



  **Module 1: A Brief Overview of the Role of Law and Policy**

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Purpose

Inform the participant of the relative importance of different types of documents used during implementation of the Endangered Species Act.

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A Brief Overview of the Role of Law and Policy

In your work with the ESA you will hear terms such as:

- law
- statute
- regulations
- rules
- policy
- guidance



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Why Does It Matter?

As practitioners of the ESA, you may:

- make recommendations or decisions based on law and policy
- write rules, legislation, or policies

Understanding the hierarchy of various types of laws and the role of law as compared to policy will help you to make better decisions and help avoid legal challenges.



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Law

A rule of action or conduct

- prescribed by controlling authority (for our purposes, a governmental body)
- with binding legal force and effect.

Law includes:

- Statutes enacted by Congress and other legislative bodies
- Constitution
- International and domestic (with Native American tribes) treaties
- Agency regulations
- Court rulings/opinions



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Statutes

Formal, written law enacted by a legislative body

Federal statutes are:

- Enacted by the Congress
- Usually (but not always) codified in the United States Code (USC)
- Implemented by federal agencies, such as the FWS

Amount of flexibility or discretion in implementing depends on the amount of flexibility or discretion given to the agency by Congress



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Rules and Regulations

Definitions

- Rule (under the APA): An agency statement with future effect that implements, interprets, or prescribes law or policy. Federal rules may be, but are not necessarily, codified in the Code of Federal Regulations (CFR).
- Regulation: A general term used to describe codified final rules. Federal regulations are found in the CFR.

Development and effect of rules and regulations

- In practice, have the force and effect of law. Some regulations are given explicit legal force and effect in the authorizing statute.
- Usually afforded a high degree of deference by the courts
- Generally requires notice to the public and opportunity to comment on how the agency will regulate the public's activities, unless an emergency situation precludes public notice and comment.

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The Role of Regulations

- Interpret terms
- Clarify provisions or resolve ambiguity in statutes
- Fill in gaps in statutory terms
- Provide for implementation and enforcement of the statute
- Provide detail on public process such as notice and comment

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Judicial Rulings/Opinions

- Interpret law (constitution, statutes, regulations) and apply it to the facts of a particular case.
- Change laws through the process of judicial review.
- Under APA, courts can compel agency action unlawfully withheld or unreasonably delayed.
- Under APA, courts can hold unlawful and set aside an agency action found to be:
 - Arbitrary and capricious
 - Contrary to the Constitution
 - In excess of statutory authority
 - Implemented contrary to required procedures

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Policy/Guidance

- Facilitates the implementation of programs
- Sets nonbinding standards
- Principles that guide future decisions
- Addresses procedures
- May be
 - “formal” - published in draft form in the *Federal Register* with public review and the opportunity to provide comments before the final policy is published
 - “informal” – internal documents (memoranda)

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Policy/Guidance

- Policies/guidance can be issued by:
 - highest levels of the Executive Branch
 - single persons in a small program
- Establishes an accepted norm but is not legally binding
 - but can be legal consequences if an agency fails to follow its own policies and guidance
- Allows for discretion – no binding force and effect

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The legal framework of the ESA consists of:

<u>Law:</u>	<u>Policy/Guidance</u>
• Treaties (international and domestic)	• Presidential Executive Orders
• Statutes	• Secretarial Orders
• Rules and regulations	• Agency Policies
• Judicial Rulings/Opinions	• Director’s Memos
	• Guidance Documents and Handbooks
	• Memoranda of Agreement or Understanding

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Resources for Law and Policy

- Federal Laws (www.fdsys.gov)
 - United States Code
 - Code of Federal Regulations
 - Federal Register
- Agency Policy and Guidance
 - www.fws.gov
 - www.nmfs.noaa.gov



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Review

- Understanding the underlying authority and nature of a document matters because you will:
 - recognize the source and nature of the standards and procedures involved in making a decision or resolving a conflict, and
 - recognize the amount of flexibility you have in making decisions and resolving conflicts.



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