



Endangered Species Committee Newsletter

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INTRODUCTION

With this issue, the Endangered Species Committee Newsletter resumes publication after a hiatus. Laura Evans traces the long history of Endangered Species Act action on the gray wolf. Ya-Wei Li advocates for more vigorous efforts to promote species recovery under Endangered Species Act section 7(a)(1). Alexander Horning and Parker Moore discuss efforts to require compensatory mitigation for impacts to migratory bird habitat. The issue also includes abstracts of the winning entries in the Endangered Species Committee's annual student writing competition from 2015 and 2016.

A BRIEF HISTORY OF THE GRAY WOLF ENDANGERED SPECIES ACT LISTING SAGA

Laura M. Evans

I. Introduction

The U.S. Fish and Wildlife Service (Service) has been trying to issue a satisfactory Endangered Species Act (ESA) listing rule for the gray wolf (*Canis lupus*) since 1967, when the Department of the Interior issued the first list of endangered species pursuant to the Endangered Species Preservation Act of 1966. There are over 50 *Federal Register* articles and at least 15 federal court opinions regarding gray wolf listing actions, and more will be issued in the coming years.

Many people are invested in the gray wolf's ESA status, including wildlife conservation advocates who want to protect wolves, farmers who worry about threats to livestock, hunters concerned about wolves decimating wild game populations, and states that want to run their own wolf conservation programs. There is little common ground between opposing groups, and these differing positions are reflected in the multitude of *Federal Register* and litigation documents.

This article provides a brief discussion and summary of the gray wolf listing history and is organized as follows: section II discusses the wolf taxonomy issue, which contributes to its long listing history; section III summarizes the gray wolf listing history by highlighting the rules and court opinions that have significantly influenced the gray wolf's ESA status; section IV provides information about the Mexican wolf, a gray wolf subspecies that received its own final listing rule in 2015 and has been the subject of recent litigation between New Mexico and the Service; and section V discusses possible next steps.

II. Taxonomic Disagreements

Truly exploring the biological basis for the taxonomic disagreements is beyond the scope of this article, but it is important to understand that this issue is highly contentious, not settled, and one of the main reasons for the gray wolf's

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Brooke Wahlberg, Editors

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drawn-out listing history. In general, disagreements revolve around two issues: (1) whether or not all of the gray wolves in North America descend from and are actually one species; and (2) how many subspecies of gray wolves historically and currently exist. The ESA requires the Service to make listing determinations based on the “best scientific information available,” so when new scientific studies on gray wolf taxonomy present information that conflicts with past studies, there is justification for interest groups to petition the Service to propose new listing rules that consider the most current scientific information. *See* 16 U.S.C. § 1533(b)(1)(A). In its 2013 proposed delisting rule, the Service made conclusions on wolf taxonomy based on current scientific literature, but also stated that it “do[es] not view this issue as ‘resolved,’ and . . . fully expect[s] that *Canis* taxonomy will continue to be debated for years if not decades to come.” 78 Fed. Reg. 35,664, 35,670 (June 13, 2013).

III. The Gray Wolf’s Listing History

Gray wolves are the largest wild members of the *Canidae* (dog) family and have a circumpolar range including North America, Europe, Asia, and possibly North Africa. The Service originally listed gray wolves as subspecies or as regional populations of subspecies in the contiguous United States and Mexico. Before Congress adopted the ESA in 1973, the Service listed two gray wolf subspecies pursuant to the Endangered Species Conservation Act of 1969: the eastern timber wolf (*C. l. lycaon*) in the Great Lakes region and the northern Rocky Mountain wolf (*C. l. irremotus*) in the northern Rocky Mountains region. 32 Fed. Reg. 4001 (Mar. 11, 1967); 38 Fed. Reg. 14,678 (June 4, 1973). In 1974, the Service moved both subspecies to the ESA’s list of endangered species. 39 Fed. Reg. 1171 (Jan. 4, 1974). On April 28, 1976, the Service listed the Mexican wolf as endangered. 41 Fed. Reg. 17,736. On June 14, 1976, the Service listed a fourth subspecies, the Texas gray wolf

(*C. l. monstrabilis*), as endangered in Texas, New Mexico, and Mexico. 41 Fed. Reg. 24,064.

Less than two years after the Service listed the Texas gray wolf subspecies, it issued a final rule to reclassify the gray wolf as endangered at the species level because the previous subspecies listing arrangement “ha[d] not been satisfactory because the taxonomy of wolves is out of date, wolves may wander outside of recognized subspecific boundaries, and some wolves from unlisted subspecies may occur in certain parts of the lower 48 States.” 43 Fed. Reg. 9607 (Mar. 9, 1978). The Service made one distinction for the Minnesota gray wolf population, which became listed as threatened with a special ESA section 4(d) regulation allowing Minnesota to operate its own wolf management program. ESA section 4(d) permits the Service to write rules regarding specific threatened species, which allows for more flexible management with less federal oversight. *See* 16 U.S.C. § 1533(d).

In 1994 and 1998, the Service designated areas in Idaho, Montana, Wyoming, and the Southwest to contain “*nonessential* experimental populations” of gray wolves and Mexican wolves. 59 Fed. Reg. 60,252, 60,266 (Nov. 22, 1994); 63 Fed. Reg. 1752 (Jan. 12, 1998). ESA section 10(j) allows the Service to designate experimental populations of listed species to be introduced outside of their current range, but within their likely historic range, in order to establish additional wild populations and promote recovery. 16 U.S.C. § 1539(j). Experimental populations are treated as threatened species with full ESA protection, while *nonessential* experimental populations, like the wolves here, are treated as a species proposed to be listed with little ESA protection. 16 U.S.C. § 1539(j)(2)(C)(i).

During the 1990s and early 2000s, the Service received numerous petitions to delist the gray wolf in all or part of the lower 48 states. In 2003, the Service issued a final rule dividing the gray wolf species into four separate regional distinct population segments (DPSs) with different listing

determinations: the Eastern DPS was listed as threatened with a 4(d) rule; the Western DPS was listed as threatened with a 4(d) rule; the Southwestern DPS was listed as endangered; and gray wolves in a region of 16 southeastern states were delisted because the Service determined they were not part of the gray wolf's historic range. 68 Fed. Reg. 15,804 (Apr. 1, 2003). Two federal courts rejected this rule and issued orders vacating it. *See Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1158–59 (D. Or. 2005); *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 557 (D. Vt. 2005).

The Service published additional gray wolf delisting rules to recognize recovery of the Great Lakes region population, 72 Fed. Reg. 6052 (Feb. 8, 2007); 74 Fed. Reg. 15,070 (Apr. 2, 2009); the northern Rocky Mountain population, 73 Fed. Reg. 10,514 (Feb. 27, 2008); 74 Fed. Reg. 15,123 (Apr. 2, 2009); and the Wyoming population, 77 Fed. Reg. 55,530 (Sept. 10, 2012). But federal courts rejected them all in a series of cases addressing various legal issues. *See Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008); *Humane Soc'y of U.S. v. Kempthorne (I)*, 579 F. Supp. 2d 7 (D.D.C. 2008); *Humane Soc'y of the United States v. Kempthorne (II)*, Stipulated Settlement Agreement and Order, Civ. No. 09-01092-PLF, Dkt. 27 (D.D.C. July 2, 2009); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010); *Defenders of Wildlife v. Jewell*, 2014 WL 4714847 (D.D.C. Sept. 23, 2014); *Humane Society of the U.S. v. Jewell*, 2014 WL 7237702 (D.D.C. Dec. 19, 2014). By the spring of 2010, the gray wolf listing “remained unchanged from the reclassification that occurred in 1978 except for the addition of the three experimental populations.” 78 Fed. Reg. 35,664, 35,666. On February 20, 2015, the Service issued a final rule “to comply with [the two 2014 U.S. District Court for the District of Columbia] court orders” by reinstating ESA protections for the gray wolf in Wyoming and the western Great Lakes. 80 Fed. Reg. 9218 (Feb. 20, 2015).

In June 2013, the Service issued a proposed rule to delist the gray wolf while maintaining ESA

protections for the Mexican wolf as an endangered subspecies. 78 Fed. Reg. 35,664 (June 13, 2013). The Service finalized the Mexican wolf listing rule in January 2015, but it has not yet issued a final rule on its proposed delisting of the gray wolf. 80 Fed. Reg. 2488 (Jan. 16, 2015). The public submitted over 1,600,000 comments on the proposed delisting rule, which the Service must consider in its final rule.

In 2015, conservation groups filed the “Petition to Reclassify Gray Wolves as Threatened in the Conterminous United States under the Endangered Species Act,” which the Service rejected six months later. *See* 80 Fed. Reg. 37,568 (July 1, 2015). The petition argued that a species-wide threatened listing would “continue needed federal oversight of wolf recovery efforts while providing the Service with the regulatory flexibility to work with state and local wildlife officials. . . .” The Service, however, concluded that the “petitioned entity” did not meet the ESA’s definition of a “listable entity” and there is no substantial information indicating that the gray wolf is a threatened species. 80 Fed. Reg. 37,568, 37,575.

IV. The Mexican Wolf

The Mexican wolf has unique genetic markers that distinguish it from other North American gray wolves, and there has been much less disagreement about their taxonomic status compared to the rest of the gray wolf population. The Mexican wolf is the smallest extant gray wolf in North America and is the only known gray wolf subspecies to have inhabited Mexico. Historically, the Mexican wolf occupied the southwestern United States and Mexico, but by the time it was listed in 1976, government and private efforts to kill predators for the previous 80 years or so had completely extirpated the subspecies and no wild populations could be found.

Between 1977 and 1980, the United States and Mexico worked together on the Mexican wolf Species Survival Plan (SSP), which captured the last known Mexican wolves in the wild, added

them to captive Mexican wolves in the United States and Mexico, and strategically bred seven Mexican wolves to establish the 248 individuals that exist in the two countries today. The SSP still operates and works to reestablish Mexican wolves in the wild through captive breeding, public education, and research. *See* 80 Fed. Reg. 2488 (Jan. 16, 2015).

The Service's Mexican wolf reintroduction program has not been welcomed by all of the states that are supposed to receive additional wolves within their borders. New Mexico recently sued the Service for releasing two Mexican wolf pups into the Gila National Forest without the appropriate permit from the New Mexico Department of Game and Fish. Although the Service applied for the permit, New Mexico refused to issue it, and the Service released the pups anyway. In June 2016, a federal district court in New Mexico granted the state's preliminary injunction and banned the Service from releasing additional Mexican wolves into New Mexico without a state permit, although it did not require the Service to recapture the released pups as the state had requested. *New Mexico Dept. of Game and Fish v. U.S. Dept. of the Interior et al.*, No. CV 16-00462 WJ/KBM (D.N.M. June 10, 2016).

V. Next Steps

The gray wolf listing saga has gone on longer than the ESA has been in existence, and there is no resolution in sight. It is unfortunate that so much time and so many resources have been spent on classifying one species under the ESA, but given the relationship between humans and wolves, as well as the relationship between the federal government and state governments, the history is understandable. While stakeholders await the Service's final rule on delisting the gray wolf, which will result in a legal challenge regardless of the outcome, it would be beneficial for all to consider other wildlife management tools and systems that encourage cooperation and compromise. Until the ESA issues are put to bed, however, the battle continues and no one (including the gray wolf) "wins."

Laura M. Evans is an attorney living in Buffalo, New York. She previously worked on Endangered Species Act matters as an associate at Sedgwick LLP, and currently authors National Environmental Policy Act documents for David Miller & Associates, Inc. Laura has a strong interest in natural resources policy and is currently developing the website www.keepingthingsalive.org. You can contact her at laura.evans716@gmail.com.



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INVIGORATING A NEGLECTED TOOL FOR ENDANGERED SPECIES RECOVERY

Ya-Wei Li

Opinions on the Endangered Species Act (ESA) are more divisive than ever, but almost everyone expresses support for the ESA's goal of recovering imperiled species. One of our best tools for recovery, however, has largely been ignored since 1973—section 7(a)(1)'s broad mandate to federal agencies. As more species are listed under the ESA, the time is ripe to revisit this neglected tool.

Section 7 of the ESA gives federal agencies two responsibilities. Under section 7(a)(2), agencies must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (collectively, the Services) to ensure their actions are not likely to “jeopardize” a listed species or “destroy or adversely modify” critical habitat. These restrictions prevent agencies from threatening the survival of a species but still allow some harmful activities that could seriously delay or even foreclose recovery for a species. The goal of the ESA, however, is to recover species, not maintain them on the brink of extinction.

Under section 7(a)(1), all federal agencies must, in consultation with the Services, “utilize their authorities in furtherance of the purposes of this [Act],” which includes species recovery. In theory, section 7(a)(1) actions should help species recover and offset the effects of section 7(a)(2) actions. In practice, however, the proper balance between harmful effects and recovery contribution has never been realized. In just the last nine years, the Fish and Wildlife Service has evaluated over 100,000 federal actions under section 7(a)(2), nearly 8400 of which were found likely to harm a species. By contrast, I am unaware of more than a dozen conservation actions carried out under section 7(a)(1) in the last decade, and no agency formally tracks all of those actions. This is not to suggest that federal agencies have entirely ignored recovery. The Bureau of Land Management, for example, has a dedicated fund that distributes approximately \$1.5 million annually for recovery projects. And the Department of Defense spends

millions of dollars annually to restore endangered species habitat on military lands. But I am suggesting that section 7(a)(1) has fallen by the wayside while thousands of projects with adverse impacts plow forward annually. The results of this imbalance, exacerbated by climate change, inadequate funding for recovery activities, and other impediments, are sobering: hundreds of species remain in long-term decline despite having been listed for many years.

The main reason for this imbalance is the weak legal mandate for agencies to fulfill their section 7(a)(1) duty. Although courts have generally held that the provision creates an affirmative duty for agencies to develop and implement programs to conserve listed species, those decisions have not translated into enforceable duties to carry out specific recovery actions. Indeed, as early as 1986, the Fish and Wildlife Service stated that “the Act does not mandate particular actions to be taken by Federal agencies to implement 7(a)(1).” The result is that section 7(a)(1) has largely sat stale since its inception. To overcome this impasse, some federal agencies have begun adopting an incentive-based approach to section 7(a)(1), rather than a purely regulatory approach.

A notable example is the Army Corps of Engineers' 2013 conservation plan for the Lower Mississippi River (Lower Mississippi Plan). The document describes conservation actions the Corps could implement under section 7(a)(1) to avoid, minimize, and offset the adverse impacts of its flood management and ship navigation activities on three listed species. On its own, the Lower Mississippi Plan does not oblige the Corps to do anything. But five months after the plan was finalized, the Corps committed to implement the conservation measures in the plan as part of its section 7(a)(2) consultation on the same flood management and navigation activities. That consultation resulted in a biological opinion, in which the Fish and Wildlife Service treated the section 7(a)(1) conservation measures as a component of the Corps' flood management and navigation activities and concluded that the Corps is not likely to jeopardize any species or adversely modify critical habitat. This is a win for wildlife

because the measures in the section 7(a)(1) plan appear to reflect more conservation than that required to comply with section 7(a)(2).

Why did the Corps create and implement the Lower Mississippi Plan? It had an important incentive, one that reveals why other federal agencies might also want to invest in section 7(a)(1). The Corps was aware that the Fish and Wildlife Service had previously found jeopardy for three Corps projects in the Middle Mississippi and Missouri Rivers, and was “concerned that a similar scenario would occur in the [Lower Mississippi River],” according to a report it prepared for the Council on Environmental Quality. To avoid that outcome, the Corps developed the section 7(a)(1) conservation plan and integrated it with the section 7(a)(2) consultation.

This example illustrates how the Services could revive section 7(a)(1) by developing incentives for federal agencies to engage voluntarily with this provision, consistent with the expanding use of collaborative approaches under the ESA. An incentive-based approach may also encourage non-federal entities to participate in section 7(a)(1). Many section 7(a)(2) consultations authorize activities that federal agencies allow others to carry out, such as when the Corps issues a Clean Water Act section 404 permit to fill a wetland. In those situations, section 7(a)(1) can provide a framework for permit applicants to help recover the species they impact.

There are at least two reasons that a permit applicant, who has no duty to further recovery under section 7, might want to voluntarily carry out conservation measures that help a federal agency fulfill its section 7(a)(1) duty. First, those measures could reduce the likelihood of a jeopardy or adverse modification finding when adopted as part of the proposed agency action, as with the Corps’ Lower Mississippi Plan.

A second advantage is to streamline consultations. If an applicant has already begun carrying out section 7(a)(1) conservation measures and demonstrated their effectiveness *before* the consultation begins, there is less uncertainty for

the Services to grapple with when they evaluate the overall effects of the proposed action. Less uncertainty means faster evaluations. Up-front conservation is also consistent with the 2015 White House memorandum, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,” which encourages federal agencies to prefer mitigation completed before adverse impacts have occurred. In other instances, however, an applicant might implement the section 7(a)(1) measures *after* the consultation is completed. Although uncertainty is not reduced in this scenario, the consultation is still streamlined because the adverse effects of the project are minimized, resulting in fewer negotiations with the Services over any residual effects. Projects that can eliminate all residual effects and hence achieve a “no net loss” or “net benefit” for species are even more deserving of reduced scrutiny and streamlining.

Before permit applicants can contribute to section 7(a)(1) measures, the Services should resolve several key legal issues. First is how to formally recognize conservation actions that an applicant implements to help a federal agency fulfill its section 7(a)(1) duty. The Services and other federal agencies should jointly develop section 7(a)(1) conservation plans for priority species. These plans, which could be based on species recovery plans, should describe the conservation measures that a federal agency believes it and its permit applicants can carry out, how conservation measures would be credited, and how those credits could offset future adverse impacts allowed through a consultation. This crediting-debiting system should resemble those the Services have recently developed for habitat banks and candidate species mitigation.

A second issue is ensuring that section 7(a)(1) measures incorporated into a consultation are legally binding and enforceable. The Services already have a method to convert voluntary conservation measures into binding commitments: treat those measures as section 7(a)(2) “conservation measures” that are considered part of a proposed project. The section 7(a)(1) commitments can also be incorporated into the

underlying permit issued by the federal action agency, so that the legal obligation to perform those commitments is grounded in the federal statute that authorizes the permit.

There are also vital policy issues to resolve. One is to provide guidance on the amount and type of conservation actions a permit applicant should adopt to meaningfully contribute to an agency's section 7(a)(1) duty. I propose the standard should be that a species is meaningfully closer to recovery because of the section 7(a)(1) actions than without it. This standard recognizes that no project or permit applicant is solely responsible for recovering a species. And it strikes a reasonable balance between the current jeopardy standard, which can allow for a considerable setback to recovery, and some far higher standard that would discourage participation at a large scale. As a starting point for identifying section 7(a)(1) measures, federal agencies should consider the non-binding "conservation recommendations" that appear in biological opinions.

The conservation measures an agency carries out under section 7(a)(1) may seem similar to mitigation incorporated into many section 7(a)(2) consultations, in that an agency may use those measures to partially offset the adverse effects of its proposed action. But the difference is that section 7(a)(1) actions go beyond any legal requirement to mitigate by meaningfully contributing to recovery, and are in that sense voluntary actions to meet the mandate of section 7(a)(1).

The Services should also ensure that section 7(a)(1) measures are consistent with Services policies and with best practices developed by species experts. For example, section 7(a)(1) should not be used to sidestep the best practice of avoiding, then minimizing, and finally offsetting the effects of federal actions. This mitigation sequence is discussed in the Fish and Wildlife Service's 2016 Compensatory Mitigation Policy and other recent agency documents. Following the sequence is particularly important for imperiled species that lack proven offset techniques. For those species, the Services should evaluate the likelihood that

offsets are likely to be effective using a basic risk assessment like the one developed by the Business and Biodiversity Offsets Programme, an international collaboration among private- and public-sector participants that develops standards and best practices for achieving no net loss of biodiversity. We fully expect that, for some species, no offsets have been shown to work, which strongly suggests that avoidance and minimization are key to conserving the species.

Transparency is another important factor. The Services should post all of their biological opinions, section 7(a)(1) conservation plans, monitoring reports, and related documents online for public review, especially because the agencies lack the capacity to review many of the monitoring reports they receive from section 7(a)(2) projects. If carried out correctly, a transparent section 7(a)(1) program with robust monitoring should enhance our knowledge of the effectiveness of conservation techniques covered by the program. This knowledge can then inform which techniques the Services recommend in future consultations, habitat conservation plans, safe harbor agreements, and other ESA decisions and plans.

For too long, section 7(a)(2) has overshadowed section 7(a)(1). Part of the reason is that section 7(a)(1) is compulsory on paper but largely voluntary in practice. The Services should develop policies that encourage federal agencies and their permittees to carry out section 7(a)(1) measures, which would supplement any avoidance, minimization, and mitigation measures already incorporated into a consultation. Creating incentives is not the only approach to reviving section 7(a)(1), but it is the one most likely to gain traction. If the section 7(a)(1) measures are properly implemented, they could provide the boost that many species need to recover.

Ya-Wei Li is the Vice President of Endangered Species Conservation and the Director for the Center for Conservation Innovation at the Defenders of Wildlife. Before joining Defenders in 2010, he was an environmental lawyer in private practice.

RESPONDING TO FWS ATTEMPTS TO REGULATE MIGRATORY BIRD HABITAT IMPACTS THROUGH AGENCY CONSULTATION

W. Parker Moore and Alexander B. Horning

The U.S. Fish and Wildlife Service (FWS) has often demanded that project proponents provide compensatory mitigation for potential impacts to migratory bird habitat. Lacking statutory authority under the Migratory Bird Treaty Act (MBTA) to require such mitigation, FWS has increasingly relied on indirect strategies to obtain compensatory mitigation commitments from project proponents. While FWS actions typically come in the form of “recommendations” to other federal agencies in comments submitted under the National Environmental Policy Act (NEPA) or in consultations under the Endangered Species Act (ESA), in practice they frequently become permit requirements, sometimes costing project proponents millions of dollars in mitigation and delays. That does not have to be the case. As discussed below, project proponents have several strategies for keeping their projects on budget and on schedule in the face of FWS recommendations to mitigate impacts to migratory bird habitat.

I. Bases for FWS’s Recommendations for Migratory Bird Habitat Mitigation

The current FWS mitigation policy, adopted in November 2016, recognizes that “[f]ederal action agencies may include terms and conditions in permits, licenses, and certificates that mitigate a full range of adverse environmental effects, such as recommendations to compensate for unavoidable impacts to migratory bird habitat, if they determine they have authority, consistent with their statutes and regulations, to require such compensatory mitigation.” U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83,440, 83,447–48 (Nov. 21, 2016) [hereinafter “Mitigation Policy”]. FWS typically uses agency consultation and/or coordination by project proponents under federal environmental laws other than the MBTA—

particularly NEPA review and consultation under ESA section 7—as opportunities to “recommend compensatory mitigation for unavoidable impacts to migratory bird habitat.” *Id.* at 83,447. Pursuant to the recently issued Department of the Interior Secretarial Order (SO) 3349, FWS currently is reviewing the Mitigation Policy and is expected to suspend, rescind, and/or amend it in whole or part in the near future. Given that FWS began making mitigation recommendations for migratory bird habitat long before the 2016 Mitigation Policy arrived, any change to the policy made in response to SO 3349 likely will not affect FWS’s ability to continue making those recommendations unless the Secretary imposes an affirmative prohibition on the practice.

Under NEPA, FWS may comment on draft environmental impact statements or participate in NEPA review as a cooperating agency. *See, e.g.*, 40 C.F.R. §§ 1501.6, 1503.1. Under ESA section 7, federal agencies must consult with FWS to ensure their actions (e.g., issuing a permit or other authorization) are not likely to jeopardize the existence of threatened or endangered species or destroy critical habitat. *See* 16 U.S.C.A. § 1536(a).

II. FWS Recommendations to Other Federal Agencies Often Become Requirements on Project Proponents

While FWS recommendations under NEPA and ESA section 7 consultation are not compulsory, other agencies often interpret them that way. That is hardly surprising given the tenor of these recommendations. For example, earlier this year FWS submitted comments to the Federal Energy Regulatory Commission urging it (1) to not consider a proposed pipeline project’s Migratory Bird Conservation Plan complete until the project proponent “committed to provide FWS’s full requested amount of compensatory mitigation,” or (2) absent that, to reconsider the final environmental impact statement’s conclusion “that the proposed projects would not have a significant adverse effect on wildlife.” *See* 158 FERC ¶ 61,109 at 68–69 (2017). When combined with

FWS's expertise and its statutory authority over conservation of imperiled species, the obligatory tone of such comments often leads the action agency to convert FWS recommendations into mandatory conditions the project proponent must satisfy for its activities to receive and maintain federal authorization.

III. Strategies for Addressing Recommendations for Migratory Bird Habitat Mitigation

Several strategies are available to the regulated community for avoiding the risks to projects from these mitigation recommendations and minimizing the project delays and blown budgets that accompany them.

First, when facing a FWS recommendation to another federal agency for migratory bird habitat mitigation, project proponents can educate the action agency on the scope and limits of the Migratory Bird Treaty Act. Like the ESA, the MBTA includes a "take" prohibition designed to protect its covered species. Accordingly, the statute makes it unlawful to, among other things, "pursue, hunt, take, capture, [or] kill" a migratory bird. *See* 16 U.S.C.A. § 703(a). Unlike the ESA, however, the MBTA does not prohibit indirect impacts to migratory birds from things like habitat modification. *Compare* 16 U.S.C.A. § 1532(19), *with* 16 U.S.C.A. § 703(a). As a result, the Ninth Circuit has recognized that the MBTA's take prohibition does not apply to migratory bird habitat impacts. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991). Although decisions from the Second and Tenth Circuits suggest a broader view of MBTA "take" than decisions from the Fifth, Eighth, and Ninth Circuits, the Second and Tenth Circuits have not specifically decided whether habitat impacts constitute "take" under the MBTA. *See United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488–94 (5th Cir. 2015).

Acknowledging the limitations presented by the Ninth Circuit decision, FWS recently conceded that it "does not have specific statutory authority pursuant to the MBTA to *require* Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities." Mitigation Policy at 83,447. Project proponents can cite to these sources to demonstrate to an action agency that FWS's recommendations are merely advisory; any suggestion from FWS that they are compulsory would be *ultra vires*.

Second, project proponents may counter FWS mitigation recommendations submitted in comments on NEPA documents by reminding the lead agency of NEPA's purpose and legal requirements. NEPA is purely a procedural statute that requires no particular result. The statute requires an action agency to consider a reasonable range of alternatives to a proposed project and to take a "hard look" at the possible environmental consequences and potential mitigation for them, but it does not require all impacts to be mitigated. As the Supreme Court observed, "[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). For these reasons, project proponents may oppose attempts to use NEPA review as an action-forcing mechanism for compelling migratory bird habitat mitigation.

Third, project proponents may look to statutory text when FWS recommends migratory bird habitat mitigation during ESA section 7 consultations between FWS and a federal action agency. After reminding the agency that the MBTA does not prohibit indirect impacts to migratory birds from habitat modification and, therefore, that habitat mitigation is inappropriate under the MBTA,

project proponents can further explain that, under the plain language of the ESA, section 7 consultations apply only to threatened and endangered species. *See* 16 U.S.C.A. § 1536(a). It is important for the agency to understand that FWS consultations on migratory birds that are not ESA-listed go beyond FWS's statutory authorization.

Finally, project proponents may prefer to preempt recommendations for migratory bird habitat by voluntarily proposing migratory bird habitat mitigation as part of a project proposal. Doing so increases the project proponent's control over the scope of such mitigation and allows the project proponent to respond to recommendations to increase the mitigation area by explaining that the initial mitigation commitment itself is voluntary and goes beyond legal requirements. This strategy may be particularly appealing where compensatory mitigation for migratory bird habitat will already be provided to address project impacts to threatened or endangered species under the ESA or state endangered species laws because the migratory bird habitat mitigation could simply be "stacked" on top of the listed species mitigation area. In other words, the project could receive credit for mitigating the habitat of both the listed species and migratory birds if those species share the same habitat types. *See* Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg.

95,316, 95,345 (Dec. 27, 2016). This approach may avoid legal arguments and possible project delays by using already required mitigation (such as mitigation for threatened or endangered bats) to provide habitat mitigation for migratory birds.

IV. Conclusion

When confronted with FWS recommendations to provide migratory bird habitat mitigation, project proponents can push back using MBTA, NEPA, ESA, and FWS policies. These strategies will allow energy, infrastructure, and other project proponents to keep projects legally compliant, on schedule, and on budget.

W. Parker Moore is a principal at Beveridge & Diamond, P.C., and co-chairs the firm's Natural Resources and Project Development Practice Group. Parker helps clients nationwide from every economic sector navigate issues arising under the Clean Water Act, ESA, NEPA, MBTA, and related environmental laws.

Alexander B. Horning is an associate at Beveridge & Diamond, P.C. and maintains a general environmental, regulatory, and litigation practice. He has helped represent clients on matters involving the ESA, Federal Insecticide, Fungicide, and Rodenticide Act, and product stewardship issues.



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ABSTRACTS OF ENDANGERED SPECIES LAW STUDENT WRITING COMPETITION WINNERS

2016 Law Student Endangered Species Writing Competition Winners

In 2016, we received multiple high-quality submissions for our annual Endangered Species Law Student Writing Competition. The winners of the 2016 competition are identified below, with brief synopses of their articles and links to the full articles on the ABA website.

1st Andrene Dabaghi, Harvard Law School—*Lethal Take as a Conservation Method Under § 4(f) Recovery Planning: The Case of the Spotted Owl*

Using the Northern spotted owl as a case study, Ms. Dabaghi explores the U.S. Fish and Wildlife Service's (FWS) authority under section 4(f) of the Endangered Species Act. Ms. Dabaghi evaluates how controversial species management approaches—in the spotted owl's case, the shooting of barred owls—fit within FWS authority and what FWS should consider when developing recovery plans for other species.

2nd Kayla Kelly-Slatten, The Pennsylvania State University, Dickinson School of Law—*California Cries Wolf: Should California Mediate?*

Ms. Kelly-Slatten describes the history and conflicting stakeholder opinions with respect to the gray wolf's presence in California. In light of the history of, and potential for, ongoing litigation, Ms. Kelly-Slatten suggests that the California Department of Fish and Wildlife consider incorporating mediation as it moves to finalize its gray wolf management plan.

3rd Rachael Warden, University of North Carolina School of Law—*MPAs in the Southern Ocean*

Ms. Warden describes the importance of Marine Protected Areas and how the Antarctic Marine Living Resources Convention Act of 1984

authorizes the National Oceanic and Atmospheric Administration and the State Department to actively participate in conservation objectives arising out of the Antarctic treaty. In particular, Ms. Warden focuses on the difficulties the treaty parties have faced in attempts to designate an MPA in the Southern Ocean.

2015 Law Student Endangered Species Writing Competition Winners

In 2015, we received multiple high-quality submissions for our annual Endangered Species Law Student Writing Competition. The winners of the 2015 competition are identified below, with brief synopses of their articles and links to the full articles on the ABA website.

1st Jacob P. Byl, Vanderbilt Law School—*Easements with Ecosystems: A Conservation Tool for Endangered Species*

Exploring the traditional approach to species conservation, Mr. Byl evaluates the role that conservation easements and ecosystem-focused management can play in endangered species conservation. In particular, Mr. Byl addresses the tension between species-focused and ecosystem-focused conservation, and the advantages and disadvantages of conservation easements as a vehicle for endangered species conservation.

1st Joseph Simpson, Vermont Law School—*Close Encounter of the Furry Kind*
Mr. Simpson addresses the potential for violent encounters where human development and wildlife intersect. Using coyotes in Southern California as a case study, Mr. Simpson suggests that innovative zoning solutions could reduce the frequency and likelihood of violent encounters and explores the challenges of these innovative zoning approaches.

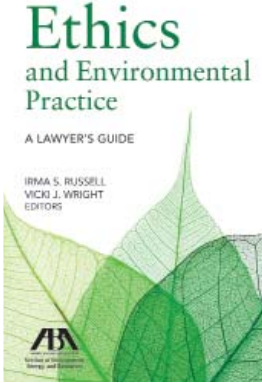
2nd Jonathon David Green, University of Utah S.J. Quinney College of Law—*On the Cusp of Disaster*

Mr. Green examines the interplay between bycatch and the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act,

the Sustainable Fisheries Act, and the North Pacific Fishery. Mr. Green's article focuses on the potential economic consequences that the listing of Alaska's king salmon may have, and how other countries such as Canada have successfully reduced their bycatch, thereby reducing incidental impacts to salmon populations.

3rd Mark K. Capone, University of Utah, S.J. Quinney College of Law—Conservation Agreements and ESA Listing

Mr. Capone analyzes Utah's successes in developing state conservation agreements that have precluded the listing of four species. This article explores how Utah has effectively implemented state conservation agreements that have withstood scrutiny under the U.S. Fish and Wildlife Service's Policy for Evaluation of Conservation Efforts and how other states may be able to adopt a similar approach to preclude the need for other listings.



Ethics and Environmental Practice
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For further details about these awards, please visit the Section website at

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