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FEATURE ARTICLE

THE ENDANGERED SPECIES ACT: THE HIGH COURT, THE SERVICES, AND CONGRESS ALL IN PLAY!

By David C. Smith

All three branches of the federal government—judicial, executive, and legislative—are actively considering major aspects of the federal Endangered Species Act (ESA or Act). Some decisions and resulting changes are certain; others are probably, based on history, unlikely to be enacted. But with the statute not having been amended or revised since 1988 and no meaningful regulatory reform having occurred since 1986, some argue that updates to what many consider the nation's most powerful environmental regulatory regime is long overdue. Currently pending are: 1) a major case at the Supreme Court regarding the Act's provision for protection of purported "habitat" on private land that is not presently occupied by the protected species nor could it be absent significant intervention and human alteration; 2) broad-sweeping and comprehensive proposed regulatory reforms; and 3) significant proposed amendments to the Act itself in both chambers of Congress.

An Endangered Species Act Primer

As statutes go, the ESA is actually notably straightforward on paper. Even non-lawyers can readily follow it section-by-section implementation from a nomination for a particular species to be "listed," the designation of particularly important habitat for that species, the role of federal agencies in ensuring that actions that they take do not further imperil listed species, and the Act's prohibition against various categories of harm to the species once listed.

The Act's provisions are carried out in combination by the Departments of the Interior (Interior) and Commerce. Commerce, generally, has jurisdiction over marine and anadromous species, and it has delegated implementation of that authority to the National Marine Fisheries Service (NMFS), also referred to as NOAA Fisheries. All other species are under the jurisdiction of Interior, and it delegated implementation to the U.S. Fish and Wildlife Service (FWS). Collectively, NMFS and FWS are referred to as the "Services."

ESA Section 4 (16 USC § 1533)

Section 4 of the Act provides the processes and standards for listing species for protection, designation of their protected habitat, and eventual delisting, among other things. There are two categories of listing provided for in the ESA: "threatened" and "endangered." An "endangered species" according to the Act is one that is "in danger of extinction throughout all or a significant portion of its range." A "threatened" species is one:

> . . .that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Section 4 outlines the procedures whereby any interested party or entity may petition the respective Service seeking to invoke the Act's protections for a given species by adding to the list for protection as either threatened or endangered.

The Services usually must also, at the time a species is listed, designate such species' "critical habitat," defined as areas "essential to the conservation of the species." The Services may include both "occupied" and "unoccupied" acreage in the designation within specified parameters.

ESA Section 7 (16 USC § 1536)

Section 7 requires and outlines the procedures whereby virtually any action by any entity of the federal government must be considered as to its potential impact on species protected under the Act. This includes the issuance of a permit or provision of federal funding to private entities. If any such federal agency action may detrimentally impact a listed species, that agency must "consult" with the respective Service to evaluate such potential harm. Under Section 7, such action may not "jeopardize the continued existence of the species" nor may it result in the "destruction or adverse modification" of its critical habitat.

ESA Section 9 (16 USC § 1538)

The "teeth" of the ESA are in Section 9. Here, the Act prohibits the "take" of any listed species. Take is broadly defined as: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

ESA Section 10 (16 USC § 1539)

Section 10 allows the respective Service to issue a permit to allow "take" of a listed species in proscribed contexts, most frequently in the private sector where such take is "incidental to otherwise lawful activity."

The U.S. Supreme Court and the ESA

Weyerhaeuser Company v. *U.S. Fish and Wildlife Service*, currently pending before the U.S. Supreme Court, presents the issue of whether "habitat" designated as critical by the Services must actually be "habitable" by the species. The case also asks whether a Service's decision not to exclude a given area from designated habitat based on its economic impact to the landowner, as permitted under the ESA, is reviewable by a court.

The dusky gopher frog was listed under the ESA as "endangered" in 2001. In fact, it was and is considered one of the most highly endangered species in the nation, according to the federal government. The FWS did not designate critical habitat for the frog, however, until it was forced to do so by litigation. The designation occurred in 2012. According to the FWS, the frog's historic range included Mississippi, Louisiana, and Alabama.

At the time the FWS designated critical habitat for the frog, it was only known to exist in one location in Mississippi. Nonetheless, the FWS designated 6,477 acres as critical habitat for the frog, including 1,544 acres known as "Unit 1" in Louisiana. Unit 1 was private land and part of an area leased by Weyerhaeuser for timber production activities. The frog had not been seen in Unit 1 since 1965 and, according to Weyerhaeuser, the area no longer contained the biological features that, according to the FWS, were essential for use of the area by the frog.

According to Weyerhaeuser, the FWS' own record provides that the "physical and biological features" that the "frog requires" are absent from Unit 1 and could only be re-established there at extraordinary effort and expense. According to Weyerhaeuser's Reply Brief in the Supreme Court proceedings, the frog requires breeding ponds and:

> . . .'upland forested nonbreeding habitat' 'maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover' and 'underground habitat' that the 'frog depends upon for food, shelter, and protection.'

Not only are the current conditions on the ground no longer accommodating of the frog's needs, the specified frequent fires for maintenance of the area would be prohibited in the active timber harvesting area.

Questions for the Supreme Court

Accordingly, the first question that the Court agreed to review in this matter is: Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to the conservation of the species?

As a threshold matter, Weyerhaeuser is asking the Court to make a blanket holding that inclusion of unoccupied areas as critical habitat must necessarily involve a more exacting and rigorous standard than inclusion of occupied habitat.

The next question the Court will review has to do with the ESA's allowance in § 4(b)(2) for the Services to exclude a given area of proposed critical habitat if it determines that the benefit to such species is outweighed by the economic or other impact

of including the area in the designation. Although the FWS' own analysis showed that inclusion of Unit 1 in the designation could have an economic impact to the landowner of as much as $34 million in lost development value, the FWS nonetheless determined that potential future biological benefit of the area to the species warranted its inclusion.

When Weyerhaeuser challenged the designation in court, both the trial court and the Fifth Circuit Court of Appeals not only upheld the designation, they ruled that the FWS' decision not to exclude the area on economic grounds was not even reviewable by any court because of a "lack of a judicially manageable standard." Thus, the second question to be reviewed by the Supreme Court is: Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

The case has garnered broad attention from many stakeholders. *Amicus* briefs in support of Weyerhaeuser and the property owners have been filed by no less than 50 entities including the Chamber of Commerce of the United States, the National Association of Home Builders, the National Mining Association, the Council of State Governments, National Conference of State Legislatures, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the American Forest Resource Council.

Weighing in supporting the government are: the Center for Biological Diversity, the Sierra Club, former Department of Interior officials, Defenders of Wildlife, the Humane Society of the United States, Wildearth Guardians, and others.

Reportedly *Weyerhaeuser* will be the first case argued in the upcoming Court's term on October 1, potentially the first case to be heard by whomever will replace Justice Anthony Kennedy. The underlying case being reviewed by the Supreme Court was *Markle Interests, L.L.C.* v. *United States Fish and Wildlife Service*, 848 F.3d 635 (5th Cir. 2017).

The Departments of the Interior and Commerce (and the ESA)

As noted, there have been no comprehensive amendments to the ESA itself since 1988, and there have been no comprehensive revisions to the Act's extensive implementing regulations since 1986. In providing context for the broad-sweeping regulatory revisions now proposed, the Services state:

> In the years since those changes took place, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been numerous court decisions regarding almost every provision of the Act and its implementing regulations; the Government Accountability Office has completed reviews of the Act's implementation; there have been many scientific reviews, including review by the National Research Council; multiple administrations have adopted various policy initiatives; and nongovernmental entities have issued reports and recommendations.

On July 24, 2018, the Services simultaneously published for public comment three packages of proposed regulatory reforms. All of the proposed revisions would apply prospectively only; they would not impact species already listed as threatened or endangered, nor would they impact already designated critical habitat. The deadline for comments on each package is September 24, 2018.

Regulations Relating to Interagency Consultation (Section 7)

Perhaps the most potentially impactful proposed regulatory revision has to do with the definition of the term "destruction or adverse modification." Recall that Section 7 of the ESA prohibits any federal agency action from jeopardizing the continued existence of a listed species or from causing the "destruction or adverse modification" of the species designated critical habitat.

What constitutes "adverse modification" has been the subject of much debate, both within the Services and in court. In 2001, the Fifth Circuit Court of Appeals in *Sierra Club* v. *United States Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001) invalidated the then-existing regulatory definition for adverse modification. Under that regulation, adverse modification was not implicated until both the recovery and survival of the listed species was implicated. Given the ESA's statutory characterization of critical habitat as areas "essential to the *conservation*" of the species, the *Sierra Club* court differentiated between factors threatening the recovery (an aspect of "conserva-

tion") of a species as being implicated well before matters proceed to a more dire point where the very survival of the species is implicated. By requiring both "recovery *and* survival" to be implicated, the regulation effectively read "recovery" out of the standard and left "survival" as the sole gage. Three years later, the Ninth Circuit Court of Appeals followed suit in *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

In 2016, the Obama administration promulgated a revised definition of adverse modification as follows:

> Destruction or adverse modification means 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 or significantly delay development of such features.

The Services today are proposing two modifications for this definition. First, the proposed change would add "as a whole" to the end of the first sentence in order to "clarify the appropriate scale of the destruction or adverse modification determination." According to the Services, whether regulatorily actionable adverse modification has taken place should be evaluated relative to:

> . . .the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation.

Further:

> . . .a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced.

Additionally, the Services propose to delete the entire second sentence from the 2016 definition:

> Many commenters argued that the proposed second sentence established a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. A number of commenters believed these concepts were vague, undefined, and allowed for arbitrary determinations.

The Services state that the second sentence is "unnecessary and has caused confusion" and is thus proposing its deletion.

Another term for which the Services are proposing revision is "effects of an action." Currently, the analysis of "effects of an action" parses between notions of "direct," "indirect," "interrelated," and "interdependent" effects. The Services today contend such differentiation is confusing and unnecessary. Instead, the Services now are proposing to collapse the analysis into a single, two-part test:

> First, the effect or activity would not occur but for the proposed action, and second, the effect or activity is reasonably certain to occur.

At the heart of the first prong is a traditional "but for" standard of causation. As for the second prong, the Services incorporate the notion of "reasonable certainty" already present in Section 7 regulations and regulatory practice.

Currently, "effects of an action" includes the notion of an "environmental baseline." The Services are not proposing to redefine "environmental baseline," but they are proposing to pull it out of "effects of an action" and make it a freestanding consideration:

> Moving it to a standalone definition clarifies that the environmental baseline is a separate consideration that sets the stage for analyzing the effects of the proposed action on the listed species and critical habitat within the action area by providing the foundation upon which to build the analysis of the effects of the action under consultation. The environmental baseline does not include the effects of the action under review in the consultation . . . .

Other proposed regulatory changes in the Section 7 consultation context include programmatic consultations, time deadlines for informal consultations, expedited consultations, and utilization of agency information and data regarding the proposed federal action in biological opinions.

The Services' proposed revisions relating to Interagency Cooperation are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15812.pdf

Regulations Relating to Species Listing, Delisting, and the Designation of Critical Habitat (Section 4)

Under the express terms of § 4(b)(1)(A) of the ESA, the Services must base their listing determinations "solely on the basis of best scientific and commercial data available after conducting a review of the status of the species." This is widely recognized as prohibiting the Services from considering economic implications of listings. Nonetheless, the Services are now proposing to strike the phrase "without reference to possible economic or other impacts of such determination" from existing regulations relating to listings. While the Services openly recognize they cannot consider economic implications in deciding whether or not to list a species, they do believe inclusion of economic data may better inform the public at large of the implications of their listing decisions.

And somewhat reminiscent of the *Weyerhaeuser* case pending at the Supreme Court referenced above, the Services are proposing reforms to the regulations governing the designation of unoccupied areas as critical habitat. In its 2016 revisions to the regulations, the Obama-era Services removed from regulations the following phrase:

> The Secretary shall designate as critical habitat outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

According to the Services, removal of this prerequisite caused broad concern that the Services "intended to designate as critical habitat expansive areas of unoccupied habitat." To address this concern, the Services are proposing to again require that they must first evaluate areas occupied by the species before proposing inclusion of unoccupied areas.

Several relatively recent listing determinations by the Services withstood judicial challenges premised upon the fact that the threat to the species was not present today but was implicated according to modeling future impacts of climate change. These cases primarily focused on projected reductions in ice sheets from melting based upon rising temperatures. Without specific reference to these cases, the Services are proposing that consideration of whether designating critical habitat for a given species at the time of listing is or is not "prudent," may be influenced by such factors. Specifically:

> In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, we propose in section 424.12(a)(1)(ii) that designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.

The Services' proposed revisions relating to Listing and Designation of Critical Habitat are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15810.pdf

Regulations Relating to Protections for 'Threatened' Species (Section 9)

Another potentially sweeping proposed change has to deal with how the Act extends protections to "threatened" as opposed to "endangered" species. The ESA itself only expressly applies the take prohibition of Section 9 to endangered species. It leaves to the discretion of the Services crafting appropriate species-specific rules for species designated as threatened. NMFS has continuously operated this way—applying Section 9's blanket take prohibition to species listed as endangered and crafting more narrow, species-specific provisions for species listed as threatened.

Conversely, the FWS has instead incorporated by regulation the Section 9 take prohibition for both threatened and endangered species without differentiation. The FWS has on occasion adopted more focused, so-called "4(d) Rules" to address the specific needs of a given species, the effect of which is often to clarify that specified instances of "take" are per-

missible without separately obtaining a permit under Section 10.

The FWS is now proposing to revert back to the same practice as NMFS—having the Section 9 prohibition apply only to species listed as endangered and adopt species-specific rules for species listed as threatened.

The proposed revisions related to threatened species are available at: https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15811.pdf

Congress (and the ESA)

The House of Representatives—the Committee on Natural Resources

Representative Mike Johnson (R-La.) introduced HR 6346 in the House of Representatives on July 12, 2018. Titled "Weigh Habitats Offsetting Locational Effects of 2018" or the "WHOLE Act," the bill simply requires consideration of beneficial measures being taken on behalf of a species. Specifically, the proposed legislation provides:

> In determining whether a Federal agency action is likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of a species, the Secretary shall consider the offsetting effects of all avoidance, minimization, and other species-protection or conservation measures that are already in place or proposed to be implemented as part of the action, including the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of such species. HR 6346.

HR 6346 is pending in the House Committee on Natural Resources and has not at the time of this publication been set for hearing. HR 6346 is available at: https://www.congress.gov/bill/115th-congress/house-bill/6346

The Senate—the Environment and Public Works Committee

On July 2, 2018, Senator John Barrasso (R-Wy), Chair of the Senate Committee on Environment and Public Works (EPW), released a comprehensive package of proposed amendments to the ESA. Though not yet formally introduced and thus not yet having a bill number, the package includes a broad array of proposed amendments. According to an EPW release:

The discussion draft legislation will:

- Elevate the role of state conservation agencies in species management;
- Increase transparency associated with carrying out conservation under the Act;
- Prioritize available resources for species recovery;
- Provide regulatory certainty for landowners and other stakeholders to facilitate participation in conservation and recovery activities;
- Require that listing of any species must also include recovery goals, habitat objectives, and other criteria established by the Secretary of Interior, in consultation with impacted states, for the delisting or downlisting of the species;
- Require that the satisfaction of such criteria must be based on the best scientific and commercial data available;
- Enable states the opportunity to lead recovery efforts for listed species, including through a species' recovery team;
- Allow such a recovery team to modify a recovery goal, habitat objective, or other established criteria, by unanimous vote with the approval of the secretary of the Interior;
- Increase federal consultation with local communities;
- Improve transparency of information regarding the status of a listed species;
- Create a prioritization system for addressing listing petitions, status reviews, and proposed and final determinations, based on the urgency of a species' circumstances, conservation efforts, and avail-

able data and information so that resources can be utilized in the most effective manner;

•Include studies on how to improve conservation efforts and to understand in greater depth the extent of resources being expended across the federal government associated with implementation of the act; and

•Reauthorize the ESA for the first time since its funding authorization expired in 1992.

The legislative discussion package is available at: https://www.epw.senate.gov/public/_cache/files/b/9/b99b7ec0-cc53-4051-8827-9a1681602304/FD921A33A08582D2C2C4124BDE001F48.esa-amendments-of-2018-discussion-draft.pdf

Conclusion and Implications

There is only one thing certain at the moment—the *Weyerhaeuser* case remains pending at the Supreme Court, is set for oral argument October 1, 2018, and will likely produce an opinion addressing designation of unoccupied habitat and judicial review of the Services' discretion to exclude areas from critical habitat on economic or other reasons. Beyond that, the future of both the packages of proposed regulatory reforms as well as the proposed statutory amendments to the Act itself remain uncertain. Additionally, the last House Committee Chair to promulgate ESA reforms and pass them out of his committee (only to see them never taken up by the entire House), was voted out of office in the immediately following election cycle after being targeted by special interest opposed to any reform of the Act.

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