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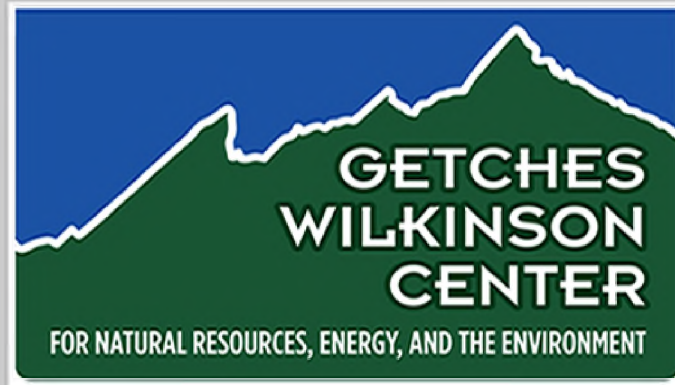
Squillace, Mark, "Day 1: Wednesday, 17 August 2005: Introduction" (2005). *Endangered Species Act Congressional Field Tour (August 17-19)*.

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Day 1: Wednesday, 17 August 2005: Introduction, in
ENDANGERED SPECIES ACT CONGRESSIONAL FIELD TOUR 2005
(Natural Res. Law Ctr., Univ. of Colo. Sch. of Law
2005).

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Introduction
Holiday Inn Denver, Downtown

Mark Squillace, Director, Natural Resources Law Center

Mark Squillace is the Director of the Natural Resources Law Center at the University of Colorado School of Law. Before coming to Colorado, Professor Squillace taught at the University of Toledo College of Law where he was the Charles Fornoff Professor of Law and Values. Prior to Toledo, Professor Squillace taught at the University of Wyoming College of Law where he served a three-year term as the Winston S. Howard Professor of Law. He is a former Fulbright scholar, and the author or co-author of numerous articles and books on natural resources and environmental law. In 2000, Professor Squillace took a leave from law teaching to serve as Special Assistant to the Solicitor at the U.S. Department of the Interior. In that capacity he worked directly with the Secretary of the Interior Bruce Babbitt, on a variety of legal and policy issues.

Background Information:

Introduction to the Endangered Species Act. Mark Squillace, Director, NRLC.

The ESA at 30: Time for Congress to Update & Strengthen the Law. House Committee on Resources

Endangered Species Act Faces Broad New Challenges. The New York Times, June 26, 2005.

Testimony of Ray Vaughan Before the House Committee on Resources. Ray Vaughan, Wildlaw, April 30, 2005.

INTRODUCTION TO THE ENDANGERED SPECIES ACT
Mark Squillace, Director, Natural Resources Law Center
University of Colorado School of Law

The Endangered Species Act (ESA) has had a profound impact on the manner in which federal, state and even private entities carry out their activities. Although the ESA is less rigid than it is sometimes characterized by its opponents,¹ it is perhaps rightfully criticized for focusing on protection of individual species rather than the preservation of natural processes.² Extinction of species occurred long before humans appeared on Earth and is a part of natural selection. However, human activities have greatly accelerated the rate of species extinction, and it is for this reason that Congress enacted the ESA.

Set forth below are brief descriptions of the four principal mechanisms for achieving the goals established by the ESA.

***A. Listing of Endangered and Threatened
Species and Designation of Critical Habitat***

The strictures of the ESA apply only to listed species, designated critical habitat, and species or habitat that have been formally proposed for listing or designation. See e.g., 50 C.F.R. § 402.10. Thus, the decision to list a species as threatened or endangered. Or to designate critical habitat is a key decision. All listings and designations are promulgated through notice and comment, informal rulemaking under the Administrative Procedure Act. While *endangered species* are in danger of extinction throughout all or a significant portion of their range, *threatened species* face a somewhat less imminent prospect of extinction but are likely to become endangered in the foreseeable future. ESA, §3(6), (20). Note that the term “species” is broadly defined to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” ESA §3(16).

A listing decision must be based solely on the ***best scientific and commercial data available***. Significantly, however, the ESA requires the Secretary to take into account the conservation efforts that are being made by any state or other political entity. ESA, §4(b)(1)(A). Thus, a state may substantially reduce the possibility of having a species listed if it has established its own effective plan for reducing threats to the species.

Generally, *critical habitat* must be designated for all listed species on the basis of the best scientific data available. “Critical habitat” is defined by the statute as that habitat which is essential to the conservation of a threatened or endangered species.

¹ See Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993) for an excellent description of how agencies interpret the ESA to accommodate desired projects.

² See Reed F. Noss, *From Endangered Species to Biodiversity*, and J. Michael Scott et al., *Gap Analysis of Species Richness and Vegetation Cover: An Integrated Biodiversity Conservation Strategy*, in BALANCING ON THE BRINK OF EXTINCTION 227, 282 (Kathryn A. Kohm ed. 1991)

Unlike the decision to list, however, designation of critical habitat must also take into account economic and other relevant impacts of the designation. Unless extinction is likely to result, the Secretary may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of designation. ESA, §4(b)(2).

Species (or critical habitat) may be proposed for listing or delisting at the initiative of the FWS or by petition from any interested person. ESA, §4(b)(3)(A). Within a year after being petitioned, the Secretary must determine whether the petitioned action is warranted. If a listing petition is warranted, the Secretary must either promptly initiate the listing process by publishing a proposed rule, or find that action is warranted but precluded by other pending listing actions and place the candidate species in Category I, which contains a list of the highest priority species awaiting a listing decision. ESA, §4(b)(3)(B).

B. Conservation.

Conservation is defined under the statute as “the use of all methods and procedures necessary to bring any endangered or threatened species back to the point at which the measures provided [under the ESA] are no longer necessary.” Although all federal agencies have a general obligation to conserve listed species, the principle vehicle for doing so is the ***recovery plan***. Recovery plans are required for all listed species unless the Secretary finds that such a plan will not promote conservation of the species. ESA, §4(f)(1). As of August 1, 2005 there were 1028 approved recovery plans. See

http://ecos.fws.gov/tess_public/servlet/gov.doi.tess_public.servlets.TESSBoxscore?format=display&type=archive&svsdate=8/01/2005

C. Consultation

The ESA precludes federal agencies from taking any action that might jeopardize the continued existence of a listed species or adversely modify habitat designated as critical to the survival of the species. Private activities are often affected by ESA consultations when a federal permit is required to undertake the action. Congress established a seldom-used process in 1978 to allow agencies to apply for exemptions from this substantive restriction.

Whenever an agency action involves a major construction activity (defined as a major federal action under NEPA), the action agency must request information from the FWS about the presence of listed or proposed species. If such species are not present, the action is allowed to proceed. If, however, a listed species is or may be present, the action agency must prepare a ***biological assessment*** (BA) to ascertain whether the species or its critical habitat is likely to be adversely affected by the proposed action.³

³ For species proposed for listing, a separate “conference” process is established by regulation for such species. 50 C.F.R. § 402.10. Agencies frequently avoid findings of adverse impacts on listed species through a process developed by regulation called *informal consultation*. *Informal consultation* is an optional process to assist the action agency in deciding whether formal consultation is necessary. 50 C.F.R. § 402.13. During informal consultation, the FWS may suggest modifications to a proposed project that will avoid adverse impacts to protected species, and thus the need to engage in formal consultation.

If a BA *concludes* that adverse affects are likely, the action agency must enter into *formal consultation* with the FWS.⁴ For proposed actions that do not require a BA, agencies must initiate formal consultation if the action may affect a listed species or critical habitat. After formal consultation concludes, the FWS prepares a *biological opinion* (BO), which determines whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. If no jeopardy will result, the action may proceed. If no jeopardy will result but individuals of listed species might be "taken" within the meaning of §9 of the ESA, then FWS may issue an *incidental take statement* which protects the agency against §9 liability for a stated number of "takes" so long as the agency employs specified precautionary measures. The incidental take statement usually allows the FWS to accommodate projects that might otherwise harm a species by imposing conditions or standards that will ameliorate that harm.

If FWS determines that jeopardy will result then it must suggest *reasonable and prudent alternatives* that will not jeopardize the species. ESA, §7(b)(3)(A). Actions that may jeopardize a listed species, or that will result in the destruction or adverse modification of their critical habitat, may not go forward unless an exemption is received. As suggested above, the exemption process is cumbersome, and exemptions are difficult to obtain. In particular, an exemption may not be granted unless five members of a committee of seven presidential appointees find that: (1) there are no reasonable and prudent alternatives to the proposed action; (2) the benefits of the action clearly outweigh the benefits of alternative courses of action which would not jeopardize the species; (3) the action is of regional or national significance; and (4) neither the Federal Agency involved or the exemption applicant made any irreversible or irretrievable commitment of resources with respect to the proposed action. Despite its importance, public involvement in the ESA process is often limited because of the strict timetables established by federal regulation for preparing the various reports required by the ESA. Nonetheless, interested persons often can and frequently do comment on ESA documents or issues because of their relevance to environmental documents prepared in accordance with NEPA.⁵ The action agency's biological assessment is often incorporated into the relevant NEPA document. Indeed, the CEQ regulations require agencies "[t]o the fullest extent possible, [to] prepare draft environmental impact statements concurrently with environmental impact analyses and related surveys and studies required by * * * the Endangered Species Act * * * and other environmental review laws." 40 C.F.R. §1502.25. Usually, a biological assessment must be completed within 180 days from

⁴ An applicant may also request *early consultation*, "to reduce the likelihood of conflicts between listed species * * * and proposed actions." 50 C.F.R. § 402.11. Early consultation leads to a "preliminary biological opinion" which may be made final if the applicant decides to go forward with the proposal action. *Id.* at § 402.11(e). The advantage of early consultation is that the applicant can determine whether a proposed action may cause jeopardy before substantial capital investments are made.

⁵ A federal action which triggers § 7 consultation necessarily triggers preparation of a NEPA document as well. Generally, the public has an opportunity to comment and participate in the preparation of NEPA documents before they become final.

its inception. Formal consultation usually must be completed within 90 days from its initiation. Then, 45 days after concluding a formal consultation, the FWS must issue the biological opinion.

D. Takings

Section 9 of the ESA makes it unlawful to take, import, export, possess, sell, deliver, transport or ship in interstate commerce any endangered animal. The ESA defines the word “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ESA, §3(19). “Harm” in the definition of “take” is defined as “an act which actually kills or injures wildlife. Such act may include 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. Similar restrictions may be imposed for threatened animals in accordance with the pertinent regulations listing those species. 50 C.F.R. §17.31(a).

Endangered plant species are not subject to the “takings” prohibitions, but are protected by special, generally less stringent standards under ESA, §9(a)(2). For example, endangered plants on federal lands are protected from: (1) removal and possession, and (2) malicious damage or destruction. Other rules make it illegal to import to or export from United States an endangered plant. 50 C.F.R. §17.61(b).

Although the “takings” prohibitions can be onerous, the ESA incorporates provisions that allow limited takings of listed species without risk of violating the law. Under §10 of the ESA, any person who proposes an activity that may “incidentally” result in the “taking” of a listed species may prepare and seek approval of a *habitat conservation plan* (HCP). The HCP must describe the impact that will likely result from the taking, the steps that will be taken to minimize and mitigate that impact, the funding that will be available to carry out the mitigation, and the alternatives to the proposed plan that were considered. The Secretary is required to approve a permit that authorizes the incidental taking of a listed species if he finds that the applicant will minimize and mitigate the impacts to the maximum extent practical, that adequate funding is available to carry out the mitigation, and that the taking will not appreciably reduce the likelihood of survival of the species.

One of the most important developments in ESA implementation in recent years is the significant increase in permit applications and HCPs.⁶ This development, along with the provision in §7 allowing incidental take statements, has resulted in much less emphasis on the notion that the ESA precludes activities, and more focus on managing activities that might impact species through negotiation and compromise.

In addition, several regulatory provisions promote cooperation between private landowners and the FWS including the “***no surprises***” policy, which promises that the requirements in plan will not be changed during duration of plan absent extraordinary circumstances. 50 C.F.R. §17.22(b)(5); 17.32(b)(5). In the words of former Secretary Babbitt, “A deal is a deal.” Also, “***safe harbor agreements***” promise that private landowners who voluntarily enhance habitat for endangered species can go back to original baseline without penalty. 50 C.F.R. §§17.22(c)(1); 17.32(c)(1).

⁶ Candidate conservation agreements (CCAs) are similar to HCPs but apply to candidate species rather than listed species. 50 C.F.R. §17.32(d)(1).