

Legal Framework for ESA Recovery Planning and Implementation



Recovery is a “bio-legal” process

- Biological foundation: scientific information and conservation principles & tools.
- Legal/policy foundation: statutes, regulations, policies & guidance.



What is “law”?

- A rule of action or conduct prescribed by controlling authority and having binding legal force.
- Includes international and domestic treaties, statutes enacted by Congress, and agency regulations.
- Also includes court rulings/opinions.

What is “policy” or “guidance”?

- Policies do not establish a binding norm. They are general principles that guide future decisions but allow for discretion.
- Policies implement programs, address procedures.
- May be “formal” (published in the Federal Register with public comment) or purely internal (memoranda and orders).

Federal recovery legal framework consists of:

- Treaties
- Statutes
- Regulations
- Judicial Rulings/Opinions
- Secretarial Orders
- Agency Policies
- Agency Memoranda & Orders
- Guidance Documents and Handbooks

ESA definition of “conserve” and “conservation”



“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 this Act are no longer necessary.”
(ESA sec. 3(3))

Regulatory provisions relevant to meaning of “Recovery”

Regulatory definition of “Recovery”:
“Improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” (50 CFR 402.02)

Regulatory provisions relevant to meaning of “Recovery”

“A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.” (50 CFR 424.11(d)(2))

Definitions of “endangered species” & “threatened species”

Endangered: In danger of extinction throughout all or a significant portion of its range.

Threatened: Likely to become [in danger of extinction] within the foreseeable future throughout all or a significant portion of its range.



The mandate and timing for developing recovery plans



ESA Sec. 4(f)(1)

“The Secretary shall develop and implement . . . plans . . . for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species.”



ESA Sec. 4(f)(1)(A)

“The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable, give priority to those [listed] species,

- without regard to taxonomic classification,
- that are most likely to benefit from such plans,
- particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”

Recovery Priority Guidelines

- Sec. 4(h)(4): Statutory requirement for FWS and NMFS to develop guidance on setting recovery plan priorities.
- NMFS – 1990: Recovery planning and implementation (55 Fed Reg 24296).

Components that by statute
must be included in each
recovery plan

ESA Sec. 4(f)(1)(A)

"The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable, . . . incorporate in each plan"



ESA Sec. 4(f)(1)(B)(i)

“A description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;”

ESA Sec. 4(f)(1)(B)(ii)

“Objective, measurable criteria
which, when met, would result in a
determination, in accordance with the
provisions of this section, that the
species be removed from the list;”

ESA Sec. 4(f)(1)(B)(iii)



“estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.”

Public Participation



ESA Sec. 4(f)(4)

- “The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan.”
- “The Secretary shall consider all information presented during the public comment period prior to approval of the plan.”

ESA Sec. 4(f)(5)

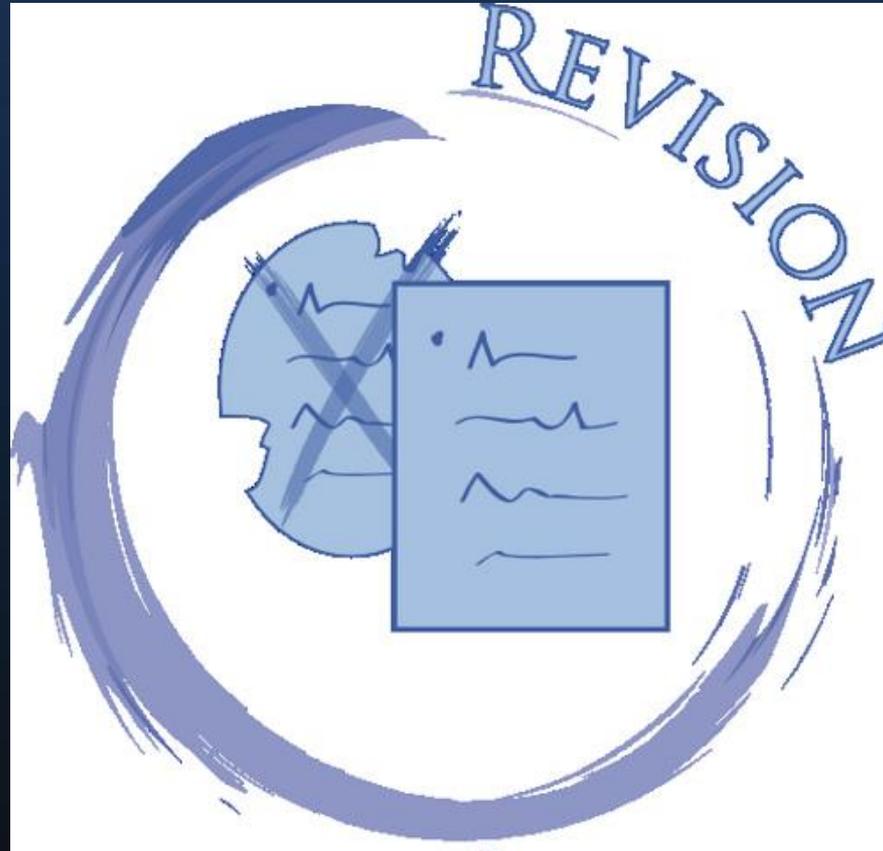
- “Each federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).”



Other recovery specifics in Sec. 4(f)

- Agency may contract for recovery planning and implementation (sec. 4(f)(2))
- Appointed recovery and implementation teams are exempt from FACA (sec. 4(f)(2))
- Agencies must send a biennial report to Congress on the status of planning and implementation efforts (sec. 4(f)(3))

Plan Revision



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Relationship to Other Areas of ESA

- Section 4 – delisting ; critical habitat designation
- Section 7(a)(2)- interagency consultation (biological opinions)
- Section 9(a)(1) – enforcement against “take”

Relationship to Other Laws

- National Environmental Policy Act (NEPA) – “significance”/controversy

Judicial Review Standards

- **ESA citizen-suit provision** – re: mandatory duty under Section 4 (16 U.S.C. § 1540(g)(1)(C))
- The Administrative Procedures Act’s **“arbitrary and capricious”** standard (5 U.S.C. §706(2)(A)) is applied
- APA standards for **“unreasonable delay”** claims are relevant to challenges for failure to adopt a compliant plan (5 U.S.C. § 706(1))

Implementation

- Most courts have held not mandatory; implementation is discretionary.
- But certain statements in recovery plans may be found to give rise to obligations.