

1.2 Legal and Policy Guidance for Recovery Planning

Recovery planning is guided by the statutory language of the ESA and NMFS policies, the latter of which may reflect interpretation by the courts (see Box 1.2), and informed by various other Federal laws. There are no specific regulations regarding recovery.

The Statute – Section 4(f) of the ESA addresses the development and implementation of recovery plans. The following are the key provisions of this section of the Act:

- 4(f)(1) - Recovery plans shall be developed and implemented for listed species unless the Secretary “. . . finds that such a plan will not promote the conservation of the species” (see section 2.2.1 - Exemption from Drafting Recovery Plans).
- 4(f)(1)(A) - Priority is to be given, to the maximum extent practicable, to “. . . species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”
- 4(f)(1)(B) - Each plan must include, to the maximum extent practicable,
 - “(i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;
 - (ii) objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list; and,
 - (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.”
- 4(f)(2) - To assist in the development and implementation of recovery plans, NMFS may appoint recovery teams,

- which may include non-NMFS participants, and which are not subject to the requirements of the Federal Advisory Committee Act (FACA).
- 4(f)(4) - NMFS must “. . . provide public notice and an opportunity for public review and comment. . .” and “. . . consider all information presented during the public comment period prior to approval of the plan.”
- 4(f)(5) - Prior to implementation of a recovery plan, each Federal agency must “. . . consider all information presented during the public comment period. . .”
- 4(h)(4) - NMFS shall establish, and publish in the *Federal Register*, agency guidelines that include “. . . a system for developing and implementing, on a priority basis, recovery plans. . .”

Recovery Policies – Five joint policies were promulgated by NMFS and FWS in 1994 which, among other things, address a number of aspects of recovery planning. These include the following:

- Interagency Cooperative Policy for Peer Review in Endangered Species Activities (59 FR 34270; FWS and NMFS 1994a)
- Interagency Cooperative Policy on Information Standards Under the Endangered Species Act (59 FR 24271; FWS and NMFS 1994b)
- Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act (59 FR 34272; FWS and NMFS 1994c)
- Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act (59 FR 34274; FWS and NMFS 1994d)
- Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities (59 FR 34275; FWS and NMFS 1994e)

The Policy on Recovery Plan Participation and Implementation Under the ESA focuses solely on recovery planning and implementation, and is updated and superseded by this policy and

guidance. The other 1994 joint policies, which apply to recovery as well as other aspects of the endangered species program, are incorporated into, but not superceded by, this guidance. Copies are included in Appendix A. Several other policies and guidance documents affect various aspects of recovery planning. For example, the Safe Harbor Policy (64 FR 32717; FWS and NMFS 1999) provides a tool that may be useful in the recovery of some species. The application of these other policies to recovery planning will be addressed in other sections of the Recovery Handbook.

Court Decisions – A number of court decisions have interpreted the recovery planning provisions of the ESA in conjunction with challenges to particular recovery plans (see Appendix B). These decisions have focused primarily on the mandatory nature of the section 4(f) provisions (unless the agency had shown that the species qualified under an exception), and the connection between threats affecting the species and the development of measurable criteria and management actions (see Box 1.2)

Other Federal Laws – In addition to the ESA, there are five other Federal statutes that are particularly important to developing and implementing recovery plans, assembling the administrative record, and involving the public.

- The Freedom of Information Act (FOIA; 5 U.S.C. 552), enacted in 1966, provides
- The Information Quality Act (Pub. L. 106-554), enacted in 2002 requires each

that any person has the right to request access to Federal agency records.

- The Federal Advisory Committee Act (FACA; 5 U.S.C., App.; C.F.R. Part 102-3), enacted in 1972, governs the establishment, management, and operation of groups, meetings, task forces, committees, and other similar groups that qualify as “federal advisory committees” under the Act.
- The Administrative Procedure Act (APA; 5 U.S.C. 551-59, 701-06, 1305, 3105, 3344, 5372, 7521), passed in 1946, identifies the process for making regulations, provides for participation by the public in the rulemaking process, and sets standards for judicial review of agency decisions.
- The National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), passed in 1969, assures that all branches of government give proper consideration to the environment prior to undertaking any major federal action which significantly affects the environment.
- The Paperwork Reduction Act (44 U.S.C. 3501-20), enacted in 1995, minimizes the burden that Federal paperwork imposes on the public and improves the quality and use of Federal information.

Box 1.2 - Sonoran Pronghorn Recovery Criteria Legal Case

In *Defenders of Wildlife v. Babbitt*, 130 F.Supp. 2d 121 (2001), the court ruled that “... the Fish and Wildlife Service has acted in a manner that is arbitrary and capricious and contrary to law by issuing a Recovery Plan that fails to establish (1) objective measureable criteria, which, when met, would result in a determination that the pronghorn may be removed from the list of endangered species or, if such criteria are not practicable, an explanation of that conclusion and (2) estimates of the time required to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal where practicable, or, if such estimates are not practicable, an explanation of that conclusion.”

The courts remanded the 1998 Final Revised Sonoran Pronghorn Recovery Plan and directed the Service to: (1) reassess Sonoran pronghorn recovery criteria and incorporate objective measureable criteria for delisting; and (2) provide estimates of time required to carry out those measures needed to achieve the plan’s goal and intermediate steps toward that goal.

Federal agency to develop guidelines to ensure the quality of disseminated information and a process by which a person can seek a correction of disseminated information (see section 4.6 Information Standards, and Appendix N. Information Quality Guidelines).

In summary, with respect to recovery planning, we have certain statutory requirements as well as other requirements imposed by either policy or court decisions. This statutory, policy, and judicial guidance requires certain elements to be included in a plan and incorporates certain standard elements into the process of drafting plans (consultation, quality data, public participation etc.). Within these sideboards, NMFS and its staff are given considerable discretion to determine the details of how we go about developing specific recovery plans and what they look like. Recovery planners should view this as an opportunity to use their creativity and ingenuity to craft the most effective and practical recovery program for each species in their care.