

THE ENDANGERED SPECIES ACT

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Outline

- Overview
- Purpose & Policy
- Section 4: listing, critical habitat, recovery
- Section 9: prohibited acts
- Section 7: no-jeopardy obligation & consultation
- Section 10: incidental take permits
- Section 10: scientific/enhancement permits & 10(j) rules
- Section 11: judicial review
- Section 8a: convention implementation
- Hot topics: legislative & administrative; litigation
- Resources

Overview

- 16 U.S.C. §§ 1531–1544
- 50 C.F.R.
 - Part 424 (listing)
 - Part 402 (consultation)
 - Part 17 (list and 4(d) rules)



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Purpose & policy

- Purpose [16 U.S.C. § 1531(b)]

“To provide a program for the conservation of such endangered species and threatened species”

“To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”

“To take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [16 U.S.C. § 1531(a)(4)]

- Policy [16 U.S.C. § 1531(c)]

“All Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”

- Key term [16 U.S.C. § 1532(3)]

Conserve/conservation: “to use and 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 chapter are no longer necessary.”

Section 4: Listing Process

- Section 4, 16 U.S.C. § 1533; 50 C.F.R. Part 424
- Listing species:
 - endangered: “in danger of extinction throughout all or a significant portion of its range”
 - threatened: “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”
- Petition process
 - 90-day finding
 - 12-month determination
 - final determination (24-month determination)

Section 4: Listing

Listing factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) overutilization for commercial, recreational, scientific, or educational purposes;
 - (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms;
 - (E) other natural or manmade factors affecting its continued existence.
- Taking into account efforts of state and foreign governments
 - “Solely on the basis of the best scientific and commercial data available”
 - Section 4(d) rules: Secretary “shall” issue regulations deemed “necessary and advisable” to provide for conservation of threatened species; “may” by regulation apply Section 9 prohibitions

Section 4: Critical Habitat & Recovery

- Designating critical habitat:
 - Occupied: “specific areas within the geographical area occupied by the species” that contain “physical or biological features” that are “essential to the conservation of the species” and “which may require special management considerations or protection”
 - Unoccupied: “specific areas outside the geographical area occupied by the species” if “such areas are essential” for conservation
 - not prudent (exception)/not determinable (delay)
 - not within foreign countries or other areas outside U.S. jurisdiction
 - economic/national security impact analysis
- Recovery plans
 - not required where plan will not promote conservation of species
 - not for species entirely outside U.S.
- Five-year status reviews

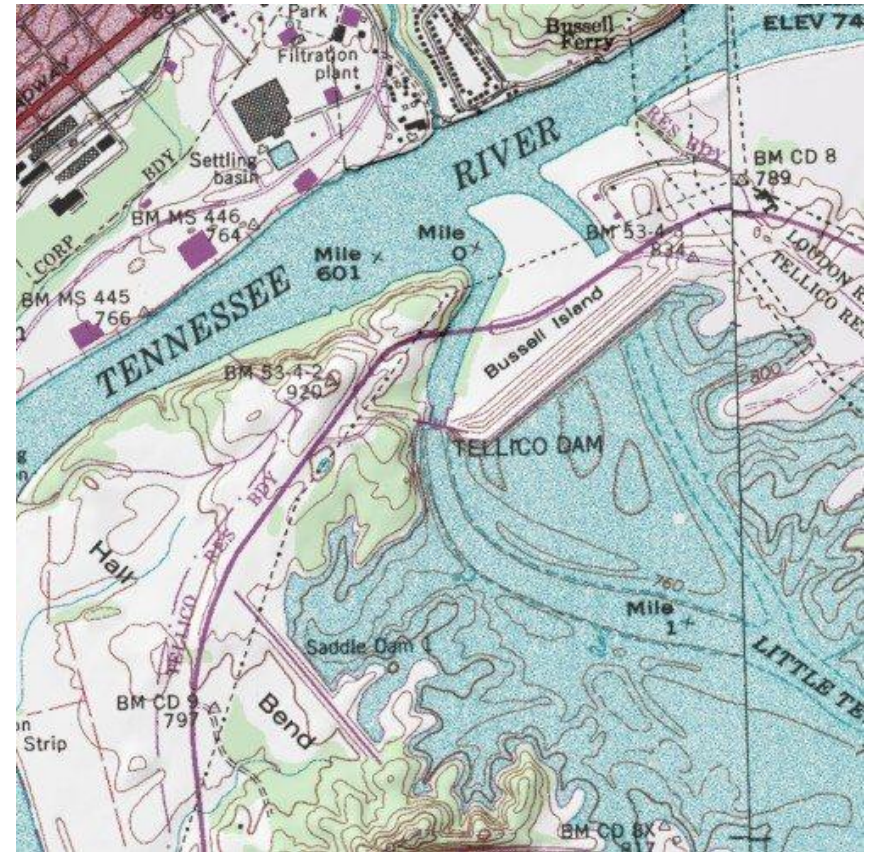
Section 9: Prohibited Acts/Take

- 16 U.S.C. § 1538
- The teeth of the act
- Applies to “any person subject to the jurisdiction of the United States.”
- Prohibits “take” of non-plant endangered species [Sec. 9(a)(1)]
 - 4(d) rules may additionally prohibit take of threatened species
- Take expansively defined:
 - “To harass, harm, hunt, shoot, wound, kill, trap, capture, or collect”
 - “Or to attempt to engage in any such activity”
- “Harm”: includes habitat modification where it “actually kills or injures wildlife.” [50 C.F.R. § 17.3]
Babbitt v. Sweet Home, 515 U.S. 687 (1995)
- Civil and criminal penalties

Section 7: The “Heart of the ESA”

- Section 7(a)(1) – Federal agencies have a duty to “utilize their authorities in furtherance of this chapter by carrying out programs for the conservation of endangered species and threatened species.” [16 U.S.C. § 1536(a)(1)]
- Section 7(a)(2) – “Each federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].” [16 U.S.C. § 1536(a)(2)]
- 50 C.F.R. Part 402

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)



TVA v. Hill cont.

“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. . . . [T]he legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals *a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.*”

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184-85 (1978)

Agency Obligation: No Jeopardy

- Jeopardy: appreciable reduction in likelihood of both survival and recovery of species in the wild [50 C.F.R. § 402.02]
- Destruction/adverse modification: direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species
- Two duties under ESA Section 7(a)(2): procedural and substantive

Agency Action

- Authorized, funded, or carried out” – includes permits, approvals, regulations
- Discretionary federal involvement or control
50 C.F.R. § 402.03
- *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007)

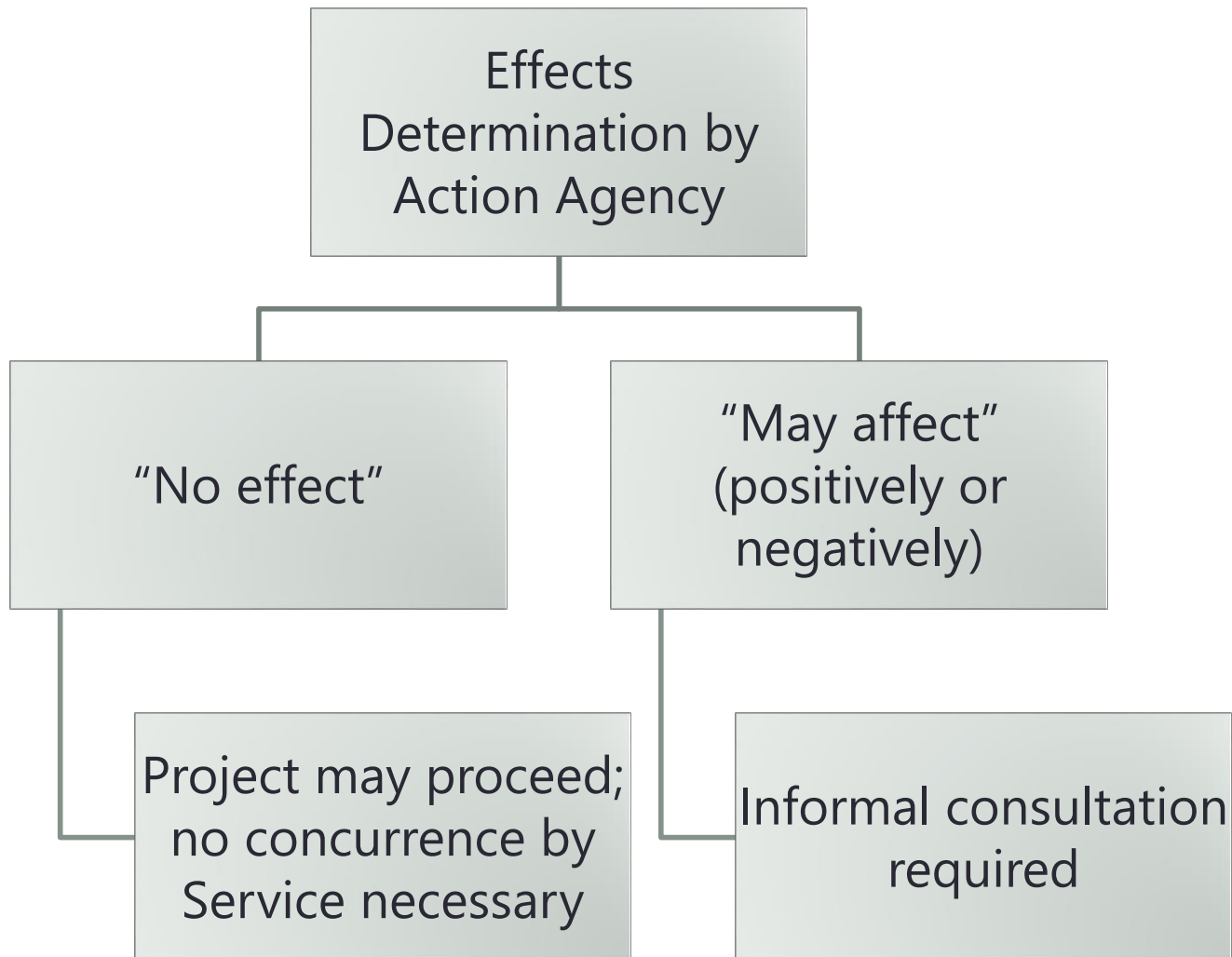
Action Area

- “All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action”
50 C.F.R. § 402.02

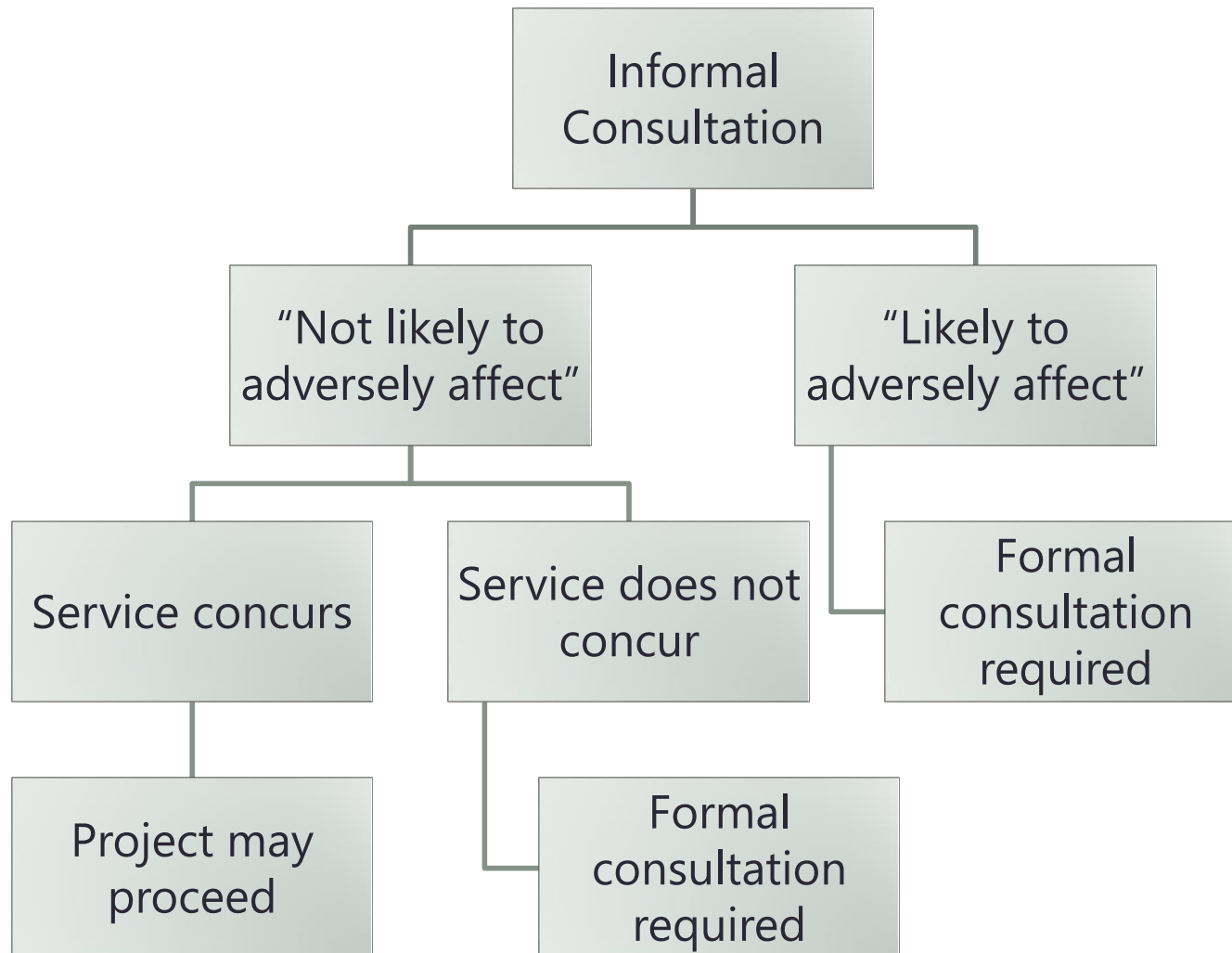
Geographic Limitation

- Applies to federal agency actions only within the US or on the high seas [50 C.F.R. § 402.02]
- Issues: “the apparent domestic orientation of the consultation and exemption processes” and the potential for “interference with the sovereignty of foreign nations” [Preamble, 51 Fed. Reg. 19,926, 19,929 (June 3, 1986)]
- *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 122–25 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992)

Section 7 Consultation Process



Section 7 Consultation Process cont.



Section 7 Formal Consultation

- Likely to adversely affect
- Action agency prepares Biological Assessment or Evaluation
- Wildlife agency prepares Biological Opinion
- Must consider:
 - Environmental baseline
 - Effects of the action (e.g., direct, indirect, interrelated)
 - Cumulative effects
- Both agencies have obligations to use best available scientific and commercial data

Section 7 Formal Consultation cont.

- If Service determines no jeopardy/adverse modification, includes Incidental Take Statement
- Specifies the amount or extent of permitted take
 - If exceeded => reinitiate consultation
- Reasonable and prudent measures to minimize impacts of incidental take
- Terms and conditions to implement RPMs
 - Includes reporting requirements
- Reinitiation of consultation [50 C.F.R. § 402.16]
 - discretionary involvement or control retained
 - ITS trigger exceeded; new information; action modified; new listed species or critical habitat

Section 7 Formal Consultation cont.

- If Service determines jeopardy/adverse modification, includes Reasonable and Prudent Alternatives to the proposed action
- Action agency has choices after receiving BiOp:
- No jeopardy
 - Implement RPMs/terms and conditions
 - Modify project and restart consultation
 - Abandon project
- Jeopardy
 - Adopt one of the RPAs
 - Modify project and restart consultation
 - Abandon project
- Apply to the Endangered Species Committee for an exemption [16 U.S.C. § 1536(e); 50 C.F.R. § 402.15(c)]

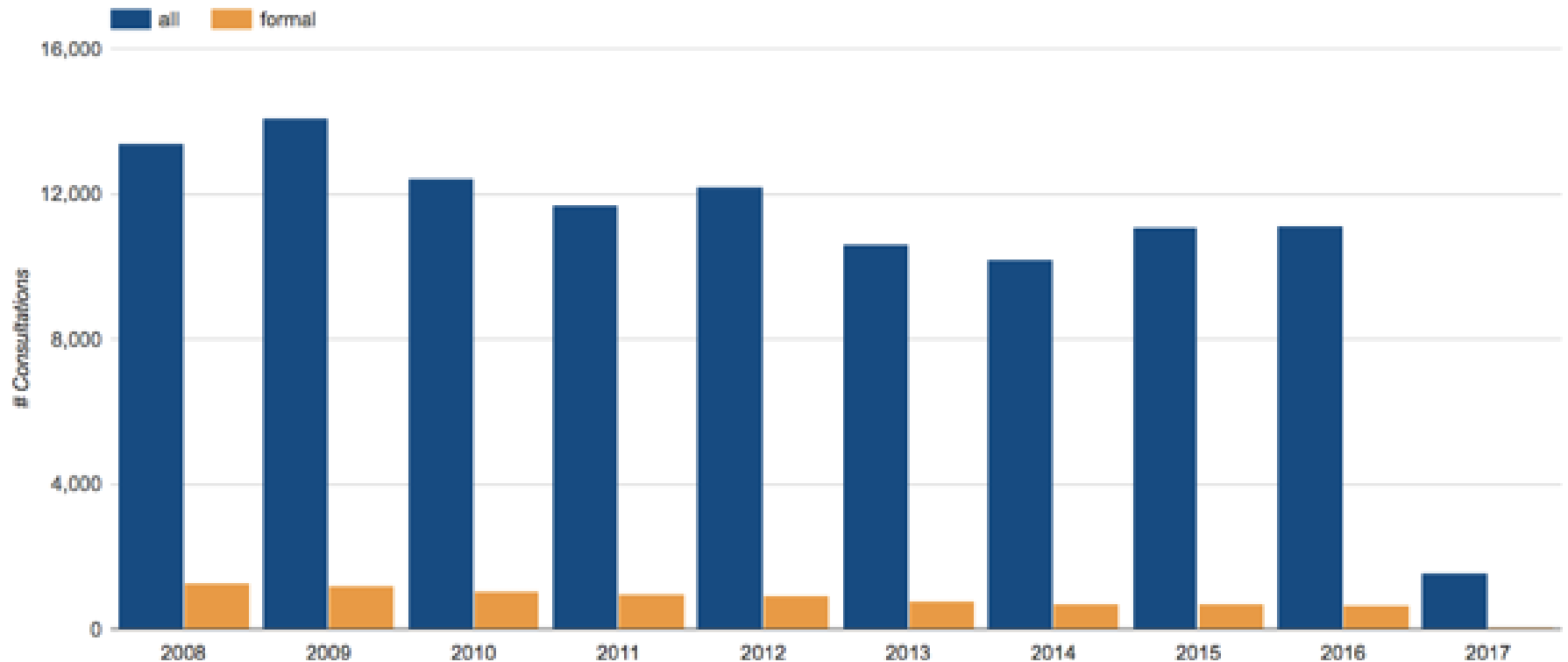
The God Squad

- Added to ESA in 1978, after *TVA v. Hill*
- Composed of 7 cabinet-level members
- Requires at least 5-2 vote
- Has only been convened three times



Informal v. formal by the numbers

Data from 2008-01-01 through 2016-12-31.



Section 7 does not stop projects...

ENDANGERED SPECIES ACT FACTS BEHIND THE ACT

No projects stopped by FWS for endangered species since 2008



...at least not in recent years

Time frame	1979 to 1981	1987 to 1991	2005 to 2009*	2008 to 2015
Informal consultation	8,817	71,560	NA	81,461
Formal consultation	1,945	2,000	1,085	6,829
Jeopardy	173 (8.9%)	350 (17.5%)	78 (7.2%)	2 (0.03%)

*Nos. include only FWS fish-related consultations.

Malcom, J. W., & Li, Y. W. (2015). Data contradict common perceptions about a controversial provision of the US Endangered Species Act. *Proceedings of the National Academy of Sciences*, 112(52). Available at <http://www.defenders.org/publications/section-7-pnas.pdf>

Section 10: Incidental Take Permits

- Incidental Take Permit [16 U.S.C. § 1539(a)(1)(B)]
 - Much like the ITS: as long as take is “incidental” to “an otherwise lawful activity,” can be permitted
- Habitat Conservation Plan [16 U.S.C. § 1539(a)(2)(A)]
 - Prerequisite for obtaining an incidental take permit
 - Required contents:
 - Impacts of incidental take
 - Steps to minimize and mitigate such take
 - Funding to take these steps
 - Alternatives considered, and why rejected
 - NEPA and Section 7 Consultation

Section 10: Survival/Propagation Permits

- Section 10(a)(1)(A): permits for scientific purposes or to enhance survival/propagation [16 U.S.C. § 1539(a)(1)(A)]
- Section 10(j) rules – experimental populations [16 U.S.C. § 1539(j)]
 - Release will further conservation of species
 - Essential – loss would appreciably reduce likelihood of survival in wild
 - Nonessential – all other populations (no consultation, only conferral; no critical habitat)
 - Species-specific areal and management regulations

Section 11: Judicial Review

- ESA citizen suit provision [16 U.S.C. § 1540(g)(1)]
 - Any person may commence a civil suit to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the 11th Amendment) who is alleged to be in violation of any statutory or regulatory provision [16 U.S.C. § 1540(g)(1)(A)]
 - Any person may commence a civil suit against the Secretary where there is alleged a failure of the Secretary to perform any non-discretionary act or duty under Section 4 [16 U.S.C. § 1540(g)(1)(C)]
 - 60-day notice requirement [16 U.S.C. §§ 1540(g)(2)(A), (C)]
- Administrative Procedure Act [5 U.S.C. §§ 701-706]
 - *Bennett v. Spear*, 520 U.S. 154, 174 (1997) (cause of action)
 - 28 U.S.C. § 1331 (federal question jurisdiction)
- APA supplies standard of review [5 U.S.C. § 706]

Section 8a: Convention Implementation

- CITES: Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
- ESA establishes Secretary of the Interior as both Scientific Authority and Management Authority [16 U.S.C. §§ 1537a(a)-(d)]
- CITES regulates 5,600 species of animals and 30,000 species of plants
 - \$100 billion – value of legal wildlife trade worldwide
 - \$7-23 billion – value of illegal wildlife trade worldwide
- U.S. is a market and transit country for wildlife trade
 - U.S. is the second largest consumer of wildlife and wildlife products globally
 - USFWS inspects over 18,000 wildlife shipments annually

Section 9 Redux: Take vs. Trade

- Limits the scope of the take prohibition for listed species of fish or wildlife to the U.S., its territorial seas, and the high seas [16 U.S.C. §§ 1538(a)(1)(B), (C)]
- Prohibits import, export, and “foreign commerce” of listed species no matter where taken [16 U.S.C. §§ 1538(a)(1)(A), (D), (E), (F)]
- Prohibits trade or possession of species in violation of CITES [16 U.S.C. § 1538(c)]
- Only applies to persons subject to the jurisdiction of the U.S. [16 U.S.C. §§ 1538(a)(1), (2), 1538(g)]

Hot Topics: Legislative Attacks

- 75 bills in the 115th Congress through April 18, 2018
<https://defenders.org/publications/chart-of-esa-attacks-in-115th-congress.pdf>
- 130 bills in the 114th Congress
<http://www.defenders.org/publications/Chart-of-ESA-Attacks-in-114th-Congress.pdf>
- Federal funding for conservation remains grossly insufficient and is disproportionately allocated among listed taxonomic groups
 - 80% of all federal spending => 5% of listed species (mostly fish)
 - 80% of all listed species share less than 5% of federal spending
- The ESA is starving, not broken

Hot Topics: Administrative Attacks

- Political appointees
- Revisions of implementing regulations
 - USFWS: rollback of blanket 4(d) rule
 - USFWS/NMFS: section 7 consultation regulations
 - USFWS/NMFS: section 4 listing regulations
- Judicial nominees

Litigation

- *Markle Interests, L.L.C. v. U.S.F.W.S.*, 848 F.3d 635 (5th Cir. 2017), *cert. granted sub nom. Weyerhaeuser Co. v. U.S.F.W.S.*, 138 S.Ct. 924 (Jan. 22, 2018) (dusky gopher frog critical habitat)
- Final SPOR Policy (79 Fed. Reg. 37,578 (Jul. 1, 2014))
 - *Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017), *recons. denied*, No. 4:14-cv-02506 (Oct. 25, 2017) (CFPO)
 - *Desert Survivors v. Interior*, 2018 WL 2215741 (May 15, 2018) (bi-state sage-grouse)
 - *Ctr. for Biological Diversity v. Sheehan*, No. 1:15-cv-00477 (D.D.C.) (northern long-eared bat)
- *Ctr. for Biological Diversity v. Jewell*, 2018 WL 1586651 (D. Ariz. Mar. 31, 2018 (Mexican gray wolf 10(j) rule)

Resources

FWS Endangered Species

<https://www.fws.gov/endangered/>

NMFS ESA-Listed Species

<http://www.nmfs.noaa.gov/pr/species/esa/listed.htm>

FWS ECOS (Environmental Conservation Online System)

<https://ecos.fws.gov/ecp/>

FWS ESA Document Library

<https://www.fws.gov/Endangered/esa-library/index.html>

NMFS ESA Policies, Guidance, and Regulations

<http://www.nmfs.noaa.gov/pr/laws/esa/policies.htm>

Interior Solicitor's Opinions

<https://www.doi.gov/solicitor/opinions>

Resources cont.

Don Baur & Wm. Robert Irvin, eds. Endangered Species Act: Law, Policy, and Perspectives. 2010. American Bar Ass'n.

Sam Kalen & Murray Feldman. Endangered Species Act: Basic Practice Series. 2012. American Bar Ass'n.