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Endangered Species Act in General

Species Listing

Threatened vs. Endangered:

A threatened species means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range." 16 U.S.C. § 1532(20).

An endangered species means "any species which is in danger of extinction throughout all or a significant portion of its range, other than insects that constitute a pest whose protection would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(6).

A candidate species is a plant and animal for which the Services have sufficient information on their biological status and threats to propose them as endangered or threatened under the ESA, but for which development of a proposed listing regulation is precluded by other higher priority listing activities. Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164, 95,171 (December 27, 2016).

A proposed species is a species that is proposed for listing, but the Service has yet to determine if it qualifies as a candidate, threatened or endangered.

Prior to August 19, 2019, once listed there was no substantive difference in management between a threatened or endangered species. On August 19, 2019, the Fish and Wildlife Service and National Marine Fisheries Service (collectively "Services") issued joint regulations that required that a species-specific special rule would be proposed for each listed threatened species which specifies any prohibited "take," and that the general "take" prohibitions would not apply.

Species Listing Process:

The Services may decide to list a species on their own initiative, or a private party may petition on of the Services to list a species. Anyone can petition to have a species listed. 16 U.S.C. § 1533(b)(3)(A).

The decision to designate a threatened or endangered species is considered rulemaking and is to be published in the Federal Register.

Listing decisions are to be based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Under the ESA, the best scientific and commercial data available" means:

- Literature search only,
- No counting of species,
- No economic considerations,
- Species population numbers may not be in decline; rather the Services can list if the agency believes the habitat area to be shrinking.

Under the ESA, a species may be listed as threatened or endangered if it meets any one of the following criteria:

- The present or threatened destruction, modification or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- Inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

"Take" Prohibitions:

Once a species is listed as endangered, prohibitions against "take" apply.

"Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19).

"Harm" in the definition of "take" means "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

"Harass" in the definition of "take" means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to

significantly disrupt normal behavior patterns which include, but are not limited to, breeding feeding or sheltering." 50 C.F.R. § 17.3

If convicted to "take," a person can be liable for either civil or criminal penalties. The ESA allows civil penalties of up to $25,000 per violation, and criminal penalties of up to $50,000 and one year in prison per violation. 16 U.S.C. § 1540(a), (b).

Critical Habitat Designation

Once a species is listed as threatened or endangered, the Services must "to the maximum extent prudent and determinable," concurrent with making a determination that a species is an endangered or threatened species, designate any habitat of such species which is then considered to be critical habitat. 16 U.S.C. § 1533(a)(3)(A); 50 C.F.R. § 424.12(a).

The ESA defines critical habitat as:

- 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

- Specific areas outside the geographical area occupied by the species at the time it is listed [...] that are essential for the conservation of the species.

16 U.S.C. § 1532(5).

This definition outlines two types of critical habitat, that which is occupied by the species at the time of listing, and that which is unoccupied at the time of listing.

An area will be designated as a "geographical area occupied by the species" (a.k.a. occupied habitat) if the area "may generally be delineated arounds species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals." 50 C.F.R. § 424.02.

An area will be deemed to have "physical or biological features essential to the conservation of the species" if it has "features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristic, soil type, geographical features, sites, prey, vegetation, symbiotic species, or other features." 50 C.F.R. § 424.02.

When designating critical habitat, the Services will first evaluate areas occupied by the species. The Services will only consider unoccupied areas as "essential to the

conservation of the species" where a critical habitat designation limited to the geographical areas occupied by the species would be inadequate to ensure its conservation. "In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainly both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species." C.F.R. § 424.12(b).

According to the Supreme Court, to be considered critical habitat, an area must first be "habitat" for the species. *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018)

> The Services shall designate critical habitat and make revisions thereto on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Services may exclude any area from critical habitat if they determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. 50 C.F.R. § 424.12(a).

Section 7 Consultation

Section 7 of the ESA provides that "[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], 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 habitat of such species which is determined by the Secretary . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2).

Actions for which ESA section 7 consultation is required include actions that require a permit or authorization from the federal government, including even private participation in U.S. Department of Agriculture or Natural Resource Conservation District farm programs or the use of pesticides licensed by the Environmental Protection Agency.

ESA Section 10 & Private Land

Habitat Conservation Plans (HCPs), Safe Harbor Agreements (SHA), and Candidate Conservation Agreements with Assurances (CCAA) are voluntary agreements between a landowner and the Services whereby the landowner agrees to take certain actions to try to keep species from being listed as threatened or endangered. 16 U.S.C. § 1539. SHAs

and CCAAs are both programs where a landowner is protected from the liability of "take" of a threatened or endangered species (listed species) if the landowner (1) voluntarily implements conservation measures that address the threats to a species and (2) is acting in compliance with the CCAA or SHA. Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,721 (June 17, 1999); Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164 (December 27, 2016). The CCAA program also includes species proposed to be listed with the additional assurance that federal Services will not implement new restrictions on their property related to the covered species. Candidate Conservation Agreements with Assurances Policy at 95,164.

For both agreements, an enhancement of survival (EOS) permit from the Secretary of the Interior is required. 16 U.S.C. § 1539(a). An EOS permit is a permit that allows an exception to the "take" provision of the ESA if certain conservation measures are taken to overall enhance the population or habitat of a protected species. 50 C.F.R. § 17.22. If an enhancement of survival permit is obtained, and the conservation measures are taken, then the landowner may continue authorized use of their property, even if it results in an incidental take of the species. 50 C.F.R. § 17.22.

Habitat Conservation Plans (HCPs)

In order to avoid the penalties for "take" of a species, and still allow the use and development of private land, the ESA also authorizes the Services to issue incidental take statement (ITS) to private landowners upon the fulfillment of certain conditions, specifically the development and implementation of HCPs. 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.22(b)(1). Under this scheme, private landowners are able to engage in activities that could result in incidental take without fearing ESA violations, while also undertaking conservation efforts that help to promote the overall goals of the ESA.

An HCP must include (a) a description of the proposed action, (b) the impact to the listed species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the Services may deem necessary for the conservation plan. 50 C.F.R. § 17.22(b)(1).

Once an HCP is presented, the Services must make certain findings before it can issue an ITS. Those findings include (a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciable reduce the survival and recovery of the listed species, and (f) that any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(A).

As a practical matter, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land.

Safe Harbor Agreements (SHAs)

Safe Harbor Agreements are voluntary agreements between the Services and a non-federal landowner who wishes to continue use of their land, even if it results in an incidental take of the species. The Services created the SHA program as a way to work with private landowners who were interested in conserving listed species. Under an SHA, the property owner agrees to engage in actions that contribute to the recovery of listed species on non-federal land. In return, the Services provide formal assurances that the property owner will not be required to take on any additional or different management practices without the property owner's consent. As part of an SHA, the participating landowner will be issued an "enhancement of survival permit" which authorizes any take incidental to carrying out the activities agreed to in the SHA. 16 U.S.C. § 1539(a)(1)(A).

SHAs are intended to be incentives for non-federal landowners to "restore, enhance, or maintain habitats and/or populations of listed species that result in a net conservation benefit to these species." Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,721 (June 17, 1999). SHAs are also intended to achieve mainly short-term and mid-term conservation benefits but are not required to achieve long-term conservation benefits.

The goal of an SHA is to allow actions on private property that achieve a "net conservation benefit." A "net conservation benefit" is "the cumulative benefits of the management activities identified in a[n SHA] that provide for an increase in a species' population and/or the enhancement, restoration, or maintenance of covered species' suitable habitat within the enrolled property, taking into account the length of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species." Announcement of Final Safe Harbor Policy at 32,722.

Conservation benefits include, but are not limited to:

- Reduction of habitat fragmentation rates;
- The maintenance, restoration, or enhancement of habitats;
- Increase in habitat connectivity;
- Maintenance or increase of population numbers or distribution;
- Reduction of the effects of catastrophic events;
- Establishment of buffers for protected areas;
- Establishment of areas to test and develop new and innovative conservation strategies.

Announcement of Final Safe Harbor Policy at 32,723.

Net conservation benefits are measured by comparing the benefits to the "baseline conditions." Baseline conditions refer to the "population estimates and distribution and/or habitat characteristics in the determined area of the enrolled property that sustain seasonal or permanent use by the covered species at the time the SHA is executed[.]" Announcement of Final Safe Harbor Policy at 32,722. Baseline conditions must reflect the known biological and habitat characteristics that support existing levels of use of the property by species covered in the SHA. These baseline conditions will be agreed upon by the Services and the participating property owner. The parties must also agree to the extent which the enrolled property is inhabited by the species (seasonally, permanently, etc.). Announcement of Final Safe Harbor Policy at 32,723.

If the actions in the SHA achieve a net conservation benefit, then the private landowner receives certain "Safe Harbor Assurances." Safe Harbor Assurances" are "assurances provided by the Services to a non-Federal property owner in the agreement and authorized in the enhancement of survival permit for covered species. These assurances allow the property owner to alter or modify enrolled property, even if such alteration or modification results in the incidental take of a listed species to such an extent that it returns the species back to its originally agreed upon baseline conditions." Announcement of Final Safe Harbor Policy at 32,723. The assurances run with the land for as long as the participating landowner complies with the SHA and accompanying enhancement of survival permit. Announcement of Final Safe Harbor Policy at 32,725. The assurances can also outlive the duration of the SHA, if the participating landowner still has the enhancement of survival permit.

In order for the Services to approve an SHA, it must satisfy the following requirements:

- Specify the species and/or habitats covered;
- Include a full description of the baseline conditions;
- Identify management actions that would be undertaken to accomplish the net conservation benefits and when those benefits would be achieved;
- Describe any incidental take associated with the management actions;
- If appropriate, incorporate a notification requirement to provide the Services or appropriate state agencies with a reasonable opportunity to rescue individuals of a covered species before authorized incidental taking occurs;
- Describe what activities would be expected to return the enrolled property to baseline conditions and the extent of incidental take that would result from the activities;
- Satisfy other requirements of section 10 of the ESA; and

- Identify a schedule for monitoring and the responsible parties who will monitor maintenance of the baseline conditions, implementation of terms and conditions of SHA and any incidental take as authorized in the permit.

Announcement of Final Safe Harbor Policy at 32,723.

Candidate Conservation Agreement with Assurances (CCAAs)

CCAAs are agreements between a non-federal landowner and the Services for landowners to implement conservation measures for species that are proposed for listing under the ESA in exchange for assurances that the land where the conservation measures are taken would be exempt from certain regulations if the candidate species is listed. Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164 (December 27, 2016).

CCAAs are intended to provide landowners with incentives to take conservation measures for candidate species while ensuring "regulatory certainty" with regard to resource restrictions that might apply if the candidate species is listed under the ESA. Candidate Conservation Agreements with Assurances Policy at 95,171. In other words, those who sign a CCAA (or "certificate of inclusion" under an umbrella CCAA) will receive assurances that additional conservation measures above those contained in the CCAA will not be required or imposed upon the landowner upon species listing or designation of critical habitat.

To receive these assurances, the conservation measures must be reasonably expected to achieve a "net conservation benefit." A "net conservation benefit" is "the cumulative benefits of the CCAA's specific conservation measures designed to improve the status of a covered species by removing or minimizing threats so that populations are stabilized, the number of individuals is increased, or habitat is improved. The benefit is measured by the projected increase in the species' population or improvement of the species habitat, considering the duration of the CCAA and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit." Candidate Conservation Agreements with Assurances Policy at 95,171.

When determining whether to enter into a CCAA, the Service will consider the extent to which the CCAA "reduces threats to proposed and candidate species and species likely to become candidates or proposed in the near future so as to preclude or remove any need to list the species as threatened or endangered under the Act." Similar to entering into a SHA, the landowner must first obtain an EOS permit as required by ESA section 10(a)(1)(A).

The enhancement of survival permit can benefit the non-federal property owner in two ways: (1) in the event that a species is listed, incidental take authorization enables property owners to continue existing and agreed-upon land uses that have the potential to cause take, provided that the property owner is properly implementing the CCAA, and

(2) the property owner is provided the assurance that, if the species is listed, no additional conservation measures will be required and no additional land use restrictions will be imposed. Candidate Conservation Agreements with Assurances Policy at 95,172.

The parties to a CCAA are the Services and the property owner(s) wanting to obtain regulatory assurances from the Services. While the policy does not require neighboring landowners or other state Services to be party to the signed CCAA, the Service is required to work with any state or federal Services that may have an interest in the CCAA to ensure that there are not any significant environmental, economic, social, historical or cultural impact, or significant controversy. Candidate Conservation Agreements with Assurances Policy at 95,173.

To be approved by the Services, the CCAA must include:

- The population levels (if available) of the covered species at the time the parties sign the agreement, existing habitat characteristics that sustain current, permanent or seasonal use, potential use by the covered species and consideration of the existing and anticipated condition of the landscape of the contiguous lands or waters not on the participating owner's property;

- The conservation measures the participating property owner agrees to undertake to address specific threats identified to conserve the species;

- The benefits expected to result from the conservation measures;

- A monitoring provision that requires measuring and reporting on:

    - Progress in implementing the conservation measures described in the CCAA;

    - Changes in habitat conditions and the species' status resulting from the conservation measures; and

- As appropriate, a notification requirement to provide the Services or state agencies with a reasonable opportunity to rescue individuals of the covered species before any authorized incidental take occurs.

U.S. Fish & Wildlife Serv., Candidate Conservation Agreements with Assurances Handbook, 11-20 (2003).

Assurances related to take of the covered species will be authorized through the EOS permit, including assurances that no additional conservation measures will be required, and no additional land, water, or resource use restrictions will be imposed beyond those described in the CCAA unless the conservation measures are not being implemented properly or there are unforeseen circumstances. The Services must obtain the property

owner's permission before additional conservation measures are implemented. The amount of prescribed incidental take allowed under the enhancement of survival permit will also be included. Candidate Conservation Agreements with Assurances Policy at 95,172.