

THE ENDANGERED SPECIES ACT



BACKGROUND

The Endangered Species Act (ESA) was enacted in 1973 for the protection of fish, wildlife, and plants at risk of extinction. The Act created a list of these threatened and endangered species and mandated the U.S. Fish and Wildlife Services (FWS) and the National Marine Fisheries Service (NMFS), in collaboration with other agencies, to create and implement plans for their recovery. When the law was first created, it protected 109 species categorized as endangered; today, there are over 1,600^[1] protected. Since 1973, less than 2% of all listed species have been removed from the list. Of the species that are no longer listed, some have gone extinct while many others were “recovered” based on data error.^[2]

Under the ESA, federal agencies are required to ensure that the actions they authorize, fund, or carry out will not negatively impact any listed species or their “critical habitat.” Additionally, the “taking” of any endangered species is strictly prohibited, meaning harassing, harming, hunting, killing, or trapping. This prohibition also includes any action that significantly modifies the habitat of a listed species, impacting their essential behavior patterns.^[3] The protection of listed species and their habitats has often come at the expense of landowners, farmers, ranchers, and essential American industries.

CORE PROVISIONS OF THE ESA

Under the ESA, federal agencies are required to ensure that the actions they authorize, fund, or carry out will not jeopardize any listed species or destroy or adversely modify designated “critical habitat.”

Additionally, the “taking” of any endangered species is prohibited. “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to do so. This prohibition also includes actions that significantly modify the habitat of a listed species in a way that impairs essential behavioral patterns. ^[1]

LISTING

Species are most commonly listed following a petition from an individual, group, or state agency asserting that the species is at risk of endangerment. The Secretary (of either the Department of Interior or the Department of Commerce) must then determine, based upon the best available scientific and commercial data, whether the species meets the criteria for listing.

RECLASSIFICATION AND DELISTING

The Secretary is required to review all listed species at least once every five years to determine whether they should be delisted, reclassified from endangered to threatened (downlisted), or reclassified from threatened to endangered (uplisted).

Citizen petitions may also request delisting or reclassification.

After delisting, management authority is generally returned to the states where the species is located. The Services must coordinate with states to monitor delisted species for at least five years. During that monitoring period, the Secretary may use emergency authority to relist the species if it faces significant risk.

CRITICAL HABITAT

Once a species is listed, the relevant agencies must designate critical habitat, including areas essential to the conservation of the species that require special management or protection. Critical habitat may include areas not occupied by the species at the time of listing but considered essential for its conservation.^[1]

When determining critical habitat, FWS and NMFS evaluate the best available scientific data to determine which physical or biological features are essential. These features may include:

- Breeding, spawning, nesting, or feeding sites
- Shelter or cover
- Food, water, air, light, minerals, or other nutritional requirements
- Habitats protected from disturbance
- Areas necessary for migration or dispersal

The designation of critical habitat does not automatically prohibit private land use. Instead, its primary regulatory effect operates through Section 7. Federal agencies must ensure that actions they authorize, fund, or carry out do not destroy or adversely modify designated critical habitat. If a proposed federal action would negatively impact critical habitat, the agency must modify the project, implement alternatives, or risk violation of the ESA.

CRITICAL HABITAT

Economic impacts are considered during critical habitat designation, meaning that a particular area may be excluded if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would result in the extinction of the species.

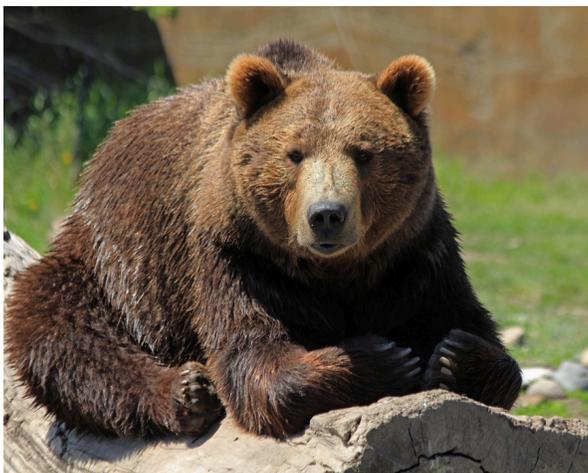
The inclusion of unoccupied areas has been particularly controversial. Agencies have interpreted the ESA to allow designation of areas not currently occupied by the species if those areas are essential for recovery, including areas necessary for future range expansion or climate adaptation. Litigation has centered on whether such areas must first qualify as “habitat” before being designated as critical habitat and how broadly the term “essential” may be interpreted. These expansive critical habitat designations have created regulatory uncertainty, reduced land-use, and imposed economic costs even where species are not present.

STATE COOPERATION

Section 6 of the ESA requires the federal government to form cooperative agreements with states to implement the ESA. States may receive federal financial assistance to support these cooperative actions through the Cooperative Endangered Species Conservation Fund (CESCF).[1]

The CESCF promotes state and federal collaboration to conserve listed species by providing financial assistance for projects that protect vital habitats, improve species recovery, and prevent new listings by addressing conservation needs early. Funding is distributed through both competitive and formula grant programs. The three major grant categories included in the CESCF are Conservation Grants, habitat Conservation Planning Assistance Grants, and HCP Land Acquisition Grants.

States with agreements with federal agencies are entitled to notice of proposed listing and critical habitat designations, opportunity to comment on rules and participate in consultations, and consideration of state data in federal decisions.



SECTION 7 CONSULTATIONS

Section 7 consultations ensure that federal agency actions, and private actions requiring federal approval or funding, will not jeopardize a listed species or adversely modify its critical habitat. If an action is found likely to cause damage, the agency must modify the action, forgo it, or seek an exemption from the Endangered Species Committee (“God Squad”).

- The God Squad was formed in 1978 to determine which projects needed to be exempt from ESA protections when their economic and national interest cost was too high. The Committee is led by the Secretary of the Interior and includes the Secretaries of Agriculture and the Army, the administrators of the EPA and OAA, and the Chairman of the Council of Economic Advisers. Relevant states can also be represented with one vote. Five votes total are required for an exemption. The God Squad has only issued two exemptions in 47 years, both exemptions faced significant litigation.[1]

ENFORCEMENT AND PENALTIES

Individuals who violate ESA prohibitions may face civil or criminal penalties. Criminal penalties may include fines, imprisonment, or revocation of related leases, licenses, and permits.

Equipment used in connection with ESA violations may be subject to seizure.

KEY ISSUES

- **Impact on Industry and Agriculture:** Endangered species often inhabit areas with existing resource development or agricultural use. Critical habitat designations and ESA compliance requirements can affect farming, ranching, timber production, mining, and infrastructure development.
- ESA compliance requirements delay or modify projects involving federal funding, authorization, or permits.
- **One-Size-Fits-All Treatment:** Concerns have been raised that the ESA’s regulatory structure may not sufficiently account for regional differences, state management capacity, or species-specific conservation approaches.
- The “blanket 4(d) rule” extends endangered-level protections to threatened species unless FWS adopts a species-specific 4(d) rule stating otherwise.

REGULATORY ISSUES

During President Trump's first administration, DOI issued four rules to alter the ESA to reign in federal overreach caused by ESA overregulation. The Biden Administration revoked each of these rules and increased FWS' authority to expand and regulate critical habitats.

In 2025, the DOI announced its intention to restore the 2019 and 2020 ESA rules, created during the first Trump Administration. Key Changes include:

- FWS will again consider national security and economic impacts—as well as scientific and commercial data—in listings, delisting, and critical habitat determinations.
- Reinstating 2019 definitions that provide clarity and consistency to the rules of interagency cooperation in ESA regulation. This reigns in federal action and ensures that agencies must closely follow laws as they were written.
- The FWS will no longer use the Biden Administration's "blanket rule" that applied an automatic one size fits all standard to threatened species protections. These changes align FWS practices with the NMFS' long-standing standards, allowing FWS to create protections for threatened species that are specific and necessary on a case-by-case basis.
- When determining a critical habitat, FWS will consider all economic, national security, and other relevant impacts to determine areas that must be excluded. This provides a reliable, consistent standard for landowners while protecting endangered and threatened species.



LEGISLATIVE SOLUTION

H.R. 1897 The ESA Amendments Act – Sponsored by Chairman Bruce Westerman (AK-04)

The ESA Amendments Act of 2025 will reform the ESA to incentivize more effective species conservation while limiting federal overreach and preventing excessive litigation.

- Requires the Services to create clear, science-based recovery timelines that incentivize species recovery by decreasing regulations and ceding authority to the states as recovery occurs.
- incentivizes conservation of private lands by strengthening the Candidate Conservation Agreements with Assurances, that allow landowners to voluntarily enter into conservation agreements with NOAA before a fish species is listed as threatened or endangered. The agreement guarantees that no further restrictions will be placed upon the landowner if the species becomes listed, if the landowner takes preemptive conservation actions.
- Requires FWS and NMFS to conduct their 5-year review determination of all listed species and prohibits judicial review within that period.
- Creates regulatory certainty that critical habitat won't be designated where a landowner is already working to manage their land to conserve the listed species.
- Increases transparency by requiring the Services to publish the data they use to determine listings and critical habitats and to disclose the total cost of ESA-related lawsuits to Congress.
- Reigns in federal overreach by clarifying the authority of FWS and NMFS in determining ESA violations.

[1] American Farm Bureau Federation, (2018), "Endangered Species Act," <https://www.fb.org/files/ESA.pdf>

[2] Rob Gordon, Western Caucus Foundation, (2025), "The Endangered Species Act at 50," <https://www.fb.org/files/ESA.pdf>

[3] U.S. Fish and Wildlife Services, "Permits for Native Endangered and Threatened Species," <https://www.fws.gov/library/collections/permits-native-endangered-and-threatened-species>

[4] Congressional Research Service, "The Legal Framework of the Endangered Species Act," 2019), <https://crs.gov/Reports/IF11241?source=search>

[5] CRS, (2016), "The Endangered Species Act: A Primer," https://www.congress.gov/crs_external_products/RL/PDF/RL31654/RL31654.28.pdf

[6] U.S. Fish and Wildlife Services, "Cooperative Endangered Species Conservation Fund," <https://www.fws.gov/program/cooperative-endangered-species-conservation-fund>

[7] The Associated Press, (2025) <https://apnews.com/article/trump-logging-endangered-species-god-squad-5d4bbd117a480cdc60f5bc5580cd72ef>