



U.S. Fish and Wildlife Service

Endangered Plants - Federal Rules and Regulations



pa'iniu (*Astelia waialealae*)



koki'o (*Kokia drynarioides*)

Photos courtesy of Marie Bruegmann - USFWS



'ohai (*Sesbania tomentosa*)

Plants and the U.S. Endangered Species Act

The U.S. Endangered Species Act (Act) was passed on December 28, 1973, to provide a legal mechanism for the conservation of endangered and threatened species and the ecosystems upon which they depend. The Act places restrictions on a wide range of activities, involving endangered and threatened animals and plants, to help ensure their continued survival. With limited exceptions, the prohibited activities may not be carried out unless authorized by a permit from the U.S. Fish and Wildlife Service (Service).

Definition of a Plant

Section 3 of the Act defines “plant” as “any member of the plant kingdom, including seeds, roots and other parts thereof.”

Prohibited Activities

Section 9(a)(2) of the Act sets forth the prohibitions that apply to ENDANGERED plants. In general, it is unlawful to:

- import and export such species;
- remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on such areas; or remove, cut, dig up or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law; and

- deliver, receive, transport, carry, ship or sell or offer for sale in interstate or foreign commerce such species.

The prohibitions apply equally to live or dead plants, their progeny, and parts or products derived from them.

The same prohibitions apply to THREATENED plants, except that the seeds of artificially propagated threatened plants, accompanied by a statement as to their cultivated origin, are exempt from the above-listed prohibitions.

Permits

Permits are available to allow persons to carry out each of the above-listed prohibited activities. For endangered plants, permits may be issued for scientific purposes or for the enhancement of propagation or survival of the species or for economic hardship. For threatened plants, the purpose of the activity may be scientific purposes, the enhancement of propagation or survival of the species, economic hardship, botanical or horticultural exhibition, educational purposes or other activities consistent with the purposes and policy of the Act.

The most common types of Endangered Species Act permits for plants are:

1. **Interstate or Foreign Commerce:** Issued to persons (individuals, botanical gardens, commercial plant nurseries, etc.) who wish to sell plants in

interstate or foreign commerce. Most commonly, the applicants are artificially propagating endangered and/or threatened plants, thus meeting the definition of “enhancement of propagation or survival of the species.” The vast majority of these permits are issued to authorize the sale of artificially propagated endangered and threatened plants to residents of another state or country, are usually valid for at least two years and are renewable. Permittees are required to submit an annual report providing at least the following information: each protected species that was sold in the preceding calendar year, how many were sold, to whom they were sold, and how many stock plants were retained.

2. Remove and Reduce to Possession: Issued to persons who wish to collect endangered or threatened plants from lands that are under Federal jurisdiction (most commonly, Defense Department, National Park Service, U.S. Forest Service, Bureau of Land Management or National Wildlife Refuge lands). The majority of these types of permits are issued for scientific research purposes, although some have also been issued for propagative purposes. They are usually valid for at least one year, are usually renewable and require the submission of annual reports. It is important to remember that a permit is required to remove and reduce to possession not only the whole plant, but also all parts of that plant, including pollen, seeds, leaves, cuttings, roots, etc.

3. Import and/or Export: Issued to persons who wish to import or export endangered or threatened plants. The majority of these permits are issued to botanical gardens and herbariums for noncommercial loans and donations with foreign institutions. *(Important: Please refer also to information on the Convention on International Trade in Endangered Species (CITES).*

Frequently Asked Questions

1. Can protected plants be destroyed, damaged or moved to allow otherwise legal development to occur (“Incidental Take”)?

Under the Endangered Species Act, there is a provision for this type of activity to be authorized via an incidental take permit [Section 10(a)(1)(B)] when the development will potentially take protected

wildlife. There is no such permit provision for plants. However, as outlined above, it is not prohibited to destroy, damage or move protected plants UNLESS such activities occur on lands that are under Federal jurisdiction or on other lands in violation of State laws. The Service may authorize plant destruction on Federal lands when no other options are available and when it has been determined through Section 7 consultation that the action will not jeopardize the continued existence of the species.

If a person wishes to develop private land, with no Federal jurisdiction involved and in accordance with State law, then the potential destruction, damage or movement of endangered or threatened plants does not violate Federal law. Under the Hawai‘i Endangered Species Law, a habitat conservation plan (HCP) which allows taking an endangered plant can be authorized for take that is incidental to activities that are otherwise legal. HCPs provide for avoidance, minimization, mitigation, and monitoring of take of endangered species.

2. Is it lawful for a State to have more restrictive laws and regulations governing the taking, possession, and transporting of plants?

Yes; any State may have more restrictive legislation than the Act; however, no State may have a less restrictive law or policy. In other words, the Act may not be undermined by local or State laws or policies.

3. How does the designation of critical habitat enhance protection of endangered and threatened plants?

If critical habitat is designated for a species, all Federal agencies, under Section 7 of the Act, must consult with the Fish and Wildlife Service (Service) to insure that any action authorized, funded or carried out by the Federal agency is not likely to result in the destruction or adverse modification of the critical habitat. Without the designation of critical habitat, Federal agencies must consult under Section 7 to insure only that any such action is not likely to jeopardize the continued existence of any endangered or threatened species. Therefore, in certain instances, critical habitat may add an extra increment of protection --but this protection requires a Federal action triggering Section 7 consultation.

4. Is it illegal to possess and propagate listed plants, such as in botanical gardens?

The Endangered Species Act does not prohibit possession of lawfully taken, or acquired, listed plants. As long as a botanical garden acquired its stock legally, it may continue to propagate such species and possess them. If the botanical garden wishes to sell the plants or any of their progeny in interstate or foreign commerce or export the plants, then permits under the Act are required. If the garden wishes to sell only in intrastate commerce, then no permits under the Act are required. In any case, the botanical garden and all recipients of the plants must abide by all State, local and other federal laws, including those requiring permits.

5. If a person has a plant on their land or in their botanical garden, and that plant later becomes listed under the Endangered Species Act, is it illegal for him to continue possessing the plant? Is it illegal for him to take propagules from it? Can he destroy or damage the plant?

Again, it must be remembered that possession of lawfully taken or acquired endangered and threatened species is not prohibited under the Endangered Species Act. Therefore, if a person has a plant growing on his land or in his botanical garden that later becomes listed, it is not illegal under Federal law for him to continue possessing that plant. It is not illegal for him to take cuttings, pollen, propagules, etc., from that plant UNLESS the plant is on land that is under Federal jurisdiction OR such taking constitutes violation of State law. It is not illegal for him to destroy or damage the plant, UNLESS the plant is on land that is under Federal jurisdiction OR such destruction or damage is in violation of State law.

6. What is the difference between “candidate”, “proposed” and “listed” species?

Candidate species are species being considered by the Service for listing as an endangered or threatened species, but not yet the subject of a Proposed Rule. Candidate species become proposed species once the Service has published a Proposed Rule in the Federal Register, announcing its intent to list the species as either endangered or threatened and soliciting comments on such listing. The proposed species



Mauna Kea silversword (*Argyroxiphium sandwicense* subsp. *sandwicense*)
Photos courtesy of Ken Foote - USFWS

does not become a listed species until a Final Rule is published in the Federal Register announcing that the Service has listed the species and the effective date of such listing.

None of the prohibitions under the Endangered Species Act are applicable to candidate and proposed species; they apply only to listed species. Permits are not needed for candidate or proposed species. However, Federal agencies must consult with the Service under Section 7 of the Act if they plan an agency action that is likely to jeopardize the continued existence of any proposed species.

7. Are plants that have been grown in a greenhouse and planted in the wild protected under the Endangered Species Act?

Yes; there is no difference in protection between naturally occurring, wild plants, and those plants that have been planted by man.

8. Is there a “Pre-Act” or “Grandfather Clause” for plants?

No; there is no Pre-Act exemption or Grandfather Clause for plants under the U.S. Endangered Species Act.

9. How does CITES relate to the Endangered Species Act with plants?

There are many more plants listed under CITES than under the Act. Plants are listed under CITES when they are threatened or endangered because of

commercial trade. CITES governs import and export; it does not regulate take or interstate commerce. All imports and exports of CITES-listed plants require accompanying CITES permits or certificates, issued by the Fish and Wildlife Service, Office of Management Authority in Arlington, Virginia.

When considering import or export of any plant, all persons should check, not only the Endangered Species Act list of protected species and permit requirements, but also the CITES list of species and permit requirements.

Fact sheets and other information on CITES are available from:

U.S Fish and Wildlife Service
Office of Management Authority
4401 N. Fairfax Drive
Arlington, VA 22203
Ph: (703) 358-2104

For More Information:

For information on Hawai‘i State laws and regulations governing protecting plants, please contact:

The Department of Land and Natural Resources
Division of Forestry and Wildlife
Kalanimoku Building
1151 Punchbowl St., Room 325
Honolulu, Hawai‘i 96813
Ph: (808) 587-0166
Fax: (808) 587-0160

Addresses and phone numbers for all other State Plant Conservation Agencies are available from the Service’s Office of Management Authority or:

The U.S. Fish and Wildlife Service
Pacific Islands Fish and Wildlife Office
Room, 3-122, P.O. Box 50088,
Honolulu, Hawai‘i 96850
Ph: (808) 792-9400
Fax: (808) 792-792-9580

Websites:

How Can I Obtain a Permit?

<http://www.fws.gov/faq/permitfaq1.html>

Division of Management Authority

http://www.fws.gov/international/newspubs/CITES_fact_sheets.html

USFWS - Pacific Islands Fish and Wildlife Office

<http://www.fws.gov/pacificislands/>