

ENDANGERED SPECIES & LITIGATION REALITIES

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Think like a plaintiff.

Who sues?

When?

Why?

Who? The Citizen Suit: ESA §11

Any person may commence a civil suit on his own behalf -

- (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or...
- (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 [listing determinations and critical habitat designations] of this title which is not discretionary with the Secretary.

When? The Federal APA

§ Section 702. - Right of review

- A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof...

§ Section 704. - Actions reviewable

- Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

Why? Largely “irrelevant” but...

- Injury
 - Money
 - Ideals & principles
 - Disagreement, different interpretations
 - Different desired outcome
- Distrust
 - Regulatory capture
 - Politics & collapse of confidence
- Strategic
 - Delay
 - Proxy

Think like a judge.

How will you decide?

What will you consider?

How?

Standards of judicial review

- Deference: did the agency interpret a statute or rule?
 - a permissible construction?
 - a reasonable accommodation of competing interests
 - a technical and complex regulatory scheme?
- But also “Hard Look” review, especially at facts...
 - Policymaking cannot just cite uncertainty
 - Must explain evidence available
 - Consider all relevant factors
 - Rational connection between facts found & choice made

What?

Incidental take

- “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §1538
- “Incidental take” means “takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.” 50 C.F.R. §402.02.

What else? Jeopardy

- *Jeopardize the continued existence of* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by *reducing the reproduction, numbers, or distribution of that species.*

50 C.F.R. §402.02. (emphasis added).

Think like a lawyer.

Just win, baby.

NOAA: history of hard numbers

- Ctr. for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996) (shrimping operation may take four hawksbill turtles, four leatherback turtles, ten Kemp's ridley turtles, ten green turtles, or 370 loggerhead turtles).

Judicial thinking... (agency loss)

- Rejected agency “Final ESA Section 7 Consultation Handbook,” which allowed agencies to use habitat impact to measure impacts on species
 - We apply instead the rule that specific population data is required unless it is impractical. The rule makes sense. The goal of the Endangered Species Act is to protect populations of species, and using habitat markers when population data is available is like turning on the weather channel to see if it is raining instead of looking out a window... the Service’s assertion in its incidental take statement that the birds are “difficult to detect” leaves us unpersuaded that counting them is impractical enough to justify the use of habitat markers instead.

Miccosukee Tribe v. U.S.A., 557 F.3d 1262, 1279 (11th Cir.2009), citing Or. Natural Res. Council v. Allen, 476 F.3d 1031,1037 (9th Cir. 2007)

Judicial thinking... (agency win)

- The [biological opinion] is detailed and specific. The 2004 biological opinion first establishes a maximum incidental take level. Given this projected number of takes, the RPA [reasonable and prudent alternative] then targets a level of post-release mortality that would result in a sufficiently low number of sea turtle deaths. The total number of turtles captured multiplied by the post-release mortality rate results in the "total estimated mortality," which is the estimated total number of turtles killed by the vessels under the regulatory authority of the Fisheries Service.

Oceana, Inc. v. Gutierrez, 488 F.3d 1020, 1023 (D.C. Cir. 2007)

Judicial thinking... (agency win)

- The anticipated take for the 2004-2006 period was 1,981, or 805 leatherbacks in 2004 and 588 thereafter. That was an increase from the goal in the 2001 biological opinion of 438 per year, but a substantial decrease from the actual takes in 2001 (1,208) and 2002 (962). The anticipated three-year take starting in 2007 was 1,764, or 588 per year. The Service expected the post-release mortality rates to decline each year as fishing crews become better trained in gear removal. The biological opinion predicted mortality rates of 32.8 percent in 2004, 26.2 percent in 2005, and 19.6 percent in 2006. Beginning in 2007, the Service expects the post-release mortality rate to be 13.1 percent -- the rate achieved in the Northeast Distant experiment. Thus, the Service expects the 2004 RPA to bring down total estimated mortality of sea turtles from about 264 per year in 2004 to about 77 per year starting in 2007...

Oceana, Inc. v. Gutierrez, 488 F.3d 1020, 1023 (D.C. Cir. 2007)

Think like a fishery manager.

How to reduce the risks of litigation?

Data & litigation: insights

- Expect to be second-guessed
- Need to ensure quality and quantification...
 - Data
 - Analysis
- Know your weaknesses
 - “Uncertainty” = likely loser
 - Future trends & projections = vulnerability

ESA & litigation realities

CORE ISSUE	OPTIONS	CAUTION	COUNCIL ROLE
LAW (ESA reform?)			
FACTS (Better science?)			
PEOPLE (Improve trust?)			

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PEOPLE (Improve trust?)	Expand consensus?	Can't please 'em all? Litigate anyway.	Stakeholder buy-in & improved relationships
	Targeted negotiations?	Appease the beast? Incentive to litigate?	

Discussion...

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