

**Slide 5: Law**

The word “law” is a broad term. There are many types of laws. A law is any rule of action or conduct that is prescribed by a controlling authority, such as a local, state, tribal, or national government. A law has binding legal force and effect.

A “violation” of law has legally-enforceable effects. If you exceed a speed limit or fail to pay income tax, you pay a fine or penalty. A legally-enforceable effect also includes a fine for importing endangered wildlife without a permit, or the setting aside of an agency’s listing rule because it violated administrative procedures.

Laws include Federal statutes enacted by Congress that employees of the executive branch are charged with implementing. Laws also include our U.S. Constitution, international and domestic treaties, legislation enacted by states and tribes, agency regulations, and court rulings.

This lesson will focus on a Federal law – the Endangered Species Act – and law and policy at the Federal level. Just be aware that there also are parallel state and tribal systems of statutes, ordinances, regulations, policies, and judicial systems.

**Slide 6: Statutes**

Statutes are one type of law. Statutes are the formal, written enactment of a legislative body. The Constitution gives Congress the authority to make all laws necessary and proper to execute the powers of the United States, as vested in a Federal Government. The Federal legislative body is the Congress, and Federal statutes are ones we implement and are required to comply with.

Federal statutes are in the form of Public Laws that become law when signed by the President. Most, but not all, Federal statutes are codified in the United States Code.

The Endangered Species Act is a Federal statute. It governs three distinct areas of law: listing and protection of endangered and threatened species, implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (also known as CITES), and import and export of nearly all wildlife and wild plants to and from the United States. Another statute, the Administrative Procedure Act, governs rulemaking by all Federal agencies and judicial review of Federal agency actions.

**Slide 7: Rules and Regulations**

Rules and regulations are issued by Federal agencies.

They have the force of law if they are consistent with the authority granted by statutes. Some regulations are expressly given legal force and effect by Congress, through the underlying statute. For example, Section 9 of the Endangered Species Act makes it unlawful to violate any regulation pertaining to an endangered or threatened species.

Rules and regulations are usually given great deference by courts ... as long as an agency's interpretation is reasonable and is supported. Different agencies implementing the same statute might have differing regulations. For example, the Fish and Wildlife Service and National Marine Fisheries Service both implement the Marine Mammal Protection Act, yet each agency has its own set of regulations.

The Administrative Procedure Act requires that Federal regulations be developed by rule-making. That usually means publication of a proposed rule, an opportunity for public comment on that proposal, publication of a final rule, and a 30-day effective date after publication.

Most Federal rules appear in the Code of Federal Regulations, the CFR. Chapters are numbered by categories. The section on wildlife and fisheries is 50 CFR. It includes all of the regulations by our two agencies, including Endangered Species Act regulations on permits, critical habitat, experimental populations, and other topics

### **Slide 8: The Role of Regulations**

Rules and regulations interpret terms, clarify provisions, and resolve ambiguity. They fill in the gaps in statutes, implement and enforce that statute, and explain processes like public notice and comment periods on agency decisions.

Interpretation includes definitions for key terms. For example, both Services have regulations that define statutory terms like "harm" and "harass," which are included in the statutory definition of "take."

Rules and regulations often describe how agencies implement and enforce their statutory authority. For example, the Endangered Species Act requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species. Joint consultation regulations developed by our two agencies explain the process and standards for consultation. The Act also prohibits certain activities with listed species unless a permit is granted. Our regulations describe the permit process – how to apply for a permit and how the agency determines whether an applicant is qualified to hold one.

### **Slide 9: Judicial Rulings/Opinions**

Law also includes court rulings, usually explained in a court opinion.

Courts interpret the law, the Constitution, treaties, statutes, and regulations and they apply law to the facts in a particular case.

The extent to which courts can review Federal agency decisions is spelled out in the Administrative Procedure Act. Under this statute, the courts can compel an agency to take action if it has been unlawfully withheld or unreasonably delayed. Courts can also declare an agency action unlawful and set it aside if it is found to be arbitrary and capricious ... contrary to the Constitution ... exceed statutory authority ... or violate required procedures.

**Slide 10: Policy/Guidance**

Policy or guidance, as compared to law, sets nonbinding standards.

Policy or guidance sets the administrative course of action that helps implement a program. A policy may address a program's procedures. For example, a policy to obtain peer input on five-year reviews of listed species ... or 30-day response deadlines on requests for information. Policies and guidance may be what we consider "formal" (published in the Federal Register for public review, input, and comment) or "informal" (purely internal, such as memoranda, guidance documents, or letters).

**Slide 11: Policy/Guidance**

Policies and guidance can be issued at the very highest levels of the Executive Branch, such as "Executive Orders" issued by the President, down to the very lowest levels, such as letters sent out by a particular Service office.

Policies and guidance establish an accepted norm, but they are not legally-binding.

Anyone subject to a policy – whether an agency official or a member of the public – has some discretion and may vary from the actions, standards, and procedures in a policy or guidance document.

Still, there can be legal consequences if an agency fails to follow its own policies and guidance. Adherence to them is vital in making defensible agency decisions. An agency decision risks being found "arbitrary and capricious" by a court if it is substantively or procedurally inconsistent with agency policy, and that inconsistency isn't explained and justified.

**Slide 12: Legal Framework**

In this entire course, we're focusing primarily on statutory terms under the Endangered Species Act. But be aware there is an entire legal framework that we use to implement and enforce the Act. It consists of all applicable laws and policies of the type you see listed here.

Each agency has its own set of regulations, policies, and guidance. They also have some joint regulations and policies, such as the consultation regulations both the Fish and Wildlife Service and the National Marine Fisheries Service have developed.

Keep in mind where in this legal framework you are operating. Knowing your source of authority helps you understand the steps and decisions that need to be made, and how much flexibility you may have for any particular agency decision.

**Slide 13: Resources**

Federal statutes are mostly found in the United States Code and agency regulations in the Code of Federal Regulations. You will want to become familiar with both, and they are available online at this URL.

Preambles to rules, which explain the reasons for the rule, and published policies appear in the Federal Register, also online.

Policies and guidance can be diverse and broad, and can be found in a variety of places. Much Endangered Species Act policy and guidance are online at the Web sites of both the Fish and Wildlife Service and the National Marine Fisheries Service.