



# Municipal Liability and the Endangered Species Act

Or, how a bird can blow your budget.

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# The Endangered Species Act

Is actually a name given to a group of related statutes and regulations

- 7 U.S.C. § 136, et seq.
- 16 U.S.C. § 1531, et seq.
- CFR Title 50, Part 17
- CFR Title 50, part 453

# Piping Plovers



A small shorebird that nest on sandy beach areas of the Atlantic Coast and the Great Lakes

# Adult piping plover



# How the Plover took down Plymouth Massachusetts

- Only 1,200 breeding pairs were known to exist in 1998 and thus the species was listed as “threatened” under the Endangered Species Act.
- This gave the Fish and Wildlife Service a certain amount of regulatory powers and oversight.
- Nearly 1/3 of the known breeding pairs nested in Massachusetts. The birds are very susceptible to Off-Road Vehicles/ Quads/ATV’s because their main line of defense is to stand still and blend into the surroundings.

Very difficult to spot



Main line of defense is to blend in -Wikipedia

# Plymouth's problem

- Zoologist spots 25 chicks and two adults dead in tracks left from ATV's from 1989-1997 (both in Massachusetts and New York state).
- Plymouth Long Beach is 2.8 miles long and is mostly owned by the Town of Plymouth, Massachusetts.
- Beach is used by both birds and ATV's.
- Town sold thousands of ATV permits from 1991 through 1997, allowing up to 325 vehicles on the beach at any one time.

(various sources, including "The Law of Biodiversity and Ecosystem Management," Nagel, 2006)

# United States v. Town of Plymouth, MA

6 F.Supp.2d 81 (Dist. Mass 1998)

- Reiterated broadest definition of “take;” includes not only killing but also harassment, and even includes knowingly destroying habitat; includes attempted “takes” as well
- Extends liability not only to the individual who “takes” but also to any third party acts that bring about a taking
- Extends liability to municipality for failing to act or remediate past damaging acts
- Imposed an injunction to be accomplished within one year or penalty of fine



# How did it shake out?

- The year after the management plan went into effect, several piping plover were killed by foxes and other predators. This gave rise to speculation that even failure to enforce leash laws on the beach might cause a “take” under the law.
- Various news articles from The Patriot Ledger, 1998-1999

# Moral of the Story

- Third party acts can give municipalities liability if the municipality provides the instrumentality to perform those third party acts

# What can a City do?

- Federally funded projects are already required to do an endangered species assessment prior to any work (NEPA)
- Consider requiring the same or similar level of investigation for any project funded by municipal dollars
- Get to know the endangered species likely to be in your area
  - This includes plants and animals
- If you learn of a “take,” take measures to correct or mitigate

# Resources

- Lake County Health Department:
  - <http://www.lakecountyil.gov/Health/want/Documents/Endangered.pdf>
  - (Doesn't include every possible species but does include pictures and where they have been spotted lately)
- IDNR Checklist
  - <http://www.dnr.illinois.gov/ESPB/Documents/ETChecklist2011.pdf>
  - List species by category, applies to entire state
- INDR County Lists
  - <http://www.dnr.illinois.gov/ESPB/Documents/ETListCounty2011.pdf>
  - Shows 137 Species in Lake County



Questions?  
Comments?  
Concerns?

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