



The Endangered Species Act: Exotic Indeed!

Environmental Law Institute

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Endangered Species Act

- 16 U.S.C. §§ 1531 to 1544
- FWS (Interior)
 - land and freshwater species
- NMFS or NOAA Fisheries (Commerce)
 - marine and anadromous species

USFWS



Dam Fish!



Key ESA Provisions

- **Section 4 - 16 U.S.C. § 1533**
 - Listing, Designation of critical habitat
- **Section 7 - 16 U.S.C. § 1536**
 - Substantive and procedural obligations applicable to federal agency actions; no “jeopardy”
- **Section 9 - 16 U.S.C. § 1538**
 - “Take” prohibition
- **Section 10 - 16 U.S.C. § 1539**
 - Ways to avoid “take” liability

Section 4 – Listing, Critical Habitat

Contains procedures for

–**Listing:** ESA’s protections apply to “listed” species

- **Endangered** – “in danger of extinction throughout all or a significant portion of its range” 16 U.S.C. § 1532(6)
- **Threatened** – “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” – 16 U.S.C. § 1532(20)
 - Section 4(d) Rules

–**Designation of Critical Habitat:** “specific areas within the geographical area occupied by the species . . . essential to the conservation of the species and . . . which may require special management considerations or protection.” – 16 U.S.C. § 1532(5)

–**Recovery Plans:** Unenforceable guidelines for recovery

Section 7 - Consultation

Requires action agency to consult with FWS or NMFS to

- “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species”

AND

- use the “best scientific and commercial data available” when doing so

16 U.S.C. § 1536(a)(2)

Consultation Procedures

“No Effect”

- Action agency determines T&E species/critical habitat not present or not affected → project may proceed, no FWS/NMFS concurrence required

“May Affect, Not Likely to Adversely Affect” – Informal Consultation

- Action agency prepares Biological Assessment (BA) to determine if action likely to adversely affect listed species or critical habitat
- If BA concludes NLAA (i.e., beneficial impacts; no take), then action agency seeks written concurrence from consulting agency to proceed

“Likely to Adversely Affect” – Formal Consultation

- If BA concludes LAA (i.e., take), then Formal Consultation is required...

Consultation Procedures (ctd.)

Formal Consultation

- Upon request from Action Agency, FWS/NMFS develops and issues Biological Opinion (BiOp)
- If jeopardy/adverse modification of critical habitat, include reasonable and prudent alternatives to prevent
- If not, consulting agency issues an Incidental Take Statement with “reasonable and prudent measures” to mitigate adverse effects of action
 - Compliance with ITS => No “take” liability under ESA Section 9

Section 9 – “Take” Prohibition

- Prohibits the “take” of endangered (non-plant) species by “any person”
 - By regulation, also prohibits “take” of threatened species
- “Any person” includes private individuals and government agencies
- Civil and criminal penalties for unlawful take
- Broad definition:

“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such activity.”

16 U.S.C. § 1532(19)
- “Harm”
 - “an act which actually kills or injures wildlife” – 50 C.F.R. § 17.3
 - May include habitat modification
 - Upheld by SCOTUS
- “Harass” (FWS): “...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 impair normal behavioral patterns including breeding, feeding or sheltering.” 50 CFR 17.3

Section 10

- Incidental Take Permit
 - 16 U.S.C. § 1539(a)(1)(B)
 - No Section 9 liability with ITP, so long as “taking is incidental to, and not the purpose, the carrying out an otherwise lawful activity”
 - Scientific exceptions
- Habitat Conservation Plan – necessary prerequisite for obtaining ITP. Must specify:
 - Likely impact of incidental taking
 - Steps applicant will take to “minimize and mitigate” impacts
 - Funding available to implement steps (often by “Implementing Agreement”)
 - Alternatives considered and reasons rejected
- “General Conservation Plans”
- Section 10 intended for non-federal activities on private lands

Section 11 – Penalties and Enforcement

- Section 11 of ESA
- Civil penalties
- Criminal penalties
- Citizen suits

Proposed and Candidate Species

- Agencies cannot take actions likely jeopardizing species proposed for listing
 - Triggers “conference” requirement under Section 7
- Agency policy to encourage protections to avoid impacts to candidate species for listing
- Candidate Conservation Agreements

Some Species Recently in the News...

Time for Pictures!!

American Burying Beetle

(Listed endangered)



Gunnison Sage-Grouse

(Proposed endangered, with critical habitat)



Lesser Prairie Chicken

(Proposed threatened)



Greater Sage-Grouse

(Candidate)



Sand Dune Lizard

(Candidate, with Candidate Conservation Agreement)



ESA Intersection with NEPA

- Substantive ESA vs. procedural NEPA
- Similar scope of species concerns, but different standards
- Functional equivalence unsettled

ESA Relationship to Other Preservation Statutes

- Lacey Act
- MBTA
- BGEPA
- MMPA
- State species laws

Going Global

- CITES
- UN Biodiversity Convention
- Other Treaties

ESA Hot Issues Going Forward

- Key listing decisions
- Addressing the backlog
- “Sue and Settle”
- Specific projects
 - Offshore seismic exploration
 - Offshore wind farms
 - Keystone pipeline
- Legislative reform (yeah, right)

Questions?

