

# THE ENDANGERED SPECIES ACT

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## **ELI Summer School**

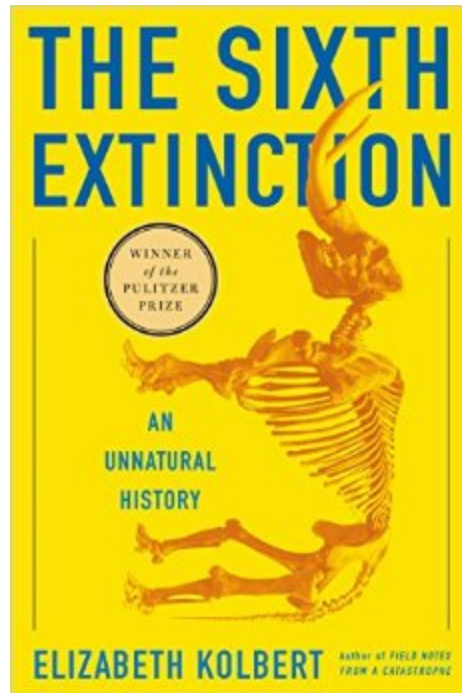
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June 22, 2017

# Why does it matter?



# WWF Living Planet Index 1970-2010

Population sizes of vertebrate species have declined by **52%**



TERRESTRIAL SPECIES  
DECLINED BY 39 PER  
CENT BETWEEN 1970  
AND 2010



THE LPI FRESHWATER  
SPECIES SHOWS AN  
AVERAGE DECLINE OF  
76 PER CENT

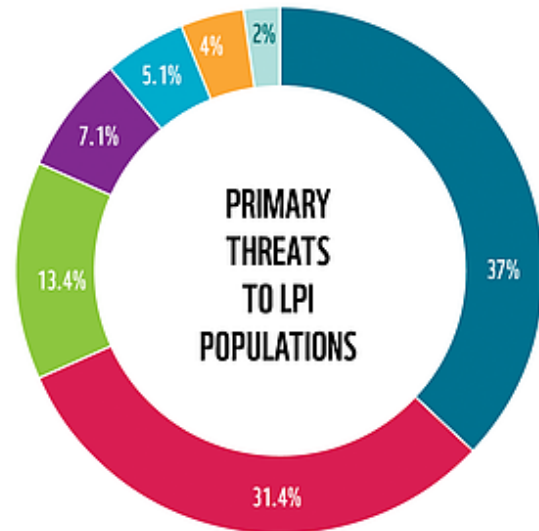


MARINE SPECIES  
DECLINED 39 PER CENT  
BETWEEN 1970 AND  
2010

## INFOGRAPHIC

### PRIMARY THREATS TO LPI POPULATIONS

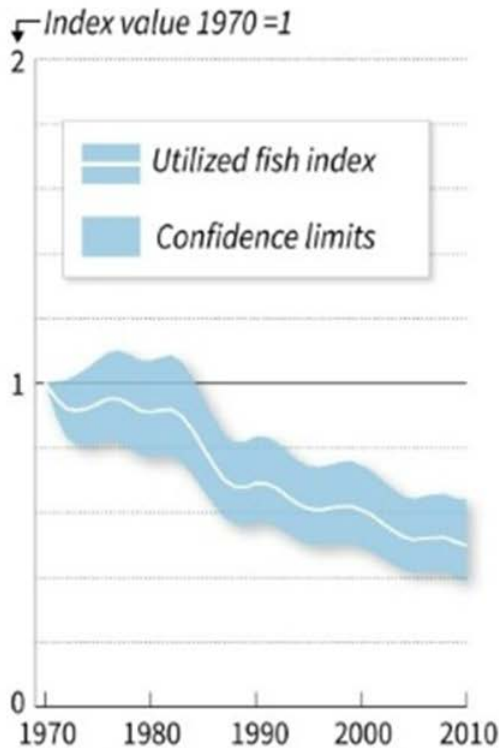
Information on threats has been identified for 3430 populations in the LPI assigned to seven categories. Other populations are either not threatened or lack threat information (WWF, ZSL, 2014).



# WWF Living Blue Planet Report 2015

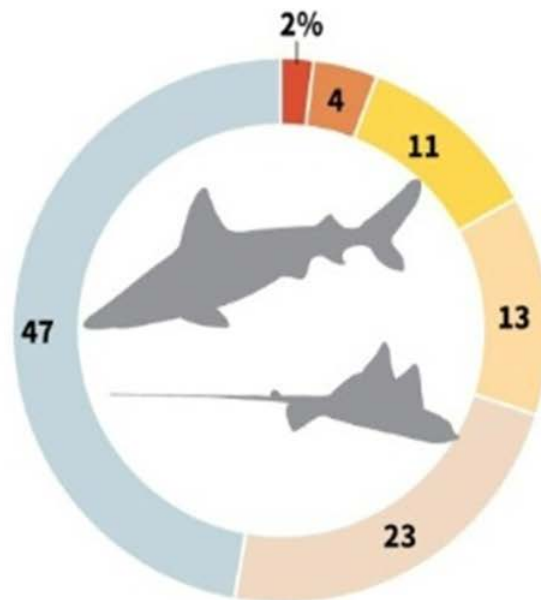
## Global marine population halved since 1970

The fish index fell 50% between 1970 and 2010



Source: WWF

Dozens of shark and ray species are at risk of extinction (including an estimated 7% of the data-deficient bloc)



Four species of turtle are endangered or critically endangered (including the Hawksbill turtle)



Conservation Status	Species
Critically endangered	25
Endangered	43
Vulnerable	113
Near threatened	129
Least concern	229
Insufficient data	465

AFP

# Introduction to the ESA

- 16 U.S.C. §§ 1531–1544
- 50 C.F.R.
  - Part 424 (listing)
  - Part 402 (consultation)
  - Part 17 (list and 4(d) rules)
- Purposes [16 U.S.C. § 1531(b)]
  - “To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”
  - “To provide a program for the conservation of such endangered species and threatened species”
  - “To take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [16 U.S.C. § 1531(a)(4)]

# Introduction cont.

- Policy [16 U.S.C. § 1531(c)]
  - “All Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”
- Key term [16 U.S.C. § 1532(3)]
  - Conserve/conservation: “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”

# ESA Outline

- Section 4: listing & critical habitat designation
- Section 9: “take” prohibition
- Section 7: federal agency obligations
- Section 10: incidental take permits
- Section 11: judicial review
- Section 8: international cooperation
- Section 8a: convention implementation

# Section 4: Listing Species & Habitat

- Section 4, 16 U.S.C. § 1533; 50 C.F.R. Part 424
- Listing species:
  - endangered: “in danger of extinction throughout all or a significant portion of its range”
  - threatened: “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”
- Petition process
  - 90-day finding
  - 12-month determination
  - final determination



# Section 4 cont.

## Listing factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
  - (B) overutilization for commercial, recreational, scientific, or educational purposes;
  - (C) disease or predation;
  - (D) the inadequacy of existing regulatory mechanisms;
  - (E) other natural or manmade factors affecting its continued existence.
- Efforts of state and foreign governments
  - “Solely on the basis of the best scientific and commercial data available”
  - Section 4(d) rules: Secretary “shall” issue regulations deemed “necessary and advisable” to provide for conservation of threatened species; “may” by regulation apply Section 9 prohibitions

## Section 4 cont.

- Designating critical habitat:
  - “specific areas within the geographical area occupied by the species”
  - “essential to the conservation of the species”
  - “which may require special management considerations or protection”
  - occupied or unoccupied
  - not prudent (exception)/not determinable (delay)
  - not within foreign countries or other areas outside U.S. jurisdiction
  - economic/national security impact analysis
- Recovery plans
  - not required where plan will not promote conservation of species
  - not for species entirely outside U.S.
- Five-year status reviews

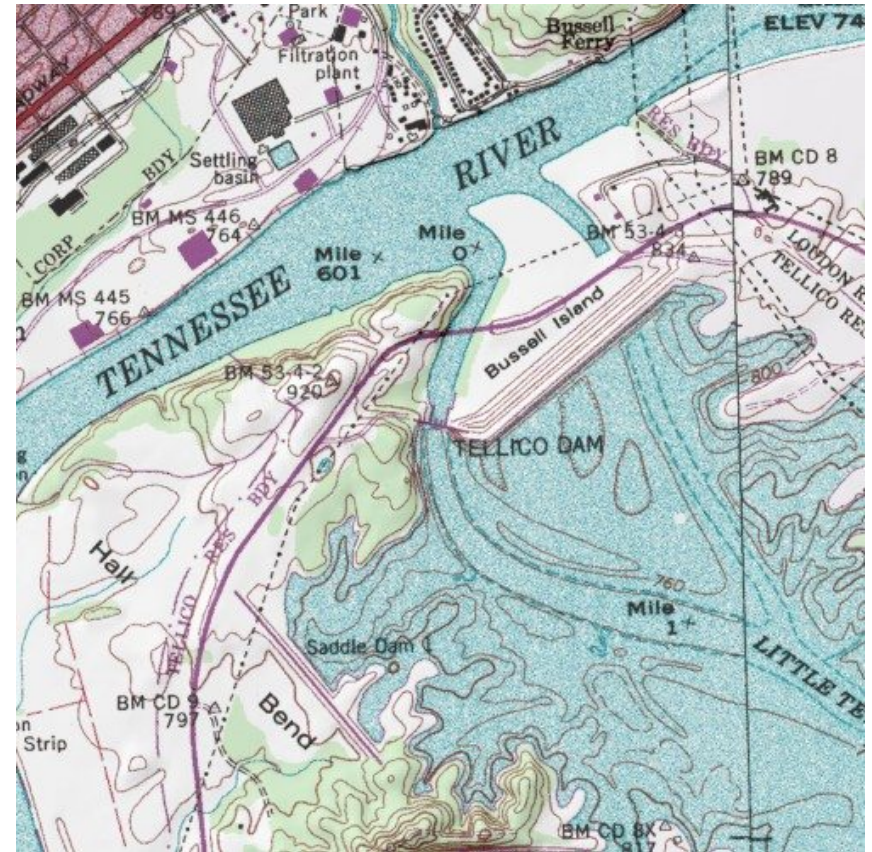
# Section 9: The “Take” Prohibition

- 16 U.S.C. § 1538
- The teeth of the Act
- Applies to “any person subject to the jurisdiction of the United States.”
- Prohibits “take” of non-plant endangered species
  - Service 4(d) rules may additionally prohibit take of threatened species
- Expansively defined:
  - “To harass, harm, hunt, shoot, wound, kill, trap, capture, or collect”
  - “Or to attempt to engage in any such activity”
- “Harm”: includes habitat modification where it “actually kills or injures wildlife.” [50 C.F.R. § 17.3]  
*Babbitt v. Sweet Home*, 515 U.S. 687 (1995)
- Civil and criminal penalties

# Section 7: The “Heart of the ESA”

- Section 7(a)(1) – Federal agencies have a duty to “utilize their authorities in furtherance of this chapter by carrying out programs for the conservation of endangered species and threatened species.” [16 U.S.C. § 1536(a)(1)]
- Section 7(a)(2) – “Each federal agency shall ... 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 [critical habitat].” [16 U.S.C. § 1536(a)(2)]
- 50 C.F.R. Part 402

# *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978)



## *TVA v. Hill* cont.

“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. . . . [T]he legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals *a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.*”

*Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184-85 (1978)

## *TVA v. Hill* cont.

"It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. . . . We conclude, however, that *the explicit provisions of the Endangered Species Act require precisely that result.*"

"One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . . *The language admits of no exceptions.*"

# Agency Obligation: No Jeopardy

- Jeopardy: appreciable reduction in likelihood of both survival and recovery of species in the wild [50 C.F.R. § 402.02]
- Destruction/adverse modification: direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species
- Two duties under ESA Section 7(a)(2): procedural and substantive



## Agency Action

- Authorized, funded, or carried out” – includes permits, approvals, regulations
- Discretionary federal involvement or control  
50 C.F.R. § 402.03
- *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007)

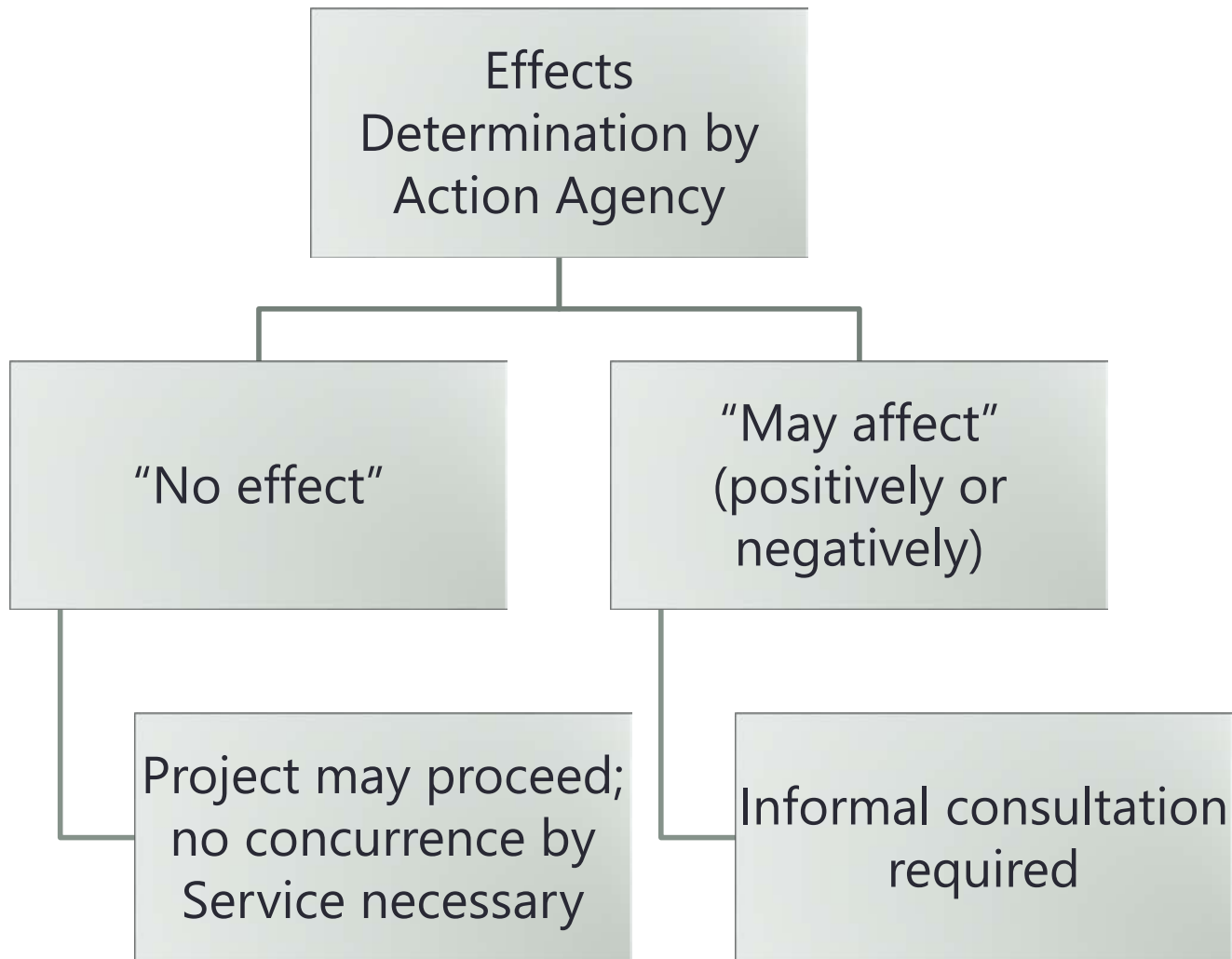
## Action Area

- “All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action”  
50 C.F.R. § 402.02

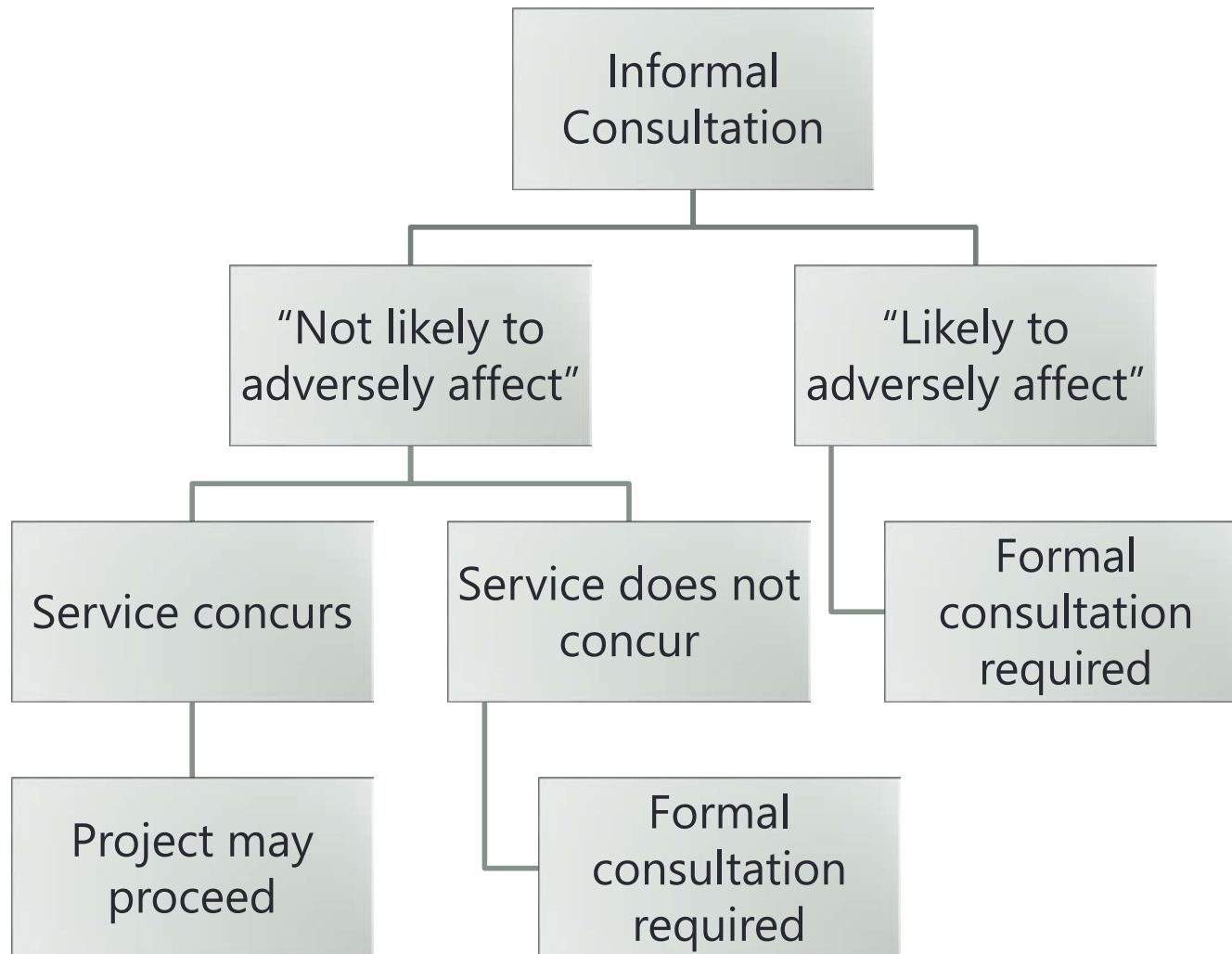
# Geographic Limitation

- Applies to federal agency actions only within the US or on the high seas [50 C.F.R. § 402.02]
- Issues: “the apparent domestic orientation of the consultation and exemption processes” and the potential for “interference with the sovereignty of foreign nations” [Preamble, 51 Fed. Reg. 19,926, 19,929 (June 3, 1986)]
- *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 122–25 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992)

# Section 7 Consultation



# Section 7 Consultation cont.



# Section 7 Formal Consultation

- Likely to adversely affect
- Action agency prepares Biological Assessment or Evaluation
- Wildlife agency prepares Biological Opinion
- Must consider:
  - Environmental baseline
  - Effects of the action (e.g., direct, indirect, interrelated)
  - Cumulative effects
- Both agencies have obligations to use best available scientific and commercial data

# Section 7 Formal Consultation cont.

- If Service determines no jeopardy/adverse modification, includes Incidental Take Statement
- Specifies the amount or extent of permitted take
  - If exceeded => reinitiate consultation
- Reasonable and prudent measures to minimize impacts of incidental take
- Terms and conditions to implement RPMs
  - Includes reporting requirements
- Reinitiation of consultation [50 C.F.R. § 402.16]
  - discretionary involvement or control retained
  - ITS trigger exceeded; new information; action modified; new listed species or critical habitat

# Section 7 Formal Consultation cont.

- If Service determines jeopardy/adverse modification, includes Reasonable and Prudent Alternatives to the proposed action
- Action agency has choices after receiving BiOp:
- No jeopardy
  - Implement RPMs/terms and conditions
  - Modify project and restart consultation
  - Abandon project
- Jeopardy
  - Adopt one of the RPAs
  - Modify project and restart consultation
  - Abandon project
- Apply to the Endangered Species Committee for an exemption [16 U.S.C. § 1536(e); 50 C.F.R. § 402.15(c)]

# The God Squad

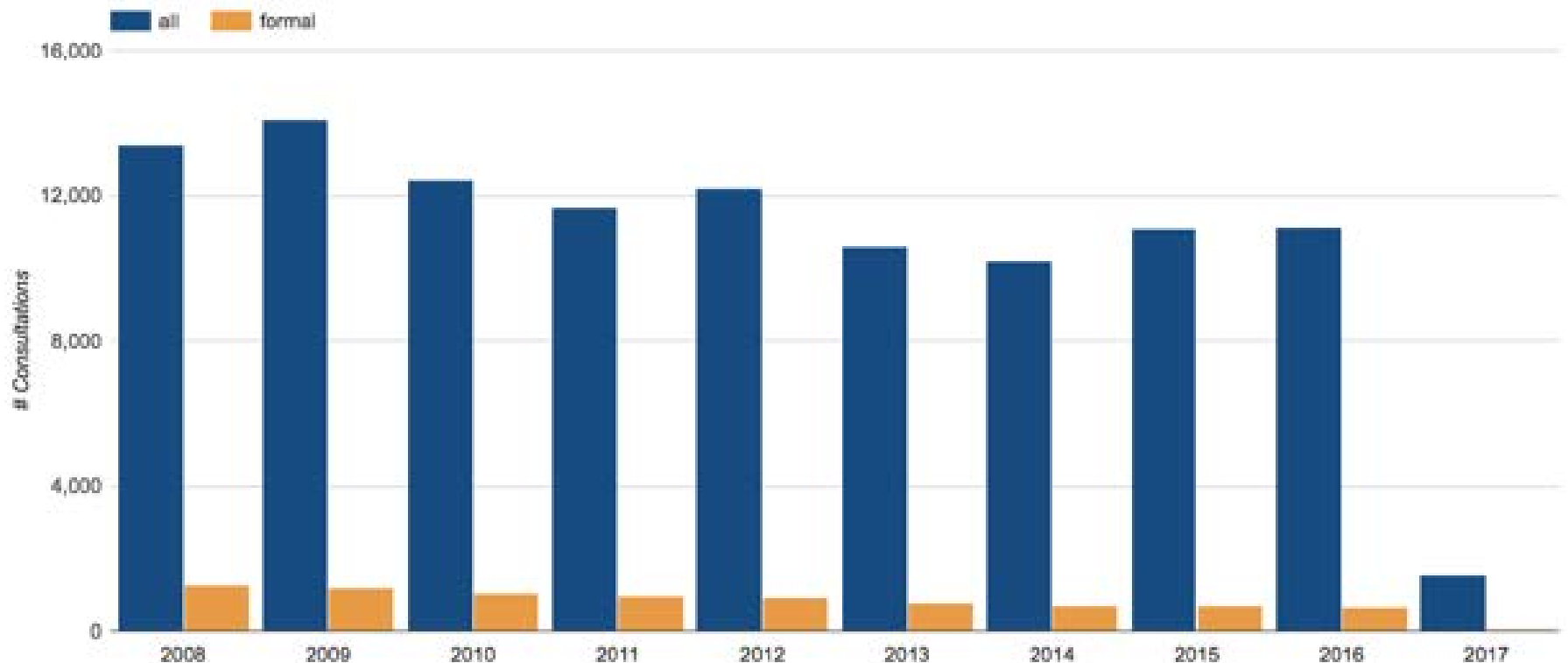
- Added to ESA in 1978, after *TVA v. Hill*
- Composed of 7 cabinet-level members
- Requires at least 5-2 vote
- Has only been convened three times





# Informal v. formal by the numbers

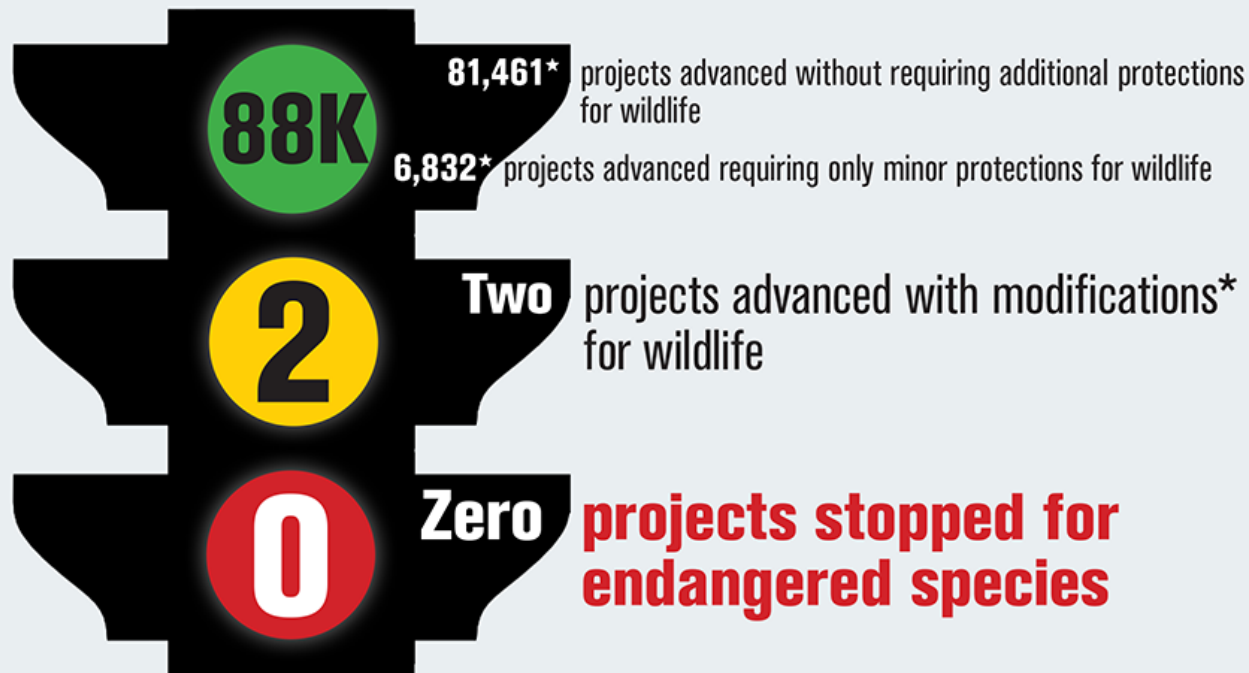
Data from 2008-01-01 through 2016-12-31.



# Section 7 does not stop projects...

## ENDANGERED SPECIES ACT FACTS BEHIND THE ACT

No projects stopped by FWS for endangered species since 2008



## ...at least not in recent years

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Time frame	1979 to 1981	1987 to 1991	2005 to 2009*	2008 to 2015
Informal consultation	8,817	71,560	NA	81,461
Formal consultation	1,945	2,000	1,085	6,829
Jeopardy	173 (8.9%)	350 (17.5%)	78 (7.2%)	2 (0.03%)

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\*Nos. include only FWS fish-related consultations.

Malcom, J. W., & Li, Y. W. (2015). Data contradict common perceptions about a controversial provision of the US Endangered Species Act. *Proceedings of the National Academy of Sciences*, 112(52). Available at <http://www.defenders.org/publications/section-7-pnas.pdf>

# Section 10: Incidental Take Permits

- Introduced in 1982 amendments
- Incidental Take Permit [16 U.S.C. § 1539(a)(1)(B)]
  - Much like the ITS: as long as take is “incidental” to “an otherwise lawful activity,” can be permitted
- Habitat Conservation Plan [16 U.S.C. § 1539(a)(2)(A)]
  - Prerequisite for obtaining an incidental take permit
  - Required contents:
    - Impacts of incidental take
    - Steps to minimize and mitigate such take
    - Funding to take these steps
    - Alternatives considered, and why rejected
  - Agency: NEPA and Section 7 Consultation

# Section 11: Judicial Review

- ESA citizen suit provision [16 U.S.C. § 1540(g)(1)]
  - Any person may commence a civil suit to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the 11th Amendment) who is alleged to be in violation of any statutory or regulatory provision [16 U.S.C. § 1540(g)(1)(A)]
  - Any person may commence a civil suit against the Secretary where there is alleged a failure of the Secretary to perform any non-discretionary act or duty under Section 4 [16 U.S.C. § 1540(g)(1)(C)]
  - 60-day notice requirement [16 U.S.C. §§ 1540(g)(2)(A), (C)]
- Administrative Procedure Act [5 U.S.C. §§ 701-06]
  - *Bennett v. Spear*, 520 U.S. 154, 174 (1997) (cause of action)
  - 28 U.S.C. § 1331 (federal question jurisdiction)
- APA supplies standard of review [5 U.S.C. § 706]

# Section 8: International Cooperation

16 U.S.C. § 1537 provides for:

- Financial assistance
- Encouragement of foreign programs for conservation
- Personnel and training for management, research, and law enforcement
- Law enforcement investigations and research abroad

## Section 8a: Convention Implementation

- CITES: Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
- ESA establishes Secretary of the Interior (not Commerce) as both Scientific Authority and Management Authority [16 U.S.C. §§ 1537a(a)-(d)]
- Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (OAS, 1940)
- ESA directs cooperation to implement Western Convention [16 U.S.C. § 1537a(e)]

# Legal and Illegal Wildlife Trade

- CITES regulates 5,600 species of animals and 30,000 species of plants
- \$100 billion – value of legal trade in wildlife products
- \$7-23 billion – value of illegal wildlife trade worldwide (350 million plants and animals)
- U.S. is a market AND transit country for wildlife trade
  - U.S. is the second largest consumer of wildlife and wildlife products globally
  - USFWS inspects over 18,000 wildlife shipments annually

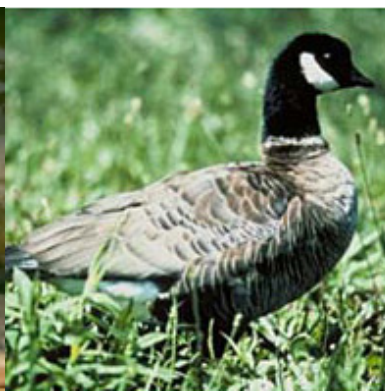


# Section 9 Redux: Take vs. Trade

- Statute limits the scope of prohibited take of listed species of fish or wildlife to the U.S., its territorial seas, and the high seas [16 U.S.C. §§ 1538(a)(1)(B), (C)]
- Prohibits import, export, and "foreign commerce" of listed species no matter where taken [16 U.S.C. §§ 1538(a)(1)(A), (D), (E), (F)]
- Prohibits trade or possession of species in violation of CITES [16 U.S.C. § 1538(c)]
- Only applies to persons subject to the jurisdiction of the U.S. [16 U.S.C. §§ 1538(a)(1), (2), 1538(g)]

# Has It Worked?

- 1600+ plant and animal species listed in U.S.
- 99% have avoided extinction
- Only 10 declared extinct (8 likely extinct before listing)
- 90% recovery rate for 110 studied species
- Species with designated critical habitat are twice as likely to be recovering as those without
- But for the ESA, at least 227 species would likely be extinct



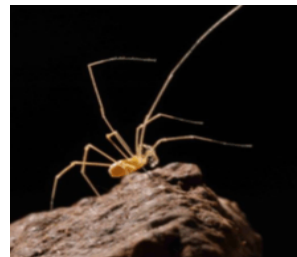
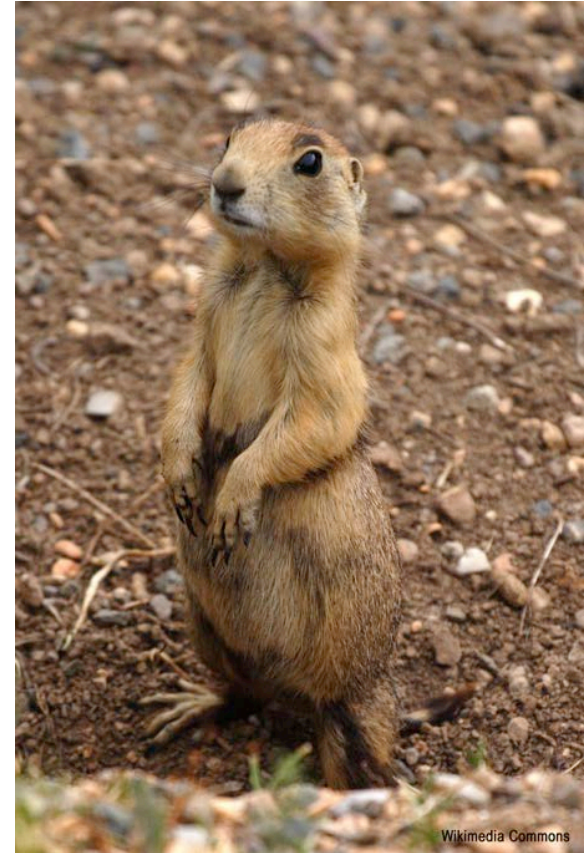
# ESA Hot Topics: Legislative

- Legislative attacks:
- 29 bills in 115<sup>th</sup> Congress so far  
[http://www.defenders.org/publications/gr/Chart of ESA Attacks in 115th Congress 6.21.17.pdf](http://www.defenders.org/publications/gr/Chart%20of%20ESA%20Attacks%20in%20115th%20Congress%206.21.17.pdf)
- 120+ bills in the 114<sup>th</sup> Congress  
<http://www.defenders.org/publications/Chart-of-ESA-Attacks-in-114th-Congress.pdf>
- Federal funding for conservation remains grossly insufficient and is disproportionately allocated among listed taxonomic groups
  - 80% of all federal spending => 5% of listed species (mostly fish)
  - 80% of all listed species share less than 5% of federal spending
- The ESA is starving, not broken

# ESA Hot Topics: Rules & Litigation

- Critical habitat: revised regulations clarifying procedures and criteria for designation (81 Fed. Reg. 7413 (Feb. 11, 2016))
  - *Alabama ex rel. Strange v. NMFS*, Case 1:16-cv-593 (S.D. Ala.)
- Significant Portion of Range Policy (79 Fed. Reg. 37,578 (July 1, 2014))
  - *Defenders of Wildlife v. Jewell*, 176 F. Supp.3d 975 (D. Mont. 2016) (wolverine)
  - *CBD v. Jewell*, 2017 WL 2438327 (D. Ariz. 2017) (cactus ferruginous pygmy owl)
  - *CBD v. Ashe*, 1:15-cv-477 (D.D.C.) (northern long-eared bat)

# Constitutional Challenges to the ESA



# Climate Change & BASD

- Climate change and extinction risk
  - NMFS Guidance for Treatment of Climate Change in NMFS ESA Decisions (6/17/2016)
- Must factor into listing decisions
  - *Defenders of Wildlife v. Jewell*, 176 F. Supp.3d 975 (D. Mont. 2016) (wolverine listing)
  - *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016) (Pacific bearded seal listing)
  - *Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016) (polar bear critical habitat)
- Must factor into consultations
  - *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224 (E.D. Wash. 2016) (chinook/steelhead BiOp)
  - *NWF v. NMFS*, 184 F. Supp. 3d 861 (D. Or. 2016) (Columbia/Snake River salmon)

# RIP Bramble Cay melomys



One-sixth of planet's species likely to follow suit:

Mark C. Urban, *Accelerating extinction risk from climate change*, *Science* (2015) Vol. 348, Issue 6234, pp. 571-73

<http://science.sciencemag.org/content/348/6234/571>



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