

# The Endangered Species Act

## 16 U.S.C. § 1531 et seq.

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# Agenda

- ▶ History of the ESA
- ▶ Core Components of Protections
- ▶ Regulatory Changes under Trump and Biden



# History

- ▶ Enacted in 1973 during the Nixon Administration
- ▶ “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).
- ▶ “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 . . . .” 16 U.S.C. § 1531(b).



Photo by Lisa Hupp, USFWS

The background features a series of overlapping, semi-transparent green geometric shapes, primarily triangles and quadrilaterals, that create a sense of depth and movement. The colors range from a light, pale green to a vibrant, saturated lime green. The shapes are layered, with some appearing to be in front of others, creating a complex, layered effect. The overall composition is clean and modern, with a focus on geometric forms and color gradients.

# Core Protections

## Key Agencies

U.S. Fish and  
Wildlife Service

National Marine  
Fisheries Service

# Listing Species under Section 4

- ▶ An Endangered Species is “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).
- ▶ A Threatened Species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).
- ▶ Five statutory factors focused on biological needs of the species, 16 U.S.C. § 1533(a).
- ▶ Determinations must be made “solely on the basis of the best scientific and commercial data available.” *Id.* § 1533(b).

# Take Prohibition

- ▶ The ESA prohibits “take” of endangered species.
- ▶ The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- ▶ *This provision does not apply automatically to threatened species.*

Photo by Mike Hemming





# Protections for Threatened Species

- ▶ Services “shall issue such regulations as [they deem] necessary and advisable to provide for the conservation of such species.” 16 U.S.C. § 1533(d).
- ▶ For decades, FWS extended all take protections from Section 9
- ▶ Can always promulgate “4(d) Rule”

# Take Permits- Section 10, 16 U.S.C. § 1536

- ▶ Experimental Populations
- ▶ Incidental Take Permits (ITPs)
- ▶ Habitat Conservation Plans (HCPs)

# Designation of Critical Habitat

- ▶ Services must designate “to the maximum extent prudent and determinable.” 16 U.S.C. § 1533(a)(3)(A).
- ▶ Designated “concurrently with” listing. *Id.*
- ▶ Determined “on the basis of the best scientific data available and after taking into consideration the economic impact . . .” *Id.* § 1533(b)(2).
- ▶ Area-specific exclusions. *Id.*

# Critical Habitat



Photo by Peter Pattavina, USFWS

- ▶ Occupied habitat must contain “physical or biological features” essential for the conservation of species.
- ▶ Unoccupied habitat must be essential for the conservation of the species.

# Interagency Consultation

- ▶ “[I]nsure that any action authorized, funded, or carried out by such agency is not **likely to jeopardize the continued existence of any [listed species]** or result in the **destruction or adverse modification of**” critical habitat. 16 U.S.C. § 1536(a)(2).



# How do agencies ensure their actions do not violate Section 7? Consultation:

- ▶ **Is there a federal action?**
  - ▶ NO- No consultation required.
  - ▶ YES- What effect will the action have on listed species or critical habitat?
    - ▶ **Is the action one that “may effect” listed species or habitat?**
      - ▶ NO- No consultation required.
      - ▶ YES- **Is the action “likely to adversely affect” listed species or critical habitat?**
        - ▶ NO- Relevant Service must concur with effects determination. If so, no further consultation required.
        - ▶ If yes, relevant Service must prepare a Biological Opinion: **Is the action likely to jeopardize listed species or destroy or adversely modify critical habitat?**
          - ▶ YES- “Reasonable and prudent measures” to avoid effects
          - ▶ NO- Activity can continue

# Mitigating Project Impacts to Comply with Section 10 and Section 7

- ▶ Two main approaches to mitigating project impacts:
  - ▶ Mitigation within a project
  - ▶ Conservation Banking

# Citizen Enforcement

- ▶ (g) Citizen suits
  - ▶ (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—
    - ▶ (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
    - ▶ (B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or
    - ▶ (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.



# Trump-Era Regulatory Changes

Five Rulemakings Promulgated by the Fish and Wildlife Service



# Changes to Critical Habitat Protections

- ▶ “Not Prudent” exception
- ▶ Prioritizing occupied critical habitat
- ▶ Redefines “destruction or adverse modification”
- ▶ 4(b)(2) Exemptions \*\*
- ▶ Definition of “habitat” \*\*

Photo by Craig Springer, USFWS

# Changes to the “Not Prudent” Exception

## Old Regulation

- ▶ (1) A designation of critical habitat is not prudent when any of the following situations exist:
  - ▶ (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or
  - ▶ (ii) Such designation of critical habitat **would not be beneficial to the species.** In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of “critical habitat.”

## New Regulation

- ▶ (1) The Secretary may . . . determine that a designation would not be prudent in the following circumstances:
  - ▶ (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat . . . ;
  - ▶ (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;
  - ▶ (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;
  - ▶ (iv) No areas meet the definition of critical habitat; or
  - ▶ (v) The Secretary otherwise determines that designation . . . would not be prudent . . . .

# Changes to Critical Habitat Protections

- ▶ “Not Prudent” exception
- ▶ **Prioritizing occupied critical habitat**
- ▶ Redefines “destruction or adverse modification”
- ▶ 4(b)(2) Exemptions \*\*
- ▶ Definition of “habitat” \*\*



## Step-wise designation of habitat

- ▶ 50 C.F.R. 424.12(b)(2)-  
“Unoccupied critical habitat considered only where occupied areas “would be inadequate to ensure the conservation of the species.”
- ▶ “Essential” means “there is a reasonable certainty 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.”

# Changes to Critical Habitat Protections

- ▶ “Not Prudent” exception
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- ▶ **Redefines “destruction or adverse modification”**
- ▶ 4(b)(2) Exemptions \*\*
- ▶ Definition of “habitat” \*\*



## Piecemeal Destruction of Habitat

- ▶ 50 CFR 402.02- “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat **as a whole** for the conservation of a listed species.”

# Changes to Critical Habitat Protections

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- ▶ Prioritizing occupied critical habitat
- ▶ Redefines “destruction or adverse modification”
- ▶ **4(b)(2) Exemptions \*\***
- ▶ Definition of “habitat” \*\*





Photo by Allen Arthur

# Changes to Critical Habitat Protections

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# *Weyerhaeuser Co v. FWS*, 139 S. Ct. 361 (2018)

- ▶ Suit by landowners whose property was designated critical Habitat for the dusky gopher frog
- ▶ “Only the “habitat” of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.”



# Changes to Critical Habitat Protections

- ▶ “Not Prudent” exception
- ▶ Prioritizing occupied critical habitat
- ▶ Redefines “destruction or adverse modification”
- ▶ 4(b)(2) Exemptions \*\*
- ▶ **Definition of “habitat” \*\***
  - ▶ “For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.”

# Change to Listing

- ▶ “Foreseeable future” in threatened determinations
- ▶ Economic considerations in listing \*\*
- ▶ Protections for species newly listed as threatened \*\*

# Change to Listing

- ▶ **“Foreseeable future” in threatened determinations**
  - ▶ 50 C.F.R. 402.02- New definition; “The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.”
- ▶ Economic considerations in listing \*\*
- ▶ Protections for species newly listed as threatened \*\*

# Change to Listing

- ▶ “Foreseeable future” in threatened determinations
- ▶ Economic considerations in listing \*\*
  - ▶ 50 C.F.R. 424.11(b)- “The Secretary shall make [listing decision] solely on the basis of the best available scientific and commercial information regarding a species' status, ~~without reference to possible economic or other impacts of such determination.~~”
- ▶ Protections for species newly listed as threatened \*\*

# Change to Listing

- ▶ “Foreseeable future” in threatened determinations
- ▶ Economic considerations in listing \*\*
- ▶ Protections for species newly listed as threatened \*\*
  - ▶ Repealed automatic protections



# Action by the Biden Administration

- ▶ Intend to repeal certain changes:
  - ▶ Critical habitat exclusions under 4(b)(2)
  - ▶ Habitat definition
  - ▶ Economic considerations
  - ▶ 4(d) rules
- ▶ Intend to “revise” definition of “effects of the action.”
- ▶ Experimental populations

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the left and right sides of the frame, leaving a large white central area. The shapes are layered, creating a sense of depth and movement.

Questions?