

The Endangered Species Act OVERVIEW

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Overview of Presentation

- History of the ESA
- Listing process
- Recovery Plans
- Consultation/Jeopardy/Adverse Modification of Critical Habitat
- Take Prohibition
- Exceptions for Take Prohibition
- Enforcement
- Applying the ESA - Checklist

New Concepts of 1973 ESA

- Federal preemption
- Take through habitat modification
- Critical habitat
- Interagency consultation
- Jeopardy/Critical habitat modification prohibition
- Recovery Plans

ESA Purpose – Sec. 2(b)

To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for conservation of such species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions [to implement the Act].

TVA v. Hill, 437 US 153, 185 (1978) (Congress intended to “halt and reverse the trend towards species extinction, whatever the cost.”)

Conservation – Sec. 3(3)

“Conservation” means to bring species to a point of not being on the ESA list.

Conservation equates with recovery.

Species Covered

- Any member of plant or animal kingdom
- Species
- Subspecies
- Distinct population segment of vertebrate fish or wildlife

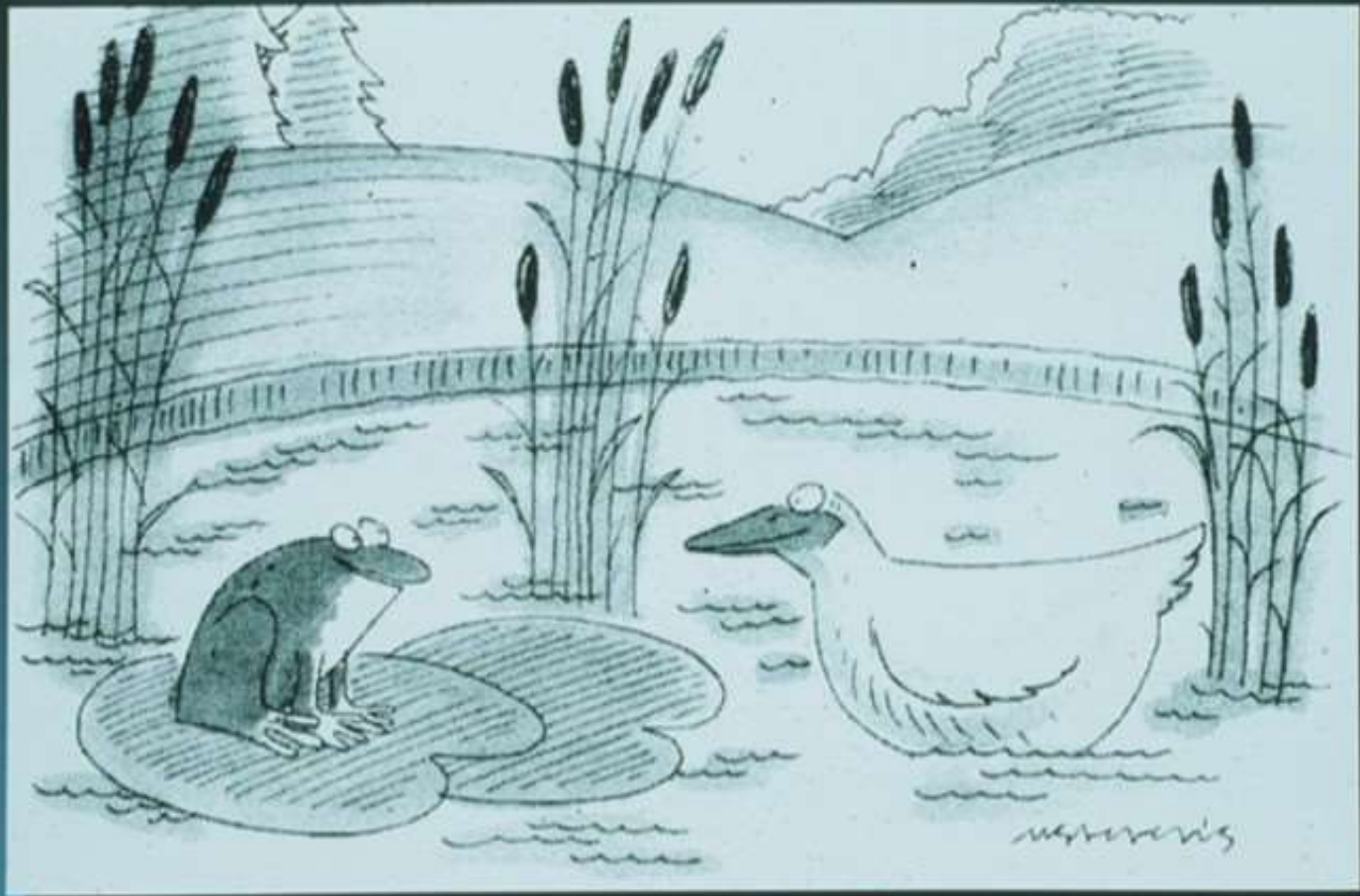
Agencies

- Department of the Interior/U.S. Fish and Wildlife Service (FWS) -- terrestrial species, nonoceanic fish, certain marine mammals
- Department of Commerce/National Oceanic and Atmospheric Administration Fisheries Service (NMFS) -- marine species
- All “action agencies”

Listing Process

Procedures for Listing

- Action by FWS or NMFS
- Petition by other party
- Subject to specific time frames –
 - 90 days substantial scientific or commercial information finding
 - Within 12 months Agency must find that listing is (1) not warranted, (2) warranted (3) warranted but precluded by higher priorities
 - Final listing decision with 12 months of proposal



“My lawyer finally got me on the endangered-species list!”

Endangered Species



Listing – Sec. 4

- Endangered -- at risk of extinction throughout all or a significant portion of its range –lost historic range not part of “SPR”
- FWS and NMFS SPR policy – ESA protections apply through all of species range if species found to be endangered or threatened only in a SPR
- Threatened -- likely to become endangered in foreseeable future
- Most use best scientific and commercial data available
- 2300 species of animals and plants listed as either endangered or threatened. 80% of their habitat on private lands.
- 5/10/11 MDL settlement – FWS agrees to either issue a prop. Rule or not warranted findings for 750 species over next 7 years

Five Factors for Listing

- Habitat loss
- Overutilization of species
- Disease or predation
- Inadequacy of regulatory mechanisms
- Other factors

Note: Economic impacts not relevant

Take Prohibition Sec. 9

Take Prohibition

- Any action that results in “take” of endangered fish or wildlife species is prohibited by Section 9 of the ESA
- Take prohibition extended to most threatened species by regulation
- Take of endangered plants only extends to “areas under federal jurisdiction” and does not extend to plants removed from private wetlands subject to Corps regulation- N. Cal. River Watch v. Wilcox, 620 F.3d. 1075 (9th cir. Jan. 26, 2011)

Other Prohibitions

- Import
- Export
- Sale or offer to sell
- Transportation in course of commercial activity
- Possession or transportation of illegally taken wildlife
- Violation of any ESA regulation

Take

To harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to do so

Harm

An act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

FWS Harm Def. Upheld by Supreme Court in Babbitt v. Sweet Home 115 S. Ct. 2407 (1995)– O’ Connor Concurrence applies concepts of Prox. Causation and Forseeability

• Aransas Project v. Shaw, 756 F. 3d. 801 (5th Cir.2014)– applying Sweet Home “Prox. Causation” to TCEQ regulation of water rights.

Exceptions To Take Prohibition

Exceptions to Take Prohibition - Federal Incidental Take

Federal actions subject to an incidental take statement issued under Section 7 formal consultation

- No jeopardy or adverse modification
- Incidental
- Within set take level
- Complies with reasonable and prudent measures (RPMs)
- Meets terms and conditions for RPMs

Exceptions to Take Prohibition

- Scientific research/species enhancement
- Hardship
- Experimental populations section 10(j)
- Alaska Natives
- Pre-Act
- 4(d) regulations for threatened species
- HCPs

Exceptions to Take Prohibition - Nonfederal Incidental Take Permit – Sec. 10

- Public review
- Incidental take
- Adequate funding
- No jeopardy
- Mitigation to maximum extent practicable
- Complies with specified measures in permit

ITP/HCP Innovations

- Prelisting agreements
- Candidate Conservation Agreements
- Multi-species HCPs
- No surprises rule
- Safe harbor
- Low effect HCPs

Enforcement – Sec. 11

- Civil and Criminal
- NMFS/USFWS/Coast Guard/Treasury
- Citizen Suits:
 - 60 day Notice
 - Injunctions may be sought against any person for violations of act and against Secretary for breach of nondiscretionary duty--- Congress did not displace the traditional four equitable factors in deciding on injunctive relief in claim of take of a single member of listed species— Animal Welfare Inst. V. Martin, 623 F. 3d. 19 (1st Cir. 2010)
 - Attorneys Fees

Penalties

- Criminal and civil
- Most stringent - knowing violation involving endangered species (\$50,000 fine/year imprisonment)
- Other penalties vary based upon severity of offense and degree of knowledge (fines, imprisonment; loss of lease, permits, etc.; seizure of other property used to perform prohibited act)

Critical Habitat – Sec. 3(5)

- Specific areas within the geographical area occupied by the species which
 - contain physical and biological features essential to the conservation of the species
 - may require special management considerations or protection
- Specific areas outside of the area occupied by the species which are essential to the conservation of the species.

Factors for Critical Habitat Designation

- Prudent and determinable
- Essential to conservation (recovery)
- May require special management
- -May be excluded if agencies determine that “the benefits of the exclusion outweigh the benefits of specifying the area as C.H. (sec. 4(b) (2)
- Decision not to exclude held reviewable under established APA principles --- Weyerhauser v. USFWS, 139 S.Ct. 361 (2018)

Critical Habitat --- Economic Analysis

- Sec. 4(b) (2) Requires consideration of economic impact in CH Designations
- FWS/ NMFS adopts “incremental approach”– “Services will compare impacts with and without designation” Vol. 78 Fed. Reg. 5308 (8/26/13)

Critical Habitat

- *Wyerhauser v. FWS* 139 S.C. 361 (2018) (Unoccupied areas must qualify as habitat but did not articulate criteria of defining that term)
- Trump rule's 2022 habitat definition (areas that currently or periodically contain features necessary to support species life processes) rescinded on June 24, 2022

**Consultation/Jeopardy/Adverse
Modification Of Critical Habitat
ESA Sec. 7**

Affirmative Duties – Sec. 7(a)(1)

Agencies are to “utilize their authorities in furtherance of the purposes of ESA”

Agencies must create or implement conservation programs where not previously done – Sierra Club v. Glickman, 156 F.3d. 606 (5th Cir. 1996)

Prohibition

Action agencies are prohibited from taking action that is “likely to jeopardize the continued existence” of a listed species

or

destroy or adversely modify critical habitat-

Covers federal agencies activities or programs”

Adverse Modification Def.

- Broadly defined to include activities that substantially delay or impair the ability of habitat to develop features that support recovery of the species.
- New “adverse modification” standard focused on activities that could diminish the conservation value of critical habitat

Consultation Procedure

Action agency must “consult” with FWS/NMFS to determine whether jeopardy or adverse modification

Triggered by “discretionary” agency action may either be “Informal” or “Formal” 1998 Section 7 Consultation Handbook by FWS. NMFS.Sct. WOTUS decision in Sackett v. EPA. (No. 21-454 (5/25.23) could limit scope of ESA consultation.

NAHB v Defenders, 127 S. Ct. 2518 (2007) ESA consultation not required to delegation of NPDES permitting to Arizona

Informal Consultation

- Action agency determines if species is present
- May the action “affect” those species?
 - No -- end of review
 - Yes -- formal consultation

Biological Assessment

Analysis prepared by action agency to determine whether “may affect” test is met during informal consultation

Formal Consultation

- Based on "best available data"
- Conducted by FWS/NMFS
- Subject to time frames
- Results in biological opinion

Biological Opinion

- Advisory opinion of FWS/NOAA-Fisheries
- Determines jeopardy/adverse modification
- If either is found, sets forth reasonable and prudent alternatives (RPAs)
- Considers direct, indirect, Interrelated and cumulative effects
- Contains nonbinding conservation recommendations
- Includes “incidental take statement” to authorize take
- Bennett v. Spear, 520 US 154 (1997) – BO subject to judicial review. Property owners may sue to challenge BO

Biological Opinions and Recovery

- Numerous courts have rejected BOs for failure to evaluate an action's impact on recovery. See, e.g., Wild Earth Guardians v. Salazar, 628 F.3d.513, 527 (9th Cir. 2010) (finding FWS' jeopardy analysis inadequate in part because it did not identify recovery "tipping point" and whether that tipping point would be reached as a result of agency operations); NWF v. NMFS, 524 F.3d. 917 , 936 (9th Cir. 2008) (finding NMFS' jeopardy analysis contrary to law because it did not address the prospects for recovery of the listed species and NMFS did not know the in-river survival levels necessary to support recovery);

Prohibition on Irreversible and Irretrievable Commitment of Resources

During consultation, agencies may not commit resources or take actions that would preclude RPAs – Sec. 7(d)

Reinitiating

Consultation must be reinitiated when:

- take levels exceeded
- new effects discovered
- new species listed
- new critical habitat designated

Exemption Process/God Squad

Cabinet-level committee may authorize activities that otherwise violate section 7(a)(2). Requires an adjudicatory process and findings that:

- no RPAs
- benefits of allowing action exceed impacts
- action is of regional or national importance

ESA and Climate Change

- 2007 Events--- (a) Intergovernmental Panel on Climate Change and (b) Massachusetts v. EPA
- Agencies required to consider climate change in ESA analysis. Center for Biological Diversity v. Salazar, 804 F.Supp.2d 987 (D. Ariz. 2011).
- Climate change a factor in listing and modeling baseline and impacts. In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, 709 F.3d. 1 (D. C, Cir.. 2013)
- Long standing policy that hard to find direct harm under section 7 from a specific agency action due to the global nature of climate change

Climate Change and the ESA cont.

- Climate Change impacts habitat due to rising sea levels,, melting sea ice, invasive species and increased frequency and intensity of storms
- Alaska Oil & Gas Association v. Pritzker , 840 F.3d. 67 1 (9th Cir. 2016)– upheld listing of bearded seal as threatened based on modeled impacts through 2100
- See Wenz “ Climate Change Attribution Science and the ESA” Vol 39:1043 Yale Journal on Regulation, (2022)

Recovery Plans

Recovery Plans – ESA Sec. 4(f)

- Blueprint for achieving delisting
- Site specific management actions based on objective measurable criteria to achieve delisting
- Unenforceable – Fund For Animals v. Rice, 85 F.3d. 535 (11th Cir. 1996)
- Required for each species unless not necessary to “promote the conservation” of the species
- Notable examples of recovered species are Bald Eagle, Brown Pelican and American Alligator

Preparation of Recovery Plans

- Prepared by FWS or NOAA-Fisheries
- Rely on advice of “recovery teams” composed of outside parties
- Subject to public review/comment
- Compliance with Recovery Plan not a consideration in listing and de listing (Friends of Blackwater v. Salazar, (691 F.3d 428 D.C. Cir 2012))

Content of Recovery Plans

- Site-specific management actions necessary for recovery
- Objective, measurable criteria to assess progress to delisting

ESA and Commerce Clause

- Limits federal jurisdiction over activities that subs. affect interstate or foreign commerce. Courts have largely upheld ESA listings as part of an economic regulatory scheme under aggregation principle— GDF Realty v. Norton, 326 F.3d. 622 (5th Cir. 2003). (harming intrastate spiders and beetles that have no inherent economic value violates the ESA)

Trump Ad. ESA Regulations Changes- Remand Fed. Reg. 143 (7/25/18)

- Biden Ad. In EO 11990 (1/20/21)
Directed all federal agencies including FWS/ NMFS to review , rescind or revise Trump ESA rules .
- On July 5, 2022 Fed. Judge Tigar (N.D. Cal.) vacated and remanded three Trump rules (listing and designation of CH, section 7 consultation process and Section 4 (d) rule)later granted agencies request for remand without vacatur. New rules expected in 2024

Questions?