The Federal Endangered Species Act

Practical Strategies for Implementing Public Projects Affected by FESA

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Intent (FESA § 2(b) - - 16 U.S.C. § 1531(b)

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



Endangered Species Act 101

- FESA is administered by:
  - The Fish and Wildlife Service (FWS) (U.S. Dep't of the Interior) for terrestrial and freshwater species
  - The National Marine Fisheries Service / NOAA Fisheries (NMFS) (U.S. Dep't of Commerce) for marine and anadromous (e.g., salmon) species

Key Sections of Federal ESA (16 U.S.C. §§ 1531-1544)

- Section 3: Definitions
- Section 4: Listing; Critical Habitat; Recovery Plans
- Section 7: Federal Actions; Biological Opinions; Endangered Species Committee
- Section 9: "Take" of Listed Species
- Section 10: Habitat Conservation Plans
- Section 11: Civil/Criminal Penalties and Citizen Suits

Listing Criteria (Section 4)

- Anyone (wildlife agencies, citizen, envt'l group etc.) can petition to list a new species as "endangered" (currently in danger of extinction) or "threatened" (likely to become endangered soon)

- Even non-pest insects can be listed

- Listing criteria (review based on the best scientific and commercial data available)

1. Extent of curtailment or destruction of the species' habitat
2. Overuse of the species for commercial, recreational or other uses
3. Disease or predation
4. Inadequacy of existing regulations
5. Any other factor affecting the species' continued existence

Critical Habitat (Section 4)

- "Critical habitat" includes areas occupied by the species at the time of listing that are essential to its conservation and require special protection, as well as unoccupied areas needed for conservation

- Service is to designate critical habitat for the species based on the best scientific data available after considering economic, social, and political impacts of the proposed critical habitat designation on current or proposed human activities





Recovery (Section 4)



- FESA Section 4(f) requires that the wildlife agencies develop and implement recovery plans for the conservation and survival of listed species
- Recovery plans do not have the force of law

Substantive Requirements (Section 7)

- Section 7(a)(2) requires federal agencies to "insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence" of any listed species

- Agencies are also prohibited from taking action that will result in the destruction or adverse modification of critical habitat

Section 7

What is a Federal Action subject to Section 7?

- Federal funding, federal project or federal permit
- For example, if your project needs a Clean Water Section 404 permit from the Corps of Engineers, it is a federalized project under FESA

Section 7 Formal Consultation Process

- If your project “may affect” listed species, and it is federalized, consultation is triggered
- Biological Assessment prepared by action agency
- Biological Opinion or “BiOp” usually issued
- “Jeopardy” BiOps include reasonable and prudent alternatives (RPAs)
- The Secretary will issue an incidental take statement only if the action (or RPA) and the incidental take will not jeopardize the listed species or adversely modify its critical habitat

Exemptions (Section 7)

- The ESA exemption process (rarely invoked or granted) includes:
  - Application made by a federal agency, permit or license applicant, or governor of the affected state
  - Determination and formal adjudication by the Secretary that Section 7 requirements have been met
  - Report submitted to the Endangered Species Committee (Secretaries of Agriculture, Interior, and the Army, the Chairman of the Council of Economic Advisors, the heads of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, and a representative from the affected state).
- The Endangered Species Committee ("God Squad") has the power to grant the exemption, though this exemption has only been granted a few times

Section 9 Take Prohibition



- All persons are prohibited from “taking” listed fish or wildlife species no matter where located and from removing, damaging, or destroying any listed plant species located on federal property
- “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”
- “Harm” includes any type of habitat degradation, modification, or other activity that actually kills or injures wildlife
- “Person” includes any individual; corporation; any officer, employee, agency, department of the federal government or of any state or local government; or any state or local government

Section 9 Take Prohibition continued

- Specific intent to harm, injure, or kill a member of a species need not be present for a taking to occur (only need intentional act and impacted species); habitat modification alone may amount to prohibited take (*Palila v. Hawaii Dept. of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981))



Section 10 Exceptions to Take Prohibition

- Section 10(a) allows private, state, and local entities to receive incidental take permits
- Section 10(a) provides that otherwise prohibited takings of endangered and threatened fish and wildlife may be allowed by permit if they are “incidental to, and not the purpose of” an otherwise lawful activity



Application Process for Section 10(a) Incidental Take Permit

- Must submit a habitat conservation plan (HCP) to the Secretary specifying:
  - Likely impacts of the anticipated taking
  - Steps applicant will take to mitigate impacts and available funding
  - Alternative actions considered and why these alternatives were rejected
  - Any other measures the Secretary requires to be addressed in HCP

Section 11

- Civil Penalties
  - Up to $25,000 (per violation) against any person who knowingly violates any provision of the ESA or regulation
  - "Knowingly" means only that the person knows he or she is killing or harming an animal, not that the killing or harming is unlawful
- Criminal Penalties
  - Up to $50,000 (total) and/or one year's imprisonment for such acts
- Section 11 also provides for "citizens lawsuits" to compel the Secretary of the Interior to enforce the ESA or against certain alleged violators

PRACTICAL TIPS

- Avoid listed species and try not to adversely modify critical habitat, if possible
  - Gather your project team early
  - Work with biological consultants before acquiring land and before designing final project
  - Reconfigure your project to avoid species, if you can
  - Understand protocol survey requirements
- Decide whether you want to "federalize" your project
  - FESA §7 Consultation may be a faster regulatory process with a lower biological bar than a §10 HCP process
- Consider in advance whether multiple city projects may be impacted in the future by the same listed species or group of listed species
  - HCP appropriate?
  - Conservation Bank?

EXAMPLE PROJECT
PIPELINE CONSTRUCTION





Thank you for attending

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