

# Endangered Species Act in Kentucky

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ATTORNEYS

# Presentation Overview

- Endangered Species Act Background
  - Listing of Species
  - Section 7 Consultations
  - Prohibitions on “Take”
- Endangered Species In Kentucky
- Kentucky Division of Forestry Conservation Memorandum of Agreement



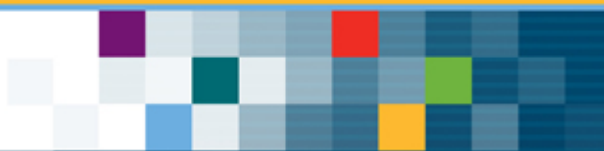
# Endangered Species Act

- Enacted in 1973
- 16 USC § 1531 et seq.
- Purpose:
  - Provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species... 16 USC § 1531(b)
- Lead Agency
  - USFWS or NOAA Fisheries



# Section 4 Listing Process (16 USC § 1533)

- Designation process for endangered or threatened species
  - Endangered: “any species which is in danger of extinction throughout all or a significant portion of its range”
    - Unless you’re a pest bug with an “overwhelming and overriding risk to man”
  - Threatened: likely to become endangered in foreseeable future
- Solely on the basis of best scientific/commercial data
- Must also designate critical habitat



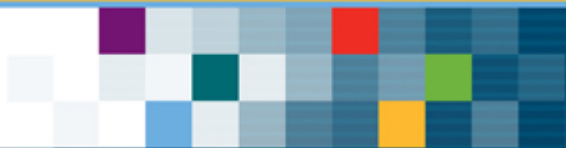
# Section 7 Consultations (16 USC § 1536)

- Federal permit or approval requires
  - consultation between the agency issuing the permit (action agency) and the ESA agency (resource agency)
- Consultation required to ensure that proposed action “is not likely to jeopardize the continued existence of any endangered species or threatened species”
- Typically a two-step process
- Takes time/\$



# Informal Section 7 Consultations

- Is there a major construction activity where T/E species are present?
- Biological Assessment
  - Whether the project “may affect species or critical habitat”
  - Whether the project is “likely to adversely affect listed species or critical habitat”
- If “likely to adversely affect”
  - Formal consultation



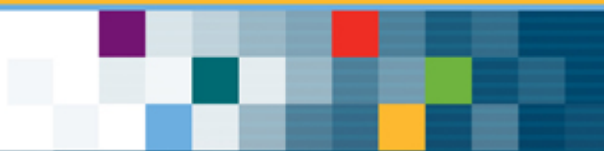
# Formal Section 7 Consultations

- Biological Opinions
- Will the project jeopardize the continued existence of the listed species or destroy habitat
  - If “no jeopardy” – Incidental Take Permit in opinion
    - Identifies reasonable and prudent measures to limit take
  - If “jeopardy” – opinion will ID reasonable and prudent alternatives projects
    - If no RPA, no project (God Squad?)
- FCRPS Opinions from Judge Redden (D. Or.)



# Section 9 Take Prohibition (16 USC § 1538)

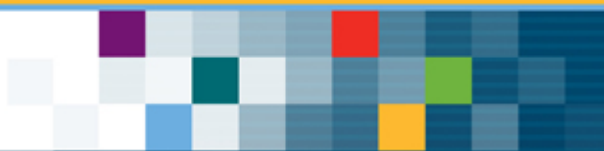
- The ESA prohibits the “take” of any listed species
- “Take” defined in the statute:
  - To harass, harm, pursue, hunt, shoot, wound, kill, trap capture, or collect, or to attempt to engage in any such conduct. (16 USC § 1532(19))
- “Harm” defined in regulation to include:
  - Significant habitat modification that:
    - Actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering (50 CFR 17.3)
- Civil (\$25,000 max) or criminal penalties





# Endangered Species in KY

- As of November 21, 2012 – 47 species listed as endangered or threatened
  - Majority (23) are mussels
  - Seven fish species
  - Three bird species
  - Three mammal species (all bats)
  - Nine plant species
  - One crustacean (KY Cave Shrimp)
  - One insect (American Burying Beetle)
- Seven species have critical habitat designations within the Commonwealth



# Kentucky Endangered Species

- Blackside Dace



- Fanshell Mussel



# Kentucky Endangered Species

- Cumberland Sandwort



- Kentucky Cave Shrimp

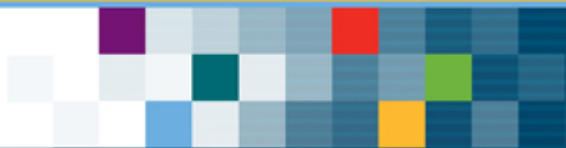


# Indiana Bat (*myotis sodalis*)



# Indiana Bat Biological Opinion

- January 2, 2011 BiOp
  - USFWS participation in and approval of Conservation MOAs
- “No jeopardy” opinion
- Incidental take permit
  - RPMs
  - Limits incidental take to bats taken on 2,500 acres/yr (12,500 acres total)





# Indiana Bat Conservation MOA



- USFWS and KDOF (9/6/12)
- Implements the BiOp ITP
- May affect, not likely to adversely affect:
  - Mowing, controlled burning, invasive species control, planting, etc...
- Must follow work practice descriptions
- Take limited to 400 acres/yr (2,000 acres/term)



# Indiana Bat Conservation MOA

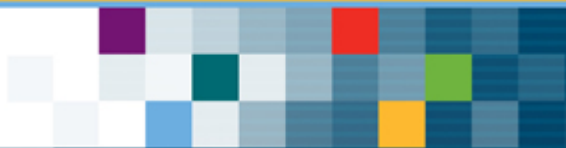


- Practices that “may adversely affect”
  - Green tree harvest, salvage harvest, hazard tree removal, road construction, etc..
- Must comply with “Avoidance, Minimization & Mitigation Measures”
- Complicated acreage calculation method



# Indiana Bat Conservation MOA

- Activities requiring project-specific review:
  - > 250 acres of habitat
  - 1 mile of priority 1 or 2 hibernacula
  - ½ mile of priority 3 or 4 hibernacula
  - ID'd hibernacula with < 60% forest cover w/in 10 miles
  - ID'd maternity areas with < 45% forest cover
  - Known maternity areas b/w June 1 and July 31





# Questions?

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