

Review of Applicable Federal Laws and Orders

- Endangered Species Act
- Marine Mammal Protection Act
- National Environmental Policy Act
- Regulatory Flexibility Act
- Executive Order 12866

Endangered Species Act

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

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

Critical Habitat

A listing agency shall to the maximum extent prudent and determinable designate any habitat to the species that is considered to be critical habitat.

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

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 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

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

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.

Marine Mammal Protection Act

It is the sense of the Congress that marine mammals should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.

Marine Mammal Protection Act

The incidental take of listed marine mammals must meet the requirements of the Marine Mammal Protection Act (MMPA). This requires authorization under section 101(a)(5) of the MMPA, and total taking must be consistent with the least practical adverse impact on the species and its habitat.

National Environmental Policy Act

The purpose of NEPA is to assure that each Federal agency conducting or supporting public works activities that affect the environment shall implement the policies enacted by law.

Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

Regulatory Flexibility Act

The RFA applies to every Federal rule on which public comment is required under the Administrative Procedure Act.

The RFA directs agencies to analyze the impact of their regulatory actions to ensure that, while accomplishing their intended purpose, they do not unduly inhibit the ability of small entities to compete.

Executive Order 12866

- Signed in 1993 by Clinton, affirmed by Bush
- Mandates that regulations should only be promulgated if necessary, indicates that costs and benefits should be understood and considered, and that net benefits should be maximized unless that conflicts with purpose of statute
- Regulatory Impact Review (RIR) is developed by Agency to demonstrate appropriate criteria was considered

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, No. 06-35011 (9th Cir. 2007)

ESA Section 7(a)(2)

"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"

FWS/NMFS Regulatory Definition

“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.

Gifford Pinchot

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.

Gifford Pinchot

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.

Gifford Pinchot

Court 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.

Gifford Pinchot

"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."

Gifford Pinchot

"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."

Gifford Pinchot

“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.”

National Wildlife Federation

National Marine Fisheries Service prepared a biological opinion (BiOp) in 2004 for endangered salmon and steelhead. BiOp was challenged on several grounds, including that agency did not consider recovery needs in its jeopardy analysis.

National Wildlife Federation

“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.”