



Environmental Law Update

WEB CONFERENCE SERIES

Developments Under the Endangered Species Act: What Organizations Need to Know

April 26, 2016



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Overview

- Endangered Species Act (ESA)
Background
- Examples of ESA Impacts on Project
Development
- Current Status of, and Recent Proposed
Changes to the ESA and Related
Regulations



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Endangered Species Act (ESA) Background



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Endangered Species Act (ESA) Background

- History of the ESA
- Key Definitions/Applications
- Key Provisions



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History of the ESA

- **Commerce Clause**
 - Lacey Act of 1900- prohibits interstate trade in illegally obtained wildlife

- **Treaty Power**
 - Migratory Bird Treaty Act of 1918- prohibits the “taking” of migratory birds
 - Convention on Nature Protection and Wildlife Preservation 1940
 - Convention on International Trade in Endangered Species or Wild Fauna and Flora 1973

- **Endangered Species Act 1973**

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Key Definitions/Applications

- **Species Covered** - any member of the plant or animal kingdom, species, subspecies, distinct population segments of vertebrate fish or wildlife

- **Agencies Involved** - primarily the U.S. Fish & Wildlife Service (DOI) and the National Marine Fisheries Service (DOC)

- **Conservation** - to bring a species to a point of not being on the ESA list

- **Endangered** - is in danger of extinction throughout all or a significant portion of its range

- **Threatened** - likely to become an endangered species within the foreseeable future

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Listing Process

- **Petition Process**
 - Any interested person may petition the USFWS or NMFS to list a species

- **Candidate Assessment Process**
 - USFWS or NMFS biologists assess the status of species that may be declining and determine whether the species is a candidate for listing



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Listing Process/Critical Habitat Designation

- **Factors for Listing**
 - Habitat loss/ land conversion
 - Overuse of species by humans
 - Disease or predators
 - Inadequacy of regulatory mechanisms
 - Other Factors- natural or man-made factors that affect the species' continued existence
 - *Economic impact is not a specific factor

- **Factors for Critical Habitat Designation**
 - Prudent and determinable
 - Essential to conservation
 - May require special management
 - Areas may be excluded if adverse consequences outweigh benefits of listing
 - *Economics are considered

- **Section 4- five-year status review and delisting**



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Key Provisions: Sections 7 & 9

- Section 7 of the ESA- prohibits action that is “likely to jeopardize the continued existence” of a listed species or destroy or adversely modify critical habitat
 - This provision only applies to actions of the federal government, but does also cover those projects that have been issued a federal permit

- Section 9 of the ESA- any action that results in a “take” of an endangered species is prohibited
 - “take”- to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to do one of the preceding
 - This provision applies to anyone, including private parties on private land

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Key Provisions: Section 10

- Incidental Take Permit – Section 10
 - The Secretary may issue an incidental take permit if the “take” of the protected species is incidental to the project and is not the purpose of the project

- Habitat Conservation Plan
 - Before the Secretary may issue an incidental take permit, the landowner or project developer must submit a Habitat Conservation Plan including proposed mitigation measures

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Examples of ESA Impacts on Project Development



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ESA – Recent Examples

- Real Impacts
 - Solar and wind developments impacted
 - Development costs
 - Operational/post-construction costs
 - Fines and penalties

- Recent Examples:
 - Mojave Desert Tortoise
 - Indiana Bat
 - (Non-ESA) Golden Eagle



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Mojave Desert Tortoise

- **Mojave Desert Tortoise**
 - Listed in 1989
 - 12 critical habitat units, totaling 6.45 million acres in California, Nevada, Arizona, and Utah
 - Most recent 5 year-review notes impacts from renewable energy projects

- **Example: Ivanpah Valley, California - BrightSource Energy Solar Farm**
 - Initial, development-stage surveys only identified 16 tortoises
 - Developer obtained an Incidental Take Permit which allowed for the relocation of 38 tortoises and three accidental tortoise deaths per year
 - Development impacted far more tortoises than expected
 - Significant Project Impacts

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Indiana Bat

- **Indiana Bat**
 - Listed as endangered in 1967
 - Large range – Illinois, Indiana, Kentucky, Missouri, New York (+15 other states)
 - Critical habitat – caves and mines in Illinois, Indiana, Kentucky, Missouri, Tennessee, and West Virginia

- **Example: Greenbrier County, West Virginia - Beech Ridge Project - 186 MW development along 23 miles of the Appalachian Mountain ridgeline**
 - The developer only conducted a summer roosting survey
 - Despite USFWS requests for more surveys, no additional surveys were conducted
 - Developer did not apply for an ITP
 - Non-profit – filed a lawsuit to stop construction
 - The court held in favor of the non-profit, halted construction of the project (except for the winter months) pending the Company applying for an Incidental Take Permit
 - Beech Ridge Energy – entered a settlement with the government
 - ITP – obtained in 2013

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ESA – Project Development Considerations

- Survey early, survey often
- Instinct is to avoid need for ITP – but may be a best practice
- Publicity concerns
- Cost impacts
- Is green energy green?

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Current Status of, and Recent Proposed Changes to the ESA and Related Regulations

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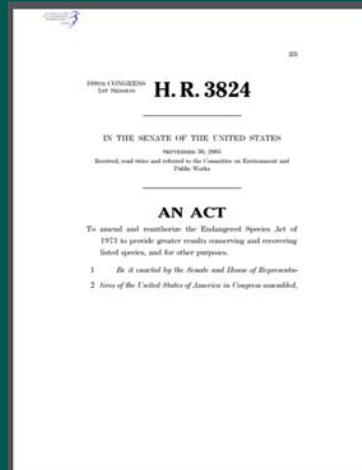
My Involvement with the ESA

Sponsored Last Major ESA Reform to Pass House

- Threatened and Endangered Species Recovery Act of 2005
- Critical Habitat Reform Act of 2004

Both Passed House with Bipartisan Support

Both Killed by Sen. Lincoln Chafee (who subsequently lost reelection)



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Endangered Species Act Today

- Since 1973, the number of domestic Threatened and Endangered Species has increased from 109 species, to nearly 1,600 species
 - American Farm Bureau Federation
- As of February, 2015, only 29 species have been recovered and delisted
 - US Fish and Wildlife Service News Release “Endangered Species Act Scores Another Success as Oregon Chub Becomes First Fish Delisted Due to Recovery.” Feb. 17, 2015



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Litigation-Driven Listing Process & Critical Habitat Designations

- 2011 Settlements by DoI with the Center for Biological Diversity and WildEarth Guardians require FWS to make listing decisions impacting over 250 species¹
- With limited exceptions, the ESA requires designation of Critical Habitat within one year of Species listing²
- However, Critical Habitat has not been designated for many/most Species³

¹ Congressional Working Group: Endangered Species Act "Report, Findings and Recommendations," February 4, 2014. Available at <http://lunmis.house.gov/uploads/files/esaworkinggroupreportandrecommendations.pdf>

² Endangered Species Act of 1973, as Amended. Available at <http://www.epw.senate.gov/esa73.pdf>

³ Congressional Research Service "The Endangered Species Act, A Primer," October 9, 2012. Available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL31654.pdf>

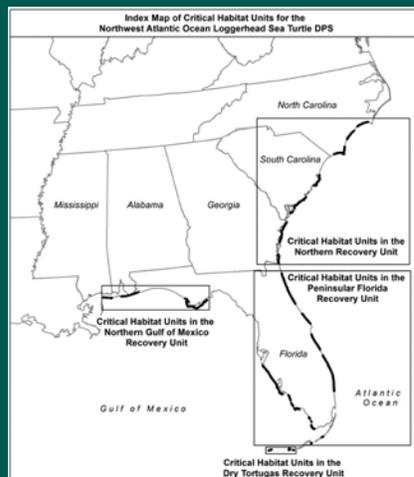


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Critical Habitat

- **Loggerhead Sea Turtle**
 - 685 miles of beaches designated as critical habitat
- **Critical Habitat**
 - If an activity in critical habitat requires any federal action—including a permit, license, or funding – the activity will cease, until FWS certifies the activity will not destroy or “adversely modify” critical habitat



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ESA is Out of Date

- The Endangered Species Act has not been substantively amended since 1988
- Congressional Authorization for funding ESA Activities expired on October 1, 1992. The Program has not been Reauthorized.
- Congress has continued to provide funds for ESA Activities in annual appropriations bills, despite the lack of authorizing authority
- Federal Expenditures on endangered species conservation totaled \$1.4B in FY2014



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Recent Federal Regulations

- Critical Habitat Designations
- Definition: “Destruction or Adverse Modification”
- New Policy on Critical Habitat Exclusions
- Proposed Mitigation Banking Policy



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New Regulations Allow for Expansive Designation of Critical Habitat

- “The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing...As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important.”

➤ Final Rule 50 CFR Part 424 “Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat” February 11, 2016 Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-11/pdf/2016-02680.pdf>



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New Regulations Allow for Expansive Designation of Critical Habitat (cont'd)

- “The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data.”

- “[W]e note that unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species...the Services may identify as areas essential to the conservation of the species areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain essential features in other areas”

➤ Final Rule 50 CFR Part 424 “Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat” February 11, 2016 Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-11/pdf/2016-02680.pdf>



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Revised Definition of “Destruction or Adverse Modification”

- Section 7(a)(2) of the Act requires Federal agencies to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species (16 U.S.C. 1536(a)(2))
- The Service’s standing definition of “Destruction or Adverse Modification” was invalidated by the Ninth Circuit Court of Appeals in 2004
- On February 5th, 2016, FWS finalized a new definition, expressly limiting “Destruction or Adverse Modification” to actions which alter the value of Critical Habitat for the conservation of a listed species
- Environmental groups criticized the revised definition, which could allow for additional economic activity within Critical Habitat



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Revised Definition of “Destruction or Adverse Modification” (cont’d)

- **Final FWS/NOAA Definition:**
 - “*Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.*”

- Final Rule 50 CFR Part 402 “Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat” February 11, 2016 Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-11/pdf/2016-02675.pdf>



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New Policy for Critical Habitat Exclusions

- Section 4(b)(2) of the ESA authorizes the Secretaries to “exclude any area from critical habitat if the Secretary determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of species concerned.”



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New Policy for Critical Habitat Exclusions (cont'd)

- Exclusions to Critical Habitat designations can be issued to facilitate species recovery through conservation agreements
- The new, non-binding Policy states the Services will:
 - **Consider** the effect of non-permitted (state, local, or private) conservation efforts
 - **Consistently exclude** areas covered by Sec. 10 Incidental Take Permits (ITP) issued for finalized Habitat Conservation Plans (HCP), Safe Harbor Agreements (SHA), and Candidate Conservation Agreements with Assurances (CCAA)
 - **Rarely designate** critical habitat exclusions for federal lands
- Final Rule 50 CFR Part 424 “Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act” February 11, 2016 Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-11/pdf/2016-02677.pdf>



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FWS Mitigation Policy

- “Mitigation includes:
 - avoiding the impact altogether by not taking a certain action or parts of an action
 - minimizing impacts by limiting the degree or magnitude of the action and its implementation
 - rectifying the impact by repairing, rehabilitating, or restoring the affected environment
 - reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action
 - compensating for the impact by replacing or providing substitute resources or environments.”
- Proposed Rule 81 FR 12379 “Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy” March, 2016 Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-03-08/pdf/2016-05142.pdf>

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FWS Mitigation Hierarchy

- “The Service recognizes it is generally preferable to take all appropriate and practicable measures to avoid and minimize adverse effects to resources, in that order, before compensating for remaining losses.”
- “It is preferable to avoid or minimize impacts to listed species or critical habitat before rectifying, reducing over time, or compensating for such impacts. Under some limited circumstances, however, the latter forms of mitigation may provide all or part of the means to achieving the best possible conservation outcome for listed species consistent with the purpose-, authority-, and feasibility- requirements of a reasonable and prudent alternative.”

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New Mitigation Standard

- “The Service’s goal for mitigation is to improve or, at minimum, maintain the current status of affected resources...”
- “Whenever required or appropriate, **the Service will seek a net gain** in the conservation outcome...” and “...will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions.”



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Habitat Valuation

- “The Service will assess the overall value of affected habitats by considering their:
 - a) Scarcity
 - b) suitability for evaluation species
 - c) importance to the conservation of evaluation species.”



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Habitat Valuation (cont'd)

- FWS Mitigation Policy: conservation land must have a value to the species that exceeds, or at least equals, that of land impacted by the proposed action
 - If the impacted habitat is of “high value” to a listed species, “the Service will seek avoidance of all impact.”
 - For impacts to “lower value” habitat, the service will consider Compensatory Mitigation, if deemed a net benefit to conservation of the listed species



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Landscape-Level Approach

- “The Service will integrate mitigation into a broader ecological context with applicable landscape-level conservation plans, where available...”
- **Climate Change:** “The Service will consider climate change and other stressors that may affect ecosystem integrity and the resilience of fish and wildlife populations, which will inform the scale, nature, and location of mitigation measures necessary to achieve the best possible conservation outcome.”
- **Partnerships:** “The Service will foster partnerships with Federal and State partners, tribes, and other stakeholders to design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.”



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Mitigation Banking

- “[T]he Service considers the banking of habitat value for the express purpose of compensating for future unavoidable losses to be a legitimate form of mitigation, provided that **withdrawals from a mitigation/conservation bank are commensurate with losses of habitat value (considering suitability and importance) for the evaluation species and not based solely upon the affected habitat acreage or the cost of land purchase and management.** Resource losses compensated through purchase of conservation or mitigation bank credits may include, but are not limited to, habitat impacts to species covered by one or more Service authorities.”



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Advanced Mitigation

- “The Service will **recommend or require** that compensatory **mitigation be implemented before the impacts of an action occur** and **be additional to any existing or foreseeably expected conservation efforts** planned for the future...”



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Conclusion

- The land-use restrictions of the Endangered Species Act will impact increasingly broad geographic regions of the United States, as climate change continues to alter the landscape
 - Forthcoming designations may utilize new authority to create expansive critical habitat reserves
 - Burdensome mitigation regulations may reduce incentives for habitat conservation



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Questions & Answers



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