Beverridge & Diamond

News Alert

Complying with the Endangered Species Act

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This practice note provides an overview of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and discusses the obligations of real estate developers and property owners with respect to the ESA. Congress enacted the ESA in 1973 to protect and recover imperiled species and their habitats. The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service/NOAA Fisheries (NMFS) (collectively, the Services) together administer the ESA. FWS has jurisdiction over terrestrial and freshwater species, whereas NMFS has jurisdiction over most marine species and anadromous fish (fish that live the majority of their life in the sea but for spawning in freshwater). More than 1,600 species are currently listed as endangered or threatened under the ESA in the United States.

The presence of an endangered or threatened species on private or public land that overlaps with real estate development may impose certain duties, such as avoiding unauthorized take and, in the case of federal agencies, requiring consultation with FWS or NMFS before issuing a federal permit or other authorization that may affect those species. *See* Environmental Impact Review in Real Estate Transactions. The ESA broadly defines "take" to include a broad range of actions, such as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect an endangered wildlife species, or any attempt to engage in such conduct. 16 U.S.C. § 1532(19). As violation of the ESA's prohibition on unauthorized take can lead to civil and criminal penalties, property owners and developers should take the necessary steps to ensure ESA compliance early in the real estate development planning stages. Real estate developers must also understand the requirements imposed by the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, Marine Mammal Protection Act, and other federal laws, as well as state species protection laws, though these are beyond the scope of this practice note.

For a full listing of key content covering environmental protection and environmental laws, see Environmental Protection Resource Kit and First Year Associate Resource Kit: Environmental Law.

For a full listing of related climate change content, see Climate Change Resource Kit.

For litigation involving the ESA in wind law, see Wind Law Court Rulings Tracker.

For updates on the Trump Administration's actions relating to the environment, see Environmental Executive Actions Tracker.

For additional guidance on environmental issues that impact real property development, see Wetlands Regulations: Considerations for Project Developers, Wetlands Protection State Law Survey, Stormwater Permitting and Management Requirements, and Environmental Impact Review in Real Estate Transactions.

Listing Species and Designating Critical Habitat

A species, subspecies, or distinct population segment of a species may be listed as endangered or threatened under Section 4 of the ESA upon petition of an interested party or by self-initiated review by the Services. Endangered species are those that FWS or NMFS determines to be in danger of extinction throughout all or a significant portion of their range. In comparison, threatened species are those that are likely to become endangered in the foreseeable future—meaning so long as the Services can reasonably determine that the future threats and species' responses are likely (i.e., not merely speculative).

Species Listing Process

Individuals or organizations may trigger the species listing process by submitting a petition to FWS or NMFS explaining why they believe a particular species should be classified as threatened or endangered. The agency then must determine within 90 days, to the extent practicable, whether there is substantial information presented in the petition (without consideration of outside information) indicating that listing the species may be warranted. If it makes an affirmative 90-day finding, FWS or NMFS then must complete a Species Status Assessment within 12 months, evaluating whether listing the species is (1) warranted, (2) warranted but precluded due to other species being of higher listing priority, or (3) not warranted. The agency's conclusion is known as a 12-month finding. In practice, however, the Services often miss the 90-day and 12-month deadlines, resulting in legal challenges from the petitioning party.

If FWS or NMSF determines that listing is warranted, it must publish a proposed rule to list the species as threatened or endangered in the Federal Register and solicit public comment for 60 days. Real estate owners and other stakeholders may wish to comment on the proposed rule if the species might occur in or near their property, they believe the species may be affected by their activities, or they believe the proposed listing is not appropriate or should be downgraded (i.e., from endangered to threatened). The Services analyze all public comments and publish a final rule in the Federal Register listing the species, assuming they still conclude that listing is warranted. The listing will take effect no sooner than 30 days after publication.

If the agency determines that listing the species is warranted but precluded, the species becomes a candidate for future listing. Candidate species are not protected under the ESA but are subject to special review requirements under Section 7 of the ESA. The Services must annually reassess a candidate species' status to determine whether its listing priority should change.

The Services follow a similar procedure when they self-initiate the listing process or when delisting or changing a species' listing status.

Species Listing Criteria

The Services determine whether listing a species as threatened or endangered is warranted based on the following factors:

- The present or threatened destruction, modification, or curtailment of the species' habitat or range
- Overutilization for commercial, recreational, scientific, or educational purposes
- Disease or predation
- The inadequacy of existing regulatory mechanisms –and–
- Other natural or artificial factors affecting the species' continued existence

The Services may not consider economic impacts when deciding whether to list a species. However, on November 21, 2025, the Services proposed revising their ESA regulations to provide the agencies with discretion to publish economic impact information in their listing decisions for transparency purposes. If finalized as proposed, the revision would restore an identical change that the agencies made in 2019 under the first Trump administration, which then was rescinded in 2022 under the Biden administration.

Regardless, a listing decision may only be based on the best available science, which initially is compiled in the Species Status Assessment and must be supplemented whenever additional information meeting this standard becomes available. The Species Status Assessment can thus serve as a valuable resource for the regulated community to identify information about a species' current condition, its range and habitat, and the threats to the species.

The ESA directs the Services to review each listing every five years to determine whether the species should be reclassified or delisted based on the same factors listed above. Delisting rarely occurs, however—only about 1% of species have been delisted to date.

Designating Critical Habitat

The ESA directs the Services to designate, to the maximum extent prudent and determinable, critical habitat for each listed species. Critical habitat represents the geographic areas considered essential to the species' conservation. The Services have been unable to keep pace with this obligation, having designated critical habitat for fewer than 900 species to date. Critical habitat, which may include public and private lands, is generally not coextensive with the entire range occupied by the listed species. It instead is limited to:

- Occupied habitat containing physical or biological features essential to the conservation of the species that may require special management considerations or protection –and–
- Unoccupied habitat that the Services determine are essential for the conservation of the species

Unlike the listing process, critical habitat must be based on the best available science, after taking into consideration economic impacts, national security, and other considerations. FWS's ESA regulations, most recently revised in 2026, require the agency to account for these considerations when designating critical habitat for species under its jurisdiction. Although the revised regulations do not change which areas may qualify as critical habitat, they require FWS to exclude an area if the benefits of exclusion outweigh the benefits of designation, unless exclusion would result in the species' extinction. To do that, FWS must (1) publish a draft economic analysis with each proposed designation and identify areas it may consider for exclusion, (2) conduct an exclusion analysis when a proponent submits credible information showing a meaningful, area-specific impact, (3) consider effects on jobs, productivity, property values, permits, leases, public safety, wildfire management, tribes, state and local governments, and existing conservation efforts, (4) give weight to information from entities with relevant expertise or firsthand knowledge unless contrary information rebuts it, and (5) apply the same general exclusion framework to federal and non-federal lands. To date, NMFS has not added similar requirements to its ESA regulations.

Prohibited Acts

Section 9 of the ESA prohibits the import, export, transport, and sale of endangered fish, wildlife, and plants in interstate and foreign commerce. Public and private parties are further prohibited from engaging in the acts described below. Real estate owners and developers must understand these prohibitions because violations can result in civil and criminal liability.

Endangered Fish and Wildlife Prohibitions

The intentional or unintentional take of endangered fish and wildlife species without authorization is prohibited under Section 9 on private and public lands. The ESA broadly defines take as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species, or to attempt to engage in any such conduct.

FWS has defined "harass" in its ESA regulations to mean intentional or negligent acts that create a likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns. NMFS has not promulgated a regulatory definition for "harass" but generally interprets the term in the same way as FWS. The Services both had defined "harm" in their ESA regulations to cover activities that actually kill or injure wildlife through, for example, significant habitat modification that significantly impairs essential behavioral patterns. But FWS and NMFS rescinded their definitions of "harm" in 2026, leaving the term undefined under the ESA and its implementing regulations. Environmental groups have challenged the Services' rescission of the definition in several federal courts.

Endangered Plant Prohibitions

The ESA's protection of endangered plants is more limited than that for endangered wildlife because the take prohibition does not extend to plant species. Nevertheless, individuals or organizations may not remove, possess, or maliciously destroy or damage endangered plants on federal land. Furthermore, these parties are prohibited from removing, cutting, digging up, damaging, or destroying endangered plants on private property in knowing violation of any state law or regulation.

Threatened Species Prohibitions

The ESA does not automatically extend the prohibitions applicable to endangered species to threatened species. Section 4(d) instead gives the Services the authority to issue regulations necessary and advisable to provide for the conservation of any threatened species.

Pursuant to this authority, in 1978, FWS (but not NMFS) issued a blanket 4(d) rule extending the take prohibition to all threatened wildlife species under its jurisdiction unless FWS promulgated a specific 4(d) rule for a species prescribing different treatment. However, FWS revised its ESA regulations in 2026 to withdraw the blanket 4(d) rule (FWS did the same in 2019 under the first Trump administration, but that was reversed in 2024 by the Biden administration). As a result, now FWS and NMFS both determine whether to extend the ESA's protections to each newly listed threatened species on a case-by-case basis.

Section 7 Consultation

Section 7 of the ESA requires federal agencies to consult with FWS or NMFS whenever they carry out, fund, or authorize an action that may affect any threatened or endangered species or cause the destruction or adverse modification of designated critical habitat for any listed species. *See* ESA Section 7 Consultation | U.S. Fish & Wildlife Service; American Law of Mining, 2nd Edition § 175.07. Section 7 consultation most frequently affects the regulated community when private activities require a federal permit or are planned to occur on federal lands, both of which trigger an obligation for the authorizing federal agency to consult with FWS or NMFS before the agency may permit the activity if a listed species or critical habitat may be affected. Consultation ensures that federal agency authorization of the activity will not jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.

To determine whether consultation is necessary, real estate owners and developers and the federal action agency first identify any endangered or threatened species or critical habitat in the project area. FWS's Information for Planning and Conservation (IPaC) database is a helpful resource that can provide general species and critical habitat location information. The IPaC database is not definitive, however, and real estate owners and developers should consider surveying their lands for suitable listed species habitat and/or the species themselves.

If no listed species or critical habitat occurs within the project area and/or the action agency determines that the proposed federal action will have no effect on listed species or critical habitat, Section 7 consultation is not required. The federal action agency does not need to seek the Services' concurrence in making a "no effect" determination but may choose to confer with FWS or NMFS. If, on the other hand, the action agency determines that the proposed federal action may affect a listed species or critical habitat, it must proceed with Section 7 consultation.

Importantly, the Section 7 consultation requirement applies to all plant and animal species that are listed as threatened or endangered irrespective of whether the species is protected by the take prohibitions discussed above.

Informal Consultation

Federal action agencies engage in informal consultation with the Services to determine whether their proposed actions is likely to adversely affect a listed species or critical habitat. To do that, the action agency (or the private applicant, if directed by the action agency) typically prepares and submits to FWS or NMFS a biological assessment, which identifies potential impacts to endangered or threatened species and critical habitat.

Informal consultation ends if the action agency finds, and FWS or NMFS concurs, that the agency action (1) will have no effect on any listed species or critical habitat or (2) that it may affect but is not likely to adversely affect any listed species or critical habitat. The Services have 60 days after receiving a written request from the action agency to concur that the project is not likely to adversely affect listed species or critical habitat, though there is no specific mechanism for enforcing that timeline.

Property owners and developers may wish to adopt avoidance and minimization measures to ensure that the action agency makes a not likely to adversely affect finding and, thus, avoids the need for formal consultation. Avoidance and minimization measures often are developed in collaboration with relevant state and federal agencies and may include timing restrictions and best management practices. For example, for the federally endangered Indiana bat, which roosts in trees during summer, property owners and developers may elect to restrict tree removal to the time of year when bats are not likely to be present, direct lighting away from bat habitat, and use bright colored flagging or fencing to ensure that tree clearing only occurs in the specified areas.

In contrast, if the action agency finds that the project is likely to adversely affect some or all listed species or critical habitat, it must initiate formal consultation with FWS or NMFS.

Formal Consultation

After receiving the request for formal consultation from the action agency, FWS or NMFS initiates consultation once it determines that it has a complete initiation package. A complete initiation package includes:

- A description of the proposed action and its duration, timing, and location
- Maps or plans
- Information about the impacts to listed species or critical habitat
- Other relevant information

FWS or NMFS must then complete consultation within 135 days unless this period is extended by the action agency or, if the extension is for more than 60 days, by consent of the private party applicant. The

Services may seek additional information, such as supplemental data about the proposed action and potential effects to species, from the action agency and applicant throughout the consultation process.

Formal consultation concludes with the issuance by FWS or NMFS of a biological opinion, which relies on the best available science and examines the potential impacts of the agency action as compared to the environmental baseline and cumulative effects. *See, e.g.,* Biological Opinion, Eareckson Air Station Long-term Fuel Pier Repairs, Shemya Island, Alaska. The biological opinion evaluates whether the project will result in jeopardy to any listed species or the destruction or adverse modification of critical habitat.

Actions that are likely to adversely affect a listed species or critical habitat may proceed so long as they do not result in jeopardy or destruction/adverse modification. In these circumstances, the Services issue an incidental take statement that exempts a specified amount of incidental take (i.e., take that results from but is not the purpose of the project) from the ESA's take prohibition and identifies reasonable and prudent measures for the property owner to minimize species impacts.

While extremely rare, actions that FWS or NMFS determines will result in jeopardy or adverse modification may not proceed unless one of two requirements is met:

- The Services propose reasonable and prudent alternatives to the proposed action that would avoid jeopardy and adverse modification and the applicant agrees to one of those alternatives –or–
- The action agency receives an exemption from a committee of federal officials, referred to as the "God Squad." That exemption allows the proposed activity to proceed irrespective of the risk of jeopardy or adverse modification. Until recently, such exemptions have been exceedingly rare. However, in 2026, the Trump administration convened the God Squad for national security purposes to issue an exemption for offshore oil and gas activities in the Gulf because some of those activities had been delayed by litigation under the ESA. That exemption has been challenged in numerous federal courts.

Contents of a Biological Opinion

Potential impacts. The Services were previously required to consider the direct, indirect, interrelated, and interdependent effects of the project on listed species and critical habitat. The revised ESA regulations issued under the Biden administration in 2024 expanded the definition of "effects of the action" to include all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action, but that are not part of the action. However, in November 2025, the Services proposed narrowing the definition to only those "effects" that are both caused by the proposed action (i.e., it would not occur but for the action) and reasonably certain to occur. The Services also proposed to restore and clarify factors relevant to determining whether an effect is "reasonably certain," including temporal and geographic remoteness, the complexity of the causal chain, and whether the action agency could prevent the effect. *See* 90 Fed. Reg. 52600.

Environmental baseline. The environmental baseline is defined as the condition of the listed species or critical habitat in the action area, without the consequences to the listed species or critical habitat caused by the proposed development. The environmental baseline includes:

- The past and present impacts of all federal, state, and private actions and other human activities in the project area
- The anticipated impacts of all proposed federal projects in the project area that have already undergone formal or early Section 7 consultation –and–
- The impact of contemporaneous state or private actions

In 2024, the Services under the Biden administration reversed prior revisions made to their ESA regulations under the first Trump administration in 2019. The 2024 regulations explicitly include within the environmental baseline any impacts to listed species or designated critical habitat from federal agency activities or existing federal agency facilities that are not within the agency's discretion to modify. However, in November 2025, the Services (acting under the second Trump administration) proposed restoring their definition from 2019, under which the environmental baseline reflects the existing condition of listed species and critical habitat in the action area, separate from the "effects" caused by the proposed action. This definition would clarify that components of federal activities or facilities over which the agency has no discretion or control are not "effects of the action." Impacts from those nondiscretionary activities and facilities would be included in the environmental baseline. See 90 Fed. Reg. 52600.

Cumulative effects. Cumulative effects are defined differently under the ESA than in other contexts, such as under the National Environmental Policy Act (NEPA). *But see* 90 Fed. Reg. 8353 (Executive Order 14154). The ESA provides that cumulative effects are the effects of the proposed action, together with other state or private (but not federal) activities, which are reasonably certain to occur.

Best available science. FWS and NMFS must base the analysis in their biological opinions on the best available science, which may include species and habitat surveys, information from previous biological opinions, the Species Status Assessment, and other reliable scientific studies. In some circumstances where the best available science does not adequately allow the Services to determine species impacts, the Services may request that the action agency develop additional species information through new studies, but the action agency does not necessarily have to develop new information to comply with the best available science standard.

Conference reports. Species proposed for listing and proposed critical habitat areas also undergo Section 7 review, though it is not as demanding as the Section 7 consultation process. Specifically, the ESA requires a federal action agency to confer with FWS or NMFS if its proposed action could jeopardize the continued existence of a proposed species or cause destruction or adverse modification of proposed critical habitat. The conference may result in the issuance of a conference opinion containing preliminary findings of no jeopardy and/or no adverse modification and recommending steps for avoiding and minimizing potential adverse impacts. Project owners and developers can benefit from the issuance of a conference report because, if the species is listed or the critical habitat is designated before the project is complete, FWS or NMFS may adopt the conference opinion as the biological opinion, avoiding the need to initiate Section 7 consultation. *See, e.g.,* Biological and Conference Opinion on the Registration of Malathion Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act.

Reinitiation of Consultation

The Section 7 consultation requirement does not necessarily end once FWS or NMFS issues the biological opinion and incidental take statement. The action agency must continue to evaluate new information about potential impacts from the federal action for as long as that action agency retains discretionary involvement or control over the action (e.g., in the case of a federal permit, for as long as the permit remains in effect) and must reinitiate consultation if one of the following conditions is met:

- The amount or extent of taking specified in the incidental take statement is exceeded
- New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered
- The identified action is subsequently modified in a manner or to an extent that causes an effect to the listed species or critical habitat not previously considered in the biological opinion –or–

- A new species is listed or critical habitat is designated that may be affected by the action

Reinitiation of consultation may occur formally or informally, depending on the likelihood of new species or critical habitat impacts, and must be requested by the action agency—though FWS or NMFS may suggest that the action agency request reinitiation.

Irreversible and Irretrievable Commitment of Resources

Section 7(d) limits the project activities that may proceed after the Services initiate or reinitiate consultation. It prohibits federal action agencies and project owners from making any irreversible or irretrievable commitment of resources that has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives that would be necessary if the consultation results in a jeopardy or adverse modification determination. Non-jeopardizing activities (i.e., those not expected to cause take), therefore, should be able to proceed during the consultation and reinitiated consultation processes. In practice, however, action agencies often discourage all activities, regardless of impact, until consultation concludes.

In some circumstances, the action agency may choose to prepare a Section 7(d) determination that identifies the activities that may proceed during consultation. Oftentimes, an action agency will solicit technical assistance from FWS or NMFS when developing a 7(d) determination. While the Services typically welcome such requests to provide guidance, they generally do not review or formally approve final Section 7(d) determinations.

Incidental Take Permits and Conservation Plans

Though not legally required, property owners and developers should consider applying for an incidental take permit under Section 10 of the ESA for their activities that do not require federal permits and are reasonably certain to take listed fish and wildlife to ensure that their activities comply with the ESA. (An incidental take permit is not necessary for private activities that are reasonably certain to affect listed plant species only as the ESA does not prohibit their take.) An incidental take permit, which must be supported by an applicant-prepared conservation plan – frequently referred to as a habitat conservation plan (HCP) – authorizes a specified amount of take to provide the property owner with greater certainty and flexibility.

Incidental take permits further benefit property owners and developers by providing assurances that—if unforeseen circumstances arise—the Services will not require the commitment of additional land, water, or financial compensation or further restrict the use of land, water, or natural resources beyond the level agreed to in the HCP without the property owner's consent. The Services honor these "No Surprises" assurances so long as the project owner implements the terms and conditions of the HCP, incidental take permit, and any other associated documents in good faith.

Habitat Conservation Plans

The HCP is a key component of an application for an incidental take permit and becomes binding following the issuance of the permit. The HCP is a detailed plan of development that ensures the impacts of the authorized incidental take are adequately minimized and mitigated. Each HCP must address the following:

- The impacts of the proposed taking on the species (not the broader impacts of the activity causing the taking)

- Steps for monitoring, minimizing, and mitigating the impacts, such as through payments into an established conservation fund or enhancement of degraded or former habitat
- Assurances of adequate funding for implementing every aspect of the HCP
- Procedures to deal with unforeseen or extraordinary circumstances
- Alternative actions to the taking and an explanation as to why the property owner or developer is not adopting these alternatives –and–
- Other measures that the Services deem necessary or appropriate

HCPs need not be limited to listed fish and wildlife species—they may cover any species regardless of listing status. Traditionally, the Services required such HCPs to also cover at least one species that already was listed as endangered or threatened. But that changed for FWS-jurisdictional HCPs in 2024, when the agency revised its Section 10 regulations to specify that HCPs may focus entirely on non-listed species. Property owners and developers therefore might consider including currently unlisted species, such as candidate species or species proposed for listing, in their HCPs so that they can receive incidental take authorization for those species if they become listed as threatened or endangered in the future. Property owners and developers must recognize, however, that this approach may require them to implement minimization and mitigation measures before a species is listed that would not otherwise be required.

Property owners and developers are encouraged to engage a consultant and regularly meet with FWS or NMFS when developing an HCP. Drafting the HCP is an iterative process that involves negotiating its size and scope with the Services.

Approving an Incidental Take Permit Application

The Services must comply with NEPA's requirements before issuing an incidental take permit. HCPs with minor potential impacts to the environment might qualify for a categorical exclusion, meaning further environmental analysis is not required under NEPA. For HCPs with more significant potential effects, NMFS or FWS (or, to expedite the permit application process, the property owner with oversight by the Services) prepares an environmental assessment or environmental impact statement.

In addition, the longstanding position of the Services is that issuance of an incidental take permit is a federal action that triggers ESA Section 7 consultation, meaning that FWS or NMFS must consult with itself before issuing the permit. To do that, FWS or NMFS will issue a biological opinion evaluating the potential impacts of the HCP and determining whether it will result in jeopardy or adverse modification. Importantly, although not specified in the ESA or the Section 10 regulations, the Services also have adopted a position that HCP proponents may not cover only one listed fish or wildlife species in their HCP and then rely on this intra-Service consultation to exempt take of other listed species with an incidental take statement.

The Services typically provide a 60-day period for public comment on the incidental take permit application and the NEPA analysis. Following this comment period, the Services issue the permit after finding:

- The taking will be incidental to an otherwise lawful activity
- Impacts of the taking will be minimized and mitigated to the maximum extent practicable
- Adequate funding exists
- The taking will not appreciably reduce the survival and recovery of the species –and–

- Any other necessary or appropriate measures specified by the Services are met

The term of the incidental take permit can be of any duration and may be negotiated with the Services. But the agencies typically have a preference for permits of 10 years or less because they offer the greatest level of certainty of species impacts.

Conservation Benefit Agreements and Enhancement of Survival Permits

Landowners may be reluctant to improve habitats for listed or candidate species or take other actions that would encourage such species to inhabit their property because doing so potentially could limit the activities that can lawfully be conducted there. Conservation Benefit Agreements (CBAs), however, encourage property owners to take beneficial actions for these species while providing assurance that they will not be subject to additional restrictions due to their voluntary conservation actions. Participating in a CBA can therefore offer a net benefit to species and provide greater certainty in the project development process. This concept has been a fixture under Section 10 of the ESA for decades, but before 2024, it was known as a candidate conservation agreement with assurances (CCAA) or a safe harbor agreement (depending on the species covered). With the 2024 regulatory revision, FWS united CCAAs and safe harbor agreements under the title of "Conservation Benefit Agreements" (CBA) and took further steps to simplify and improve both processes. 89 Fed. Reg. 26070. This practice note continues to use the CCAA and safe harbor agreement nomenclature because those terms will be familiar to most ESA practitioners.

Candidate Conservation Agreement with Assurances

Property owners may voluntarily participate in CCAAs (now known as CBAs) when their property includes a candidate species, a species proposed for listing, or an at-risk species that may become a candidate in the near future in order to address concerns about the potential regulatory implications of listed species presence. By agreeing to a CCAA, landowners can obtain an "enhancement of survival permit" that provides that, if they implement the proactive conservation measures, they will not be subject to restrictions beyond that in the CCAA without their consent if the species becomes listed as endangered or threatened in the future. The permit also will authorize incidental take to the then-listed species from activities covered under the CCAA, such as vegetation maintenance. Examples of conservation activities typically covered under CCAAs include restoring or enhancing habitat, expanding habitat connectivity, and controlling invasive plants or wildlife.

A CCAA may cover one or multiple species and need only address threats that property owners can control on their property. A CCAA may be developed in coordination with the Services in six to nine months or longer depending on its complexity.

Safe Harbor Agreement

Safe harbor agreements (also now known as CBAs) are voluntary agreements between the Services and property owners whose actions contribute to the recovery of a species already listed as endangered or threatened. In exchange for fulfilling the requirements of the safe harbor agreement by implementing actions (similar to those implemented under a CCAA) that aid in the recovery of the listed species, the property owner receives formal assurances through an enhancement of survival permit that the Services will not require additional management activities without the property owner's consent. The enhancement of survival permit also authorizes incidental take of a species that may result from the conservation actions performed by the property owner under the safe harbor agreement.

As with CCAAs, a safe harbor agreement may be developed in coordination with the Services in six to nine months or longer depending on the complexity of the agreement.

Civil and Criminal Enforcement

Unauthorized take of a listed fish or wildlife species may be subject to civil or criminal liability under Section 11 of the ESA. An individual or organization may receive fines or imprisonment, as well as the additional penalties described below, for each violation—meaning each individual of a listed animal species taken without authorization—of Section 9.

While the ESA imposes liability for Section 9 violations related to listed plant species, it does not prohibit the take of such plants; therefore, this section focuses on liability for the unauthorized take of animal species.

Civil Liability

Accounting for inflation adjustments that the federal government makes annually, as of 2026, the ESA authorizes assessment of the following civil penalties for each violation of the take prohibition:

- $65,653 for knowingly taking an endangered animal
- $31,513 for knowingly taking a threatened animal –or–
- $1,659 for otherwise violating a provision of the ESA, including by negligently harassing a listed animal or unintentionally taking a listed species

90 Fed. Reg. 40050 (the 2025 adjustments were carried over through 2026). A knowing violation only requires a general intent to commit the act impacting the species. A defendant need not know that the species is endangered or threatened or intend to violate the ESA to be held liable.

Criminal Liability

The Services, through the U.S. Department of Justice, may criminally prosecute an individual or organization that knowingly takes a listed animal species in violation of Section 9. Knowingly taking an endangered animal is a Class A misdemeanor that may result in imprisonment of no more than one year and/or a fine. Under the ESA, a fine for a Class A misdemeanor is no more than $50,000. The Criminal Fine Improvements Act increases this amount to $100,000 for an individual or $200,000 for an organization.

Knowingly taking a threatened animal is a Class B misdemeanor that may result in imprisonment of no more than six months and/or a fine. The ESA authorizes a fine of no more than $25,000 for a Class B misdemeanor, whereas the Criminal Fine Improvements Act authorizes a fine of no more than $5,000 for an individual or $10,000 for an organization. In a nonbinding opinion, a federal district court has held that the penalty amount in the ESA controls over that in the Criminal Fine Improvements Act. See United States v. Eisenberg, 496 F. Supp. 2d 578, 583 (E.D. Pa. 2007). However, this remains an unsettled issue.

Additional Penalties

The ESA further authorizes the federal government to seek additional remedies for the unauthorized take of listed animal species, including the following:

- Injunction of the activity causing the take

- A federal agency that issued a lease, license, permit, or other agreement authorizing the use of federal lands to a person convicted of a criminal ESA violation may immediately modify, suspend, or revoke the lease, license, permit, or other agreement
- All equipment, vehicles, and other means of transportation used to aid the taking are subject to forfeiture after a person is convicted of a criminal violation –and–
- Restitution for ESA violations or imposition of conditions of probation on the individual or organization

ESA Section 11(g) – Citizen Suits

The ESA also gives the public the right to bring a citizen suit to enforce the statute's provisions. Under Section 11(g), citizens may file a civil suit to:

- Enjoin any person or organization, including a federal or state agency, alleged to be in violation of the ESA –or–
- Compel the Services to enforce the ESA's take prohibitions, to list a species or designate critical habitat, or to carry out any other obligations under the statute

A 60-day notice of intent to sue is a prerequisite to bringing a citizen suit. The notice requirement is intended to give the alleged violator or the Services time to redress the violation and potentially avoid the lawsuit.

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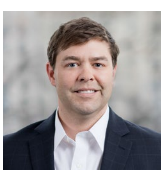

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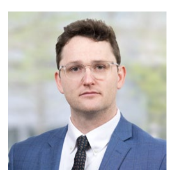

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