of existing protective measures
 - ▶ Other natural or manmade factors affecting its continued existence
- Determination solely on the basis of the “best scientific and commercial data available” and taking into account State efforts to protect species

Endangered Species Act (ESA) , 16 U.S.C. §§ 1531 *et. seq.* – **Take Prohibition**



- ESA Section 9 prohibits the “take” of any endangered species by any “person”
 - “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”
 - A “person” is broadly defined to include an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department of the Federal or State government or any other entity subject to the jurisdiction of the U.S.
 - The USFW has promulgated rules to apply the take prohibition to threatened species (50 C.F.R. § 17.31), and the NMFS addresses this issue on an case-by-case basis

Houston Toad



ESA, Section 7 Consultation

Each Federal Agency is required to insure that any action “**authorized, funded, or carried out**” by such agency “**is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.**”
16 U.S.C. § 1537(a)(2)



Comal Springs Riffle Beetle

Potential triggers for Section 7 Consultation:

- Drilling activity on BLM or US Forest Service lands
- Drilling activity on BOEMRE-leased offshore lands
- Wetlands permits from the US Army Corps of Engineers for pipeline crossings or certain other oil and gas activities affecting waters of the US
- Texas Greenhouse Gas Permitting program administered by US EPA Region 6 (PSD Permitting) – criteria pollutant potential impacts (LCRA example)

Section 7 Consultation (continued)

- Informal Consultation
 - Determination that “not likely to adversely affect” species, supported by a biological assessment and Agency concurrence letter
- Formal Consultation
 - Determination that “may adversely affect” species, supported by biological opinion, reasonable and prudent measures, a no jeopardy opinion, and an incidental take statement.
 - Determination that species in “jeopardy,” then requires reasonably and prudent alternatives or Endangered Species Committee
- Agency determination may result in an incidental take statement under Section 7, or may require a incidental take permit under Section 10.

Section 10, Incidental Take Permit and Habitat Conservation Plans



- “Incidental take” where the take is a result from, but not the purpose of, carrying out an otherwise lawful activity
- Applicant submits a Habitat Conservation Plan (HCP) specifying –
 - Likely impact from the taking
 - What steps the Applicant will take to minimize/mitigate impacts, and related implementation funding
 - What alternatives to the taking were considered and the reasons why the alternatives are not being utilized
- Texas innovative example – the Dune Sagebrush Lizard Conservation Plan managed by the Texas Comptroller of Public Accounts

ESA Current List of Threatened/Endangered Species



Summary of Listed Species Listed Populations¹ and Recovery Plans as of Tue, 10 Jan 2012

Group	United States ³			Foreign			Total Listings (US and Foreign)	US Listings with active Recovery Plans ²
	Endangered	Threatened	Total Listings	Endangered	Threatened	Total Listings		
Mammals	70	13	83	256	20	276	359	59
Birds	76	16	92	204	14	218	310	85
Reptiles	13	23	36	66	16	82	118	36
Amphibians	15	10	25	8	1	9	34	17
Fishes	77	68	145	11	1	12	157	101
Clams	64	8	72	2	0	2	74	70
Snails	25	12	37	1	0	1	38	29
Insects	51	10	61	4	0	4	65	40
Arachnids	12	0	12	0	0	0	12	12
Crustaceans	19	3	22	0	0	0	22	18
Corals	0	2	2	0	0	0	2	0
Animal totals	422	165	587	552	52	604	1191	467
Flowering Plants	613	147	760	1	0	1	761	638
Conifers and Cycads	2	1	3	0	2	2	5	3
Ferns and Allies	27	2	29	0	0	0	29	26
Lichens	2	0	2	0	0	0	2	2
Plant totals	644	150	794	1	2	3	797	669
Grand totals	1066	315	1381	553	54	607	1988	1136

¹A listing has an E or a T in the "status" column of the tables in [50 CFR 17.11\(h\)](#) or [50 CFR 17.12\(h\)](#) (the "List of Endangered and Threatened Wildlife and Plants"). 15 animal species (10 in the U.S.³ and 5 Foreign) are counted more than once in the above table, primarily because these animals have distinct population segments (each with its own individual listing status).

USFW Settlement with WildEarth Guardians and the Center for Biological Diversity, Sept. 9, 2011



- The USFW is mandated to take action within specific timeframes under the ESA, including an initial 90-day petition for review, and if warranted, an additional 12-month period to evaluate and develop proposed regulations for public review and comment
- Agency had received an extraordinary number of petitions in recent years and had a significant backlog and missed statutorily defined deadlines
- NGOs sued Agency for missing deadlines and not taking action per the ESA
- Settlement with NGOs to address 250+ species on the candidate list on a 6 year schedule for consideration and potential listing as threatened or endangered
- The settlements provide for additional consideration of 485+ additional species that were the subject of 90-day petitions (new candidate species)
- NGOs are not prohibited from filing additional petitions for listing, but limited to maximum of 10 a year

USFW Settlement with WildEarth Guardians and the Center for Biological Diversity, Sept. 9, 2011 (cont.)



- Current list of 1381 domestic listed species could increase over the next 5 – 10 years to more than 2000 species (and counting)
 - 9/26/2011 – USFW added 374 aquatic, riparian, and wetland animals and plants to candidate list (from list of 404 from CBD petition)
- Careful consideration of potential impact to current and future operations, and assessment of state of scientific data related to particular species and potential need to invest in significant scientific, biological studies of species, and critical habitat/range
- Early assessment and participation in the listing process is important



Post-USFW Settlement ESA Considerations

- Monitor USFW and NOAA activity relating to petitions for listing under ESA
- Assess operation areas (current and future) to factor in species that may be of concern (candidate, threatened or endangered)
- Identify initiatives through Federal, State and Local Governments to participate in programs (CCAA, Habitat Mitigation Bank, Habitat Conservation Plan)
- Engage and participate in trade organizations that are involved in these issues to pool resources and funding for the science-based data and research that is critical to the listing determinations



Whooping Crane

ESA-related Websites and Resources

USFW Settlement and Work Plan:

http://www.fws.gov/endangered/improving_ESA/listing_workplan.html

USFW ESA Page (searchable database of species)

<http://www.fws.gov/endangered/index.html>

Texas Comptroller ESA website:

<http://texasahead.org/texasfirst/>

Federal Regulations Rule Proposals and Comments:

<http://www.regulations.gov/>