

THE ENDANGERED SPECIES ACT: A PRIMER ON OUR NATION'S GOAL OF SLOWING DOWN EXTINCTION

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The Endangered Species Act, known as one of the United States' toughest environmental laws, is 50 years old this year. The Act's primary goal is to protect wildlife before it is too late. It is a complex statute to navigate and includes detailed requirements when dealing with protected species and strong enforcement consequences when failing to do so. This article provides a look into how this law came about and breaks down the Act's sections into basics, revealing its flexibilities as well as its teeth. This article does not detail all the positives and negatives of this landmark legislation, and most definitely does not dive into the nuances of interpretation over the years, but instead, draws a roadmap of its key provisions that have withstood the test of time.¹

I. INTRODUCTION: THE ATTEMPT TO UNDO SO MUCH HARM

On December 28, 2023, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, turns 50 years old.² The Act – loved by some and not-so-much by others – was signed into law by President Richard Nixon in 1973 in response to an unnatural and alarming decline in many animal and plant populations. Its primary purpose is to protect biodiversity and recover species at risk of disappearing forever by using the best-available science to identify those in need of protection. The Act also endeavors to promote the conservation of those species' ecosystems and habitats deemed crucial for their continued survival; the idea being that protecting the species from extinction cannot be accomplished without also protecting the air, land, and water where they thrive.³

The ESA requires an affirmative duty on behalf of the federal government to prevent extinction and proactively recover the species' chance of survival. Fundamentally, it establishes a means for the conservation of endangered and threatened species, determined as so and listed by Secretaries of authorized federal agencies. Likewise, the ESA is administered by the U.S. Fish and Wildlife Service (USFWS) for terrestrial and freshwater species, as authorized by the Secretary of the Interior; and by the National Marine Fisheries Service (NMFS) for marine and anadromous species,⁴ as authorized by the Secretary of Commerce.⁵

¹ The sources for or against the ESA are far too many to list. For an overview of the issues and successes, see U.S. Congressional Research Service. *The Endangered Species Act: Overview and Implementation* (R4667; Updated: Mar. 4, 2021) by Pervaze A. Sheikh, <https://crsreports.congress.gov/product/pdf/R/R46677>.

² Endangered Species Act (ESA), P.L. 93-205, 87 Stat. 884 (1973), 16 U.S.C. §§1531-1544. The ESA has been amended multiple times since enactment including by P.L. 94-359 (1976); P.L. 95-212 (1977); P.L. 95-632 (1978); P.L. 96-159 (1979); P.L. 96-246 (1980); P.L. 97-79 (1981); P.L. 97-304 (1982); P.L. 98-327 (1984); P.L. 99-659 (1986); P.L. 100-478 (1988); and P.L. 108-136 (2003).

³ ESA §2, 16 U.S.C. §1531.

⁴ Anadromous species include rockfish. These species can survive in freshwater *and* saltwater, whereas throw a freshwater species in saltwater, and the rather fast-acting consequence is a dead fish.

⁵ The Agriculture Secretary enforces the import and export of ESA-listed plant species. 16 U.S.C. §1532(15).

Today, there is evidence the ESA has saved hundreds of species from extinction in our country and 50 years following enactment, is still considered one of the United States most significant wildlife conservation laws. One of its greatest success stories is the recovery of the country's iconic national symbol: the bald eagle. In 2007, the bald eagle was removed from the endangered species list by the USFWS.⁶ This powerful raptor with a wingspan that reaches about seven feet was declared the national bird in 1782 when its numbers were as many as 100,000 nesting eagles. But in the early 1900s, the bald eagle almost completely lost its freedom when it was brought close to extinction mainly due to habitat destruction and degradation, as well as illegal shooting and the contamination of their essential food source, following the introduction of the insecticide DDT.⁷ In 1963, only approximately 400 active nests existed in the wild. In 1978, the federal government responded to the dangerously low numbers by turning to its newly enacted environmental law and listing the bald eagle as endangered, setting in motion conservation actions that included banning DDT and implementing species and habitat protection. By 2006, the bald eagle's U.S. population numbers rebounded to an impressive estimated number of 7,000 breeding pairs.⁸ As of 2020, the number has increased to an estimated 71,000 nesting pairs, a spectacular recovery.

When Congress passed the ESA, its primary goal was to undo some of the serious environmental harm humans placed on the country's wildlife, as well as to conserve critical habitat for successful recovery. Whether this Act is referred to as the "crown jewel"⁹ or the "pit bull"¹⁰ of U.S. environmental laws, after 50 years, the goal seems to be working, most of the time. And considering what is at stake otherwise, "most of the time" is a success.

II. THE U.S. RESPONSE TO AN UNNATURAL TREND OF EXTINCTION

"If we unbalance nature, humankind will suffer."¹¹

– His Holiness the Dalai Lama XIV –

These are such simple yet important words in today's complex world, where the balance of species is tentative, now more than ever. Life has evolved over billions of years making

⁶ Endangered and Threatened Wildlife and Plants, 72 Fed. Reg. 37,346 (July 9, 2007) (codified at 50 C.F.R. §§17.11, 17.41 (2008))

⁷ DDT also known as Dichlorodiphenyltrichloroethane. *See, e.g.,* [Eagle Management | U.S. Fish & Wildlife Service \(fws.gov\)](#).

⁸ *See* Endangered and Threatened Wildlife and Plants, 71 Fed. Reg. 8,238 (Feb. 16, 2006). The peregrine falcon also benefitted from the DDT ban, recovering from a low of only approximately 300 nesting pairs in 1975 in the United States, down from over 3,000 in the 1940s. The peregrine, which reaches speeds of up to 200 mph, was delisted in 1999 after a full recovery. *See* 61 Fed. Reg. 46542 (Aug. 25, 1999).

⁹ Lynda V. Mapes, Dec. 28, 1998, ['Crown Jewel' Of U.S. Environmental Law -- Endangered Species Act Survives. If Not Thrives, On Firing Line 25 Years | The Seattle Times](#) (25th Anniversary).

¹⁰ Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 464 (1999) (citing Hearings on S. 921 Before Subcomm. on Clean Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works, 103d Cong. 2 (1994) (Sen. Graham Statement.)).

¹¹ *See* <https://www.dalailama.com/messages/environment/clean-environment> (Quote from *Freedom in Exile: The autobiography of His Holiness the Dalai Lama of Tibet*, Hodder and Stoughton. UK 1990).

biological diversity necessary for the survival of all life forms on the planet.¹² Accordingly, wildlife extinction is the natural order of evolution.¹³ In fact, there have been five mass extinction events during earth's history, the largest occurring over 250 millions of years ago, which scientists believe resulted in the extinction of over 90 percent of all species on earth.¹⁴ Human beings have never been able to fully appreciate the degree of complexity with which all life forms are intertwined, making conservation efforts more important than ever.¹⁵ The benefits individual species bestow upon the entire web of life are not quantifiable, and equally, the consequences of mass extinction on the ecosystem are unpredictable. Scientists believe we are quickly heading towards, or are experiencing, a sixth mass extinction. But this one is different. This one is not the result of "natural" phenomena, but instead is driven by human activity and the "unnatural," unsustainable use of land, water, and wildlife.¹⁶ This new extinction threat set off alarms around the world.¹⁷

In 1973, the United States responded to this threat and enacted keystone legislation aiming for the protection of endangered and threatened species and their natural areas within the United States, and beyond.¹⁸ Although the law does not take on the burden of returning all of the world's endangered species to their original status, it does extend protection to at least a select portion in order to help them recover.

The Supreme Court refers to the ESA as "the most comprehensive" legislation for the preservation of endangered species ever "to be enacted by any nation."¹⁹ The ESA's enactment demonstrated a commitment by a unanimous Congress "to halt and reverse the trend towards species extinction, whatever the cost."²⁰ The law is an aggressive act of Congress, which some critics consider too aggressive, but an Act with the goal of ending extinction has to be more than a paper tiger in order to accomplish what it sets out to do.²¹

¹² Edward O. Wilson, *THE DIVERSITY OF LIFE* 344 (1992).

¹³ The "survival of the fittest" phrase originated from Charles Darwin's theory of evolution, which described the process of natural selection. See Charles Darwin and Leonard Keble, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (1859). Darwin did not coin this phrase or even agree with it, however. Instead, Herbert Spencer developed the concept after studying Darwin's book. See Herbert Spencer, *1 THE PRINCIPLES OF BIOLOGY* 444-45 (Univ. Press of the Pac. 2002).

¹⁴ See <https://www.amnh.org/exhibitions/dinosaurs-ancient-fossils/extinction/mass-extinction> (American Museum of Natural History, New York).

¹⁵ See James Dvozdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 *CASE W. RES. L. REV.* 553, 560 (1995); Bradley C. Karkkainen, *Biodiversity and Land*, 83 *CORNELL L. REV.* (1998-1998).

¹⁶ Scientists estimate that "the current rate of species loss varies between 100 and 10,000 times the background extinction rate (which is one to five species per year when the entire fossil record is considered)." See <https://www.britannica.com/science/biodiversity-loss>.

¹⁷ Consider, for instance, the American alligator that has survived on earth for 180-200 million years, yet the populations reached critical lows in the late 1860s due to hunting for its highly coveted skin for use in leather products. See 52 Fed. Reg. 21,059 (June 4, 1987); 86 Fed. Reg. 5112 (Jan. 19, 2021).

¹⁸ See 16 U.S.C. §1531(b); see also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

¹⁹ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978).

²⁰ *Id.* at 184.

²¹ See, e.g., [The Endangered Species Act: Celebrating 50 Years of Success in Wildlife Conservation | U.S. Department of the Interior \(doi.gov\)](#); Testimony of Dan Ashe, Dir., USFWS, *Critical Habitat Testimony*

Thus, through a series of word-specific provisions, the ESA establishes prohibitions and strict implementation plans for the conservation of species determined by science as being endangered or threatened.

III. KEY PROVISIONS – HOW THE ESA WORKS

The ESA strategically establishes the plan for wildlife protection and recovery through its detailed sections. The key ESA sections or provisions discussed in this article are:

- Section 3: Definitions
- Section 4: Listing
- Section 9: Prohibitions
- Section 10: Exceptions
- Section 11: Penalties and Enforcement and
- Section 8: Convention Implementation.²²

A. ESA Sections 3 and 4: Determining Which Species Need Protection

Section 3 of the ESA, 16 U.S.C. § 1532, is the dictionary for all important terms under the Act and is the place to reference when assessing any ESA provision. One of the most important terms in the statute is “take.” The ESA regulates *all* “take” of endangered species by *all* parties – individuals, businesses, and governmental entities. The term “take” is broadly defined as actions making it unlawful to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered species “or to attempt to engage in any such conduct” without a permit.²³ Significantly, harm includes destruction of habitat for a listed species that also results in actually killing *or* injuring that species.²⁴

The key step before any ESA enforcement action, however, is first, the animal or plant must be placed on the “list.” For any wildlife species to be protected under the ESA, that

Before the U.S. H.R., Comm. On Nat. Res., Regarding Implementation of The Critical Habitat Requirements of The Endangered Species Act of 1973 (Apr. 19, 2016).

²² ESA §3, 16 U.S.C. §1532; ESA §4, 16 U.S.C. §1533; ESA §9, 16 U.S.C. §1538; ESA §10, 16 U.S.C. §1539; ESA §11, 16 U.S.C. §1540; ESA §8a 16 U.S.C. §1537a.

Other equally important Sections, not fully detailed here, are: Section 5: Land Acquisition (ESA §5, 16 U.S.C. §1534); Section 6: Cooperation with States (ESA §6, 16 U.S.C. §1535; 16 U.S.C. §1533(b)(2)); Section 7: Interagency Cooperation and Consultation (ESA §7, 16 U.S.C. §1536); Section 15: Authorization of Appropriations (16 U.S.C. §1542 expired in 1992, however, Congress continues to appropriate funds for the ESA).

²³ 16 U.S.C. §§1532(19), 1538(a)(1)(B), (C). *See also* 50 C.F.R. §17.3 (USFWS definition of harm); 50 C.F.R. §222.102 (2023) (NFMS definition of harm).

²⁴ *See Sweet Home*, 515 U.S. at 697-704. *See also* [Critical Habitat fact sheet \(fws.gov\)](https://www.fws.gov/critical-habitat).

species²⁵ must be listed under Section 4 of the Act as either “endangered” (under danger of extinction)²⁶ or “threatened” (likely to become endangered in the foreseeable future).²⁷

1. *The Listing Process*

The listing process is no simple matter and follows strict federal rulemaking policy that involves assessment of biological information, prioritization based on assessed degree of threat (versus determination that the species is considered more important in an ecosystem), public notices for review, and publication of the final rule listing the animals or plants that warrant listing.²⁸ The USFWS or NFMS may propose to list a species under the ESA, or any person or private entity may petition them to list a species.²⁹ The factors considered in the decision to list wildlife include the current or threatened destruction of the species’ range, the unsustainable use of the species (for commercial or recreational purposes, for example), current regulatory measures in place, and other unnatural factors affecting the species’ risk of extinction.³⁰ Throughout assessment of these factors, the ESA specifically requires the decision be based “*solely on the basis of the best scientific and commercial data available*” to the Secretary.³¹ The economic impacts in listing a species cannot be part of any consideration. Section 3 does not define “best scientific and commercial data;” however, the courts interpret the phrase as not a standard of “absolute scientific certainty,” but one in which measures must be taken “*before* a species is ‘conclusively’ headed for extinction.”³² As the number of species at risk increases, the balancing act involved in the listing process becomes more complex, as human and financial resources to address the threat is not unlimited.

Today, there are more than 1,600 animals and plants listed as either endangered or threatened in the United States.³³ The ESA mandates that every five years the Secretary shall review the status of the listed species to assess whether the species should be removed from the list, uplisted, or downlisted.³⁴

²⁵ 16 U.S.C. §1532(16) (species); 16 U.S.C. §1532(8) (fish or wildlife); 16 U.S.C. §1532(14) (plant).

²⁶ 16 U.S.C. §1532(6).

²⁷ 16 U.S.C. §1532(20). “Foreseeable” defined by Congress in 2019, is “only so far into the future as the Services can reasonably determine . . . that both the future threats and the species’ responses to those threats are probable.” 84 Fed. Reg. 45020 (Aug. 27, 2019).

²⁸ See [Listing a Species as Threatened or Endangered \(fws.gov\)](https://www.fws.gov/ecp/listing-species) (explaining listing process).

²⁹ 16 U.S.C. §1533(b)(3).

³⁰ 16 U.S.C. §1533.

³¹ 16 U.S.C. §1533(b)(1)(A) (emphasis added). Congress’ 1982 amendments clarified that economic factors are not considered for listing purposes by adding the word “solely.” See H.R. 97835 (1982); [Listing Species under the ESA and Designating Critical Habitat \(justice.gov\)](https://www.justice.gov/esa/listing-species).

³² *Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-80 (D.D.C. 1997) (emphasis included). Courts further state that the agency can rely on inconclusive data, provided it is the best available at the time and is viewed as accurate by its own scientists. See, e.g., *Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223 n.13 (W.D. Wash. 2003), *vacated on other grounds by Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960 (9th Cir. 2007); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000); see also *Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989).

³³ For a current listing, see 50 CFR §§17.11 (animals) and 17.12 (plants). See also <https://ecos.fws.gov/ecp/>.

³⁴ 16 U.S.C. §1533(c); 50 C.F.R. §424.21.

2. *Critical Habitat*

The ESA stipulates that one of its key purposes is to conserve the “ecosystems upon which endangered species and threatened species depend,” since habitat maintenance is considered absolutely vital to wildlife conservation and recovery.³⁵ Unlike in the listing process, the Secretaries must consider economics, and national security, when designating critical habitat and “may exclude any area from critical habitat” unless that particular exclusion will result in extinction of the species at issue.³⁶ Not each listed species has designated critical habitat, and critical habitat size varies depending on the species.³⁷ Notably, the ESA provides that critical habitat for a listed species “shall not include the entire geographical area which can be occupied by the threatened or endangered species.”³⁸ The current list of critical habitats can be found at 50 CFR §17.94.

B. ESA Sections 9 & 10: The Prohibited Acts & Limited Exceptions

Once a species becomes part of the “list,” ESA’s tools for the conservation and recovery of the wildlife and their habitat come into full force. For “endangered species,” the ESA makes it unlawful for any party subject to the jurisdiction of the United States to commit (or cause to be committed) the following:

- a) import or export of any such species from the United States;
- b) take any such species within the United States or the U.S. territorial seas;
- c) take any such species upon the high seas;
- d) possess, sell, deliver, carry, transport, or ship any such taken species in violation of (B) or (C) above;
- e) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species (not necessarily the taking of the species);
- f) sell or offer for sale in interstate commerce any such species; or
- g) violate any USFWS or NMFS regulation pertaining to any endangered or threatened species.³⁹

The primary tool is the ESA’s prohibition against the “take” of an endangered species, with actions, as stated earlier, to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. Regarding plants, the ESA is more limiting and prohibits the removal,

³⁵ 16 U.S.C. §1531(b). *See also* 16 U.S.C. §1532(5) (critical habitat defined); Endangered Species: Hearings on H.R. 37 and H.R. 1461 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marines and Fisheries, 93d. Cong., 1st Sess. 241 (1973).

³⁶ 16 U.S.C. §1533(b)(2).

³⁷ For USFWS and NMFS designations, *see* <https://ecos.fws.gov/ecp/report/table/critical-habitat.html> and <https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat>.

³⁸ 16 U.S.C. §1532(5)(C). *See also* U.S. Congressional Research Service, “*The Endangered Species Act (ESA) and Claims of Property Rights ‘Takings’*,” (Jan. 7, 2013) (Limitations on private land designation) (<https://sgp.fas.org/crs/misc/RL31796.pdf>).

³⁹ 16 U.S.C. §1538(a)(1)(A)–(G). *See also* 16 U.S.C. §1538(a)(2) (listed plants).

reduction to possession of, or malicious damage or destruction of any ESA-listed plants that are either on *federal land* or taken in violation of any state law.⁴⁰

Sections 7, 9, and 10 allow for exceptions from the “take” prohibition.⁴¹ A rarely-used exemption involving federal action is the exemption by the Endangered Species Committee, also known as (no joke), “The God Squad,” allowing extinction resulting from federal action.⁴² Conversely, the ESA can instantly halt any non-exempted federal action that potentially jeopardizes or modifies the species existence or its critical habitat.⁴³ Another example involves incidental take permits, which authorize the taking of an endangered species without penalty, provided the taking is *incidental* during an otherwise lawful activity. A wind power company whose turbines are likely to incidentally take a number of endangered bats would apply for a permit before any take. The Service in reviewing the application then considers the company’s best management practices as described in the permit and the intended implementation agreement in developing a project that minimizes the credible risk for take.⁴⁴

Other eligible exceptions include the taking for scientific purposes to “enhance the propagation or survival” of the species.⁴⁵ Consider zoos with educational wildlife exhibits and captive breeding programs; they all must have permits if endangered species are involved. A limited number of permits are also granted allowing trophy hunters the take (and import) of a specified number of endangered species provided that the hunting activity is determined as justified for the survival of the species in the wild, and the permits are applied for in good faith.⁴⁶

C. ESA Section 11: The Act’s Teeth –Penalties & Enforcement

1. Civil / Criminal Penalties

ESA enforcement of its prohibitions has several avenues, including criminal, civil or administrative actions against private parties, citizen suits against both private or government parties, and restrictions on government actions or projects adversely impacting

⁴⁰ 16 U.S.C. §1538(a)(2)(B).

⁴¹ See ESA §§7, 9, and 10. Exceptions include: Federal incidental take, ESA §7, 16 U.S.C. §1536(c); National security, ESA §7, 16 U.S.C. §1536(j); Pre-Act, ESA §9, 16 U.S.C. §1539(b); Hardship, ESA §10, 16 U.S.C. §1539(b); Certain actions by Alaska Natives, ESA §10, 16 U.S.C. §1539(e); Preexisting historical item, ESA §10, 16 U.S.C. §1539(h) (e.g., ancient ivory); and Experimental populations, ESA §10, 16 U.S.C. §1539(j) (e.g., [What is a 10\(j\) Rule? - Fact Sheet \(fws.gov\)](#) (wolf re-introduction)).

⁴² ESA §7, 16 U.S.C. §1536(g). The God Squad created in 1978 by Congress is composed of six cabinet-level members and a state representative: The Environmental Protection Agency Administrator; the National Oceanic and Atmospheric Administration Administrator; the Council of Economic Advisers Chairman; a state representative; the Secretaries of Agriculture, Army, and Interior. With five votes, the Squad can allow the extinction of a species via federal action. See Jared des Rosiers, *Exemption Process under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

⁴³ ESA §7 requires federal agencies to assure that their actions do not jeopardize protected species or modify habitat, otherwise they face a complete project shutdown. 16 U.S.C. §§1536(a), (b).

⁴⁴ 16 U.S.C. §1539(a)(1)(B). Applications are publicly registered allowing for comment. *Id.* at §1539(d).

⁴⁵ 16 U.S.C. §1539(a)(1)(A).

⁴⁶ 16 U.S.C. §§1539(a), (d).

endangered species.⁴⁷ Section 11 provides for civil and criminal penalties for violating the ESA. The Secretary may assess civil or administrative monetary penalties of up to \$25,000 for *knowingly* taking either endangered or threatened species.⁴⁸ The Service may alternatively assess a \$500 strict liability civil penalty depending on the level of knowledge. There are no felony criminal liability provisions in the ESA. Most knowing criminal ESA violations regarding endangered species are Class A misdemeanors, punishable of up to one year in prison for an individual (up to five years' probation for a corporation), and up to a \$100,000 to fine or twice the pecuniary gain or loss resulting from the offense.⁴⁹ Knowing violations regarding threatened species are classified as Class B misdemeanors, punishable of up to six months in prison, and a \$25,000 fine.⁵⁰ ESA prosecutions range from the attempt to smuggle in imported exotic animals or parts like leopard pelts, rhino horns, or hunting trophies, to the harm done to tiger cubs at exhibits,⁵¹ to the take of protected species during unpermitted hunts.

The ESA does not provide for a harsher penalty for those charged with *killing* versus *harassing or harming* a listed species. Instead, the ESA focuses on the species' listing status. The legislative history does not provide the reason for this, but academics believe that Congress recognized that harm to an endangered species more likely has an unknown domino effect on the species' already risky survival prospects.

2. Seizure / Forfeiture

Misdemeanor violations under the ESA, however, can extend far beyond probation and a small fine. An impactful enforcement tool is the seizure of the species or its parts merely possessed by the person in violation of the ESA. Such seizures can occur immediately at the U.S. customs border when a tourist returns with souvenirs made from turtle shell or elephant ivory, or pursuant to a federal court order granting a more inclusive seizure through a search warrant. The ESA also provides for the forfeiture of items used to commit the crime, including vehicles or aircraft used to transport the species, or guns used to take the species.⁵² This can be a hefty penalty depending on the value of the equipment. The

⁴⁷ *Supra* note 43.

⁴⁸ 16 U.S.C. §1540(a)(1).

⁴⁹ 16 U.S.C. §1540(b)(1); 18 U.S.C. §3559(a)(6). Reading the ESA's penalty provisions requires diligence, because the ESA does not directly provide for a \$100,000 fine. Originally, endangered species violations were punishable by a maximum of one year in prison and only a \$20,000 fine. For other ESA violations (e.g., those relating to threatened species), the original punishment was up to six months in prison and a \$10,000 fine. *See* ESA of 1973, Pub. L. No. 93-205, §11(b)(1) (16 U.S.C. §1540(b)(1)). ESA amendments in 1988 increased these fines, respectively, to \$50,000 and \$25,000. *See* Act to Amend the ESA of 1973, Pub. L. No. 100-478.

The Alternative Fines Act, 18 U.S.C. §§3571(b)(5), (d), increased Class A misdemeanor fines across the federal criminal code to \$100,000 and where a defendant "derives pecuniary gain from the offense ... the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss"; *but see United States v. Eisenberg*, 496 F. Supp. 2d 578, 583 (E.D. Pa. 2007) (declining to apply the Alternative Fines Act in an ESA case).

⁵⁰ 16 U.S.C. §1540(b)(1); 18 U.S.C. §3559(a)(7).

⁵¹ The first federal criminal prosecution of the take and harm to captive tigers involved the infamous Tiger King from the Netflix series: *United States v. Maldonado*, CR-18-227 (W.D. OK 2020). *See also United States v. Lowe*, 20-cv-423 (E.D. OK. 2020) (civil complaint alleging take of Big Cats, lemurs, grizzly bear).

⁵² 16 U.S.C. §1540(e)(4).

ESA further authorizes the Secretary to pay a reward to any person providing information that results in a conviction, as well as use the reward fund to pay for the care of seized live species while court proceedings are pending. The Secretary also may suspend a convicted person's permits, such as federal land grazing permits, or import/export permits. The Secretary must, however, revoke any federal hunting or fishing permits to anyone criminally convicted of an ESA violation.⁵³

3. *Citizen Suits*

Just as private citizens may petition for the listing of species in the ESA, Section 11 permits a private citizen to file suit, in federal court, against anyone alleged to be violating the ESA, with some limitations.⁵⁴ Many of these types of suits, however, are filed to compel agency action or lack thereof, under the ESA.

IV. THE TREATY THAT GAVE BIRTH TO THE ESA

On March 3, 1973, in Washington, D.C., before Congress enacted the ESA, 21 nations signed an unprecedented international agreement for the conservation of wildlife: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) [pronounced "sight ease"],⁵⁵ administered by the U.N. Environmental Programme. The treaty is the first to combine the politics of wildlife trade with the interests of wildlife conservation and has been hailed as one of the most successful international responses to the worldwide threat of wildlife extinction. Today, the treaty boasts a membership of 183 nations and the European Union who joined together to protect and promote the sustainability of endangered and threatened traded species. Its primary goals are: first, to protect endangered species from over-exploitation caused by unregulated international wildlife trade, by establishing a compromise between the profitable wildlife business and the disappearing resources; and second, "to establish a worldwide system for ensuring that trade in other species is conducted on a sustainable basis for the future."⁵⁶ CITES differs from the ESA in that under CITES the threat to survival of the species is associated with the harvesting of the species for international trade. Under the ESA, consideration of the threat to survival goes beyond trade to cover habitat loss, disease, predation, and also consumption.

Most international trade in wildlife is legal, which is why a U.S. consumer can visit a big-box store or licensed pet trader and purchase shrimp caught in Thailand, a picture frame made from wood harvested in Indonesia, or a pet python imported from Africa. Each year, a small cadre of about 140 wildlife inspectors stationed at designated ports around the United States inspects approximately 170,000 shipments declared to contain some type of wildlife. Alongside this vast legal trade, but hidden by false declarations or outright smuggling, is an equally large illegal marketplace in live animals for the pet trade or medical research, multi-ton shipments of fish for restaurants and wholesalers, and huge

⁵³ 16 U.S.C. §§1540(d) and (b)(2).

⁵⁴ 16 U.S.C. §1540(g).

⁵⁵ The Convention on Int'l Trade in Endangered Species in Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [CITES].

⁵⁶ Mollie Beattie, Dir. USFWS, Speech at the CITES Ninth Conference of the Parties (Nov. 7, 1994).

consignments of logs and furniture from illegally-sourced wood, along with an almost unimaginable variety of other items, such as rhinoceros horn, sea turtle skin boots, elephant ivory figurines, bear gall bladders for the medicinal trade, hunting trophies, and on and on. Millions of dollars in wildlife items are seized at the U.S. borders each year due to noncompliance with U.S. or international law, an amount that “probably only scratches the surface,” of the illegal trade in this country alone.⁵⁷

The treaty promotes a framework for international cooperation where member parties rely on each other to protect native wildlife that moves beyond the jurisdictional limits of a country’s national sovereignty. But CITES is not a self-executing treaty; instead, each member must enforce the treaty’s provisions by controlling their wildlife imports and exports by self-regulation.⁵⁸ The United States took the lead with a system of complex, highly sophisticated programs regulating the import and export of wildlife and wildlife products. That system is the ESA. Nearly every specimen, part, or product made from a wild plant or animal that crosses the U.S. border in either direction must be accurately declared and offered for inspection and clearance by U.S. authorities. Basically, any trade contrary to CITES is subject to prosecution under the ESA.

V. CONCLUSION: STEPPING IN

“If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.”⁵⁹

– Aldo Leopold, Conservationist, Writer –

The ESA is a statute applauded by some and deplored by others. Nonetheless, the Act is meeting its original goal of endangered species protection while continuing to develop creative implementation strategies to address new threats humans present on wildlife. Unfortunately, there is no legislation to *prevent* a species from becoming endangered or threatened; the ESA only comes into play *after* a species is facing the real threat of extinction. It may sound cliché, but extinction lasts forever. For wildlife like the bald eagle, the condor, and the majestic whooping crane – North America’s tallest bird, reaching a height of about five feet – the ESA stepped in, flexed its muscles, and collaborated with partners to preserve the species and their homes. Today, the whooping crane population has grown from a low of only 15 birds in the 1940s to over 500 birds living in the wild. And if you have never set eyes on the whooping crane in the wild, once you do, you will be pleased that nations, like the United States, stepped in, because seeing is so much better when it comes to the wildlife wonders surrounding us. *Happy 50th Birthday, ESA.*

⁵⁷ Testimony of Benito A. Perez, Chief, Law Enforcement, USFWS, Before the H.R. (Mar. 5, 2008).

⁵⁸ CITES, art. VIII (1), requiring parties to: (a) penalize trade in, and/or possession of, such specimens; and (b) confiscate or return to export State species.

⁵⁹ ALDO LEOPOLD, A SAND COUNTY ALMANAC 190 (1949).