



Environmental Law Institute Summer School: The Endangered Species Act

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History

- Migratory Bird Treaty Act of 1918
- Endangered Species Preservation Act of 1966
- Endangered Species Conservation Act of 1969
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
- Endangered Species Act of 1973



History

- *TVA v. Hill*
- 1978 Amendment
 - Critical habitat required
- 1982 Amendment
 - Habitat conservation plans
 - Incidental take permits
- 1988 Amendment
- 2004 Amendment



Endangered Species Act Provisions

ESA Table of Contents

Sec. 2 Findings, purposes, and policy

Sec. 3 Definitions

Sec. 4 Determination of endangered species and threatened species

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Sec. 16 Effective date

Sec. 17 Marine Mammal Protection Act of 1972

Sec. 18 Annual cost analysis by the Fish and Wildlife Service

Administration and Regulations

The U.S. Fish and Wildlife Service (USFWS) and the Commerce Department's National Marine Fisheries Service (NMFS) administer the Endangered Species Act. USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and fish.



Implementing Regulations:

- Listing species and designating critical habitat: 50 CFR Part 424
- Interagency consultation: 50 CFR Part 402
- Protection of threatened species: 50 CFR Part 17



**NATIONAL MARINE
FISHERIES SERVICE**

ESA Key Objectives

1. Prevent extinction
 - Designate species
 - Avoid “jeopardy”
 - Prohibit “take”
2. Recover species



Section 2: Purpose and Policy

“[V]arious species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation. . . .”



Section 4: Determination of Endangered and Threatened Species

Key Terms

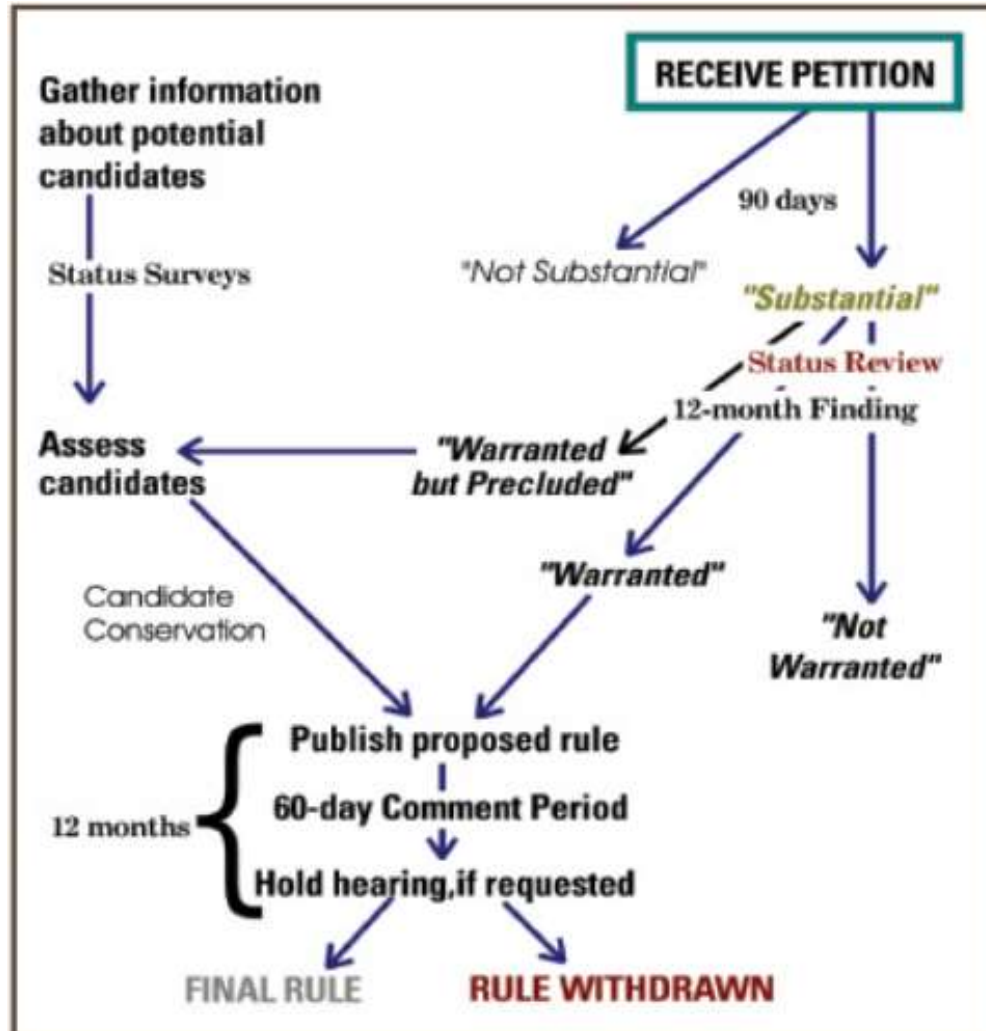
- Species
 - Includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” ESA Sec. 3(16)
- Endangered Species
 - Any species that is “in danger of extinction throughout all or a significant portion of its range” ESA Sec. 3(6)
- Threatened Species
 - “[A]ny species which is likely to become an endangered species w/in the foreseeable future throughout all or a significant portion of its range” ESA Sec. 3(19)

Section 4: Determination of Endangered and Threatened Species Species Rules

- 4(d) Rule
 - “Whenever any species is listed as a threatened species ... the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. . . .”
- USFWS 4(d) Rule
 - “Blanket” rule
 - 2019 Rule Change (50 C.F.R. Part 17)
- NMFS 4(d) Rules:
 - “Species-Specific”



Section 4: Determination of Endangered and Threatened Species Listing Process



Section 4: Determination of Endangered and Threatened Species Listing Criteria

Listing and Delisting Criteria

- Destruction of species' habitat
- Species over-utilization
- Disease or predation
- Inadequate regulations
- Other factors affecting existence

2019 Rule Change

- Deletes prohibition on referencing economic factors listing decisions
- Listing and delisting criteria are the same
- “Foreseeable future”

Listed Species Summary (Boxscore)

Summary of Listed Species Listed Populations¹ and Recovery Plans² as of Sun, 07 Jun 2020 20:21:31 GMT

Group	United States ²			Foreign			Total Listings (US and Foreign)	US Listings with active Recovery Plans ²
	Endangered	Threatened	Total Listings	Endangered	Threatened	Total Listings		
Amphibians	21	15	36	8	1	9	45	24
Annelid Worms	0	0	0	0	0	0	0	0
Arachnids	12	0	12	5	0	5	17	12
Birds	77	22	99	217	21	238	337	87
Clams	76	15	91	2	0	2	93	72
Corals	0	7	7	3	15	18	25	0
Crustaceans	24	4	28	0	0	0	28	19
Fishes	95	75	170	26	10	36	206	106
Flatworms and Roundworms	0	0	0	0	0	0	0	0
Hydroids	0	0	0	0	0	0	0	0
Insects	75	13	88	4	0	4	92	46
Mammals	67	29	96	260	23	283	379	56
Millipedes	0	0	0	0	0	0	0	0
Reptiles	16	29	45	71	24	95	140	40
Snails	40	12	52	1	1	2	54	33
Sponges	0	0	0	0	0	0	0	0
Animal Totals	503	221	724	557	95	652	1416	455
Plant Totals	772	171	943	1	2	3	946	723
Grand Totals	1275	392	1667	558	97	655	2362	1218

Section 4: Determination of Endangered and Threatened Species Listing and Delisting Cases

American Stewards of Liberty v. Department of the Interior
5370 F. Supp. 3d 711 (W.D. Tex. 2019).

- Challenge to USFWS denial of delisting petition
- Holding:
 - USFWS violated its own regulations by requiring that a petition to delist the bone cave harvestman must present “conclusive evidence that the overall population of the harvestman did not decline as human population and development increased.”



Section 4: Determination of Endangered and Threatened Species Listing and Delisting Cases

Center for Biological Diversity v. Bernhardt
No. 3:18-cv-00064-SLG, 2019 WL 4725124
(D. Alaska Sept. 26, 2019)

- Challenge to USFWS listing determination
- Holding:
 - Upheld the USFWS's 2017 determination that listing of the Pacific Walrus was not warranted.
 - The administrative record supported USFWS “foreseeable future” determination.



Section 4: Determination of Endangered and Threatened Species Listing and Delisting Cases

Center for Biological Diversity v. Jewell
No. 16-CV-1932-MSK-STV, 2019 WL 4695570
(D. Colo. 2019)

- Challenge to USFWS listing determination
- Holding:
 - USFWS did not adequately explain its methodology for determining the number of Rio Grande Cutthroat Trout that must be in a population before that population is determined to be stable.



Section 4: Determination of Endangered and Threatened Species Listing and Delisting Cases

Friends of Animals v. Ross
396 F. Supp. 3d 1 (D.D.C. 2019)

- Challenge to NMFS listing determination
- Holding:
 - Court vacated and remanded the NMFS's 2014 decision not to list the queen conch as an endangered or threatened species



Section 4: Determination of Endangered and Threatened Species Critical Habitat Designation

The Secretary. . . (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and (ii) may, from time-to-time thereafter as appropriate, revise such designation. ESA Sec. 4(a)(3)(A)



Section 4: Determination of Endangered and Threatened Species Critical Habitat Designation

The term “critical habitat” for a threatened or endangered species includes specific areas:

- i. “within the geographical area occupied by the species . . . on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection” and
- ii. “outside the geographical area occupied by the species at the time it is listed that such areas are essential for the conservation of the species”

Section 4: Determination of Endangered and Threatened Species Critical Habitat Designation Rule Changes

1. Limitations Designation of Critical Habitat Outside the Species Current Range
2. Expansion of Grounds for Determining that Designation of Critical Habitat Would not be Prudent



New
Rule!

Section 4: Determination of Endangered and Threatened Species Critical Habitat Cases

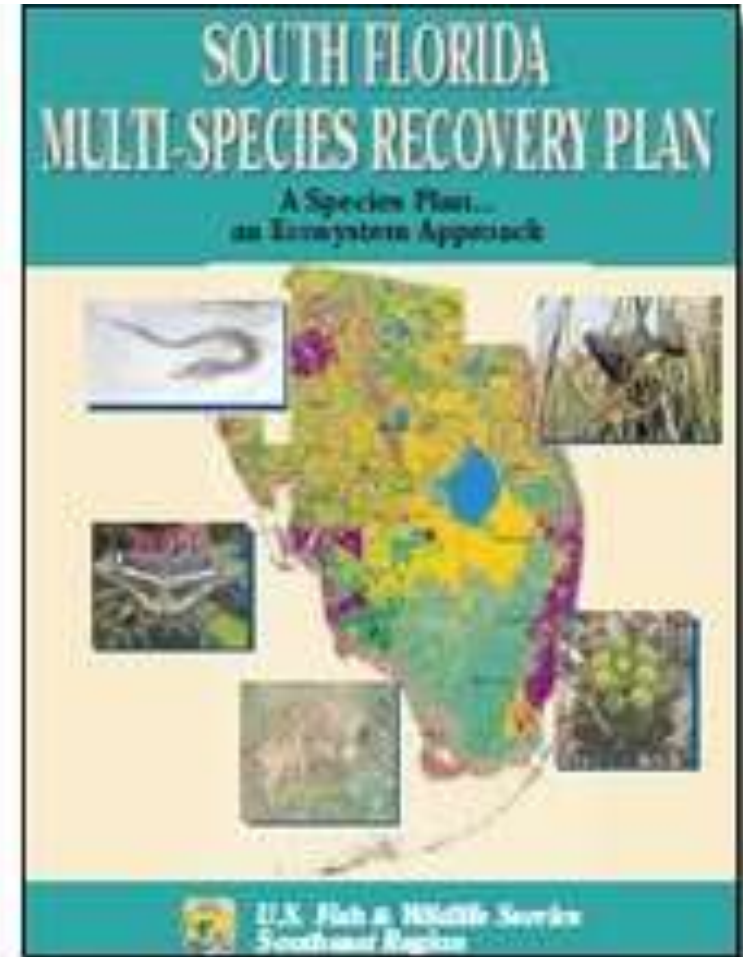
Weyerhaeuser Co. v. U.S. Fish & Wildlife Service
139 S. Ct. 361 (2018)

- Challenge to USFWS critical habitat designation for the dusky gopher frog
- Holding:
 - “Critical habitat” must also be “habitat” under Section 4 of the ESA
 - Courts may review the USFWS’s assessment of economic factors in deciding whether to exclude areas from critical habitat designations.



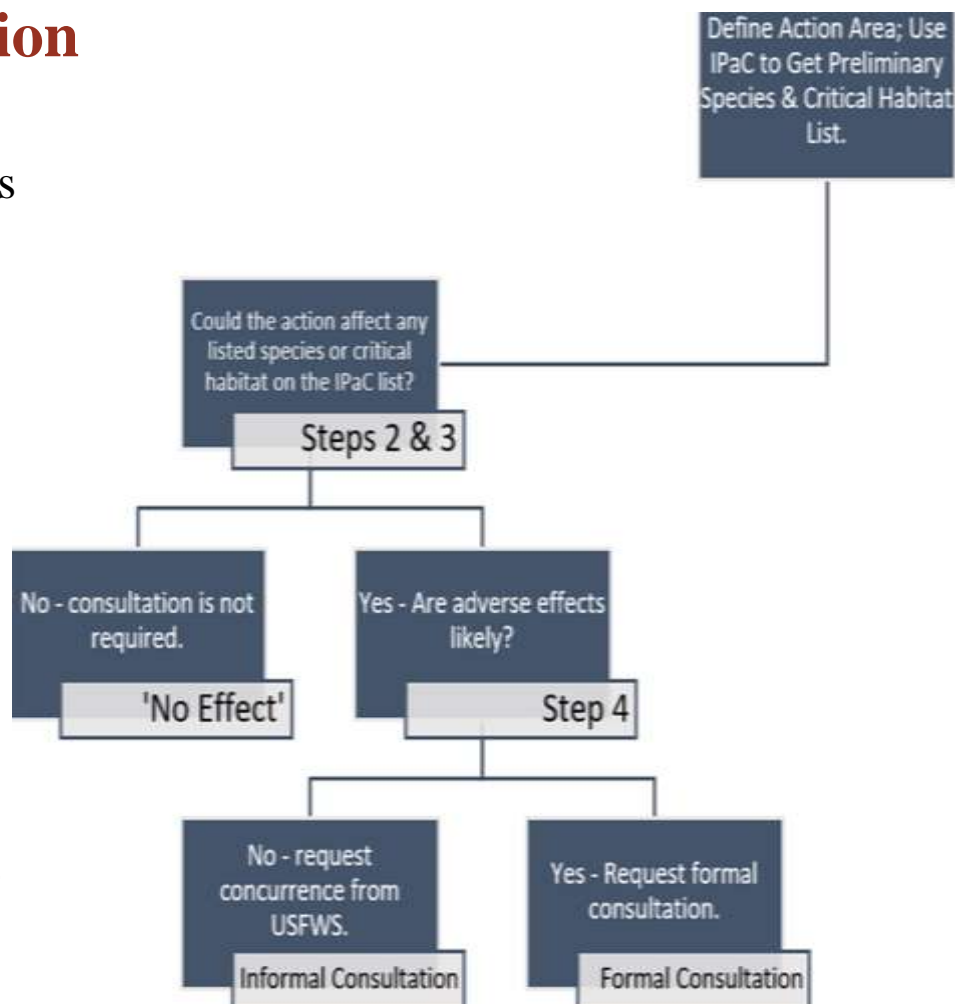
Section 4: Determination of Endangered and Threatened Species Recovery

- Recovery Phases:
 - Reducing or eliminating threats to listed animals and plants;
 - Restoring, or maintaining self-sustaining wild populations; and
 - Removing species from the lists because they have recovered to the point where they no longer need the protection of the Endangered Species Act.
- Recovery Plans
 - Non-regulatory documents that describe, justify, and schedule the research and management actions necessary to support recovery of a species



Section 7: Interagency Cooperation Consultations

- Applies to federal agencies and federal actions
 - Federal nexus
 - Any action authorized, funded, or carried out
 - By any federal agency
 - Includes any discretionary involvement/control:
 - Federal permitting of private development
 - Projects requiring federal funding
 - Federal programs
 - Federal projects
 - Without a federal nexus, no obligation to consult, but Section 9 take prohibition still applies



- Requires consultation with USFWS, NMFS, or both
- For any action that is likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of designated critical habitat

Section 7: Interagency Cooperation

Informal Consultations

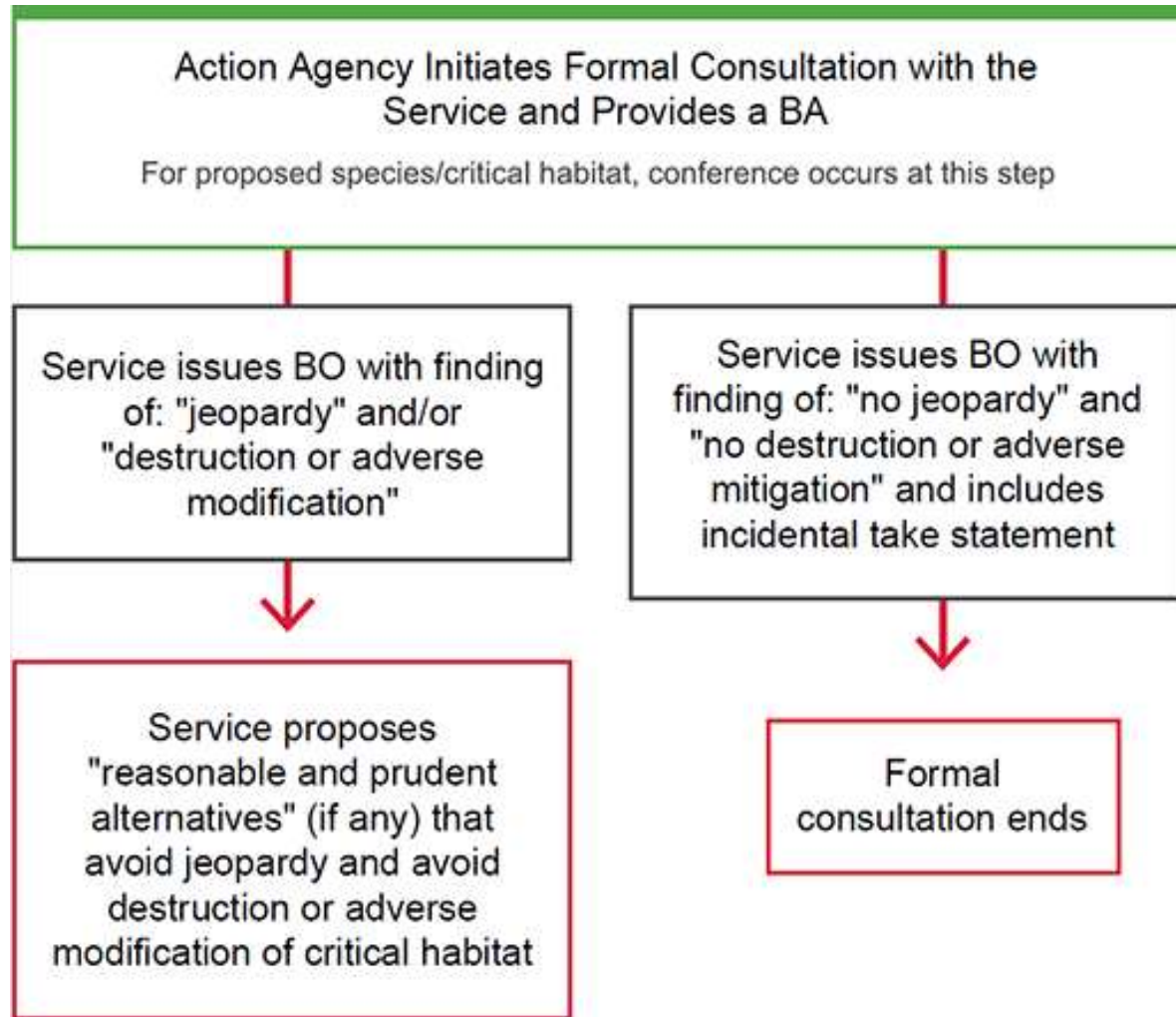
- Define project area
- Consult IPaC
 - No species present, no consultation necessary
- Determine whether the proposed action may affect listed or proposed species or designated or proposed critical habitat
- Biological Assessments
 - Required for all “major construction activities” where listed species/critical habitat may be present
 - 180 for action agency to complete
 - 90 days for USFWS to respond
- Initiation of formal consultation

The screenshot displays the IPaC 'Explore location' interface. The 'Resources' sidebar on the left lists the following counts: ENDANGERED SPECIES (27), CRITICAL HABITATS (3), MIGRATORY BIRDS (1), FACILITIES (9), and WETLANDS (1). The 'Endangered species' section provides a detailed overview, including a note that species and critical habitats are managed by the Ecological Services Program of the U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries. It also includes a 'What's next?' section with a 'DEFINE PROJECT' button. Below, the 'Mammals' section features three species cards: Canada Lynx (Threatened), Gray Wolf (Endangered), and Indiana Bat (Endangered).

Section 7: Interagency Cooperation

Formal Consultations

- “Likely to adversely affect”
- Initiation of formal consultation, 50 C.F.R. 402.12
- Biological opinion:
 - “Jeopardy”
 - “No Jeopardy”
- Incidental take statements



Section 7: Interagency Cooperation Solar Development Example

- Federal nexus
- Early consultation option
- Review covers construction, operation, and maintenance impacts
- Determination of no effect may include mitigation, avoidance, and minimization measures to reduce project impacts



Section 7: Interagency Cooperation Consultation Rule Changes

- Revisions to regulatory definitions
 - “Destruction or adverse modification” of critical habitat
 - “Effects of the Action”
 - “Environmental Baseline.”
- Establishment of timelines for informal consultation
- Expedited consultations



Section 7: Interagency Cooperation Consultation Cases

Friends of the River v. National Marine Fisheries Service
786 Fed. App'x 666 (9th Cir. 2019)

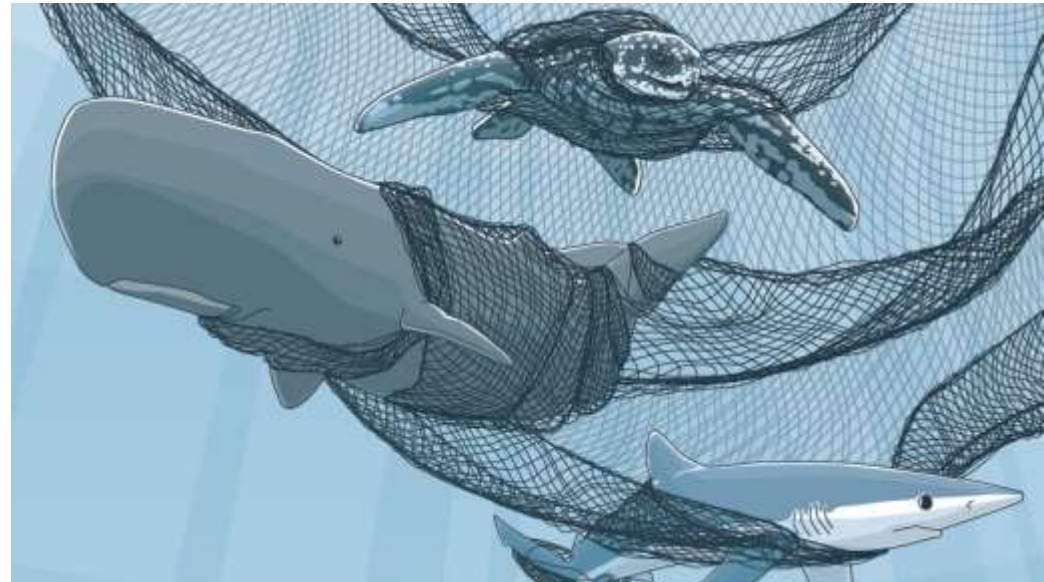
- Issue: whether the effects of existing facilities such as dams should be considered under Section 7 as part of the environmental baseline or part of the proposed action
- Holding: NMFS was arbitrary and capricious for failing to provide a “reasoned explanation” for reversing its prior position regarding the “environmental baseline” and remanded to the district court for it to remand to NMFS for further explanation



Section 7: Interagency Cooperation Consultation Cases

Conservation Law Foundation v. Ross
No. 18-1087 (JEB), 2019 WL 5549814
(D.D.C. Oct. 28, 2019)

- Holding: NMFS's 2018 decision to lift the ban on gillnets in two areas of the North Atlantic right whale's feeding grounds that had been closed for over 20 years violated the ESA and the Magnuson Stevens Act and ordered an injunction that restored the prohibitions on gillnet gear in those areas



Section 7: Interagency Cooperation Consultation Cases

WildEarth Guardians v. U.S. Fish & Wildlife Service
No. CV-13-00151-TUC-RCC, 2019 WL 4345333
(D. Ariz. Sept. 12, 2019).

- Holding: Court enjoined all Forest Service timber management actions in Region 3 national forests until conclusion of formal consultation superseding certain Biological Opinions (BiOps) concerning the Mexican Spotted Owl in 2012.



Section 9: Prohibited Acts

- Prohibited Acts
 - “Take”
 - “Harass”
 - “Harm”
 - Habitat modifications
 - Habitat destruction
 - Breeding
 - Food source
 - Relocation of a species
 - Speculative impacts
 - Direct and indirect injuries



Section 10: Exceptions

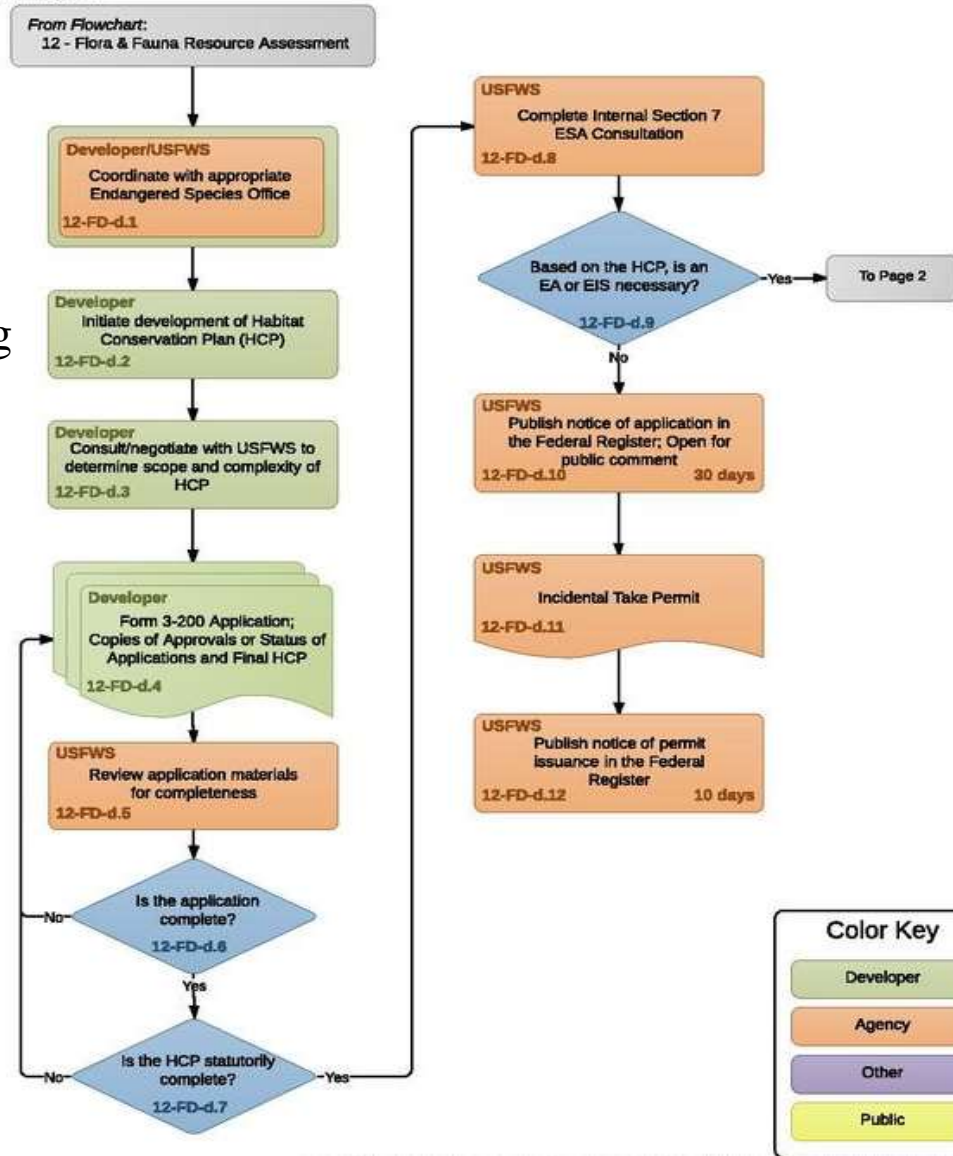
- Incidental Take Permits
 - Section 10(a) authorizes permits for the “take” of species in certain circumstances, including:
 - Scientific or enhancement of species purposes
 - “Incidental Take”
 - For any taking for any taking otherwise prohibited by Section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.
- Habitat Conservation Plans
- Candidate Conservation Agreements and Safe Harbor Agreements
 - Enhancement of Survival Permit



Section 10: Exceptions Incidental Take Permits

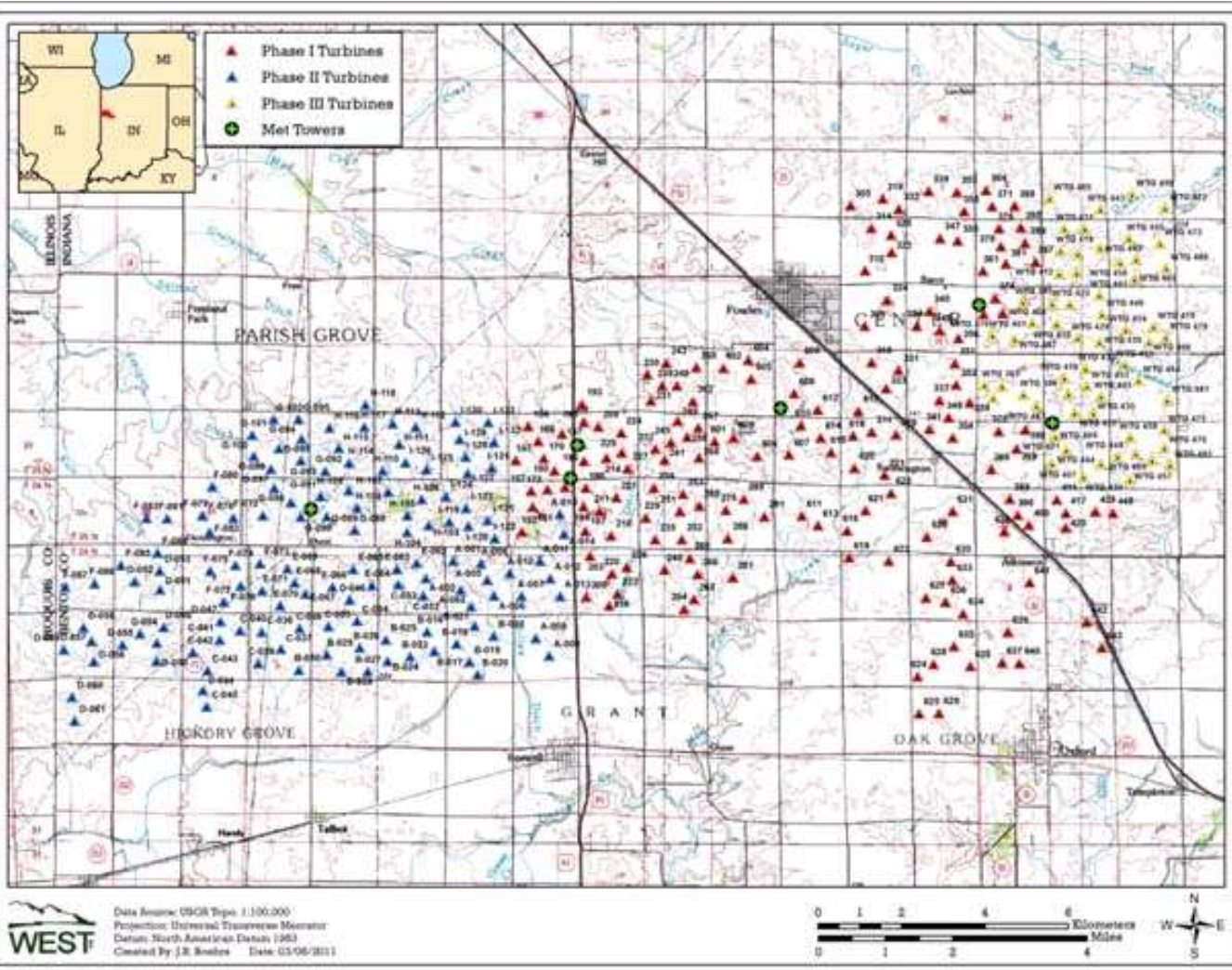
ESA Section 10 Incidental Take Permit

Version: 8 July 2014



- Application must include a Habitat Conservation Plan that addresses:
 - Potential impacts
 - Monitoring, minimizing, and mitigating impacts
 - Funding
 - Alternative actions
 - Other measures as required by USFWS
- 60-day Comment Period
- Findings
 - Taking will be incidental
 - Impacts minimized and mitigated
 - Adequate funding
 - Taking will not appreciably reduce survival and recovery
 - Other necessary measures met
- Monitoring and Adaptive Management

Section 10: Incidental Take Permit Fowler Ridge Wind Farm Indiana Bat HCP



Candidate Conservation Agreements and Safe Harbor Agreements

Participants voluntarily commit to actions to reduce threats to species covered by the agreement

- CCAs can help participants by
 - reducing the need for formal listings
 - providing assurances
 - enhancement of survival permit
- CCAs can help species by
 - securing conservation measures not legally required



Section 11: Penalties and Enforcement

Civil and Criminal Liability

- Civil penalties for each violation of the take prohibition:
 - \$52,596 for knowingly taking an endangered animal
 - \$25,246 for knowingly taking a threatened animal, or
 - \$1,329 for otherwise violating a provision of the ESA
- Criminal Liability
 - Knowingly taking an endangered animal is a Class A misdemeanor
 - Knowingly taking a threatened animal is a Class B misdemeanor
- Additional Penalties
 - Attorney general or citizen injunction
 - Forfeiture of equipment and vehicles aiding the taking
 - Restitution or probation



Section 11: Penalties and Enforcement

Citizen Suits

- Under Section 11(g), citizens may file a civil suit to:
 - Enjoin any person or organization, including a federal or state agency, alleged to be in violation of the ESA, or
 - Compel the Services to enforce the ESA's take prohibitions or to list a species or designate critical habitat
- Requires a 60-day notice of intent to sue
- Attorney's fees awarded to prevailing party but only against a citizen if the suit is frivolous

