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AN OVERVIEW OF THE ENDANGERED SPECIES ACT

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**BIODIVERSITY PROTECTION:
IMPLEMENTATION AND REFORM OF THE
ENDANGERED SPECIES ACT**

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It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

One would be hard pressed to find a statutory provision whose terms were any plainer than those in Section 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species" This language admits of no exception. . . .

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history and structure of the legislation . . . indicates beyond a doubt that Congress intended endangered species to be afforded the highest of priorities . . .

. . . .

The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. . . . [The legislative history of Section 7] reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

. . . .

[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable."

- Tennessee Valley Authority v. Hill, 473 U.S. 153 (1978)

I. INTRODUCTION

- A. The Endangered Species Act ("ESA") burst into public awareness in the late 1970s with the Tellico Dam/Snail Darter conflict which gave rise to Chief Justice Burger's comments in Tennessee Valley Authority v. Hill. During the years that followed, the Act was relatively quiescent. In the latter part of the 1980s, however, the Act once again became the focus of controversy as conservation requirements for the Northern Spotted Owl, the Marbled Murrelet, the Columbia River Chinook, Coho and Sockeye Salmon, the Grizzly Bear, the Colorado Squawfish, the Mexican Spotted Owl, the Golden Cheeked Warbler, the Sacramento River Chinook Salmon, the Delta Smelt, and the California Gnatcatcher (to name but a few) emerged as a focal point in significant resource conflicts throughout the western United States.
- B. With the emergence of conservation biology and related wildlife and habitat management conservation goals as factors driving wildlife and natural resource management at both the federal and state government levels, heightened public awareness of endangered species issues, and increasingly effective advocacy by conservation organizations, the next decade will see the ESA play an ever-increasing role in dictating natural resource management, conservation, and even pollution control strategies by both federal and state government. Indeed, the ESA has become the linchpin in ongoing efforts to address "ecosystem management" and "biodiversity" concerns.
- C. This paper provides an abbreviated discussion of some of the most significant provisions of the Act, including the listing process, interagency consultation

under Section 7, and the "take" prohibition of Section 9.

II. KEY STATUTORY PROVISIONS

A. Section 2 - Congressional Declaration of Purposes and Policy.

1. The purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of" certain treaties and conventions cited in Section 2. [16 U.S.C. § 1531(b)].
2. Congress declared it federal policy that all federal agencies and departments seek to conserve threatened and endangered species, and use their authorities to further the purposes of the ESA. [16 § 1531(c)].

B. Section 4 - The Listing Process.

1. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (referred to collectively herein as "the Service") are charged with surveying species status and listing those species determined to be threatened or endangered. (16 U.S.C. § 1533).
 - a. Listing triggers the regulatory mechanisms of the Act.
 - b. Species can be listed either as "threatened" or "endangered."
 - (1) "Threatened species" are species likely to become endangered within the foreseeable future throughout all or a significant portion of their range. [16 U.S.C. § 1532(20)].

- (2) "Endangered species" are those in danger of extinction throughout all or a significant portion of their range. [16 U.S.C. § 1532(6)].
- c. The ESA defines the term "species" to include species, subspecies, and isolated population groups of vertebrate species which are capable of interbreeding when mature. [16 U.S.C. § 1532(16)].
- d. Listing decisions must be based on the "best available scientific and commercial information" regarding the species and the reasons it is threatened with extinction. [50 C.F.R. § 424.11(b) (1992)].
- e. The Service is specifically precluded from considering the economic or other impacts of listing.
- f. Listing is performed through rulemaking and publication in the Federal Register.
2. The ESA proscribes strict timetables for species listing.
- a. With regard to listings initiated by the Service as a result of status reviews or other activities, a final determination to list or not list the species must be published within one year after the species was proposed for listing. [16 U.S.C. § 1533(b)(6)(A)].
- (1) This one-year period may be extended up to six months upon a finding that "there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination." [16 U.S.C. § 1533(b)(6)(B)].

3. In addition to listings resulting from the Service's own species status reviews, species may also be listed as a result of a listing petition filed by a third party.
 - a. Within 90 days of receipt of a listing petition, the Service must determine whether it "presents substantial scientific or commercial information indicating that the petitioned action may be warranted," and must then promptly publish the finding in the Federal Register. [16 U.S.C. § 1533(b)(3)(A)].
 - b. If a "may be warranted" finding is made, the Service will initiate a status review of the species. Within 12 months of receipt of the petition, the Service is then required to find either that the petitioned action is not warranted, or to publish a proposed listing. [16 U.S.C. § 1533(b)(3)(B)].
4. Critical Habitat Designation.
 - a. The Service is also charged with identifying and designating "critical habitat" for listed species based on the best scientific data available. [16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a)].
 - b. The purpose of designation is to identify and protect habitat essential to the survival and recovery of the species. [50 C.F.R. § 424.12(b)].
 - (1) "Critical habitat" means the specific areas within or outside the geographical range of the species at the time of listing which are found to contain the physical or biological features essential to the conservation of the

species and which may require special management or protection. [50 C.F.R. § 424.02(d)].

(2) In designating critical habitat, the Service must consider the economic and other impacts of designation. [16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a)].

(3) Areas may be excluded from designation as critical habitat if the costs of designation would outweigh the benefits, provided that exclusion would not result in extinction. [16 U.S.C. § 1533(b)(2)].

c. Designation generally must be done at the time of listing. [16 U.S.C. § 1533(a)(3)].

C. Section 7 - Interagency Consultation and Cooperation.

1. Section 7(a) imposes dual obligations on federal agencies. Section 7(a)(1) requires the DOI to review and utilize its programs to further the purposes of the ESA. Additionally, all other federal agencies must, in consultation with and with interior's assistance, "utilize their authorities in furtherance of the purposes of the ESA, by carrying out programs for the conservation of threatened and endangered species." [16 U.S.C. 1536(a)(1)].

a. In 1986, the Service stated in preamble language that Section 7(a)(1)'s purpose is to authorize federal agencies to factor endangered species conservation into their planning process, regardless of other statutory directives. The Service saw its role under Section 7(a)(1) as assisting other agencies in meeting their Section 7(a)(1)

responsibilities by identifying opportunities to assist in conservation through species recovery plans and by providing "conservation recommendations" with formal and informal Section 7 consultations related to specific projects. [51 Fed. Reg. 19,926 (June 3, 1986)].

- b. By 1994, the Service's approach to interpreting and applying Section 7(a)(1) had changed somewhat. On September 28, 1994, the Service, together with 12 other federal agencies or departments, signed the Memorandum of Understanding Between Federal Agencies on Implementation of the Endangered Species Act ("MOU"). The MOU links the general obligation set forth in Section 7(a)(1) with the purposes provision set forth in Section 2(b) of the Act, committing each signatory to: "(1) Use its authorities to further the purposes of the ESA by carrying out programs for the conservation of Federally listed species . . . (2) Identify opportunities to conserve Federally listed species and the ecosystems upon which those species depend within its existing programs or authorities. . . . (3) Determine whether its respective planning processes effectively help conserve threatened and endangered species and the ecosystems upon which those species depend. . . ." (MOU Section III. A).
2. Section 7(a)(2) requires every federal agency to consult with the Service to ensure that any action it authorizes, funds, or carries out is not likely to affect a listed species or designated critical

habitat. [16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(a)].

a. The term "federal action" is broadly defined to include all activities or programs authorized, funded, or carried out, in whole or in part, by federal agencies. (50 C.F.R. § 402.02).

b. Examples include:

- promulgation of regulations,
- granting of licenses, contracts, permits, leases, easements rights-of-way, or grants-in-aid, and
- actions directly/indirectly causing modifications of land, water, air, or other elements of a listed species' environment.

3. The consultation process is complex and multifaceted, and includes:

- conferencing
- informal consultation
- early consultation
- formal consultation

a. Consultation Processes.

(1) Conferencing.

(a) Section 7(a)(4) requires that a conference be conducted when it is determined that a federal action is likely to jeopardize the continued existence of a proposed species (one that has been proposed for listing in a formal rulemaking) or result in the destruction or adverse modification of proposed critical habitat. [16 U.S.C.

§ 1536(a)(4); 50 C.F.R.

§ 402.10(a)].

- (b) The purpose of a conference is to determine at an early stage whether an action is likely to have significant adverse effects on the species or habitat, and to provide an opportunity to identify ways to minimize or avoid those adverse effects. [50 C.F.R. § 402.10(a), (c)].
- (c) Such conferences may be informal, or, at the action agency's request, may be formal. A formal conference report may serve as a biological opinion if the listing rule is finalized, unless new information becomes available or changes are made in the action. [50 C.F.R. § 402.10(d)].
- (d) The prohibition in Section 7(d) against commitment of resources that would foreclose development of reasonable and prudent alternatives does not apply during conferences. Incidental take statements may be provided as part of formal conferences, but are neither necessary nor effective until the final listing action occurs. [50 C.F.R. § 402.10(d)].

(2) Informal Consultation.

- (a) Informal consultations may be conducted with the federal agency, the applicant, or a designated non-federal representative. [50 C.F.R. § 402.13(a)].
- (b) The purposes of these informal proceedings may be to:
- Clarify whether and what listed species may be in the project area;
 - Determine what effect the project may have on these species;
 - See whether there are ways in which the project can be modified so that it will not adversely affect the species; and
 - Determine whether there is a need to enter into formal consultation.
- (c) If it is determined during informal consultation that the project will not adversely affect listed species or their critical habitat, the Service's written concurrence with that finding ends the consultation requirement of the Act. [50 C.F.R. § 402.13(a)].

(3) Early Consultation.

- (a) Section 7(a)(3) of the Act allows the formal consultation process to occur prior to the time the actual permit application is filed. [16 U.S.C. § 1536(a)(3)].
- (b) "Early consultation" is conducted when a prospective applicant asks the federal agency to request such

a consultation with the Service prior to actual submission of an application to that action agency. In this instance, the prospective applicant must have an actual proposal that can be addressed and must certify that it intends to implement the proposal. [50 C.F.R. § 402.11(b)]. This form of consultation results in a preliminary biological opinion which is used at an early stage to determine the potential effect on listed species and the project modifications that may be needed to obtain the permit. No take of the species or its habitat is authorized by this preliminary opinion. [50 C.F.R. § 402.11(e)].

(4) Formal Consultation.

- (a) When an action agency determines that a proposed action may adversely affect a listed species or its critical habitat, the agency enters into formal consultation with the Service. [50 C.F.R. § 402.14(a)]. The consultation generally will conclude with the issuance of a biological opinion and a determination of jeopardy/no jeopardy. [50 C.F.R. § 402.14(g)].

(b) The Act requires that the biological opinion be based on the best scientific and commercial data available. [16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8)]. With the data provided by the agency and other data that may be available, the Service undertakes a scientific assessment of the effect of the proposed action on the species or critical habitat. [50 C.F.R. § 402.14(d), (f)-(g)].

(c) The biological opinion analyzes not only the specific federal action, but the overall context of what is happening to the species. [50 C.F.R. §§ 402.14(h), 402.02]. In determining whether the project is likely to jeopardize the species, the Service looks at three things:

i. The Environmental Baseline:

An analysis of the accumulated effect of past and ongoing human and natural impacts that have lead to the current state of the species, including ongoing and past actions, actions that have successfully completed Section 7 consultation, but are not yet in place, and recurring natural phenomenon such as drought or flooding that may affect the species' habitat

[50 C.F.R. §§ 402.14(h),
402.02.];

- ii. The Effect of the Action: A multi-faceted analysis of
- The direct or immediate impact of the project on the species or its habitat, i.e., driving an ORV through the nesting habitat of the piping plover may destroy its ground nest, or building a housing unit may destroy the habitat of an endangered mouse;
 - The indirect impacts anticipated later from the action, i.e., the newly hatched piping plover falls into the track left by the ORV and cannot escape its predators, or the people who move into the housing unit may bring cats that will prey on the mice left in the adjacent habitat; and
 - The impacts of actions that are interrelated or interdependent to the federal action, i.e., development of irrigation canals or inclusion of hydropower turbines that would not otherwise be built but for the construction of a dam. [Interrelated effects (the irrigation canals) are part of a larger action and

depend on that larger action for their justification.

Interdependent actions (the hydropower turbines) have no significant independent utility apart from the action (the dam) under consideration] [50 C.F.R. §§ 402.14(h), 402.02.]; and

iii. The Cumulative Effects: An analysis of the reasonably certain future non-federal actions that may affect the species [50 C.F.R. §§ 402.14(h), 402.02.].

(d) The total of the environmental baseline, the effects of the action and the cumulative effects is then considered to determine whether this accumulated effect is expected to "appreciably reduce the likelihood of survival and recovery of the species in the wild": The jeopardy standard. [50 C.F.R. §§ 402.14(h), 402.02].

(e) If the Service determines that the action is likely to jeopardize a listed species, it works with the federal agency and the applicant to determine whether there are reasonable and prudent alternatives to the project that will eliminate that jeopardy. [50 C.F.R. §§ 402.14(5), 402.02]. These

alternatives represent actions that:

- i. Can be implemented in a manner consistent with the intended purpose of the action;
- ii. Are within the scope of the federal agency's legal authority and jurisdiction; and
- iii. Are economically and technologically feasible. Examples include siting a highway interchange further away from the Mississippi Sandhill Crane's habitat to reduce the effect of associated development, taking steps to reduce disturbance from people and pets by fencing salt marsh harvest mouse habitat, or reducing vehicle and motorboat speeds to avoid collisions or injury to key deer or the manatee.

(f) Incidental Take Statement.

- i. Section 9 of the Act prohibits any person under the jurisdiction of the United States from taking a listed species except as provided by that Section. [16 U.S.C. § 1538(a)(1)]. Taking is very broadly defined to include any activity that would or would attempt to harass, harm,

pursue, hunt, shoot, wound, kill, trap, capture, or collect a species covered by the Act. [16 U.S.C. § 1532(19)].

- ii. The prohibitions in Section 9 apply to federal as well as non-federal activities. [16 U.S.C. § 1532(13)]. Thus, a formal consultation package also generally contains an "incidental take statement." [50 C.F.R. § 402.14(i)]. Incidental take is that take which occurs as a result, but not the intent, of an otherwise lawful activity. [16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.3 (1993)]. Examples include displacement of a species in the process of development, competition with grazing animals, harassment or injury during recreational events (i.e., ORV races), or exposure to agricultural pesticides.
- iii. The incidental take statement contains three parts: An estimate of the anticipated take; a determination that the level of take is not likely to jeopardize the species; and the nondiscretionary measures (reasonable and prudent

measures with their implementing terms and conditions) that must be undertaken onsite to minimize the take. [50 C.F.R. § 402.14(i)].

(g) Irreversible and Irretrievable Commitments.

- i. Section 7(d) of the Act requires that the federal agency or the applicant make no irretrievable or irreversible commitment of resources during formal consultation that would preclude development of reasonable and prudent alternatives. [16 U.S.C. § 1536(d)]. The benefit of this provision is that there is greater opportunity to develop an alternative that is acceptable to all parties. Failure to observe this provision would disqualify the agency or applicant from appeal to the Endangered Species Committee.

(h) Conservation Recommendations.

- i. Conservation recommendations may be included with a biological opinion if appropriate. These recommendations are discretionary actions, related

to the project under review, that the federal agency or applicant can undertake to help conserve the species or its habitat. [50 C.F.R. § 402.14(g)(6)].

(5) Biological Assessment - Section 7(c).

- (a) The initial responsibility for determining whether the project will affect a listed or proposed species lies with the action agency. The Service then concurs or does not concur with their finding. One of the tools for assisting the action agency in making that determination is the "biological assessment." [16 U.S.C. § 1536(c); 50 C.F.R. § 402.12].
- (b) By regulation, a biological assessment must be prepared for "major construction activities" [50 C.F.R. § 402.12(b)], which are further defined as construction projects (or other undertakings having similar physical impacts) which are a major federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA). (50 C.F.R. § 402.02).
- (c) The contents of a biological assessment are discretionary, but generally include the results of

onsite inspections to determine the presence of a listed or proposed species, and an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature and the views of species experts. The assessment also should describe any known future non-federal activities in the action area that are likely to impact the species. [50 C.F.R. § 402.12(f)].

(d) The data included in the biological assessment may be prepared by the applicant or a non-federal representative (often a consulting firm), but the action agency is responsible for the findings presented in that assessment. (50 C.F.R. § 402.08).

(e) If there is any reason to believe that the agency or the applicant may later wish to appeal a biological opinion to the Endangered Species Committee (God Squad), a biological assessment should be prepared. [See 16 U.S.C. § 1536(h)(2)(A)].

(f) For non-construction projects the agency still needs to assess the likely impacts of the action and present those findings to the Service so that the Service can determine the likely effects on

listed or proposed species.

Biological assessments are often a useful vehicle for this exercise.

D. Section 9 - The Takings Prohibition.

1. Section 9 prohibits the unauthorized "taking" of endangered species. [16 U.S.C. § 1538(a)(1)(B)].

a. The Service's regulations define the take prohibition very broadly to encompass both direct takings of the species (through wounding, killing, trapping, etc.) and indirect takings (through harm arising from habitat alteration or destruction or otherwise). [16 U.S.C. § 1532(19); 50 C.F.R. § 17.3 (1993)].

(1) The viability of the "harm" definition was upheld by the U.S. Supreme Court in Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 115 S. Ct. 2407 (1995), which upheld the Service's regulation interpreting the Section 9 prohibition as applying to harm to species resulting from significant habitat modification activities.

(2) In the face of a challenge to the harm definition as including indirect harm resulting from habitat modification, the Court found the Service's definition to be consistent with the Act's statutory language and legislative history. Further, "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." Id.

(3) This conclusion is consistent with the Court's recognition in TVA v. Hill that in enacting the ESA, "Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat," . . . and that of those threats, Congress was "informed that the greatest was destruction of natural habitats." 437 U.S. at 179.

b. The Section 9 take prohibition applies to private sector, federal, state and local government alike, [16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(13)], and applies wherever the taking occurs, whether on private or public land, [16 U.S.C. § 1538(a)(1)(B)].

(1) Marbled Murrelet, (Brachyramphus marmoratus); Environmental Protection Information Center vs. Pacific Lumber Company, No. 95-16504, N.D. Cal. No. CV-93-01400-LCB.

E. Section 10 - Incidental Take and Habitat Conservation.

1. Section 10 authorizes the issuance of "incidental take" permits which allow private landowners to pursue development and other activities without fear of Section 9 liability for any takings which might occur "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." [16 U.S.C. § 1539(a)(1)(B)].

a. The permit applicant must prepare and submit a habitat conservation plan specifying the type of activities to be pursued and outlining the conservation measures that the applicant will pursue to mitigate the level of take authorized by the service. [16

U.S.C. § 1539(a)(2)(A); 50 C.F.R.

§ 17.22(b)(1)].

- b. Mitigation requirements often include land acquisition for conservation purposes.

III. THE ESA IS A DRIVING FORCE AND MECHANISM FOR BIODIVERSITY CONSERVATION AND ECOSYSTEM MANAGEMENT.

A. Regardless of definitions, conservation of biodiversity is the focal point of the ESA.

1. Congressional debate when the Act was passed explicitly relied on the need to conserve biological heritage as the driving rationale behind the ESA.

B. The ESA currently is the single tool best suited to catalyzing a comprehensive federal strategy to manage ecosystems.

1. One of the express purposes of the ESA is to "provide a means whereby the ecosystems upon which endangered . . . and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species." [16 U.S.C. § 1531(b)].
2. Section 7(a)(1) further requires federal agencies "to utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered . . . and threatened species". [16 U.S.C. § 1536(a)(1)].
3. Taken together, these provisions provide statutory authority (relied upon in the 1994 Memorandum of Understanding on Implementation of the Endangered Species Act) by which the federal government can utilize its existing statutory authorities, including the Federal Land Policy Management Act, the National Forest Management Act, and other statutes, in concert with the ESA to accomplish

"ecosystem management" without congressional action.

4. Indeed, even without any significant or consistent focus by the Service on biodiversity and ecosystem management, the ESA and its regulatory mechanisms, linked with current principles of conservation biology, is driving federal land managers to take a more holistic approach to land management decisions, and to incorporate species habitat conservation needs into project permitting and approval actions in previously unprecedented fashion.
- C. The ESA should not, however, and probably cannot, be relied upon as the sole tool for implementing ecosystem management. Such an approach will fall short of the mark, for reasons including the inconsistency of the ESA's regulatory procedures and timeframes (including Section 7), the lack of expertise and resources within the Service to engage in landscape planning, and the political realities resulting from the imbalance between the Service on the one hand and the federal land managers on the other.
1. Compare the short time frame for consultation (which Service regulations provide will normally be completed within 135 days) and the lack of public involvement and administrative review with the elaborate public involvement and review procedures adopted under the Federal Land Policy & Management Act and the National Forest Management Act.
- D. The ESA is, however, admirably suited as a catalyst to compel other federal authorities to elevate endangered species conservation to its place as a primary purpose in the administration of their authorities. In the words of the Court in TVA v. Hill:

[T]he legislative history undergirding Section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies. 437 U.S. at 153.

- E. Whether one takes the point to the length articulated by Chief Justice Burger or not, it is clear that Section 7(a)(1) affords the federal government as a whole - including the Bureau of Land Management and the U.S. Forest Service - the opportunity to bring its cumulative natural resource management expertise to the task of species - and ecosystem - management and conservation.

IV. Conclusion.