

Lesson Overview

This lesson describes the Endangered Species Act (ESA) and how it affects FEMA's actions.

Lesson Objectives

At the end of this lesson, you will be able to:

- Describe the key components of the ESA.
 - Describe the responsibilities of FEMA and other parties under the act.
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Laws and Executive Orders: Biology

This lesson will introduce a key piece of legislation designed to protect endangered species.

Key Points

- Congress passed the Endangered Species Act in 1973 as a result of growing concern worldwide over the disappearance of plant and animal species.
 - The ESA currently protects more than 1,200 species in the United States and is credited with the recovery of a number of species.
 - All individuals and Federal agencies must comply with the ESA.
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The Endangered Species Act (ESA)

The Endangered Species Act of 1973 protects endangered and threatened species and their critical habitats.

In passing the act, Congress recognized that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

ESA Requirements

Under the ESA, Federal agencies are required to:

- Consider the effects of their actions on threatened or endangered species.
 - Be proactive in conservation activities.
 - Avoid harm to listed species or the critical habitat of listed species.
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Endangered vs. Threatened

The two categories of species that are given protection under the ESA are:

- **Endangered:** Any fish, animal, or plant that is in danger of extinction.
- **Threatened:** Any fish, animal, or plant that is likely to become endangered in the foreseeable future.

While not given formal protection, species being considered for listing by the ESA are known as "candidates."

Prohibition Against Taking Endangered Species

Under the ESA, it is unlawful to "take" any endangered species. The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.

The ESA:

- Applies to everyone, from individuals to Federal agencies.
 - Has very stiff penalties, including imprisonment and fines. If a Federal action violates the ESA, the project may be halted and the area returned to its pre-project condition.
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ESA, Section 7

The requirements of Section 7 of the ESA apply specifically to Federal agencies whenever they permit, authorize, fund, or carry out an action.

Under the National Environmental Policy Act (NEPA), certain FEMA emergency actions are statutorily excluded from NEPA compliance. However, as a separate law with separate requirements, the ESA has no such emergency exclusions. Any FEMA action must comply with the ESA requirements even if totally exempted from NEPA.

ESA, Section 10

Under Section 10 of the ESA, an incidental take of Federally listed species may be permitted if the take is likely to occur as a result of actions carried out by a private landowner on private property.

These actions must not:

- Require a Federal permit to lawfully undertake, and
 - Be funded by Federal money.
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Consultation Under the ESA

Before taking action that has the potential to affect the natural environment, even in most emergency situations, FEMA must first consult with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS). (NMFS should be consulted in cases involving marine species and anadromous species such as salmon; FWS should be consulted in all other cases.)

Initially, FEMA determines if, due to the nature of the project, there is any potential for its action to affect protected species. If no potential to effect is determined, then no consultation with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) is required.

If the action has the potential to affect species/habitat, even in most emergency situations, FEMA must initiate consultation with the FWS and/or the NMFS to determine:

- The effects on protected species and their critical habitats.
- What avoidance or minimization is required to reduce adverse effects.

While this consultation is usually informal, it may proceed to the formal level.

Emergency Actions

An emergency action is one that must be taken to protect life or property.

If emergency action must be taken, and if time permits, the FWS should be notified that the action is being taken.

Once the emergency situation is no longer critical, the FWS should be contacted for consultation about addressing any adverse effects resulting from emergency action.

Informal Consultation Process

Consultation begins with the informal consultation process, which is used to determine whether or not formal consultation is required. This process typically includes discussions, telephone conversations, meetings, and correspondence between FWS or NMFS and FEMA.

Under the informal consultation process:

- FEMA asks FWS/NMFS whether protected species or critical habitat may be present within the proposed project area.
- FWS/NMFS must respond within 30 days with a species list.
- FEMA shares its determination of effect with FWS/NMFS.

Informal consultation will usually determine whether or not formal consultation is required.

Outcomes of Informal Consultation

The possible outcomes of an informal consultation are as follows:

- No effect, and no further consultation necessary.
- May affect but not likely to adversely affect, which requires FWS or NMFS concurrence of determination with possible avoidance or minimization measures.
- Likely to adversely affect, which requires a biological assessment initiating formal consultation.

The level of effect may be reduced by the implementation of prescribed avoidance or minimization measures.

Formal Consultation

To begin a formal consultation, FEMA must send a written request to FWS or NMFS, accompanied by a biological assessment.

The biological assessment will contain the following information:

- A description of the action being considered.
 - The geographic area that may be affected by the action.
 - Any listed species or critical habitat that the action may affect, and how the action may affect the species or critical habitat.
 - Cumulative effects on any listed species or critical habitat.
 - Any other relevant information on the action, affected species, or critical habitat.
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Outcomes of Formal Consultation

The formal consultation process concludes with the FWS and/or NMFS issuing a biological opinion. The biological opinion has three possible findings:

- The action will not jeopardize protected species, and the action may proceed.
- The action is likely to jeopardize protected species.
- The action will jeopardize the continued existence of protected species.

The next screens present information on the two outcomes that require further revision or mitigation: "likely to jeopardize" and "jeopardize continued existence."

Likely to Jeopardize

When FWS/NMFS issues a "likely to jeopardize" biological opinion, the potential to jeopardize may be avoided or minimized to below significant levels.

Along with avoidance and minimization measures to reduce the likelihood of jeopardizing protected species, the opinion may include a statement regarding the incidental taking of a protected species.

Remember . . . To "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a protected species. An **incidental** take is a take that is the result of, but not the purpose of, an otherwise lawful activity.

Incidental Take Statement

An incidental take statement includes:

- Estimates of permissible incidental takes.
 - Reasonable and prudent measures to minimize impact.
 - Measures for complying with other laws, if necessary.
 - Terms and conditions with which FEMA or other agencies must comply.
 - Procedures for handling any actual takings.
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Jeopardize Continued Existence

If FEMA receives a "jeopardize continued existence" biological opinion, the project cannot proceed as is. After major redesign or relocation, the consultation process may be reinitiated and the project re-evaluated.

Memorandum of Understanding

In an effort to streamline the consultation process, Federal agencies may develop programmatic procedures for ESA compliance, such as a Memorandum of Understanding (MOU) between the agency and FWS/NMFS.

An MOU could include the following:

- Activities grouped by type, area, or disaster.
 - Activities with "no effect" determinations.
 - Programmatic biological assessment.
 - Take conditions and procedures.
 - Programmatic biological opinions.
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Disaster-Specific Procedures

Streamlined disaster-specific procedures are defined early in the recovery effort in an agreement between FEMA and the FWS/NMFS. Agreements may be informal or formal.

Subjects addressed in the agreement include:

- Areas within declared counties with no protected species concerns.
- Mutually agreed-upon types of projects and conditions not needing ESA review.
- Minimization procedures under specific conditions.
- Procedures for expedited processing.

Responsibilities Under the ESA

The following table summarizes the responsibilities of FEMA and the applicant under the Endangered Species Act.

Party	Responsibilities
FEMA	<ul style="list-style-type: none"> ▪ Ensure its activities do not jeopardize protected species. ▪ Review project area/action and determine level of effect. ▪ Conduct an informal or formal consultation, as required. ▪ Complete a biological assessment, if required. ▪ Ensure that all parties abide by the decisions and conditions resulting from consultations.
Applicant	<ul style="list-style-type: none"> ▪ Work with FEMA to comply with the Federal ESA requirements. ▪ Comply with the provisions of a biological opinion, incidental take statement, or any other agreement, if applicable. ▪ Notify FEMA of any changes to the proposed action. ▪ Comply with ESA provisions that apply to members of the general public (Section 10) even if Federal funds are not involved.

Lesson Summary

You have now completed the fifth lesson in the Environmental Review section of this course. You should be able to:

- Describe the key components of the ESA.
- Describe the responsibilities of FEMA and other parties under the act.