



# ▶ THE ENDANGERED SPECIES ACT

## How Can You Stay Ahead of the Game?

Scott R. Smith

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What is it?



▶ Passed in 1973

Found at 16 USC §1531, et seq.

Designed to prevent the irreversible extinction of plant and animal species.

USFWS has jurisdiction over the threatened and endangered species found in Kentucky



# ▶ WHY SHOULD YOU CARE ABOUT THE ENDANGERED SPECIES ACT



Why should you care?



▶ ESA compliance will result in extended time and project costs.

If you don't comply, you are penalized:

- Felonies: fines up to \$50,000 and/or one year imprisonment
- Misdemeanors/civil penalties: fines up to \$25,000
- Unintentional violations: fines up to \$1,000
- Rewards leading to convictions: up to \$2,500

## Enforcement Actions in Kentucky

- ▶ 2009: a natural gas exploration and production company in London, KY. Violations of ESA and CWA. ESA charge was based on the recovery of 2 dead blackside dace (a fish). Fine of \$50,000.

2014: A \$7200 reward offered for information on the November shooting of a whooping crane in KY.



# ▶ WHAT TYPES OF PROJECTS TRIGGER ESA COMPLIANCE?



- ▶ Step 1: Determine whether you have a federal nexus OR if your project requires ESA compliance.

## WHAT TYPES OF PROJECTS TRIGGER ESA COMPLIANCE?

- ▶ ANYTHING that will result in
  - An “incidental take”;
  - A “take”;
  - Or “harm” of a threatened or endangered species.

**BUT, Construction Activities** are primarily the projects that trigger ESA requirements.



## What Activities Require A ESA Permit



- ▶ “Taking” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”

“Incidental Take”, almost a taking. Burden is on the owner and/or builder to decide if an “incidental take” permit is needed.

“Harm”, includes significant habitat modification where it kills or injures a “listed “ species through impairment of essential behavior (nesting or reproduction).

- ▶ • **Before** beginning any construction project you should consider the impact of your construction activities on species listed or proposed under the Endangered Species Act (ESA) and the habit of listed species.
- The impacts on listed species should be assessed as **early** as possible in the construction process to avoid delays in your project

- ▶ The ESA generally applies to construction activities under three general scenarios:
  - Construction activities under **EPA's Stormwater Construction General Permit (CGP)**;
  - Activities funded or permitted by federal agencies (other than the CGP) for a construction project;
  - Construction activities that impact a listed species and/or critical habitat.



Does the ESA apply to projects on private and other non-federal land?

**YES!**

Projects can fall under **Section 7** or **Section 9** of the  
ESA

- ▶ • Requires a **Federal nexus** - federal agency funds, authorizes (though a permit or license) or carries out the program or project.
- Federal agencies are required to conserve threatened and endangered species through a process of consultation with FWS.
- Consultation allows a Federal agency to ensure that their actions (permits, funding, etc.) are not likely to jeopardize listed species or destroy or adversely modify critical habitat.
- Once consulted, FWS must, if listed species might be affected, prepare a **biological opinion** to determine the actual impact of the proposed action.

## ▶ Section 9: The Take Prohibition

- No one may “take” an endangered animal species on either private or public land.
- “Take” includes not only to hunt, kill, or wound, but also harm or harass.
- Permits can authorize “incidental take.”

### BUT – Section 10

Creates an exemption from Section 9’s taking prohibitions.

Allows some projects to proceed even if the projects may harm individuals of a listed species.

Agencies can issue Incidental Taking Permits (ITPs) to non-federal entities after the landowner submits a habitat conservation plan (HCP), including proposed mitigation measures and the considered but rejected alternatives to the proposed action.



▶ HOW TO IDENTIFY THE PRESENCE OF AN ENDANGERED SPECIES OR ITS HABITAT



▶ Step 1: Determine whether you have a federal nexus OR if your project requires ESA compliance.

Step 2: Determine whether you are you located in an area where a threatened or endangered species is found.



- ▶ • The FWS of the Department of the Interior **maintains the worldwide list** of endangered and threatened organisms.
- U.S. F&W is increasing the number of endangered species. Pay attention to the Federal Register!

## Possible websites to check



- ▶ Before you begin construction, consult KY and U.S. F&W listings, which might include:

<http://www.fws.gov/ENDANGERED/species/>

<http://www.fws.gov/frankfort/>

<http://fw.ky.gov/More/Pages/Kentucky's-Threatened-and-Endangered-Species.aspx>

## Indiana Bat



- ▶ • Specifically pay attention to the Indiana Bat ([http://www.fws.gov/frankfort/indiana\\_bat\\_procedures.html](http://www.fws.gov/frankfort/indiana_bat_procedures.html))
- Found throughout KY
- MOAs are available but require TIME & MONEY



# Species of note in Kentucky



## ▶ Long Eared Bat



Proposed; all over

## Kentucky Glade Cress



Bullitt and Jefferson

## Running Buffalo Clover



Central Kentucky



A THREATENED OR ENDANGERED  
▶ SPECIES MAY BE IMPACTED BY MY  
PROJECT. NOW WHAT?



- ▶ Step 1: Determine whether you have a federal nexus.
- Step 2: Determine whether you are you located in an area where a threatened or endangered species is found (using suggested websites).
- Step 3: Determine whether the area that you are disturbing contains habitat of a threatened or endangered species.

## Does your site contain critical habitat?



- ▶ • Conduct visual inspections to identify any listed species or critical habitat. Suitable for sites that are smaller in size or located in non-natural settings.
- Conduct a formal biological survey. Suitable for larger construction sites with extensive stormwater discharges.
- Conduct an environmental assessment under the National Environmental Policy Act (NEPA). Coverage under CGP does not trigger NEPA.



▶ HOW TO MITIGATE YOUR  
RESPONSIBILITIES TO FISH &  
WILDLIFE

BOOK 551 PAGE 500

STATE OF *Kentucky*



- ▶ Step 1: Determine whether you have a federal nexus.
- Step 2: Determine whether you are you located in an area where a threatened or endangered species is found (using suggested websites).
- Step 3: Determine whether the area that you are disturbing contains habitat of a threatened or endangered species.
- Step 4: Notify Fish and Wildlife and be prepared to work with them to mitigate or permit your project.

- ▶ For a section 7 consultation - If “jeopardy” of species or “destruction or adverse modification” of critical habitat is found, the FWS must suggest “reasonable and prudent alternatives”.

If the agency agrees then the FWS issues a incidental take statement and the activity may go forward consistent with its terms.

## The “God Squad”



- ▶ A federal action may be exempted from the section 7 mandate by an Endangered Species Committee of high-ranking federal officials (popularly called the **God Squad**).

The Committee must find, among other things, that **there are no reasonable and prudent alternatives to the agency action, and that the action’s benefits clearly outweigh the benefits of alternatives** that would conserve the species or its critical habitat.

The Endangered Species Committee exemption process is generally considered burdensome and is rarely used.

## Section 10 Incidental Take Permits (ITPs)



- ▶ The consultation for section 10 ITPs is the same as the Section 7 consultation.

Compliance with the mitigating measures in the biological opinion confers the same exemption.

So, what are some examples of things you can do?

- ▶ Effective recovery of listed species depends in part on:
- (1) **creative processes** such as avoiding or minimize adverse impacts to listed species, their habitat and Critical Habitat. Therefore you may avoid projects during a certain:
    - Time of year
    - Time of day
    - Physical location
  - (2) and **agreements**, such as:
    - safe harbor agreements,
    - habitat conservation plans,
    - recovery permits,
    - MOAs are available but require TIME & MONEY
    - conservation banks.

KA3

**Slide 29**

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**KA3**

I will create slides to explain each of these.

Kori Andrews, 7/29/2014

- ▶ A voluntary agreement involving private or other non-Federal property owners whose actions contribute to the recovery of species listed as threatened or endangered under the Endangered Species Act

The agreement is between cooperating non-Federal property owners and the U.S. Fish and Wildlife Service

In exchange for actions that contribute to the recovery of listed species, participating property owners receive formal assurances from the Service that if they fulfill the conditions of the SHA, the Service will not require any additional or different management activities by the participants without their consent

- ▶ Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal parties to conserve ecosystems

HCPs are planning documents required as part of an application for an incidental take permit.

HCPs describe:

- the anticipated effects of the proposed taking;
- how those impacts will be minimized, or mitigated; and
- how the HCP is to be funded.

HCPs can apply to both listed and nonlisted species, including those that are candidates or have been proposed for listing.



- ▶ Issued to allow for take as part of activities intended to foster the recovery of listed species.

A typical use of a recovery permit is to allow for scientific research on a listed species in order to understand better the species' long-term survival needs.

- ▶ These may take many forms. Some examples:
  - Preservation (acquisition or conservation easement) of existing habitat;
  - Enhancement or restoration of degraded or a former habitat;
  - Creation of new habitats;
  - Establishment of buffer areas around existing habitats;
  - Modifications of land use practices and;
  - Restrictions on access.

## Indiana Bat

[http://www.fws.gov/frankfort/indiana\\_bat\\_procedures.html](http://www.fws.gov/frankfort/indiana_bat_procedures.html)



- ▶ • Projects that can affect the bat: land clearing, utility line construction and maintenance, and road construction and maintenance.
- Projects in areas where suitable bat habitat occurs and where the bat is known or assumed to be present require proponents to determine if potential adverse effects to the bats will occur and, if so, how can the project avoid or minimize the effects.
- If avoidance is not achievable, project proponents have 3 options:
  1. Surveying;
  2. Conducting informal and/or formal consultation under §7(a)(2);
  3. Obtaining an incidental take permit pursuant to § 10(a)(1)(B).



# ▶ PLANNING YOUR PROJECT



## How Much Time To Receive Approvals??



- ▶ The length of time to complete the permitting process depends on:
  - The complexity of issues involved (number of species);
  - The completeness of the documents submitted by the applicant;
  - Availability of personnel to conduct the review of information submitted.

## How Much Time??



- ▶ • “Low Effect “ permits, those involving minor impacts, are processed in approximately three months. This does not include time the applicant spends to prepare the application.
- Projects with greater impacts that will require the applicant to submit additional documents (Environmental Assessment or Environmental Impact Statement) have a processing times of up to 12 months.

Tips...



▶ Detail matters!!

Determine if have federal nexus early

Work with FWS & other federal agencies to aid in determining affected species, minimization measures, etc.

Build species measures into project design

Plan time to determine effects and get compliance

**Don't wait 'til the last minute for ESA compliance**

Questions?



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▶ **THANK YOU**  
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