

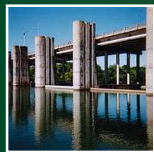


Endangered Species Act (ESA) – Listing Process Lessons

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ESA – Section 4 Listing Process Background



- Most important Section of the ESA
 - All protection, permitting, and enforcement actions in other sections of the ESA reference Section 4



Agencies in Charge of ESA



- U.S. Fish and Wildlife (USFWS)
 - Terrestrial and freshwater species
 - Department of Interior
- National Marine Fisheries Service (NMFS)
 - Marine species
 - Department of Commerce



What Species can be Listed Under the ESA?



- Very broad – breeding distinction
 - Elephant or cave bug
 - “Lumpers” versus “splitters”
 - Subspecies
 - Distinct population settings



Two Categories of Species Protected Under ESA – Section 4



- Endangered: Any species which is in danger of extinction throughout all or a portion of its range
- Threatened: Any species likely to become an endangered species within the foreseeable future throughout all or a portion of its range
- Same restrictions apply for both categories of species unless and ESA—Section 4(d) rule is written for a threatened species.
- Special rule that may allow for certain types of activities prohibited by ESA—Section 9; and, may set targets (i.e. population, etc.) for recovery of threatened species.



How do Species get Listed?



- Citizens petition process
- Agency listing process
- Emergency rule process (in effect for 240 days)



How are Species Identified as a Potentially Threatened or Endangered Species?



- Candidate species list
- Interested parties



How are Listing Petitions Processed?



- 90-day finding (petition may be warranted)
- 12-month finding (to list or preclude)
- Comment period for proposed decision to list (60 days)
- Final rule to list (30 days)



What are the Criteria for Listing a Species as Endangered or Threatened?



- Scientific based criteria:

- Solely based on the best scientific and commercial information available.

- Statutory criteria:

- Five criteria – two of the most commonly applied:
 1. Curtailment of the species, habitat, range, or population
 2. Inadequacy of existing local, state, or federal regulations to protect the species



The Case for the American Robin



- Decline in range, population, and habitat and there are identifiable threat



What is the Best Scientific and Commercial Information Available?



- Does not require scientific certainty
- Does not require new studies to verify
- Does require an assessment of the species entire population to determine if certain population within the species' range may require listing
- Does require an assessment of the current regulatory scheme but not future (potential) actions



How is the Best Scientific and Commercial Information Collected?



- Section 6 funding to states
- Heritage programs (The Nature Conservancy)
- University research
- Private sector research



Listed Species



- Over 2,000 species are designated as endangered or threatened. There are almost 800 species that have or are currently being processed by USFWS and NMFS under a settlement agreement primarily with two environmental groups — the Center for Biological Diversity and WildEarth Guardians.



Critical Habitat Designation



- Specific area within the geographic area occupied by the species that are essential to the conservation and recovery of the species and which may require special management requirements. It is assumed that modification or destruction of designated critical habitat may lead to extinction (i.e. jeopardy) of the species.
 - Palila court case
 - Sweet Home court case (proximate cause)



The Settlement Agreement to List 757 Species as Threatened or Endangered



- Settled by the Obama Administration and (primarily) the Center for Biological Diversity and WildEarth Guardians
- The government agree to review all species in the Settlement Agreement on a schedule published in the Federal Register
- Species Status Assessment



A “little history” Background on the Current Listing Mayhem



- This is not the first time that the Interior and Commerce Departments have “settled” a massive listing petition lawsuit.



A “little history” Background on the Current Listing Mayhem

(continued)



- Fund for Animals vs. Turner (1992)
 - Turner was the Director of the USFWS during the George H. W. Bush presidency
 - The same plaintiff’s attorney argued both cases
 - Government agreed to process for listing 401 species by 1996 and examine the possibility to review for listing another 1,100 species.
 - A total of 782 species were listed during George H. W. Bush and Bill Clinton’s tenures in the White House.



A “little history” Background on the Current Listing Mayhem

(continued)



- Fund for Animals vs. Turner (1992) (continued)
 - Many of these species listed took direct aim at otherwise lawful activities such as the timber, mining, land development, and water resources industries
 - Spotted Owl in the NW
 - Birds and Rats in Southern California
 - Bugs, Birds, and Salamanders in Central Texas
 - Fish in the Colorado River



A “little history” Background on the Current Listing Mayhem

(continued)



- The listings that occurred during the nineties resulted in planning chaos and sometimes severe economic dislocation of the regulated community



A “little history” Background on the Current Listing Mayhem

(continued)



- As the regulated industry began gathering information to the process authorizations under Section 7, 9, and 10 of the ESA, one thing became clear:
 - Data used to list the species was not reliable
 - Karst Invertebrates
 - Data used to justify listings was controlled by a select few researchers who would not turn their data over for public scrutiny
 - Barton Springs salamander (BSS)
 - Preble’s meadow jumping mouse
 - Data that ran contrary to the scientific claims and speculation in the listing package were suppressed or ignored
 - Golden-cheeked warbler (GCWA)



A “little history” Background on the Current Listing Mayhem

(continued)



- As the regulated industry began gathering information to the process authorizations under Section 7, 9, and 10 of the ESA, one thing became clear: (continued)
 - Studies that were commissioned by the regulated industry that were in direct contrast to the basis for listing a species were not submitted during the listing process.
 - Spotted owl
 - Data that clearly demonstrated that the species should be delisted were not acted upon
 - Black-capped vireo (BCVI)



A “little history” Background on the Current Listing Mayhem

(continued)



- When George W. Bush came into office, there was hope in the regulated community that some common sense and sound science would be restored in regulating the ESA.
- Although twice as many species were listed following the Fund for Animal Settlement as there were in the previous 16 years of the ESA, few had been recovered and there was little funding for recovery, the primary goal of the ESA.



A “little history” Background on the Current Listing Mayhem

(continued)



- Changes did occur during the George W. Bush administration on how the ESA was implemented.
 - More emphasis on tangible, scientifically-based evidence to support ESA decisions
 - More emphasis on cooperative approaches
 - More funding for recovery (i.e. less emphasis on rushing to list species and more emphasis on recovering the species that were on the list)





**This did not sit well with the
environmental groups**

Remember #1



- Always remember this #1; environmental advocacy is a multi-billion dollar industry
 - Very favorable ratings – all they have to say is that an evil woodsman is killing Bambi
 - Close connection to the government
 - Jamie Rappaport Clark – from Director of USFWS in the Clinton administration to President of Defenders of Wildlife
 - Don Barry – from Assistant Secretary of Interior in charge of Parks and Fish and Wildlife in the Clinton administration to the Wilderness Society and Defenders of Wildlife (also worked for the World Wildlife Fund and the Environmental Defense Fund)
 - Michael Bean – from the Environmental Defense Fund to Special Counselor to the Assistant Secretary of Interior for Parks and Fish and Wildlife in the Obama administration



Remember #1



- Granted, many other appointees in other administrations have gone on to work for the regulated industry and law firms associated with the regulated industry; however, we are no longer talking about environmental organizations that are run on a shoestring basis
 - These groups wield immense power and these associations should be scrutinized in the same manner in which other transition have occurred (i.e. it creates a question of how access and influence is granted in the same manner that industry is examined)



Remember #2



- Always remember this #2; there is an assortment of environmental advocacy groups
 - Environmental industry advocates and DC insider trading
 - Fantasy advocates and the “War on Evil”
 - Why worry about cost – they get paid virtually every time by the government whether they win or lose
 - Fear factor – garners unnecessary scrutiny of the regulated community by government reviewers
 - Settlements exclude the regulated community



Remember #3



- Always remember this #3; environmental groups will sue the government



Remember #4



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Remember #4



- Bush administration emphasis on recovery instead of listing results in two groups, Center for Biological Diversity and WildEarth Guardians petitioning (virtually) the remaining species on the Candidate Species list as endangered
 - Reasons that they are not on the list
 - Not enough verifiable information on decline
 - Precluded as a priority for listing
 - No known threats
- Bush administration failed to process the petitions timely and the Center for Biological Diversity and WildEarth Guardians sued to force them to list
- Settled by the Obama administration and the Settlement Agreement has set time frames for processing petitions
 - The two groups have petitioned for about 70 more species to be listed since the Settlement Agreement



Two Species that have the Potential to Affect Oil and Gas Development



- Lesser-prairie chicken (LEPC)
- Dunes sagebrush lizard (DSL)
- Both species were advertised as cooperative conservation efforts designed to preclude listings through an agreement for a plan (Candidate Conservation Agreement with Amendments (CCA)) that would codify all previous future efforts to prevent future decline to its range, habitat, and populations.



Species & Oil and Gas Development



- The LEPC developed a range-wide conservation plan covering multiple states to preclude listing but USFWS listed the species anyway
 - USFWS is now saying that the plan will be the basis for all enforcement and authorization actions (Section 4(d) Rule)
 - Conservation efforts have gone from voluntary and cooperative process to a mandatory process



Species & Oil and Gas Development



- The DSL agreement was approved by USFWS and passed a recent legal challenge but it was unclear whether that CCAA will be effective since it is voluntary
 - Also, I believe it has no relevant nexus between “take” and mitigation so expect another legal challenge unless you think growing vegetation in an arid environment is viable.





So where does this leave us?

Species & Oil and Gas Development



- The industry can continue on the path of fighting each listing petition on “new” regulation to existing as not supported by science or too costly for the American economy or exceeding the statutory intent of Congress
 - Fund scientific studies
 - File legal action
 - Seek changes to the ESA
- All of this has been attempted in the past 25 years and besides Sweet Home (which severely curtailed the extent destruction of habitat can be considered harm/take), there has been nothing that has materially changed in the 28 years that I have been working on ESA issues





So what should the oil and gas industry do?

Remember #1 and #2



- Remember this (redux) #1; that you are targeted by groups with tremendous sway over government and the American public
 - Simply saying that you are vital to economy or to the health, safety and welfare of the public is not enough
- Remember this (redux) #2; that they are attacking every facet of your delivery to the market
 - Production, surrounding infrastructure (ex-water) transportation, refinement, and use
 - You need to make a more comprehensive analysis than just production



Remember #3 and #4



- Remember this (redux) #3; PR machinery and political power only take you so far (insider trading only takes you so far in the world of the ESA)
- Remember this (redux) #4; quit playing the victim
 - You should see what they do to land developers in southern California and Austin if you want to see abuse of governmental power



Recommendation #1



- National Database
- Instead of financing scientific studies that are probably well done and point out serious deficiencies in the information that supports a particular listing the industry needs to take the lead in developing a private sector funded National Database for at-risk and listed species
 - Current data collection process is controlled by USFWS and various state agencies
 - Did anybody know that environmental groups are embedded in this process? (Heritage programs)
 - Access tightly controlled
 - Studies conducted by a selected few with pre-determined outcomes and relationship built on receiving funds from the agency
 - Public not aware that data collected by “contract” biologist may contradict current status of species
 - A National Database for species will create much more awareness of potentially listed species in a particular area and will provide valid information on the changing scientific basis for the regulatory process if the species is listed
 - The tale of two salamanders



Recommendation #2



- Start incorporating environmental constraints such as the ESA in the cost of doing business even if the species is not listed
 - Be proactive not reactive



Recommendation #3



- Only participate in common sense regional planning
 - Government participation is not mandated
 - Only two successful regional HCPs ever
 - Nearly all the rest based on unrealistic financial expectations of bad science
 - Nearly all of them add burdens to the plan as time goes on
 - The new karst protocols in Austin





**These are but a few of my
recommendations**





- You will notice that I did not use the term peer review

- The most overused complaint by scientist on both sides of a debate
- Stop it! Only time will tell.
- If we develop a database and fund research that changes the information demonstrating that listing may not be warranted then we can petition to delist it





- Finally, I have one final suggestion that can be related to the listing process but is a personal pet peeve on mine—make USFWS do their job—they have a very bad habit of only responding to what they want to respond to
 - Critical habitat
 - Five year status reviews



Questions



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