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THE ENDANGERED SPECIES ACT: AN OVERVIEW

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The Endangered Species Act ("ESA") provides a set of protections for species that have been listed as endangered species or threatened species ("listed species"). The ESA is sometimes called the "pit bull of environmental law" due to its tenacious protection of listed species.

The ESA's bite first became clear in the famous snail darter case, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). There, the Supreme Court held that ESA § 7 required an injunction against closing the Tellico Dam gates – even though Congress had already devoted hundreds of millions of dollars to the Dam's construction – as closure would cause the extinction of the small darter fish. This paper provides an overview of the ESA for those who are encountering the bite of the ESA.

The ESA Is Administered By Two Services – The ESA grants authority to the "Secretary." The Secretary is defined to be either the Secretary of the Interior or the Secretary of Commerce, depending on the allocation in an obscure reorganization plan. *See* 16 U.S.C. 1532(15). After delegations of authority, the ESA is administered by: (1) the National Marine Fisheries Service ("NMFS"), a Commerce Department agency, for some listed marine and anadromous species; and (2) the U.S. Fish and Wildlife Service ("FWS"), an Interior Department agency, with respect to most listed species. FWS and NMFS will be referred to jointly as the Services.

Endangered Species And Threatened Species – The 1973 ESA provides for listing of, and establishes constraints to protect, an endangered species or a threatened species. The more-imperiled "endangered species" is defined as a "species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A "threatened species" is a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). As part of a program of regulatory updates undertaken in response to President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," the Services issued a new policy interpreting the phrase "significant portion of the range." 79 Fed. Reg. 37578 (July 1, 2014). The new policy is complex and is currently the subject of litigation challenging its application in multiple recent listing decisions. (For more information on the regulatory update initiative *see* https://www.fws.gov/endangered/improving_ESA/index.html.)

The category makes a difference under some ESA provisions. For example, ESA § 9 establishes a set of prohibitions (e.g., "take") that apply only to "endangered" species, while ESA § 4(d) grants the Services more discretion to extend or not extend prohibitions to a "threatened" species. *See* 16 U.S.C. 1533(d), 1538. As discussed below (Take and ESA § 9 Prohibitions), the FWS has promulgated a rule that extends the same protections to threatened species that are mandated for endangered species as a default. 50 C.F.R. 17.31(a). Alternatively, the Service may develop a species-specific rule for a threatened species, which is referred to as a "4(d) Rule." *See, e.g.*, *In re Polar Bear Endangered Species Act Listing Litig*., 818 F. Supp. 2d 214 (D.D.C. 2011).

Listing Of Species And Designation Of Critical Habitat – The Services list species and designate critical habitat under the notice-and-comment rulemaking processes described in ESA § 4, 16 U.S.C. 1533. The resulting list of endangered and threatened species is codified in 50 C.F.R. 17.11 (listed wildlife) and 17.12 (listed plants). Critical habitat designated by FWS appears in 50 C.F.R. 17.94 and 17.95, and in 50 C.F.R. Part 226 for listed species under NMFS's jurisdiction.

There are over 2,000 listed species. This includes over 1,600 species with habitats in the United States. *See* http://www.fws.gov/endangered/ index.html. There are listed species in each State, and the list expands almost weekly. The broad geographic reach of the ESA, coupled with the willingness of many environmental non- governmental organizations

("ENGOs") to use the ESA to further their objectives, has increased the number of conflicts between the ESA and human uses of land and water resources.

The Service must list a species if the "best scientific and commercial data available" indicate that the species is endangered or threatened as a biological matter. 16 U.S.C. 1533(a). The Service cannot decline to list a species for economic or other public interest reasons. But, the Service can make judgments that the limited information does not demonstrate a species is imperiled, and that existing regulatory programs provide sufficient protection. *See id.*

In contrast, when designating critical habitat, the Services are permitted to consider other issues. As part of its regulatory update initiative, the Obama Administration has issued multiple new rules and policies affecting almost all elements of the critical habitat analysis, including how the Service will apply its discretion when designating and excluding areas from critical habitat. The Administration recently issued a new rule intended to define the scope and purpose of critical habitat, as well as define the attributes of critical habitat. 81 Fed. Reg. 7414 (Feb. 11, 2016) (revising 50 CFR Part 424). To date, no critical habitat has been finalized under the new rules. Concurrent with the revisions to Part 424, the Services issued a policy on Implementation of Section 4(b)(2) of the Endangered Species Act. 81 Fed. Reg. 7226 (Feb. 11, 2016). ESA § 4(b)(2) allows the Service to exclude an area from designated critical habitat to reduce adverse economic impacts and adverse impacts to other public interests. 16 U.S.C. 1533(b)(2). The Section 4(b)(2) also requires that the Service prepare an economic analysis to inform the Service's decision on which areas to include in, and exclude from, critical habitat. By rule, this analysis must be issued when critical habitat is proposed. 50 CFR § 424.19.

ESA § 4(b) provides numerous deadlines and detailed processes for listing a species or designating critical habitat. *See* 16 U.S.C. 1533(b). This has led to frequent litigation asserting that the Service has missed a particular deadline, has improperly listed or not listed a particular species, or has improperly included or excluded an area from designated critical habitat.

Species are listed and critical habitats are designated by the Services through public notice-and-comment rulemaking procedures. Typically, a rulemaking petition from an ENGO initiates the first serious look at listing a species or designating critical habitat. The Services have recently revised their rules regarding the content and information required to support a listing petition. 40 C.F.R. 424.14; 81 Fed. Reg. 66461 (Sept. 27, 2016). Responding to a recent trend toward "mega-petitions" seeking the listing of many species in a single petition, these regulatory revisions also specify that each petition may address only one species. 50 CFR §424.14(c)(2).

Within 90 days after receiving such a petition, the Service is directed to "make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action is warranted." 16 U.S.C. 1533(b)(3)(A). If the Service makes a positive finding, the Service conducts a more-detailed status review, during which the public can provide information on whether the species is endangered or threatened as a biological matter.

Within a year of receipt of a petition to list a species, the Service must decide whether to propose a species for listing or to propose a critical habitat designation. *See* 16U.S.C. 1533(b)(3)(B). Normally, within a year of the proposed rule, the Service must issue a final listing or critical habitat rule. *See* 16 U.S.C. 1533(b)(6). The procedures and some standards for petitions, listings, and critical habitat designations are described in 50 C.F.R. Part 424.

Designation of critical habitat for a particular species often lags behind the ESA listing of a species. The ESA allows a one-year delay in many circumstances. *See* 50 C.F.R. 1533(b)(6)(C).

Affected stakeholders usually comment on a proposed listing or proposed critical habitat designation. Persuasive comments for or against the listing (or de- listing) of a species usually focus on issues of biology (*e.g.*, does the species meet the ESA §§ 3 and 4 standards for being "endangered"?) and taxonomy (e.g., does the proposal concern a listable "species" unit?). In this vein, it should be noted that the ESA defines a "species" to include not only a taxonomic or biological species, but also a recognized "subspecies" and "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. 1532(16). The Services adopted a Distinct Population Segment ("DPS") Policy in 1996.

DPS issues, other listing issues, and critical habitat designation issues have been litigated frequently. The most common result has been judicial affirmance of the Service on issues of biology and policy. But, well-crafted suits have been successful. This is particularly true when the suit relies on rulemaking comments that the Service did not address, or where an ESA provision or rule creates a requirement the Service did not satisfy.

ESA § 7 Limitations On Federal Agency Actions – ESA § 7, 16 U.S.C. 1536, creates several duties that apply directly to federal agencies. Those duties apply directly to actions an agency itself carries out, and indirectly to the broad universe of private actions that require some form of federal authorization (e.g., a permit) or federal funding.

Most notably, ESA § 7(a)(2) provides that, in "consultation" with the Service, each federal agency shall "insure" that its action is "not likely to jeopardize the continued existence of" any listed species "or result in the destruction or adverse modification of [designated critical] habitat." 16 U.S.C. 1536(a)(2). Consequently, federal agencies have a procedural duty to engage in action-specific "consultation" with the appropriate Service in the circumstances described in 50 C.F.R. Part 402 and case law.

The varieties of consultation include informal consultation under 50 C.F.R. 402.13, and formal consultation accompanied by a written biological opinion from the Service under § 402.14 and 16 U.S.C. 1536(b). Formal consultation often takes longer – sometimes over one year, despite the time deadline in ESA § 7(b)(1). Still, formal consultation has the advantage of providing an incidental take statement that immunizes any covered "take" from being a violation of the ESA. *See* 16 U.S.C. 1536(b)(4); 50 C.F.R. 402.14(i). The Services recently promulgated a rule addressing how to quantify the amount of take authorized by an incidental take statement. 80 Fed. Reg. 26832 (May 11, 2015) (revising 50 CFR §402.14(g)).

Substantively, ESA § 7 contains several limitations. First, until a required consultation has been initiated and completed, ESA § 7(d) prevents the federal agency or a "permit or license applicant" from making certain "irreversible or irretrievable commitment[s] of resources." 16 U.S.C. 1536(d).

Second, ESA § 7(a)(2) limits almost all federal agency actions to actions that are not likely to jeopardize the continued existence of an listed species or not likely to adversely modify critical habitat. As implemented, the jeopardy constraint has not prohibited many federal agency actions. It is rare that a federal action will be found likely to jeopardize the continued existence of an entire listed species.

While the Services had defined "destruction or adverse modification" of critical habitat in 50 C.F.R. 402.02 to be very similar to the "jeopardize" definition, courts have found that the ESA compels a more stringent, conservation or recovery-oriented test for determining when a federal agency action would adversely modify critical habitat. *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-74 (9th Cir. 2004). The Services recently adopted a new definition of "adverse

modification" to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude of significantly delay development of such features. 50 C.F.R. 402.02; 81 Fed. Reg. 7214 (Feb. 11, 2016).

Courts generally have required strict adherence with the substantive limitations and consultation procedures in ESA § 7(a)(2), (b), and (d), and the implementing rules. *E.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008). This trend began with the Supreme Court opinion that transformed the ESA into a pit bull – the 1978 ruling that the ESA compels an injunction against future federal actions that would substantively violate ESA § 7(a)(2). *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). More recently, however, the Supreme Court read ESA § 7(a)(2) to apply only to discretionary federal actions, and to not override statutory limitations on an agency's authority. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

ESA § 7(a)(2) can be viewed as a provision that prevents federal actions that would significantly degrade the current status of a listed species or its critical habitat. In contrast, ESA § 7(a)(1) provides that federal agencies "shall . . . utilize their authorities . . . by carrying out programs for the conservation" of listed species. 16 U.S.C. 1536(a)(1). "Conservation" implies improving the status of a listed species, though it also includes actions that preserve a species in the short term and for longer- term recovery. While ESA § 7(a)(1) may require a federal agency to adopt some conservation program, the general rule is that each agency has wide latitude over the content of any conservation program. *See Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990). Additionally, the Services and the House committee with ESA jurisdiction have agreed that ESA § 7(a)(1) does not require that each federal agency action be structured to provide conservation benefits for listed species. *See* 51 Fed. Reg. 19926, 19954-55 (June 3, 1986).

"Take" And Other ESA § 9 Prohibitions – While ESA § 7 provides constraints that apply principally to federal agencies, ESA § 9 creates a series of "prohibited acts" that apply to any public or private "person subject to the jurisdiction of the United States." 16 U.S.C. 1538. Under these prohibitions, it is unlawful to "take" an "endangered species of fish or wildlife," to traffic in endangered species articles, or to engage in most other commerce involving endangered species. *Id*.

Notably, all of the ESA § 9 statutory prohibitions are limited to "endangered species." ESA § 4(d) grants the Service more discretion as to whether to extend or not to extend those prohibitions to a less-imperiled "threatened species." *See* 16 U.S.C. 1533(d); *Sweet Home Chapt. of Cmtys. for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993); *In re Polar Bear Endangered Species Act Listing Litig*., 818 F. Supp. 2d 214 (D.D.C. 2011); *Wash. Envtl. Council v. Nat'l Marine Fisheries Serv.*, 2002 WL 511479 at *8 (W.D. Wash. 2002). FWS has presumptively extended the ESA § 9 prohibitions to all threatened species, but has preserved the ability to adopt a special 4(d) rule for a particular threatened species. *See* 50 C.F.R. 17.31; *Sweet Home*, 1 F.3d at 7-8.

The prohibition of widest concern to development interests is "take." "Take of most listed wildlife is unlawful, unless authorized under the "incidental take" provisions discussed below. The ESA definition of "take" of wildlife includes to "harass, harm, pursue, hunt, shoot, wound" or "kill" wildlife. 16 U.S.C. 1532(19). The Services have defined the "harm" form of "take" to include land-use and water-use activities that indirectly affect listed species as potential causes of a wildlife "take" – i.e. "significant habitat modification or degradation where it actually kills or injures wildlife by

significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3 and 222.102.

The inclusion of land-use activities as potential sources of wildlife "take" spawned the *Sweet Home* challenge to the rule's validity. The "harm" rule survived that challenge in *Babbitt v. Sweet Home Chapt. of Cmtys. for a Great Oregon*, 515 U.S. 687 (1995), but under narrowing constructions. The Solicitor General in his briefs, and then the Court in its majority opinion, interpreted the regulation narrowly, finding three compulsory elements for the "harm" form of "take." To demonstrate "harm" to wildlife, the plaintiff must prove (i) there is or will be death or actual injury (ii) to an identifiable member of a listed wildlife species (iii) that is proximately caused by the action in question. See 515 U.S. at 691 n.2, 697-703 and notes 9 and 13. *Sweet Home*, as interpreted in most subsequent lower-court decisions, has raised the burden of proof plaintiffs must satisfy to establish "harm" and obtain an injunction. *See Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001); Defenders of Wildlife v. Bernal, 204 F.3d 920, 924-925, 927 (9th Cir. 2000).

Mechanisms For Authorizing Incidental Take – As originally enacted in 1973, the ESA contained an almost total ban against "take" of listed wildlife. In the 1982 ESA Amendments, Congress softened the ESA somewhat by creating two methods for authorizing the unintentional take of listed wildlife incidental to an otherwise-lawful activity ("incidental take").

One method is available where there is a nexus (a connection) to a federal agency action. Congress thought it was unfair that a project which satisfies ESA § 7(a)(2) – as it would not jeopardize the continued existence of an entire listed species – could be enjoined because the project would "take" a few individuals. Congress's answer was to give the Service the authority to specify, in an incidental take statement, the allowed extent of incidental take if the project proponent agreed to follow certain "reasonable and prudent measures" to reduce the potential for take. 16 U.S.C. 1536(b)(4) and (o)(2); 50 C.F.R. 402.14(i). *See supra* ESA § 7 Limitation on Federal Agency Actions.

Congress, having allowed incidental take for actions with a federal nexus, wanted to provide comparable relief for private and other non-federal actions. ESA § 10(a)(2) allows the Service to issue an incidental take permit ("ITP") if the developer agrees to abide by a habitat conservation plan ("HCP") and constraints urged by the Service. *See* 16 U.S.C. 1539(a)(2); 50 C.F.R. 17.22(b).

To encourage such voluntary public-private partnerships, former Interior Secretary Babbitt adopted regulations providing so-called No Surprises assurances. *See* 50 C.F.R. 17.22(b). Under those assurances, the developer knows the costs and acreage devoted to ESA purposes, and the resource commitment normally cannot be increased unilaterally by the Service. No Surprises assurances and a related rule were affirmed in *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31 (D.D.C. 2007). Courts have addressed the legality, under the standards and procedures in ESA § 10(a)(2), of individual HCPs/ITPs, with varying results.

In addition to ITPs, the rules provide for issuance of other, less-common permits. They include enhancement- of-survival permits, safe harbor agreements, and candidate conservation agreements with assurances. *See* 50 C.F.R. 17.22(a), (c), and (d).

Enforcement Under ESA § 11 – ESA § 11 provides for civil and criminal penalties for a completed "take" or other violation of an ESA § 9 prohibition. *See* 16 U.S.C. 1540(a) and (b). Such prosecutions have been extremely rare for land-use activities and other "takes" outside the hunting context.

A land-use or water-use developer's greatest exposure to ESA litigation is from an ESA § 11(g) citizen suit brought by an ENGO. ESA § 11(g) broadly

authorizes suits to enjoin any alleged violation of the ESA or an ESA rule by a private person or government entity, and provides for an award of attorney fees to a successful plaintiff. *See* 16 U.S.C. 1540(g). Where actions against federal agencies fall outside the scope of ESA § 11(g), the federal agency normally can be sued for maladministration of the ESA under the Administrative Procedure Act. *See Bennett v. Spear*, 520 U.S. 154, 171-79 (1997).

The ESA And Global Climate Change – One emerging mega-trend under the ESA and other environmental statutes is how to address global climate change. The basic position for two Administrations has been (1) ESA § 4 requires listing if the best science suggests a species (e.g., the polar bear) is threatened by future global climate change; but (2) the ESA does not provide the Services with authority to regulate greenhouse gas ("GHG") emissions or provide effective mechanisms for addressing GHG emissions. *See id*. For example, since scientists cannot say that any single source of GHGs proximately causes any set of effects to listed species, the Services' view is that such non-effects do not trigger ESA § 7 consultation and do not create "take" liability under ESA § 9. *See id.* As to the first point, however, there has been substantial litigation regarding how "foreseeable" the climate change threat must be to support a listing of species. *See, e.g.Alaska Oil and Gas Ass'n v. Pritzker*, No. 14-35806, *2016 U.S. App. LEXIS 19084, * (9th Cir. Oct. 24, 2016) (overturning the district court and upholding ice seal listing on the conclusion that anticipated future adverse impacts from climate change was sufficiently foreseeable to support a listing decision) Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975 (D. Mont. 2016) (holding that FWS erred when it determined that climate change did not pose a threat to wolverines).* Issues on how the ESA should address climate-challenged species are likely to remain in the forefront for the foreseeable future.

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While we hope this overview of the ESA provides you with a helpful background, this overview cannot provide legal advice. Persons with emerging ESA issues should contact a knowledgeable practitioner.

For those interested in learning more about the ESA, we would recommend two sources in particular. First, FWS and NMFS websites provide substantial information on ESA facts, legal issues, and policies. *See http://www.fws.gov/endangered/* and *http://www.nmfs.noaa.gov/pr/laws/esa/*. Second, the ABA's 2010 edition of Endangered Species Act: Law, Policy, and Perspectives (2d ed., Baur & Irvin eds., 2010) is a valuable resource for attorneys.

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