

Overview of the Endangered Species Act

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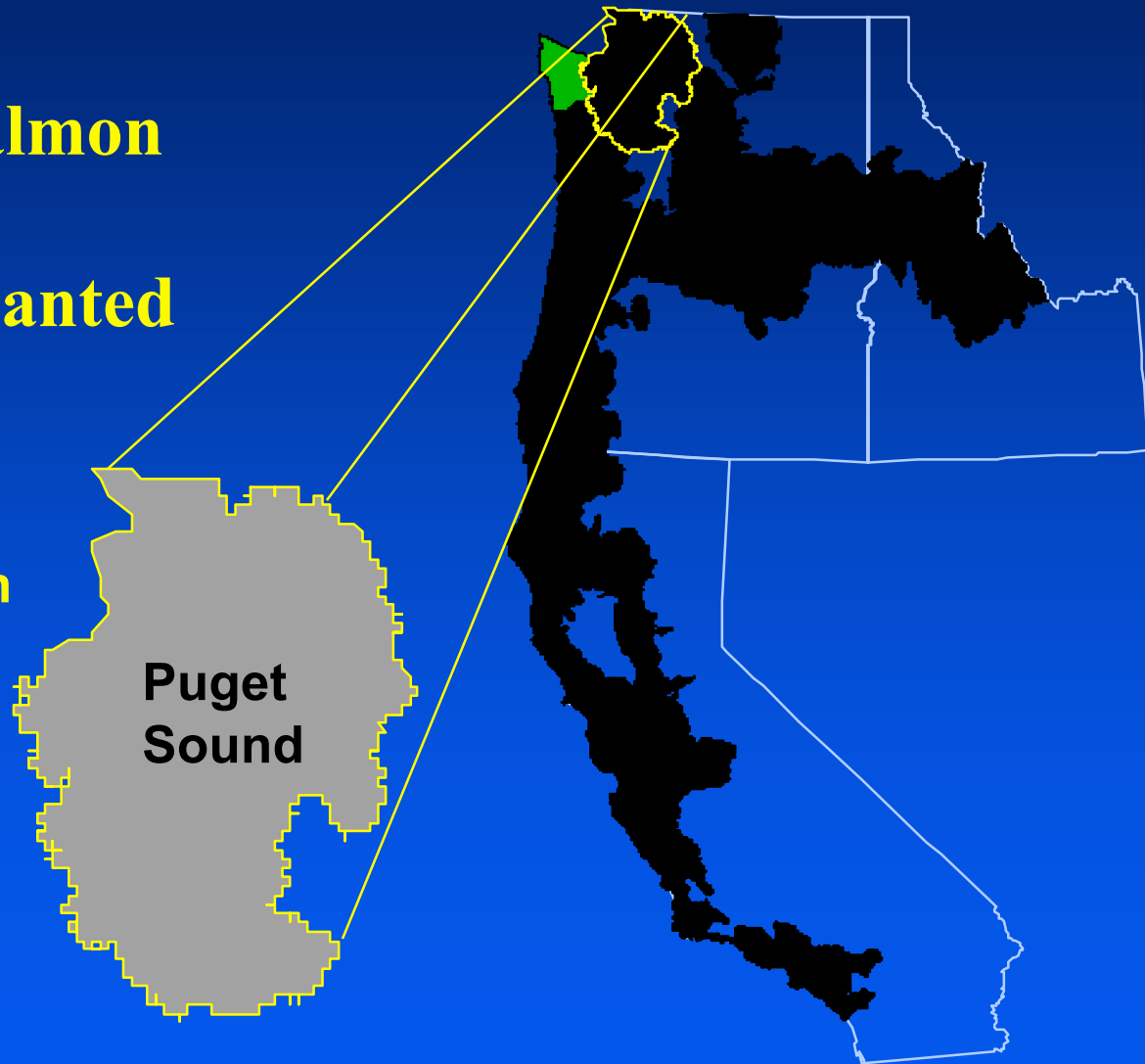
- **The Endangered Species Act of 1973 (“the ESA”)** authorizes the Secretaries of Interior and Commerce to (1) list species; (2) designate critical habitat; and (3) implement programs and regulations to conserve such species.
- **The ESA is both substantive and procedural.**
- **Implemented by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) through an MOA.**
- **Threatened vs. Endangered Status**

- The ESA defines a “species” to include any “distinct population segment (DPS) of any species of vertebrate...which interbreeds when mature.”
- DPS Policy – discreteness and significance.
- NMFS policy states that a salmonid population will be considered a “species” under the ESA if it represents an evolutionarily significant unit (ESU) of the biological species.
- Hatchery fish under new NMFS policy.

 **Listed Salmon**

 **Not warranted**

- **Killer Whales**
- **Chinook Salmon**
- **Bull Trout**
- **Chum Salmon**
- **Terrestrial Sp.**
- **EFH**



- Section 9 of the ESA makes it illegal to “take” listed species. Take is defined broadly to mean, among other things, to harass, harm, injure, or kill listed species.
- FWS and NMFS have adopted regulations defining the term “harm” as including significant habitat alteration which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns...
- Proof issues
- Civil fines and criminal penalties
- Injunctive relief
- Governmental liability
- 4(d) Rules – Conserve the Species

- Every discretionary federal action that “may affect” a listed species or designated critical habitat must undergo section 7 consultation.
- *National Wildlife Federation v. Les Brownlee*, 402 F.Supp.2d 1 (D.D.C. March 31, 2005).
- *Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs*, 351 F. Supp. 2d 1232 (D. Wyo. Jan. 7, 2005).
- NWP General Condition 17. See 71 Fed. Reg. 56258 (September 26, 2006).

- **The Corps failed to complete ESA consultation with FWS prior to approving the NWP for use in panther habitat. Consultation is required notwithstanding the NWP conditions requiring project specific consultations.**
- **The ESA violation easily may be corrected through the use of informal consultation provided that FWS agrees with the Corps concerning the sufficiency of existing permit conditions and procedures for project specific reviews.**
- **The proposed rule to reissue NWPs states that Corps districts will consult with the Services for the species that occur in their districts.**

- No activity authorized that will jeopardize listed species or adversely modify critical habitat.
- No activity authorized that “may affect” listed species unless ESA Section 7 consultation has been completed.
- Non-federal permittees shall no district engineer if listed species or critical habitat “might” be affect or is in the vicinity of the project, or is located in critical habitat.
- Cannot begin work until requirements of ESA satisfied.
- District Engineer determines if activity may affect or will have no effect on listed species within 45 days.
- As a result of consultation, Corps may add conditions.
- Approval of permit does not authorize take.

- **Every discretionary federal action that “may affect” a listed species or designated critical habitat must undergo section 7 consultation**
- **Jeopardy vs. adverse modification**
- **No effect determinations**
- **Informal v. formal consultation**
- **Section 7(d) limitation on commitment of resources**
- **Incidental Take Statements and Conditions**
- **Reinitiation of consultation**
- **Recovery planning**

- After listing species, NMFS and FWS typically designate “critical habitat” for the species
- Must consider the economic impacts of designation
- Critical habitat only relevant in the context section 7 consultation
- Federal agencies must avoid authorizing activities that “adversely modify” designated critical habitat
 - Adverse modification vs. jeopardy analysis
 - Implications of Gifford Pinchot and requirement to analyze effects on species recovery
 - Current status of adverse modification analyses

Applicant status - HLA v. NMFS, 288 F.Supp 2d 7 (D. DC 2003)

- Right to request (receive) and comment upon draft BO prior to its issuance
- Right to object to extensions of time in consultation
- Right to discuss any terms and conditions and requirement for Service to utilize applicant's expertise

Non-federal representative status

- Highly variable if agencies will extend non-federal representative status
- Non-fed representative status provides ability for applicant to prepare BA/BE on behalf of action agency

- **Consultation clock starts when Service determines information is complete**
- **Regulations provide that Service has 90 days from initiation (submission of BA/BE) unless extended**
- **Service may extend by an additional 60 days without consent of applicant**
- **Within 45 days of concluding consultation, the Service must issue a biological opinion (4 to 6 months).**
- **Informal consultation was intended to be faster**

- **Establishing the “lead agency”**
- **Designation as non-federal representative**
- **Requesting “formal consultation”**
- **Resolving conflicts between ESA, NEPA, and other legal requirements**
- **Resolving timing issues with agencies and securing staff resources for consultation**
- **Building relationships with agency staff**
- **Reviewing draft agency documents**
- **Ensuring sufficiency of documentation**

- (1) *Gifford Pinchot Task Force*, 378 F.3d 1059 (9th Cir. Aug. 6, 2004) (adverse modification).**
- (2) *Arizona Cattle Growers*, 273 F.3d 1229 (9th Cir. 2001) (likelihood of take and quantification of take).**
- (3) *National Wildlife Federation v. NMFS*, No. CV 01-640-RE (D. Or. May 26, 2005)(environmental baseline and jeopardy).**

- **Section 10 of the ESA provides that the Services may issue incidental take permits if for actions conducted pursuant to an approved “conservation plan”**
- **No Surprises**
- **NEPA and public notice requirements**
- **Implementation Agreement**
- **Incidental Take Permit**
- **Term of permit**
- **Post-termination mitigation**
- **Enforcement of permit terms**

- **On September 29, 2005 HR 3824 (“the Pombo Bill) passed the House of Representatives.**
 - **Repealed critical habitat requirements.**
 - **Created incentives, grants and reimbursement programs.**
 - **Best available science provisions.**
 - **Clarified baseline to include the effects of actions that have occurred or that are occurring.**
 - **Adopts no surprises regulation.**

- **Federal agencies must consult with NMFS if their action “may adversely affect” designated EFH**
- **Designated EFH in Puget Sound includes freshwater and marine areas inhabited by commercially-managed fish species (e.g., chinook, coho, pink salmon; groundfish species)**
- **Agency must prepare EFH assessment analyzing effects and recommending conservation measures**
- **Abbreviated and expanded consultation procedures**
- **Conservation recommendations**
- **Response to NMFS and Fishery Management Council**

[ESA Section 7 Consultation Handbook](#) - Policy handbook produced by NMFS and FWS concerning the section 7 consultation process (endangered.fws.gov/consultations/)

[The Matrix and the Habitat Approach Papers](#) - white papers explaining application of NMFS' PFC concept to section 7 consultations (www.nwr.noaa.gov)

[HCP Handbook](#) - Policy handbook produced by NMFS and FWS concerning the HCP process (endangered.fws.gov/hcp/index.html)

[ESA and EFH Regulations](#) - regulations guiding agency implementation of ESA (e.g., 50 C.F.R. Part 402 [ESA consultation]; 50 C.F.R. § 600.920 [EFH Consultation])