

B R I E F I N G D O C U M E N T

**SUMMARY DOCUMENT:
THE ENDANGERED SPECIES ACT
FOR THE FLORIDA BEACHES
HABITAT CONSERVATION PLAN
(HCP)
VERSION 1, REVISION 1**

Prepared for

Florida Department of Environmental Protection
Bureau of Beaches and Coastal Systems
Florida Fish and Wildlife Conservation Commission

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This document is part of a series prepared in support of the Florida Beaches Habitat Conservation Plan (FBHCP) Section 6 ESA Grant. These resource documents are intended to provide background information about subjects integral to the development of the FBHCP, including an understanding of the Federal Incidental Take Permitting (ITP) process, the key elements of the Florida Department of Environmental Protection Bureau of Beaches and Coastal System's Coastal Construction Control Line (CCCL) permitting program and general approaches to HCP development derived from several other existing large-scale HCP/ITP programs. This document set is intended to provide project teams, which include the Project Steering Committee, the Project Work Group and the various support committees (e.g., Science Committee), with a common set of background information necessary to make informed decisions and recommendations about the project.

These documents function as a related set, meaning that each contains only a portion of the information necessary to understand the overall nature of the program. They are also presented as evolving documents with the potential for revisions and updates. To help organize track revisions, each document is provided with a version and revision number. Changes in the revision number represent minor modifications while changes in the version number represent significant changes in the content or organization of each document. Executive summaries are included in each report. Related visual presentations (PowerPoint Presentations) are also available. The list of documents given below will expand in time. An up-to-date list is available at <http://flbeacheshcp.com/Documents.aspx>.

LIST OF DOCUMENTS:

Briefing Documents:

- The CCCL Program for the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1.
- Chapter 161 Florida Statutes for the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1.
- Overview of Habitat Conservation Plans for the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1.
- Implementation of the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1
- The Endangered Species Act for the Florida Beaches Habitat Conservation Plan, vers. 1 rev. 1.

Resource Documents:

- Preliminary List of Data Sources for Best Management Plans for the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1.
- Florida Beaches Habitat Conservation Plan Framework Document, vers.1 rev. 1.
- Preliminary List of Data Sources for the Florida Beaches Habitat Conservation Plan, vers.1 rev. 1.

The Endangered Species Act (ESA) was passed in 1973 in order to protect plant and animal species that are at risk of becoming extinct. Species that receive protection under the ESA are classified into two categories, “Endangered” or “Threatened,” depending on their status and how severely their survival is in peril. A species that is listed as endangered is in danger of becoming extinct throughout all or a significant portion of its range. Threatened species are those that are likely to become endangered in the foreseeable future. The decisions to list species rely only on the best available scientific and commercial data. The ESA has provisions that assure that endangered species are protected on international levels as well.

The Secretaries of the Department of the Interior and the Department of Commerce are responsible for administering the ESA’s provisions. Day-to-day management authority for endangered and threatened species under the Departments’ jurisdictions has been delegated to the services.

The ESA prohibits any harassment or harm to a listed species. The best-known consequence of the ESA is the establishment of broad prohibitions against any take of endangered and threatened species. *Take* is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or the attempt to engage in any such conduct, and includes any significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. However, Congress recognized that during the course of otherwise lawful activities, a limited amount of take of a listed species could be allowed. It therefore amended the ESA in 1982 to authorize take of these listed species, through the issuance of an Incidental Take Permit (ITP), provided certain conditions were met.

The overarching purpose of the ESA is to provide a means to protect ecosystems on which endangered and threatened species depend. There are 18 sections contained within the ESA, of which four (sections 6, 7, 9, and 10) are the most relevant. Section 6 encourages cooperation between the states and the Federal government so as to promote conservation of threatened and endangered species and to acquire lands to enhance these conservation efforts. Funds for the development of most large-scale regional HCPs are obtained from grants authorized under section 6. Section 7 of the ESA applies to federal activities that may adversely affect federally listed species. Provisions in this section specify interactions between Federal agencies to ensure compliance with the ESA. Section 9 addresses violations or unauthorized take regardless of where it occurs. Section 10 is the provision of the ESA that allows a private landowner to voluntarily seek an ITP so that they would not be subject to section 9. These sections are the most far-reaching portions of the ESA. Additionally, while section 9 prohibits any harm to a listed species, section 10 provides a mechanism to authorize the take of a threatened or endangered species incidental to an otherwise lawful activity, provided certain conditions are met. According to these provisions the services may issue ITP’s to authorize take of listed species provided that there is adequate assurance that the impact of the project on the listed species and its habitat is acceptable. These conditions are included in a *Habitat Conservation Plan (HCP)*, which is part of the permit application submitted to the services. To approve an HCP, the services must find that 1) the take is incidental to an otherwise lawful activity, 2) the applicant will minimize, mitigate and monitor the impacts of any incidental take to the *maximum extent practicable*, 3) adequate funding for implementation has been provided and procedures for unforeseen circumstances have been developed, and 4) applicant must ensure that the take will not significantly reduce the likelihood of the survival and recovery of the species in the wild.

The ESA, therefore, is a pragmatic tool that provides the highest levels of protection for threatened and endangered species at both the federal and state levels while still allowing growth and development to continue.

The purpose of this document is to provide an overview of the various sections of the ESA, with a particular emphasis on the sections relevant to the development of a Beaches Habitat Conservation Plan for Florida, which will be referred to as the Florida Beaches HCP.

The ESA is a Federal law designed to protect threatened and endangered species and to consider habitat protection as an integral part of that effort. The Secretaries of the Department of the Interior and the Department of Commerce are responsible for administering the ESA's provisions. Day-to-day management authority for endangered and threatened species under the Departments' jurisdictions has been delegated to the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) hereinafter referred to as the services.

Until recent decades, extinction losses in the world were believed to be primarily due to over-exploitation and extermination efforts, generally through targeted poisoning, hunting, trapping, or overfishing of selected species. In the late 20th century, a major change occurred and the vast majority of species now protected under the ESA reached that status more indirectly, due to habitat loss. Habitats in the United States that have been reduced to a small fraction of their former extent include tall-grass prairie, fresh and saltwater wetlands, old growth forests of most types, free-flowing rivers, coral reefs, undisturbed sandy beaches, unmodified estuaries, and many others. Another significant factor in the decline and demise of many species has been the introduction of non-native species. Many species are endangered by multiple causes; and there is often an overlap in the causes of risk. Definitive solutions to these problems may not exist and may not be entirely feasible due to conflicting human interests; however, some methods of reducing the current high rate of species loss have been devised and implemented in recent years, and codified in legislation including the ESA, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act, to name a few.

Coastal development, coastal armoring, and other activities are among the many regulated actions that contribute to the degradation of coastal habitats and take of federally listed species that occur in these areas. The Florida Beaches HCP is therefore being developed to address activities permitted by the State of Florida Department of Environmental Protection (FDEP) at or seaward of the Coastal Construction Control Line (CCCL). This HCP could potentially be beneficial to 40 taxa listed by Federal and state agencies as endangered, threatened, candidate, or species of special concern.

Under the ESA, species of plants and animals (both vertebrate and invertebrate) are listed as either "endangered" or "threatened" based on their risk of extinction. Once a species is listed, legal tools are available to assist the recovery of the species and to protect its habitat. A declared purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."

In recent years, tensions over the ESA have developed as species have been added to the protected list, and as the increasing demands of a growing economy and human population have affected species habitats. Critics state that neither the ESA nor administrative efforts are far-reaching enough in accommodating needs other than species conservation, while the ESA's defenders counter that it merely balances an inherent bias toward development in other governmental laws and policies.

This section discusses the contents of the Endangered Species Act (ESA), and is organized according to the sections of the ESA, as follows:

Section 1 – *Table of Contents*

Section 2 – *Findings, Purposes and Policy*

Section 3 – *Definitions*

Section 4 – *Determination of Endangered Species and Threatened Species*

Section 5 – *Land Acquisition*

Section 6 – *Cooperation with the States*

Section 7 – *Interagency Cooperation*

Section 8 – *International Cooperation*

Section 9 – *Prohibited Acts*

Section 10 – *Exceptions*

Section 11 – *Penalties and Enforcement*

Section 12 – *Endangered Plants*

Section 13 – *Conforming Amendments*

Section 14 – *Repealer*

Section 15 – *Authorization of Appropriations*

Section 16 – *Effective Date*

Section 17 – *Marine Mammal Protection Act of 1972*

Section 18 – *Annual Cost Analysis by the Fish and Wildlife Service*

2.1 SECTION 1 – TABLE OF CONTENTS

Section 1 of the ESA is a “Table of Contents” providing the titles of the sections contained within the Act.

2.2 SECTION 2 – FINDINGS, PURPOSES AND POLICY

Section 2 of the ESA describes the main policy of the ESA. Various species of fish, wildlife and plants in the U.S. have been rendered extinct and others depleted to the point of being in danger of or threatened with extinction. Congress declared that these depleted species are of aesthetic, ecological, educational, historical, recreational and scientific value, and pledged to conserve the various species facing extinction. In addition to providing a means of conserving the ecosystems upon which endangered and threatened species depend, Federal agencies must seek to conserve endangered and threatened species and use their authorities to further the ESA’s purposes.

2.3 SECTION 3 – DEFINITIONS

Providing an explanation of the terms used in the ESA is the purpose of section 3. The definitions of 21 terms are included in this section, the most significant of which are listed below:

Endangered species: Any species which is in danger of extinction throughout all or a significant portion of its range, other than a species of the Class *Insecta* determined by the Secretary of the Interior or the Secretary of Commerce to constitute a pest whose protection under the provisions of the ESA would present an overwhelming and overriding risk to man.

Threatened species: Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Take: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or the attempt to engage in any such conduct. The term harm has been further defined in the ESA implementation regulations as an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering (50 CFR Part 17.3). The regulations further define the term harass as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to breeding, feeding or sheltering@ (50 CFR Part 17.3).

Conserve, Conserving, Conservation: To use and the use of all necessary methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary.

Critical Habitat: : (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of Section 4 of the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of Section 4 of the ESA, upon a determination by the Secretary of the Interior or the Secretary of Commerce that such areas are essential for the conservation of the species. Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established.

Person: Means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

Additional definitions from section 3 of the ESA are provided in **Appendix A**.

2.4 SECTION 4 – DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

Section 4 of the ESA authorizes the Services to “list” species as endangered or threatened, depending on the risk of extinction to that species, after conducting a status review and considering the best scientific and commercial data available and taking into account any efforts being made to protect such species by a state, or foreign nation.

The process of listing a species begins with one of the following:

- A petition by any U.S. citizen to the services

- Emergency designation of a species as threatened or endangered
- An agency initiation of a review of a species

Any of the following factors may be the basis for listing a species as endangered or threatened:

- The present or threatened destruction, modification, or curtailment of its habitat or range
- Overutilization for commercial, recreational, scientific, or educational purposes
- Disease or predation
- Inadequacy of existing regulatory mechanisms
- Other natural or manmade factors affecting its continued existence

Within 90 days of receiving a petition to list, delist, or reclassify a species, the services must make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If a 90-day finding concludes that substantial information has been presented, the agency initiates a review of the status of the species, and must make a determination of whether or not the petitioned action is warranted within one year (12 months) of the receipt of the petition. In its 12-month petition finding, the services can make one of three decisions: that the petitioned action is not warranted; that it is warranted and a proposed rule is promptly published; or that it is warranted but precluded by higher priority listing actions. If a warranted finding is made and a proposed rule is published in the Federal Register, then a final determination on the proposed rule must be made within a year of the proposed rule. Any proposed or final regulation must include a summary of the data upon which the agency relied to reach its decision.

Similar procedures are required for petitions to revise a designation of critical habitat. In the case of critical habitat designations, the data summary must include a description and evaluation of activities that may cause adverse modification to the habitat or be affected by the designation.

Lists of all species determined to be threatened or endangered and their critical habitats must be published annually, and a review of these lists is completed every five years. An interesting aside regarding the listing of species is that an unlisted species can be treated as listed if it so closely resembles a listed species that enforcement personnel would have considerable difficulty in attempting to differentiate between the species, and the effect of this difficulty poses an additional threat to the listed species.

The agencies must develop and implement recovery plans for the conservation and survival of listed species, unless such plans will not promote species conservation. These plans are to include site-specific management actions, as well as objective, measurable criteria, which, when met, would allow a species to be removed from the endangered and threatened species list. Estimates of time and cost to achieve a plan's goals and to achieve intermediate steps toward that goal are included.

There is disparity among regulators about what "recovery" – perhaps the most important concept in the ESA – means in reality. Section 4 of the ESA requires the Secretaries of Interior and Commerce to "develop and implement plans for the conservation and survival of endangered species and threatened species." Conservation, according to the ESA, means the use of all methods and procedures which are necessary to bring any endangered species or threatened

species to the point at which the measures provided pursuant to the ESA are no longer necessary. Therefore, recovery plans should be designed to be a basic road map to recovery, a process that stops or reverses the decline of a species, and counteracts threats to its existence.

2.5 SECTION 5 – LAND ACQUISITION

Section 5 of the ESA addresses land acquisition for conservation of listed species. The Secretaries of the Interior and Commerce are authorized to acquire land under the auspices of the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, and/or the Migratory Bird Conservation Act as appropriate.

2.6 SECTION 6 – COOPERATION WITH THE STATES

Section 6 refers to cooperation between the states and the agencies to the maximum extent practicable. The appropriate agency is authorized to enter into cooperative agreements to assist states in the implementation of their threatened and endangered species programs, if the programs meet certain specified standards.

The vast majority of threatened and endangered species are found on privately owned land, the USFWS therefore recognizes that the success of species protection plans will depend on working cooperatively with landowners, communities and tribes. The USFWS has a variety of programs to assist the states and landowners to plan and implement projects that conserve listed species. These programs include several types of grants such as: Conservation Grants, Habitat Conservation Planning Assistance Grants, HCP Land Acquisition Grants, and Recovery Land Acquisition Grants. If a cooperative agreement is reached, the states may receive federal funds to implement the program, but the states must usually provide a minimum 25% matching amount. Under the 1988 amendments to the ESA, a fund was created to provide for the state grants. The Florida Beaches HCP is being developed from funds provided under the Habitat Conservation Planning Assistance Grants program.

2.7 SECTION 7 – INTERAGENCY COOPERATION

This section of the ESA applies specifically to federal interagency cooperation or agency actions and consultations. Each federal agency must ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species in the wild, or result in the destruction or adverse modification of a species' critical habitat. If an action agency determines that a federally listed species occurs within the project area of the proposed action, the action agency will consult either formally or informally with the services, as appropriate. The action agency will make a determination as to whether the action "may affect, but is not likely to adversely affect" or "may affect and is likely to adversely affect" the listed species, and request concurrence from the services, as appropriate, with their determination. If the services concur with a "may affect, likely to adversely affect" determination, the action agency would initiate formal consultation with the services, who would then issue a Biological Opinion and Incidental Take Statement which exempts take anticipated as a result of the proposed action.

If the USFWS finds jeopardy to the listed species, or critical habitat destruction or adverse modification may occur, it must work with the federal action agency to develop reasonable and prudent alternatives to the action. If the agency contemplating the action cannot agree with the

USFWS that there are reasonable and prudent alternatives, the action agency could proceed into the section 7 exemption process (see a description below) or would need to reassess the design or need for the proposed action. The USFWS can also propose conservation recommendations to the action agency in the Biological Opinion. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. Pending completion of the consultation process, agencies may not make irretrievable commitments of resources that would foreclose the formulation or development any reasonable and prudent alternatives. A private applicant for a federal permit, whose activities have a federal connection that triggers a Section 7 consultation, may request to participate in the consultation and to comment on a draft Biological Opinion before its issuance.

If the USFWS makes a no jeopardy and/or no adverse modification finding, the action agency may proceed with the action as proposed, provided no incidental take is anticipated. If incidental take is anticipated, the agency or the applicant must comply with the reasonable and prudent measures and implementing terms and conditions to minimize the impact of the incidental take that might otherwise result from the proposed action.

Advocates of a federal action may apply for an exemption from section 7 of the ESA for that action based on an amendment to the ESA adopted in 1978. A committee of six specified federal officials and a representative from each affected state must decide whether to allow a project to proceed despite future harm to a species; at least five votes are required to pass an exemption. The ESA includes detailed rules and deadlines to be followed in applying for such an exemption, as well as stringent rules to which the committee must adhere while deciding whether to grant an exemption. The committee must grant an exemption if the Secretary of Defense determines that an exemption is necessary for national security. If an exemption is granted, the committee must specify the mitigation and minimization measures to be taken regarding the action.

Other consultation requirements exist for both federal and state agencies, including those required under the new regulations for the 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act. These amendments, referred to as the Sustainable Fisheries Act, require the NMFS and the various fishery management councils to identify and protect "essential fish habitat" for species managed under the Magnuson Act. Essential fish habitat can include coastal areas and oceans, and it can also include rivers used by anadromous fish.

2.8 SECTION 8 – INTERNATIONAL COOPERATION

The Secretary of the Interior has been designated as management and scientific authority for the Convention on International Trade in Endangered Species of Wild Fauna and Flora, commonly known as CITES. Section 8 of the ESA deals with the actions and activities related to the worldwide protection of threatened and endangered species. The Secretary, together with the Secretary of State and other Secretaries, also represents the United States at the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. The Secretary implements the recommendations of the Convention by developing programs, identifying species, and taking measures to ensure that species, including migratory birds, will not become threatened and endangered.

2.9 SECTION 9 – PROHIBITED ACTS

Section 9 of the ESA addresses actions prohibited by the ESA. Once listed, Section 9 of the ESA makes it unlawful for any person – including private and public entities – to “take” individuals of an endangered species. Additionally any permitting entity that knowingly issues permits to authorize an activity that may result in unauthorized take of a listed species can be held equally liable under section 9. As defined previously, *take* means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or the attempt to engage in any such conduct. These take prohibitions apply to both threatened and endangered species under the USFWS’S jurisdiction, but the NMFS issues species-specific regulations that may allow certain kinds of incidental take; for example, general commercial fishing rules. Harass is defined in the ESA Implementation Regulations as the intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to breeding, feeding or sheltering (50 CFR Part 17.3). Harm is defined in the ESA Implementation Regulations as an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where such an act actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering (50 CFR Part 17.3).

2.10 SECTION 10 – EXCEPTIONS

This section of the ESA provides the basis for the development of the Florida Beaches HCP. In 1982, Congress amended the ESA to provide a mechanism for the Services to issue incidental take permits to private land owners, states, counties, local municipalities, or other non Federal partners to proceed with activities that would otherwise be prohibited under section 9, as long as the taking was incidental to the carrying out of an otherwise lawful action. This mechanism is commonly referred to as the Habitat Conservation Planning Process. As part of the ITP, the applicant is required to develop a HCP.

The HCP addresses the following:

- Likely impacts of the take
- Mitigation and minimization measures that will be undertaken
- Funding sources for the mitigation
- Alternative actions considered
- Adaptive management plan
- Other measures required by the Secretary as necessary

There are other mechanisms under section 10 where the Services authorize incidental take. For instance, under section 10(a)(1)(A), the Services issue permits for scientific purposes or to enhance the survival of the species. In addition, incidental take is currently authorized through a variety of voluntary agreements to conserve or minimize and mitigate impacts upon fish and wildlife, including: *Candidate Conservation Agreements (CCA)*, *Safe Harbor Agreements*, and *HCPs with Implementation Agreements*.

Successful CCA applicants receive an *Enhancement of Survival Permit (ESP)* if they agree to actions that will provide a net benefit to specified unlisted species so that listing of the species

would be unnecessary if all similarly situated landowners within the range of the species were to manage their land in the same fashion. If species covered by the CCA are eventually listed for protection, the ESP authorizes incidental take of those species by any action in accordance with the CCA.

Safe Harbor Agreements offer landowners an incentive to assist in the recovery of a protected species by providing regulatory assurances to persons who agree to improve habitat conditions for species that are already listed under the ESA. This agreement allows a landowner to provide a net conservation benefit that will contribute to recovery of a listed species. As with CCAs, applicants with Safe Harbor Agreements will receive an ESP that authorizes incidental take by actions consistent with the terms of the agreement. Under Safe Harbor Agreements, however, no immediate take of existing populations or occupied habitat within the planning area is usually allowed.

With an HCP, however, a landowner is authorized to incidentally take protected species by any action outlined in the plan. In addition, an applicant for an HCP may negotiate for long-term regulatory assurances that no additional mitigation will be required under the plan regardless of changes in circumstances over the life of the Incidental Take Permit (ITP). These assurances are obtained under the *No Surprises Policy*. However, *No Surprises* only applies if the permittee is in compliance with their ITP.

In 1998, a number of environmental organizations challenged the No Surprises rule on the grounds that the rule resulted in a record increase in the number of ITPs, which in turn would result in additional otherwise unlawful takings of listed species. In 1999, the Services adopted the Permit Revocation Rule (PRR), which sets standards for when the Services will revoke an ITP. Under the PRR, the Services may revoke an ITP if continuing the permitted activity would be inconsistent with the ESA's requirements in section 10 that the permitted taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and if the Services have not remedied the inconsistency in a timely manner.

Each type of agreement (CCAs, Safe Harbors Agreements and HCPs) must not jeopardize a listed species by appreciably reducing the likelihood of survival and recovery of the species in the wild. .

2.11 SECTION 11 – PENALTIES AND ENFORCEMENT

This section lays out the penalties and enforcement criteria of the ESA. Criminal penalties and imprisonment for one year, or both, and civil penalties will be assessed against a Person (see the definition of Person under section 3) who knowingly violates a provision of the ESA or its regulations. In addition, section 11 includes provisions that allow any person to file a lawsuit to enforce the ESA. Participation in interstate or foreign commerce or any commercial activity involving any endangered species of fish, wildlife or plants in violation of CITES is also considered a criminal act. No penalty is assessed without notice and opportunity for a hearing. No penalty can be assessed against the defendant if the act was committed on a good faith belief that he was acting to protect himself or herself, a family member, or any other person from bodily harm from a threatened or endangered species.

Congress added mandatory deadlines and the citizen suit provision to speed up the very slow listing process so as to enhance protections to threatened and endangered species awaiting

listing. Criminal actions are prosecuted in the federal district courts, and civil penalties are imposed by the Secretaries of the Interior or Commerce. The fines collected are used to pay reasonable and necessary costs incurred for the care of fish, wildlife or plants, pending disposition of the proceedings. When the balance of funds received exceeds \$500,000, the Secretary of the Treasury is required to deposit an amount equal to the excess into the cooperative endangered species conservation fund.

2.12 SECTION 12 – ENDANGERED PLANTS

This section of the ESA directs the Secretary of the Smithsonian Institution, together with other affected agencies, to review plant species that are or may become threatened or endangered, and methods adequate to conserve the species. The Secretary is required to report the results of this review to Congress, including recommendations for new or amending legislation.

2.13 SECTION 13 – CONFORMING AMENDMENTS

The first strong legislation that was passed in the United States to protect species at risk of extinction was in 1966 and was called the Endangered Species Preservation Act. This act encouraged the protection of “selected species” and encouraged the protection of habitat and the government acquisition of land for conservation. This Act was filled with loopholes and was voluntary. Therefore, Congress in 1969 enacted the “Endangered Species Conservation Act.” This law added foreign species and invertebrates to its umbrella of protection. However, the need for incorporating science-based decisions to list species and to strengthen enforcement of the Act led Congress to pass the Endangered Species Act of 1973. This act incorporated the earlier laws and prohibited the take of listed species. Section 13 of the ESA addresses the amendments and revisions, primarily to the 1966 and the 1969 Acts but also certain other Acts passed previously, which relate to the conservation of listed species.

2.14 SECTION 14 – REPEALER

Section 14 repeals the Endangered Species Preservation Act of 1966 and the 1969 Endangered Species Conservation Act of 1969.

2.15 SECTION 15 – AUTHORIZATION OF APPROPRIATIONS

Congress authorized funds to be appropriated to enable the Department of the Interior and the Department of Commerce to carry out their functions and responsibilities under the ESA. Congress also authorized funding to the Department of Agriculture for enforcement of plant importation and exportation restrictions. These regulations are addressed in section 15 of the ESA.

2.16 SECTION 16 – EFFECTIVE DATE

Section 16 states that the effective date for the implementation of the Endangered Species Act of 1973 is the day of its enactment.

2.17 SECTION 17 – MARINE MAMMAL PROTECTION ACT OF 1972

Section 17 addresses the Marine Mammal Protection Act (MMPA) passed in 1972. This section states that no provision of the ESA should take precedence over the more restrictive provisions already provided in the Marine Mammal Protection Act. Therefore, since there are no provisions to authorize take under the MMPA, incidental take can not be issued for marine mammals under the ESA.

2.18 SECTION 18 – ANNUAL COST ANALYSIS BY THE FISH AND WILDLIFE SERVICE

Since 1991, Congress has required that the Secretary of the Interior report all identifiable Federal and state grant expenditures that have been utilized primarily for the conservation of endangered and threatened species. Section 18 outlines the details of these requirements.

While listing threatened and endangered wildlife species is very important, and sometimes the only concrete way to gain simultaneous protections for the habitat of such species, individual species, whether they are federally listed or not, cannot survive or recover without the conservation of entire ecosystems. A prudent and proactive application of habitat conservation planning under the ESA can be a highly effective tool in protecting endangered ecosystems. In order to trigger the ESA's protections, the services must list a species as threatened or endangered and designate the critical habitat of that species if such designation is determined to be reasonable and prudent. Bringing a species (and its ecosystem) to the point at which the ESA's protective measures are no longer necessary is the same as bringing the species to the point at which delisting is appropriate. The ESA is a powerful mechanism by which wildlife biodiversity and landscape values can survive and hopefully prosper.

Appendix A
Definitions from Section 3 of the Endangered Species Act

Appendix A

Definitions from Section Three of the Endangered Species Act

Alternative courses of action: Includes all alternatives, and thus is not limited to original project objectives and Agency jurisdiction.

Commercial Activity: All activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling; provided, however, that it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

Conserve, Conserving, and Conservation: To use, and the use of, all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Convention: The Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto (also referred to as CITES).

Critical habitat for a threatened or endangered species: (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of Section 4 of the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of Section 4 of the ESA, upon a determination by the Secretary of the Interior that such areas are essential for the conservation of the species. Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established.

Endangered species: Any species that is in danger of extinction throughout all or a significant portion of its range other than a species of the Class *Insecta* determined by the Secretary of the Interior to constitute a pest whose protection under the provisions of the ESA would present an overwhelming and overriding risk to man.

Federal agency: Any department, agency, or instrumentality of the United States.

Fish or wildlife: Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Foreign commerce: Includes, among other things, any transaction (1) between persons within one foreign country; (2) between persons in two or more foreign countries; (3) between a person within the United States and a person in a foreign country; or (4) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

Import: To land on, bring into, or introduce into or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

Appendix A

Definitions from Section Three of the Endangered Species Act

Permit or License Applicant: When used with respect to an action of a federal agency for which exemption is sought under Section 7 of the ESA, any person whose application to such agency for a permit or license has been denied primarily because of the application of Section 7(a) to such agency action.

Person: An individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

Plant: Any member of the plant kingdom, including seeds, roots and other parts thereof.

Species: Includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature.

State: Any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

State agency: Any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

Take: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

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

United States: When used in a geographical context, includes all States.