

The Endangered Species Act and “Take”



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Objectives for this Session

- Introduction to the structure and intended function of the ESA (or “Act”)
- You will see that “Take” is addressed in many places in the Act, each of which we will discuss
- We will discuss some differences in how the Act is administered between the USFWS and NOAA-Fisheries, and why.

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SEC. 2. (a) FINDINGS

The Congress finds and declares that—

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

SEC. 2. (a) FINDINGS

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) [International Treaties]

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programsto better safeguard, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants

SEC. 2. (b) PURPOSES

- The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.
- To provide a program for the conservation of such endangered species and threatened species
- and [International Treaties]

SEC. 2. (c) Policy

(1) It is further declared to be the policy of Congress that 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 Act.

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Section 3. Definitions

- Endangered Species

- any species which is in danger of extinction throughout all or a significant portion of its range

- Threatened Species

- any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Section 3. Definitions

- Species

- includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife

- Take

- means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

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Section 4. DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

- Governs the process for listing species as threatened or endangered.
- Recovery Planning
- “5-Year Status Reviews”
- 4(d) “Rules” - Protective Regulations
 - can add prohibitions that exist for Endangered species to threatened species
 - Differences between USFWS & NOAA-Fisheries
 - More on this later

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Section 6. Cooperation with the States

- recognizes that successful ESA implementation depends on a good working relationship with the States
- Cooperative Agreements - allow 75 to 90% funding by Feds of State implemented conservation programs
- **Cooperative agreements** - also allow for "agents of the State" to take listed wildlife under certain circumstances.
 - More on this later

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Section 7. Interagency Cooperation

- “Section 7 Consultation”
- Federal agencies consult with USFWS or NOAA-Fisheries if their actions "may affect" listed species.
- **Section 7** includes a mechanism for allowing take that is “incidental to, but not the intended purpose of” an otherwise lawful action.
- More on this later.

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Section 9. Prohibited Acts

- Endangered Fish and Wildlife Species
 - Take
 - Import, export, sell, possess, deliver, engage in activity of interstate or foreign commerce in endangered species, or violate any regulation pertaining to endangered animal species
- Threatened Fish and Wildlife Species
 - Protections allowed for Endangered species of wildlife may be applied to Threatened as well

Section 9. Prohibited Acts continued

- Endangered and Threatened Plants
 - Take prohibitions do not generally apply
 - On Federal lands, “reduce to possession” is prohibited.
 - All other prohibitions (e.g., import, export, etc.) do apply

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Section 10. Exceptions

- (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—
 - (A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species.
 - Most common “scientific take permit”
 - Also used for such Recovery tools as “Safe Harbor Agreements”

Section 10. Exceptions

- (a) PERMITS.— (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
 - (A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species.
 - Commonly referred to as a 10(a)(1)(A) Permit
 - Also called “Recovery Permit” or “Enhancement of Survival” Permit

Section 10. Exceptions

- (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—
 - (B) any taking otherwise prohibited by section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.
 - These permits are issued once an approved Habitat Conservation Plan or HCP is developed.
 - These apply to Non-Federal entities only

10(j) - EXPERIMENTAL POPULATIONS.

- Treated as Threatened species
- No Federal take prohibitions apply unless stated in 10(j) final rule
- Two currently in Oregon
 - Clackamas bull trout 10(j) population (USFWS)
 - Requires researchers to have a 10(a)(1)(A) Permit
 - (Proposed) Upper Deschutes River anadromous salmonids (NOAA-Fisheries)

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Section 11. PENALTIES AND ENFORCEMENT

- Civil
 - Up to \$25,000 fine per violation
 - Each “act” a separate violation
- Criminal
 - Up to \$50,000 fine per violation
 - Up to one year imprisonment per violation
 - Each “act” a separate violation

Section 11. PENALTIES AND ENFORCEMENT

- Enforcement is generally carried out by USFWS Law Enforcement, or NOAA-Fisheries Law Enforcement, but Dept. of Homeland Security can enforce as well.

What about “More on this later”?

- Section 4(d) rules
- Section 6 Cooperative Agreements
- Section 7 Incidental Take Statement

Section 4(d) rules

- The Act applies the Take prohibitions to Endangered (animal) species only, but allows them to be applied to Threatened animals too.
- USFWS applied the Take prohibitions to all Threatened animals in a “blanket” approach.
- NOAA-Fisheries does so on a species-by-species basis for Threatened listings.
- 4(d) rules apply only to Threatened species

Section 4(d) rules

- USFWS 4(d) rules *REMOVE* take prohibitions for certain circumstances.
 - Take resulting from fishing activities in compliance with State or Tribal approved fishing regulations
- NOAA-Fisheries 4(d) rules *IMPOSE* take prohibitions for Threatened species with specific exceptions.
 - Scientific take
 - Take resulting from approved management actions

Section 4(d) rules

- All 4(d) rules are published in the Federal Register, either as part of a Listing rule, or as stand alone regulations.
- USFWS has 3 listed fish, research-related 4(d) rules in Oregon
 - Warner sucker
 - Hutton tui chub
 - Foskett speckled dace

Section 6. Cooperation with the States

- Cooperative Agreements - allow for “agents of the State” to take listed wildlife under certain circumstances.
- “Agent” usually means “employee”
- Applies to Threatened species only
- Must comply with Section 6 agreement between the State agency and USFWS intended to conserve listed species

Section 7 Consultation “incidental take”

- Federal actions that go through formal consultation with the Services may cause incidental take
- Incidental means “incidental to, but not the intended purpose of” an otherwise lawful action.
- The take is exempted from the Section 9 prohibitions

Section 7 Consultation “incidental take”

- Incidental Take Statement
 - Part of, or attached to, Biological Opinion
 - Describes and enumerates expected incidental take
 - Differentiates between forms of take
 - Reasonable and Prudent Measures and Terms and Conditions must be followed.
 - Include minimization measures, monitoring of take and reporting on take

Section 7 Consultation “incidental take”

- Failure to comply with the Incidental Take Statement causes the “exemption” from Section 9 prohibition to expire.
- See “Section 11. Penalties and Enforcement”

Questions?

