

THE ENDANGERED SPECIES ACT

ELI Summer School

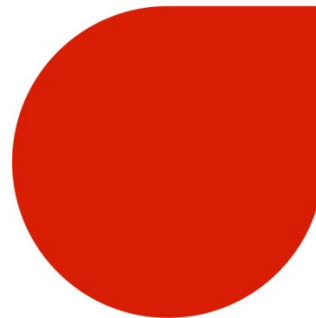
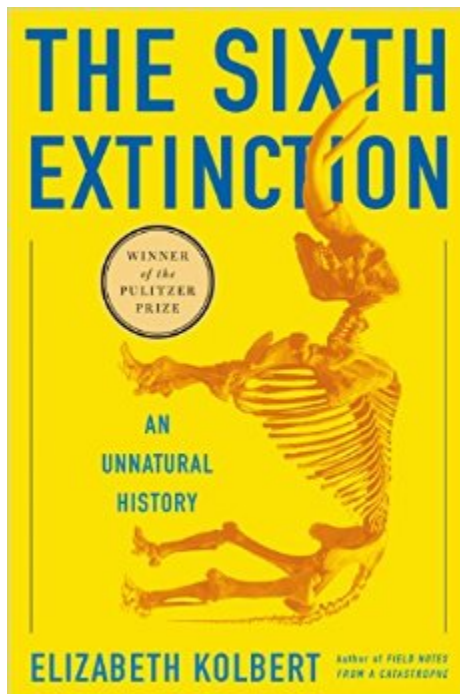
Jane Davenport

Defenders of Wildlife

June 11, 2015

Why does it matter?

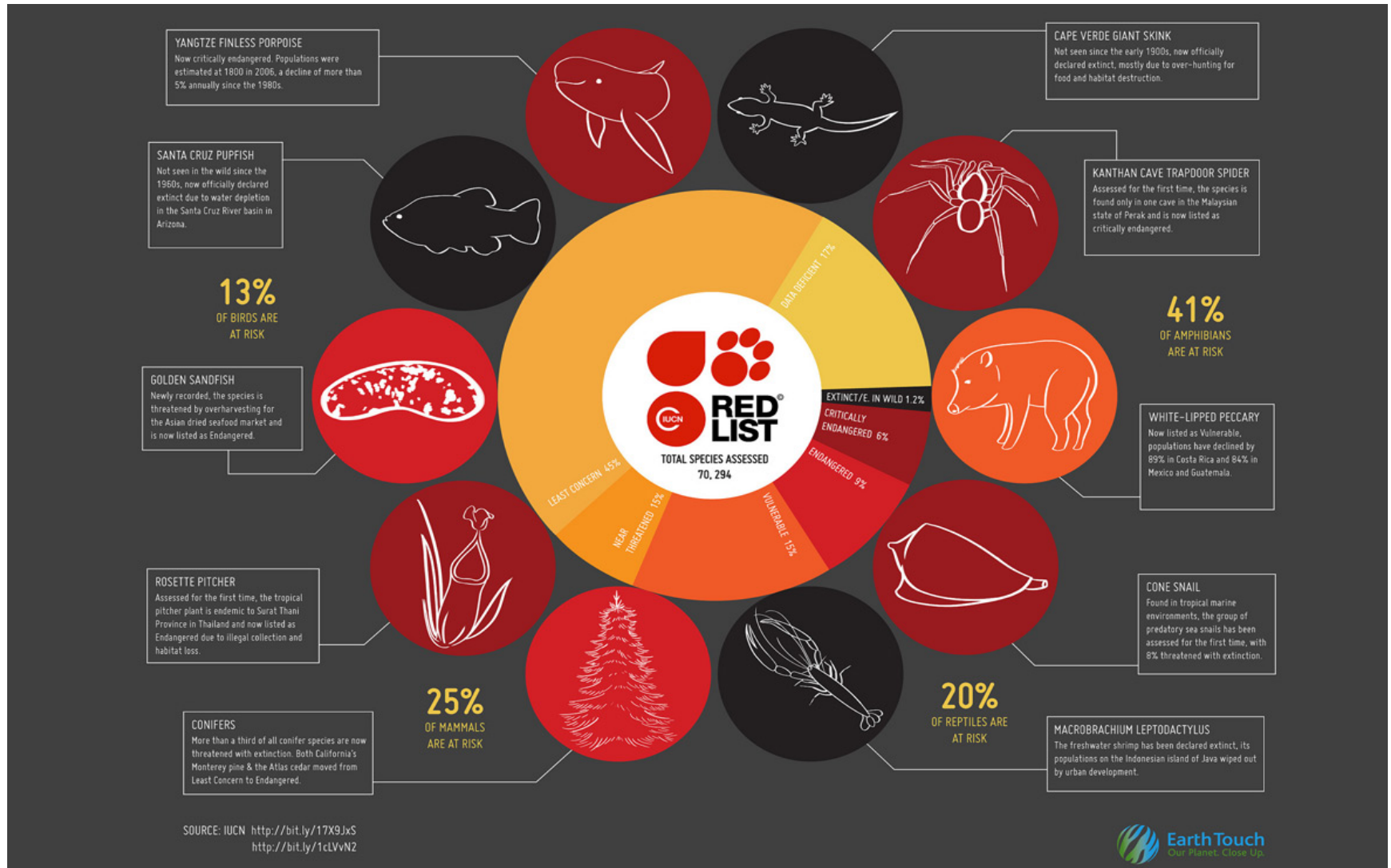
- Natural/background rate of extinction: 1-5 species per year
- The Anthropocene and the Sixth Mass Extinction
- Extinction now at 1,000 to 10,000x background rate



IUCN Red List

- To date, has assessed 3% of described species – 38% of assessed species are threatened with extinction
 - One-quarter of mammals
 - Forty percent of amphibians
 - One-third of reef-forming corals
 - Twenty-one percent of fish
 - One-third of sharks and rays
 - Twelve percent of birds
 - Twenty-one percent of reptiles

IUCN Red List



WWF Living Planet Index 1970-2010

Population sizes of vertebrate species have declined by **52%**



-39%
TERRESTRIAL SPECIES
DECLINED BY 39 PER
CENT BETWEEN 1970
AND 2010



-76%
THE LPI FRESHWATER
SPECIES SHOWS AN
AVERAGE DECLINE OF
76 PER CENT

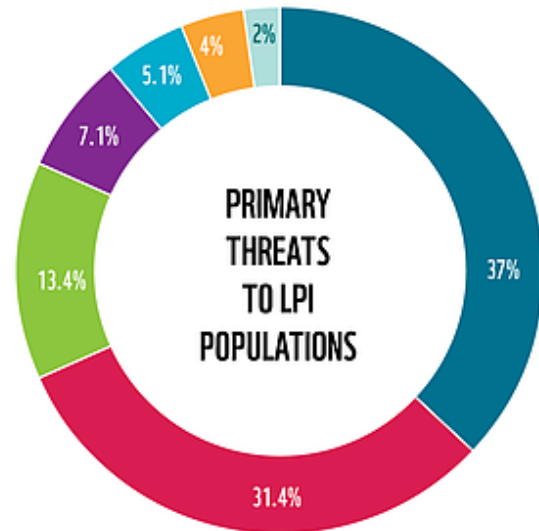


-39%
MARINE SPECIES
DECLINED 39 PER CENT
BETWEEN 1970 AND
2010

INFOGRAPHIC

PRIMARY THREATS TO LPI POPULATIONS

Information on threats has been identified for 3430 populations in the LPI assigned to seven categories. Other populations are either not threatened or lack threat information (WWF, ZSL, 2014).



Introduction to the ESA

- 16 U.S.C. §§ 1531 – 1544
- 50 C.F.R.
 - Part 424 (listing)
 - Part 402 (consultation)
 - Part 17 (list)
- Purposes [16 U.S.C. § 1531(b)]
 - “To provide a means whereby the ecosystems whereby endangered species and threatened species may be conserved”
 - “To provide a program for the conservation of such endangered species and threatened species”
 - “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)]

Introduction cont'd

- 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:
 - 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.” 16 U.S.C. 1532(3).

ESA Basic Concepts

- Section 4: listing species & designating critical habitat
- Section 7: obligations on federal agencies
- Section 9: prohibition on “take” of species
- Section 10: permits for incidental take
- Section 11: judicial review

Section 4: Listing Species & Habitat

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

Section 4 cont'd

- 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"

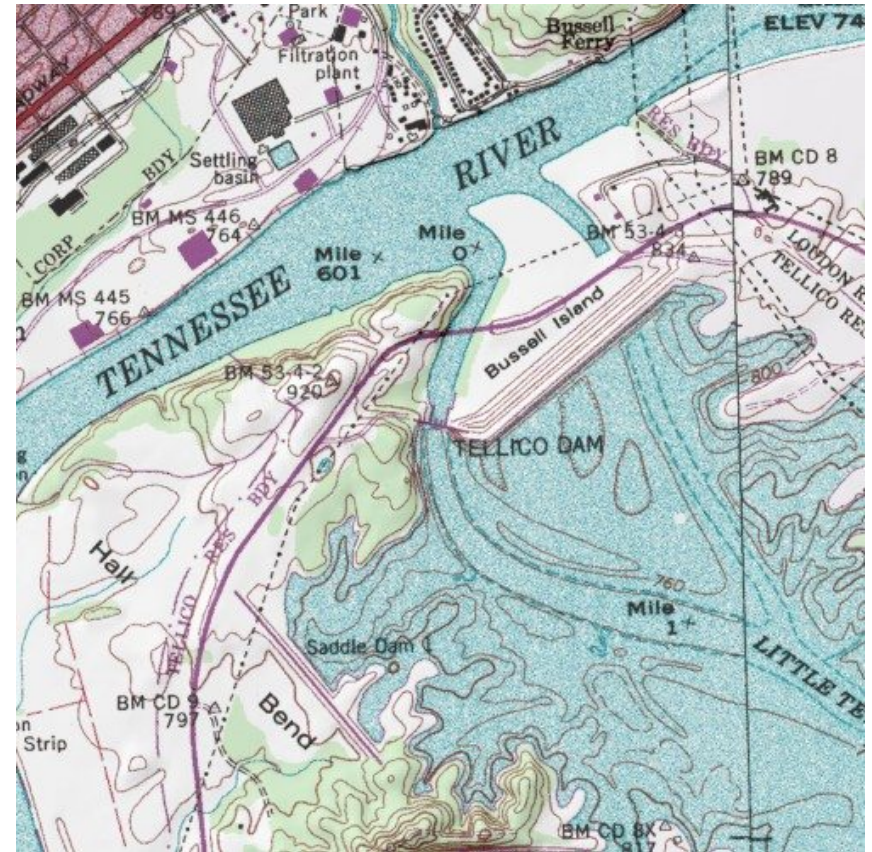
Section 4, cont'd

- Designating critical habitat:
 - "Specific areas within the geographical area occupied by the species . . ."
 - "essential to the conservation of the species . . ."
 - "which may require special management considerations or protection."
 - May be occupied or unoccupied areas
- Not prudent (exception)/not determinable (delay)
- Economic/national security impact analysis
- Recovery plans
- Five-year status reviews

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 CFR Part 402**

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



TVA v. Hill, cont'd

“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 Authority v. Hill, 437 U.S. 153, 184-85 (1978)

TVA v. Hill, cont'd

"It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. . . . We conclude, however, that **the explicit provisions of the Endangered Species Act require precisely that result.**"

"One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . . **The language admits of no exceptions.**"

Agency Obligation: No Jeopardy

- Jeopardy: appreciable reduction in likelihood of both survival and recovery of species in the wild
- Destruction/adverse modification: alteration that appreciably diminishes the value of critical habitat for both survival and recovery
- Two duties under ESA Section 7(a)(2): procedural and substantive

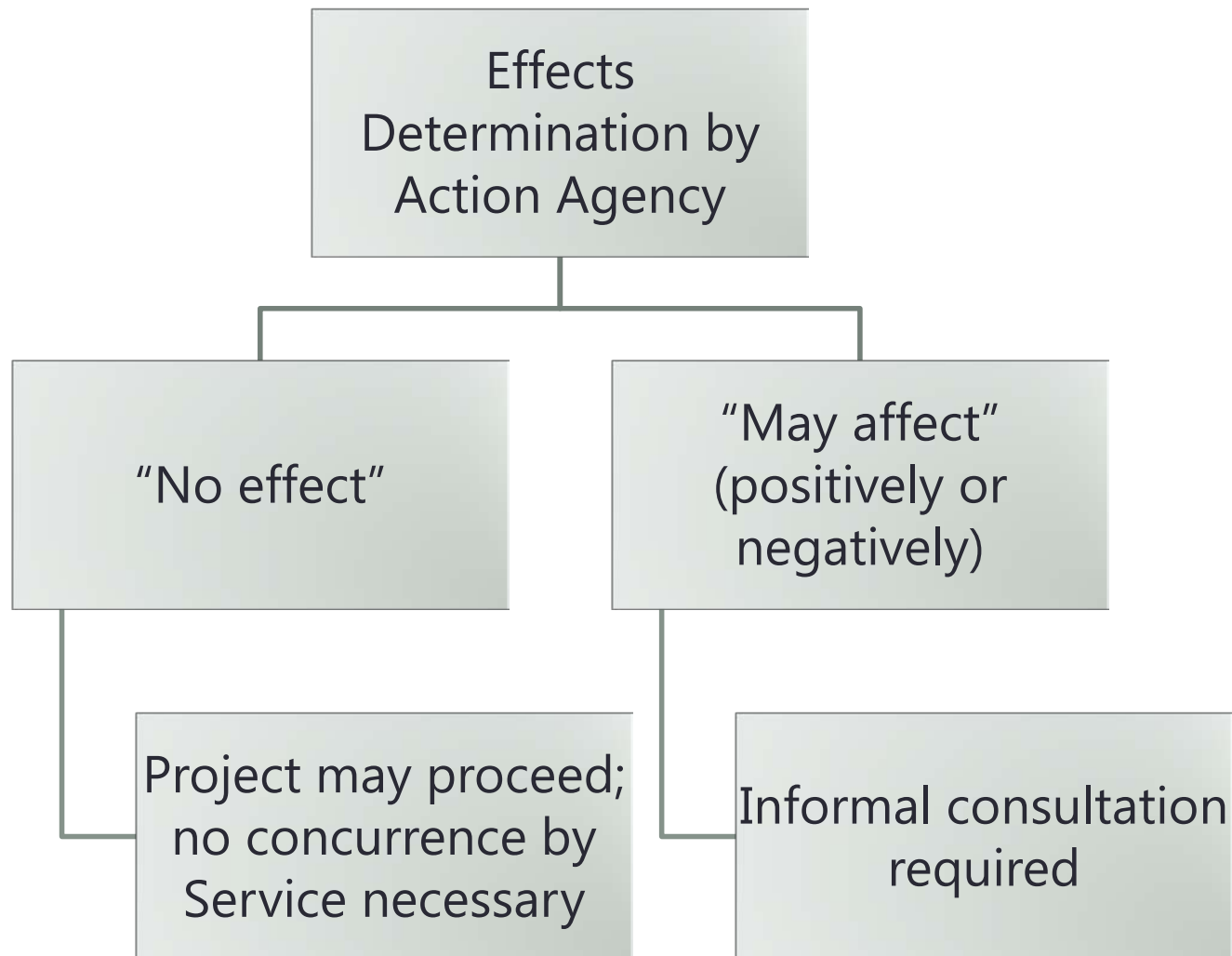
Agency Action

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

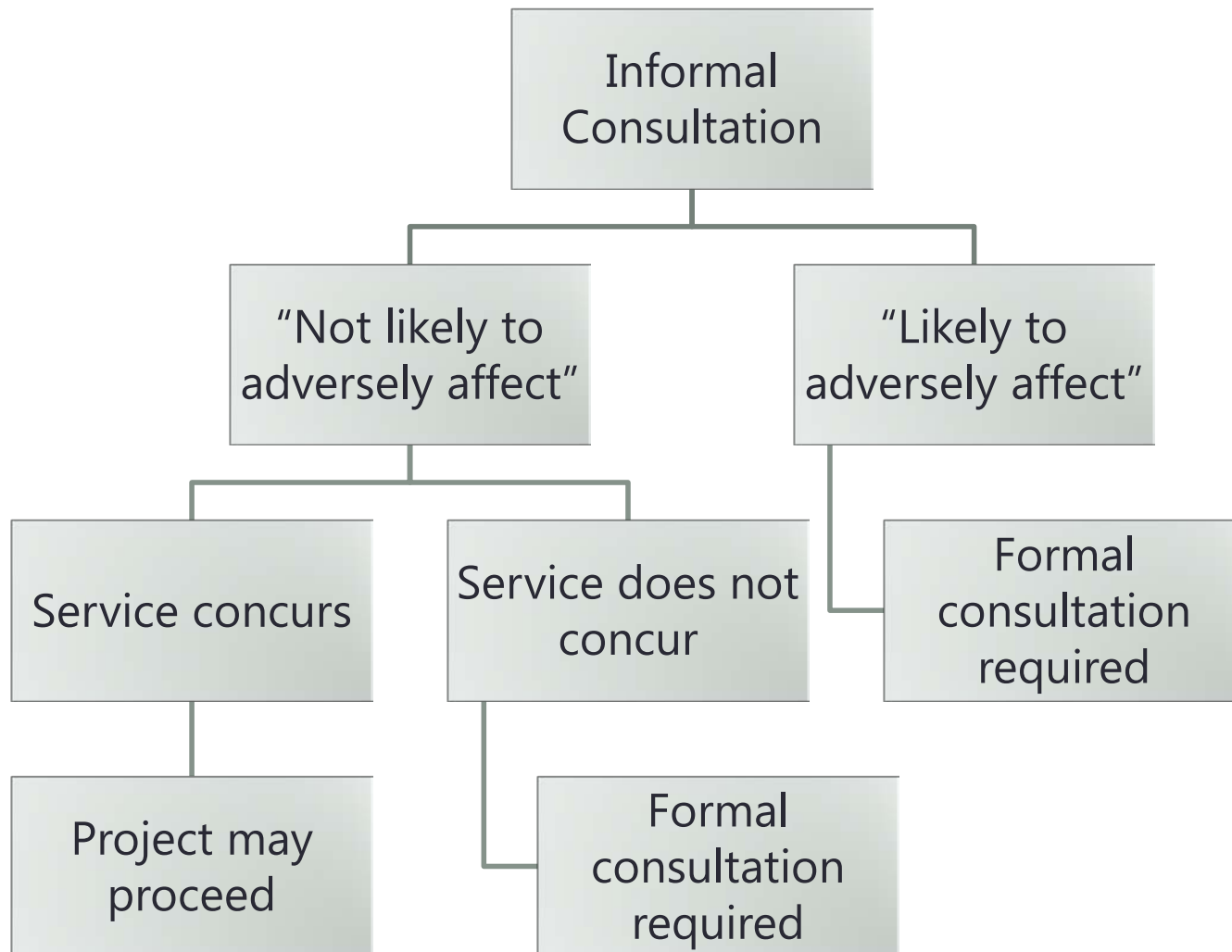
Action Area

- “All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action” (50 CFR § 402.02)

Section 7 Consultation



Section 7 Consultation cont'd



Section 7 Formal Consultation

- Likely to adversely affect
- Action agency prepares Biological Assessment or Evaluation
- FWS or NMFS 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'd

- 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 the impacts of incidental take
- **Terms and conditions** to implement the RPMs
 - Includes reporting requirements
- **Reinitiation of consultation** [50 CFR § 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'd

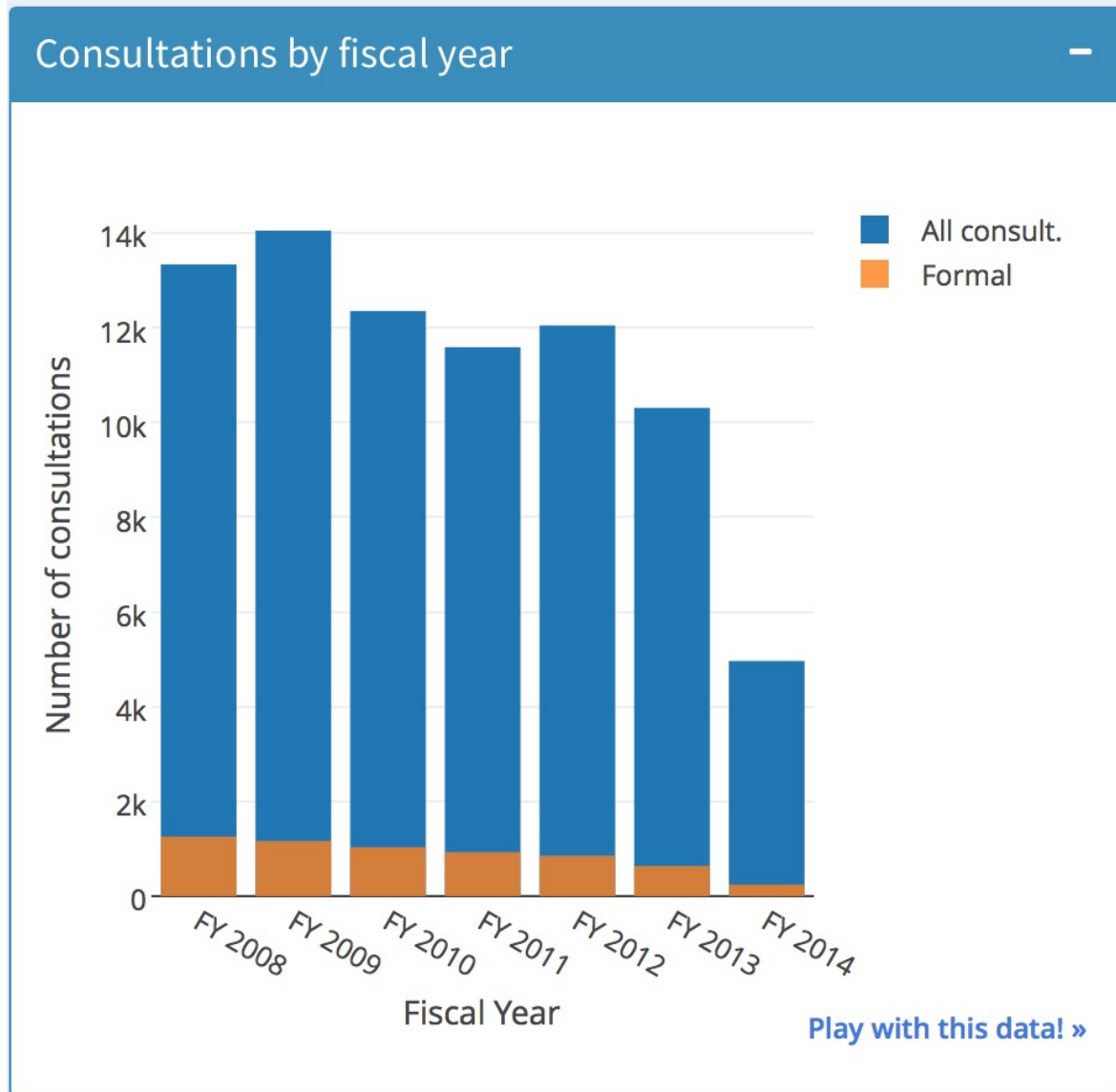
- If Service determines jeopardy/adverse modification, includes **Reasonable and Prudent Alternatives** to the proposed action
- Action agency has choices after receiving BiOp
- No jeopardy
 - Implement RPMs/terms and conditions
 - Modify project and restart consultation
 - Abandon project
- Jeopardy
 - Adopt one of the RPAs
 - Modify project and restart consultation
 - Abandon project
- Apply to the Endangered Species Committee for an exemption [50 CFR § 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



Section 9: The “Take” Prohibition

- 16 U.S.C. § 1538
- The teeth of the Act
- Unlike section 7, applies to “any person subject to the jurisdiction of the United States.”
- Prohibits “take” of non-plant endangered species
 - Service 4(d) rules may additionally prohibit take of threatened species
- Civil and criminal penalties apply
- 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 CFR § 17.3.

Babbitt v. Sweet Home, 515 U.S. 687
(1995)



Section 10: Avoiding Take Liability

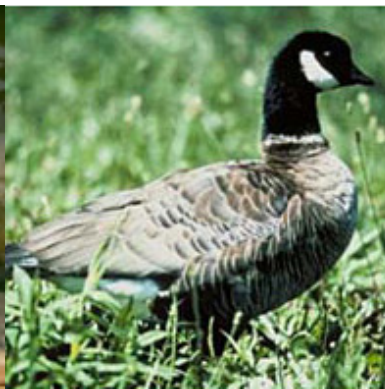
- How private parties on private lands can avoid liability
- Introduced in 1982 amendments
- **Incidental Take Permit**
 - 16 U.S.C. § 1539(a)(1)(B)
 - Much like the ITS: as long as take is “incidental” to “an otherwise lawful activity,” can be permitted
- **Habitat Conservation Plan**
 - 16 U.S.C. § 1539(a)(2)(A)
 - Prerequisite for obtaining an Incidental Take Permit
 - Required contents:
 - Impact from incidental take
 - Steps to minimize and mitigate such take
 - Funding to take these steps
 - Alternatives considered, and why rejected

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. §§ 701-06
 - *Bennett v. Spear*, 520 U.S. 154, 174 (1997) (cause of action)
 - 28 U.S.C. § 1331 (federal question jurisdiction)
- APA supplies scope and standard of review (5 U.S.C. § 706)

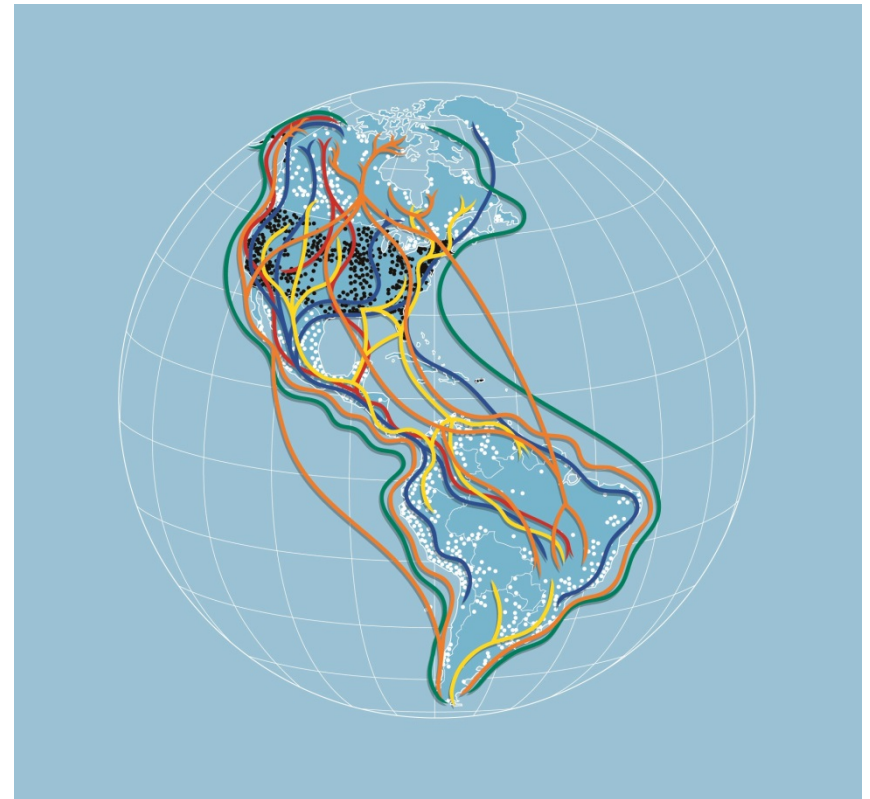
ESA: Has It Worked?

- 1400+ plant and animal species listed in U.S.
- Only 10 declared extinct (8 likely extinct before listing)
- 90% recovery rate for 110 studied species
- Species with designated critical habitat are twice as likely to be recovering as those without
- But for the ESA, at least 227 species would likely be extinct
- *On Time, On Target: How the Endangered Species Act is Saving America's Wildlife* (CBD 2012, available at http://www.esasuccess.org/pdfs/110_REPORT.pdf)



Other Species Protection Acts

- The Migratory Bird Treaty Act
 - 16 U.S.C. § 703 *et seq.*
 - Enacted in 1918, amended many times
 - Illegal to “pursue, hunt, take, capture, kill, or sell” migratory birds (live or dead), nests, or eggs
 - **Unless** under a valid permit



Other Species Protection Acts, cont'd

- The Bald and Golden Eagle Protection Act
 - 16 U.S.C. § 668 *et seq.*
 - Enacted in 1940
 - Like MBTA, a broad take prohibition for bald and golden eagles
 - \$100K fines for individuals, plus one-year imprisonment
 - Eagle take permits can be obtained



Other Species Protection Acts, cont'd

- The Marine Mammal Protection Act
 - 16 U.S.C. § 1361 *et seq.*
 - Enacted in 1972, amended substantially in 1994
- Like ESA, divides authority between the Services:
 - NMFS: whales, dolphins, porpoises, seals, and seal lions
 - USFWS: walrus, manatees, otters, and polar bears
- Prohibition on take of marine mammals in U.S. waters
- Permits can be obtained for:
 - Incidental take from commercial fishing and other activities
 - Scientific research
 - Aquariums and science centers

Other Species Protection Acts, cont'd

- The Lacey Act:
 - 16 U.S.C. § 3371 *et seq.*
 - Enacted in 1900, amended substantially in 2008
 - Prohibits trade (i.e., import, sale, etc.) of animals and plants taken, transported, or possessed illegally
 - Regulates the introduction of invasive or non-native species
- CITES
 - Convention on International Trade in Endangered Species of Wild Fauna and Flora
 - International treaty signed by the U.S. in 1973. 180 signatories.
 - Meant to ensure that international trade in animals and plants does not threaten survival in the wild
 - USFWS carries out under authority of the ESA and Lacey Act



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