Legislation Protecting the Habitat of Endangered Species

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In our nation's early years, the abundant land and natural resources challenged us to tame nature and utilize its bounty. Our country's economic success, however, has not been without costs to the natural world. In more recent years, awareness of the threats human activities pose to biodiversity and the health of ecosystems has resulted in legislation designed to conserve species that are endangered or threatened. After enacting statutes in 1966 and 1969 that, among other things, declared the preservation of endangered species to be a national policy, in 1973, Congress passed the Endangered Species Act, 16 U.S.C. Sections 1531-44 (ESA). The ESA sought to ensure that adequate conservation measures mitigated the impact of economic growth on biodiversity.

The three stated purposes of the ESA are to conserve ecosystems used by endangered and threatened species (listed species), provide a program to conserve listed species and achieve the purposes of various treaties and conventions. The ESA authorizes the secretaries of the Department of the Interior and the Department of Commerce to classify species as endangered or threatened on the basis of the best available scientific and commercial data. These "listing" decisions may consider existing governmental efforts to protect the species but not economic or private impacts of the listing decision. Thus, private landowners may bear much of the burden of conserving listed species for the benefit of the public.

Two provisions of the ESA have the most far-reaching effect. Section 7 requires each federal agency to consult with the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service (FWS) (collectively, the services) to ensure that any action authorized, funded or carried out by such agency does not jeopardize the continued existence of the listed species or adversely modify its critical habitat. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the U.S. Supreme Court enjoined the operation of a $100 million dam because the dam jeopardized the snail darter, an endangered species. This dramatic ruling sent a strong message that Section 7's mandate to avoid jeopardizing listed species would be enforced.

Section 9 of the ESA extends the ESA's reach to private parties. Various conduct, including "taking" any endangered species of fish or wildlife, is unlawful and subject to substantial civil and criminal penalties. Taking includes a broad range of acts such as harassing, harming or killing. As the U.S. Supreme Court held in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), habitat modification may also constitute a taking regardless of the landowner's intent if the action causes injury to a particular endangered animal.

Habitat Designation

Although the listing of a species may itself cause landowners to limit or adjust activities on their land to avoid harming the species, the designation of critical habitat may intensify their concerns. Concurrently with listing a species, the ESA requires the secretary (either of the Interior or Commerce) to designate a critical habitat, i.e., a habitat "essential to the conservation

of the [listed] species," "to the maximum extent prudent and determinable." The ESA defines "conservation" as the use of methods and procedures to bring the listed species to a point where protection is no longer necessary. The secretary must make his or her decision on the basis of the best scientific and commercial data available and after considering economic, national security and other impacts. Under Section 7 of the ESA, an agency must consult with the applicable service to ensure that the agency's action (such as the issuance of a permit or the funding of a project) is not likely to jeopardize the continued existence of a species or result in the "destruction or adverse modification" of critical habitat. After consultation, the service issues a biological opinion.

In *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the U.S. Court of Appeals for the Fifth Circuit reviewed an FWS regulation that defined the "destruction or adverse modification" as an alteration that appreciably diminishes both the survival and recovery of the listed species. By establishing a standard under which "destruction or modification" of critical habitat would be found only when the very survival of the species would be put at risk, FWS effectively merged the critical habitat and "jeopardize the continued existence" standards. The Fifth Circuit held that the regulation violated the ESA because the ESA prohibits actions adversely affecting the recovery of listed species even if the actions do not jeopardize its existence.

The Ninth and Tenth circuits likewise held the FWS regulation to be infirm for focusing narrowly on the survival of the species rather than on its recovery. Because "a species requires more critical habitat for recovery than is necessary for survival," and "Congress intended that conservation and survival be two different (though complementary) goals of the ESA," the regulation violated the ESA, according to *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-1072 (9th Cir. 2004). Consequently, the courts of appeals have sent a strong message that a federal action that would adversely affect the recovery of a listed species falls within Section 7's purview.

The Proposed Regulations and Policy

The services have taken this message to heart. After initially adopting a policy to disregard the infirm regulation, on May 12, the services published two draft regulations and a policy that include a revised definition for "destruction or adverse modification," a definition of the "geographical area occupied by the species" for purposes of designating critical habitat, and a policy on exclusions from critical habitat. The new definition of "destruction or adverse modification" would encompass any habitat alteration that "appreciably diminishes the conservation value of critical habitat for a listed species." Alterations "that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery" meet the definition.

To designate critical habitat under the second proposed regulation, the services will identify the geographic area regularly occupied by the species at any point in its life cycle. Within this area the services will designate critical habitat by assessing the strength of the contribution that the habitat's physical or biological features provide or may provide to the recovery of the listed species. Physical features include water characteristics, soil type and

geology on which the species depends. Biological features include vegetation, prey species and nesting or spawning sites. These features provide "food, water, light, shelter from predators … or migratory corridors," that may be essential to the species' recovery and require special management or protection. In accordance with the ESA, the secretary will also include as critical habitat specific areas outside the geographic area occupied by the species that are essential for its conservation.

Designating an area as critical habitat primarily affects the Section 7 obligations of federal agencies, but it may also impact landowners dependent on federal permits, financing or projects. In addition, the designation of critical habitat puts private owners of critical habitat on notice that even minor activities on their properties may take a listed species. The principal mechanism for private parties to avoid takings liability that may result from habitat alteration that is not intended to harm a listed species is to prepare a habitat conservation plan (HCP). The HCP requires the private party to undertake actions to minimize and mitigate the impacts of any taking on listed species to the maximum extent practicable. If the service approves the HCP, it will issue an "incidental take" permit under Section 10 of the ESA that protects the party from liability for incidental takings.

The May 12 draft policy provides that the secretary will ordinarily exclude an area covered by a Section 10 permit from critical habitat designation on the ground that the benefits of exclusion outweigh the benefits of designation. The exclusion decision, however, remains subject to the services' discretion, resulting in a case-by-case review. In general, the secretary will balance the benefits of inclusion or exclusion by considering whether there has been agency review, public participation, National Environmental Policy Act compliance, and implementation of measures to conserve essential physical or biological features and to perform monitoring.

Efforts to Limit the ESA

In a report issued Feb. 4, 13 Republican members of the House of Representatives detailed some of the hardships caused by ESA compliance and advocated various reforms. The report attributed the "mass shutdown of timber harvesting activity in the Pacific Northwest" to the spotted owl litigation, and noted that the absence of harvesting has increased the habitat loss from wildfires. It condemned the practice of compelling the listing of species through litigation and settlements. The report decried the near absence of delistings following recovery of species, citing the gray wolf as a prime example of a slow and inconsistent delisting process.

The authors of the report have introduced four bills in the House Committee on Natural Resources to amend the ESA to cure what they deem deficiencies: HR 4315 (to require Internet publication of the best scientific and commercial data available serving as a basis for a regulation); HR 4316 (to require disclosure of government expenditures for litigation under the ESA); HR 4317 (to require disclosure to states of the basis for listing determinations under the ESA); and HR 4318 (to limit an award of attorney fees under the act to prevailing parties). Sen. Rand Paul, R-Ky., and others have introduced legislation (SB 1731) in the Senate to give states primacy in the administration of the ESA and compensate landowners for diminution of their property values.

In the current partisan climate in Congress, it is unlikely that any of these legislative proposals will be enacted intact. But the claims that the ESA is unfair to owners of critical habitat will continue to resonate as long as a few landowners must bear the cost of conserving listed species for the benefit of the public. Statutory changes that spread burdens more equitably while maintaining the laudatory goals and effectiveness of the ESA have the greatest chance of passage.

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