

Lecture 15 overview

1. Species extinctions
2. NEPA & ESA
3. Overview of Endangered Species Act
4. Interagency Coordination & TVA
5. 'Harm' and Spotted Owl

Endangered Species



Increasing rates of extinction of plants & animals in 1960s

Largely due to destructive activities:

- construction
- logging
- mining

Endangered Species



Market-place economies drive species to extinction

Example: Live Reef Fish Industry

- Philippines & Indonesia
- Large fish caught live, held in aquaria before eating
- As fish become rarer, price goes up
- Fisherman spent entire day on one fish

NEPA & Endangered Species

NEPA as policy 'integrator:'

- Include compliance with other laws in EIS
- Endangered species trigger 'extraordinary circumstances' for categorical exclusions
- Important criterion for evaluation of 'significance'
- Impacts on endangered species a 'major action'

Endangered Species Act (ESA)

Authored by Dingell & Williams in 1973

One of the strongest pieces of legislation, besides NEPA, passed in early 1970s

Revolutionary legal document:

- arose out of Convention on International Trade in Endangered Species (CITES)
- model for state- & International-ESAs

ESA

Strategy of ESA is two-fold:

Open disclosure: make public information on threatened and endangered species during process of listing

Roadblock: prevent further "harm" to listed species by stopping activities which cause further endangerment

ESA

Similarities to NEPA:

- Applies to all Federal agencies
- Only small part of law has “teeth”
- Difference between legislative intent and legal function

Long policy with 18 sections (29 pp)

ESA

§2. Declaration of purposes and policy

§3. Definitions

§4. Determination of endangered & threatened species

§5. Land acquisition

§6. Cooperation with States

ESA

§7. Interagency cooperation

§8. International cooperation

§8A. Convention implementation

§9. Prohibited acts

§10. Exceptions

§11. Penalties and enforcement.

ESA

- §12. Endangered plants
- §13. Authorization of appropriations
- §14. Repealer (of 1969 Act)
- §15. Authorization of Appropriations
- §16. Effective Date
- §17. Construction with Marine Mammal Protection Act of 1972
- §18. Annual cost analysis by Fish & Wildlife Service

Responsibility

The Secretary of the Department of Interior is required to list species of plants and animals that are both threatened and endangered

Task delegated to the Fish & Wildlife Service (terrestrial species) and the National Marine Fisheries Service (marine)

Species Listing Process (§4)

Petition the government to list a species:

- any citizen may initiate
- requires some detailed information about the species in question

Lead agency conducts biological assessment to determine status

Species Listing Process

Endangered species is any species '*in danger of extinction through all or a significant portion of its range*'

Threatened species is any species '*which is likely to become an endangered species within the foreseeable future.*'

Species Listing Process

Consequences:

- Protects species from further 'harm'
- Declare and protect species habitat
- Develop recovery plan to de-list species

§7 Interagency Cooperation

Major intent:

- Agencies consult with FWS/NMFS on listed species
- Solicit opinion on effects of project on species or habitat (biological opinion process)

Interagency Cooperation

§7. INTERAGENCY COOPERATION.

The Secretary shall . . . insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence. . .

Interagency Cooperation

§7 Cooperation: real “teeth” of ESA

Very word heavy; true meaning unclear at first read

“*Do not jeopardize*” a strict roadblock

In contrast to NEPA: substantive, specific and mandatory

Tellico Dam



Part of Tennessee Valley Authority (TVA) hydroelectric project

Last undammed segment of Little Tennessee River

Classic environmental case: ‘Fish bites dam’

Tellico Dam



Last of 70 dams; lowest priority

Economic justification: increased recreation, development of “model” industrial city “*Timberlake*” with hydroelectric and water control

Costs: 300 farm families, 100s of fisherman and canoeists, sacred to the Cherokee

Tellico Dam

1964: Citizen coalition formed to resist the project through political opposition:

Citizens groups (farmers, sportsman, archeologists, Cherokee Tribe)

vs.

TVA allied with business interests (primarily real estate & recreation)

Tellico Dam

1960s:

- No legal justification for stopping
- Concrete part of dam built for \$5 million

1970: used NEPA to produce an injunction

- dissolved in 1973 when an EIS was completed
- EIS revealed large negative impacts

Tellico Dam



1973: Univ. of Tennessee biologists discovered endangered dusky snail darter

Required clean, flowing water habitat to survive

Estimated 25,000 fish lived in the area

Tellico Dam

1974: filed lawsuit using ESA; trial in 1975

Unique case built on economic costs relative to benefits:

- Unique recreation, history, rich ag soils,
- Proposed alternate river-based development
- Snail darter used as "*canary in the coal mine*" for humans

Trial History

District court found that the dam would destroy the snail darter:

- did not issue an injunction to stop the dam

Sixth Circuit Court of Appeals overturned the conviction

TVA appealed to the Supreme Court

Hill

*Tennessee Valley Authority v.
Hiram Hill et al.*
Supreme Court, 1978

- Plaintiffs seek to enjoin the completion of the Tellico Dam and impoundment of the Little Tennessee River.
- Allege that TVA is in violation of ESA by bulldozing and clear-cutting trees with plans to impound the river in January 1977.

Hill

Ruling: upheld appeals court

- ESA only issue: found §7 to be clear and unambiguous, admits no exceptions
- Tellico dam would clearly violate by eradicating species
- Would waste the \$100 million spent on the dam, but species protection of highest priority

Hill

Ruling:

- Does not allow for economic weighing; value of endangered species is “incalculable”
- Irreconcilable conflict between dam and §7
- Court will not second-guess Congress:
 - *Dissenting opinion:* should have discretion to override statutory violations
 - Send issue back to Congress

Congressional Hearings

1979: held hearings on ESA

Amended §7:

- Change "do not jeopardize" to "not likely"
- Created *Biological Opinion* process
- Limited resources commitments to avoid "sunk resources" tactics

The 'God Committee'

Creation of *Endangered Species Committee* to grant exemptions:

- Allowed review of case on full legal merits (not just ESA)

Committee denied an exemption to Tellico on economic grounds:

- Project 95% complete, benefits not worth costs
- Poorly conceived from the start

Tellico Dam

June 1979: Tennessee legislators (Sen. Howard Baker and Rep. John Duncan):

- Added rider onto ongoing appropriations bill
- Overrode Supreme Court decision and ordered dam's completion
- Amendment not read, few knew of existence, not vetoed by Carter

Cherokees filed lawsuit based on religious rights; injunction denied

TVA flooded valley in Nov. 1979; snail darters in Little Tennessee died

Discussion

What do think about 1978 amendment?
How about if §7 drafted to be specific but
camouflaged?
Do we need stark roadblocks?

Seattle Audubon

*Seattle Audubon v.
John Evans.*
9th Circuit Court, 1991



- Spotted Owl listed by USFW as a threatened species in June 1990
- The National Forest Management Act requires the maintenance of viable populations of native vertebrates. (ESA was invoked in a parallel case)
- USFS proceeding with large timber sales of old growth forest without EIS or rule-making

Seattle Audubon

Ruling:

- USFS failing to fulfill its obligations under NFMA & ESA
- USFS, without notice, EIS, or rule-making procedures proceeding with large timber sales of old growth forest
- It had earlier agreed to revise guidelines and an older ROD, but failed to comply
- Injunction granted against timber sales

God Committee

Evaluated ESA issues of case
Granted a partial exemption and 13 timber contracts (of 44) were awarded
Economic interests (and jobs) won out over environmental interests

§9 Prohibited Acts & 'Harm'

. . .it is illegal to "take" any listed endangered or threatened species ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.")

Sweet Home

*Babbitt v.
Sweet Home Chapter of Communities for a
Greater Oregon.*
Supreme Court, 1995

- FWS defined "harm" as a "significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."
- Sweet Home (landowners, logging industry, logging companies), challenged FWS's regulation defining harm to include "habitat modification"

Sweet Home

Ruling:

- Definition of "harm" is "to cause hurt or damage to"; It does not say only direct or willful action causing injury is "harm".
- "Harm" would have no meaning separate from the other words included in the definition of "take" (i.e., kill, shoot, trap).
- Definition is consistent with Congress' clear expression of ESA's broad purpose to protect wildlife and ecosystems

1995 Salvage Rider

Senators Hatfield (R-OR) and Gorton (R-WA) stealthily attached "Emergency Salvage" timber rider to the 1995 Rescissions Bill

Suspended ESA, NEPA, NFMA, and "all other applicable Federal environmental and natural resource laws" for 18 months

All sales exempt from the administrative appeal process and judicial review."

Next Time. . .

- Reviewing EAs and EISs
- Reading:
 - Jain et al., 8.1-8.5
