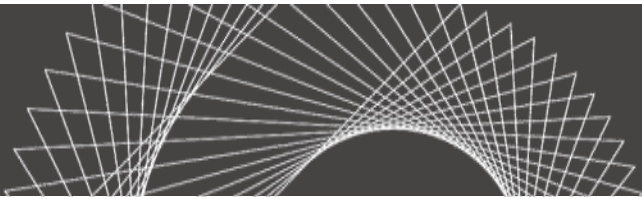


ELI Summer School: The Endangered Species Act



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What is the ESA?



Agenda

- Overview of the Endangered Species Act (ESA)
- Overview of Key Sections
- Implementing Regulations and Recent Developments
- Landmark Litigation and Recent Developments

Overview of the ESA

- Scope of Protection
- Responsibility
- Practical Impacts

Overview of Key Sections

- Section 4
- Section 7
- Sections 9 & 10
- Section 11

Regulation

- Implementing Regulations
- Trump-era Developments
- Biden-era Developments

Litigation

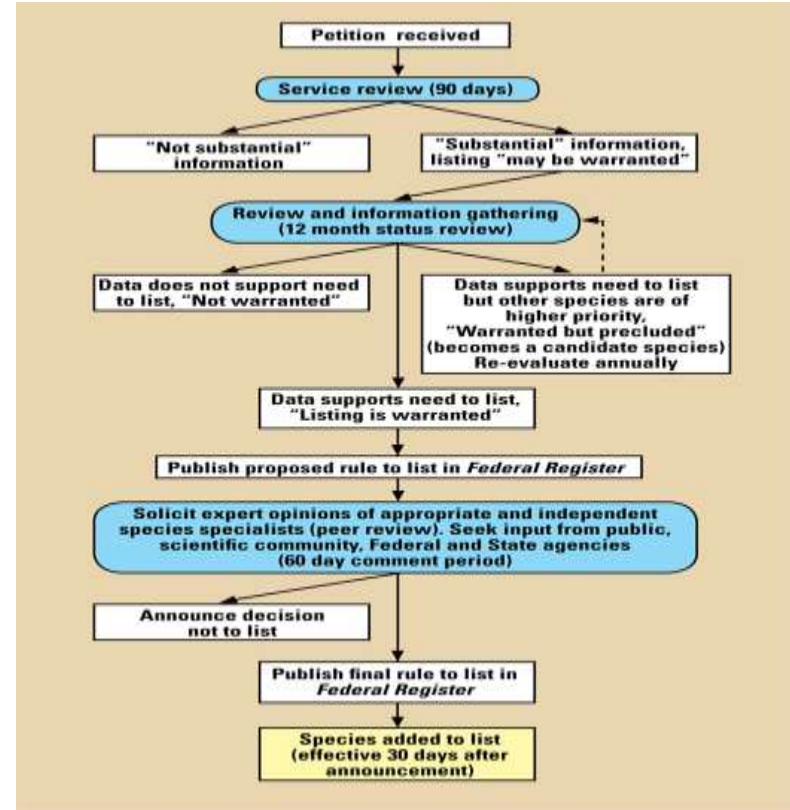
- Key Cases
- Recent Cases

Overview of the ESA



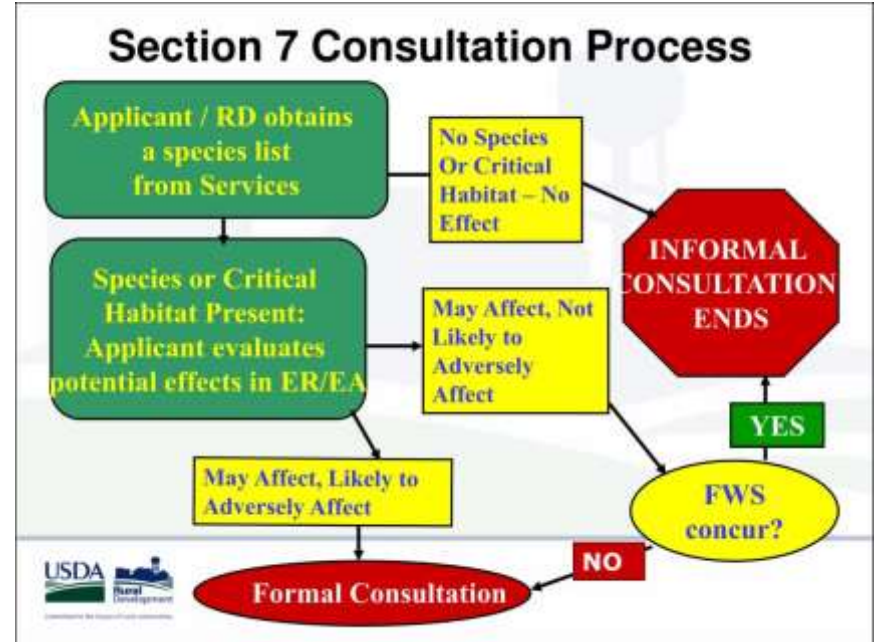
Section 4 – Listing Species

- What counts as a species?
- How are species listed?
- How are they protected?
- What kinds of protection exists?



Section 7 – Interagency Cooperation

- Applies to federal agencies proposing to undertake project or authorize an action
- Consultation with FWS or NMFS
- Informal v. formal consultation
- Biological Assessment v. Biological Opinion
- Practical implications



Sections 9 & 10 – Prohibited Acts and Permits

- Applies to... just about everyone subject to U.S. jurisdiction
- Unlawful to “take” endangered species or wildlife
- Protections for threatened species (actually Section 4(d))
- Incidental take permits (ITPs)
- Habitat Conservation Plans (HCPs)

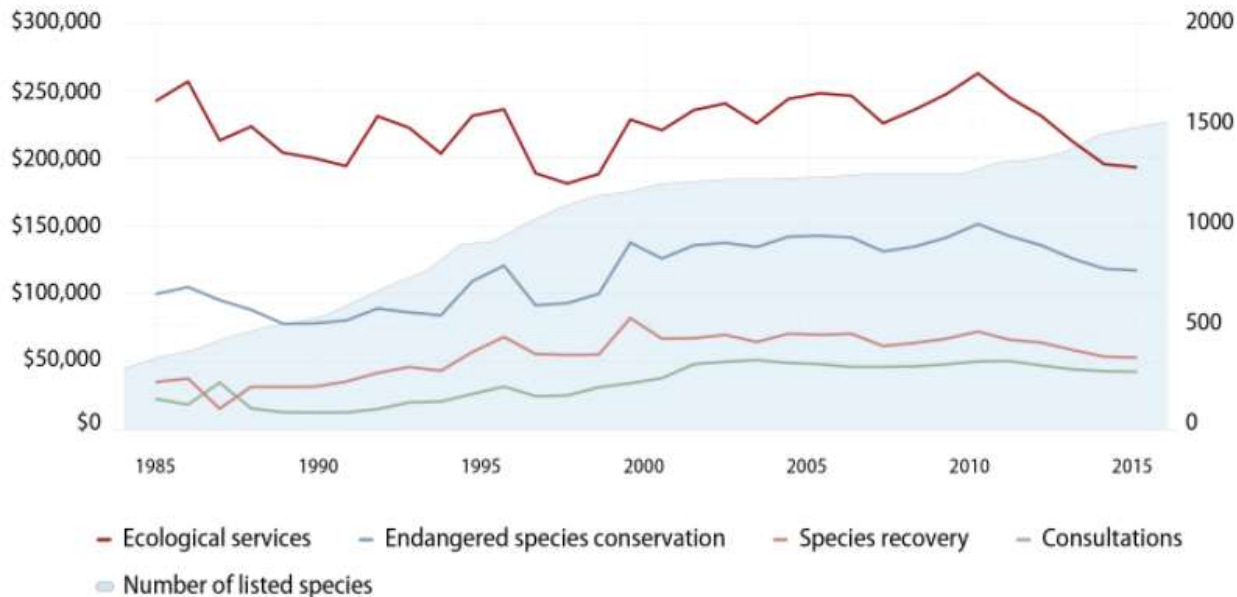


Section 11 – Penalties and Enforcement

- Civil liability
- Criminal liability
- Citizen suits



Budget appropriations per species listings, by year and ESA activity



Source: Leah R. Gerber and James A. Estes, "Conservation triage or injurious neglect in endangered species recovery," Proceedings of the National Academy of Sciences of the United States of America 133 (13) (2016): 3563-3566.

Implementing Regulations

- 50 C.F.R. Part 17: Endangered and Threatened Wildlife and Plants, Subparts A–J (50 C.F.R. §§ 17.1–17.108)
- 50 C.F.R. Part 23: Convention of International Trade in Endangered Species of Wild Fauna and Flora, Subparts A–H (50 C.F.R. §§ 23.1–23.92)
- 50 C.F.R. Part 222: General Endangered and Threatened Marine Species, Subparts A–E (50 C.F.R. §§ 222.101–222.504)
- 50 C.F.R. Part 223: Threatened Marine and Anadromous Species, Subparts A–B (50 C.F.R. §§ 223.101–223.301)
- 50 C.F.R. Part 224: Endangered Marine and Anadromous Species (50 C.F.R. §§ 224.101–224.105)
- 50 C.F.R. Part 226: Designated Critical Habitat (50 C.F.R. §§ 226.101–226.226)
- 50 C.F.R. Part 402: Interagency cooperation—Endangered Species Act of 1973, as Amended, Subparts A–D (50 C.F.R. §§ 402.01–402.48)
- 50 C.F.R. Part 424: Listing Endangered and Threatened Species and Designating Critical Habitat, Subparts A–B (50 C.F.R. §§ 424.01–424.21)
- 50 C.F.R. Chapter IV, Subchapter C: Endangered Species Exemption Process, Parts 450–453 (50 C.F.R. §§ 450.1–453.06)

Trump-era Developments

- Listing species and designating critical habitat
- Prohibitions regarding threatened wildlife and plants
- Interagency cooperation



Biden-era Developments

- Reviewing Trump-era rules
- (Re)New(ed) listings and protections
 - Wolves
 - Lesser prairie-chicken
 - Polar bears
 - Pacific walrus
 - And more....
- Bernhardt Memorandum?



Litigation

- *TVA v. Hill*, 437 U.S. 153 (1978)
 - Establishes ESA's expansive reach
 - Reined in by subsequent amendment to the ESA, but still powerful
- *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018)
 - "Critical habitat" must also be "habitat"
 - FWS's evaluation of economic factors in exclusion from critical habitat designations is subject to judicial review
- *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010)
 - Agencies cannot arbitrarily limit analysis in Biological Opinions
- *Defenders of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017)
 - Upholding FWS rule to remove gray wolf in Wyoming from ESA list
 - *But see Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (designation of distinct population segment of gray wolf arbitrary and capricious)

Intersection with Other Environmental Laws

- Clean Air Act NAAQS cases
- Clean Water Act permit issuances
- FDA reviews of genetically engineered animals
- EPA pesticide approvals

