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# **THE ENDANGERED SPECIES ACT: IMPACTS ON LAND USE AND DEVELOPMENT**

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## **B. Biological Assessments**

For Federal actions that are "major construction activities,"<sup>78</sup> the action agency must prepare a biological assessment.<sup>79</sup> The biological assessment must be completed "before any contract for construction is entered into and before construction is begun."<sup>80</sup> To begin the biological assessment process, the action agency either sends USFWS/NMFS a list of the species and critical habitat that are being included in the biological assessment or requests from the USFWS/NMFS a list of any listed or proposed species or critical habitat that may be present in the action area.<sup>81</sup>

Once the "request for information" has been submitted, the USFWS/NMFS has 30 days to either concur with or revise the provided list, or, in cases where the action agency has requested a list, advise the action agency of those listed, proposed and candidate species or critical habitat which may be present in the action area.<sup>82</sup> If no listed species or critical habitat are present in the action area, the action agency "need not prepare a biological assessment."<sup>83</sup> If, however, any listed or proposed species or critical habitat are present, the action agency must prepare a biological assessment.<sup>84</sup>

The action agency must complete the biological assessment within 180 days of receiving a concurrence or a species list from the USFWS/NMFS.<sup>85</sup> The action agency has discretion in determining what to include in the biological assessment.<sup>86</sup>

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<sup>78</sup>A major construction activity "is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. § 4332(2)(C)]."

<sup>79</sup>50 C.F.R. § 402.12(b)(1).

<sup>80</sup>50 C.F.R. § 402.12(b)(2).

<sup>81</sup>50 C.F.R. § 402.12(c).

<sup>82</sup>50 C.F.R. § 402.12(d)(2). The USFWS/NMFS also provides the action agency with additional information or references to additional information concerning the species and may recommend discretionary studies or surveys to better prepare for the assessment. *Id.*

<sup>83</sup>50 C.F.R. § 402.12(d)(1).

<sup>84</sup>16 U.S.C. § 1536(c)(1).

<sup>85</sup>50 C.F.R. § 402.12(i). This time period may be extended if agreed to by the action agency and the USFWS/NMFS. *Id.*

<sup>86</sup>50 C.F.R. § 402.12(f). The following are acceptable inclusions:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or

Within 30 days of receiving a biological assessment, the USFWS/NMFS responds in writing as to whether or not they concur with the findings of the biological assessment.<sup>87</sup>

Once completed, the action agency uses the biological assessment to determine whether formal consultation or a conference is required.<sup>88</sup> If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action, and the USFWS/NMFS concurs, "then formal consultation is not required."<sup>89</sup> The USFWS/NMFS may also use the biological assessment in determining whether to initiate formal consultation or a conference or when formulating a preliminary or final biological opinion.<sup>90</sup>

### ***C. Formal Consultation***

If an action agency determines that its action "may affect" listed species or critical habitat, it must engage in formal consultation.<sup>91</sup> Also, the USFWS/NMFS "may request a Federal [action] agency to enter into consultation if [the USFWS/NMFS] identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation."<sup>92</sup> Prior to initiating formal consultation, the action agency must complete and submit a biological assessment, if one is required.<sup>93</sup> To begin the formal consultation process, the action

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proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action. *Id.*

<sup>87</sup>50 C.F.R. § 402.12(j).

<sup>88</sup>50 C.F.R. § 402.12(k)(1).

<sup>89</sup>50 C.F.R. § 402.12(k)(1).

<sup>90</sup>50 C.F.R. § 402.12(k)(2).

<sup>91</sup>50 C.F.R. § 402.14(a). As noted above, formal consultation is not required where, as a result of informal consultation or the preparation of a biological assessment, the action agency has determined, with the concurrence of the USFWS/NMFS, that the proposed action is not likely to adversely affect any listed species or critical habitat. 50 C.F.R. § 402.14(b)(1). Also, [a] Federal [action] agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion. 50 C.F.R. § 402.14(b)(2).

<sup>92</sup>50 C.F.R. § 402.14(a).

<sup>93</sup>50 C.F.R. § 402.14(c).

agency submits a written request to the USFWS/NMFS.<sup>94</sup>

Formal consultation usually should last no longer than 90 days.<sup>95</sup> The action agency and the applicant have the duty to conduct and fund any studies and to provide the USFWS/NMFS with the data to make their biological opinion.<sup>96</sup> To assist the USFWS/NMFS in formulating its biological opinion, the action agency must provide the USFWS/NMFS with the "best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat."<sup>97</sup> The USFWS/NMFS may request the action agency to obtain additional data if it determines that additional data is needed for making the biological opinion.<sup>98</sup>

The USFWS/NMFS has several requirements for its part in formal consultation. First, the USFWS/NMFS must review all relevant information<sup>99</sup> and "evaluate the current status of the listed species or critical habitat"<sup>100</sup> and "the

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<sup>94</sup>*Id.* The request must include the following:

- (1) A description of the action to be considered;
- (2) A description of the specific area that may be affected by the action;
- (3) A description of any listed species or critical habitat that may be affected by the action;
- (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
- (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
- (6) Any other relevant available information on the action, the affected listed species, or critical habitat. *Id.*

<sup>95</sup>50 C.F.R. § 402.14(e). An extension is permissible under the following guidelines:

If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

- (1) The reasons why a longer period is required,
- (2) The information that is required to complete the consultation, and
- (3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. *Id.*

<sup>96</sup>50 C.F.R. § 402.14(d).

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<sup>99</sup>50 C.F.R. § 402.14(g)(1). This includes all relevant information provided by the action agency and any other available relevant information. The USFWS/NMFS may also inspect the action agency as part of its review. *Id.*

<sup>100</sup>50 C.F.R. § 402.14(g)(2).

effects of the action and cumulative effects on the listed species or critical habitat."<sup>101</sup> The USFWS/NMFS is also required to discuss its review of the relevant information and its evaluations with the action agency and any applicant.<sup>102</sup> Furthermore, the USFWS/NMFS must "formulate discretionary conservation recommendations, if any, which will assist the Federal [action] agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat."<sup>103</sup> However, the USFWS/NMFS is not required to provide the action agency with the conservation recommendations.<sup>104</sup>

#### **D. Biological Opinion**

The USFWS/NMFS'S most important role in the consultation process is the formulation of a biological opinion. Once formal consultation ends, the USFWS/NMFS has, theoretically, only 45 days in which to complete its biological opinion.<sup>105</sup> In the biological opinion, the USFWS/NMFS states "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."<sup>106</sup> If the USFWS/NMFS determines that "the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the USFWS/NMFS must formulate

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<sup>101</sup>50 C.F.R. § 402.14(g)(3). "Cumulative effects" are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. 50 C.F.R. § 402.02.

<sup>102</sup>50 C.F.R. § 402.14(g)(5).

<sup>103</sup>50 C.F.R. § 402.14(g)(6). Conservation recommendations are advisory and are not intended to carry any binding legal force. 50 C.F.R. § 402.14(j).

<sup>104</sup>50 C.F.R. § 402.14(j).

<sup>105</sup>50 C.F.R. § 402.14(e). This deadline may be extended if the applicant involved consents in writing to a specific date. 50 C.F.R. § 402.14(g)(5).

<sup>106</sup>50 C.F.R. § 402.14(g)(4). The biological opinion must include the following: (1) A summary of the information on which the opinion is based; (2) A detailed discussion of the effects of the action on listed species or critical habitat; and (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

50 C.F.R. § 402.14(h). From 1987 through 1991, over 90% of the biological opinions issued concluded that the proposed action would not likely jeopardize the species. GAO REPORT, *supra* note 4, at 31.

reasonable and prudent alternatives.<sup>107</sup> The USFWS/NMFS must discuss with the action agency and any applicant the basis for the USFWS/NMFS's findings, and, if requested by the action agency or any applicant, must make available a draft of the biological opinion for purposes of analyzing the reasonable and prudent alternatives.<sup>108</sup> The issuance of a final biological opinion ends the consultation process.<sup>109</sup>

After the biological opinion is issued, the action agency must determine how to proceed in light of its obligations under section 7 and the biological opinion.<sup>110</sup>

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<sup>107</sup>50 C.F.R. § 402.14(h). "Reasonable and prudent alternatives" refer to alternative actions that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is [sic] economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02. In identifying reasonable and prudent alternatives, the USFWS/NMFS MUST utilize the expertise of the Federal [action] agency and any applicant. 50 C.F.R. § 402.14(g)(5). If the USFWS/NMFS cannot develop any reasonable and prudent alternatives, it must indicate that to the best of its knowledge, there are no such alternatives. 50 C.F.R. § 402.14(h)(3). Of the 181 jeopardy opinions issued from 1987 through 1991, 158 had reasonable and prudent alternatives while 23 did not. GAO REPORT, *supra* note 4, at 32.

<sup>108</sup>50 C.F.R. § 402.14(g)(5). The USFWS/NMFS may not issue its biological opinion prior to the 45 day deadline if the action agency is reviewing the draft biological opinion. *Id.*

<sup>109</sup>50 C.F.R. § 402.14(l)(1). Formal consultation can be reinitiated in certain instances: Reinitiation of formal consultation is required and shall be requested by the Federal [action] agency or by the [USFWS/NMFS], where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

Additional requirements apply for agency actions which are made up of smaller incremental steps. The requirements for such agency action are as follows: When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if: (1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2); (2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step; (3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action; (4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and (5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act. 50 C.F.R. § 402.14(k).

<sup>110</sup>50 C.F.R. § 402.15(a).

The action agency is not required to follow the suggestions of the USFWS/NMFS.<sup>111</sup> The action agency satisfies the section 7(a)(2) requirement if it takes "alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species."<sup>112</sup> If the USFWS/NMFS determined, in its biological opinion, that the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the action agency must notify the USFWS/NMFS of its final decision.<sup>113</sup> If, after consultation, the action agency determines that it cannot comply with the jeopardy prohibition of section 7, it may apply for a "God Committee" exemption discussed below.<sup>114</sup>

### ***E. Early Consultation***

"If a prospective applicant [for a Federal license] has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the [USFWS/NMFS]."<sup>115</sup> USFWS/NMFS created this process for the benefit of the prospective applicant to avoid any future conflicts allowing for consultation before the prospective applicant files an application.<sup>116</sup> Procedures for early consultation and preliminary biological opinions are treated the same as normal formal consultation and biological opinions.<sup>117</sup> After the Federal agency or prospective applicant applies for the Federal permit or license, the action agency, prior to issuing the permit or license, should request the USFWS/NMFS to confirm the preliminary biological opinion as the final biological opinion.<sup>118</sup> Within 45 days of receiving the confirmation request, the USFWS/NMFS must either confirm the preliminary biological opinion or request the action agency to initiate formal consultation.<sup>119</sup>

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<sup>111</sup>Departure from the suggestions in the biological opinion does not by itself constitute a violation of Endangered Species Act. *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 660 (9th Cir. 1988).

<sup>112</sup>*Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 660 (9th Cir. 1988).

<sup>113</sup>50 C.F.R. § 402.15(b).

<sup>114</sup>50 C.F.R. § 402.15(c).

<sup>115</sup>50 C. F. R. § 402.11(b).

<sup>116</sup>50 C.F.R. § 402.11(a).

<sup>117</sup>50 C.F.R. §§ 402.11(d) & (c).

<sup>118</sup>50 C.F.R. § 402.11(f)(1).

<sup>119</sup>50 C.F.R. § 402.11(f)(2).

### ***F. The Exemption Process***

If the USFWS/NMFS's biological opinion indicates that the action will violate the jeopardy prohibition of section 7 and there are no reasonable and prudent alternatives which would allow the action to go forward without violating the prohibition, the action agency, any applicant, or the Governor of the State in which the action will occur may apply for an exemption.<sup>120</sup> This process was created "to determine whether the economic benefits of a proposed federal action outweigh the benefits of protecting a species."<sup>121</sup> An application must be filed no later than 90 days after the completion of the consultation process.<sup>122</sup> The exemption application is initially considered by the USFWS/NMFS, and finally by the Endangered Species Committee ("Committee"), sometimes called the "God Committee" or "God Squad" because of its godlike power to relegate an entire species to oblivion.<sup>123</sup>

Once the USFWS/NMFS receives the application, they must promptly notify the Governor of each affected state and request the Governors to recommend individuals to be appointed to the Committee.<sup>124</sup> Within 20 days of receipt of the application, the USFWS/NMFS must determine whether the action agency and the exemption applicant have consulted with the USFWS/NMFS in good faith, have "made a reasonable and responsible effort to develop and fairly consider modifications or reasonably prudent alternatives," have conducted a biological assessment, and have "refrained from making any [prohibited] irreversible or irretrievable commitment of resources."<sup>125</sup> If the USFWS/NMFS finds that the above requirements have not been complied with, the exemption application will be denied.<sup>126</sup> If the USFWS/NMFS finds that the above requirements have been met,

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<sup>120</sup>16 U.S.C. § 1536(g)(1).

<sup>121</sup>GAO REPORT, *supra* note 4, at 37.

<sup>122</sup>16 U.S.C. § 1536(g)(2)(A). If a permit applicant is involved, the exemption application must be filed no later than 90 days after the denial of the permit. *Id.*

<sup>123</sup>16 U.S.C. § 1536(g)(2)(A). The Committee's only job is to consider exemption applications. The Committee is made up of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the National Oceanic and Atmospheric Administration, and one individual from each affected state chosen by the USFWS/NMFS and appointed by the President. 16 U.S.C. § 1536(g)(3).

<sup>124</sup>16 U.S.C. § 1536(g)(2)(B).

<sup>125</sup>16 U.S.C. § 1536(g)(3)(A).

<sup>126</sup>16 U.S.C. § 1536(g)(3)(B).



the USFWS/NMFS holds a hearing with the Committee and prepares a report.<sup>127</sup>

The USFWS/NMFS must submit the report to the Committee within 140 days after it determines that the action agency complied with the above requirements.<sup>128</sup>

The report must discuss the following:

- (A) the availability or reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;
- (B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;
- (C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and
- (D) whether the Federal [action] agency concerned and the exemption applicant refrained from making any [prohibited] irreversible or irretrievable commitment of resources.<sup>129</sup>

After receiving the report from the USFWS/NMFS, the Committee has 30 days to determine whether or not to grant an exemption.<sup>130</sup> In order for the Committee to grant an exemption, five or more of the Committee members voting in person must determine, based on the USFWS/NMFS report and record of the hearing, that:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance;
- (iv) neither the Federal [action] agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources . . .<sup>131</sup>

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<sup>127</sup>16 U.S.C. § 1536(g)(4).

<sup>128</sup>16 U.S.C. § 1536(g)(5).

<sup>129</sup>16 U.S.C. § 1536(g)(5).

<sup>130</sup>16 U.S.C. § 1536(h)(1).

<sup>131</sup>16 U.S.C. § 1536(h)(1)(A).

and the action agency establishes reasonable mitigation and enhancement measures to protect what remains of the species.<sup>132</sup> The exemption process has been used to completion only three times since it was created by the 1978 amendments to the Endangered Species Act.<sup>133</sup>

### ***G. Conference on Proposed Species***

Because of the slow pace at which USFWS/NMFS can make final determinations of endangered or threatened status and designate critical habitat, there is a backlog of proposed species and critical habitat. Section 7 applies to these "candidate" species and habitat. If it is likely that a federal action will jeopardize a proposed species or result in the destruction or adverse modification of a proposed species' critical habitat, the action agency must confer with the USFWS/NMFS.<sup>134</sup> "Conference" consists of "informal discussions" in which applicants for federal permits or licenses may be involved.<sup>135</sup> During the conference, the USFWS/NMFS is to make any "advisory recommendations, if any, on ways to minimize or avoid adverse effects."<sup>136</sup> If the action agency and the USFWS/NMFS wish, the consultation can be conducted in accordance with the procedures for formal consultation,<sup>137</sup> and any opinion issued by the USFWS/NMFS may be adopted as the final biological opinion when the species is listed or critical habitat designated.<sup>138</sup> The USFWS/NMFS must document and provide the action agency

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<sup>132</sup>16 U.S.C. § 1536(h)(1)(B). Mitigation and enhancement measures can include live propagation, transplantation, and habitat acquisition and improvement. *Id.*

<sup>133</sup>Congress created The Endangered Species Committee in response to the United States Supreme Court holding in *Tennessee Valley Authority v. Hill* preventing completion of the Tellico Dam to protect the endangered snail darter. Proponents of the Tellico Dam sought to exempt it from Section 7 of the Endangered Species Act through the Endangered Species Act Committee process. However, the committee did not grant an exemption. Endangered Species Committee, 44 Fed. Reg. 3547 (1979). The Committee had granted an exemption earlier that year for the Greyrocks Dam in Wyoming (affecting whooping crane habitat in Nebraska). See Council on Environmental Quality, 58 Fed. Reg. 68635 (1991). The Endangered Species Act Committee came into play again in 1992 and granted exemptions for 13 Bureau of Land Management timber sales in northern spotted owl habitat. Endangered Species Committee, 57 Fed. Reg. 23405 (1992).

<sup>134</sup>50 C.F.R. § 402.10(a).

<sup>135</sup>50 C.F.R. § 402.10(c).

<sup>136</sup>50 C. F. R. § 402.10(c).

<sup>137</sup>50 C.F.R. § 402.10(d).

<sup>138</sup>50 C.F.R. § 402.10(d).

with its conclusions reached during the conference and its recommendations.<sup>139</sup>

#### 4. PROHIBITION AGAINST TAKINGS

Section 9 of the Endangered Species Act prohibits any person<sup>140</sup> from "taking" any member of a protected species of wildlife. To "take" a species is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>141</sup> "Harass" is an "act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."<sup>142</sup> Harm, an act which actually kills or injures wildlife, includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering."<sup>143</sup> While the section 7 jeopardy prohibition applies only to federal agencies, the section 9 taking prohibition applies to every person within the jurisdiction of the United States<sup>144</sup> and protects every member of every species of endangered fish and wildlife.<sup>145</sup>

By its terms, the section 9 prohibition against takings applies only to endangered species of fish and wildlife. However, USFWS regulations extend the prohibition to threatened species of wildlife.<sup>146</sup> In 1995, USFWS proposed an amendment to its regulations limiting protection for threatened species from actions of landowners with holdings of five contiguous acres or less.<sup>147</sup> As of January 1997,

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<sup>139</sup>50 C. F. R. § 402.10(e).

<sup>140</sup>A person includes:

[A]n individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government, any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13).

<sup>141</sup>16 U.S.C. § 1532(19).

<sup>142</sup>50 C.F.R. § 17.3. Normal behavior patterns include, but are not limited to, breeding, feeding and sheltering.

<sup>143</sup>50 C.F.R. § 17.3.

<sup>144</sup>16 U.S.C. § 1538(a)(1).

<sup>145</sup>16 U.S.C. § 1538(a)(1).

<sup>146</sup>See 50 C.F.R. 17.21(c) and 17.31(a).

<sup>147</sup>Endangered and Threatened Wildlife and Plants: Proposed Rule Exempting Certain Small Landholders and

the regulation has not been finalized.

The definitions of the terms "harm" and "harass" extend the taking prohibition to both protected species members and their essential habitat. The degree to which section 9(a)(1) protects essential habitat has been a subject of great dispute in the past few years. The Fifth and Ninth Circuits have interpreted the taking prohibition and the USFWS regulations implementing it to include habitat modification.<sup>148</sup> On the other hand, the District of Columbia Circuit invalidated USFWS regulations including habitat modification within the definition of take.<sup>149</sup> In 1995, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,<sup>150</sup> the United States Supreme Court reversed the District of Columbia Circuit holding, upholding the authority of USFWS to promulgate regulations including "habitat takings" within the definition of "harm" in the definition of "take." However, Justice O'Connor's concurrence called into question the scope of the original Ninth Circuit holding in *Palila v. Hawaii Department of Land and Natural Resources* interpreting the meaning of habitat taking.<sup>151</sup> In 1996, the Ninth Circuit opined that the Supreme Court's musings in *Babbitt* did not affect its precedent interpreting the meaning of the taking prohibition.<sup>152</sup>

The prohibition against habitat takings may potentially preclude a broad range of land use activities. Parties unable to cut timber on private land for fear of violating section 9 have claimed that enforcement of section 9 on private land can constitute an unconstitutional taking of property without just compensation.<sup>153</sup> Another party has asserted that protection of grizzly bears resulted in a fifth amendment taking of his sheep.<sup>154</sup> Enforcement of the Endangered Species Act has

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Low-Impact Activities From Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37419 (July 20, 1995).

<sup>148</sup>*Sierra Club v. Yuetter*, 926 F.2d 429 (5th Cir. 1991); *Palila v. Hawaii Department of Land and Natural Resources*, 451 F. Supp. 985 (D. Hawaii 1979) *aff'd* 639 F.2d 495 (9th Cir. 1981).

<sup>149</sup>*Sweet Home Chapter of Communities For A Greater Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994) *rev'd* 115 S. Ct. 2407 (1995).

<sup>150</sup>115 S. Ct. 2407 (1995).

<sup>151</sup>*Id.* at 2418.

<sup>152</sup>*Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

<sup>153</sup>See Danny Westneat, *Government Drops Logging Suit, Buys Land to Protect Spotted Owl*, Seattle Times, October 4, 1996, A1 (reporting final resolution of private timber land suit which many believed would present the constitutional "takings" of property/ prohibited "takings" of wildlife issue in federal court).

<sup>154</sup>*Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988).

not yet resulted in a proven case of an unconstitutional taking of property.<sup>155</sup>

Both the Attorney General<sup>156</sup> and "any person"<sup>157</sup> may enforce the Section 9 taking prohibition by use of an injunctive suit. The Government may prosecute a "knowing" violator of the taking prohibition.<sup>158</sup>

## 5. EXCEPTIONS TO THE TAKING PROHIBITION

### **A. Section 10(a) Incidental Take Permit/Habitat Conservation Planning Process**

Section 10(a)<sup>159</sup> of the Endangered Species Act allows the USFWS/NMFS to issue "incidental take permits" to any party whose actions might otherwise violate section 9(a)(1). To get a section 10(a) permit, an applicant must submit a "conservation plan" to the USFWS/NMFS.<sup>160</sup> The plan must specify the impact likely to result from the taking, steps that the applicant will take to minimize that impact, alternative actions considered, and any other "measures" the USFWS/NMFS considers "necessary or appropriate."<sup>161</sup>

Once the applicant submits the plan to the USFWS/NMFS, the USFWS/NMFS, after soliciting and reviewing public comment, will issue an incidental take permit if it finds: "the taking will be incidental," the applicant will minimize impacts on the species, the applicant can fund the plan, and the taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."<sup>162</sup> The legislative history of section 10(a) suggest that the "not appreciably reduce the likelihood of the survival of the species in the wild" is the most important criterion in determining the validity of a conservation plan and that "likelihood of survival" standard is simply another formulation of the section 7(a)(2) jeopardy standard.<sup>163</sup>

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<sup>155</sup>See Murray Feldman and Michael Brennan, *Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property*, 26 E.L.R. 10646 (1996).

<sup>156</sup>16 U.S.C. § 1540(e)(6).

<sup>157</sup>16 U.S.C. § 1540(g)(1).

<sup>158</sup>16 U.S.C. § 1540(b).

<sup>159</sup>16 U.S.C. § 1539(a)(1)(b).

<sup>160</sup>16 U.S.C. § 1539(a)(2)(A).

<sup>161</sup>16 U.S.C. § 1539(a)(2)(A).

<sup>162</sup>16 U.S.C. § 1539(a)(2)(B).

<sup>163</sup> As amended, section 10(a) of the Act will authorize the Secretary to permit any taking otherwise

In the late 1970s, San Bruno Mountain, directly south of San Francisco in San Mateo County, included about 3,400 acres of undeveloped land. Vistacion Associates had purchased the land for residential and commercial development. In 1980, Vistacion and San Mateo County settled on a plan under which about 2,000 of the 3,400 acres would be set aside for parkland and the rest opened for development. After the 1980 deal, the USFWS discovered that the endangered Mission Blue Butterfly and two other proposed endangered species inhabited the open land. In 1981 after an extensive biological study, representatives of the County, Vistacion, local municipalities, USFWS, the California Department of Fish and Game, and the Committee to Save San Bruno Mountain began negotiations to put together a habitat conservation plan to protect the endangered species while allowing development. In November 1982, USFWS received a formal request for a 10(a) permit for the San Bruno development. On March 4, 1983, USFWS granted the permit application.<sup>164</sup> The San Bruno plan permitted the destruction of about fourteen percent of the habitat of the endangered Mission Blue Butterfly, creating an estimated two to five percent increase in the likelihood of the butterfly's extinction.<sup>165</sup>

In November 1983, Friends of Endangered Species, Inc. challenged the San Bruno conservation plan incidental take permit in court on the grounds that it violated section 10(a) and section 7 by jeopardizing the continued existence of the Mission Blue Butterfly, one of the species for which it authorized takings. On January 7, 1984, in *Friends of Endangered Species v. Jantzen*,<sup>166</sup> the United States District Court for the District of Northern California denied plaintiff's motion for preliminary injunction and rejected plaintiff's Endangered Species Act claims. The district court noted that

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prohibited by section 9(a)(1)(B) of the Act if the taking is incidental to, and not the purpose of, an otherwise lawful activity. An applicant for such a permit must submit to the Secretary a conservation plan that specifies the impact which will likely result from such taking, what steps the applicant will take to minimize and mitigate those impacts, what other alternatives that would not result in the takings were analyzed, and why those alternatives were not adopted. The Secretary will base his determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild.

H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 29, *reprinted in* 1982 U.S.C.C.A.N 2807, 2870; see H.R. Rep. No. 567, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S.C.C.A.N 2807, 2831 (offering the same analysis but using "jeopardize continued existence of the species" language to describe the 7(a)(2) standard).

<sup>164</sup>See 48 Fed. Reg. 10,136 (1983).

<sup>165</sup>See Comment, *Habitat Conservation Plans Under the Endangered Species Act*, 24 San Diego L. Rev. 243, 249-50 (1987); see, Note, *Where Have All the Butterflies Gone? Ninth Circuit Upholds Decision to Allow Incidental Taking*, 16 Golden Gate U.L. Rev. 93, 93-96 (1986).

<sup>166</sup>596 F. Supp. 518 (N.D. Cal. 1984), *aff'd*, 760 F.2d 976 (9th Cir. 1985).

Congress, in its 1982 amendments to the Act, had used the San Bruno plan as an exemplar of possible section 10(a) conservation plans.<sup>167</sup> The court also observed that the plan had been reviewed and endorsed by a variety of independent experts.<sup>168</sup>

On May 14, 1985, the Ninth Circuit affirmed the district court decision.<sup>169</sup> The court emphasized: (1) that Congress had considered the San Bruno plan as a "paradigm"<sup>170</sup> for section 10(a) conservation plans; (2) that USFWS had determined that the plan would enhance the habitat of the Mission Blue Butterfly;<sup>171</sup> (3) that USFWS had considered expert opinion and public comment before issuing the incidental take permit; and (4) that the permit was subject to revocation or reconsideration if significant new information emerged from the monitoring required under the plan. The court found that the plan's proposed mitigation measures reasonably met the requirements of section 10(a).<sup>172</sup> The court noted that the plan permanently protected 86% of the Mission Blue Butterfly habitat and provided for habitat enhancement.<sup>173</sup>

In recent years, "habitat conservation plans" or HCPs authorized under section 10(a) have shown promise as a flexible method of resolving conflicts between species protection and land development.<sup>174</sup> The section 10(a) exemption process has inspired a variety of habitat conservation planning initiatives some of which have been granted 10(a) incidental take permits<sup>175</sup> but many of which have not for a variety

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<sup>167</sup>*Id.* at 522.

<sup>168</sup>*Id.* at 523.

<sup>169</sup>*Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985).

<sup>170</sup>*Id.* at 982.

<sup>171</sup>Of course, the development itself did not enhance the habitat. However, management of the remaining open areas to increase habitat value allegedly did enhance the habitat by halting the intrusion of brush and gorse. *Id.* at 984.

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>See Michael Bean, Sarah Fitzgerald, Michael O'Connell, RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE (1991).

<sup>175</sup>See, e.g., Taking of Species in Central and Coastal Sub-Region of Orange County California, 61 Fed. Reg. 50503 (1996); Taking of Golden-Cheeked Warblers, 61 Fed. Reg. 56965 (1996) and 59 Fed. Reg. 66361 (1994); Taking of Snake River Salmon, 59 Fed. Reg. 29,250 (1994); Taking of Stephens' Kangaroo Rats, 55 Fed. Reg. 33777 (1990); and Taking of Coachella Valley Fringe-Toed Lizards, 50 Fed. Reg. 31926 (1985).

of reasons.<sup>176</sup>

In November 1996, USFWS and NMFS released a Handbook for Habitat Conservation Planning and Incidental Take Permit Processing. The handbook detailed guidance for preparing and processing HCPs.<sup>177</sup> The Handbook provides consistent procedures for Service compliance with the incidental take permit provisions of the Endangered Species Act.<sup>178</sup>

On August 11, 1994, USFWS and NMFS issued a policy document entitled "No Surprises: Assuring Certainty for Private Landowners in Endangered Species Act Habitat Conservation Planning." Under the policy, in negotiating "unforeseen circumstances" provisions in Habitat Conservation Plans, USFWS and NMFS will not "require the commitment of additional land or financial compensation beyond the level which was otherwise adequately provided for a species under the terms of a properly functioning HCP."<sup>179</sup> USFWS and NMFS designed the policy to encourage participation in the HCP Process by assuring participants that their agreed commitments of land and money would not increase when new information emerges.

#### ***B. Section 7(b)(4)/(o)(2) Incidental Take Statement Process***

Sections 7(b)(4)<sup>180</sup> and 7(o)(2)<sup>181</sup> authorize the USFWS/NMFS to include incidental take statements as part of biological opinions rendered for Federal action agencies through the section 7 consultation process. These "statements" allow a Federal agency or applicant subject to section 7(a)(2), planning to engage in an activity not likely to jeopardize the continued existence of a species, to take members

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<sup>176</sup>See TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH, 96-107 (1994) (discussing failed North Key Largo habitat conservation plan).

<sup>177</sup>For notice of availability, see 61 Fed. Reg. 63854 (Dec. 2, 1996).

<sup>178</sup>The new handbook endeavors to standardize the HCP process by:

- (1) providing national procedural and policy guidance;
- (2) providing standardized guidance to Service offices and personnel who participate in conservation planning programs under section 10(a)(1)(B) and review and process incidental take permit applications;
- (3) providing assistance to applicants in the non-Federal sector who wish to apply for incidental take permits; and
- (4) providing for conservation of federally listed, proposed, and candidate species.

*Id.* at 63855.

<sup>179</sup>USFWS and NMFS, No Surprises: Assuring Certainty for Private Landowners in Endangered Species Act Habitat Conservation Planning, at 2 (1994).

<sup>180</sup>16 U.S.C. § 1536(b)(4).

<sup>181</sup>16 U.S.C. § 1536(o)(2).



of that species if the taking is not the purpose of the action and, therefore, "incidental" to the action.

If, after section 7 consultation, the USFWS/NMFS concludes that the action subject to consultation will not jeopardize the species and that the "incidental taking" is not likely to jeopardize the species, then the USFWS/NMFS must "formulate a statement concerning the incidental take."<sup>182</sup> This statement must specify the extent of the incidental take, specify reasonable and prudent measures that are necessary to minimize the impact and set forth the terms and conditions that the action agency and any applicant must comply with in order to implement the reasonable and prudent measures, and specify procedures for handling or disposing of taken species.<sup>183</sup> Section 7(o)(2) provides that any taking in compliance with a section 7(b)(4) incidental take statement "shall not be considered to be a prohibited taking of the species concerned."<sup>184</sup>

Under some circumstances, issuance of an incidental take statement can be a major federal action significantly affecting the quality of the human environment and subject to the requirements of the National Environmental Policy Act.<sup>185</sup>

## 6. RECOVERY PLANNING PROCESS

Section 4(f)<sup>186</sup> of the Endangered Species Act imposes a duty on the USFWS/NMFS to "develop and implement" recovery plans: plans designed to show a path by which the numbers and habitat of threatened and endangered species may recover to the point at which those species no longer require the protection of the Act. Although the Act does not define "recovery," it does state that the recovery plans are "for the conservation and survival" of listed species.<sup>187</sup> The USFWS/NMFS does not need to develop a recovery plan if "such a plan will not promote the conservation

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<sup>182</sup>50 C.F.R. § 402.14(g)(7).

<sup>183</sup>50 C.F.R. § 402.14(i)(1). Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes. 50 C.F.R. § 402.14(i)(2). The action agency must report the progress of the action and its impact on the species to the [USFWS/NMFS], and if the amount or extent of incidental taking, as specified [in the incidental take statement] is exceeded, the Federal [action] agency must reinitiate consultation immediately. 50 C.F.R. §§ 402.14(i)(3) & (4).

<sup>184</sup>16 U.S.C. § 1536(o)(2).

<sup>185</sup>See *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996).

<sup>186</sup>16 U.S.C. § 1533(f).

<sup>187</sup>16 U.S.C. § 1533(f)(l).

of the species."<sup>188</sup> "Conservation" is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Endangered Species Act] are no longer necessary."<sup>189</sup>

In developing recovery plans, the USFWS/NMFS should "give priority" to species "that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity."<sup>190</sup> In each plan, the USFWS/NMFS must, to the maximum extent practicable, incorporate:

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.<sup>191</sup>

The USFWS/NMFS must also provide for public notice, review and comment for each plan, and must consider the public comments prior to approval to the plan.<sup>192</sup> To carry out its duties under the recovery planning section, the USFWS/NMFS organizes a "recovery team" to actually formulate and carry out the plan.<sup>193</sup> Recovery teams are made up of "appropriate public and private agencies and institutions, and other qualified persons."<sup>194</sup>

The recovery of protected species and the ecosystems on which they depend is

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<sup>188</sup> 16 U.S.C. § 1533(f)(1).

<sup>189</sup> 16 U.S.C. § 1532(3).

<sup>190</sup> 16 U.S.C. § 1533(f)(1)(A).

<sup>191</sup> 16 U.S.C. § 1533 (f)(1)(B).

<sup>192</sup> 16 U.S.C. § 1533(f)(4).

<sup>193</sup> 16 U.S.C. § 1533(f)(2).

<sup>194</sup> 16 U.S.C. § 1533(f)(2). For an in-depth discussion of the recovery team dynamic and recovery planning process, see Tim Clark, Richard Reading, Alice Clark, *ENDANGERED SPECIES RECOVERY* (1994).

the central purpose of the Act.<sup>195</sup> However, recovery plans are considered to be only "guidance documents" and not "decision-making" documents.<sup>196</sup> Although recovery plans are required by law to identify specific recovery actions and a specific time frame for implementing them,<sup>197</sup> the agencies and courts agree that these "implementation schedules" are unenforceable.<sup>198</sup>

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<sup>195</sup> 16 U.S.C. § 1531(b).

<sup>196</sup> USFWS, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN at iv.

<sup>197</sup> 16 U.S.C. § 1533(0)(1)(B).

<sup>198</sup> See *National Audubon Society v. Hester*, 801 F.2d 405 (D.C. Cir. 1986); *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834 (D.D.C. 1992); *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

