

## **Overview of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.***

The authority for implementing and executing the ESA is delegated to the Department of the Interior and, within that agency, to the U.S. Fish and Wildlife Service (FWS). The National Marine Fisheries Service (NMFS), operating under the Department of Commerce, has similar powers for protecting and conserving marine life and anadromous fish. FWS and NMFS are responsible for determining which species are listed as threatened or endangered and delineating critical habitats necessary for their survival.

The ESA declares that all federal departments and agencies must seek to conserve endangered and threatened species and to “utilize their authorities in furtherance of the purposes of this Act” (ESA Section 2(c), 16 U.S.C. § 1531(c)). The Act sets forth the procedure for determining whether a species is threatened or endangered, resulting in a published list of all species determined to be threatened or endangered, and designating critical habitat for listed species (ESA Section 4, 16 U.S.C. § 1533).

Federal agencies must ensure that any action authorized, funded, or carried out by the agency (referred to as an “agency action”) is (1) “not likely to jeopardize the continued existence” of any listed species, or (2) result in the destruction or adverse modification of the “designated critical habitat” of a listed species, unless the agency has been granted an exemption (ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2)). Federal agencies are required to consult with FWS or NMFS before implementing an action that may affect listed species or their critical habitat (ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2)). These requirements also apply with respect to species that are proposed for listing or adverse modification of critical habitat proposed to be designated for such species (ESA Section 7(a)(4), 16 U.S.C. § 1536(a)(4)).

### ***Federal Agency Obligation - Section 7 Consultation***

Section 7 consultation begins with a determination as to whether any species which is listed or is proposed for listing as threatened or endangered “may be present” in the area of the proposed action. If no such species are present, consultation ends (an informal process). If there may be such species present, then the federal agency must conduct a *biological assessment* for the purpose of identifying any threatened or endangered species that are likely to be affected by the proposed federal action (ESA Section 7(c)(1), 16 U.S.C. § 1536(c)(1)). The biological assessment may be undertaken as part of the federal agency’s compliance with NEPA (*id.*).

Following the submission of the biological assessment, FWS or NMFS must provide a “written statement setting forth the [agency’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” (ESA Section 7(b)(3), 16 U.S.C. § 1536(b)(3)). If FWS or NMFS concludes that the proposed action is likely to jeopardize the continued existence of the species or would result in the destruction or adverse modification of critical habitat, then FWS or NMFS must suggest *reasonable and prudent alternatives* that would not affect listed species or critical habitat and that could be taken by the federal agency or applicant in implementing the proposed action (*id.*). If the proposed federal action would not result in jeopardy or adverse modification, or if reasonable and prudent alternatives are taken to avoid jeopardy or adverse modification, FWS or NMFS can authorize the taking of a listed species incidental to the proposed action

(ESA Section 7(b)(4), 16 U.S. C. § 1536(b)(4)). If such taking is authorized, then FWS or NMFS must specify the “reasonable and prudent measures” that the agency considers necessary or appropriate to minimize the impact to the species (ESA Section 7(b)(4)(C)(ii), 16 U.S. C. § 1536(b)(4)(C)(ii)).

*Applicants for Federal Permits or Licenses.* With respect to applicants for federal permits or licenses, Section 7 requires that, a federal agency must consult with FWS or NMFS on any prospective agency action at the request of and in cooperation with the prospective permit or license applicant if the applicant has reason to believe that a listed species may be present in the area affected by the project and that implementation of such action will likely affect such species (ESA Section 7(a)(3), 16 U.S. C. § 1536(a)(3)). Further, after initiation of consultation, the federal agency and the permit or license applicant “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would not” jeopardize the continued existence of the species or would result in the destruction or adverse modification of critical habitat” (ESA Section 7(d), 16 U.S. C. § 1536(d)).

*Exemptions.* After consultation, the federal agency or permit or license applicant may apply for an *exemption* for the proposed agency action if the biological opinion indicates that the action would jeopardize the continued existence of the species or would result in the destruction or adverse modification of critical habitat ((ESA Section 7(g), 16 U.S. C. § 1536(g)). The request for an exemption is considered by the Endangered Species Committee (informally referred to as the “God Committee”) which must address issues such as whether the proposed agency action is in the public interest and is of national or regional significance (*id.*). Further details regarding exemptions can be found in ESA Section 7(h) – (p), 16 U.S.C. §1536(h) – (p).

### ***General Prohibition and Permit Requirements***

While ESA Section 7 deals with federal agency obligations, ESA Section 9 prohibits “any person”<sup>1</sup> from importing, exporting, taking<sup>2</sup>, possessing, selling, or transporting any endangered fish, wildlife, or plants or to violate any regulation pertaining to threatened fish, wildlife, or plants ((ESA Section 9(a), 16 U.S. C. § 1538(a)). However, FWS or NMFS may permit (1) any act prohibited by Section 9 for scientific purposes or to enhance the propagation or survival of the affected species, or (2) any taking otherwise prohibited in Section 9 if the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (ESA Section 10(a)(1), 16 U.S. C. § 1539(a)(1)).

No permit may be issued unless the permit applicant submits a habitat conservation plan that specifies the impact that would likely result from the taking, what steps the applicant would take to minimize and mitigate such impacts, the funding that would be available to implement mitigation, what alternative actions the applicant considered, and why such alternatives are not being utilized (ESA Section

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<sup>1</sup> “Person” means an individual, corporation, or other private entity or any officer, employee, department, or instrumentality of the federal government, state government, or municipal government (ESA Section 3(12), 16 U.S.C. § 1532(12)).

<sup>2</sup> “Taking” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (ESA Section 3(18), 16 U.S.C. § 1532(18)).

10(a)(2)(A), 16 U.S. C. § 1539(a)(2)(A)). FWS or NMFS may issue a permit only upon a finding that the taking would be incidental, the applicant will minimize and mitigate the impacts of the taking to the fullest extent possible, the applicant will ensure that adequate funding for the plan will be available, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild (ESA Section 10(a)(2)(B), 16 U.S. C. § 1539(a)(2)(B)).

### ***Penalties and Citizen Suits***

Any person violating ESA Section 9 may be assessed a civil penalty of not more than \$12,000 for each violation and may be subject to criminal prosecution (ESA Section 11(a) and (b), 16 U.S. C. § 1540(a) and (b)). There is also a citizen suit provision that allows any person to commence a civil suit to enjoin any person, including the United States, who is alleged to be in violation of the ESA (ESA Section 11(g), 16 U.S. C. § 1540(g)).