

40 Years of the Endangered Species  
Act:  
Remarkable Origin, Resilience, and  
Opportunity

January 14, 2013

# Endangered Species Preservation Act of 1966

## Section 1(b):

“It is further declared to be the policy of Congress that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, insofar as is practical and **consistent with the primary purposes of such bureaus, agencies, and services**, shall preserve the habitats of such threatened species on lands under their jurisdiction.” (Emphasis added.)

# Endangered Species Preservation Act of 1966

## Section 1(c):

This subsection authorized the Secretary of the Interior to list a species **of native fish and wildlife** as “threatened with extinction” after finding that “its existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance.”

# Endangered Species Preservation Act of 1966

- The listing procedure required the Secretary to consult with the States and, “from time to time,” to seek the advice and recommendations of scientific experts on the species at issue. The rule-making procedure of 5 U.S.C. § 553 did not apply to this listing procedure, although the Secretary was required to publish in the Federal Register the names of the species found to be threatened with extinction.

# Endangered Species Preservation Act of 1966

- No general prohibitions or regulatory constraints applied to species listed under Section 1(c). However, taking prohibitions were invoked for all fish and wildlife species found within units of the National Wildlife Refuge System through Sections 4 and 5, which later became the National Wildlife Refuge System Administration Act.

# Endangered Species Conservation Act of 1969

- Section 2 established an import prohibition for **any foreign species or subspecies of fish or wildlife** determined to be threatened with “worldwide extinction.”

# Endangered Species Conservation Act of 1969

- Section 3 set out a procedure for the listing of foreign fish or wildlife species that was subject to the provisions of 5 U.S.C. § 553, required listing determinations to be based on the “best scientific and commercial data available,” and required determinations of “endangered” status to be based on one of four statutory standards:
  - (1) the destruction, drastic modification, or severe curtailment, or the threatened destruction, drastic modification, or severe curtailment, of its habitat, or
  - (2) its overutilization for commercial or sporting purposes, or
  - (3) the effect on it of disease or predation, or
  - (4) other natural or man-made factors affecting its continued existence.

# Endangered Species Act of 1973

- Included plant species and subspecies within the definition of species that can be the subject of a listing determination.
- Included, for fish and wildlife species, any subspecies or “any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature” within the definition of species. (Later amended in 1978 to replace the quoted text with “distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature”.)

# Endangered Species Act of 1973

- Section 4 – Provided for the determination of whether any species is an endangered species or a **threatened species** by regulation. Under subsection (b)(1), the Secretary was directed to make listing determinations “on the basis of the best scientific and commercial data available . . . .”
- No procedures were identified for the designation of critical habitat.

# Endangered Species Act of 1973

- Section 7:

“The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. **All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act** by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and **by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.**” (Emphasis added.)

# Endangered Species Act of 1973

- The provisions in Section 7 were not addressed in the Conference Report or any of the other primary committee reports. However, Rep. Dingell stated the following during the House floor debate on the Conference Report: “The purposes of the bill include the conservation of the species and of the ecosystems upon which they depend, and every agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.” 119 Cong. Rec. 42913 (Dec. 20, 1973).

# Endangered Species Act of 1973

- Section 9(a)(1)(B) – Provided a comprehensive taking prohibition for endangered fish or wildlife species, including the new concept of “harm” in the definition of “take”.
- Section 9(a)(1)(C) – Prohibited the take of endangered fish or wildlife species on the high seas for persons subject to the jurisdiction of the United States (interpreted by the Fish and Wildlife Service in 1975 to extend up to the territorial sea of another country—50 C.F.R. § 17.21(c)(1)).

# Endangered Species Act of 1973

- Section 9(a)(1)(E) & (F) – Provided a set of interstate and foreign commerce prohibitions for endangered fish or wildlife species. The foreign commerce prohibitions, while limited in application to “persons subject to the jurisdiction of the United States,” had extraterritorial effect.

# Endangered Species Act of 1973

- Section 3(6) [now paragraph (9)] definition of “foreign commerce” includes, “among other things, any transaction—
  - (A) between persons within one foreign country;
  - (B) between persons in two or more foreign countries;
  - (C) between a person within the United States and a person in a foreign country; or
  - (D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.”

# Endangered Species Act of 1973

- Section 9(a)(2) – Included import, export, and interstate/foreign commerce prohibitions for endangered plant species.
- Section 9(c)(1) – Implemented the Convention on International Trade in Endangered Species of Wild Fauna and Flora by prohibiting any trade (import, export, or re-export) in specimens of species included in one of the three appendices to CITES contrary to the provisions of that treaty.

# Endangered Species Act of 1973

- Section 10(a) – Provided for the issuance of permits for endangered species “for scientific purposes or to enhance the propagation or survival of the affected species.”
- Section 11(g)(1)(A) – Provided jurisdiction for citizen suits to enjoin alleged violations of the Act.

# Section 4 Implementation

- The lists of endangered species developed under the 1966 and 1969 Acts were deemed to be “endangered species” under the 1973 Act, pending the Secretary’s republication of the list “to conform to the classification for endangered species or threatened species, as the case may be . . . .” Section 4(c)(3), 1973 Act. The “republication” process did not require compliance with 5 U.S.C. § 553.

# Section 4 Implementation

- The 1978 ESA Amendments established procedures for the designation of critical habitat, tightened actual notice and other procedures for the listing of species, and established a binding two-year window within which final action had to be taken on proposals to list species or such proposals had to be withdrawn. No subsequent proposal of such species for listing could be done absent the Secretary's finding that "significant new information" supported such a proposal.

# Section 4 Implementation

- The 1982 ESA Amendments added language to what is now Section 4(b)(1) of the Act to make clear that determinations of the status of species under Section 4(a)(1) must be based “solely” on the best available scientific and commercial information. This amendment invalidated the practice within the Interior Department of requiring the preparation of economic analyses prior to the approval and signature of Section 4 listing rules.

# Section 4 Implementation

- As noted in the Conference Report to the 1982 Amendments, “economic considerations have no relevance to determinations regarding the status of species and the economic analysis requirements of Executive Order 12291 [now 12866], and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process.” H.R. Conf. Rep. No. 835, 97<sup>th</sup> Cong., 2d Sess. 20 (1982).

# Section 4 Implementation

- Section 4 implementing regulations (50 C.F.R. Part 424) were jointly promulgated by Interior and Commerce in 1984, incorporating changes resulting from the 1978, 1979, and 1982 Amendments to the ESA. Subject to minor amendments, they remain largely unchanged.

# Section 4 Implementation

- The 1982 ESA Amendments also added to the Act's citizen suit provisions a new Section 11(g)(1)(C) that allowed suits to be brought against the Secretary of the Interior (or Commerce) "where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary." Among the many non-discretionary duties found in Section 4 is the one-year deadline for taking final action on listing proposals, also added by the 1982 Amendments.

# Section 4 Implementation

- During the 1990s a series of appropriations act measures that rescinded Section 4 funds or imposed rule-making moratoria disrupted the orderly administration of the Section 4 program. As a result, rule-making and petition backlogs occurred, and citizen suits gave rise to many, sometimes conflicting, court-ordered deadlines. The MDL settlements approved by the District Court in September of 2011 have finally provided the stability required for the orderly administration of the program.

# Section 7 Implementation

- Initial Interior/Commerce implementing regulations were issued on January 4, 1978 (43 Fed. Reg. 870). They established a basic consultation procedure that involved a threshold examination of the proposed Federal agency action, the issuance of a “biological opinion” to the Federal agency within 60 days of the initiation of consultation, and a special process that applied to situations where scientific information was insufficient to prepare an opinion. A regulatory process for the designation of critical habitat was included in these regulations.

# Section 7 Implementation

- For the first time, the 1978 regulations established the regulatory requirement that Federal agencies must initiate consultation if they find that their proposed actions “may affect” an endangered or threatened species or their habitat.

# Section 7 Implementation

- The Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), resolved the dispute over the plain language of Section 7:

“One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]. 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.” 437 U.S. at 173 (citation omitted, emphasis theirs).

# Section 7 Implementation

- As stated further by the Court:  
“It has not been shown, for example, how TVA can close the gates of the Tellico Dam without ‘carrying out’ an action that has been ‘authorized’ and ‘funded’ by a federal agency. Nor can we understand how such action will ‘*insure*’ that the [endangered] snail darter’s habitat is not disrupted.” 437 U.S. at 173 (footnote omitted, emphasis theirs).

# Section 7 Implementation

- The substantive and procedural requirements of Section 7 apply to ongoing projects where discretionary Federal agency involvement or control exists. As stated by the Court, “it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act.” 437 U.S. at 186 (footnote omitted). “Our holding merely gives effect to the plain words of the statute, namely, that § 7 affects all projects which remain to be authorized, funded, or carried out.” *Id.* n.32.

# Section 7 Implementation

- The 1978 ESA Amendments added a generic exemption procedure, as well as special exemption processes for the Tellico Dam and Grayrocks Projects.
- The duties to avoid jeopardy to listed species and to avoid the destruction or adverse modification to critical habitat were not altered.

# Section 7 Implementation

- The 1978 Amendments also added a new subsection on the issuance of biological opinions, established a 90-day period for the completion of consultation, and called for the suggestion of any “reasonable and prudent alternatives” that the Secretary believes would avoid jeopardizing the continued existence of listed species or adversely modifying their critical habitat. A new procedure for preparing biological assessments by the Federal action agency was also added.

# Section 7 Implementation

- The 1978 Amendments added a new subsection (d) to Section 7 that prohibits any irreversible or irretrievable commitment of resources on the part of the Federal action agency or its permit or license applicant that would have the effect of foreclosing the implementation of any reasonable and prudent alternative.

# Section 7 Implementation

- The 1979 ESA Amendments changed the substantive standard of Section 7 [now set out in paragraph (a)(2)] from “do not jeopardize” to “is not *likely*” to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. This change was intended to deal with data challenges that are sometimes encountered in the Section 7 process.

# Section 7 Implementation

- This part of the 1979 Amendments also added a new data requirement to Section 7(a)(2): “In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.” As noted in the Conference Report: “This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).” H.R. Rep. No. 697, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1979).

# Section 7 Implementation

- The 1982 ESA Amendments introduced a new feature, the “incidental take” statement (ITS), that is added to a biological opinion so that federal action agencies have coverage under both Sections 7 and 9 when they implement their actions in accordance with the recommendations of the opinion and the terms and conditions of the ITS.

# Section 7 Implementation

- The joint consultation regulations were totally updated on June 3, 1986 (51 Fed. Reg. 19926).
  - All provisions of the ESA Amendments of 1978, 1979, and 1982 were addressed.
  - The “may affect” threshold for formal consultation was retained.
  - A threshold for the preparation of biological assessments, “major construction activity,” was adopted.
  - Simple causation requirements were added for the determination of “indirect effects” and “cumulative effects.”
  - A binding procedural requirement was established for “reinitiation” of formal consultation.

# Section 7 Implementation

- The 1986 regulations also added a new Section 402.03, which stated:  
“Section 7 and the requirements of this Part [402] apply to all actions in which there is discretionary Federal involvement or control.”

# Section 7 Implementation

- Lastly, the 1986 rule included an interpretation that Section 7 of the ESA does not apply to Federal agency actions that are carried out within the territory or territorial waters of a foreign country. This interpretation was challenged in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), where the Court found that the plaintiffs lacked Article III standing to bring their claim. (However, Justice Stevens, who disagreed with the majority on standing, nonetheless concurred in the judgment because he agreed with the regulatory interpretation.)

# Section 7 Implementation

- The regulatory definition of “destruction or adverse modification” of critical habitat was found to be arbitrary and capricious by two courts of appeal. *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004).

# Section 9 Implementation

- Most of the prohibitions found in Section 9(a)(1) and (a)(2) of the Act have been implemented in 50 C.F.R. Part 17. Perhaps the most controversial of these regulations is the definition of “harm,” one of the statutory components of the definition of “take.” 16 U.S.C. § 1532(19).

# Section 9 Implementation

- FWS definition of “harm”:

“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.

# Section 9 Implementation

- *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9<sup>th</sup> Cir. 1988): “The Secretary’s inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is ‘to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .’” *Id.* at 1108 (citation omitted).

# Section 9 Implementation

- As noted further in *Palila*: “. . . we do not reach the issue of whether harm includes habitat degradation that merely retards recovery. The district court’s (and the Secretary’s) interpretation of harm as including habitat destruction that could result in extinction, and findings to that effect are enough to sustain an order for the removal of the mouflon sheep.” *Id.* at 1110 (footnote omitted).

# Section 9 Implementation

- *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)

FWS definition of “harm” was upheld by the Court: “. . . the Secretary reasonably construed the intent of Congress when he defined ‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’” *Id.* at 708. “But for” causation is recognized by the majority as the test for applying the definition of “harm.” *Id.* at 700 n.13. In contrast, Justice O’Connor, in her concurring opinion, found that “proximate causation” is the appropriate test, and she noted her disagreement with the 9<sup>th</sup> Circuit decision in *Palila*.

# Significant Efforts to Amend the ESA (since 1995)

- The last reauthorization of the ESA occurred in 1988, and the amendments resulting from that process largely improved the administration of the statute. The 1988 Amendments were bipartisan, in keeping with past reauthorization efforts, and former Senator Alan Simpson noted the importance of the ESA: “. . . the Endangered Species Act has come to be one of the most important pieces of environmental legislation on the books today. The act supersedes all other Federal laws when conflicts concerning a threatened or endangered species arise.” 134 Cong. Rec. 19277 (July 28, 1988).

# Significant Efforts to Amend the ESA (since 1995)

- However, subsequent controversies involving Northern spotted owls, timber wolves, and grizzly bears created a difficult environment for the consideration of subsequent reauthorization bills. In 1995, two prominent bills were introduced that would have substantially modified the conservation tools of the ESA.

# Significant Efforts to Amend the ESA (since 1995)

- S. 768 (104<sup>th</sup> Congress) (former Sen. Gorton's bill).
- H.R. 2275 (104<sup>th</sup> Congress) (House ESA Task Force bill).

# Secretary Babbitt's 10-Point Plan

1. Base ESA decisions on sound and objective science.
2. Minimize social and economic impacts.
3. Provide quick, responsive answers and certainty to landowners.
4. Treat landowners fairly and with consideration.
5. Create incentives for landowners to conserve species.
6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.
7. Prevent species from becoming endangered or threatened.
8. Promptly recover and de-list threatened and endangered species.
9. Promote efficiency and consistency.
10. Provide state, tribal and local governments with opportunities to play a greater role in carrying out the ESA.

# Significant Efforts to Amend the ESA (since 1995)

- S. 1180 (105<sup>th</sup> Congress), “Endangered Species Recovery Act of 1997”
  - Bipartisan bill successfully negotiated and reported out of the Senate Environment and Public Works Committee through the leadership of Chairman Chafee and Senators Kempthorne, Baucus, and Reid.
  - Combined an effective array of new remedies for landowners and other economic interests, while maintaining the vital substantive provisions in Sections 7 and 9 and a science-based listing process.
  - S. Rep. No. 128, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997) (the Committee’s report explains S. 1180 in detail).

# Significant Efforts to Amend the ESA (since 1995)

- S. 911 (107<sup>th</sup> Congress)

Senator Baucus and Senator Smith (Oregon) introduced S. 911 in June of 2001. The bill basically replicated the provisions of S. 1180.

# Contemporary Achievements and Administrative Opportunities

- Listing of the polar bear as a threatened species (May 15, 2008).
- MDL Settlements (September 2011).
- Regulatory opportunities.