



COOPERATION WITH THE STATES
THE ENDANGERED SPECIES ACT SECTION 6 PROGRAM

Application Guidance for States

INTRODUCTION

Section 6 of the Endangered Species Act (ESA) provides a mechanism for cooperation between NOAA's National Marine Fisheries Service (NMFS) and the States for the purposes of conserving endangered and threatened species, candidate species, and recently de-listed species. Under section 6, NMFS may enter into an agreement with any State that "establishes and maintains an adequate and active program for the conservation of endangered and threatened species" (16 U.S.C. 1535). Once a State and NMFS enter into a section 6 agreement, NMFS is authorized to provide federal assistance to support development and implementation of the State's conservation programs. This document provides guidance on how States can formally apply for an ESA section 6 agreement.

DEFINITIONS

All terms used are as defined in section 3 of the ESA. The definition of the term "State", however, will now include the U.S. flag islands/ commonwealths that were once considered part of the Trust Territory of the Pacific Islands. For the purposes of this guidance, the term "Secretary" refers to the Secretary of Commerce, whose responsibilities under section 6 have been delegated to NOAA's Assistant Administrator for Fisheries.

SECTION 6 AGREEMENTS

Under section 6 of the ESA, a State, through the appropriate State agency or agencies, may apply to enter into one of several types of section 6 agreements. Under section 6(c)(1), a State may enter into an agreement for the conservation of animal species, and under section 6 (c)(2), a State may enter into an agreement for the conservation of plant species. Alternatively, a State may choose to combine these two agreements into a single document. Agreements for plants and animals can each be further divided into what are commonly termed 'full' and 'limited' agreements. Limited agreements were created in 1977 when Congress amended section 6 to improve the section 6 program and create more flexibility for States wishing to enter into an agreement. The creation of limited agreements established a means by which States with adequate authority and conservation programs for some, but not all, resident listed species could enter into an agreement.

In order to enter into a full section 6 agreement, the Secretary must find that the State meets the five findings of section 6(c)(1) (for animals) indicated below or similar findings of section 6(c)(2) (for plants). In order to enter into a limited section 6 agreement for animals, the Secretary must find that the State meets three of those five findings and has plans under which immediate attention will be given to those species deemed most urgently in need of conservation. With the exclusion of criterion (D) below, the same requirements must be met in order for a State to enter into a limited agreement for plants.

Findings (from section 6(c)(1) for animals):

Limited agreements (animals)

- (A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;**
- (B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;**
- (C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;**
- (D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and**
- (E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened.**

The application of ESA prohibitions and authorizations to resident listed species depends on whether the State enters into a full or a limited agreement. A full agreement removes ESA prohibitions for certain species, whereas a limited agreement does not. Specifically, for full agreements, section 6(g)(2) applies. This clause states that the prohibitions set forth in or authorized pursuant to section 4(d) (for threatened species) and section 9(a)(1)(B) (for endangered species) shall not apply to listed species other than those species listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (CITES) or that are otherwise specifically covered by any other treaty or Federal law. So, for example, if a resident listed species is listed on Appendix I of CITES, the prohibitions set forth in section 4(d) and section 9(a)(1)(B) would apply, and permits would be needed to conduct research projects that involve the taking of these species. For limited agreements, section 6(c)(1)(E)(ii) and 6(c)(2)(E)(ii) apply. These clauses state that the agreement shall not affect the applicability of the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) of the ESA with respect to the taking of any resident endangered or threatened species. States that enter into limited agreements instead can receive authorization to take listed species by obtaining permits pursuant to section 10 of the ESA.

APPLICATION REQUIREMENTS

The goal of the application process is to demonstrate that the State agency (or agencies) that will enter into the agreement has the authority, plans, programs, and capability to establish and

maintain a program for the conservation of resident endangered and threatened species that is in accordance with the purposes and policies of the ESA. When preparing the application, previously prepared information and agency publications should be used as much as possible and provided as part of the application package. For a particular agency to demonstrate that it meets the relevant findings of section 6, the application package must include the documentation and information listed below.

State Laws

- **A copy of all State laws and regulations applicable to the protection and conservation of endangered and threatened species.** This includes species under both the U.S. Fish and Wildlife Service's (FWS) and NMFS' jurisdiction.
- **An opinion letter from the State Attorney General's Office, or other counsel authorized by the State to issue formal legal opinions on its behalf, that discusses whether the State's laws meet all or some of the conditions set forth in section 6(c).** In particular, this letter must identify which State agency(ies) has the authority to conserve resident species of fish and wildlife (or plants) under NMFS' jurisdiction. If the agency desiring to enter into the agreement has questions regarding their authorities, it is best to get in touch with the Attorney General's Office as soon as possible, as some States have indicated that it can take a significant amount of time to obtain this letter.

Conservation Program

- **A summary of State programs that demonstrate a history of conservation activities for endangered and threatened species within the State.** This summary can include species under both FWS' and NMFS' jurisdiction and can reference or use previously prepared reports or plans (e.g. State Wildlife Action Plans).
- **For limited agreement applications, a description of the activities the State would specifically like to pursue during the first year after signature of the agreement.** These activities can be contingent upon funding. This is an area where the NMFS Regional Offices and the State can work together to identify conservation and recovery priorities or ideas for how the State can build their section 6 program. Note that this is not a proposal for funding; rather, it gives NMFS an idea of which species the State would like to focus its initial conservation program development on.
- **A list of endangered and threatened species under NMFS' jurisdiction or joint jurisdiction of FWS and NMFS for which the State has or would like to develop a conservation program.** For full agreement applications, this list must include all resident listed species; for limited agreement applications, this list should include those species most in need of conservation efforts and for which the State either has an adequate and active conservation program or has the authority to establish one.

Enforcement

- **A summary of what role (if any) enforcement personnel play in the State's program.** Section 3 of the ESA defines "conservation" to include law enforcement as one of its elements, so it is important to include information on what role enforcement plays or

could play in the overall conservation program. Enforcement activities can be contingent upon funding and/or the development or enhancement of a Joint Enforcement Agreement (JEA) with NMFS.

Staff

- **A description of the State conservation agency(ies) that would enter into the agreement with NMFS.** This should include a brief history of the agency, organizational structure, number of employees, facilities, sources of funding, etc. Previously prepared reports or documents may be used to fulfill this requirement.
- **A list of employees in the State conservation agency(ies), their roles, experience, and expected participation (if any) in this program and other State conservation programs.** Also, identify the State agency staff who will serve as the point of contact on matters relative to the development and execution of the agreement. Previously prepared reports or documents may be used to fulfill this requirement.

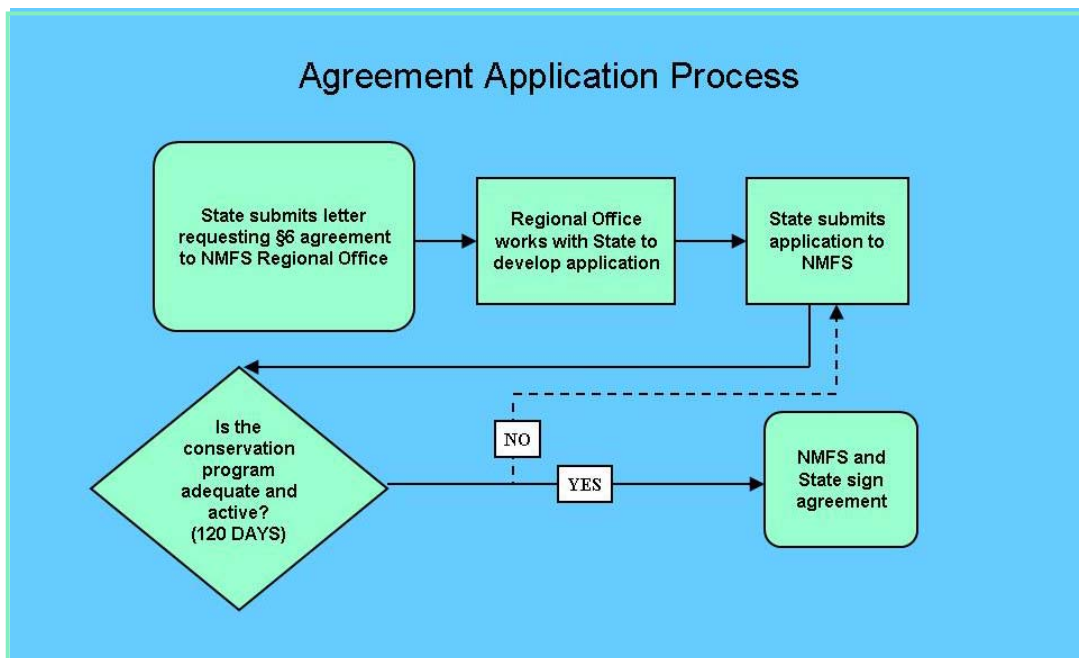


Figure 1. Overview of the application process. The process begins when the State submits a letter to NMFS requesting a section 6 agreement. Once a complete application is received, NMFS is required by statute to complete its review of the application within 120 days. The length of time to develop and sign section 6 agreements has varied; early coordination with the appropriate NMFS Regional Office, however, can greatly reduce the time required for review of an application.

APPLICATION PROCESS

To initiate the application process, a State agency(ies) sends a letter to the appropriate NMFS Regional Office indicating that the State wishes to enter into a section 6 agreement with NMFS

(Figure 1). The Regional Office then works with the State to prepare the application package. As part of this process, the Regional Office will draft a copy of the section 6 agreement and provide it to the State for their review. After the Regional Office completes its review of the final application, all application materials, a final copy of the agreement, and a memorandum from the Regional Office are forwarded to NMFS Headquarters for final review and signature of the agreement by the Assistant Administrator for Fisheries. Then, the agreement is mailed back to the State agency to countersign and thus effectuate the agreement.