The Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., has been called the “pit bull” of environmental laws. This article contends that increases in ESA litigation and consultation obligations have expanded the ESA's scope and effect. Specifically, the reach of the ESA has expanded because of a dramatic rise in listing petitions that are likely to increase the number of species subject to the ESA’s protections and because of an increase in consultation obligations triggered by recent rulemaking, water supply disputes, and novel consultation contexts. The U.S. Environmental Protection Agency’s (EPA) recent final rule addressing impingement and entrainment of fish and other aquatic organisms at cooling water intakes is an example of a new paradigm in ESA consultation for regulatory actions. See EPA, Pre-Publication Final Rule, Final Regs. to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities (May 19, 2014), available at http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/ (hereinafter Pre-publication Final Rule). The ESA also features prominently in major water supply disputes throughout the United States. ESA consultation requirements are becoming more complex and broadening to include contracts, land use, and government programs such as flood insurance programs.

Budget constraints limit the ability of federal agencies to respond to the ESA’s expanding scope. The federal agencies tasked with administering the ESA, the U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS), have long been budget constrained. In fiscal year (FY) 1998, and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the listing program. Congress designed this spending cap to prevent the listing function from depleting funds needed for other functions under the ESA (for example, recovery functions, such as delisting), or for other Services programs. See H. Rep. 105-163, 105th Cong., 1st Sess. (1997). In addition, since FY 2002, the FWS budget has included a critical habitat sub-cap to ensure that some funds are available for completing listing program actions other than critical habitat designations. The ESA requires expert biological science, but it is constrained by sometimes unrealistic deadlines inconsistent with scientific methods. The increasing scope of ESA decisions and impacts on day-to-day policy require greater attention to ESA issues.

Listing Petitions Likely to Dramatically Increase the Number of Protected Species

The ESA’s expanding reach follows in part from an anticipated dramatic increase in species subject to ESA protections. Section 4(a)(1) of the ESA requires FWS and NMFS (the Services) to list, based upon best scientific and commercial data available, all species determined to be threatened or endangered. Under section 4, listing can be initiated by the Services, or by petition from “interested” citizens. Once listed, species receive protections afforded by the remaining provisions of the ESA. Because of a major settlement agreement arising from citizen listing petition litigation, the Services agreed to make decisions regarding listing of over 700 species by the end of FY 2016. See Settlement Agreements with WildEarth Guardians (Guardians) filed on May 10, 2011, and Center for Biological Diversity (CBD), filed on July 12, 2011 (Settlement Agreements), In re ESA Section 4 Deadline Litig., No. 10-377 (D.D.C.), ECF Nos. 55, 56. Under the settlement agreement with Guardians, the Services agreed to complete initial petition findings for over 600 species and to either issue proposed listing rules or not-warranted findings for all 251 candidate species on the 2010 candidate list by the end of FY 2016—a “considerable and aggressive task.” Wildwest Inst. v. Ashe, No. 13-06-M-DLC, 2014 WL 1648170 (D. Mont. Apr. 25, 2014).

The conservation benefits of an expansion in listed species remains in dispute. While environmental organizations have expressed frustration at the pace of ESA listings, some members of Congress have raised concern that the ESA's citizen petition provisions have promoted lawsuits at the expense of species recovery. See Hearing on Implementation of the ESA in the Southwest, H. Comm. on Natural Resources, 105th Cong., 2d Sess. (July 15, 1998), http://www.gpo.gov/
Increase in Scope of Actions Requiring ESA Consideration and Consultation

Recent ESA consultation determinations point out another area of the extensive potential reach of the ESA. EPA’s cooling water intake rule, recent water supply disputes, and several novel consultation contexts illustrate an expanding scope of ESA consultation. The implications cry out for greater science at early stages such as ESA listings and initial project development.

EPA’s Cooling Water Intake Final Rule

While the requirement to consider and protect listed species in the context of permitting has become commonplace, EPA’s May 18, 2014, cooling water intake rule under § 316(b) of the Clean Water Act (CWA), 33 U.S.C. § 1326(b), creates a new process that may serve as a model for future permit actions. Under the new rule—the result of EPA consultation with the Services—many applicants will be required to undertake multiyear entrainment studies involving consultation with the Services and state wildlife agencies. Pre-publication Final Rule at 284. Many permit applications will require development of biological information and a Source Water Baseline Biological Characterization Data report to be submitted to the permitting agency. Besides the expected complexity of the ESA due to its inherent focus on biological populations, ESA effects must be measured against a “baseline,” which can be evasive and a source of regulatory and legal debate. FWS, Programmatic Biological Opinion (BiOp) on EPA’s Issuance and Implementation of the Final Regulations § 316(b) of CWA (May 19, 2014). Facilities are also required to submit annual certifications that cooling water structures and processes have not changed.

The § 316(b) pre-publication rule is perhaps the most extensive generally applicable CWA National Pollutant Discharge Elimination System (NPDES) permit process directed at implementing ESA provisions. While EPA regulations at 40 C.F.R. § 124.10(c)(1)(iii) & (e) generally provide for notice of EPA-issued permits to be sent to the Services, the § 316(b) pre-publication rule carves out specific pre-permit notice “mini-consultation” with the Services. The § 316(b) pre-publication rule provides for a “General Process of Information Exchange and Technical Assistance Between Directors and the Services,” requiring permit applications for all applicable cooling water intakes to be sent to the Services for review and presumably a mini-consultation. If this step is not taken or recommendations of the Services not accepted, the Services BiOp would deem the situation a § 316(b) violation with potential implications for take of species, prohibited by section 9 of the ESA. The BiOp provides that EPA would use its permit oversight authority, presumably to veto a permit that does not follow the procedures or otherwise fails to include recommendations by the Services. Id. at 69–74.

In the realm of biological sciences, disputes regarding specific recommendations are likely. Such disputes in other federal actions such as hydropower licensing have lasted for many years. Note that NPDES permits are limited in duration to five years, raising the potential likelihood that a dispute regarding ESA-based conditions could consume much of the typical NPDES permit five-year effective period. NPDES permits can be administratively continued under 40 C.F.R. § 122.6; however, EPA and state agencies have strived to minimize administratively continued NPDES permits, which were more commonplace during the early years of the CWA.

EPA regularly consults regarding environmental programs such as CWA water quality standards, see, e.g., 64 Fed. Reg. 2,742 (Feb. 22, 2001), and development of ambient air quality standards under the Clean Air Act. The process for § 316(b) differs, however, in that it establishes a mini-consultation regarding a highly technical site-specific biological determination for permits that are largely administered by state-authorized programs.
Delta Smelt Water Contract Renewals

ESA implementing regulations provide that section 7 consultation applies only to actions “in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. There is no duty to consult for actions “that an agency is required by statute to undertake once certain specified triggering events have occurred.” Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007).

In the more recent delta smelt saga, the Bureau of Reclamation (Bureau) is required to consult regarding renewal of water contracts for the Central Valley Project in the California River Delta. Natural Res. Def. Council v. Jewell, No. 09-17661, 2014 WL 1465695 (9th Cir. Apr. 16, 2014). In the 1960s, the Bureau entered into several long-term contracts pertaining to the Central Valley Project providing for 40-year terms addressing water rights at the Central Valley Project. When two groups of contracts expired, the Bureau claimed that renewal did not require ESA consultation because under the terms of the 1960s contracts, the same volume of water and allocation were required in a renewal contract. See NRDC v. Kempthorne, No. 05-1207, 2009 WL 2424569 (E.D. Cal. Aug. 6, 2009). In April, the Ninth Circuit, on rehearing the case en banc, reversed, holding that the Bureau had discretion regarding whether to renew the contracts in the first instance. NRDC v. Jewell, 749 F.3d 776 (9th Cir. 2014) (en banc). This discretion triggered the duty to consult under section 7.

Other Examples of Consultation and the ESA


ESA consultation requirements can find their way into land use. The familiar sage grouse, found in 11 states and throughout U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) lands, was not listed but was found “warranted but precluded” by other listing priorities and is now a candidate species. Nevertheless, analysis of sage grouse impacts of federal actions is required under National Environmental Policy Act mitigation provisions. W. Watersheds Project v. BLM, No. 10-02896-KJM, 2014 WL 119189 (E.D. Cal. Jan. 9, 2014) (Bureau failed to provide citations in the Environmental Assessment (EA) to the studies upon which it relied in its analysis of the impacts of the grazing decisions on the sage grouse and pygmy rabbit); see also Ore. Natural Desert Ass’n v. Jewell, 3:12-CV-00596-MO, 2013 WL 5101338 (D. Or. Sept. 11, 2013).

Expansion of the ESA Beyond Listings and Consultations

The sage grouse debate has focused primarily on federal lands managed by the BLM and USFS. However, because “take” of species is prohibited under ESA section 9 even on private lands, and the ESA can apply almost anywhere given the definition of take includes habitat modification, the scope of the ESA can extend to such private properties. The proposed Habitat Conservation Plan for Imperiled Aquatic Species of the Etowah River Basin (Etowah HCP) proposed implementation of local land use ordinances for 20 local governments in the Atlanta metropolitan area, including land acquisition, expanded buffers, and development controls. 74 Fed. Reg. 31,304 (June 30, 2009); see also DOI, Press Release, Sec’y Norton Announces More than $70 million in Grants to Support Land Acquisition and Conservation Planning for Endangered Species, 2004 WL 2112061 (Sept. 23, 2004). The Etowah HCP is unique because it proposed restrictions for private lands, which is less common for private lands than for federal lands. The Etowah HCP was not finally approved.

Other examples of ESA implications on private lands or state actions include citizen challenges to state game and wildlife laws and ordinances involving critical habitat areas. Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) (citizens could challenge Maine’s authorization of foothold traps that harmed lynx); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (challenging Massachusetts’ licensing of gill-net and
lobster pot fishing as harming northern right whale; *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231 (11th Cir. 1998) (ESA applies to citizen’s challenge of county’s refusal to ban beach driving during sea turtle nesting season). Further, applying the principle of *Home Builders*, courts have found that the Federal Emergency Management Agency may be enjoined from issuing flood insurance for private properties for failing to consult. *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008). Moreover, the ESA includes a form of “vicarious” liability under which indirect effects of what might otherwise be normal societal actions can give rise to potential civil or criminal liability. See Devon L. Damiano, *Licensed to Kill: A Defense of Vicarious Liability Under the ESA*, 63 DUKE L.J. 1543, 1544 (2014).

ESA issues are also at the forefront of the well-publicized interstate water disputes between Georgia, Florida, and Alabama (involving the purple bankclimber, gulf sturgeon, and fat three-ridge mussel). Like the delta smelt litigation, ESA consultation and direct action may find its way into numerous aspects of reservoir and water system management. Richard Hamann, *Can the ESA Save the Apalachicola?*, 29 GA. ST. U. L. REV. (2013). Last year, the Texas Commission on Environmental Quality was enjoined from approving or granting new water permits affecting the Guadalupe or San Antonio Rivers until the state of Texas provides reasonable assurances to the court that such permits will not take whooping cranes in violation of the ESA. *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 789 (S.D. Tex. 2013), rev’d 2014 WL 2932514 (5th Cir. June 30, 2014).

**Threats to ESA Scientific Decision Making**

The Services resources are seriously constrained. FWS estimates that, based upon section 4 petitions for listing, FWS listing decisions would dramatically increase and exceed the totality of decisions for the first 20 years of the ESA. See FWS, *ESA Listing Workplan*, available at https://www.fws.gov/endangered/improving_ESA/listing_workplan_FY13-18.html. Some in Congress have expressed concern regarding citizen suits over listing petitions and the effect on species recovery. Concerns have been expressed regarding the ability of the Services to comply with stringent ESA deadlines while maintaining fidelity to the scientific core of the statute. See *Compl., Nat’l Ass’n of Homebuilders v. Salazar*, No. 12-02013-EGS (D.D.C. filed on Dec. 17, 2012) (alleging that the Settlement Agreements with Guardians and CBD improperly permitted the two groups to set listing priorities and that the resulting listings will potentially be the result of incomplete science), dismissed, 2014 WL 1278630 (Mar. 31, 2014) (lack of standing).

The increased scope of the ESA threatens the scientific basis for ESA decision making. The Services and most biologists readily accept that scientific evaluation requires time and field resources. For example, under FWS guidance, proper assessment of species population requires evaluation of temporal changes and distribution, likely requiring multiple sampling sessions over different time periods and thus periodic reports. FWS, *How to Develop Survey Protocols: A Handbook* (2013), available at http://www.fws.gov/policy/SurveyProtocolsHB.pdf. The rigor and duration of biologically necessary assessments differ greatly from the standard NPDES permit application process, land use development, and contract negotiation, not to mention tight 90-day and 12-month listing deadlines under the ESA.

With its expanding scope and reach, the ESA’s effect on day-to-day life is increasing. The Services will require greater support from a resource and public input standpoint to achieve effective scientific and policy decisions in accordance with the protections of the ESA. Additional public and private resources will be necessary to provide the Services and regulatory and regulated entities with the information and support to meet the challenges of the expanding scope of the ESA.

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