The Endangered Species Act and the Oil and Gas Industry

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Section 4 Listing

• Section 4 requires listing of “endangered” and “threatened” species.
  – “Endangered” means a species is in danger of extinction throughout all or a significant portion of its range.
  – “Threatened” means likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

• Listing factors: 1) present or threatened damage to or destruction of habitat or curtailment of range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) inadequacy of existing protective measures; and 5) other natural or manmade factors.

• Listing decisions must be made “solely on the basis of the best scientific and commercial data available.”
Section 9 Take Prohibition

- Section 9 prohibits “take” of any endangered species by any “person.”
- “Take” includes harassing, harming, pursuing, shooting, wounding, killing, capturing, or collecting listed species, or attempting to engage in any such conduct.
- “Person” is broadly defined to include essentially any person or entity subject to the jurisdiction of the United States.
Section 9 Take Prohibition (cont’d)

- FWS has by regulation extended the take prohibition to threatened species, in the absence of a special rule under ESA §4(d). 50 C.F.R. §17.31
- NMFS addresses take of threatened species on a case-by-case basis.
“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. §1537(a)(2) (emphasis added).
Potential Triggers for Section 7 Consultation

- Drilling activities on Bureau of Land Management or U.S. Forest Service lands.
- Drilling activities on BOEM-leased offshore lands.
- Wetlands permits from the Army Corps of Engineers for pipeline crossings or certain other oil and gas activities affecting waters of the United States.
Consultation Triggers and Off Ramps

- May Affect Determination → Informal Consultation (Biological Assessment, Not Likely to Adversely Affect Determination, Concurrence Letter)
- May Adversely Affect Determination → Formal Consultation (Biological Opinion, No Jeopardy Opinion, Reasonable and Prudent Measures, Incidental Take Statement)
- Jeopardy Determination → Reasonable and Prudent Alternatives or Endangered Species Committee
• If the Service issues a no jeopardy opinion, it may include an incidental take statement (§7) or permit (§10).

• “Incidental take” is defined as take that results from, but is not the purpose of, carrying out an otherwise lawful activity.

• An incidental take authorization must describe any incidental take that may result from an agency action, and must contain clear terms and conditions designed to reduce the impact of the anticipated take to the species.
• Under ESA Section 10, a private party or state or local government undertaking an activity that may result in take of a listed species must obtain an **incidental take permit** from the applicable Service.

• To obtain a permit, the applicant must develop a **habitat conservation plan** (HCP) to offset any harmful effects the proposed activity might have on the listed species.

• Issuance of a Section 10 Permit triggers Section 7 Consultation.
Habitat Conservation Plans (HCPs)
- Required to meet the permit issuance criteria of ESA Section 10.

Candidate Conservation Agreements (CCAs)
- Voluntary conservation agreements between the Service and public or private parties.

Candidate Conservation Agreements with Assurances (CCAAs)
- More expansive than traditional CCAs, because they relate to non-Federal landowners, who can receive assurances.
- Assures that if such landowners implement certain conservation measures, they will not be subject to additional restrictions if and when the species becomes listed under ESA.
**WildEarth Guardians v. Salazar**

- Species go to the candidate list when they warrant protection but the Service determines other priorities preclude their listing.

- WildEarth Guardians and the FWS proposed a stipulated settlement agreement on May 10, 2011.

- The Center for Biological Diversity and the FWS followed with a separate stipulated settlement agreement on July 12, 2011.

- The U.S. District Court for the District of Columbia approved the settlements on September 9, 2011.
• Sets a 6-year schedule for final listing decisions on 251 species on the FWS candidate list and initial findings on hundreds of others.

• The settlements could result in a considerable increase to the 1,300 species currently protected under ESA, and their designated critical habitat.

• In February of 2013, FWS issued a work plan for all species covered by the settlement for fiscal years 2013-2018.

Texas Conservation Plan for the Dunes Sagebrush Lizard (Sceloporus arenicolus)

- The plan’s objectives are to facilitate continued and uninterrupted economic activity in the Permian Basin, which accounts for over 20% of national domestic energy production, and to promote compliance with the ESA for covered oil and gas activities.

- The CCAA portion of the plan applies so long as the DSL remains unlisted. It would encourage non-Federal participants to manage their property to minimize and mitigate impacts to the DSL in exchange for the ability to obtain coverage under ESA Section 10 if the DSL is listed.

- If the DSL is listed, the plan would facilitate the issuance of a Section 10 incidental take permit authorizing take of the DSL pursuant to an HCP incorporated into the plan.
Texas Conservation Plan for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*)

Oil and Gas Mitigation Measures

- Develop well sites outside of occupied and suitable shinnery oak dune complexes.
- Limit human and vehicular activity around well sites through remote monitoring, pipeline-based transportation of fuels, etc.
- Limit seismic surveying to areas outside of occupied shinnery oak dune complexes.
- Improve habitat through reclamation of plugged and abandoned locations.
- Collaborate with FWS on proposed research activities to advance the science for the DSL and delineate the DSL’s habitat.
Lesser Prairie Chicken Status Update

- LPC Proposed ESA Listing (threatened) in December 2012.
- Final Listing Decision due March 30, 2014.
- In May of 2013, FWS proposed a 4(d) rule that would allow take consistent with the NRCS LPC Initiative and conservation plans developed by or in coordination with state fish and wildlife agencies.
- WAFWA LPC Range-wide Conservation Plan endorsed by FWS in October 2013.
  - Covers portions of Texas, New Mexico, Oklahoma, Kansas and Colorado
- Proposed 4(d) rule requested comment on whether it should be expanded to cover other (i.e., industry specific) conservation plans.
Conservation Plans and Agreements

Greater Sage Grouse

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Questions?

Comments?