

## Applicable Fish and Wildlife Service Statutory Obligations

- Endangered Species Act (16 U.S.C. 1531 et seq.)
- Migratory Bird Treaty Act (16 U.S.C. 703 et seq.)
- National Wildlife Refuge System Administration Act (16 U.S.C. 668dd)
- Administrative Procedures Act (5 U.S.C. 701 et seq.)

# Endangered Species Act

- Section 2 (policy): all federal departments and agencies must seek to conserve endangered and threatened species
- TVA v. Hill, 437 U.S. 153 (1978) – ESA reflects conscious decision by Congress to give species protection priority over “primary mission” of federal agencies

# Endangered Species Act – Section 4 (Listing and Recovery)

- Listing Criteria and Process
  - 5 factors
    - The present or threatened destruction, modification, or curtailment of its habitat or range;
    - Over utilization for commercial, recreational, scientific, or educational purposes;
    - Disease or predation;
    - The inadequacy of existing regulatory mechanisms;
    - Other natural or manmade factors affecting its continued existence.
  - Petition and Finding
  - Proposed and Final Rule

## Endangered Species Act – Section 4 (Listing and Recovery)

- Designation of Critical Habitat
  - Prudency Determination
  - Criteria for Critical Habitat
  - Balancing under 4(b)(2)
  - Economic Analysis
  - Effect of Designation

## Endangered Species Act – Section 4 (Listing and Recovery)

- Recovery
- Five-Year Reviews
- Delisting, Downlisting, Uplisting

## Endangered Species Act – Section 7 (Consultation)

- Section 7(a)(1): Affirmative duty of agencies to adopt programs to conserve species
- Section 7(a)(2): Agencies must consult with FWS before taking action, to determine effect on listed species and critical habitat
- Biological Opinion/Incidental Take Statement

## Endangered Species Act – Section 9 (Take)

- Defined
- Includes habitat modification, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, (515 U.S. 687)

## Endangered Species Act – Section 10 and 11 (Exemptions and Enforcement)

- Section 10: Incidental Take Permits – Private parties
- Section 11: Enforcement
  - Section 11(a): Civil penalties
  - Section 11(b): Criminal penalties for knowing violations
  - Section 11(g): Citizen suits

# Endangered Species Act

National Park Service

Implementation – Management Policies

# Migratory Bird Treaty Act, 16 U.S.C. 703 et seq.

## ■ Application

- Section 703(b): Migratory birds native to the U.S.
- 50 C.F.R. Section 10.13: lists of covered birds

# Migratory Bird Treaty Act

## ■ Prohibited Actions

- Section 703 (a): Except as permitted by regulations is unlawful to pursue, hunt, take, capture, kill or attempt to take, capture, or kill any migratory bird, or an part, nest or egg.
- 50 C.F.R. 10.12: "Take" means "to pursue, hunt, shoot, wound, kill, trap, capture or collect" or attempt to do so; both intentional and unintentional
- Case Law – indirect take (destruction of habitat alone) does not violate the MBTA
- 2003 FWS policy memo: nest destruction without unpermitted take of birds or eggs not prohibited, if no possession occurs during destruction – but cautions re: colonial waterbirds

# Migratory Bird Treaty Act

## ■ Enforcement

- Criminal Statute: Section 707 sets forth penalties for knowing and unknowing violations
- Applicability to federal agencies – split but prevailing view is that MBTA does apply
- Private action against agency would have to be brought under Administrative Procedures Act

# National Wildlife Refuge System Administration Act 16 U.S.C. 668dd

- Creation and Administration of National Wildlife Refuges
- Section 668dd(c): prohibits disturbing, injuring, cutting, burning, removing, destroying or possessing real property of refuge without authorization (permit)
- Section 668dd(d)(3)(B) and 50 C.F.R. 26.41: Before considering whether to permit use at refuge, FWS determines whether use is compatible with major purpose for which refuge was established
- Applicability of 16 U.S.C. 459a-3

# Administrative Procedures Act

## 5 U.S.C. 701 et seq.

- Additional standard for judicial review of federal agency actions
- Section 704: “final agency action” reviewable
- Section 706(1): court may compel agency to take or complete action that was unlawfully withheld or unreasonably delayed
- Section 706(2): court may invalidate agency action that is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law