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The Legal Framework of the Endangered Species Act (ESA)

The Endangered Species Act of 1973 (ESA or the Act) (16 U.S.C. §§ 1531 *et seq.*) aims to protect threatened and endangered fish, wildlife, and plants from extinction. In its findings, Congress recognized the “esthetic, ecological, educational, historical, recreational, and scientific value” that threatened and endangered species provide. The Act creates a framework for facilitating recovery and conservation of endangered and threatened species and minimizing the effect of federal and private actions on these species and their habitats. Listing a species as endangered or threatened triggers many of the Act’s protections and, accordingly, frequently spawns legal disputes.

Under the ESA, the U.S. Fish and Wildlife Service (FWS) within the Department of the Interior manages terrestrial, freshwater, and catadromous species, and the National Marine Fisheries Service (NMFS) within the Department of Commerce manages marine species and anadromous fish. (This In Focus refers to “the Secretary” to mean either the Secretary of the Interior or the Secretary of Commerce, as applicable.) This In Focus provides an overview of the legal framework governing ESA regulation and enforcement.

Listing

To receive protection under the ESA, a species generally must be listed as endangered or threatened. *Endangered species* are those species in danger of extinction throughout all or a significant portion of their range. *Threatened species* are those species likely to become endangered within the foreseeable future in all or a significant portion of their range. *Candidate species* are species being considered for listing but not yet the subject of a proposed rule. The Secretary may list species, subspecies, or distinct population segments (DPS) of a species.

Selection of Species for Review

The Secretary may review a species for listing on his own or pursuant to a petition. Under Section 4(b), any person or entity other than a federal agency may petition to add or remove a species from the list of endangered or threatened species. Within 90 days (“to the maximum extent practicable”), the Secretary must determine whether the petition provides sufficient information to warrant further action. If the petition is sufficient, the Secretary must decide within 12 months after receiving the petition that listing is warranted, not warranted, or warranted but precluded from immediate action due to priorities for listing other species. The Secretary must monitor any “warranted but precluded” species and promptly use his emergency powers to list the species if needed to prevent a significant risk to the species’ well-being.

Initial Listing

To list a species under Sections 4(a) and (c), the Secretary must determine that the species is endangered or threatened because of habitat destruction, overutilization, disease or

predation, inadequate existing regulatory mechanisms, or any other natural or manmade factors that affect its continued existence. Under Section 4(b), the Secretary determines whether a species is endangered or threatened based solely on the best scientific and commercial data available after reviewing the status of the species and accounting for existing conservation efforts.

Critical Habitat

Concurrently with listing a species, Section 4(a)(3) requires the Secretary—“to the maximum extent prudent and determinable”—to designate critical habitat for the species. *Critical habitat* is the area occupied by the species when it is listed that contains physical or biological features essential to the conservation of the species and that may require special management or protection, as well as specific areas not occupied by the species when it is listed that are essential for the conservation of the species. Critical habitat determinations must be based on the best scientific data available and account for economic effects, effects on national security, and other relevant effects.

Recovery Plans

Section 4(f) requires the Secretary to develop and implement a recovery plan for listed species, unless he finds a plan will not promote the conservation of the species. The recovery plan is to include any site-specific management actions needed to achieve the species’ conservation and survival, the estimated time and cost associated with these actions, and specific criteria for determining that the species has recovered and may be delisted.

Reclassifications and Delisting

Section 4(c) requires the Secretary to review all of the listed species at least once every five years to determine whether any of them should be reclassified or delisted. A citizen petition may also initiate reclassification or delisting to change a species’ listing status. The same process and criteria are used to reclassify or delist a species as to list it. The Secretary may reclassify a species’ status from threatened to endangered (uplist) or endangered to threatened (downlist), or he may delist the species entirely if he determines the species has sufficiently recovered that it is no longer threatened or endangered.

Post-Delisting Monitoring

Delisted species are entrusted to the management of the state in which they are found. Under Section 4(g), the Secretary coordinates with the relevant states to develop a system to monitor the species for at least five years after delisting to ensure its continued survival. If monitoring identifies a significant risk to the well-being of the species, the Secretary must promptly use his emergency powers under Section 4(b)(7) to relist the species.

Prohibited Acts

In general, Section 9 of the ESA prohibits persons from importing, exporting, transporting, or selling endangered species of fish, wildlife, and plants in interstate or foreign commerce. It is also illegal to “take” an endangered fish or wildlife species or possess taken species. Take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” or an attempt to do the same. It is unlawful to import or export endangered plant species from the United States, or to remove, possess or maliciously damage or destroy such species on federal land or any other area in knowing violation of a state law or regulation.

Section 4(d) of the ESA requires the Secretary to promulgate regulations tailored to conserve threatened species. The regulations may extend the prohibitions for endangered species to threatened ones, except that prohibitions on taking the species may be limited by a cooperative agreement with a state. FWS promulgated a rule, referred to the “blanket 4d rule,” which extends the prohibitions for endangered species to threatened species unless FWS promulgates a specific Section 4(d) rule for the species. NMFS has taken a different approach and aims to promulgate a Section 4(d) rule for each threatened species.

Further restrictions apply to international trade. Section 9(c) prohibits trading or possessing specimens in contravention of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES aims to ensure that trading wild animal and plant specimens does not threaten their survival. For more information on CITES, see CRS Report RL32751, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, by Pervaze A. Sheikh. The ESA also generally requires a license for and regulates commercial imports and exports of legal wildlife, fish, plants, or elephant ivory.

Exceptions: Permits and Exemptions

Section 10 allows for certain limited exceptions to the ESA’s prohibitions for private actions. The Secretary may issue permits to engage in prohibited acts for scientific purposes or to enhance the survival of the species. He may also issue permits to take endangered wildlife or fish if the take is *incidental* to an otherwise lawful activity. Incidental take permit applications must include a habitat conservation plan detailing the expected effect on the species, how the holder will minimize and mitigate these effects, the alternatives considered and reasons for rejecting them, and any other information the Secretary considers necessary or appropriate. To issue the permit, the Secretary must find that the taking will be incidental, the effects of the taking will be minimized and mitigated, the conservation plan is adequately funded, and the taking will not appreciably reduce the likelihood of the species’ survival and recovery. The Secretary may impose terms and conditions on the permit, and he needs to revoke the permit if the holder is not complying with its terms and conditions.

The Secretary may also exempt persons from the prohibitions of Section 9 for up to one year if (1) they entered into contractual obligations before receiving notice that the species was being considered for listing and (2) complying would cause “undue economic hardship.”

Section 7 Consultation

The Section 7 consultation process is meant to ensure that federal agency actions and private actions with a federal nexus (e.g., requiring federal approvals, permits, or funding) are “not likely to jeopardize the continued existence” of a listed species or adversely modify critical habitat. Before proceeding with the action, the federal agency must determine whether any listed species may be present and affected. Through a biological assessment (BA) and, optionally, informal consultation with the Secretary, the federal agency determines if the listed species is likely to be adversely affected by the action. If not, the Secretary issues a concurrence letter. If so, the federal agency initiates formal consultation with the Secretary. After formal consultation, the Secretary issues a biological opinion (BiOp) that finds either (1) no likely adverse effect from the action, with terms and conditions for any incidental take, or (2) the action will likely jeopardize the species or adversely modify critical habitat, with suggestions for any reasonable and prudent alternatives to avoid the harm. If none exist, the federal agency must forgo the action, risk violating the ESA, or obtain a formal exemption from a committee of federal officials created by the ESA (the “God Squad”).

Cooperation with the States

Section 6 requires the federal government to cooperate with the states “to the maximum extent practicable” to implement the ESA. States may propose state programs to conserve endangered and threatened species. The Secretary must enter into cooperative agreements with the states to help implement the program if he finds that the state program is an active and adequate conservation program that complies with the Act. States with cooperative agreements are eligible for federal financial assistance.

Penalties and Enforcement

Section 11 requires the Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating to enforce the Act and related regulations or permits. The Act also allows for citizen suits to enjoin violators and compel the Secretary to act in certain instances after providing 60 days’ notice to the Secretary and any alleged violator. Any person who provides information that leads to an arrest, criminal conviction, civil penalty, or forfeiture in connection with an ESA violation is entitled to a reward and coverage of certain incidental costs.

Violators may incur civil or criminal penalties. Following a hearing, the Secretary may impose civil penalties, which may be enforced through the U.S. district courts. Criminal penalties for knowing violations may include fines, imprisonment, or revocation of related leases, licenses, and permits. In addition, specimens and equipment used in connection with violating the Act may be subject to seizure and forfeiture.

For more information on the ESA, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by Pervaze A. Sheikh.

Erin H. Ward, Legislative Attorney

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