



ENDANGERED SPECIES ACT

A Reference Guide | August 2013



UNITED STATES MARINE CORPS



THE ENDANGERED SPECIES ACT



PURPOSE

This *Reference Guide on the Endangered Species Act* identifies the requirements for the United States Marine Corps to comply with the federal Endangered Species Act. The information included in this Reference Guide is intended to inform Marine Corps personnel about the requirements of the ESA, consultation procedures, and how they integrate into other planning processes.

INTRODUCTION

Congress passed the Endangered Species Act (ESA) of 1973 due to the decline of numerous wildlife species around the world. The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend.

To that end, the Act:

- ▶ establishes a framework to prevent the extinction of imperiled plant and animal species;
- ▶ conserves the ecosystems upon which endangered and threatened species depend; and
- ▶ recovers and maintains listed species by removing or lessening threats to their survival.

Congress split the authority to manage species listed under the ESA between the Departments of Interior and Commerce. The Department of the Interior, through the U.S. Fish and Wildlife Service (USFWS), is responsible for managing terrestrial and freshwater species. The National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS), in the Department of Commerce, is responsible for marine wildlife, such as whales, and anadromous fish, such as salmon. NMFS manages 94 listed species, while the USFWS has jurisdiction over the other approximately 1,900 listed species.

The USFWS and NMFS work cooperatively with other federal agencies in planning federal projects and actions so they will have minimal impact on listed species and their habitat. The ESA works with other laws that have enforcement provisions, such as the Marine Mammal Protection Act (MMPA), Migratory Bird Treaty Act (MBTA), and Bald and Golden Eagle Protection Act (BGEPA) to protect declining populations of rare species and their habitat.

“Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.”
– President Nixon, upon signing the Endangered Species Act

Species Listing Process

All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened under the ESA. The ESA requires species to be listed as endangered or threatened solely on the basis of their biological status and threats to their existence.

ENDANGERED SPECIES: any plant or animal species that is in danger of extinction throughout all or a significant portion of its range.

THREATENED SPECIES: any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

When evaluating a species for listing, the USFWS and NMFS consider five factors based on the best scientific information available:

1. damage to, or destruction of, a species' habitat;
2. overutilization of the species for commercial, recreational, scientific, or educational purposes;
3. disease or predation;
4. inadequacy of existing protection; and
5. other natural or manmade factors that affect the continued existence of the species.

When one or more of these factors imperils the survival of a species, the USFWS or NMFS takes action to protect it. They also maintain a list of candidate species; these are species for which there is enough information to warrant the proposed listing under the ESA, but are precluded from being listed due to higher listing priorities. While listing actions of higher priority go forward, the USFWS or NMFS also works with states, tribes, private landowners, private partners, and other federal agencies to carry out conservation actions for candidate species to prevent further decline and possibly eliminate the need for listing.

The ESA also directs the designation of critical habitat for a species either at the same time it lists the species or subsequent to listing. Critical habitat designations are made through an open, public process and must be based on the best scientific information available, while also taking into account the impacts to the economy, national security, or other relevant factors.

CRITICAL HABITAT: a specific geographic area(s) that is essential to the conservation of a listed species and that may require special management and protection. Critical habitat may include an area that is not currently occupied by the species, but will be needed for its recovery. The USFWS or NMFS may designate critical habitat at the time the species is listed under the ESA or any time thereafter.

2 The National Defense Authorization Act of 2004 amended Section 4 of the ESA so that the USFWS shall not designate critical habitat on a military installation if it would impact national security or if the USFWS or NMFS determines that the installation's Integrated Natural Resources Management Plan (INRMP) provides a conservation benefit to the listed species.

“The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an Integrated Natural Resources Management Plan prepared under Section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.”

– *Endangered Species Act Section 4(a)(3)(B)(i)*

The ESA prohibits everyone, private person and federal agency alike, from “taking” a listed animal species without a permit. “Take” includes “harming” a listed species, which means an act that actually kills or injures wildlife; it also includes significant habitat modification or degradation where it kills or injures wildlife by significantly impacting essential behavioral patterns, including breeding, feeding, or sheltering. Listed plants are not protected from take, although it is illegal to collect or maliciously harm them on federal land.

TAKE: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct toward a listed species.

Section 7: Federal Management Responsibilities

Section 7 of the ESA, titled “Interagency Cooperation,” defines the responsibilities of federal agencies. As a federal agency, the Marine Corps has the responsibility to both contribute to the protection and recovery of listed species, as well as consult on the effects of their proposed actions to ensure that they do not jeopardize the continued existence of a species or result in adverse modifications to designated critical habitat. The Marine Corps implements INRMPs to provide for the overall conservation of natural resources on their installations, with a focus on listed species and their habitats. However, any specific project or action (i.e., land management, construction, training activities) that may affect listed species or designated critical habitat must be reviewed in consultation with either the USFWS or NMFS as appropriate, and is commonly referred to as a “Section 7 Consultation.”

SECTION 7: the section of the ESA that requires all federal agencies to work with the USFWS or NMFS to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Integrating with other planning processes

Protection, management, and recovery of listed species, as well as that of species having the potential for listing under the ESA, must be accounted for in the various planning activities at a Marine Corps installation. Overall management and monitoring of listed species is accomplished through implementation of the installation's INRMP. INRMPs provide baseline natural resources information and outline the installation's strategy for addressing the conservation of listed species and their habitats.

Consideration and analysis of the effects of individual actions or programs on listed species and their habitats is required not only by the ESA, but also by the National Environmental Policy Act (NEPA). Certain listed species (i.e., marine mammals, migratory birds) are also protected by other laws such as the MMPA and MBTA, which may require separate permits. While compliance with the ESA, NEPA, MMPA, or MBTA are all distinct legal requirements with unique processes and procedures for each, the analysis and timelines of these processes should be closely coordinated to ensure consistency of information, synchronization of scheduling, and overall efficiency. Under current Department of Navy policies, any action that may result in adverse effects to listed species must, at a minimum, be evaluated by the preparation of an Environmental Assessment to determine the significance of the impacts of the action. Satisfaction of all relevant legal and regulatory requirements is a prerequisite to implementing actions or programs that may affect a listed species.

The Marine Corps, through its planning processes, must first determine if an action may affect a listed species. If the action would negatively affect a listed species, then the Corps must avoid and minimize the adverse effects to the maximum extent practicable. If the effects to listed species are unavoidable, then consultation with the USFWS or NMFS is required.

“The Endangered Species Act is the strongest and most effective tool we have to repair the environmental harm that is causing a species to decline.”

– Representative Norm Dicks (WA)

SECTION 7 CONSULTATION PROCESS

The consultation process may begin with an informal consultation, during which a federal agency, such as the Marine Corps, discusses with the USFWS or NMFS which listed species occur in the proposed action area and what effect the proposed action may have on those species. If the Marine Corps determines that the proposed action is not likely to adversely affect any listed species in the action area, and if the USFWS or NMFS concurs, then the informal consultation is complete and the proposed action may

proceed. However, if it is determined that the action may adversely affect, or “take,” a listed species, then the Marine Corps must initiate a formal consultation. Formal consultation begins with a written request for consultation under section 7(a)(2) of the ESA and concludes with the issuance of a biological opinion under section 7(b)(3).

ACTION AREA: all areas directly or indirectly effected by the federal action, not merely the immediate area involved in the action.

INFORMAL CONSULTATION: an optional process that includes all discussions and correspondence between the USFWS, NMFS, and a federal agency or designated non-federal representative, prior to formal consultation, to determine whether a proposed federal action may affect listed species or critical habitat. This process allows the federal agency to utilize the expertise of the USFWS or NMFS to evaluate the agency’s assessment of potential effects or to suggest possible modifications to the proposed action that could avoid potentially adverse effects.

FORMAL CONSULTATION: a process between the USFWS or NMFS and a federal agency or applicant that:

1. determines whether a proposed federal action is likely to jeopardize the continued existence of listed species or to destroy or adversely modify designated critical habitat;
2. begins with a federal agency’s written request and submittal of a complete initiation package; and
3. concludes with the issuance of a biological opinion and incidental take statement by either the USFWS or NMFS.

If a proposed federal action may affect a listed species or designated critical habitat, formal consultation is required (except when the USFWS or NMFS concurs, in writing, that a proposed action “is not likely to adversely affect” listed species or designated critical habitat).

BIOLOGICAL OPINION: a document stating the opinion of the USFWS or NMFS as to whether a federal action is likely to:

- jeopardize the continued existence of a listed species; or
- result in the destruction or adverse modification of critical habitat.

It is the product of formal consultation under Section 7 of the ESA.

INCIDENTAL TAKE: take of listed fish or wildlife species that results from carrying out, but is not the purpose of, an otherwise lawful activity conducted by a federal agency or applicant.

During formal consultation, the Marine Corps prepares and submits a biological assessment to the USFWS or NMFS providing information about the proposed action, the action area, the species likely to be affected, an evaluation of the potential effects of the action, and any conservation measures proposed by the Marine Corps to avoid and minimize the adverse effects. Formal consultation may last up to 90 days, after which the USFWS or NMFS will prepare a biological

opinion on whether the proposed action will jeopardize the continued existence of a listed species. The USFWS or NMFS has 45 days after completion of the formal consultation to write the biological opinion.

BIOLOGICAL ASSESSMENT: a document prepared by the project proponent for the Section 7 process to determine if a proposed project is likely to adversely affect federally listed species or designated critical habitats.

EFFECTS OF THE ACTION: the direct and indirect effects of an action on listed species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.

In making a determination on whether the proposed action will jeopardize the existence of a species, the USFWS or NMFS begins by looking at the current conservation status of the species, or “baseline.” The USFWS or NMFS adds to the baseline the various effects of the proposed action: direct, indirect, interrelated, and interdependent. The USFWS or NMFS also examines the cumulative effects of other non-federal actions that may impact the species, including state, tribal, local, or private activities that are reasonably certain to occur in the proposed action area.

CUMULATIVE EFFECTS: those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation.

The USFWS or NMFS then measures their analysis against the criteria of jeopardy for a particular species, such as a species recovery plan, and determines if the Marine Corps’ action, in conjunction with proposed conservation measures, will put the species in jeopardy.

JEOPARDY: when an action is reasonably expected, directly or indirectly, to diminish a species’ numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced.

Once the USFWS or NMFS collects all the data and completes its analysis, it prepares a biological opinion. If the USFWS or NMFS confirms that the action is not likely to jeopardize the species, it issues a “non-jeopardy” opinion and prepares an incidental take statement for the proposed action. While the ESA prohibits take under most circumstances, incidental take may be allowed only when the USFWS or NMFS approves it through an incidental take statement. The incidental take statement includes:

- ▶ the amount or extent of anticipated take due to the federal action;
- ▶ reasonable and prudent measures to minimize the take; and
- ▶ terms and conditions that must be observed when implementing those measures.

After the USFWS or NMFS issues its biological opinion, the Marine Corps then decides how to proceed. If the USFWS or NMFS made a non-jeopardy determination, then the Marine Corps can adopt the measures outlined in an incidental take statement and proceed with the proposed action. If the Marine Corps proceeds with the action, then the Marine Corps' proposed conservation measures and reasonable and prudent measures outlined in the biological opinion must be implemented and are legally enforceable. The USFWS or NMFS may also propose conservation recommendations to the Marine Corps that will further assist in minimizing adverse effects to listed species of critical habitats.

If the USFWS or NMFS determines that the proposed action will put the species in jeopardy, then it makes a "jeopardy determination" in the biological opinion. In that case, it provides the Marine Corps with reasonable and prudent alternative actions that would not violate the ESA. These alternatives are often developed with input and assistance from the Marine Corps. Alternatives must:

- ▶ be consistent with the purpose of the proposed action;
- ▶ be consistent with the Marine Corps' legal authority and jurisdiction;
- ▶ be economically and technically feasible; and
- ▶ in the USFWS' or NMFS' opinion, avoid jeopardy.

If the USFWS or NMFS makes a jeopardy determination, then the Marine Corps has several options:

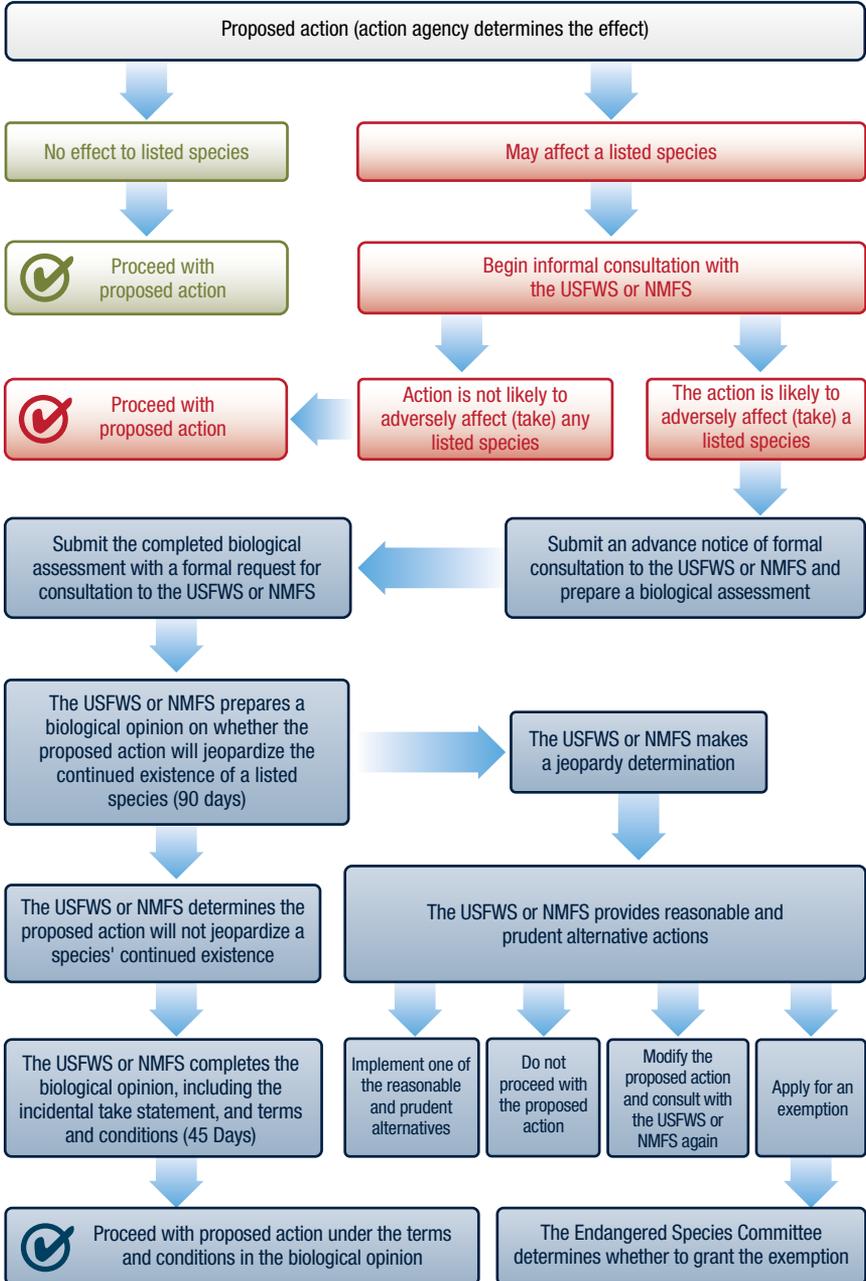
- ▶ implement one of the reasonable and prudent alternatives;
- ▶ modify the proposed action and consult with the USFWS or NMFS again;
- ▶ decide not to undertake (or fund, or authorize) the project; or
- ▶ disagree with the opinion and proceed (at risk).

Following the issuance of a biological opinion, there are certain circumstances that may necessitate the re-initiation of formal consultation for a specific action. These include:

- ▶ if the amount or extent of taking specified in the incidental take statement is exceeded;
- ▶ if new information reveals that the results of the action may affect listed species or critical habitat in a manner or to an extent not previously considered;
- ▶ if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- ▶ if a new species is listed or critical habitat designated that may be affected by the identified action.

THE ESA SECTION 7 CONSULTATION PROCESS

KEY ■ No Effect ■ Informal Consultation ■ Formal Consultation



ADDRESSING NON-LISTED SPECIES

It is not required that the Marine Corps consult with the USFWS or NMFS on effects to non-listed species, such as candidate species for listing under the ESA, species protected by state laws, or species identified as “at-risk” by criteria other than the ESA. Effects to these species are addressed in other environmental impact analyses required by NEPA.

However, if a species is proposed for listing or critical habitat has been proposed in the action area, then the Marine Corps may be required to conduct a conference with the USFWS or NMFS. A conference is required only when the Marine Corps determines that a proposed action is likely to jeopardize the continued existence of a proposed species, or to destroy or adversely modify proposed critical habitat. The Marine Corps may also request a conference on any proposed action that may affect proposed species or critical habitat. The USFWS or NMFS can also request a conference after reviewing the available information that suggests a proposed action is likely to jeopardize proposed species, or destroy or adversely modify proposed critical habitat.

CONFERENCE: a process of early interagency cooperation involving informal or formal discussions between a federal agency, the USFWS, and NMFS pursuant to Section 7(a)(4) of the ESA regarding the likely impact of an action on any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under Section 4 of the ESA.

Conferences may involve informal discussions between the USFWS or NMFS and the action agency. Action agencies may also request formal conferences on a proposed action. Although the regulations permit the USFWS or NMFS to decide whether a formal conference is appropriate, formal conferences should be provided if requested. Formal conferences follow the same procedures as formal consultations. The opinion issued at the end of a formal conference is called a “conference opinion;” it follows the contents and format of a biological opinion. The incidental take statement provided with a conference opinion does not take effect until the USFWS or NMFS adopts the conference opinion as a biological opinion on the proposed action, which happens after the species is listed. This process may be advantageous if it is reasonably likely that a species will be listed, to avoid further future consultation and project delays following the final listing determination.

MARINE CORPS QUICK GLANCE

Why do I have to care?

Upon passing the ESA, Congress expressed that our rich natural heritage was of “esthetic, ecological, educational, recreational, and scientific value to our nation and its people.” Therefore, it is of the utmost importance that we protect native species for current and future generations. Currently, there are 59 listed species that occur on Marine Corps owned or controlled lands and waters; we must take these species into consideration during military training and operations, construction activities, and general land use planning. Additionally, critical habitat for one species is currently designated on two separate installations. As land use in the regions surrounding our installations continues to change from undeveloped to developed, declines in species populations and available habitats will continue to require additional species listings and protections.

Under the ESA, the Marine Corps must take measures to protect these listed species and consult with the USFWS or NMFS when funding, conducting, or authorizing an action that may adversely impact a listed species. Penalties for violating the ESA may include, but are not limited to, monetary fines up to \$50,000, imprisonment for up to one year, or both. If violators do not pay their fines, the U.S. Department of Justice may recover the money in an appropriate district court. Failing to comply with the ESA’s procedures has the potential to significantly slow or completely suspend training and mission activities.

How long does the consultation process take?

The duration of the consultation process depends on the species, location, and situation. If the Marine Corps enters formal coordination with the USFWS or NMFS, that process can last up to 90 days. After formal coordination is complete, then the USFWS or NMFS will prepare a biological opinion within 45 days on whether the proposed activity will jeopardize the continued existence of a listed species. For more complex actions, the USFWS or NMFS may request additional time or require additional information that may extend this timeline.

Who pays/programs funds for this process?

Funding for ESA Section 7 consultations varies, depending on the proposed activity. If the proposed activity requires a biological assessment (BA), then the action proponents pay for any required surveys, preparation of the BA, and the proposed conservation measures, including mitigation. If the proposed activity is programmatic or long-term (e.g., inventory, monitoring), then the installation’s Natural Resources Program pays.

SOURCES/REFERENCES

- ▶ Endangered Species Act of 1973:
<http://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>
- ▶ NOAA NMFS Office of Protected Resources, Endangered Species Act website:
<http://www.nmfs.noaa.gov/pr/laws/esa>
- ▶ U.S. Fish and Wildlife Service: “ESA Basics, More Than 30 Years of Conserving Endangered Species” fact sheet, January 2013:
http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf
- ▶ U.S. Fish and Wildlife Service Midwest Region Endangered Species Act Section 7 Consultation website: <http://www.fws.gov/midwest/endangered/section7/index.html>
- ▶ U.S. Fish and Wildlife Service and National Marine Fisheries Service: “Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act” March 1998: http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf
- ▶ U.S. Marine Corps: “Natural Resource Conservation Program” Guidebook, 2nd Edition, 2010. HQMC Conservation Section (CMC-LFL-1).

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Website: <http://www.fws.gov/endangered/regions/index.html>

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