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AN INDEPENDENT, NON-PARTISAN ENVIRONMENTAL EDUCATION AND POLICY RESEARCH CENTER.

NEPA, ESA, & Fundamentals of Environmental Law

June 12, 2014

The seminar will begin shortly.

Questions for the panel? Email barney@eli.org.

For audio, dial 1-857-232-0300

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Speaking Now:

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A “Hard Look” Before You Leap: National Environmental Policy Act

Environmental Law Institute

James M. Auslander

Beveridge & Diamond, P.C.

June 12, 2014

Remember When...



...Congress Used to Do Stuff?

- NEPA – 1969
- EPA created – 1970
- First Earth Day – 1970
- Clean Air Act – 1970
- Clean Water Act – 1972
- Endangered Species Act – 1973
- RCRA – 1976
- CERCLA/Superfund – 1980

Rules? What Rules?

- U.S. Constitution
- Statutes (enacted by Congress)
- Regulations (promulgated by federal Executive agencies)
- Case law (issued by courts)
- Agency guidance/Executive Orders/other “non-binding” pronouncements

National Environmental Policy Act

- Statute: 42 U.S.C. §§ 4321 to 4370h
- Regulations implementing NEPA
 - Council on Environmental Quality (“CEQ”)
 - 40 C.F.R. – Parts 1500-1508
 - Departments and agencies also have own NEPA regs
 - Various CEQ and agency guidance, e.g.:
 - NEPAnet – CEQ’s NEPA website, <http://ceq.hss.doe.gov>
 - EPA’s NEPA Policies and Guidance –
<http://www.epa.gov/compliance/resources/policies/nepa>
 - CEQ, NEPA’s Most 40 Asked Questions –
<http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>
- State “little NEPA” laws, too

NEPA at a Glance

- NEPA recently celebrated 40th anniversary
- Basic NEPA Goals:
 - Environmentally informed decisions – “Policy” not Protection
 - Public transparency
 - No surprises/no regrets
 - Not gigantic documents or massive delays
- NEPA does not require adoption of least environmentally harmful alternative (but other statutes might)

Does NEPA Apply?

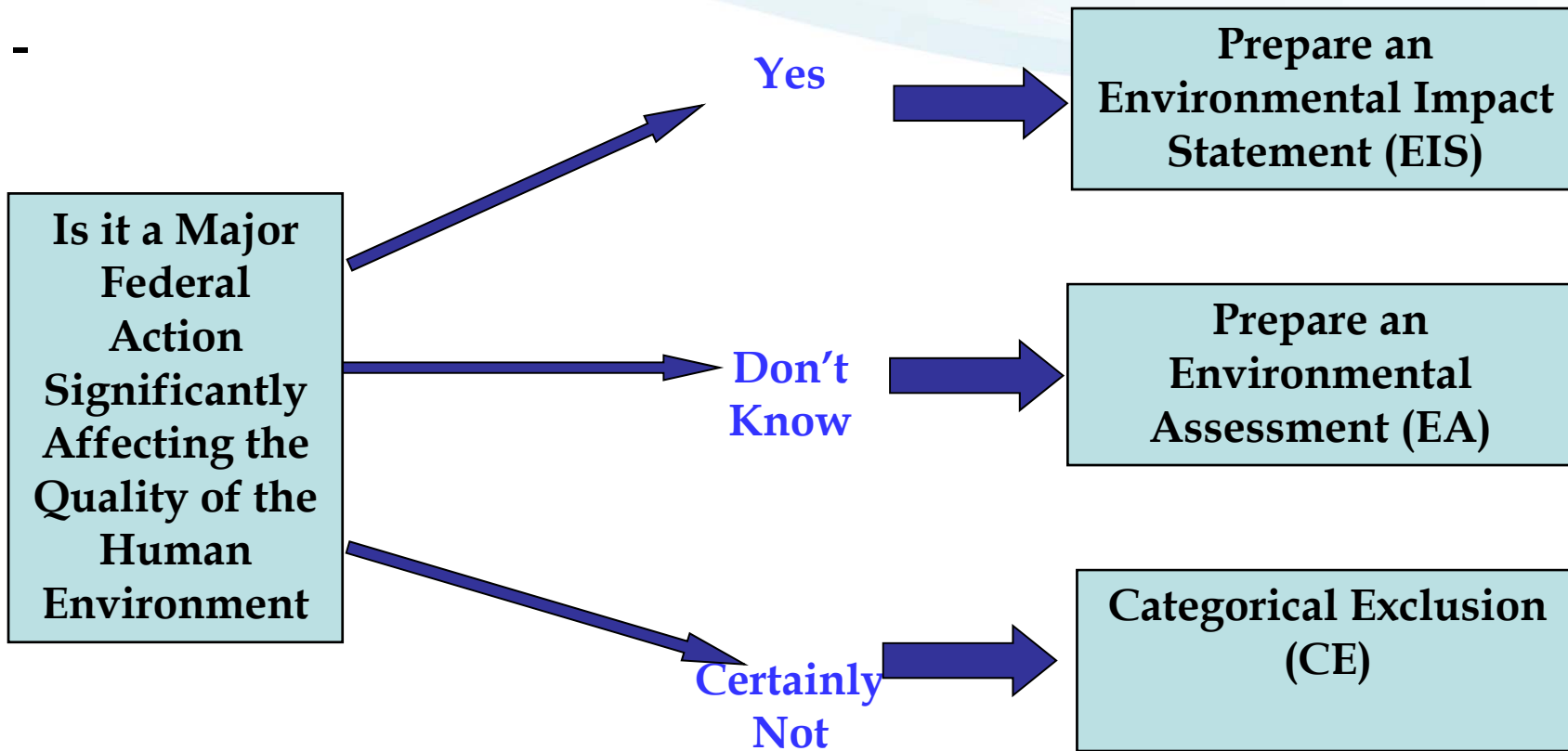
(Wait, so I can go home now?)

- Broad trigger for EIS: proposals for “major Federal actions significantly affecting the quality of the human environment”
- In practice, unless specifically exempted by statute or rule, NEPA applies to every federal agency discretionary action, including approving, financing, assisting, or conducting plans, projects, or programs, whether regional or site-specific
- Beware small handles and segmentation

The NEPA Players

- Lead agency
- Cooperating federal, state, tribal, and local agencies with jurisdiction or special expertise
- Hired consultants under agency supervision
- Private project proponent
- Public (through commenting)

NEPA Applies – Now What?



“Significant” Effect?

- Determined case-by-case
 - **Context:** Affected environment where proposal is planned
 - **Intensity:** Severity of impacts, considering e.g.:
 - Beneficial and adverse environmental impacts
 - Public health
 - Unique characteristics of affected area
 - Effects on cultural resources
 - Endangered species
 - Violations of federal, state, or local environmental laws
 - Controversy (but not simply public opposition)
 - List not exhaustive; no single factor dispositive

Which “Effects”?

- Agency must analyze “effects” including: ecological, aesthetic, historic, cultural, economic, social, health
- Agency must consider direct, indirect, and cumulative effects
 - But only those effects that are reasonably foreseeable, not remote and speculative

Option 1: Categorical Exclusion

- By far, CE most common form of NEPA compliance
- CEQ on CE: “a category of actions which do not individually or cumulatively have a significant effect on the human environment”
- Must be no “unusual circumstances” barring CE
- CEQ Final Guidance for Establishing, Applying, and Revising Categorical Exclusions (75 Fed. Reg. 75628, Dec. 6, 2010)

Option 2: Environmental Assessment

- Used to determine if EIS is required (in theory, at least)
- Finding of No Significant Impact (FONSI) or EIS
 - Conclusion must be supported by data and analysis in EA
 - Mitigated FONSI possible
- No prescribed format – Must “briefly” describe
 - Purpose and need for proposed action
 - Proposal and feasible alternatives
 - Environmental effects of proposal and alternatives
 - Agencies and persons consulted during preparation
- Though supposed to be “concise,” EAs in recent practice may approximate EISs in length and complexity

Option 3: Environmental Impact Statement

- Notice of Intent (“NOI”) in Federal Register
- Scoping
- Draft EIS
- Public Comment Period
- Final EIS
- Record of Decision (“ROD”)

Anatomy of an EIS

- Statement of “Purpose and Need”
 - Project’s purpose (goals/objectives)
 - Need to which agency is responding
- Alternatives to proposal
 - “Heart” of the EIS
 - Proposed action + “no action” + “reasonable range” of alternatives
- Description of baseline affected environment
- Analysis of environmental effects for each alternative
 - Direct, indirect, and cumulative effects
 - Any mitigation measures

Draft EIS (cont.)

Purpose and Need Statement

- Foundation of EIS
- Brief statement by lead agency
 - Project's purpose (goal/objectives)
 - Need agency is responding to with project
- Reasonable scope; not artificially constrained

Draft EIS (cont.)

Alternatives Analysis

- Heart of the EIS
- Proposed action + no action alt + “reasonable range” of alts.
 - Alts that are practical and feasible technically, economically, and logistically
 - Identify preferred alt. & environmentally preferable alt.
 - Explain eliminated alts.

Draft EIS (cont.)

- Description of Affected Environment
 - Baseline conditions
- Analysis of Environmental Effects
 - Summary of impacts of each alt.
 - Comparison of each alt's effects
 - Direct, indirect, cumulative effects
 - Mitigation measures

DEIS Review

- Request comments
- File DEIS with EPA
 - EPA publishes notice in Fed. Reg.
- 45 day (min.) public comment period
- Review/address comments
 - Modify proposal/alts or develop new alts
 - Supplement/modify analysis
 - Make factual corrections
 - Explain inaction

Final EIS

Final EIS = Draft EIS +:

- Responses to comments on DEIS
- Revisions or additions to DEIS

File w/ EPA, publish in Fed. Reg.

30-day cooling off period

Final decision on proposed action

Record of Decision (ROD)

ROD = explanation of decision and process

- Selected alternative
- Alternatives considered (incl. env. preferable)
- Bases for choosing selected alt. over others
- Factors considered (incl. minimizing harm)
- Mitigation adopted/rejected

Filing ROD = final agency action

Supplemental EIS

(We're still not done?)

- Required when agency makes relevant “substantial changes” to proposed action, or when there are “significant new circumstances or information”
- Mere passage of time does not automatically trigger supplemental EIS
- Addition of new alternative or new mitigation measures not described in the Draft EIS may trigger SEIS

Insulating the NEPA Process

ADMINISTRATIVE RECORD IS KEY

- Submissions to agency should be strong, supported, and thoroughly reasoned
- Include potentially adverse as well as beneficial information, with explanation
- On the merits, courts apply a “rule of reason” and usually defer to agency’s “hard look”

ESA and Elk River Fact Pattern



<http://www.criticalmassachusetts.com/2012/07/handing-off.html>.

Looking Forward: Addressing Modern NEPA Hurdles

- “Hard look” has become herculean
- Common roadblocks:
 - Failure by lead and resource agencies to act timely
 - Adversarial agencies with overlapping jurisdiction pursuing different agendas
 - Lack of federal/state coordination
 - Duplication of effort
 - Strategically timed litigation by project opponents
- Not uncommon for project to consume thousands of pages of analysis and over a decade

Signs of Progress

- New Categorical Exclusions
- Integration of planning and NEPA
- Concurrent, not consecutive, reviews
- Deadlines and penalties
- Abbreviated FEIS, and combination of FEIS and ROD
- Early interagency consultation and dispute resolution
- Greater role available to states
- Alternatives to project-by-project review
- Expedited and reduced litigation
- Accountability

Best Practices for NEPA

- Recall NEPA requires agencies to “stop and think,” not any specific outcome or more paper
- Affirmatively build a robust administrative record
- Each NEPA analysis is project/plan-specific, but need not consider in a vacuum—utilize existing analyses
- Acknowledge and resolve issues and information gaps, rather than ignoring or hiding them
- Continue to follow and encourage agency efforts to streamline efforts and involve applicant expertise

NEPA/ESA/Other Questions?

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Speaking Now:

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THE ENDANGERED SPECIES ACT

ELI Summer School

Adam Kron

Environmental Integrity Project

June 12, 2014

Introduction to the ESA

- 16 U.S.C. §§ 1531 - 1544
- Good counterpoint to NEPA.
- Like NEPA, requires agencies follow certain procedures.
- Unlike NEPA, requires certain outcomes:
 - No jeopardy
 - No take
- “The pit bull of environmental laws.”

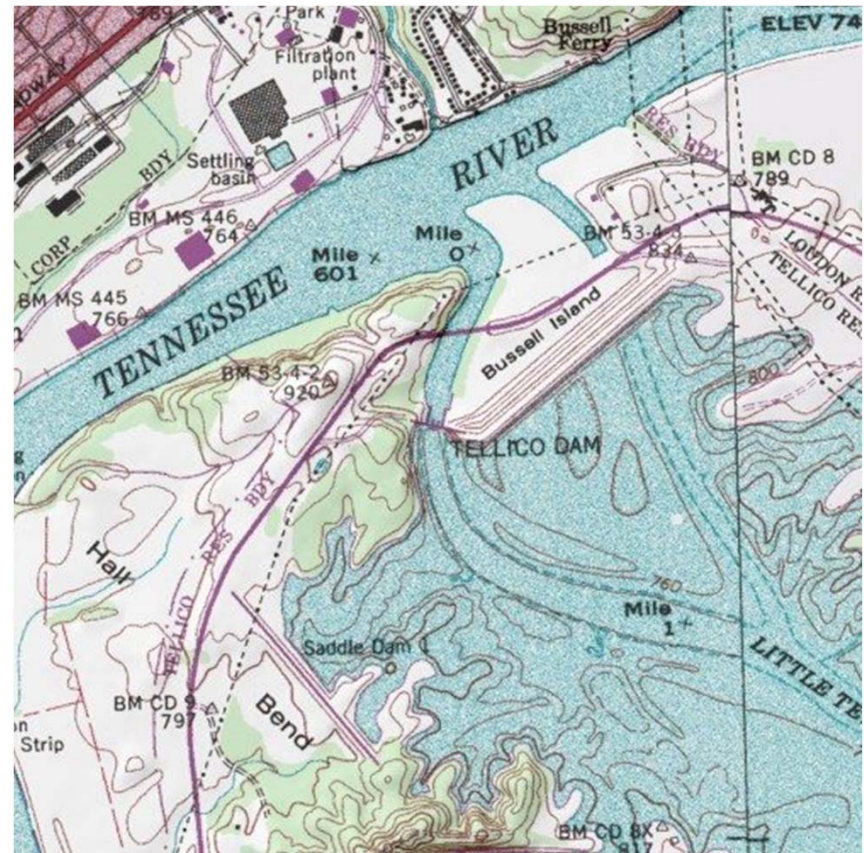
History & Background

- Enacted in 1973.
- Preceded by less comprehensive versions in 1966 and 1969 and many prior species preservation laws.
- Administered by two federal wildlife services:
 - U.S. Fish and Wildlife Service (Department of the Interior): land and freshwater species
 - National Marine Fisheries Service (Department of Commerce): marine and anadromous species

Basic Concepts

- Central purpose: “to protect and recover imperiled species and the ecosystems upon which they depend.”
- Four main provisions:
 - Section 4: Listing Species & Habitat,
 - Section 7: Requirements for Federal Actions,
 - i.e., consultation and NO JEOPARDY,
 - Section 9: Prohibition on “Take” of Species,
 - Section 10: Procedures to Avoid Take Liability.

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



TVA v. Hill, cont'd

“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.**”

Section 4: Listing Species & Habitat

- 16 U.S.C. § 1533
- The prerequisite for the rest of the Act.
- Can list species, designate critical habitat, and set recovery plans.
- Listing species:
 - Endangered: “in danger or extinction throughout all or a significant portion of its range”
 - Threatened: “likely to become an endangered species with the foreseeable future”

Section 4, cont'd

- 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.”
- Recovery plans: internal guidelines the Services set for recovery of the species.
- Section 4(d) rules.

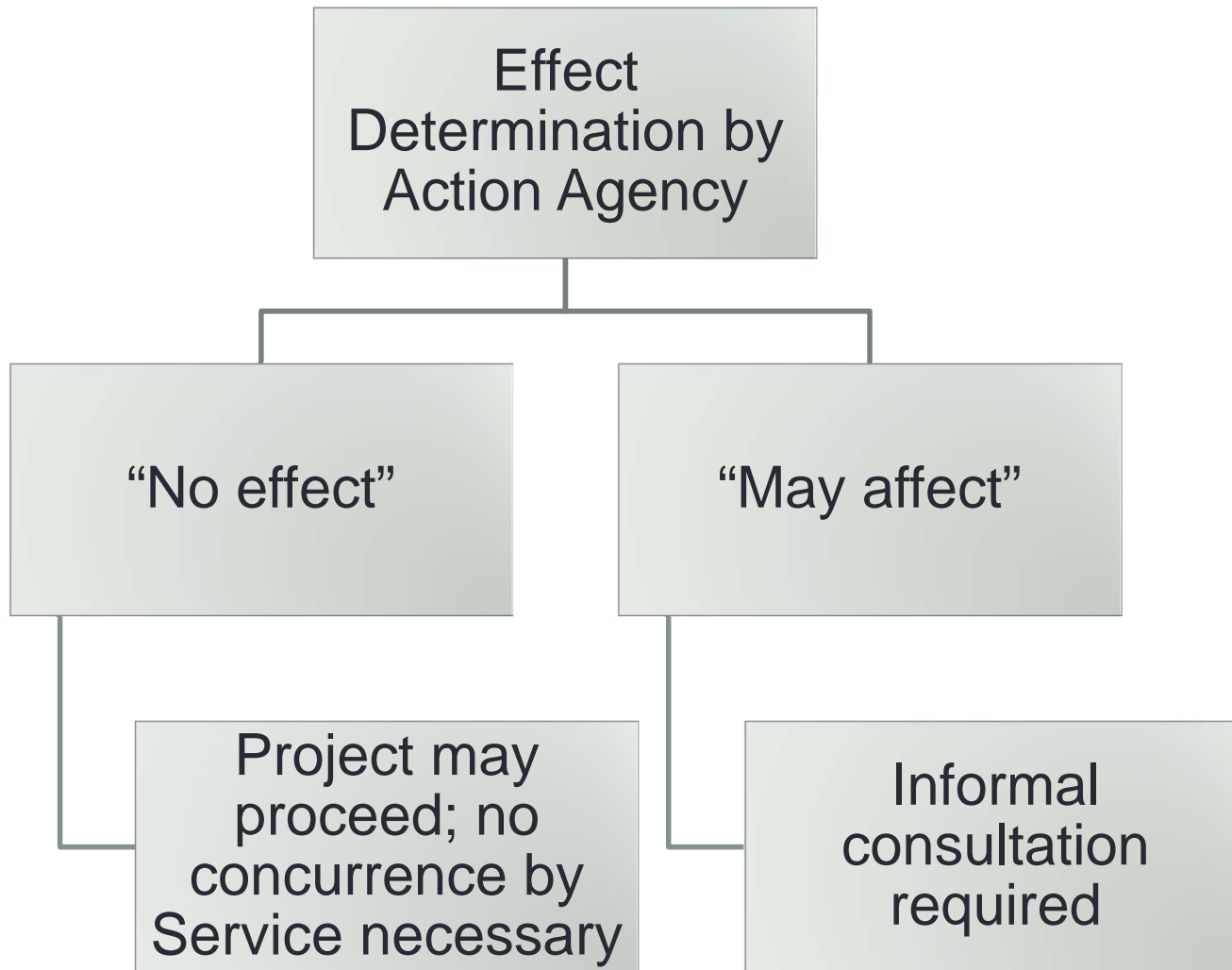
Northern Spotted Owl v. Hodel,
716 F. Supp. 479 (W.D. Wash. 1988)



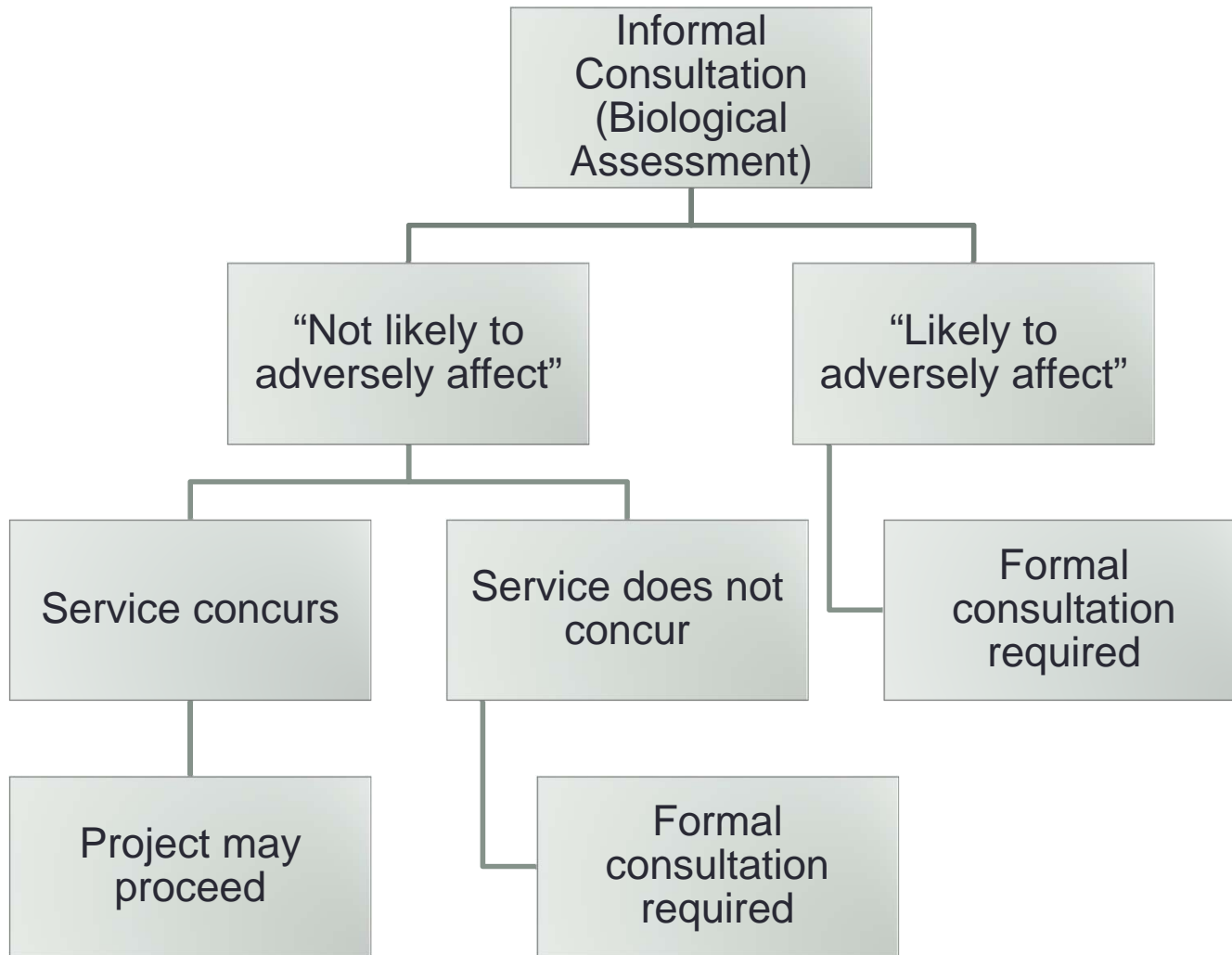
Section 7: Federal Actions & Consultation

- Section 7(a)(2), 16 U.S.C. § 1536(a)(2)
- The most visible provision of the Act (at least from an environmental lawyer's perspective).
- Insure that federal actions do not:
 - **Jeopardize** the continued existence of a species,
 - Result in destruction or **adverse modification** of critical habitat.
- “Federal action”: authorized, funded, or carried out by a federal agency.

Section 7 Consultation



Section 7 Consultation, cont'd



Section 7: Formal Consultation

- FWS or NMFS prepares a “Biological Opinion” (aka “BiOp” or “BO”)
- Service considers:
 - Baseline,
 - Effects of the action (e.g., direct, indirect, interrelated),
 - Cumulative effects
 - (Echoes of NEPA)
- If Service determines no jeopardy/adverse modification, issues **Incidental Take Statement**:
 - ITS allows take that isn’t the purpose of the action.
 - Compliance with ITS avoids section 9 “take” liability.

Section 7: Formal Consultation, cont'd

- If Service determines **jeopardy**/adverse modification, includes **Reasonable and Prudent Alternatives** to the proposed action.
- Action agency has choices under a jeopardy opinion:
 - Adopt one of the Reasonable and Prudent Alternatives,
 - Modify the project and restart consultation,
 - Abandon project,
 - Disagree with the Service and proceed (take liability possible),
 - (Most rarely) apply to the Endangered Species Committee for an exemption.

THE GOD SQUAD

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



Section 9: The “Take” Prohibition

- 16 U.S.C. § 1538
- The teeth of the Act
- Unlike section 7, applies to “any person subject to the jurisdiction of the United States.”
- Prohibits “take” of non-plant endangered species
 - Service regs additionally prohibit take of threatened species
- Civil and criminal penalties apply
- 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)

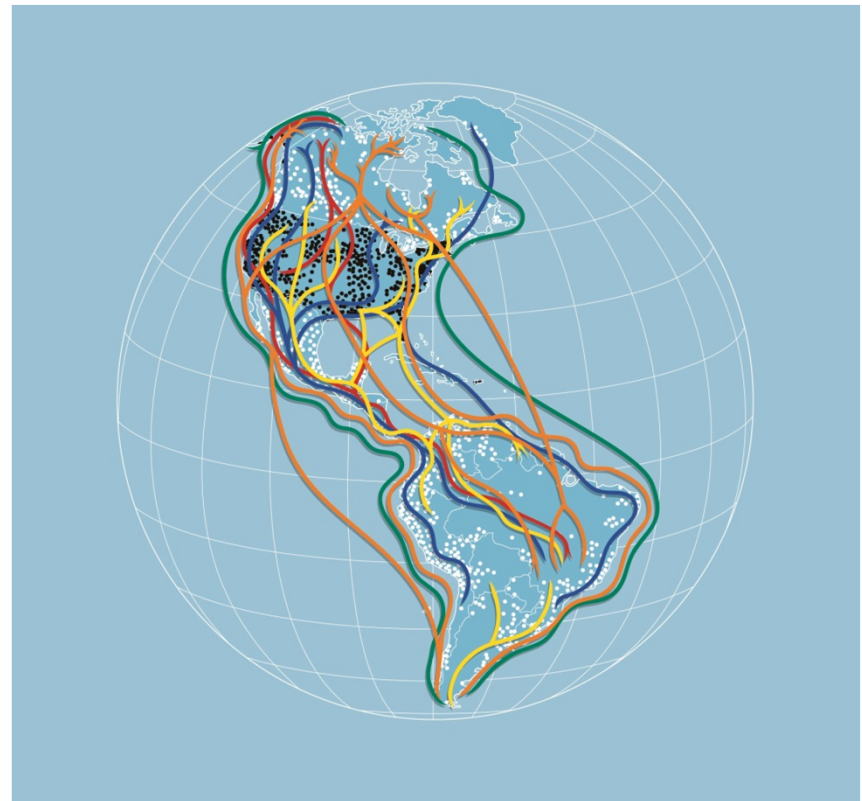


Section 10: Avoiding Take Liability

- How private parties on private lands can avoid liability
- 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:
 - Impact from incidental take,
 - Steps to minimize and mitigate such take,
 - Funding to take these steps
 - Alternatives considered, and why rejected

Other Species Protection Acts

- The Migratory Bird Treaty Act
 - 16 U.S.C. § 703 *et seq.*
 - Enacted in 1918, amended many times.
 - Illegal to “pursue, hunt, take, capture, kill, or sell” migratory birds (live or dead), nests, or eggs.
 - **Unless** under a valid permit.



Other Species Protection Acts, cont'd

- The Bald and Golden Eagle Protection Act
 - 16 U.S.C. § 668 *et seq.*
 - Enacted in 1940.
 - Like MBTA, a broad take prohibition for bald and golden eagles.
 - \$100K fines for individuals, plus one-year imprisonment.
 - Eagle take permits can be obtained.



Other Species Protection Acts, cont'd

- The Marine Mammal Protection Act
 - 16 U.S.C. § 1361 *et seq.*
 - Enacted in 1972, amended substantially in 1994.
- Like ESA, divides authority between the Services:
 - NMFS: whales, dolphins, porpoises, seals, and seal lions.
 - USFWS: walrus, manatees, otters, and polar bears.
- Prohibition on take of marine mammals in U.S. waters.
- Permits can be obtained for:
 - Incidental take from commercial fishing and other activities,
 - Scientific research,
 - Aquariums and science centers.

Other Species Protection Acts, cont'd

- The Lacey Act:
 - 16 U.S.C. § 3371 *et seq.*
 - Enacted in 1900, amended substantially in 2008.
 - Prohibits trade (i.e., import, sale, etc.) of animals and plants taken, transported, or possessed illegally.
 - Regulates the introduction of invasive or non-native species.
- CITES
 - i.e., the Convention on International Trade in Endangered Species of Wild Fauna and Flora.
 - International treaty signed by the U.S. in 1973. 180 signatories.
 - Meant to ensure that international trade in animals and plants does not threaten survival in the wild.
 - USFWS carries out under authority of the ESA and Lacey Act.

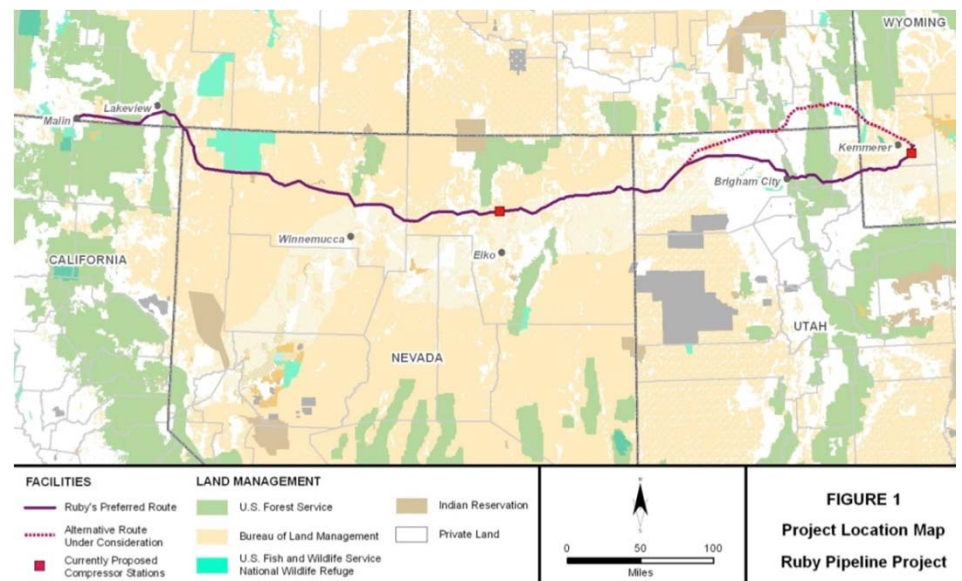
The ESA “in the Wild”

- *WildEarth Guardians v. Salazar*
 - 880 F. Supp. 2d 77 (D.D.C. 2012)
 - Coal leases: 4,100 acres, 430 million tons of federal coal
 - Informal consultation only, no analysis of climate impacts
 - *Rev'd in part*, 738 F.3d 298 (D.C. Cir. 2013)



The ESA “in the Wild” cont’d

- *Center for Biological Diversity v. BLM*
 - 698 F.3d 1101 (9th Cir. 2012)
 - 678-mile pipeline from Wyoming to Oregon
- Agencies involved:
 - FERC
 - BLM
 - USFWS
 - U.S. Forest Service
 - Army Corps of Engineers



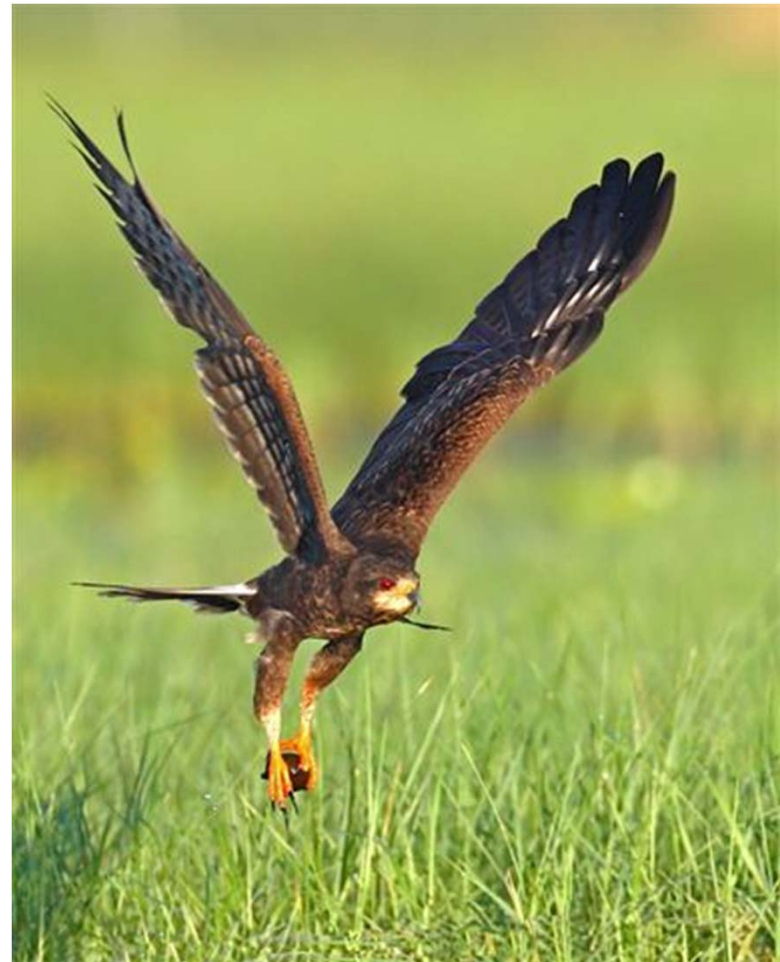
Questions?

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