

## Chapter 9

# Endangered and Protected Species

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### Roadmap

- Understand how the federal government decides whether a species is threatened or endangered.
  - Learn how federal agencies must investigate whether their actions might harm a protected species, and what approvals or permits the agency must obtain before it can proceed.
  - Grasp how the Endangered Species Act forbids the harassment or injury of a protected species without a permit or authorization from the federal government.
  - Understand the full scope of potential civil and criminal liability that may arise from violations of the Endangered Species Act, even if unintentional.
  - Navigate the different tools and requirements for enforcement of the Endangered Species Act, including citizen suits and standing requirements.
  - Know the basics of the Marine Mammal Protection Act, which provides important additional legal protection to certain marine cetaceans and coastal species such as seals, walruses, and polar bears.
  - Learn key aspects of the Migratory Bird Treaty Act, which extends critical legal protections to migratory birds that can trigger criminal liability for actions that (even unintentionally) result in the death of protected birds.
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## I. Introduction

The Endangered Species Act (ESA) has a well-deserved reputation as the bulldog of environmental law. In essence, the ESA implements Congress' broad direction to protect imperiled species (both animals and plants) without regard for the economic value of the protected species. Given the increasing pace of extinction of imperiled species and the growing encroachment of human development into habitat needed by vulnerable species, the ESA will

likely continue to grow in importance as a keystone federal environmental program.

This chapter provides an overview of key aspects of the federal Endangered Species Act and how its protections for certain species create legal obligations and liabilities for private parties and federal agencies. In particular, it focuses on the two basic strategies used by the ESA. The first strategy requires federal agencies to investigate how their actions might affect a protected species and, if necessary, take steps to mitigate any unavoidable harm to those species incidentally caused by the agency. Second, as the chapter explains, the ESA flatly prohibits harassing, injuring, or killing a protected species without authorization. The chapter concludes with a brief overview of two other important statutes that protect imperiled species: the Marine Mammal Protection Act and the Migratory Bird Treaty Act.

## II. The Endangered Species Act

The ESA is the only comprehensive federal statute dedicated to the protection and preservation of endangered species. It sets out the sweeping goal of preserving all species, without regard to their economic value, value to the ecosystem, charismatic importance to humans, or any other characteristic or factor. All species, no matter how humble, may qualify for the ESA's protection if that species is endangered or threatened. As a result, the statute does not provide any overt framework or guidance on ranking species for protection or for choosing a particular species for triage. This approach, while laudable for promoting the broadest possible protection for imperiled species, has triggered controversy when it imposes unexpectedly large costs or substantially restricts the use of public or private property.

### A. Section 4: Listing a Protected Species and Candidate Conservation Agreements

As a threshold step, before species receive protection under the ESA, the federal government must identify and list those species as threatened or endangered. The Act charges the Secretaries of Interior and Commerce with responsibility for listing species, and they in turn have delegated that duty to the U.S. Fish & Wildlife Service (F&WS) for terrestrial species and the National Marine & Fisheries Service (NMFS) for marine species and anadromous fish. These agencies must list a species as endangered if it faces “danger of extinction throughout all or a significant portion of its range.”

Similarly, a species qualifies as threatened if it is “likely to become an endangered species” throughout all or a significant portion of its range. 16 U.S.C. § 1532(6), (20). To make this determination, the agencies must consider five factors: present or threatened destruction of habitat; overuse of the species for commercial, recreational, scientific, or educational purposes; disease or predation; inadequate regulations; and other natural or man-made factors that may affect the species’ continued existence. 16 U.S.C. § 1533(a)(1)(A)–(E).

To designate a species as threatened or endangered, these agencies must rely solely on the “best available scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). This language, added to the statute in 1982, creates a mandate that the federal government must rely solely on the scientific data relevant to a decision to list a species and not on any economic or policy assessment of the listing’s impact.

The listing process does not rest solely within the discretion of the F&WS or NMFS. The ESA specifically authorizes citizens to petition the Secretary of Interior or of Commerce (in effect, the F&WS or NMFS) to list (or delist) a species that merits protection as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A). The statute requires the Secretary to decide within 90 days whether that petition provides “substantial scientific or commercial information” to support the listing, and then find within 12 months after receiving the petition whether the action is warranted, not warranted, or warranted but precluded by other pending proposals to protect the species. 16 U.S.C. § 1533(b)(3)(A)–(B).

To create flexibility in the ESA’s rather prescriptive listing process, agencies and stakeholders have begun to create an “off-ramp” through voluntarily agreeing to take steps to protect a species before it is listed as endangered or threatened. This proactive strategy allows parties to adopt a conservation plan to allow more flexibility in protecting habitats and species while allowing parallel commercial activity or personal uses of some habitat. The stakeholders and agencies will typically package their agreement into a Candidate Conservation Agreement with Assurances that sets out binding obligations on the parties to protect the species, and the F&WS or NMFS can then rely on that enforceable agreement as a basis to postpone or decline listing a particular species. U.S. Departments of Interior and Commerce, *Final Candidate Conservation Agreements with Assurances Policy*, 64 Fed. Reg. 32726–32736 (June 17, 1999); *Candidate Conservation Agreements with Assurances Policy*, 81 Fed. Reg. 95164 (Dec. 27, 2016). This policy, however, has proven controversial because some agreements have allegedly failed to provide the protections promised to their imperiled species.

In addition to identifying and listing threatened or endangered species, the agencies must also designate the habitat that those species need to survive. To be considered “critical habitat,” an area must have physical or biological features that are essential to the conservation of the species, and that may require special management considerations or protections. 16 U.S.C. § 1532(5)(A)(i). The ESA directs the federal government to designate critical habitats “on the basis of the best scientific data available and taking into consideration the economic impact.” 16 U.S.C. § 1533(b)(2).

Setting the boundaries of a critical habitat is one of the most important steps of the listing process because the ESA also prohibits actions that harm a protected species by destroying habitat critical to its survival. It is important to note that the Act’s definition of “critical habitat” is limited to areas inhabited by the species at the time of its listing (although the F&WS or NMFS may expand that critical habitat to include unoccupied areas “essential for conservation of the species”). 16 U.S.C. § 1532(5)(a). Thus, the Act will not permit expansion of the current critical habitat used by a protected species even if it historically inhabited wide swaths of territory.

## B. Section 7: Consultation and Incidental Take Permits

Once a species is formally listed as endangered or threatened, the ESA requires each federal agency to evaluate whether its actions could potentially harm that species. In particular, Section 7 of the ESA requires all federal agencies to consult with the F&WS or the NMFS to ensure that their actions will neither jeopardize the continued existence of a protected species nor result in the destruction or adverse modification of habitat critical to the species’ survival. 16 U.S.C. § 1536(a)(2). This consultation process has real bite: if the agency finds that its action would jeopardize the species or its habitat, the ESA flatly prohibits the agency from undertaking the action. This requirement applies to any action by the agency, including actions “authorized, funded, or carried out” by the agency. Section 7 also requires the agency to use “the best scientific and commercial data” when it makes its jeopardy assessment.

The consultation process goes through several discrete steps. The agency that wants to act must first conduct an informal biological assessment to determine whether its action will potentially affect a protected species. If so, the agency must then consult with F&WS or NMFS to weigh the scale of that impact and identify any potential steps it can take to mitigate the risk to the species. This review, which may require the preparation of an extensive biological opinion, can take a considerable amount of time, require the collection

and review of voluminous data, and result in the imposition of conditions or restrictions on the agency's project as needed to assure the species' protection.

In particular, the F&WS or NMFS may require the acting agency to adopt mitigation measures necessary to keep the proposed action from jeopardizing the species. These mitigation measures may include an Incidental Take Statement (ITS) that allows the agency to undertake its action by confirming it will not jeopardize the species overall and may potentially result in a take of some members of the species. That taking will be limited by the terms of the ITS within the biological opinion. If the biological opinion cannot identify sufficient mitigation measures to protect the species from jeopardy, however, the proposed action cannot proceed regardless of its cost or value (absent a rarely granted special waiver from the high-level interagency Endangered Species Act Committee, affectionately known as the "God Squad").

The ESA famously bars any actions that jeopardize a protected species without regard to cost or difficulty. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the U.S. Supreme Court found that the Act barred the last steps needed to finish construction of a dam because it would flood the running stream habitat needed by the snail darter as critical habitat. Even though this outcome barred TVA from using a dam that it had largely completed at the cost of millions of dollars to benefit a species with virtually no economic value, the Court ruled that the ESA's plain language left no ambiguity in its absolute prohibition on federal agency actions that jeopardized an endangered species.

## C. Section 9: Prohibition on Taking Protected Species and Habitat Conservation Plans

In addition to Section 7's consultation requirement, the ESA bars any actions that result in the "taking" of a protected species. While the ESA's consultation requirement applies solely to federal agency actions, the no-take prohibition of Section 9 casts a far broader net. It defines "take" expansively to include any action that could "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a member of a protected species. 16 U.S.C. § 1532(19).

The breadth of Section 9's coverage, however, differs from Section 7's consultation requirement in several important ways. First, it only applies to takings of species, while Section 7 requires consultation for any action that jeopardizes a species or its critical habitat. 16 U.S.C. § 1538(a)(1)(B). Second, Section 9's prohibition on taking of protected species applies to everyone (including private citizens). In contrast, as noted above, Section 7 imposes its consultation requirement only on federal agencies. Third, Section 9 only

protects *endangered* species from a “taking.” Both F&WS and NMFS, however, routinely extend Section 9’s protections to almost all *threatened* species as well through separate rulemakings authorized by the ESA. 16 U.S.C. § 1533(d). And last, Section 9 offers only limited protection to listed plant species. While fish and animals receive automatic coverage, plant species fall under Section 9’s protective ambit only if they were removed or damaged in knowing violation of a state’s laws, taken from federal land, or transported in interstate or international commerce. 16 U.S.C. § 1538(a)(2)(B), (C).

Violating Section 9 carries serious consequences. In addition to civil fines, the ESA imposes criminal liability for knowing violations of Section 9’s statutory provisions as well as any regulations or permits issued under them. 16 U.S.C. § 1540(b)(1). Liability can reach up to \$50,000 per violation and up to one year in prison.

It is important to note that a person can knowingly violate Section 9 without realizing that the animal taken was endangered or threatened (e.g., a hunter who knowingly shoots a crane without realizing it was protected under the ESA). Moreover, given the ESA’s broad definition of “take,” a person can face criminal liability for knowingly destroying or damaging critical habitat in a way that takes a protected species.

Beyond these financial penalties and potential prison terms, the ESA also empowers the government to seek forfeiture for any tools, traps, vessels, or other equipment used to violate Section 9 (a financial impact that can far exceed the daily penalties themselves). 16 U.S.C. § 1540(e)(4). Moreover, a violator can risk losing its lease, license, permits, or other agreements involved in the violation (for example, grazing rights on federal lands). 16 U.S.C. § 1540(b)(2). However, the Act does offer some enforcement relief by excluding from criminal and civil liability any offenses committed by a person acting on the good faith belief that an endangered or threatened species member threatened bodily harm to himself, a family member, “or any other individual.” 16 U.S.C. § 1540(a)(3), (b)(3).

If an otherwise legal action might incidentally take a protected species, the ESA allows private parties to seek an incidental take permit (ITP) under Section 10. 16 U.S.C. § 1539(a). Obtaining an ITP can be challenging. For example, Section 10(a)(2)(A) requires an applicant for an ITP to submit a Habitat Conservation Plan (HCP) that spells out the likely size of the taking, how the applicant will seek to minimize and mitigate those impacts, what alternative steps the applicant considered but chose not to use, and any other measure that F&WS or NMFS required as “necessary and appropriate.” 16 U.S.C. § 1539(2)(A)(i)–(iv). Before granting the ITP, F&WS or NMFS must find that the taking in question is incidental, that the HCP will minimize and



mitigate its impacts, that the taking “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,” and that the HCP will provide adequate funding for the plan. 16 U.S.C. § 1539(2)(B)(i)–(v). While developers have traditionally sought ITPs for individual development projects, some of them have recently begun to consolidate their HCPs into broad regional plans to facilitate coordinated and expedited approvals.

## D. Citizen Suits and Petitions

As noted above, the ESA allows citizens to petition the F&WS and the NMFS to list species that deserve protection as either endangered or threatened. The Act, however, goes much further in empowering citizen enforcement. Like several other federal environmental statutes, the ESA authorizes any person to bring a citizen civil suit to enjoin any other person (including the United States) from violating any provision of the ESA or its implementing regulations. This authority expressly includes lawsuits to force the F&WS or NMFS to halt a taking that violates Section 9 and to compel the agencies to perform a non-discretionary duty under the ESA. 16 U.S.C. § 1540(g)(1)(A)–(C). For lawsuits to enjoin a violation, the petitioner must first give the United States 60 days’ notice prior to filing the action. Failure to provide this notice is a jurisdictional flaw that cannot be cured with late notice (even if no prejudice has occurred). 16 U.S.C. § 1540(g)(2).

The citizen suit provision has evolved into one of the most effective tools to enforce the ESA’s requirements. The statute, however, requires that the plaintiff file the lawsuit in federal district court. 16 U.S.C. § 1540(g)(1), (3). As a result, ESA citizen suits must satisfy the constitutional standing requirements for any action brought in an Article III federal court, and the Constitution’s standing to sue limitation has served as an important threshold requirement for (and barrier to) ESA citizen suits. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Native Ecosystems Council v. Marten*, 883 F.3d 782 (9th Cir. 2018).

## III. The Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) protects marine mammals from attempts to “take” them without a permit. As a result, no one can harass, feed, hunt, capture, collect, or kill any marine mammal (or part of a marine mammal) without authorization or permission. The MMPA protects far more than whales and dolphins: it shields all marine mammals from

human depredation, including cetaceans (whales, porpoises, and dolphins), sirenians (manatees and dugongs), pinnipeds (seals, sea lions), walruses, sea otters, and polar bears. It protects these species, however, only when they are within the waters of the United States. By focusing solely on mammals, the MMPA acts as a complement to the Magnuson-Stevens Fishery Conservation and Management Act, which protects and manages U.S. marine fisheries.

Three federal agencies jointly implement the MMPA. The National Oceanic and Atmospheric Administration (NOAA) Fisheries Service oversees protections of dolphins, porpoises, seals, sea lions, and whales. The U.S. Fish & Wildlife Service is responsible for walruses, manatees, sea otters, and polar bears; and a third agency, the U.S. Marine Mammal Commission, supplies scientific expertise and oversees federal policy regarding human impacts on marine mammals and ecosystems. Together, the three agencies focus on providing conservation strategies aimed at promoting the well-being of the ecosystem supporting marine species, rather than individual species themselves.

The Act's broad prohibition on "takes" of marine mammals does contain exceptions. Congress specifically amended the MMPA to exclude certain activities, including—most important—some "incidental takes," where legally permissible activities result in unintentional harm to marine mammals.

One example of a permitted incidental taking includes the killing or injury of marine mammals as part of commercial fishing conducted within the federal Marine Mammal Authorization Program. Other incidental takes include non-fishing activities permitted by other federal programs, such as upstream oil and gas exploration and development, renewable energy projects, construction projects, military training and preparation, and research work. Alaska natives can also take marine mammals as part of their subsistence use or to create authentic handicrafts and clothing.

## IV. The Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) is one of the oldest U.S. federal environmental statutes. As its name suggests, the Act implements protections provided to migratory birds by the Migratory Bird Treaty between the United States and Canada. While those nations ratified the treaty in 1916, the United States did not incorporate its requirements into federal law until passage of the MBTA in 1918. The federal law's scope has grown through the enactment of additional treaties with Russia, Japan, and Mexico that also protect migratory birds.



The MBTA sets out a simple and broad ban on any attempt to pursue, take, hunt, capture, kill, or sell protected migratory birds without permission. 16 U.S.C. § 1703. This prohibition includes both living and dead birds (as well as their body parts), and it also forbids the importation and export of protected birds. The MBTA now extends protections to more than 800 migratory bird species, and it includes both rare birds shielded under other environmental statutes (such as the ESA) as well as common and familiar birds such as crows, ravens, and songbirds. 50 C.F.R. § 10.13.

Notably, the MBTA does not define the broad term “take,” and the U.S. Fish & Wildlife Service has interpreted it via regulation as “pursue, hunt, shoot, wound, kill, trap, capture or collect” any migratory bird, including that bird’s body parts, nests, or eggs. The statute broadly forbids killing “by any means or in any manner,” and it imposes both felony criminal liability for “knowing” violations as well as misdemeanor criminal liability for violations without proof of “knowing” conduct. 16 U.S.C. §§ 703, 707.

The federal courts have split on how broadly to interpret the term “take.” Several federal courts have given it a broad reading to include any activity that has the direct effect of killing or injuring a migratory bird. *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *U.S. v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *U.S. v. Moon Lake Electric Ass’n.*, 45 F. Supp. 2d 1070 (D. Colo. 1999). In contrast, several other federal appellate courts have interpreted “take” and “kill” to only encompass affirmative conduct directed against wildlife. *U.S. v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton County Wildlife Ass’n. v. U.S. Dept. of Agriculture*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991).

The scope of these terms plays an enormous role in environmental enforcement because most major spills, upsets, or releases (particularly to water) will often injure or kill migratory birds. The U.S. Supreme Court has not yet addressed the split between the circuits on the scope of “take” under the MBTA.

In the meantime, the F&WS recently changed its interpretation of the “take of birds” to exclude activities that cause the death of birds unless those activities’ underlying purpose was to take migratory birds, their eggs, or their nests. Principal Deputy Director, U.S. Department of Interior Fish & Wildlife Service, *Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act*, at 1, 3 (2018). This guidance has not yet received any judicial review or legal challenge.

The MBTA empowers the U.S. Fish & Wildlife Service to authorize some types of migratory bird “takes.” Pursuant to this authority, the F&WS has set

up four flyway councils to review data on the population of migratory birds that transit through corridors under the councils' jurisdiction. Each council for a flyway can then authorize hunting, taking, or killing of migratory birds pursuant to regulatory authorizations or hunting permits.

Each of the bilateral treaties underlying the MBTA designate species of migratory birds as "game birds" that can be legally hunted. The MBTA delegates authority to the U.S. Secretary of the Interior to establish hunting seasons for game birds, and in turn the F&WS has decided that game birds must be a species for which there is a long tradition of hunting, as well as a population that can support such hunting. As a result, even though the MBTA classifies more than 170 species as game birds, fewer than 60 species are usually hunted each year.

The MBTA occupies an unusual place in federal environmental laws because it primarily relies on Congress' power to pass legislation to implement a treaty obligation (as opposed to the Commerce Clause) under the U.S. Constitution. As a result, the U.S. Supreme Court upheld the MBTA as a valid exercise of congressional authority created by treaty commitments even if it arguably lacked authority to regulate solely intrastate conduct involving migratory birds. *Holland v. Missouri*, 252 U.S. 416 (1920). Notwithstanding this broad expansion of Congress' authority, however, the U.S. Supreme Court found that a U.S. Army Corps of Engineers' attempt to regulate solely intrastate waters because migratory birds inhabited them raised constitutional concerns about the scope of Congress' powers under the Commerce Clause. The Court accordingly interpreted the Corps' regulatory definitions to exclude such waters thereby avoiding a statutory interpretation that might violate the U.S. Constitution. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Given its age, the MBTA does not expressly authorize a private right of action or any citizen suits (a relatively recent legislative invention). This statutory structure is logical since the MBTA relies solely on criminal prosecution to enforce its provisions, and it lacks any civil enforcement provision. However, the federal courts have ruled that the MBTA does allow private parties to sue federal agencies under the federal Administrative Procedure Act to enforce nondiscretionary obligations imposed by the statute. *Humane Society of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). Plaintiffs in such actions, however, may only seek an injunction to force compliance with the MBTA. The Act does not allow for the recovery of penalties or fines.

### Checkpoints

- The Endangered Species Act protects only species that the federal government has affirmatively listed as either endangered or threatened.
- The U.S. Fish & Wildlife Service (F&WS) or the National Marine Fisheries Service (NMFS) will list a species as endangered or threatened based on the best available scientific and commercial data, but they will not base the listing decision on the economic value of the species. However, they may consider economic impacts in identifying the critical habitat that the species will require to survive.
- A federal agency may not take actions that will jeopardize an endangered or threatened species. To determine if its action will jeopardize the species, a federal agency must consult with either the F&WS or NMFS. Those agencies in turn will produce a biological opinion. If the biological opinion finds that the action will jeopardize a protected species (even with mitigation or protective actions), the federal agency is not permitted to move ahead with the action.
- If the agency's action is otherwise legal, and it only causes the incidental death of some protected species members without threatening the species overall, the agency may obtain authorization for an incidental take of the species, consistent with the biological opinion.
- Any person (including private parties and federal agencies) who knowingly causes the taking of a protected land animal or fish (and, in some cases, a plant) may face civil and criminal liability under Section 9 of the Endangered Species Act. Among other things, this prohibition includes taking a species through the destruction or impairment of critical habitat needed by the species.
- If a person will only incidentally take some protected species members as part of an otherwise legal action, he or she may seek an Incidental Take Permit that would authorize the taking. Such permits require the submission of a Habitat Conservation Plan that would assure the protection of the protected species.
- The Marine Mammal Protection Act also prohibits the taking of members of marine species (including whales, dolphins, walruses, seals, sea lions, and polar bears) in marine waters under U.S. jurisdiction. Some exceptions to this prohibition allow limited incidental takes of some species, including hunts for subsistence needs by native American tribes and scientific research.
- The Migratory Bird Treaty Act protects migratory birds, including a vast array of songbirds, waterfowl, and common birds. This Act relies on criminal liability for enforcement, and its reduced requirements for misdemeanor criminal liability makes it an important environmental enforcement tool after spills or releases that injure migratory birds.

