

Endangered Species Act

Purposes, Requirements, and Recent Court Decisions

Endangered Species Act

Section 2(b)

The purposes of the ESA are to provide a means whereby the *ecosystems* upon which *endangered species* and *threatened species* depend may be *conserved*, and to provide a program for *conservation* of such endangered and threatened species.

Endangered Species Act

Sections 3(6) and 3(19)

Endangered Species means any species which is in danger of extinction throughout all or a significant portion of its range.

Threatened Species means any species which is likely to become endangered within the foreseeable future.

Endangered Species Act

Section 4(a)(1)--Listing Criteria

1. The present or threatened destruction, modification, or curtailment of a species' habitat or range
2. Overutilization for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. The inadequacy of existing regulatory mechanisms
5. Other natural or manmade factors affecting the species' continued existence

Endangered Species Act

Section 2(b)

The purposes of the ESA are to provide a means whereby the *ecosystems* upon which *endangered species* and *threatened species* depend may be *conserved*, and to provide a program for *conservation* of such endangered and threatened species.

Endangered Species Act

Section 3(5)(A)

Critical habitat means the specific areas within the geographical area occupied by the endangered or threatened species . . . on which are found those physical or biological features essential to the *conservation* of the species and which may require special management considerations or protections.

Endangered Species Act

50 CFR § 424.12(b)--Criteria for determining Critical Habitat

NMFS must consider those physical and biological features that are essential to the conservation of the species and that may require special management considerations or protections.

Endangered Species Act

Critical Habitat Considerations

Space

Food, water, air, light, minerals, or other nutritional or physiological requirements

Cover or shelter

Sites for breeding, reproduction, or rearing of offspring

Habitats protected from disturbance or representative of the historic geographical distribution and ecological distribution of the species

Endangered Species Act

Section 2(b)

The purposes of the ESA are to provide a means whereby the *ecosystems* upon which *endangered species* and *threatened species* depend may be *conserved*, and to provide a program for *conservation* of such endangered and threatened species.

Endangered Species Act

Section 3(3)

Conserve and *conservation* mean to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary.

Endangered Species Act

Recovery Plans

The ESA requires the Secretary to develop and implement a recovery plan for the conservation and survival of listed species, unless he or she finds that a recovery plan will not promote conservation of the species.

Endangered Species Act

Recovery Plans

To the maximum extent practicable, recovery plans should include:

1. A description of site-specific management actions as may be necessary to achieve conservation and survival of the species
2. Objective and measurable criteria that, if met, would result in the de-listing of the species
3. Time and cost estimates to carry out the plan measures, and to achieve intermediate steps toward the goal of recovery

Endangered Species Act

Section 7

Each Federal agency shall, in consultation with the Secretary, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize a listed species or adversely modify critical habitat.

Endangered Species Act

Section 7 Consultations

An agency proposing to undertake activities that are "actions" for purposes of the ESA must screen the actions to determine the level of consultation required.

Development of Biological Assessment (BA) to determine whether the action is "likely to adversely affect" a listed species or designated critical habitat.

Endangered Species Act

Section 7 Consultations

If a determination of “likely to adversely affect” in the BA, then formal consultation is required.

Formal Consultation results in the development of a Biological Opinion (BiOp), which is a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.

Endangered Species Act

Biological Opinion

Biological Opinions must include a summary of the information on which the opinion is based, a detailed discussion of the effects of the action on listed species or critical habitat, and the Service's opinion as to whether the action is *likely to jeopardize* the continued existence of a listed species or result in *destruction or adverse modification of critical habitat*.

Endangered Species Act

50 CFR § 402.02--Regulatory Definition

To *jeopardize* the continued existence of a listed species means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the listed species in the wild by reducing the reproduction, numbers, or distribution of the species.

Endangered Species Act

50 CFR § 402.02--Regulatory Definition

Destruction or adverse modification of critical habitat means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Endangered Species Act

Recent litigation

Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004)

and

National Wildlife Federation v. NMFS, 481 F.3d 1224 (9th Cir. 2007)

Endangered Species Act

"Each Federal agency shall . . . insure 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 [critical] habitat** of such species"

Endangered Species Act

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for **both** the survival **and** recovery of a listed species.

Endangered Species Act

FWS prepared a series of biological opinions on the effects of Forest Service timber sales in Northwest national forests. The biological opinions concluded that the sales were not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for the threatened Northern spotted owl. Environmental groups filed suit to enjoin the sales.

Endangered Species Act

In *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), the Ninth Circuit Court of Appeals found that the regulatory definition of "destroy or adversely modify critical habitat" was inconsistent with the Endangered Species Act and invalidated the biological opinions.

Endangered Species Act

The Ninth Circuit found that under the regulation, destruction or adverse modification would not occur unless the Federal action appreciably diminishes the value of the critical habitat for the species' *survival*, even if the Federal action appreciably diminishes the value of the critical habitat for the species' *recovery*. The Court found this was an impermissible interpretation of the ESA.

Endangered Species Act

"The ESA also defines critical habitat as including 'the specific areas . . . occupied by the species . . . which are . . . essential to the *conservation* of the species' and the 'specific areas outside the geographical area occupied by the species . . . that . . . are essential for the *conservation* of the species" 16 U.S.C. §1532(5)(A) (emphases added). By these definitions, it is clear that Congress intended that conservation and survival be two different (though complementary) goals of the ESA."

Endangered Species Act

"Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival. The regulation, by contrast, finds that adverse modification to critical habitat can only occur when there is so much critical habitat lost that a species' very survival is threatened. The agency's interpretation would drastically narrow the scope of protection commanded by Congress under the ESA."

Endangered Species Act

"We . . . hold that the regulatory definition of 'adverse modification' gives too little protection to designated critical habitat."

"The critical habitat analysis is therefore irredeemably flawed."

Endangered Species Act

National Marine Fisheries Service prepared a biological opinion (BiOp) in 2004 for endangered salmon and steelhead. BiOp was challenged on several grounds, including that the agency did not consider recovery needs in its jeopardy analysis, in *National Wildlife Federation v. NMFS*, 481 F.3d 1224 (9th Cir. 2007)

Endangered Species Act

"The question before us is . . . whether, as part of the consultation process, NMFS must conduct a full analysis of [recovery] risks and their impacts on the listed species' continued existence. Although recovery planning alone may not *often* prompt a jeopardy finding, NMFS's analytical omission here may not be dismissed as harmless: the highly precarious status of the listed fishes at issue raises a substantial possibility that considering recovery impacts could change the jeopardy analysis. The only reasonable interpretation of the jeopardy regulation requires NMFS to consider recovery impacts as well as survival."

Endangered Species Act

NMFS Reaction

NMFS issued a memorandum on November 7, 2005, requiring the agency to comply with *Gifford Pinchot*. Biological Opinions of NMFS now rely on statutory requirements of the ESA and not the regulatory definition for "destruction or adverse modification."