

# ENDANGERED SPECIES ACT OVERVIEW

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## NATIONAL SEA GRANT LAW CENTER





“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as *institutionalized caution*.”

### A NOTE ON CHEVRON DEFERENCE

- When an agency is interpreting a phrase in a statute through regulation, Chevron deference applies.
  - This is often the case in ESA cases.
- Chevron deference involves two steps:
  - **Step 1: Has Congress spoken directly on the issue?**
    - If the meaning of the statute is clear, the agency's actions have to fit within the statute's unambiguous terms.
    - If the statute is ambiguous, move on to Step 2.
  - **Step 2: Is the agency's construction based on a permissible reading of the statute?**
    - Agency doesn't need to have the best interpretation- the interpretation only needs to be reasonable.
    - Courts are required to take a "hard look"- so agency needs some basis for their action.
    - This step is **highly** deferential.

## ESA OVERVIEW

- Statutory Purpose and Definitions
- Listing- Section 4
- Consultation- Section 7
- Take- Section 9
- Trump Administration Proposed Rules

## STATUTORY PURPOSE AND DEFINITIONS

## PURPOSE- ESA SECTION 2

### (b) Purposes

The **purposes** of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the **conservation** of such endangered species and threatened species . . .

## DEFINITIONS- ESA SECTION 3

For the purposes of this chapter . . .

(3) The terms “conserve,” “conserving,” and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are **no longer necessary** . . .

### DEFINITIONS- ESA SECTION 3

- (15) The term “**Secretary**” means, except as otherwise herein provided, the Secretary of the **Interior** or the Secretary of **Commerce** as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970...

### DEFINITIONS- ESA SECTION 3

(6) The term “**endangered species**” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.



North Atlantic  
Right Whale

Source: NOAA Fisheries



Great Lakes  
Piping Plover

### DEFINITIONS- ESA SECTION 3

(20) The term “**threatened species**” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.



Northern Great Plains and  
Atlantic Coast Piping Plover

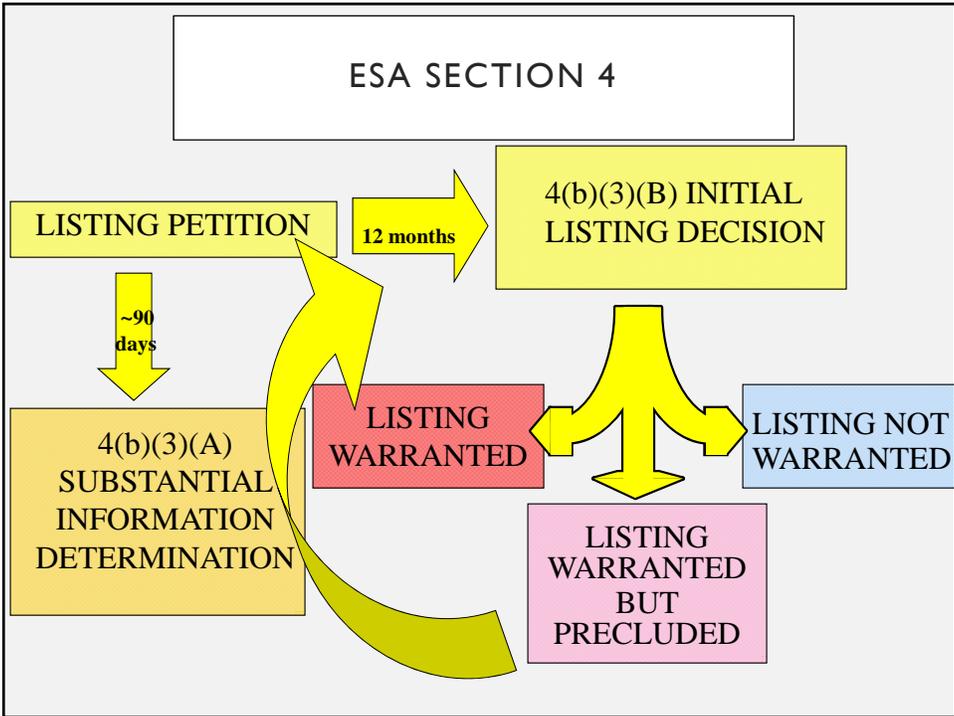


Red Knots, Mispillion Harbor, Delaware.  
Credit: Gregory Brees/USFWS

### DEFINITIONS- ESA SECTION 3

(16) The term “**species**” includes any **subspecies** of fish or wildlife or plants, and any **distinct population segment** of any species of vertebrate fish or wildlife which interbreeds when mature.

LISTING- SECTION 4



## ESA SECTION 4

### (a) Generally

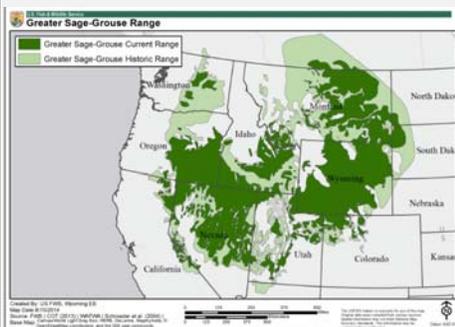
- (1) The Secretary shall by regulation . . . determine whether any species is an endangered species or a threatened species because of any of the following factors:
- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
  - (B) overutilization for commercial, recreational, scientific, or educational purposes;
  - (C) disease or predation;
  - (D) the inadequacy of existing regulatory mechanisms; or
  - (E) other natural or manmade factors affecting its continued existence. . . .

## ESA SECTION 4

### (b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the **best scientific and commercial data** available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species . . . .

## GREATER SAGE GROUSE



Greater sage-grouse at SeedsKadee National Wildlife Refuge  
Photo: Tom Koerner/USFWS

## RUSTY PATCHED BUMBLE BEE

**Rusty Patched Bumble Bee Map**  
Where the rusty patched bumble bee may be present

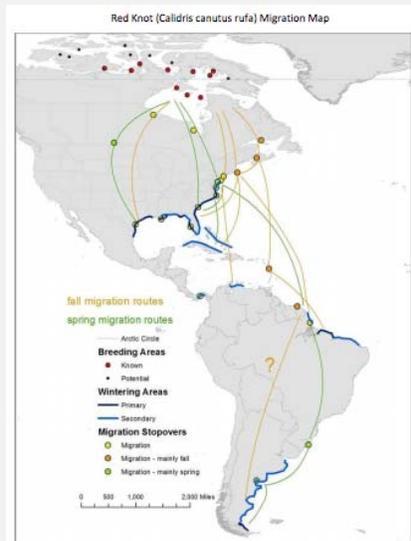
Map may be slow to load  
Click the double right arrows to view legend.



Rusty patched bumble bee feeding on wild bergamot (*Monarda fistulosa*)  
Photo Kim Mitchell; USFWS

OSU Blog Post: <https://ohioaglaw.wordpress.com/2017/02/08/whats-the-buzz-about-the-rusty-patched-bumble-bee/>

## RED KNOT



## CRITICAL HABITAT DESIGNATION

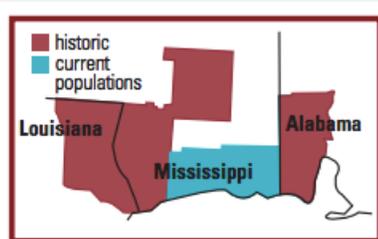
### (b) Basis for determinations

(2) The Secretary shall designate **critical habitat** . . . on the basis of **the best scientific data available** and after taking into consideration the **economic impact** . . . and any other relevant impact, of specifying any particular area as critical habitat. . . .

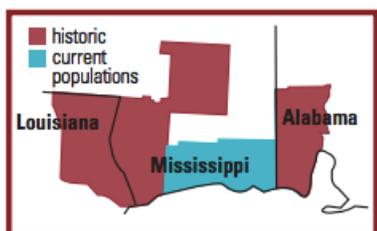
## WHAT IS CRITICAL HABITAT?

- Defined as:
  - “(i) the specific areas within the geographical area occupied by the species, at the time it is listed...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;and
  - (ii) specific areas outside the geographical area occupied by the species at the time it is listed...upon a determination by the Secretary that such areas are essential for the conservation of the species.” ESA § 3(5)(A)
- Generally cannot include the entire geographic area that could be occupied by the species.

## DUSKY GOPHER FROG

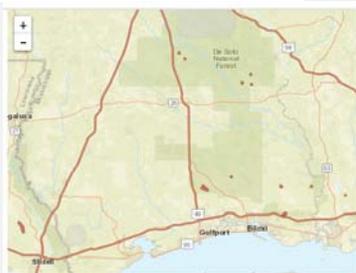


# DUSKY GOPHER FROG



*Table 1—Occupancy of Dusky Gopher Frog by Designated Critical Habitat Units*

Unit	Parish/County	Occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently unoccupied
LOUISIANA				
1	St. Tammany			X
MISSISSIPPI				
2, Subunit A	Harrison	X		
2, Subunit B	Harrison			X
3	Harrison			X
4, Subunit A	Jackson	X		
4, Subunit B	Jackson			X
5, Subunit A	Jackson	X		
5, Subunit B	Jackson			X
6	Jackson			X
7	Jackson	X		
8	Forrest			X
9	Forrest			X
10	Perry			X
11	Perry			X
12	Perry			X



## CONSULTATION- SECTION 7

## SECTION 7 CONSULTATION

### (a) Federal agency actions and consultations ...

(2) Each Federal agency shall, in *consultation* with and with the assistance of the Secretary, *insure* that any action *authorized, funded, or carried out by such agency* (... “agency action”) is not likely to *jeopardize* the continued existence of any endangered species or threatened species or result in the destruction or *adverse modification* of *habitat* of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be *critical*.

...

## SECTION 7 CONSULTATION

- Applies to all listed species and designated critical habitat
  - Looks at species as a whole
- Protects only against “*federal*” actions
  - any action *authorized, funded, or carried out by such agency*
- Protects only against *jeopardy* or *adverse modification*
- “Best available scientific and commercial data”

## SECTION 7 CONSULTATION

- Jeopardize the continued existence of = “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 a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 CFR § 402.02.
- Destruction or adverse modification = “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” 50 CFR § 402.02.
- May include altering the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

## CONSULTATION TYPES

### Informal consultation: § 7(a)(3)

- → Biological assessment § 7(c)
- T/E species may be present?
- Likely to be affected by federal action?

### Formal consultation: § 7(a)(2)

- Avoid irreversible/irretrievable commitment of resources
- → Biological Opinion (BiOp) § 7(b)(3)(A)
- → Reasonable & Prudent Alternatives (RPAs)

## OYSTERS AND RED KNOTS

- Delaware Bay, NJ is home to a Aquaculture Development Zone-
  - ADZs have streamlined permitting for aquaculture development in areas with minimum user conflicts.
- Delaware Bay is also a vital stopover point for Red Knots.
  - 2015- listed as a threatened species under the ESA.
  - Activities impacting the red knot potentially subject to Section 7 consultation and Section 9 take.



## NJ ADZ CORP PERMIT

- Triggered Section 7 consultation.
- Resulted in a Programmatic Biological Opinion
  - Contains Conservation Measures- CMs:
    - Limit gear placement, farm work hours, and access to all farms.
    - Resulted in one farm closure and the targeted relocation of a second.
- BiOp has served as a lightning rod for conflict between the aquaculture community and shorebird conservation groups

## TAKE- SECTION 9

### TAKE

- Take means:
  - “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
    - Lethal and Non-Lethal Takes
    - Regulatory definitions for Harass and Harm
      - Does the action interfere with essential behavioral patterns?
      - Harass- an intentional or negligent act or omission which creates the likelihood of injury to wildlife...
      - Harm- an act which actually kills or injures wildlife

## TAKE PROHIBITION

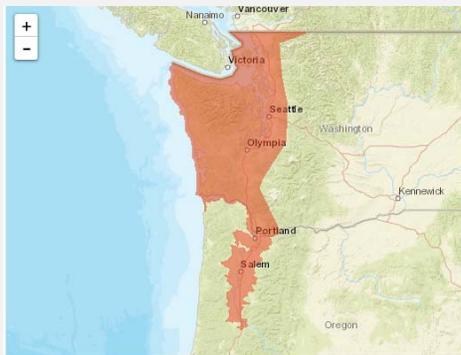
- Take protects:
  - **Endangered** species of fish and wildlife by statute
  - **Threatened** species of wildlife by regulation
  - Against actions by **any person**
  - Individual **members** of species

## SECTION 4(D) RULES

## 4D RULES

- Section 4D of the act states- Whenever any species is listed as a **threatened** species... The Secretary may by regulation prohibit with respect to any threatened species any act prohibited...with respect to endangered species.
- This includes the take prohibition.
  - FWS has issued a blanket prohibition- the take prohibition applies to all listed species
  - NMFS does this on a case by case basis.
- To undo the blanket prohibition, FWS has to issue another 4D rule.

## STREAKED HORNED LARK



## SECTION 7 INCIDENTAL TAKE PERMITS

### SECTION 7(B)(4)

*If* after consultation . . . the Secretary concludes that—

- (A) the agency action [or reasonable and prudent alternative thereto] **will not violate** such subsection;
- (B) the taking of an endangered species or a threatened species incidental to the agency action **will not violate** such subsection; . . .
- (C) **the Secretary shall provide** the federal agency and the applicant . . . with a written **statement** that—
  - (i) specifies the impact of such **incidental taking** on the species,
  - (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact . . . and
  - (iv) sets forth the terms and conditions . . . that must be complied with by the Federal agency or applicant . . .

## AQUACULTURE OPERATIONS AND TAKE OF RED KNOTS

- BiOp's Incidental Take Statement (ITS) allows the structural aquaculture industry to impact red knot to a certain extent.
- Distinguishes between lethal and non-lethal takes:
  - Lethal Takes:
    - Allows 315 lethal takes from harassment or harm over the ten-year life span of the BiOp.
    - Not split up among individual oyster farms.
  - Non-Lethal Takes:
    - ITS allocates non-lethal takes to certain farms- 644 to one farm and 641 to another.

## SECTION 10 PERMITS

## SECTION 10(A)(1)

[It is unlawful for any person to] take any [endangered species of fish or wildlife] within the U.S. or the territorial sea of the U.S.

The Secretary **may permit**, under such terms and conditions as he shall prescribe—

(A) Any act otherwise prohibited by section 1538 [§9] for scientific purposes or to enhance the propagation or survival of the affected species . . . or

(B) Any taking otherwise prohibited by [§9(a)(1)(b)] . . . if such **taking** is **incidental** to, and not the purpose of, the carrying out of an otherwise lawful activity.

## SECTION 10(A)(2)

(A) No permit may be issued by the Secretary authorizing any taking . . . unless the applicant therefor submits . . . a **conservation plan** that specifies—

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) [alternatives considered]
- (iv) such other measures that the Secretary may require as being necessary or appropriate . . .

SECTION 10(A)(2)

(B) *If the Secretary finds*, after opportunity for public comment . . . that—

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures . . . Required under . . . (A)(iv) will be met . . .

*the Secretary shall issue the permit. . . .*

TRUMP ADMINISTRATION  
PROPOSED REGULATIONS

## ESA REGULATIONS- PROPOSED CHANGES

- Proposed rules published in the Federal Register on July 25, 2018
- Comments were due by September 24, 2018 (60 days)
- Proposed changes focused on three main areas:
  - Listing and Critical Habitat Designation
  - Prohibitions to threatened wildlife and plants
  - Section 7 Interagency Consultation
- Also sought input on other items not included in the proposed revised regulatory language
- FWS page for more info:  
[https://www.fws.gov/endangered/improving\\_ESA/regulation-revisions.html](https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html)

## ESA REGULATIONS- PROPOSED CHANGES

- Listing and Critical Habitat Designation
  - Remove the phrase, “without reference to possible economic or other impacts of such determination” to listing regs
  - Identify when designating critical habitat may not be prudent
  - Revisions to designating unoccupied critical habitat
- Prohibitions to threatened wildlife and plants
  - Rescind FWS blanket rule
- Section 7 Interagency Consultation
  - Revise the definition of destruction or adverse modification
    - “direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.”
  - Other definitional changes and procedural changes to consultation

THANK YOU!

[NSGLC Website:](http://nsglc.olemiss.edu/)

<http://nsglc.olemiss.edu/>

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