

Presentation to



Endangered Species Act Non-Federal Compliance Process and Options

Amanda Aurora, CWB
Senior Scientist / Project Manager
SWCA - Austin
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Endangered Species Act of 1973

- Protects listed species and habitats
- Species can be listed as “endangered” or “threatened”
- Generally, illegal to “take” a listed species without authorization
- Civil and criminal penalties for ESA violations
 - Fines or jail time - up to \$100,000 and 1 year imprisonment per violation
 - Non-enforcement consequences of violations include substantial project delays and negative press/market reactions
- Provides for “citizens suits” allowing third party enforcement of ESA



SPECIES OF CONCERN TO THE OIL & GAS INDUSTRY




INDIANA BAT

Habitat: Summer—mature wooded areas in summer; winter—caves and mines

Status: Endangered

Survey Window: Summer roost surveys—May 15-Aug. 15; winter—most locations known; requires service coordination

Known Distribution (see map): 


GRAHAM'S & WHITE RIVER BEARDTONGUES


Habitat: Exposed oil shale outcrops

Status: Proposed; final rule due July 2014

Survey Window: April 15-May 20; results valid until start of next survey season

Known Distribution (see map):

Graham's River Beardtongue (top) 

White River Beardtongue (bottom) 

AMERICAN BURYING BEETLE


Habitat: Grasslands, woodlands, forests, natural edge habitats

Status: Endangered

Survey Window: Active season May 20-Sept. 20

Known Distribution (see map):

Natural Population 


Experimental Population 

NORTHERN LONG-EARED BAT

Habitat: Summer—wooded habitats (in cavities, underneath bark, in tree hollows); winter—caves, mines, and tunnels

Status: Proposed; final rule due October 2014

Survey Window: Summer roost surveys—May 15-Aug. 15; Follow same protocols as Indiana Bat

Known Distribution (see map): 




GUNNISON SAGE-GROUSE

Habitat: Large expanses of sagebrush with wetland and riparian ecosystems

Status: Proposed; final rule due November 2014

Survey Window: Late March-early May


Known Distribution (see map): 

LESSER PRAIRIE CHICKEN

Habitat: Short- and mid-grass prairies

Status: Threatened

Survey Window: April


Known Distribution (see map): 

GREATER SAGE-GROUSE

Habitat: Large expanses of sagebrush

Status: Candidate; final rule due September 2015

Survey Window: Late March-early May

Known Distribution (see map): 

Triggers for Agency Involvement

- **Federal Actions -**
 - Action “may effect” listed or candidate species - a low threshold!
 - Likely to involve any action within potential habitat for a listed species
 - Determination made by the federal action agency, often in coordination with USFWS
 - *No effect* determinations by the action agency do not need USFWS concurrence
- **Non-federal Actions**
 - Depends on the likelihood of “take”
 - Responsibility of the project proponent to evaluate risk and seek a permit if warranted
 - Violations are subject to enforcement by USFWS

What is Take?

- “Take” defined by statute (16 USC 1532(20))
to **harass**, **harm**, pursue, hunt, shoot, **wound**, **kill**, trap, capture, or collect, or to attempt to engage in any such conduct



Photo Credit: GameBirdHunts.com

What is Take?

- “Harm” defined by regulation (50 CFR 17.3)
includes **significant habitat modification** or degradation where it **actually kills or injures** wildlife by **significantly impairing essential behavioral patterns**, including breeding, feeding, or sheltering
- “Harass” also defined by regulation (50 CFR 17.3)
an intentional act or omission that creates the **likelihood of injury** to wildlife by annoying it to such an extent as to **significantly disrupt** normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering



Take Assessments

- How to determine if project activities are likely to take a listed species?
 - Foreseeable
 - Proximate Cause
 - Actual death or injury of one or more particular members of a listed species
- And for “harm” by habitat modification?
 - *Significant* habitat modification
 - *Significantly* impairs essential behavioral patterns
 - Actually leads to *death or injury*
- Explicit analysis of the causal pathway from project activities to take

Responsibilities of Non-federal Project Proponents

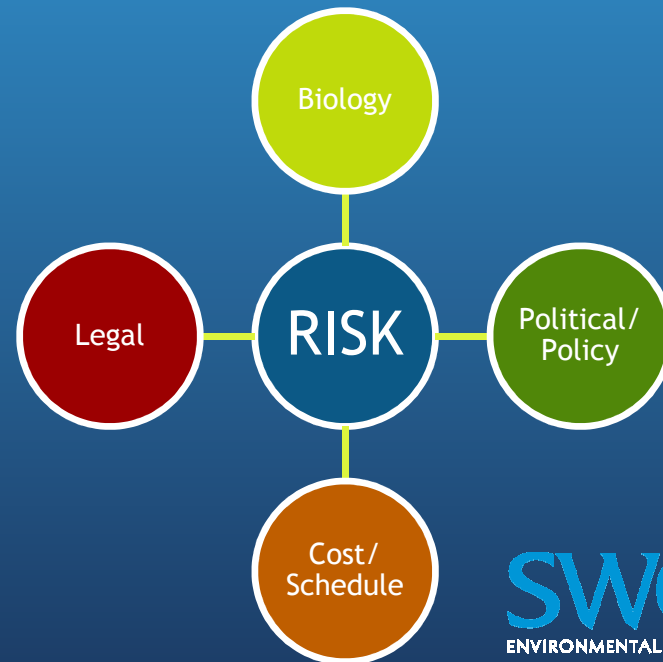
- No statutory or regulatory mandate to consult with USFWS - but project proponents risk of enforcement by USFWS for ESA Section 9 violations

Except as provided... with respect to any endangered species of fish or wildlife... **it is unlawful** for any person subject to the jurisdiction of the United States **to...take** any such species within the United States or the territorial sea of the United States... (16 USC 1538(a)(1))

The decision to obtain a permit lies with the prospective permit applicant. However, should the applicant ultimately elect not to obtain a permit, and an unauthorized take attributable to project activities occurs, the responsible individuals or entity would be liable under the enforcement provisions of the ESA. (HCP Handbook, pg 1-4)

Is Seeking USFWS Authorization Warranted?

- **Federal actions** - little opportunity for in-depth risk assessment; consultation is mandated
- **Non-federal actions** - If the possibility for take exists, risk assessment involves complex balancing of various considerations:
 - Biological (take assessment)
 - Legal
 - Political / Policy
 - Cost
 - Timeline
- Review recent precedents in the region for guidance
- Legal Assistance!



Non-federal Compliance Options

- Avoid Adverse Effects - obvious “no take” scenario
- Take / Risk Assessment results in decision that a permit is not warranted - finding an acceptable level of risk
- Candidate Conservation Agreement with Assurances for species identified for future listings
- 4(d) Rule Programs - e.g., WAFWA Rangewide Plan for LEPC
- Regional/Range-wide Habitat Conservation Plans
- Individual Habitat Conservation Plan
 - Project specific or company-wide programmatic
 - Permittee-responsible mitigation, conservation banks, in-lieu fee programs

Tips for Industry

- Be prepared and start planning early
- Carefully assess your risks
- Compliance will require time and money, but projects will go through
- Understand your options for compliance

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For Assistance Contact:

Amanda Aurora, CWB
Senior Scientist / Project Manager
SWCA – Austin
512.476.0891
aaurora@swca.com