



Endangered Species Act and NRD Practice: An Overview

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First, a quick review on...



- Contaminated property acquisitions and liability
- CERCLA liability, exemptions, strategies
- RCRA liability, exemptions, strategies
- VCP and TRRP
- MSDs
- PACE



High Island, Texas BP Property Map Galveston County, Texas 2017 Photo



Statutory Authority for Wildlife Protection



Migratory Bird Treaty Act - 16 U.S.C. § § 703-712 –

Unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird [or] any part, nest, or egg of any such bird . . ." listed under the statute, except when specifically authorized by DOI.

Bald & Golden Eagle Protection Act - 16 U.S.C. § § 668-668d –

Unlawful to take any bald eagle or golden eagle in any manner, including by killing, wounding, molesting or disturbing to a degree that causes injury, decrease in productivity, or nest abandonment.

Endangered Species Act - 16 U.S.C. § § 1531- 1544 –

Unlawful to take any listed species ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct")

ESA – Key Concept Review



- Section 4 Listing
 - Endangered, Threatened, Special 4d Rule
 - Candidate Conservation Agreement
- Section 7 consultation
 - Federal action
 - Jeopardy
 - Biological assessment, BiOp, Incidental Take Permit
- Section 9 Taking
 - All persons; includes critical habitat destruction
 - Habitat Conservation Plans

Example – Hill Country Wind





Creative options



- USFW vs EPA
- What federal permits are actually necessary?
- Mitigation steps create new habitat
- Can you finesse operating periods?
- Market mechanisms ESA banks
- Insurance and risk spreading
- Remember Texas law, and Texas actors

Threatened Freshwater Mussels (Bivalvia: Unionidae) of Texas



Fusconaia askewi Tex as Pigtoe TPWD-Threatened



Fusconaia lananensis Triangle Pigtoe TPWD-Threatened



Lampsilis bracteata Texas Fatmucket TPWD-Threatened ESA- Candidate



Lampsilis satura
Sandbank Pocketbook
TPWD-Threatened



Obovaria jacksoniana Southern Hickorynut TPWD-Threatened



Pleurobema riddellii Louisiana Pigtoe TPWD-Threatened



Popenaias popeii Tex as Hornshell TPWD-Threatened ESA-Candidate



Potamilus amphichaenus Texas Heelsplitter TPWD-Threatened



Potamilus metnecktayi Salina Mucket TPWD-Threatened



Quadrula aurea Golden Orb TPWD-Threatened ESA-Candidate



Quadrula houstonensis Smooth Pimpleback TPWD-Threatened ESA-Candidate



Quadrula mitchelli False Spike TPWD-Threatened



Quadrul a petrina Texas Pimpleback TPWD-Threatened ESA-Candidate



Truncilla cognata Mexican Fawnsfoot TPWD-Threatened



Truncilla macrodon Texas Fawnsfoot TPWD-Threatened ESA-Candidate

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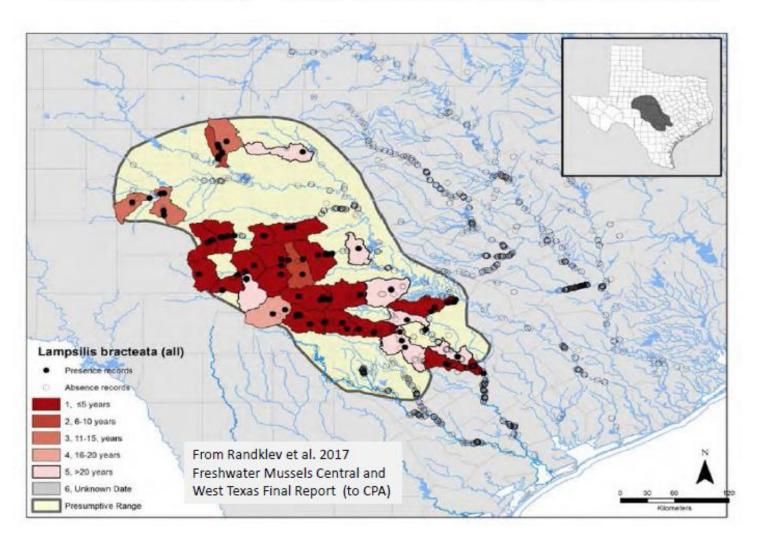
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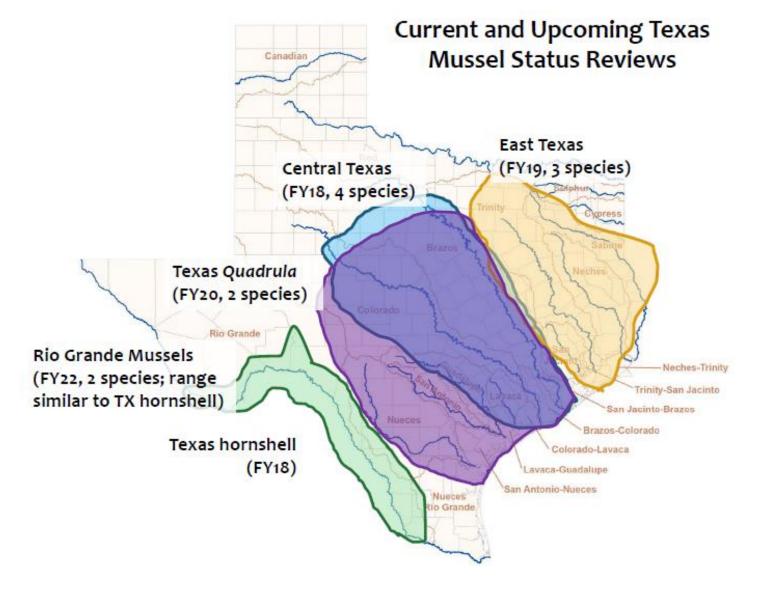
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Conservation Map – Texas fatmucket (Lampsilis bracteata)







Migratory Bird Treaty Act



- First adopted in 1918 to implement treaty with Great Britain/Canada and later Mexico aimed at curbing trade in feathers.
 - Over 800 bird species listed
 - Live or dead birds
- Unlawful "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . ." a migratory bird.
 - Misdemeanor: 6 mos. prison/\$15,000 fine
 - Strict liability, selective enforcement
- MBTA authorizes USFWS to issue take permits
 - "Unless and except as permitted by regulations made as hereinafter provided"
 - Permits available but not incidental take
 - USFWS still contemplating developing a MBTA permit program

MBTA Jurisdiction and Proposed Rule



Solicitor's M-Opinion (M-37041) – Jan 10, 2017

- Supported FWS' long-standing legal interpretation
- "MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing."
- Suspended pending review on February 6, 2018

Solicitor's M-Opinion (M-37050) – Dec 22, 2017

- Permanently withdraws and replaces Opinion M-37041
- MBTA's "prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."
- "Neither the plain language of the statute nor its legislative history support the notion that Congress intended to criminalize, with fines and potential jail time, otherwise lawful conduct that might incidentally result in the taking of one or more birds."

BGEPA -- 2016 Eagle Permit Rule and Programmatic EIS



- Triples nationwide annual take limit for bald eagles without compensatory mitigation. Golden eagle take authorized east of 100th meridian, but compensatory mitigation required
- Allows 30 year permit terms, but with 5-year reviews to evaluate take levels and limits. Additional conservation measures could be required consistent with adaptive management measures in ECP
- Replaced "unavoidable" standard with "maximum extent practicable" standard from ESA, which allows for consideration of cost and available technology. ACP concept dropped
- BGEPA "preservation standard" (consistent with goal of stable or increasing breeding populations) applied on Eagle Management Unit scale. Authorized take cannot exceed 5% of Local Area Population without compensatory mitigation
- Requires standard pre-construction surveys (2 years) and use of Bayesian collision model
- Compliant applications can tier off of PEIS; otherwise waiver or individual NEPA required



Natural Resource Damage – assessment and recovery



Key concepts

- NOT section 107 CERCLA cost recovery for cleanup costs
 - Trustees (including states and tribes)
 - Not response, but recovery
 - Exceptions still apply 107b, federally permitted releases
- Statute of Limitations
- Lost use of resources vs restoration how to put a price tag?
- Settlement frameworks and strategies





Looking ahead on NRD legal developments



- Climate change?
- Interplay with ESA and natural resource statutes?
- Aerial emissions?
- Public trust doctrine?
- Criminal liability?

Resource for you – Natural Resource Damage Liability Law