

**ESA Basics**  
***And why it matters to Ag***

*January 2017 – Draft*

**Background**

When President Nixon signed the [Endangered Species Act](#) (ESA)<sup>i</sup> in 1973, a bill that passed Congress with broad bipartisan support, he explained that the act “provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage--threatened wildlife.”<sup>ii</sup> Few at the time could have imagined just how powerful or pervasive the ESA would become. What started out as a noble effort to prevent the grizzly bear and whooping crane from going the way of the passenger pigeon, has become an enormous bureaucratic complex reaching into nearly every facet of land management and supporting a vast industry of environmental conflict.

Although agriculture was not significantly impacted by the ESA in the first decades after passage, this began to change in the 1990s with the timber wars of the Pacific Northwest. As environmental organizations used litigation and agencies used regulation, the ESA became much more powerful and invasive. From owls and timber in the 1990s the emphasis expanded to fish and water in the 2000s where litigation and Biological Opinions shut down water supply in the Klamath basin and San Joaquin Valley of California. A few years later, the ESA’s emphasis again expanded to attack energy development in the vast sagebrush steppe of west.

All of this history improves agriculture’s ability to understand the threats the ESA poses to farmers and ranchers going forward, and to work proactively to develop solutions instead of waiting to defend lawsuits. This coincides well with broader changing paradigms about the ESA. Over the past several years more Federal agencies, more conservationists, and more landowners have recognized the ESA isn’t working. While few on the agency or conservation side want to see any overhaul of the ESA, many are interested in thinking about better solutions. This creates a unique opportunity for agriculture.

[TVA v. Hill](#)

In 1978, only five years after the ESA was enacted, the Supreme Court explained just how powerful the ESA was when it ruled that the Tennessee Valley Authority’s nearly complete Tellico Dam could not be finished because it would eradicate the listed snail darter. As the Court explained, “... Congress intended to halt and reverse the trend toward species extinction—whatever the cost.” (Tennessee Valley Authority v. Hill (1978) 437 U.S. 153, 154.)

## How the ESA Works

The US Fish & Wildlife Service (FWS) explains that the “purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend,”<sup>iii</sup> which includes the goals of protecting and recovering listed species, as well as conserving species at risk in order to prevent listing.<sup>iv</sup>

Species that warrant protection are identified through a **listing** process, and then protecting those species by prohibiting unpermitted **take** and requiring agencies to **consult**<sup>v</sup> with the [US Fish & Wildlife Service](#) (FWS)<sup>vi</sup> for terrestrial and freshwater species or the [National Marine Fisheries Service](#) (NMFS and collectively with FWS, “Services”)<sup>vii</sup> for marine species. Through consultation the action is evaluated to ensure it will not likely **jeopardize** the continued existence of a listed species, or **destroy or adversely modify** designated **critical habitat**. ([ESA Basics](#))<sup>viii</sup> While the stated objective of the ESA is to achieve **recovery** and delisting, this has only happened for 2% of listed species.

**Listing** – Species are listed through a rulemaking process where the agency determines if survival of the species is imperiled. ([Listing Fact Sheet](#)).

- Graduated Listings based on threats to the species:
  - **Endangered** – In danger of extinction throughout all or a significant portion of its range.
  - **Threatened** – A species is likely to become endangered within the foreseeable future. A threatened listing provides nearly all the same protections, but allows for **some flexibility** in management and permitting.
  - **Candidate** – Listing is warranted but precluded because of other priorities.

### **Listing Factors:**

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.

**Ag Impact** – While some species are listed because they are “charismatic” in their own right, e.g. the grizzly bear, others are strategically listed in order to promote a larger goal. For example, there is a good case to be made that the spotted owl was really about protecting old growth trees and changing management of forests in the northwest. This lesson adds meaning to such proposed listings or petitions as the [Rust Patched Bumble Bee](#) or [Monarch Butterfly](#), and listings like the [Northern Long Eared Bat](#). In many cases the real implications of the listing will not be evident for several years after strategic litigation by environmental interests.

**Protections** – The ESA protects listed species by prohibiting unpermitted “take” and requiring Federal agencies to ensure their actions do not jeopardize the species.

- **Take Prohibition** – Section 9 prohibits the unpermitted “take” of listed species. “Take” is defined, “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” By regulations and case law, this includes “significant habitat modification or degradation if it kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.”<sup>ix</sup>
  - 4(d) Rules<sup>1</sup> – Special regulations may be developed for **threatened** species relaxing the ESA’s normal restrictions.

**Ag Impact** – *More than 2/3 of listed species use private lands. While this is good evidence that farmers are good stewards, it also poses a risk that agricultural activities might “take” a listed species. Historically the chance of take being demonstrated was very slight and risks were very low. But with technological advances and newly listed species, the risk may be going up. For example, if the Monarch Butterfly is listed, can you remove or spray milkweed if butterflies are present?*

- **Federal Agency Consultations** – Section 7 requires Federal agencies to consult with FWS or NMFS to ensure that their activities are *not likely to jeopardize* the continued existence of listed species or *adversely modify designated critical habitats*.
  - **Informal Consultation** – Process through which an agency contacts FWS or NMFS to determine if listed species or critical habitat may be present in the action area, requiring additional analysis.
  - **Biological Assessment** – A document an agency prepares to determine whether the project is likely to adversely affect a listed species or critical habitat.

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<sup>1</sup> Section 4(d) of the ESA authorizes the agencies to issue regulations relaxing the take prohibitions of Section 9 if this is “necessary and advisable to provide for the conservation of such species.” This authority has been used for many species including [Salmon and Steelhead](#) in the West and the [Northern Long-Eared Bat](#) in the Midwest and East.

- *Biological Opinion (BiOp)* – The document prepared by FWS or NMFS to analyze “whether or not the proposed action is likely to jeopardize the continued existence of the species or adversely modify designated critical habitat.” If so, the BiOp “must identify any reasonable and prudent alternatives that could allow the project to move forward.” ([Consultation Fact Sheet](#))<sup>x</sup>

**Ag Impact** – Consultation typically affects agriculture in three circumstances. First, when there is a Federally operated project of some sort, often a water project for flood or irrigation supply, but this also applies to EPA’s approval of pesticides. Second, when a Federal permit is required. Historically agriculture needed very few Federal permits. But as demonstrated by WOTUS, there are efforts to change this reality. Third, when Federal funding is involved. Environmental groups are always looking for creative ways to utilize the ESA to attack other farm bill programs.

**Permitting** – Section 10 of the ESA authorizes the Services to issue permits authorizing take of listed species when certain conditions are met. ([Permits Fact Sheet](#))<sup>xi</sup>

- **Incidental Take Permit (ITP)** – Required when an otherwise lawful non-Federal activity will result the “incidental take” of a listed species. The ITP must be accompanied by a [Habitat Conservation Plan](#)<sup>xii</sup> describing how the effects of the activity on species will be adequately mitigated and minimized.
- **Enhancement of Survival Permit** – Landowners interested in taking voluntary actions that benefit a species in exchange for assurances that new obligations will not be imposed may enter into a [Safe Harbor Agreement](#) (for listed species) or [Candidate Conservation Agreements with Assurances](#) (for candidate species).
- **Recovery and Interstate Commerce Permits** – Typically issued to allow for scientific study of the species.

**Ag Impact** – Permitting impacts farmers in three ways. First, if a listed species is present, it increases the likelihood that a farmer may want or need take protection. The Services and conservation groups are increasingly recognizing that private landowners cannot be the enemy of species if the goals of the ESA are to be achieved. Because of this, more interest is being placed in voluntary conservation agreements like Safe Harbor Agreements or Candidate Conservation Agreements with Assurances.

Second, permitting requirements imposed on non-agricultural development (e.g. oil and gas) are often based on conservation actions occurring on private lands. This presents both a problem and, in some cases, an opportunity for farmers. The problem is that agricultural land is often lost to mitigation. The opportunity in some cases is that farmers can benefit from selling mitigation that doesn’t entirely displace their agricultural operation.

**Recovery** – The ultimate purpose of the ESA is to recover species “*by removing or reducing threats*” to the point where they no longer need the protections of the act.<sup>xiii</sup>

- **Recovery Plans** – The ESA requires the Services to develop recovery plans to serve as a non-regulatory guide for activities by private, Federal, and State entities in helping conserve listed species and their ecosystems. ([Recovery Fact Sheet](#))<sup>xiv</sup>
- **Conservation Mandate** – Section 7(a)(1) of the ESA includes a general mandate that “[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species....”

**Ag Impact** – *Although recovery plans are non-regulatory, in the long term they can shape the “secondary effects” of the ESA.*

**Critical Habitat** – The Services must consider whether to designate a geographic area essential to the conservation of the species and that may need special management or protection critical habitat when proposing to list a species. ([Critical Habitat Fact Sheet](#))

**Ag Impact** – *The Services assert that Critical Habitat designations don’t impact private lands, directly. Only Federal actions are prohibited from impacting critical habitat in a way that harms the species. But as the ESA expands into other areas, and as new agricultural permitting schemes (e.g. WOTUS) emerge, the implications of critical habitat for agriculture are likely to expand.*

**Enforcement & Implementation** – The ESA’s slow evolution means that the easy part (listing species) comes long before the hard part (enforcement and implementation).

- **Citizen Suits** – The ESA specifically authorizes citizens to enforce the act, after a 60 day notice period, against private individuals or any governmental agencies alleged to violate the ESA. and to recover costs including attorneys’ fees.<sup>xv</sup> Generally citizen suits are brought in the following situations:

- Listings – To compel the Services to make a listing decision or critical habitat designation within the time frames required by the ESA.
- Take – To enjoin private individuals or any governmental agency from taking listed species.

***Ag Impact*** – Citizen suits pose a particular challenge for agriculture by allowing extreme environmental groups to take their arguments straight to the courts. This means that a farmer can be hauled into court and accused of take by an environmental group. It also means groups can go to court to force the Services to enforce the ESA regardless of whether the Service wants to.

- **Federal Enforcement** – A significant number of species have been listed, but Federal enforcement efforts remain focused primarily on a small percentage of those species. As we move ahead, more species are listed and more Federal enforcement actions are taken to implement the ESA.
- **Federal Implementation** – Recently Federal agencies other than the Services have been taking greater action on the Conservation Mandate in Section 7(a)(1) of the ESA.

#### **State of Affairs** – January 2017

- 2327 Listed Species Populations (1/6/17 [Summary](#))
  - 1651 Listed Populations in US
  - Species listed by state [here](#)
  - Map of listed species [here](#)
- 101 Candidate and Proposed for Listing
  - 29 Species Proposed for Listing (1/6/17 [List](#))
  - 30 Candidate species (11/4/16 [List](#))
- 135 ESA Petitions under Review (1/6/17 [List](#))
- 796 Species with Critical Habitat Identified (1/6/17 [List](#))
- ESA Listing Settlement – (WildEarth Guardians, Center for Biological Diversity, FWS) Seven year “[listing work plan](#)” related to 362 listing and critical habitat decisions.

## **ESA Resources**

History of the ESA [https://www.fws.gov/endangered/esa-library/pdf/history\\_ESA.pdf](https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf)

Tools on Private Lands (FWS [Paper](#))

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- i <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>
  - ii <http://www.presidency.ucsb.edu/ws/?pid=4090>
  - iii <http://www.fws.gov/endangered/laws-policies/>
  - iv <http://www.fws.gov/endangered/about/index.html>
  - v <https://www.fws.gov/Endangered/esa-library/pdf/consultations.pdf>
  - vi <https://www.fws.gov/endangered/>
  - vii <http://www.nmfs.noaa.gov/pr/laws/esa/>
  - viii [https://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf)
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  - xii <https://www.fws.gov/endangered/what-we-do/hcp-overview.html>
  - xiii <https://www.fws.gov/endangered/esa-library/pdf/recovery.pdf>
  - xiv <https://www.fws.gov/endangered/esa-library/pdf/recovery.pdf>
  - xv See [16 USC 1540\(g\)](#).