



COOPERATION WITH THE STATES

THE ENDANGERED SPECIES ACT SECTION 6 PROGRAM

Application Guidance for States

INTRODUCTION

Section 6 of the Endangered Species Act (ESA) provides a mechanism for cooperation between NOAA's National Marine Fisheries Service (NMFS) and the States for the purposes of conserving endangered and threatened species, candidate species, and recently delisted species (i.e., delisted within the past 5 years). Under section 6, NMFS may enter into an agreement with any State that "establishes and maintains an adequate and active program for the conservation of endangered and threatened species" (16 U.S.C. 1535). Once a State and NMFS enter into a section 6 agreement, NMFS is authorized to provide federal assistance to support development and implementation of the State's conservation programs. This document provides guidance on how States can formally apply for an ESA section 6 agreement.

DEFINITIONS

All terms used are as defined in section 3 of the ESA and 50 CFR 222.102. The definition of the term "State", however, will now include the U.S. flag islands/ commonwealths that were once considered part of the Trust Territory of the Pacific Islands. In addition, for the purposes of this guidance, the term "Secretary" refers to the Secretary of Commerce, whose responsibilities under section 6 have been delegated to NOAA's Assistant Administrator for Fisheries.

SECTION 6 AGREEMENTS

Under section 6 of the ESA, a State, through the appropriate State agency, may apply to enter into one of several types of section 6 agreements. Under section 6(c)(1), a State may enter into an agreement for the conservation of animal species, and under section 6 (c)(2), a State may enter into an agreement for the conservation of plant species. Alternatively, a State may choose to combine these two agreements into a single document. Agreements for plants and animals can each be further divided into what are commonly termed 'full' and 'limited' agreements. Limited agreements were created in 1977 when Congress amended section 6 to improve the section 6 program and create more flexibility for States wishing to enter into agreements. The creation of limited agreements established a means by which States with adequate authority and conservation programs for some, but not all, resident listed species could enter into an agreement.

In order to enter into a full section 6 agreement, the Secretary must find that the State meets the five findings of section 6(c)(1) (for animals, Box 1) indicated below or similar findings of section 6(c)(2) (for plants). In order to enter into a limited section 6 agreement for animals, the Secretary must find that the State meets three of those five findings and has plans under which immediate attention will be given to those species deemed most urgently in need of conservation. With the exclusion of criterion (D) below, the same requirements must be met in order for a State to enter into a limited agreement for plants.

Box 1. Criteria for adequate and active conservation programs under section 6(c)(1) of the ESA.

Full Agreements

- (A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;
- (B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;
- (C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;
- (D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

Limited Agreements

- (E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened, or that under the State program –
 - i. the requirements set forth in paragraphs (C), (D), and (E) of this subsection are complied with, and
 - ii. plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs...

Under section 3 of the ESA, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. The application of ESA prohibitions and authorizations with respect to take of resident listed species depends on whether the State enters into a full or a limited agreement. A full agreement removes ESA take prohibitions for certain species, whereas a limited agreement does not. Specifically, under a full agreement, prohibitions on taking resident listed species do not apply to any such species that is not specifically covered by any other Federal law or treaty or listed on Appendix I of to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (CITES).

In contrast, a limited agreement does not affect the applicability of any ESA take prohibitions for any resident endangered or threatened species. States that enter into limited agreements can instead seek authorization to take listed species through permits issued pursuant to section 10 of the ESA.

APPLICATION REQUIREMENTS

The goal of the application process is to demonstrate that the State agency that will enter into the agreement has the authority, plans, programs, and capability to establish and maintain a program for the conservation of resident endangered and threatened species that is in accordance with the purposes and policies of the ESA. To maximize efficiency when preparing the application, agency publications and previously prepared information should be used as much as possible and provided as part of the application package. For a particular agency to demonstrate that it meets the relevant findings of section 6, the application package must include the documentation and information listed below.

State Laws

- **A copy of all State laws and regulations applicable to the protection and conservation of endangered and threatened species.** This information can be provided electronically or in hard copy and should address the relevant section 6(c)(1) criteria regarding the State's authority to conserve, conduct investigations, and establish programs for resident, listed, marine and anadromous species. This information should also address the requirement for public participation in designating resident threatened and endangered species. The laws and regulations provided must pertain to species under NMFS jurisdiction (including those under joint NMFS and U.S. Fish and Wildlife Service (FWS) jurisdiction).
- **An opinion letter from the State Attorney General's Office, or other counsel authorized by the State to issue formal legal opinions on its behalf, that discusses whether the State's laws meet all or some of the conditions set forth in section 6(c)(1).** In particular, this letter must identify which State agency has the authority to conserve and/or establish conservation programs for resident species of fish and wildlife under NMFS jurisdiction. The letter should also clearly distinguish which of the section 6(c)(1) criteria the state agency meets (i.e., full or limited agreement criteria). State agencies are strongly encouraged to submit a request to their Attorney General's Office as soon as possible, as it can take a significant amount of time to obtain this letter.

Conservation Program

- **Description of State conservation programs or activities for resident endangered and threatened species.** This information should address resident listed species under NMFS jurisdiction and can address both federally listed and State listed species. This summary can be provided electronically or in hard copy and should reference or use previously prepared reports or plans (e.g. State Wildlife Action Plans) as much as possible. For full agreement applications, the information provided must indicate that the State has established conservation programs for *all* resident listed species under NMFS' jurisdiction.

- **For limited agreement applications, a description of the activities the State would specifically like to pursue during the first year after signature of the agreement.** This should not be a detailed proposal but rather a general description of what species and conservation issues or projects the State would like to focus on in the near-term. These activities can be contingent upon funding. The appropriate NMFS Regional Office will work with the state agency to help identify any conservation and recovery priorities and/or help develop ideas for how the state agency can build their section 6 program.
- **A list of endangered and threatened species under NMFS jurisdiction or joint jurisdiction of FWS and NMFS for which the State has or would like to develop a conservation program.** For full agreement applications, this list must include all resident listed species; for limited agreement applications, this list should include those species most in need of conservation efforts and for which the State either has an adequate and active conservation program or has the authority to establish one.

Enforcement

- **A summary of what role (if any) enforcement personnel play in the State's program.** Section 3 of the ESA defines "conservation" to include law enforcement as one of its elements, so it is important that States include information on what role enforcement plays or could play in their overall conservation program. Enforcement activities can be contingent upon funding and/or the development or enhancement of a Joint Enforcement Agreement (JEA) with NMFS.

Staff

- **A description of the State conservation agency that would enter into the agreement with NMFS.** This should be a very brief overview of the organizational structure of the agency, relevant divisions or staff, relevant facilities, and sources of funding. This information should convey the existing capacity the agency has for maintaining and/or establishing conservation programs.
- **Contact information for one or more staff members, their roles and/or expected participation under a section 6 agreement.** The State agency staff member(s) who will serve as the point of contact on matters relative to the development and execution of the agreement should be clearly identified in the application.

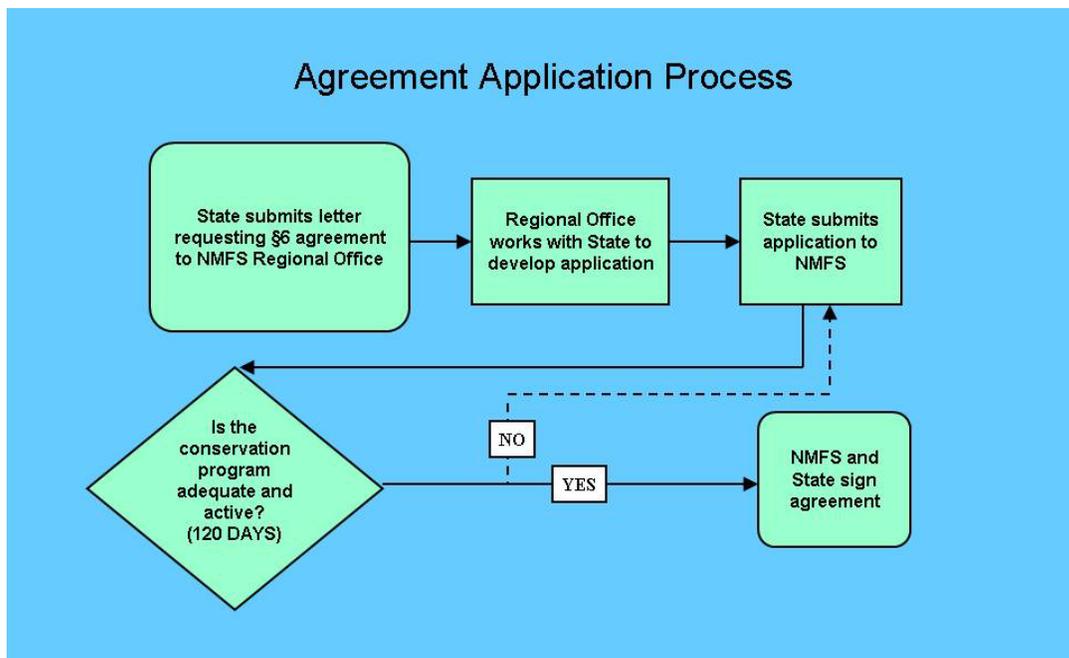


Figure 1. Overview of the application process. The process begins when the State submits a letter to NMFS requesting a section 6 agreement. Once a complete application is received, NMFS is required by statute to complete its review of the application within 120 days. Early coordination with the appropriate NMFS Regional Office, however, greatly reduces the time required for review of an application.

APPLICATION PROCESS

To initiate the application process, a State agency sends a letter to the appropriate NMFS Regional Office indicating that the State wishes to enter into a section 6 agreement with NMFS (Figure 1). The Regional Office then works with the State to prepare the application package. As part of this process, the Regional Office will draft a copy of the section 6 agreement and provide it to the State for their review. After NMFS completes its review of the final application, the Assistant Administrator for Fisheries signs two copies of the agreement, which are submitted back to the State agency to countersign and thus effectuate the agreement.