

Alaska Bar Association Municipal Section

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Overview of the Endangered Species Act

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Entering ESA-Land:

Basic Questions for Finding Your Way

- Adopt a project-oriented perspective: Is my project or activity in an area where an ESA-listed species is present or is it located in designated critical habitat for a listed species?
- Does the project have “federal handles” that will trigger the ESA consultation requirements (funding, permitting, other federal involvement)?
- Is the project likely to affect ESA-listed species or its critical habitat --might it harm listed species, broadly defined, or adversely modify its habitat?
- Has federal agency permitted other similar projects in the area since the species was listed? Are there other paradigms to examine to identify pathways through the ESA maze?

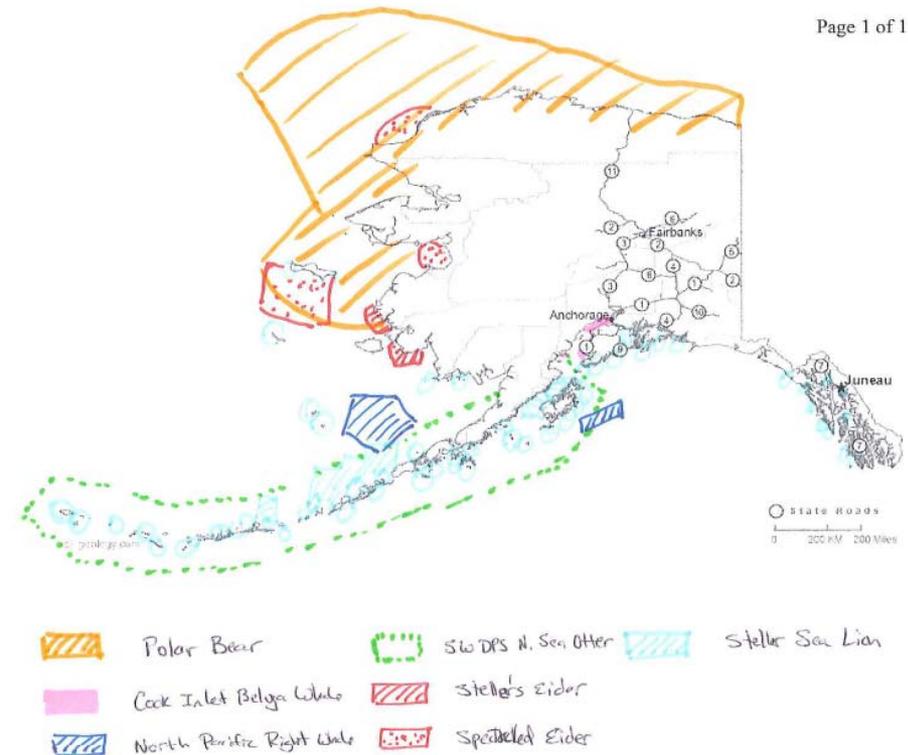
What is the ESA?

- The Endangered Species Act (ESA) of 1973 is a federal law that prohibits unauthorized “take” of listed species, and requires federal agencies to insure their actions avoid “jeopardizing” such species. The purpose of the ESA is to provide a means to conserve the ecosystems upon which listed species depend, but it does so with a species-specific starting point.
- It is administered by Interior’s Fish and Wildlife Service (freshwater aquatics; plants; terrestrial and avian species) and Commerce’s NOAA Fisheries (marine and estuarine species).
- The ESA authorizes (requires) the Services to list species as threatened or endangered; to designate critical habitat; and to enact regulations to conserve listed species.
- The ESA may impose significant substantive and procedural requirements on federal agency activities, resulting in a powerful new layer of mandatory process steps and substantive protective requirements.

The ESA Starting Point: The First Prong of the Listing Process: Listing Species

- The entire ESA machinery starts with the listing of threatened or endangered species – and the designating of their critical habitat – authorized in section 4 of the Act.
- Its a mandatory duty based upon the best available scientific information; driven by petitions to list and subject to third party litigation.
- Two core issues in listing: what is the “species”; and what is its risk of extinction through all or a significant portion of its range.
- 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.
- Risks of extinction typically informed by population trends and viability analyses

- Polar Bear
- Cook Inlet Beluga Whale
- North Pacific Right Whales
- Steller's and Spectacled Eider
- SW Alaska DPS N. Sea Otter
- Steller Sea Lion
- Walrus?



The Second Prong of the Listing Process: Designating Critical Habitat

- When listing a species, NMFS and FWS must designate “critical habitat” for the species or explain why it is not warranted.
- Critical habitat is defined by statute as that habitat essential for conservation and in need of special management protection.
- 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

The Basic Rules of the ESA

- Federal agencies must avoid taking actions that are likely to jeopardize listed species;
- Federal agencies must avoid taking actions that adversely modify designated critical habitat;
- Everybody must avoid doing things that will “take” listed species;
- Procedural: Federal agencies must consult with FWS/NMFS before doing things that affect listed species;
- Procedural: Everyone must get authorizations to engage in the “incidental take” of listed species, using either the incidental take authorizations of the section 7 consultation process or the incidental take permitting provisions of section 10.

Section 7 Consultations

ESA Prohibition #1: Federal agencies shall not jeopardy listed species or adversely modify their designated critical habitat: the main driveshaft of the ESA program.

- Every discretionary federal action that “may affect” a listed species or designated critical habitat must consult with the expert agencies (FWS/NMFS) to ensure compliance with the protective requirements of the ESA.
- Sec. 7 consultation a formalized, multi-step process that may result in issuance of a “biological opinion” that describes the effects of the proposed action on listed species and recommends ways to minimize or avoid those effects
 - Reasonable and prudent alternatives (for jeopardy/adverse mod opinions)
 - Reasonable and prudent measures (RPMs)
 - Incidental take statements
 - Quantification of take
 - Reinitiation of consultation

Section 7 Consultation – Key Concepts

- Every **discretionary** federal action that “may affect” a listed species or designated critical habitat must undergo consultation
- Species list letters
- No effect determinations
- Informal v. formal consultation
- Biological assessments
- Section 7(d) limitation on commitment of resources
- Reasonable and prudent measures (RPMs)
- Incidental Take Statements and Quantification of Take
- Reinitiation of consultation
- Recovery planning

Status During a Consultation

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

ESA Prohibition # 2: Do not “take” listed species (the Section 9 “Take” Prohibitions)

- Section 9 of the ESA makes it illegal for anybody to “take” listed species unless authorized by the incidental take machinery of the ESA. 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...*
- The take prohibition is broadly applicable to everyone: governments and private entities
- Proof issues: how much showing of harm is actionable?
- Not self enforcing; but injunctive relief available, as are civil fines and criminal penalties

Authorizing Incidental Take Outside of Section 7 Consultations: the Section 10 “incidental take” permits

- The Services may issue permits authorizing incidental take of listed species if for actions conducted pursuant to an approved “conservation plan.” See ESA Section 10(a)(1)(B); 50 CFR § 222.307; 50 CFR § 17.32.
- Most applicable where activities have a high likelihood of take, where they do not have federal handles, and where long-term certainty is desirable
- The required documents include HCP, Permit, IA, BiOp, NEPA document
- Implementation Agreement or “IA”
 - Dispute resolution
 - Adding new species
 - Termination
- Post-termination mitigation
- Applicability of “no surprises” assurances to improve long-term certainty

Key Recent Cases

- (1) *Gifford Pinchot Task Force*, 378 F.3d 1059 (9th Cir. Aug. 6, 2004) (adverse modification).
- (2) *ONRC v. Allen*, No. 05-35830 (9th Cir. 2007) (quantification of take).
- (3) *National Wildlife Federation v. NMFS*, No. CV 01-640-RE (D. Or. May 26, 2005)(environmental baseline and jeopardy).
- (4) *National Association of Home Builders v. Defenders of Wildlife*, 2007 WL 1801745 (2007)(discretionary involvement or control and need for consultation)

Additional Resources

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

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])

ESA Practice Tips

- Plan early for ESA consultations and be conservative in expectations: the consultation process can upend project schedules and can result in material changes to proposed projects.
- Search for friendly (and unfriendly) examples of similar projects and consultation prototypes. Pay attention to the science and biology of the underlying listing decisions, species status reviews and available recovery plans.
- Do your homework and do their homework: superficial assertions will not carry the day where “take” can reasonably be anticipated.
- Continually search for (and be vigilant of) the technical and legal interrelationships among similar regulatory programs; compliance with other federal or state environmental requirements will not per-se suffice.
- If litigation is a possibility, pay attention to building the record. Be aware of the community of interests associated with your project or undertaking (friends and foes alike).
- Advise your clients to take it seriously and procure good outside expertise if needed.