

1 Executive Summary

1.1 Overview

The Endangered Species Act (ESA) is perhaps the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹ Congress’s “plain intent” when enacting the ESA “was to halt and reverse the trend toward species extinction, at whatever the cost.”² Lately the Act has offered the polar bear as an iconic symbol of the efforts to address the Act’s conservation mandate and the regulatory implications of those mandates. But today, the words “endangered species” are so familiar in American life as to have become a cliché. “Ask [people] in the street what [they think] about the problem of disappearing species, and [they] may well reply that it would be a pity if the tiger or the blue whale disappeared,” yet it is not apparent whether that sentiment is sufficient to cause the same people to alter their lifestyle.³ Even the name “Endangered Species Act” elicits the strongest of feelings, conjuring up images of the polar bear, the grizzly bear, the gray wolf, spotted owls, or even angry loggers.

This book cannot capture or explore the historical, scientific, sociological, political, or psychological underpinnings of the ESA, or even provide a comprehensive survey of wildlife law in the United States.⁴ Rather, the purpose of the *Basic Practice*

1. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995).

2. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

3. NORMAN MYERS, *THE SINKING ARK: A NEW LOOK AT THE PROBLEM OF DISAPPEARING SPECIES* 3 (1979).

4. See MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1997), for a detailed and thorough discussion of federal wildlife law, including the ESA; and for other useful books on the Act, see *REBUILDING THE ARK*:

Series and, in particular, this book, is more modest. The series is designed to introduce the reader to a particular statute and its regulatory program—in this case the ESA—and then offer citations and references that further inform the reader of how the Act and its regulations have been implemented. That the Act will remain a vibrant program warranting continued understanding is underscored, unfortunately, by the fact that climate change “may constitute an important new threat for many” at-risk or vulnerable species.⁵

1.2 Purposes of the Endangered Species Act

By 1973, when the ESA became law, Congress already was acutely aware of the problem of human-induced species extinction.⁶ Congress’s earlier efforts, the 1966 Endangered Species Preservation Act⁷ and the 1969 Endangered Species Conservation Act,⁸ had proven insufficient to protect endangered wildlife.⁹ Against this backdrop, Congress acted decisively. Finding that “species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people,”¹⁰ Congress declared: “The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species.”¹¹ To meet these underlying objectives, Congress established in the ESA a comprehensive suite

NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (Jonathan H. Adler ed., 2011); ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010); KATHRYN A. KOHM, BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE (1991); DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1989); STANFORD ENVTL. LAW SOC’Y, THE ENDANGERED SPECIES ACT (2001).

5. HECTOR GALBRAITH & JEFF PRICE, A FRAMEWORK FOR CATEGORIZING THE RELATIVE VULNERABILITY OF THREATENED AND ENDANGERED SPECIES TO CLIMATE CHANGE 1 (Global Change Research Program 2009).

6. For a discussion about the early concerns animating and surrounding the passage of the Act, see LEWIS REGENSTEIN, THE POLITICS OF EXTINCTION: THE SHOCKING STORY OF THE WORLD’S ENDANGERED WILDLIFE (1975).

7. Pub. L. No. 89-669, 80 Stat. 926 (1966).

8. Pub. L. No. 91-135, 83 Stat. 275 (1969).

9. See ROHLF, *supra* note 4, at 21–23.

10. 16 U.S.C. § 1531(a)(3).

11. *Id.* § 1531(b).

of affirmative mandates, strict prohibitions, strong recommendations, and limited exceptions.

The U.S. Supreme Court has provided perhaps the most strident and oft-quoted summary of the ESA's breadth.¹² After reviewing the Act and its legislative history, the Court stated that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost," and noted further that this conclusion is reflected "in literally every section of the statute."¹³ Although the Court admitted that it might seem "curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent holding up of a virtually completed dam for which Congress has expended more than \$100 million," the Court held in *Tennessee Valley Authority v. Hill* that the Act required "precisely that result."¹⁴

Since the Court's decision in *Hill*, Congress has substantively amended the ESA on four occasions (1978, 1979, 1982, and 1988). The rigidity of the Act's prohibitions has been tempered somewhat through the creation of several exceptions and exemptions¹⁵ and the countervailing Supreme Court statements,¹⁶ but the exceptions and statements have not swallowed the rule. The ESA remains a "powerful tool"¹⁷ for species protection and conservation, and quite possibly warrants the attribution of being the "pit bull"¹⁸ of all environmental and conservation programs. After all, it has served as the fulcrum for driving management decisions

12. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

13. *Id.*

14. *Id.* at 172–73. For an excellent history of the Tellico dam controversy, see KENNETH M. MURCHISON, *THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT* (2007).

15. For discussion of the ESA's various exceptions and exemptions, see *infra* chapter 4, sections 4.3 and 4.8; chapter 5, section 5.4.5.4; chapters 6 and 7; and chapter 10, section 10.7.

16. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997) (The "obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.") (quoting 16 U.S.C. § 1536(a)(2)).

17. James C. Kilbourne, *The Endangered Species Act under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 *ENVTL. L.* 499, 501 (1991).

18. Donald Barry, Address at American Bar Association Section of Natural Resources, Energy, and Environmental Law, Workshop on Endangered Species (Apr. 6, 1990).

on millions of public and private acres, as well as for watersheds and river systems throughout the nation.

1.3 Basic Structure of the ESA

The ESA provides substantive protections to any species listed as endangered or threatened. Key among these protections are the prohibition against any federal agency activity that might jeopardize a listed species or adversely modify or destroy its critical habitat,¹⁹ the prohibition against any activities that would “take” a protected species,²⁰ the requirement that federal agencies develop programs to conserve and recover listed species,²¹ and the obligation imposed on the federal government to cooperate with states and foreign governments to meet the purposes of the Act.²² The Act explicitly implements two international treaties respecting trade and conservation in wildlife.²³ In some cases, federal agencies may avail themselves of limited exceptions to the Act’s mandates,²⁴ and private parties may obtain a variety of permits allowing limited taking of protected species.²⁵ Finally, the ESA contains substantial criminal and civil penalties,²⁶ as well as a liberal citizen-suit provision, encouraging any person to act as a “private attorney general” to enforce the Act.²⁷

Each section of the ESA attempts to work in tandem with the others to collectively achieve the Act’s overarching conservation objective, although various provisions of the Act affect different people in differing ways and some requirements are relevant only to specific situations. The chapters in this book are organized with that in mind, grouping issues topically when appropriate, while adhering as closely as possible to the underlying organizational structure of the Act itself.

19. See *infra* chapter 5.

20. See *infra* chapter 4.

21. See *infra* chapter 3.

22. See *infra* chapters 8 and 9.

23. See *infra* chapter 9, section 9.5.

24. See *infra* chapter 5, section 5.4.5.4, and chapter 7.

25. See *infra* chapter 6.

26. See *infra* chapter 4, section 4.7.1.

27. See *infra* chapter 11.