

Handbook of Florida Water Regulation: Endangered Species Act¹

Michael T. Olexa and Zachary Broome²

Preface

This handbook is designed to provide an accurate, current, and authoritative summary of the principal federal and state (Florida) laws that directly or indirectly relate to agriculture. This handbook provides a basic overview of the many rights and responsibilities that farmers and farmland owners have under both federal and state laws as well as the appropriate contact information to obtain more detailed information. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this handbook is based are subject to constant revision, portions of this publication could become outdated at any time. Several details of cited laws are also left out due to space limitations.

This handbook is distributed with the understanding that the authors are not engaged in rendering legal or other professional advice, and the information contained herein should not be regarded as a substitute for professional advice. This handbook is not all inclusive in providing information to achieve compliance with the federal and state laws and regulations governing water protection. For these reasons, the use of these materials by any person constitutes an agreement to hold harmless the authors, the Florida Cooperative Extension Service, the Institute of Food and Agricultural Sciences, and the University of Florida for any liability claims, damages, or expenses that

may be incurred by any person as a result of reference to or reliance on the information contained in this handbook.

ESA Overview

The Endangered Species Act (ESA) was passed by federal legislation in 1974 to protect species of fish, wildlife, and plants that are threatened with extinction as well as the ecosystems critical to the survival of those species. In many cases, these ecosystems are wetlands, so endangered species protection often equals water protection.

Who Enforces ESA?

ESA requires all federal agencies to consult with an appropriate federal department (i.e., United States Department of the Interior or United States Department of Agriculture) to determine what effects its land use or other actions will have on endangered species. The agencies are prohibited from taking any action that will threaten an endangered species without a special waiver from a committee headed by the Secretary of the Interior.

Agency action might include the issuance of a permit to a private party such as when the Army Corps of Engineers issues permits for dredge and fill activities (see [FE582](#), Clean Water Act). ESA also applies to private and state actions, although the prohibitions are slightly different.

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2. Michael T. Olexa, professor, Food and Resource Economics Department, and director, Agricultural Law Center, University of Florida, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida, Gainesville, FL, and chair, Agricultural Law Committee, The Florida Bar, and Zachary Broome, student, Levin College of Law, University of Florida, Gainesville, FL 32611.

ESA grants enforcement authority to the Secretary of the Interior (delegated to the United States Fish and Wildlife Service), the Secretary of Commerce (delegated to the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration), and the Secretary of Agriculture. The United States Department of Agriculture is responsible for the protection of threatened and endangered plant species and the importation/exportation of plants.

What Laws Are Often Used to Help Enforce ESA?

The National Environmental Policy Act

The National Environmental Policy Act (NEPA), through the procedures it mandates, basically provides federal agencies the opportunity to consider the environmental effects that will be caused by proposals for legislation and other major federal actions (projects) they propose before they commence the project. NEPA requires that all federal agencies must include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed written statement (Environmental Impact Statement [EIS]) on:

- The environmental impact of the proposed action
- Any adverse environmental effects that cannot be avoided if the proposal is implemented
- Alternatives to the proposed action
- The relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity
- Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it were implemented

If, after performing an EIS, the federal agency's decision is to state a finding of no significant impact (FONSI), or if the agency does not perform an EIS due to a categorical exclusion, those findings may be challenged and overturned by judicial review (especially if the agency fails to follow the rulemaking process as mandated under the Administrative Procedure Act [APA]).

In situations where an EIS is not required for a federal agency's action because the action is not a major federal action or when the action falls under a categorical exclusion, the federal agency can choose to perform an Environmental

Assessment (EA) on the project/proposal to determine whether the federal agency should perform an EIS on the specific project (a step frequently taken by agencies) or to state a finding of no significant impact (FONSI). Just like an EIS, a federal agency through an EA can state a ruling of no significant impact (FONSI). For more information about NEPA, refer to the EPA website at <http://www.epa.gov/compliance/nepa/>.

The Administrative Procedure Act

The Administrative Procedure Act (APA) mandates the requirements the federal agencies must follow when they go through the process of making a rule. Basically, the rule-making process requires that the federal agency determining whether or not to make a rule must first provide public notice, published in the *Federal Register*, of the proposed rulemaking which includes:

- The time, place, and nature of the public rulemaking proceedings
- The legal authority under which the rule is being proposed
- Either the terms of the rule or a description of the subject and issues involved

Next, the federal agency must provide the public with an opportunity to be heard through participation in the rulemaking process by submission of written data, views, or arguments, with or without the opportunity of oral presentation. After considering all of the relevant matter presented, the federal agency must incorporate in the rule(s) adopted a general statement of their basis and purpose.

Finally, the federal agency must publish the substantive rule in the *Federal Register* no less than 30 days before its effective date.

If the federal agency fails to follow these requirements, APA allows for judicial review of the agency's rule in some circumstances, but excludes judicial review if agency discretion is mandated by law. Only a person with standing may sue a federal agency for making a ruling. For more information about APA, refer to the EPA website at <http://www.epa.gov/lawsregs/laws/apa.html>.

The federal agency's violation of the requirements of NEPA can be addressed by APA. This can prevent the federal agency from taking, or failing to take, an action that could

negatively impact the environment or violate legislation such as ESA.

What Does ESA Prohibit?

ESA prohibits the taking of any endangered species. “Taking” under the Act basically means killing, trapping, harassing, hunting, collecting, or harming the species in any way.

The definition of *taking* has been extended by the federal courts to include the destruction of areas designated as “critical habitats” where the destruction or adverse modification might be reasonably expected to result in a reduction in the number or distribution of an endangered species, especially if it hinders the endangered species’ ability to feed, shelter, and/or reproduce. Any adverse modification or destruction of critical habitat is restricted under ESA.

Nonpoint source pollution of such a habitat—and most agricultural operations (with the exception of concentrated animal feeding operations) are classified as nonpoint sources—that leads to the destruction or adverse modification of the habitat and results in a reduction in the number or distribution of an endangered species could be considered by the courts as a taking of endangered species. The owner of that non-point source may then be liable for a violation of ESA and face the penalties under ESA.

What Are the Penalties under ESA?

Civil penalties may be enforced by any of the federal agencies in amounts of up to \$25,000 per violation (for knowing violators and importers/exporters) or up to \$500 per violation (for all violators, regardless of knowledge). The enforcing agency is required to give the offender notice and opportunity for a hearing before assessing the penalty. Criminal penalties for knowing violations may climb as high as \$50,000 per violation and/or one year’s imprisonment. A self-defense argument against both civil and criminal penalties is available if the violator can prove that the offense was committed as a good faith reaction to the belief that an endangered or threatened species was going to cause bodily harm to the violator or another person.

Courts are authorized to issue warrants and injunctive relief, as well as to commit searches and seizures to enforce ESA. In addition, private citizens may bring suit against violators, including the government, or against the agencies to compel enforcement of ESA. Agencies may even go as far as to make arrests for violations of ESA. Also, any

equipment or property used in the violation of ESA may be declared forfeited and seized by the agencies.

What Are the Exceptions and Exemptions under ESA?

ESA Exceptions

The federal agencies administering ESA are authorized to grant exceptions, usually by way of takings permits, to the prohibitions against takings. Permits may be granted for the following:

- Scientific purposes (conservation/propagation of an endangered species)
- The taking of an endangered species, if such a taking is incidental to, and not the purpose of, the performance of an otherwise lawful activity

In order to apply for a takings permit under the second rationale, the applicant must submit a Habitat Conservation Plan to either the Secretary of the Interior or the Secretary of Commerce, depending on whether the endangered species to be taken is a land or an aquatic animal, or to the Secretary of Agriculture if the endangered species to be taken is a plant.

In the Habitat Conservation Plan, the applicant must specify (1) the impact that will likely result from the taking; (2) what steps the applicant will take to minimize and mitigate the impact, and the funding that will be available to implement such steps; (3) what alternatives to the taking the applicant considered and the reasons why these alternatives are not being used; and (4) any other measures that the Secretary (of the Interior, Commerce, or Agriculture, depending on the type of endangered species which is taken) may require as being necessary or appropriate for purposes of the plan. The Secretary will issue the permit if the Secretary finds, after public notice and comment has been received, that the taking will be incidental; that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; that the applicant will ensure that adequate funding for the plan will be provided; that the taking will not appreciably reduce the probability of the survival and recovery of the species in the wild; and that all other additional measures required by the Secretary for the specific case, to be determined on a case-by-case basis, will be met. The permit can be revoked if it is found that the applicant is not complying with the terms and conditions of the permit.

ESA Exemptions

There are several exemptions from the ESA, including:

- *The Hardship Exemption:* This exemption is used in cases where the applicant has proven to the Secretary that the applicant had entered into a contract for the lawful taking of an animal or plant before it was placed on the endangered species list, and the listing will cause undue economic hardship to the applicant under the contract. Undue economic hardship includes substantial economic loss resulting from the inability to perform such contracts due to the listing of the species as endangered; substantial economic loss to people who for at least a year prior to the listing of the species derived a substantial portion of their income from the lawful taking of the now listed species; and the ending of the lawful taking of the species for food by people who are not reasonably able to secure other sources of food and who are substantially dependent on hunting and fishing for food. These permits are usually limited to allow takings only for one year following the designation of the species as endangered.
- *The Antique Articles Exemption:* Basically this exemption allows for the importation, exportation, transportation, possession, sale, and purchase in foreign and interstate commerce of antique articles made from threatened or endangered species (contact EPA for a complete list of designated import ports and appropriate Customs import forms). This exemption covers only antique articles that:
 - Are at least 100 years of age
 - Are composed in whole or in part of any listed threatened or endangered species
 - Have not been repaired or modified with any part of any listed species on or after December 28, 1973
 - Have entered at one of the designated ports within the Customs territory of the United States

For the complete list of exemptions from the ESA please contact EPA.

For more information about ESA, refer to the EPA website at <http://www.epa.gov/lawsregs/laws/esa.html>.

Source

16 United States Code, Sections 1531 to 1544

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