Fixing the Law to Allow for Agency Adaptive Management for Ecosystem Services

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THE PROBLEM: One Administrative Law, Two Types of Agency Decision

**DIAL:**
The agency could employ any one of several graduating options to address an issue, and maybe it would like to “fine tune” over time.
EXAMPLE: Changing Ecosystem Services in the Everglades and Impacts on Species

Cape Sable Seaside Sparrow
Photo care of U.S. Fish & Wildlife Service

Everglades Snail Kite
Photo care of U.S. Fish & Wildlife Service
The “Light Switch” Decision: Listing Each Species under the ESA

- ESA § 4
- By statute, species are listed through modified notice-and-comment rulemaking, reviewable under “arbitrary and capricious” standard.
- USFWS must make the decision “solely on the basis of the best scientific and commercial data available to him.”

- THREE options: don’t list; list as threatened; list as endangered.
- FIVE statutory FACTORS:
  - Habitat loss
  - Overutilization of species
  - Disease or predation
  - Inadequacy of existing regulation
  - Other natural or manmade factors affecting the species’ continued existence.
The Outcomes for Our Birds:

- Listed as **ENDANGERED**, 1967 = “in danger of extinction throughout all or a significant portion of its range.” ESA § 3.

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The “Dial” Decision: How to Recover the Species

- ESA § 4: USFWS “shall develop and implement plans [“recovery plans”] for the conservation and survival of endangered species and threatened species . . . .”
- Priority goes to species that are in conflict with development.

- Plan must include “site-specific management actions” to achieve recovery.
- “Conservation” = bringing the species “to the point at which the measures [under the ESA] are no longer necessary.” ESA § 3.
The Problem for Our Two Birds:
“Competed in 1999 in partnership with agencies of the Department of Interior, the South Florida Multi-Species Recovery Plan acts as a ‘living document’ that allows for the recovery of listed species through adaptive management techniques based upon the most current science and research. The plan looks at species recovery through a landscape lens, rather than the traditional species-by-species approach.”
Adaptive Management Will Also Be Increasingly Important Because of . . .
The Adaptive Management Process

1. Define Problem and Objectives
2. Select Reference Baseline & Models
3. Select & Implement Management Actions
4. Monitor and Evaluate Performance

The process is iterative, allowing for continuous improvement and adjustment based on performance monitoring.
The Structural Problem

Administrative agencies “have not often been rewarded for flexibility, openness, and their willingness to experiment, monitor, and adapt.”

Other Current Legal Impediments to Adaptive Management

- **Public Participation Requirements**
  - Absolutely important for agency accountability, transparency of agency decisionmaking, avoiding agency capture, etc.
  - HOWEVER, current requirements are best suited to light switch decisions.

- **Judicial Review Requirements**
  - Again, absolutely important to promote a number of administrative law values, including agency accountability and proper separation of values.
  - HOWEVER, judicial review of EVERY adjustment an agency makes would thwart adaptive management.

- **Finality Values:** AM is an ongoing process by definition, so how do we achieve finality?
Our Proposal: Embrace the Cycle!

"Normal" Track

1. Congress requires
2. Congress commits to agency discretion
3. Congress is silent
4. Congress forbids

Agency sticks with standard APA

Adaptive Management Track

Agency decides to jump tracks through rule, subject to judicial review.

Establish goals, monitoring plan, management measures for this iteration.

Agency reviews data gathered in light of overall goals.

Agency implements plan, free of judicial review (1-10 years).

SHORT period for judicial review.
The Ideal Result for Adaptive Management

![Graph showing the ideal result for adaptive management, with management state oscillating over time towards a goal.](image)
Short term tolerance

Long term tolerance

Deviation

Time

RED result might justify emergency intervention; BLUE requires adjustments to plan.