

### Substantive Requirements of the Endangered Species Act

A. In General. The Endangered Species Act forms the basis for the federal protection of threatened plants, insects, fish and wildlife. The Fish and Wildlife Service ("Service") administers the Endangered Species Act on behalf of the United States. The Endangered Species Act has four major components:

1. The provisions for listing threatened or endangered species, 16 U.S.C. § 1533;
2. The requirement for a federal agency to consult with the Service for projects the federal agency authorizes, funds or carries out. 16 U.S.C. 1536;
3. The prohibitions against the taking of listed endangered species, 16 U.S.C. § 1538; and
4. The provisions for permits to allow incidental taking of threatened and endangered species. 16 U.S.C. § 1539 (b).

B. The Listing Process. The listing of a species as threatened or endangered is the key to the Endangered Species Act. The Service may list a species as threatened or endangered if the continued existence of the species is jeopardized by:

1. The present or threatened destruction, modification or curtailment of its habitat or range;
2. Overuse for commercial, recreational, scientific or educational purposes;
3. Disease or predation;
4. The inadequacy of existing regulatory mechanisms; or
5. Other natural or manmade factors concerning or affecting its continued existence. 16 U.S.C. § 1533(a)(1).

An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range. . . ." 16 U.S.C. § 1532(6). A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). The Service makes its determination on whether a species is threatened or endangered on the basis of "the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those effects, if any, being made by any State or foreign nation or any political subdivision of a State or foreign nation, to protect such species . . ." 16 U.S.C. § 1533(b). The Endangered Species Act's definition of "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). These factors lead to a listing process which can be summarized as follows:

1. Is the species under consideration a species or subspecies of fish or wildlife or plant or a distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature ("a population segment")?
2. What is the range of the species, subspecies or population segment?
3. Is the species, subspecies or population segment in danger of extinction in all or any part of its range?
4. If it is in danger of extinction in only part of its range, is that a significant part of its range?
5. If the species, subspecies or population segment is not in danger of extinction in all or part of its range, is it likely to become an endangered species within the foreseeable future through all or part of its range?

The economic impacts of listing play no role in the process. The Service may only consider information which concerns the species. The Commerce Clause provides the basic constitutional underpinning for the Endangered Species Act. *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (The Service has the authority under the Commerce Clause to list a fly that lives only in a small part of San Bernardino County).

Normally, the Service initiates the listing process. As described below, the Endangered Species Act also provides a petition process which allows individuals to ask the Service to begin a listing process. In either case, the Service begins the listing process by publishing a Notice of Proposed Rule in the Federal Register. 50 C.F.R. § 424.16. The proposed notice must contain the complete text of the proposed rule, summarize the data on which the proposed listing is based, and show the relationship of the data to the rule being proposed. 50 C.F.R. § 424.16(b).

The Service then allows at least sixty (60) days for the public to comment following publication in the Federal Register. The Service may extend or reopen the public comment period upon a finding that there is good cause to do so. 50 C.F.R. § 424.16(c)(2). The Service will also hold at least one public hearing if any person so requests within forty-five (45) days of the proposed notice, and the Service will provide at least fifteen (15) days notice in the Federal Register of the time and place of the hearing. 50 C.F.R. § 424.16(b)(3).

Within one year after publishing a proposed rule to determine whether a species is an endangered or threatened species, the Service must publish in the Federal Register either a final rule to implement the determination, a finding that the determination will not be made, a notice withdrawing the proposed rule "upon a finding that available evidence does not justify the action proposed by the rule." Alternatively, the Service must publish a notice extending the one-year period by an additional period of not more than six (6) months because there is a "substantial disagreement" among scientists knowledgeable about the species regarding the sufficiency or accuracy of the available data relevant to the determination. 50 C.F.R. § 424.17(a).

In addition to designating a species as endangered or threatened, the Service is also required to publish concurrently a designation of a "critical habitat" of the species. The term "critical habitat" means:

1. The specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection, and
2. Specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. 50 C.F.R. § 424.02(d).

The requirement to designate critical habitat can be excused if the Service determines that it is essential that the species be listed promptly even without a critical habitat designation or if the Service determines that the critical habitat of the species is "not then determinable." 50 C.F.R. § 424.17(b). The Service's should decide not to designate critical habitat rarely and must demonstrate clearly why listing is not prudent. *NRDC v. Interior*, 113 F.3d 1121 (9th Cir. 1997) (The Service failed to provide adequately justify why it decided not to designate critical habitat for the California Gnatcatcher); *Enos v. Marsh*, 769 F.2d 1363 (9th Cir. 1985) (A decision not to define critical habitat is proper where essential biological features are unknown.) Once the Secretary determines to adopt a final rule, it is published in the Federal Register. 50 C.F.R. § 424.18.

In addition to its normal rulemaking authority, the Service may list a specie in response to any "emergency posing a significant risk to the well-being of a species of fish, wildlife or plant." 50 C.F.R. § 424.20. These emergency rules take effect immediately on publication in the Federal Register but cease to have force and effect after 240 days. 50 C.F.R. § 424.20.

In *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989), the court held that the Endangered Species Act gave the Service considerable deference and latitude in the emergency designation of endangered species and refused to grant a preliminary injunction to halt the emergency listing. The court said that its "scrutiny of such emergency regulations is . . . less exacting on the Secretary than it would be if he enacted precisely the same regulation . . . after a normal rulemaking." *City of Las Vegas*, supra, at 932.

Listing is not considered to be a major federal action under the National Environmental Policy Act ("NEPA") which may require the Service to prepare an environmental impact statement ("EIS"). *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (NEPA does not apply to because its application conflicts with the listing process). On the other hand, there is split between the circuits on whether designation of critical habitat is subject to NEPA. Compare *Catron County v. U.S. Fish & Wildlife*, 75 F.3d 1429 (10th Cir. 1996) (Designation of critical habitat requires compliance with NEPA) with *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996) (Designation of critical habitat does not require compliance with NEPA).

The Endangered Species Act provides for a petition process to force the Service to list species. Within ninety (90) days of receiving the petition, the Service must make a finding about whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If the Secretary finds that the petition is warranted, he must promptly begin a review of the status of the species. 16 U.S.C. § 1533(b)(3)(A).

Within twelve (12) months after the Service receives a petition for which it determines further action is warranted, the Service must publish in the Federal Register one of the following findings:

1. That the petitioned action is not warranted;
2. That the petitioned action is warranted, in which case the Secretary shall promptly publish a proposed rule to that effect in the Federal Register; or
3. The action is warranted but further action is precluded by other pending proposals considering whether various species are eligible or ineligible for listing. 16 U.S.C. § 1533(b)(3)(B).

Once a species is listed, the Secretary is required to develop a "recovery plan." A recovery plan provides for the conservation and survival of the species. 16 U.S.C. § 1533(f). Frequently, the Secretary lacks sufficient resources to prepare recovery plans for all species. The number of completed recovery plans is limited.

C. The Consultation Process. Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, implements the listing process. Under Section 7, each federal agency must consult with the Service to insure that any actions authorized or funded or carried out by the agency are not likely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of lands determined by the Service to be 'critical habitat'." 16 U.S.C. § 1536(a)(2), 16 U.S.C. § 1532(5). The consultation process does not apply to private actions; it applies only to actions involving permits or other approvals by the federal government.

The consultation process begins with the "action" agency's request for information on whether any species listed or proposed to be listed is in the area of the proposed action. 16 U.S.C. § 1536(c)(1). The agency conducts a biological assessment to identify whether those species are likely to be affected by the proposed action. *Id.* If the agency determines that an endangered species may be present in the area affected by the action and the proposed action is likely to affect the species. The ESA requires consultation. 16 U.S.C. § 1536(a)(3)(4).

The Service then prepares a biological opinion identifying the effects on threatened or endangered species. If the Service finds that the action would jeopardize the continued existence of the species or adversely affect critical habitat ("a jeopardy opinion"), the Service must suggest reasonable and prudent alternatives to avoid the adverse impacts. 16 U.S.C. § 1536(b)(3). If there are no such alternatives, the agency may not proceed with the project unless the Endangered Species Committee grants an exception. 16 U.S.C. § 1536(h).

If the Service does not issue a jeopardy opinion (a "non-jeopardy opinion"), it must inform the agency whether there are any "reasonable and prudent measures" that should be applied to the project. 16 U.S.C. § 1536(b)(4). The non-jeopardy opinion also sets out the impact of the incidental take and the terms and conditions needed to implement the reasonable and prudent measures.

The Service's biological opinion is now considered to be final agency action that can be challenged in court. *Bennett v. Spear*, 520 U.S. 154 (1997). Agencies may depart from the alternatives recommended in the Service's biological opinion without violating the Act so long as the agency has taken alternative, reasonable and prudent steps to insure the continued existence of the endangered species. *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 660 (9th Cir. 1988). While an agency's departure from the biological opinion may be permitted if these steps are taken, the failure to consult with the Service (or reinstate consultation, if necessary) violates the Act. *Platte River Whooping Crane v. F.E.R.C.*, 876 F.2d 109 (D.C. Cir. 1989); *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). In deciding how to proceed as part of Section 7 consultation process, both the Service and the other federal agencies must use the best available scientific and commercial information. *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), *Roosevelt Campobello Intern. Park v. U.S.E.P.A.*, 684 F.2d 1041, 1050 (1st Cir. 1982). (Failure to use "real time simulation studies" to assure low risk of oil spills with potential impact on endangered whales violates the Endangered Species Act.) See *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (The Army Corps of Engineers must consider the direct and indirect impact on endangered whooping cranes of its actions to approve wetland fill permits for a dam.) But see *Pyramid Lake Paiute Tribe v. Dept. of Navy*, 898 F.2d 1410 (9th Cir. 1990) (An agency cannot rely on biological opinion of the Service and abrogate its responsibility under the Endangered Species Act if to do so is arbitrary and capricious.)

The leading case concerning the prohibitions against federal agencies causing jeopardy in violation of Section 7 is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In this case, the Tennessee Valley Authority had proposed to build a dam on the Little Tennessee River. The dam had been opposed by local interests for many years but these efforts were largely unsuccessful. After nearly \$100 million had been spent on the dam, an

ichthyologist from the University of Tennessee discovered the tiny snail darter in the river. The Secretary designated the snail darter as an endangered species and designated the stretch of the Little Tennessee River in which the dam was located as "critical habitat."

Shortly thereafter a group of scientists and local river users sued to halt completion and operation of the dam. The Supreme Court held that years of Congressional funding of the dam did not repeal, by implication, the mandate in the Endangered Species Act to halt or reverse the trend to extinction of species. The Court held that the protection of endangered species had priority over the primary mission of the agency and completion of the dam. The Court upheld a decision enjoining construction of the dam.

When the Court decided *Hill* the Endangered Species Act provided no exception to allow a project to go forward if it jeopardized an endangered species. Ultimately, the Tellico Dam was completed. Subsequent investigation found the snail darter could live in other streams and the Service was able to modify its jeopardy opinion. The case led, however, to a change in the Act.

The Congress subsequently established the Endangered Species Committee – popularly known as the "God Squad" – to allow exemptions to the requirements in the Endangered Species Act which could jeopardize the continued existence of an endangered species. 16 U.S.C. § 1536(e). The God Squad consists of seven members including the Secretaries of Agriculture, Army and Interior; the Administrators of the EPA and the National Oceanic and Atmospheric Administration; and the Chairman of the Council of Economic Advisors. The seventh member is an individual from the affected state, appointed by the President. Despite the conflicts with the continued existence of a species, the Committee can allow the action to proceed if it finds that there are no reasonable and prudent alternatives and the benefits of the action "clearly outweigh the benefits of each considered alternative course of action consistent with conserving the species)." 50 C.F.R. § 451.02(5)(ii).

The God Squad is rarely used, and in the absence of its application, the Endangered Species Act remains an overriding obligation of federal agencies. It imposes a mandatory duty to consider the effect of their action on endangered species and to conserve endangered species.

D. Private Party Burdens. When a private party seeks a federal permit, as a practical matter, the burden of satisfying the Endangered Species Act usually falls on the applicant. It is advisable in permitting actions involving federal lands or federal agencies, including the Army Corps of Engineers, to work with these agencies in the early part of the permitting process to identify potential endangered species problems and to meet and consult informally with the Service at the earliest possible time. The applicant must normally prepare the required studies and reports and identify the presence or absence of the endangered species. Giving consideration to issues of endangered species can be, and frequently is, done in conjunction with compliance with the National Environmental Policy Act.

A private party should design the projects to avoid impacting threatened or endangered species, and to identify suitable mitigation. It is possible to engage in "early consultation" on the effect of a proposal on endangered species. 50 C.F.R. § 402.11. Early consultation allows a developer to reach advance approval of his plans before he submits an actual permit application. The early consultation results in a "preliminary biological opinion." 50 C.F.R. § 402.11(e). The preliminary biological opinion will be confirmed as final if there have been no significant changes in the planned action or in the information used in the consultation. 50 C.F.R. § 402.11(f).

In potential jeopardy situations, mitigation and guidance should be tailored to reduce impacts below that threshold level. The mitigation measures must ensure that there will be no jeopardy to the continued existence of the endangered species. The degree of required mitigation can vary but the general objective is to ensure the short term and long term viability of the species in the area affected by the project. For animals and birds, habitat enhancement, breeding programs and habitat protection are likely mitigation measures. For plants, cultivation and protection of existing populations may be done. In nonjeopardy situations, the forces should be on more modest efforts to minimize impacts.

E. Prohibitions Against Taking. The consultation process in Section 7 of the Endangered Species Act applies only to federal agencies actions. Section 9 of the Endangered Species Act prohibits any person including federal, state and local agencies from taking an endangered species. 16 U.S.C. § 1538(a)(1). Any person who knowingly violates the taking provisions of the Endangered Species Act is subject to a civil penalty of not more than \$25,000 for each violation. 16 U.S.C. § 1540(a)(1). The "take" prohibition does not apply to plants on private land.

Any person who knowingly violates the prohibitions against taking is also subject to a criminal fine of not more than \$50,000 or imprisonment for not more than one year in jail or both. The Secretary has, by regulation, adopted regulations providing similar protection for threatened species. 50 C.F.R. § 17.71. These are also subject to the civil penalties for endangered species.

The Endangered Species Act defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or attempt to engage in any such conduct." The actual death of a particular individual of a species is not required for a "taking." Evidence supporting a finding that land management techniques or state licensing programs result in "harm" to an endangered species constitutes a taking within the meaning of the Act. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (state licensing system for fishing caused injury to protected whales and the Court properly enjoined state officials from causing harm); *Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D. Tex. 1988) (decline in the population of woodpeckers ranging from 22 percent to 76 percent on lands managed by the United States Forest Service in a period of less than ten years constituted a taking of an endangered species). But see *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993) (mishandling of a red squirrel is not a take because action was covered by incidental take authority).

In *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 882 F.2d 1294, 1295 (8th Cir. 1989), wildlife and environmental organizations charged that the EPA had failed to comply with the Endangered Species Act in carrying out its obligations under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). The EPA had allowed strychnine to be registered under FIFRA. As a result of the registration, farmers and others used it to kill prairie dogs and other rodents. The use of the pesticide indirectly caused deaths to the endangered black footed ferret. The court held that EPA had to comply with the Endangered Species Act and that its action in registering strychnine violated the Act and caused a taking. See also *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (Failure of a state agency to remove goats and feral sheep from habitat at Palila on the slopes of Maunakea on the island of Hawaii.)

One key question concerns the scope of the taking prohibition. In *Sweet Home Chapter v. Babbitt*, 515 U.S. 687 (1995), the Supreme Court addressed the interpretation of "harm." The plaintiffs, timber industry and ranchers, claimed that the Service's rules improperly defined harm to prohibit injury to protected species through habitat modification. The Supreme Court rejected this argument. It held that the Service's definition of "harm" was proper. Under the Service's definition, for example, habitat modification leads to the actual death or injury of a protected species is prohibited. *United States v. Glenn Colusa Irr. District*, 788 F.Supp. 1125 (E.D. Cal. 1992)

(Harm to listed fish from pumping water is a take).

The Endangered Species Act's criminal provisions are a general intent crime and it is not necessary that the defendant know that he possessed an endangered species or that such possession was illegal. *U.S. v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990). The defendant, Danh Nguyen, captained a small fishing boat which the Coast Guard boarded for a safety check. During the inspection, the Coast Guard found four flippers from a threatened sea turtle. Mr. Nguyen was charged with a misdemeanor violation of rules on the importation and transportation of this species. The court held specific intent was not required. *Accord United States v. McKittrick*, \_\_\_ F.3d \_\_\_, 1998 WL 202261 (9th Cir. 1998) (the critical issue was whether the actions were done knowingly, not whether the defendant recognized that the action was illegal).

In some cases, the taking of threatened or endangered species has been a historic part of Indian religion and tribal practices. Some wildlife protection acts, such as the Bald Eagle Protection Act, 16 U.S.C. § 668 et seq., provide limited exceptions for some Indian religious practices. The Endangered Species Act contains no express In *United States v. Dion*, 476 U.S. 734 (1986), the Supreme Court held that the treaty with the Yankton Sioux does not provide a shield against a prosecution for under the Endangered Species Act killing an eagle because the Bald Eagle Protection Act abrogated any treaty the right to kill eagles. In *U.S. v. Billie*, 667 F.Supp. 1485 (S.D. Fla. 1987), the Court held that the prohibitions on taking in the Act do not constitute a burden on freedom of expression and religious beliefs as applied to the Florida black panther. The Court said that the Act was not void on its face. *Id.* at 1495. It held that the defendant's interests in hunting the panther were not central to the claimed religious belief and did not outweigh the government's interest in protecting the species. *Id.* at 1497.

The courts have also decided that the right to protect domestic livestock must give way to the mandates of the Act. In *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1989), cert. denied, 490 U.S. 1114, the court upheld a fine of \$2,500 against a rancher who shot an endangered grizzly bear which was killing his sheep. Justice White, dissenting from a denial of certiorari, commented that the right to protect one's property was a deeply rooted liberty interest and would have accepted certiorari to consider a possible Fifth Amendment claim. *Christy v. Lujan*, 109 S.Ct. 3176 (1989). On the other hand, where a defendant alleges that he killed a protected species in self defense or in defense of others, and presents evidence of self defense, the government has the burden of proving self defense beyond a reasonable doubt. *United States v. Clavette*, 135 F.2d 1308 (9th Cir. 1998).

F. Habitat Conservation Plans. Originally, the Endangered Species Act provided no opportunity for a private person conducting a purely private action to obtain advance protection if his activities inadvertently caused a taking. This could occur, for example, if grading or land clearing activities killed or otherwise harmed a listed species. In 1982, the Congress amended the Act to allow the Secretary to issue permits to allow the "incidental" taking of listed, threatened or endangered species. To qualify, the taking of the species must be "incidental to and not the purpose in carrying out an otherwise lawful activity." 16 U.S.C. § 1539(a)(1). These incidental taking provisions are of particular interest to the development community. They permit incidental take pursuant to activities such as construction of homes, roads and other facilities.

The Endangered Species Act, and the regulations adopted by the Secretary establish a process by which a person can seek a permit to authorize incidental taking of endangered species. To be eligible for a Section 10 permit, the prospective permittee must submit a habitat conservation plan ("HCP") to the Secretary which specifies:

1. The impacts which are likely to result from the taking;
2. The steps the applicant will take to mitigate and minimize the impacts;
3. The funding that will be available to implement such steps;
4. What alternative actions to the taking the applicant has considered;
5. The reason why the alternatives are not being adopted; and
6. Other measures as the Secretary should require. 16 U.S.C. § 1539(a)(2)(A).

The Secretary is authorized to issue an incidental takings permit only if he finds that the applicant, to the maximum extent practicable, minimized and mitigated the impacts of the taking, that adequate funding for the plan will be provided, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. 16 U.S.C. § 1539(a)(2)(B).

The HCP process has been quite complex and complicated. See 50 C.F.R. § 17, Parts C and D. The action is treated as a proposed federal action and triggers the requirements of the National Environmental Policy Act, including the possible preparation of an Environmental Impact Statement. The plans typically take in excess of one year to prepare and require extensive information to be obtained regarding the species and extensive measures to be undertaken to protect the species.

For many years, the HCP process did not work effectively. The Service approved only a few HCP's. The HCP process was not seen as a cost-effective remedy. One major problem was the lack of clear assurances to landowners who entered into HCP's that the Service would not require additional mitigation at a later time if circumstances changed. Over the past six years, the situation has changed dramatically.

The Service has made great progress in standardizing the HCP process. It has adopted an HCP Handbook and has devoted more resources to HCP. More importantly, the Service has adopted a "no surprises" policy for HCP's. The Service first adopted this policy internally and has now made the no surprise policy a rule. 63 Fed. Reg. 8859 (1998). Basically, this rule means that a landowner who receives approval of an HCP cannot be made to provide more land or money beyond the original commitment even if circumstances change, so long as the landowner maintains a properly implemented conservation plan; the government rather than the landowner has that obligation. 50 CFR § 17.22(b)(5); 50 CFR § 17.32(b)(5). These changes make the HCP process more feasible. In the last five years, the Service has approved more than 200 HCP's.

Despite the complexity of the process, the plan is of increasing importance in California where development increasingly encroaches on territory inhabited by listed or threatened species. The California Gnatcatcher, the Stevens Kangaroo Rat, the Morro Bay Kangaroo Rat, the Mission Blue Butterfly, and the Least Bell's Vireo are some of the species which have now been subject to the habitat conservation planning process. See *Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985). (Decision allowing incidental taking of Mission Blue Butterfly complies with the Endangered Species Act.) Multi-species HCP's are becoming the norm rather than the exception.

In the absence of a Section 10 permit, purely private activity which is near or adjacent to the habitat of a listed species places the developer at grave risk of civil penalties and injunctive relief. Once you know that a threatened or endangered species is in the vicinity of construction activity, there is a risk of a "taking" and serious fines.

G. Judicial Review. The Secretary's decision whether to list a threatened or endangered species and the results of the Section 7 consultation process is subject to judicial review. The basic standard of judicial review is the arbitrary and capricious test under the Administration Procedure Act. 5 U.S.C. § 706. Agency actions will be upheld unless they are arbitrary or capricious or otherwise not in accordance with the law. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d. 678, 685 (D.C.Cir. 1982).

Nonprofit organizations with an interest in threatened or endangered species have been held to a standing to challenge decisions under the Act. *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F.Supp. 985 (D. Hawaii 1979). In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court held that the zone-of-interest test for prudential standing did not preclude ranch operators and irrigation districts from bringing claims under the citizen suit provisions of the Endangered Species Act. Even though the ranchers and irrigation district sought to prevent the application of the ESA. But see *Lujan v. Defender of Wildlife*, 504 U.S. 555 (1992) (an environmental group lacked standing to challenge whether ESA applied to funding projects on the high seas).

Moreover, in injunctive proceedings, the party seeking a permit from a federal agency is not an indispensable party to a suit seeking injunction. In *Pacific Legal Foundation v. Andrus*, 657 F.2d. 829 (6th Cir. 1981), a legal foundation and some state residents filed suit to require the Service to prepare an EIS on a proposal to list seven species of mussels as endangered species. The Service defended the injunctive relief on the grounds that there was a lack of indispensable party—the person seeking the permit. The court rejected this argument stating that complete relief could be granted because the Service was the party who was subject to the action. *Pacific Legal Foundation*, supra, at 833. The court also concluded that no EIS was required because NEPA conflicted with the Endangered Species Act's mandatory requires. *Id.* at 836-41.

The Act also authorizes citizen suits. 16 U.S.C. § 1540(g). The citizen suit provision allows any person to commence a civil suit to enjoin any person including the United States who is alleged to be in violation of the Act or regulations issued under the authority of the Act. Citizen suits also are allowed to compel the Secretary to carry out the prohibitions against the taking of endangered species and against the Secretary where there is a failure of the Secretary to perform a non-discretionary act or duty. Suits are to be filed in District Court which have jurisdiction without regard to the amount of the controversy or citizen of the parties.

No citizen suit may be brought prior to sixty (60) days after written notice of the violation has been given to the Secretary to allege any violator of the Act. 16 U.S.C. 1540(2)(a-c). Initially, the courts differed on the interpretation of the citizen suit provision and whether it is mandatory that the notice be given a full sixty days prior to the filing of any litigation. In *Save The Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1987), the Court held that compliance with the sixty day notification provisions were jurisdictional and no suit could be brought under the Endangered Species Act until they had been met. The failure to give the required notice requires dismissal of the suit brought under the citizen suit provisions of the Act. *Building Industry Association v. Lujan*, 785 F.Supp. 1020 (D.D.C 1992) (failure to provide sixty day notice preclude challenge to listing to Mojave Desert population of desert tortoise). Parties who are successful in filing suits under the Act may be entitled to attorney's fees.

H. Conclusion. Overall, the Endangered Species Act will continue to grow in importance in California. The law and policies are still developing. It is critical in purchasing and developing land and other resources in California to investigate thoroughly the possibility of listed, threatened or endangered species being present on the property and to plan in advance to the maximum extent possible how the project can be designed to avoid or minimize effects on endangered species.

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