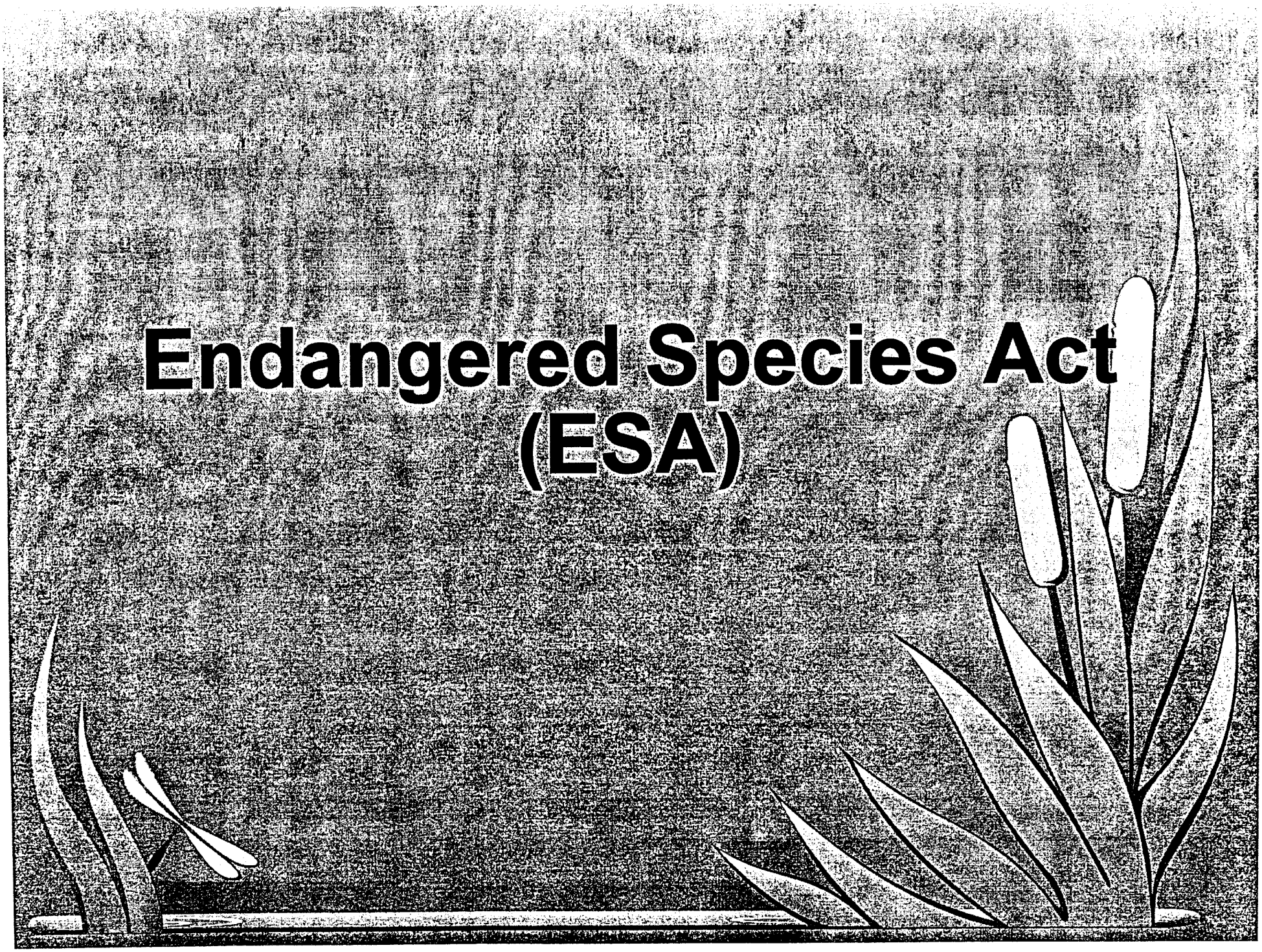
Endangered Species Act (ESA)



ESA Sections

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- Section 18 - Annual cost analysis by FWS

Section 7

Consultation Requirements

- Section 7(a)(1) directs Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act.

- Section 7(a)(2) states that each Federal agency (FERC) shall, in consultation with the Secretary (Service), insure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.

ESA Definitions

- Effects definitions
  - Direct- the immediate effects of the project on a species or its habitat.
  - Indirect- those effects that are caused by or a result from the proposed action and are later in time, but are still reasonably certain to occur.
  - Cumulative- effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the Ferderal action subject to consultation.

ESA Definitions

Interrelated, Interdependent, and Action Area

- **Interrelated** and **interdependent** actions: Effects of the action under consultation are analyzed together with the effects of other activities that are interrelated to or interdependent with that, action.
  - An interrelated activity is an activity that is part of the proposed action and depends on the proposed action for its justification.
  - An interdependent activity is an activity that has no independent utility apart from the action under consideration.
- Action area is all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02).

ESA & Definitions

- The analysis of whether other activities are **interrelated** to, or **interdependent** with, the proposed action under consultation should be conducted by applying the "but for" test.
  - For example, the biologist should ask whether another activity in question would occur "but for" the proposed action under consultation.
    - **If no, that activity is interrelated or interdependent and should be analyzed with the effects of the action.**
    - If yes, then the activity is not interdependent or interrelated and would not be analyzed with the effects of the action under consultation.

More ESA Definitions

- May Affect- the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat. **When the Federal agency proposing the action determines that a "may affect" situation exisits**, then they must initiate formal consultation.

- Is likely to adversely affect- the appropriate finding in a BA if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions.

- Jeopardize the continued existence of- 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 CFR 402.02).

ESA-Informal Consultation Process

- Federal Energy Regulatory Commission (FERC) or its non-Federal representative (Department of Water Resources-DWR) requests a species list from the Service for the project's action area.
- Species lists can take up to 30 days to prepare from the date the Service receives the request.
  - Candidate species and species of concern are also included in the list.
  - While candidate species are not protected under the law, it is a benefit to consider project impacts to these species to avoid future conflicts in the event the species get listed.
- The National Marine Fisheries Service has jurisdiction for Federally listed or proposed anadromous fish species and marine mammals.

ESA and Biological Assessment

- Section 7 (c) of the ESA requires the Federal Action Agency or its non-federal representative to prepare a biological assessment (BA) for "major construction activities".
- An environmental assessment prepared for NEPA that adequately addresses impacts to listed and proposed species may serve as a BA pursuant to ESA.
- If a proposed Federal action has any adverse effects on listed species or designated critical habitat formal consultation is required.

Formal Consultation

- Action agencies initiate formal consultation through a written request to the Service. The request must also have all the information required to complete consultation.

- Formal consultations determine whether a project is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification) and can also: