



# Endangered Species Act

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# Your Presenter

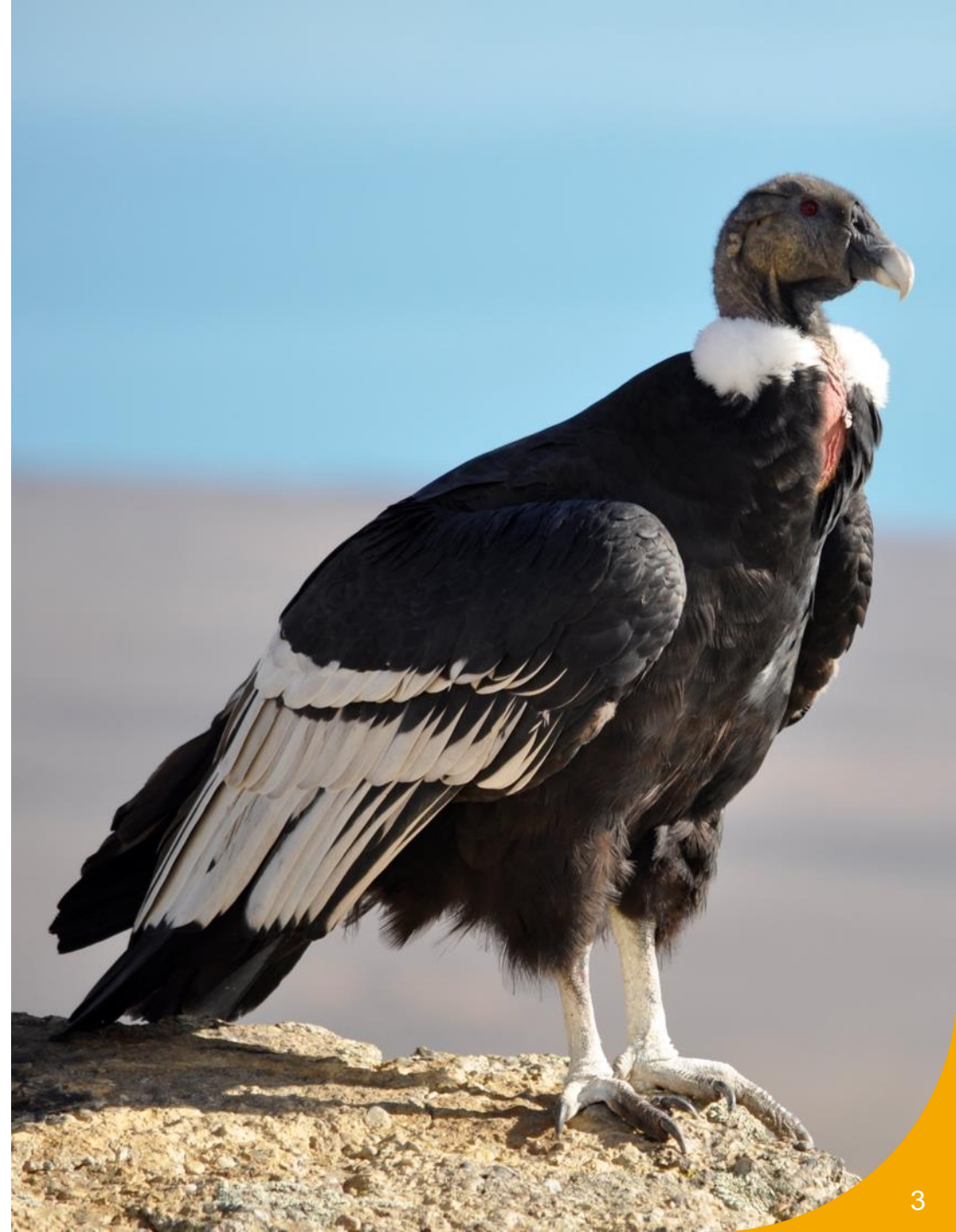


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# Endangered Species Act

- Adopted in 1973
- Codified at 16 U.S.C. §1531 et seq.
- Administered by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services)
  - USFWS – terrestrial and freshwater species
  - NMFS – marine and anadromous species
  - Jointly manage species that occur in both habitats



# Endangered Species Act

- Section 4: Listing and critical habitat (50 C.F.R. 424)
- Section 7: Consultation for federal actions (50 C.F.R. 402)
- Section 9: Prohibition on “take” of endangered species (50 C.F.R. 17)
- Section 10: Non-federal permitting (50 C.F.R. 17)
- Section 11: Enforcement and citizen suits



## Section 4: What the ESA Protects

- The ESA protects “listed species”
- Listed species fall into two categories:
  - **Endangered Species** - in danger of extinction throughout all or a significant portion of its range
  - **Threatened Species** - likely to become endangered in the foreseeable future
- ESA provides limited protections for species that are not yet listed but in the listing process

# Threatened and Endangered Species – How Do They Get On The List?

- Services can propose a species for listing on own initiative
- Section 4 requires Services to respond to petitions for listing.
  - To the maximum extent practicable, make a preliminary 90-day finding
  - Make a 12-month finding (warranted, not warranted, or warranted-but-precluded)
  - If positive 12-month finding, then a final listing rule within 12-months of positive finding
- Petition deadlines frequently missed (lawsuits abound)
- Listing process follows rulemaking process and allows for public comment

# Endangered vs. Threatened

- The difference between the two designations is the imminence of extinction
- USFWS must look at whether species is endangered or threatened in a “Significant Portion of Its Range”
- ESA does not prohibit take of threatened species, requires regulation
- 4(d) Rules may be issued that apply or exempt species from the section 9 take prohibition
  - USFWS has “blanket” 4(d) rule

# Northern Long-Eared Bat





# What About Plants?

- Plants are listed as threatened or endangered too
- But plants are not subject to the ESA section 9 prohibition
- Plants are considered during ESA section 7 consultation – this is important to remember in context of other federal permitting (e.g., NWP)



# Listing Factors

- Species must be listed solely on the basis of the best available scientific and commercial information regarding their status to determine whether the species qualifies under one or more of the following factors:
  - Present or threatened destruction, modification, or curtailment of a species' habitat or range
  - Overutilization for commercial, recreational, scientific, or educational purposes
  - Disease or predation
  - The inadequacy of existing regulatory mechanisms; or
  - Other natural or manmade factors affecting the species' continued existence (e.g. climate change)



# Listing Factors: Threatened Species

- Services must analyze whether the species is likely to become an endangered species within the *foreseeable future*
- Foreseeable future extends as far into the future as Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats.
- Foreseeable future determined on case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability.
- The Services need not identify the foreseeable future in terms of a specific period of time.

# Delisting

- Services are required to delist species when one or more of the following are found:
  - Species is extinct
  - Species has recovered to a point at which it no longer meets definition of threatened or endangered species
  - New information has become available since original listing showing the listed entity does not meet the definition of threatened or endangered species
  - New information has become available since original listing showing the listed entity does not meet the definition of a species

# Critical Habitat Designation

- ESA section 3 defines “**critical habitat**” to mean the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features:
  - I. Essential to the conservation of the species *and*
  - II. Which may require special management considerations or protection; as well as
  - III. Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species

# Critical Habitat Designation

- Critical habitat is designated through a rulemaking procedure (similar to listing)
- Services can exclude critical habitat based on economic, national security, and certain other impacts. This is an important distinction from listing.



# Designating Critical Habitat

- Recently, the issue of designating unoccupied critical habitat made its way to Supreme Court
  - *Weyerhaeuser v. U.S. Fish and Wildlife Service*
- Supreme Court: Unoccupied critical habitat must be “habitat” in the first place
- USFWS later adopted definition of “habitat” in the context of critical habitat designations (2020)
- Habitat definition withdrawn in 2022

# Dusky Gopher Frog





# What Does it Mean if You Have Critical Habitat?

- If you are a non-federal entity on non-federal land with no federal nexus, there are no obligations regarding critical habitat (possible economic stigma or litigation risk)
- If you are on federal lands or have a federal nexus (permit, funding, ROW authorization), then Section 7 requires assessing whether the federal action would destroy or adversely modify the critical habitat
- Services' regulations require analyzing impacts to critical habitat "as a whole," rather than on a unit-by-unit basis; however, this analysis can be complicated

# Reoccurring Review

- The ESA requires the Services to conduct 5-year review of species' status. Services can propose to change listing status based on review:
  - Uplisting
  - Downlisting
  - Delisting
- ESA allows petitions for a change in status (listing, uplisting, downlisting, delisting)
- Designated critical habitat may be changed through a similar rulemaking process (designation, reduction, removal)

# How to Track Listings

- Services publish 90-day findings, 12-month findings and final rules in the *Federal Register*
- USFWS also maintains a “listing workplan” that provides a schedule of species and anticipated timing for listings [noss.law/30IxrfY](https://www.noss.law/30IxrfY)
- Services update the OIRA Unified Agenda twice a year with anticipated actions and timing [noss.law/2D5KiR2](https://www.noss.law/2D5KiR2)
- Listings, de-listings, and critical habitat are frequently litigated (failed deadlines and challenges to final decisions) and can be invalidated
- Check newsrooms of eNGOs that are active in petitions and litigation.

# Potential Listings on the Horizon with Large Geographic Implications

- Monarch
- Various bumblebees
- Tri-colored bat
- Little brown bat



USFWS

# ESA Section 9 Prohibition

- *Take*: “It is unlawful for any person to *take* any endangered species of fish or wildlife (not plants) within the United States or the territorial seas of the U.S.”
  - To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct
- *Harm*:
  - An act which actually kills or injures wildlife
  - Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering



# Supreme Court and “Harm”

*Babbitt, Secretary of the Interior v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)—facial challenge

- Not all habitat modification = harm
- Habitat modification must proximately (foreseeably) cause actual death or injury to identifiable member of protected species
  - This is a high burden to prove

# Section 7 Consultation

- Federal action agency must evaluate effects of its action (permit issuance, funding, etc.) on listed species and ensure against jeopardy and adverse modification of critical habitat. Actions triggering section 7 include:
  - ROW on federal lands
  - NWP's where species or critical habitat are in the vicinity and/or might be affected by the NWP activity
  - Federal funding
- Agency issuing the ROW/permit/funding is the “action agency”
- The project proponent supports the action agency by providing a biological assessment (or biological evaluation)

# Jeopardy and Adverse Modification

- *Jeopardize the continued existence of:* to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species
- *Destruction or adverse modification:* direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species



# Section 7 Consultation Process

- Consultation can be an informal or formal consultation
- Effects analysis can conclude:
  - No effect (no consultation)
  - Not likely to adversely affect (informal)
  - Likely to adversely affect (formal)
  - Jeopardy or adverse modification (formal)
- Consultation timeframe is 135 days, sort of



# Section 7 Consultation Process

- If agency concludes that federal action is not likely to adversely affect listed species, then it provides its conclusion to USFWS/NMFS
  - If USFWS/NMFS concurs in writing, then informal consultation is complete (no take coverage)
  - If USFWS/NMFS disagrees, then formal consultation required
- If agency concludes that federal action is likely to adversely affect listed species or critical habitat, then formal consultation is required. If action will not jeopardize listed species or destroy or adversely modify critical habitat, USFWS/NMFS issue no-jeopardy biological opinion
- If effects will result in incidental take, USFWS/NMFS will issue an incidental take statement (ITS)

# Section 7 Consultation Process

- ITS authorizes take of listed species and sets forth reasonable and prudent measures (RPMs) to minimize the impacts of take
- For hard-to-detect species, the burden to quantify take can be expensive
  - Fourth Circuit has invalidated biological opinions for pipelines on the grounds that the quantification was not specific enough for bats and other species
- New regulations allow imposition of compensatory mitigation as part of RPMs
  - Prior to new regulations, Services' position was that mitigation could not be required

# Section 7 Consultation

- If USFWS/NMFS determine action will jeopardize listed species or destroy or adversely modify critical habitat, biological opinion will provide reasonable and prudent alternatives (RPAs) to the action
- RPAs:
  - Implemented in a manner consistent with purpose of the action
  - Implemented consistent with scope of agency authority and jurisdiction
  - Technologically and economically feasible
- ITS can be issued in connection with RPA
- Rarely, USFWS/NMFS will find there are no RPAs that would avoid jeopardy

# Fish Stops Dam, Creates Lasting Legacy

- Tennessee Valley Authority's Tellico Dam
  - Project cost \$116M in 1970s (\$487M)
  - Construction from 1967-1969
  - When project was 95% complete...
  - ...Scientist finds tiny, rare fish
  - Completing the dam would drive fish to extinction



# Fish Stops Dam, Creates Lasting Legacy

- Snail darter was listed as endangered in 1973, just after passage of the ESA and four years after construction on dam began
- ESA forbids federal actions that would jeopardize endangered species
- Project opponent sued to halt construction
- Lower court issued permanent injunction
- SCOTUS agrees, extinction not allowed
- Congress creates “God Squad” in 1978



# God Squad Amendment

- Creates a way to exempt a specific project from ESA
- Creates special committee of various Cabinet-level members and at least one member from projects' state
- Committee can exempt project from Section 7 requirements upon certain findings:
  - No RPAs available
  - Benefits of action outweigh benefits of alternatives and is in public interest
  - Action is of regional or national significance
  - Action agency and any non-federal applicant did not make irretrievable commitment of resources
  - Establishes mitigation/enhancement measures to minimize adverse effects
- Known as "God Committee" or "God Squad" because of potential that exempting a project from ESA means extinction of an entire species

# No Irretrievable Commitment of Resources

- During consultation process, federal agency and any applicant prohibited from making irreversible or irretrievable commitment of resources that have effect of foreclosing formulation or implementation of RPAs (Section 7(d))
  - Triggered by a “may affect” call
- Not all commitments of resources will automatically violate 7(d)



# Updates to Section 7 Regulations

- Updates to Section 7 regulations published April 2024, effective May 6<sup>th</sup>
- Codify Services' ability to require compensatory mitigation to offset impacts in an ITS
- Adopts mitigation hierarchy (first avoid, then minimize, and then mitigate any impacts that could not be avoided or minimized)
- Retain 60-day limitation on completing informal consultation adopted in 2020

# Section 10 Incidental Take Permits and Habitat Conservation Plans

- Non-federal actors that have identified a risk of take can apply for an incidental take permit (ITP)
- Application must be accompanied by a Habitat Conservation Plan (HCP) that meets issuance criteria
- Applying for an ITP is voluntary
- ITPs can be project-specific or programmatic



# Section 10 Incidental Take Permits and Habitat Conservation Plans

- Standard for ITP issuance
  - Take must be incidental to otherwise lawful activities;
  - Applicant prepares an HCP that commits to minimize and mitigate the impacts of the take to the maximum extent practicable;
  - Applicant must ensure adequate funding to implement HCP;
  - Take to be authorized cannot jeopardize the species or adversely modify critical habitat
- Issuance of ITP federal action triggering Section 7, NEPA, and other relevant statutes

# Section 10 Incidental Take Permits and Habitat Conservation Plans

- HCPs published in the *Federal Register* for public comment
- HCPs must include:
  - A take estimate
  - An analysis of the impacts of that take estimate on the species
  - Minimization measures
  - Mitigation measures
  - Monitoring
    - Compliance monitoring (are you within your take estimate)
    - Effectiveness monitoring (is your mitigation remaining effective)
  - Adaptive Management
  - Financial Assurances

# Section 10 Definitions

- Changed Circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by the plan's developers and the Service for which responses can be identified in a conservation plan (e.g., the listing of new species, effects of climate change, or a fire or other natural catastrophic event in areas prone to those events)
- Unforeseen Circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that could not reasonably have been anticipated by plan or agreement developers and the Service at the time of the conservation plan's or agreement's negotiation and development, and that result in a substantial and adverse change in the status of the covered species

# Section 10 Definitions

- **No Surprises:** if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee
- Services will honor these assurances as long as a permittee is implementing the terms and conditions of the HCP, permit and other associated documents in good faith

# Section 10 – Applicant-driven process

- In theory, HCPs are applicant-driven processes and ESA states Services “shall issue” an ITP if statutory criteria are met
- April 2018 guidance on when to seek ITP emphasizes that the decision to pursue a permit and which species to cover is the applicant’s own risk assessment of whether take is reasonably certain to occur
- Oftentimes coordination with the USFWS on the contents of an HCP is lengthy; often years (sometimes decades)
- HCP is a final agency action subject to challenge under the Administrative Procedure Act

# Updates to Section 10 Regulations

- In April 2024, USFWS published updates to Section 10 regulations
- Introduced a number of provisions intended to make the process more efficient
- Primarily focused on updating enhancement of survival (EOS) permits
- Clarify HCPs needs not include listed species
- Clarify that to determine whether to seek EOS permit or ITPs depends on the primary purpose of the permit (conservation benefit or take authorization)
- Adds USFWS determination of application “completeness” as required step in the process



# Case Study – Buckeye Wind Energy HCP

## Buckeye Wind Energy Project

- *Union Neighbors United v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016)



# Enhancement of Survival (EOS) Permits

- Section 10(a)(1)(A) authorizes USFWS to issue permits for take that occurs in connection with scientific purposes or to enhance the propagation or survival of affected species (EOS permits)
- Previously USFWS had two programs under its EOS permits that could be relevant to project proponents: CCAAs and SHAs
- Updates to Section 10 regulations combined these programs into one “Conservation Benefit Agreement” (CBA)
- CBA must demonstrate net conservation benefit

# Conservation Benefit Agreements

- CBAs can cover activities where a species is listed and you are undertaking an activity that may attract species to your project or property or where a species is not yet listed and regulatory assurances are desirable
  - Permittee retains the right to discontinue the conservation measures and return the area to its baseline (original state), at which point take authorization would cease
  - If non-listed species are listed after approval of CBA, take authorization provided so long as permittee continues to implement conservation measures established by CBA

# EOS Permit Example

- Programmatic Monarch CCAA for renewable energy and transportation facilities
  - Developed by a number of renewable energy companies, state departments of transportation, and the University of Illinois-Chicago (UIC)
  - UIC administers CCAA
  - Companies and transportation entities may voluntarily enroll in the agreement via certificates of inclusion
  - Enrollees agree to carry out certain conservation measures on their lands
  - Enrollees permitted to undertake activities necessary for operations and maintenance
  - Does not provide for significant new clearing
  - If monarch listed take authorization provided for enrollees
  - Implementation could prevent listing

# Penalties for Non-Compliance and the Section 11 Citizen-Suit Provision

- Civil and Criminal Penalties
- Citizen-suits
  - A third-party, with adequate notice, can sue USFWS or a private party on ESA grounds
  - The citizen-suit provision allows third-parties to sue USFWS to enforce the ESA or to allege that a private party has violated or will violate the ESA section 9 take prohibition (injunction)
  - 60-day notice required
- Citizen-suit, APA challenges and NEPA challenges

# Beech Ridge & R-Line

- Beech Ridge Wind Energy Project
  - *Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009)
- *Oregon-California Trails Association v. Walsh*
  - Case No. 1:19-cv-01945-WJM (D. Colo. June 17, 2020)



# Thank You



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