

OVERVIEW OF THE
FEDERAL AND STATE ENDANGERED SPECIES ACTS

Outline of Presentation by Jones & Stokes Associates
to California Chamber of Commerce

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Federal Endangered Species Act (16 USC Secs. 1531 et seq.)

I. History, Purposes, and Policies

A. History

1. Predecessor laws: Enacted in 1966 and 1969; less comprehensive.
2. Current law: Endangered Species Act enacted in 1973; major amendments in 1978 and 1982 weakened provisions somewhat, but made no fundamental changes.

B. Purposes and Policies

1. Findings: Congress found various species threatened with extinction; these species have aesthetic, ecological, educational, historical, and recreational value.
2. Purposes: Ensure endangered and threatened species and their habitat; comply with treaty obligations to conserve endangered species.
3. Key policies
 - a. basic policy: All federal agencies must seek to conserve endangered and threatened species to further Act's purposes (i.e., agencies must use authorities to promote recovery, not just to prevent extinction).
 - b. water resource issues: Federal agencies must cooperate with state and local agencies to resolve water resource issues "in concert with" endangered species protection.

II. Listing Process

A. Definitions

1. "Endangered species": Any species in danger of extinction throughout all or a significant portion of its range, other than insects that are pests.
2. "Threatened species": Any species likely to become endangered within the foreseeable future

throughout all or a significant portion of its range.

B. Process for Species Listing (also applies to delisting)

1. Initiation: With U. S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), or filing of petition.
2. Decision to propose species for listing: Made after FWS review of candidate species' status.
3. Final decision on listing: Criteria include loss or change in habitat, commercial or recreational overutilization, disease or predation, or inadequacy of existing regulatory mechanisms.
 - a. designation of critical habitat: Critical habitat required to be designated at time of listing, but broad exception applies (i.e., if it is essential to species conservation that listing proceed without critical habitat designation).
 - b. definition of "critical habitat": Geographic area essential to conservation (i.e., recovery) of species which may require special management or protection, whether occupied by species or not. Economic impact may be used to exclude an area from critical habitat unless extinction would result.
4. Opportunities for notice and hearing: Exist throughout listing process.
 - a. notice in Federal Register.
 - b. state and local agency notified (e.g., county).
 - c. hearing by request.
5. Total number of listed species in 1987: About 900, of which about 400 occur within U. S.; recently, about 50 added per year. (See Attachment 1.)

C. Special Circumstances

1. Emergency listings: Valid for 240 days.

D. Changes in Listing Status

1. Five-year review: FWS reviews each listed species every 5 years to determine needed changes.
2. Other opportunities: FWS may revise a species at any time after following required procedures.

E. Recovery Plans

1. Requirement: FWS must prepare species recovery plan following listing; summarizes species data and describes management programs.
2. Implementation: Uneven (60 percent of listed species had recovery plans in 1985).

F. Practical Considerations

1. Listing

- a. typically receive petitions from university and college instructors or environmental group. FWS may reject petition for insufficient information or for lack of agreement with petitioner (e.g., spotted owl).
- b. listing priorities: magnitude of threats, immediacy of threat, taxonomic position.
- c. species can be "up or down" listed or delisted. Delisting - usually because extinct; also find distribution more widespread.
- d. critical habitat: area not designated if publically perceived as a threat, if habitat is not a fixed location (e.g., California least tern), or because requirements to look at economic consequences of declaring critical habitat.

2. Recovery plans

- a. prepared by committee - local FWS, DFG, and independent researcher and/or university instructor.
- b. recommendations often general because have no funding and no responsibility for practical implementation (no action plans).
- c. review and approval process by FWS can be slow and protracted.

- d. decision to fund recovery plan preparation based on priority guidelines: degree of threat, species potential to benefit from recovery plan, species taxonomic position, and degree of conflict with development projects.

III. Section 7 Consultation (See 50 CFR Part 402)

A. Basic Requirements (See Attachment 3.)

1. Duty of federal agencies (Sec. 7[a][2]): Federal agencies must, in consultation with FWS, ensure that agency actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.
 - a. definition of federal "action": Includes direct federal action, granting of entitlements (contracts, leases, permits), and federal funding.
 - b. definition of "jeopardy" (FWS 1986 regulations): Action would reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing species reproduction, numbers, or distribution.
 - c. definition of "destruction or adverse modification" (FWS 1986 regulations): Direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.
2. Limitation on resource commitments: Once consultation initiated, federal agencies may not irreversibly commit resources, thereby foreclosing alternatives to proposed action; applies to listed species only.
3. Biological assessment: Federal agencies must prepare biological assessment for "major construction activities" (construction projects that would require Environmental Impact Statements [EIS] under the National Environmental Policy Act [NEPA]).
 - a. species list: Before preparing assessment, agency must request FWS to provide list of listed and proposed species in area.

- b. use: To determine if listed species or critical habitat "are likely to be adversely affected" by action.
- c. contents: Analysis of effects of proposed action and alternatives on listed and proposed species and habitat, including direct, indirect, and cumulative effects; effects on candidate species need not be considered.

4. Formal consultation process

- a. requirement: Federal agencies must request formal consultation if federal action "may affect" listed species or critical habitat. Exception: if FWS concurs that action "is not likely to affect" species or habitat based on biological assessment or informal consultation (see below).
- b. biological opinion: FWS within 90 days of request must issue biological opinion stating whether federal action is likely to jeopardize listed species or destroy critical habitat.
 - 1) information: Biological opinion must be based on best available data unless agency agrees to time extension; FWS may request but not require additional data.
 - 2) contents of biological opinion:
 - a) Effects of action (direct and indirect) on listed species and critical habitat, including cumulative impacts.
 - b) FWS opinion on jeopardy.
 - c) Jeopardy opinion must include "reasonable and prudent alternatives" to action that would avoid jeopardy; reasonable and prudent alternatives must be consistent with intended purpose of action, implementable by agency, and technologically and economically feasible.
 - d) Nonjeopardy opinion must address incidental take (see below).

e) Optional advisory conservation recommendations (measures to minimize adverse effects or develop more information).

3) draft biological opinion: May be reviewed by federal agency or applicant upon request.

4) certain incremental federal actions: Agency may request biological opinion on incremental step being taken and proceed with incremental step if it would not result in jeopardy, provided consultation continues on future steps and there is a reasonable likelihood that entire action would not result in jeopardy; applies to offshore oil and gas development (incremental steps of lease sale, exploration, and production).

5. Effect of jeopardy opinion: FWS jeopardy opinion entitled to great deference, but since FWS role is purely advisory, agency may proceed with proposed action, risking violation of Sec. 7(a)(2), or agency may seek exemption. (Taking prohibition still applies, however.)

6. Other consultation procedures

a. mandatory: Federal agencies must "confer" with FWS on actions likely to jeopardize a proposed species or destroy a proposed critical habitat; requirement does not apply to species that are candidates for listing proposals.

b. optional: Permit applicant and federal agency may initiate "early consultation" with FWS prior to filing permit application if biological assessment (if required) is prepared first; agency may initiate "informal consultation" prior to formal consultation (intended to reduce number of formal consultations).

B. Exemptions Following Jeopardy Opinion (See 50 CFR Parts 450-453)

1. Intent: To allow exemptions from requirements of Section 7(a)(2) following issuance of jeopardy opinion, provided certain conditions met; enacted in 1978 in response to Tellico Dam controversy.

2. Process

- a. Endangered Species Committee: Upon petition, FWS convenes committee composed of six high-ranking officials (Washington level) and one member from affected state.
- b. Conditions for granting exemption: Following FWS report, five members of committee must find that: no reasonable and prudent alternatives to proposed action exist; benefits of proposed action outweigh benefits of alternatives; alternatives were not foreclosed through irreversible resource commitments during consultation process; action is in public interest and is of regional or national significance; and mitigation and enhancement measures are established to minimize adverse effects.
- c. Effect: Very few exemptions have been granted; Tellico Dam was denied exemption by committee, but subsequently received specific congressional exemption.

C. Practical Considerations

1. Species list: FWS has up to 30 days to provide list of endangered and threatened species that may use project area.
 - a. can be very long list; FWS can add to list at any time.
 - b. proposed species - included on list.
 - c. candidate species - included on list.
2. Biological assessments
 - a. prudent to include proposed species.
 - b. if long time line--prudent also to consider candidates (but perhaps not in same depth); can determine from FWS if candidate could be proposed in near future.
3. Biological opinion
 - a. reasonable and prudent alternatives: FWS are biologists not engineers, architects, or planners--don't expect detailed alternatives to be offered.

- b. "best available data" used by FWS in biological opinion--applicant has better chance for no jeopardy determination if provides detailed, scientifically accurate analyses in biological assessment including literature review, site study, proposed project, and potential effects.
4. Early consultation: Most helpful to establish working relationship with FWS endangered species office staff. Get early input on potential conflicts and opportunities.

IV. Prohibited Acts, Exceptions, and Penalties

A. Prohibited Acts

1. Prohibition against import, export, sale, or transport: Applies to listed endangered fish, wildlife, or plant species.
2. Prohibition against taking:
 - a. application: For listed endangered (not threatened) fish and wildlife species only. Listed plants on federal lands may not be "removed and reduced to possession."
 - b. broad definition of "take": Harass (significant disruption of normal behavior), harm (includes significant habitat modification), pursue, hurt, shoot, wound, kill, trap, capture, or collect, or attempting this conduct.
 - c. threatened species: FWS has discretion to issue regulations necessary for conservation.
 - d. "Persons" to whom prohibitions apply: Defined broadly as individual, corporation, and any other private entity; or employee or department of federal, state, or local government.

B. Exceptions (See 50 CFR Parts 13 and 17)

1. Authorized take permits: may be issued for acts involving scientific purposes or intended to enhance species survival.

2. Incidental take permits

- a. intent: Take allowed if it is incidental to, and not the purpose of, carrying out otherwise lawful activity; substitutes flexible regulation for staff penalties.
- b. conservation plan: Applicant must submit conservation plan specifying steps applicant will take to minimize and mitigate adverse impacts, funding for such steps, and reasons alternatives to taking are not available.
- c. criteria for granting permit: FWS must find that: taking is incidental; applicant will minimize and mitigate impacts to maximum extent practicable; adequate funding exists for conservation plan; and taking will not result in jeopardy.

3. Incidental take in Section 7 consultation

- a. non-jeopardy opinion: Must set forth conditions governing incidental take, including requirements for "reasonable and prudent measures" to minimize adverse impacts; these are much narrower than the "reasonable and prudent alternatives" to avoid jeopardy.
- b. effect of incidental take statement: Compliance operates as exemption to requirement for incidental take permit.

C. Penalties

1. Civil: Up to \$10,000 for each violation; assessed by FWS.
2. Criminal: Up to \$20,000 or 1-year imprisonment for each violation.
3. Defense: Defendant was acting in good faith to prevent endangered or threatened species from causing bodily harm.

D. Practical Considerations

1. "Taking" habitat: does not just apply to critical habitat but to known habitat of species.
2. Habitat conservation plans
 - a. land use plan that protects bulk of individuals of listed species. Typically,

areawide plan (combination of preservation, conservation, enhancement, and habitat creation).

- b. recognizes incidental take and accounts for loss.
- c. provides certainty for local government and development interests.
- d. detailed, protracted development of plan. Requires EIS and EIR at local level. Requires public input on incidental take and changes in local land use.
- e. recent HCPs involve steering committee, including wildlife agencies, local agencies, developers, environmental groups, interested individuals, and others. Decision by consensus.

V. Selected Recent Developments

A. Legislative

- 1. Reauthorization of Act: Expected this congressional session.

B. Others

- 1. Experimental reintroduction of endangered species into former habitats. Controversial because may threaten life, property, or economy (e.g., reintroduction of California sea otter opposed by shellfishermen and oil companies). 1982 amendments to Act relax restrictions applied to reintroduced individuals to encourage attempted range extension or reintroduction. Why would private interest want to support experimental populations if they would restrict later options?
- 2. Conner v. Burford (88 D.A.R. 462, 1988)
- 3. EPA pesticide "label improvement program": Postponed for at least 1 year.

California Endangered Species Act
(Fish and Game Code Secs. 2050 et seq.)

I. History, Purposes, and Policies

A. History

1. Predecessor laws: Enacted in 1970 and 1977; less comprehensive.
2. Current law: Enacted in 1984, effective January 1985; no major subsequent amendments.

B. Purpose and Policies

1. Legislative findings: Similar to federal law.
2. Key policies
 - a. basic policy: To conserve, protect, restore, and enhance endangered species and their habitats.
 - b. state agency actions: State agencies should not approve proposed projects that would jeopardize endangered or threatened species or destroy habitat essential to their continued existence if reasonable and prudent alternatives are available.
 - c. overriding considerations: If specific social or economic conditions make such alternatives available, projects may be approved if appropriate mitigation and enhancement is provided.
 - d. state agency authorities: Must be used to conserve endangered and threatened species (i.e., agencies must use authorities to promote recovery, not just to avoid extinction).
 - e. landowner cooperation: Owners of habitat for endangered and threatened species are encouraged to cooperate to achieve Act's purposes.

II. Listing Process

A. Definitions

1. "Endangered species": Similar to federal definition, but excludes insects and limited to native

species; endangered animal and plant species listed prior to 1985 grandfathered.

2. "Threatened species": Similar to federal definition, but limited to native species; "rare" animal (but not plant) species listed prior to 1985 grandfathered.
3. "Candidate species": Species formally being reviewed for listing by DFG.

B. Process for Species Listing (also applies to delisting)

1. Initiation: With DFG or petition by interested person.
2. Decision to make species candidate for listing: Made by Fish and Game Commission (Commission) following DFG review.
3. Final decision on listing: Made by Commission following DFG study of species status; causes for listing as endangered include loss or change in habitat, overexploitation, predation, competition, or disease.
 - a. habitat necessary to continued existence of species: Not designated as part of formal listing process, but studied by DFG; defined more narrowly than federal critical habitat, because "conservation" (i.e., recovery) not mentioned.
4. Opportunities for notice and hearing: Exist throughout listing process; landowner notice required unless impractical.
5. Total Number of listed species in 1987: Animal, 65; plants, 187. (See attachments 3 and 4.)

C. Special Circumstances

1. Emergency listings: May be made via Commission regulation.

D. Changes in Listing Status

1. Five-year review: DFG to review each listed species every 5 years to determine if change needed; coordinated with federal review process.

2. Other opportunities: Commission or DFG may review species at any time based upon petition or other available data.

3. Annual report: DFG to publish annual report on species status. *May request report from Fish & Game Commission office.*

E. Recovery Plans

1. Requirement: DFG to develop recommendations for species recovery within 12 months of acceptance of petition by Commission.

2. Implementation: None to date.

F. Practical Considerations

1. Threatened species: No grandfathering because different criteria used for "rare" vs. threatened plants. Rare species can be nominated for threatened status. Native Plant Protection Act (NPPA) in effect.

2. Candidate species: Covered under provision of "taking," Trade-off in the development of the law for landowner notification.

3. Listing

a. Notice in agenda for Fish and Game Commission. Specifically, ask for copies of supporting materials.

b. Only few species proposed in 1987: 3 birds - Colorado River; desert tortoise; 14 plant species.

4. Determining species potentially on a site

a. California Natural Diversity Data Base (part of DFG).

b. No equivalent to federal candidate plant and animal lists.

III. State Agency Consultation (See DFG Guidelines, February 1986)

A. Basic Requirements (See Attachment 5.)

1. Duty of state lead agencies: May not approve proposed projects that would jeopardize the continued existence of listed species or destroy

or adversely modify habitat essential to continued existence of listed species, if reasonable and prudent alternatives could avoid jeopardy.

- a. agencies affected: State lead agencies preparing Initial Studies, Negative Declarations, or EIRs pursuant to CEQA.
 - b. DFG consultation: Required as part of CEQA process.
2. Limitation on resource commitments: None established by Act, but CEQA precludes agencies from premature resource commitments.
 3. Biological assessment: Formal biological assessment not required by Act, but information on listed species impacts must be contained in CEQA documents.
 4. Formal consultation process
 - a. DFG determination: DFG must issue written finding on whether proposed project would jeopardize listed species or destroy habitat essential to its continued existence, and on whether incidental taking would occur.
 - b. timing of written determination: Upon receipt of proposed Negative Declaration or Draft EIR.
 - c. information: DFG determination must be made based upon best existing scientific information.
 - d. types of DFG recommendations: If jeopardy found, DFG recommends "reasonable and prudent alternatives" that would avoid jeopardy but also maintain project purpose to greatest extent possible; if incidental taking found, DFG must recommend "reasonable and prudent measures" to minimize adverse impacts.
 5. Relationship to Section 7 consultation: When relevant, DFG must coordinate with Section 7 consultation and whenever possible adopt FWS Biological Opinion as DFG findings.
 6. Optional consultation procedures: State lead agencies or applicants may informally consult with DFG to consider effects on candidate species and to achieve early conflict resolution.

7. Local lead agencies: Not required by Act to formally consult with DFG, but may informally consult with DFG. CEQA provides authority for project disapproval based on listed species impacts.

B. Consequences of Jeopardy Finding

1. Reasonable and prudent alternatives: State lead agency must adopt reasonable and prudent alternatives that avoid jeopardy, unless below exception applies.
2. Exception: If specific social or economic conditions make these alternatives infeasible, agency may approve the project subject to two conditions.
 - a. mitigation and enhancement measures: Agency must require reasonable mitigation and enhancement measures to minimize impacts on species and habitat necessary for continued existence.
 - b. balancing: Benefits of proposed action must outweigh benefits of reasonable and prudent alternatives, and alternatives may not have been foreclosed through irreversible resource commitments during consultation process.
3. Extinction: Notwithstanding the above, agency may not approve project that would likely result in extinction of listed species.

C. Practical Considerations

1. Consultation requirements: Only apply to state lead agency actions, not to local government.
2. Informal consultation: Can be useful for building understanding of projects.

IV. Prohibited Acts, Exceptions, and Penalties

A. Prohibited Acts

1. Prohibition against taking, import, export, or sale: Applies to listed endangered or threatened plant or animal species; does not apply to rare plant species. DFG may apply to candidate species after notice.

- a. rare plants: NPPA prohibits taking of rare plants from the wild and requires landowners to notify DFG of intended land use changes to allow salvage provided DFG has notified landowner that a rare plant is found on property.
 2. Narrow definition of "take": hunt, pursue, capture, or kill, or attempting this conduct.
 3. "Persons" to whom prohibition applies: defined broadly, as in federal Act.
- B. Exceptions
1. Authorized take: permits or memoranda may be issued for scientific, educational, or management purposes.
 2. Incidental take permit: not provided for by state Act.
 3. Other minor exceptions: e.g., Commission may authorize taking pursuant to sportfishing.
- C. Penalties
1. No additional penalties: No additional penalties established by Act. \$2,000 and up to 1-year imprisonment; \$5,000 for birds of prey (Fish and Game Code Secs. 12008, 12010).
- D. Practical Considerations
1. NPPA: DFG has not used landowner notification to any extent. Silence is seen as a protective policy.

V. Selected Recent Developments

A. Legislative

1. Extension of sunset provision of the Act: from July 1, 1987 expiration date to July 1, 1988.
2. Possible amendments: Some discussion to extend the formal consultation process to local government lead agencies and to change definition of take.
3. Legislative activity this session: Senate Natural Resources Committee hearing on Sliding Toward Extinction. The Nature Conservancy recommended:

- a. accelerating listing process.
- b. expanding scope of Endangered Species Act.
- c. Legal protection for rare plant communities.

Summary Comparison of Federal and State
Endangered Species Acts

I. Listing Process

A. Steps in Process

1. Federal: More elaborate three-step process (candidate, proposed, and listed species).
2. State: Less elaborate two-step process (candidate and listed species).

B. Listed Species

1. Federal: Include nonpest insects.
2. State: Exclude insects.

C. Protected Habitat

1. Federal: "Critical habitat" definition mentions recovery of species as well as survival; protected habitat formally designated.
2. State: Protected habitat strictly limited to that necessary to prevent extinction; protected habitat not formally designated.

D. Recovery Plans

1. Federal: Majority of listed species have recovery plans.
2. State: Little progress; using federal plans.

II. Public Agencies (consultation requirements)

1. Agencies required to consult:

- a. federal: All.
- b. state: Only state lead agencies.

2. Standard for jeopardy opinion

- a. federal: Mentions recovery as well as survival.
- b. state: Strictly limited to survival.

3. Effect of jeopardy opinion
 - a. federal: Advisory, but subject to great deference.
 - b. state: Binding.
4. Procedure for overriding jeopardy opinion
 - a. federal: Endangered Species Committee exemption process.
 - b. state: Agency may adopt special statement of overriding considerations, unless extinction would result.
5. Agency affirmative duties other than consultation process
 - a. federal: Agencies must use authorities to promote conservation (i.e., recovery).
 - b. state: Similar.

III. Private Sector (prohibitions against taking)

1. Taking prohibition
 - a. federal: "Take" includes harass and harm; taking prohibition does not apply to plants or threatened species.
 - b. state: "Take" does not include harass and harm; taking prohibition applies to listed endangered or threatened species, including plants.
2. Exceptions
 - a. federal: Incidental take permit.
 - b. state: No incidental take permit, but permits or memoranda of understanding include "management."

Sources

I. Federal

1. Endangered Species Act (16 USC Secs. 1531 et seq.)
2. Endangered and threatened wildlife and plants: Review of vertebrate wildlife; Notice of Review (50 FR 37958-37967). List for environmental planning of all species under review categorizes species into:

- a. Category 1: Taxa for which FWS currently has substantial information on hand to support the biological appropriateness of proposing to list as endangered or threatened. Proposals have not yet been issued because they have been precluded at present by other listing activity.
- b. Category 2: Taxa for which information now in possession of FWS indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules.
- c. Category 3: Taxa that were once being considered for listing as endangered or threatened, but are not currently receiving such consideration.

3A - extinct species

3B - do not meet definition of species

3C - abundant species and/or reduced threat

- 3. Interagency cooperation: Endangered Species Act of 1973 as amended (51 FR 19926-19963). Procedural regulations governing interagency cooperation under Section 7. Covers agency and private applicant roles, informal consultation, biological assessments, and biological opinions.
- 4. Endangered and threatened wildlife and plants; prohibitions and permits (50 FR 39681-39691)
 - a. provides for permits to take endangered and threatened species incidental to otherwise lawful activities.
 - b. provides instruction for habitat conservation plans.
 - c. prohibits removal and possession of protected plants from federal jurisdiction.
 - d. interrelates Sections 7 (consultation), 9 (prohibited acts), and 10 (exceptions).

II. State

- 1. California Endangered Species Act (Fish and Game Code Secs. 2050 et seq.)
- 2. California Department of Fish and Game: Guidelines for consultation with the Department of Fish and Game on projects subject to CEQA that may affect endangered and threatened species. E. W. Cummings and Stephen J.

Nicola. Environmental Services Division Administrative Report 86-1. February 1986.

- a. procedures for state agencies to use in consulting with DFG on endangered and threatened species.
 - b. same procedures are suggested, but not required for other governmental entities and private project applicants.
3. California Department of Fish and Game: 1986 Annual Report on the Status of California's Threatened and Endangered Plants and Animals. February 1987. DFG required January 30 of each year to issue status report. Copies available from Fish and Game Commission through written request.

